



**United Nations Treaty Bodies' jurisprudence
on sexual orientation, gender identity, gender
expression and sex characteristics**

The toolkit on the United Nations Strategic Litigation is a publication of the International Lesbian, Gay, Bisexual, Trans and Intersex Association. It was conceptualised and developed by Kseniya Kirichenko, ILGA World's Senior Officer, Women and UN Advocacy.

The Toolkit includes:

- **Part 1 – Policy Paper:**

- » the concept of strategic litigation, its aims and components, as well as some information about the use of strategic litigation by LGBTI advocates;
- » basic information about Treaty Bodies, their working methods, and procedural aspects of Treaty Bodies' individual complaints mechanism;
- » analysis of Treaty Bodies' SOGIESC jurisprudence and pending cases, and identifies gaps and opportunities for future developments. This chapter specifically looks into six topics: the criminalisation of same-sex relations; LGBTI asylum seekers; violence, hate crimes and hate speech; freedom of expression and freedom of assembly and association; LGBTI families; and legal gender recognition;
- » region-specific background information on Treaty Bodies' jurisprudence, as well as evidence, recommendations and thoughts from activists, experts, lawyers, and attorneys working in six different regions; and
- » tables with brief information about LGBTI cases reviewed by, and pending before, Treaty Bodies, as well as lists of useful resources and contacts.

- **Part 2 – Treaty Bodies' Case Digest:** Treaty Bodies' decisions on 25 LGBT cases: brief description of facts; reasoning and decision; comments; and information on follow-up.

- **Part 3 – Regional Tribunals' Case Digest:** Information on LGBT cases reviewed by the Inter-American Court of Human Rights and the European Court of Human Rights.

- **Part 4 – Table of Treaty Bodies' LGBTI Decisions and Pending Cases:** Information on the reviewed and pending Treaty Bodies' cases on SOGIESC (periodically updated), available at: <https://ilga.org/Treaty-Bodies-jurisprudence-SOGIESC>.

This Case Digest is a part of ILGA World's Treaty Bodies' Strategic Litigation toolkit.

This publication is a compilation of views adopted by the United Nations Treaty Bodies on cases related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). The digest includes summary of all SOGIESC cases reviewed by the United Nations Treaty Bodies by 7 August 2018. Each case summary presents case reference details, subject matter, substantive issues raised in the case, articles of the relevant treaty involved, facts of the case, conclusions made by the Committee, remedies, case comments and information on any follow-up developments on the case.

Data research, compilation and coordination: Kseniya Kirichenko

Research Assistant: Bernardo de Souza Dantas Fico

Proofreading: Lara Goodwin

Design and layout: Oksana Klimova

This publication is copyright-free provided you cite both the author and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World).

Suggested citation: International Lesbian, Gay, Bisexual, Trans and Intersex Association: Kirichenko K, *United Nations Treaty Bodies jurisprudence on sexual orientation, gender identity, gender expression and sex characteristics: Case Digest* (Geneva: ILGA World, October 2019).

Download the case digest at ilga.org or contact untreaties@ilga.org.

On the names of countries and territories in this publication

ILGA World is an organisation with ECOSOC-accredited consultative status at the United Nations and our publications therefore have to follow UN-recommended language on the names of countries and territories. Nothing in an ILGA World publication should be taken as a position made by the organisation on the status of any country or territory. If you have any doubts or queries with regard to this aspect of this publication, please contact ILGA World at info@ilga.org.

LIST OF ACRONYMS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984)
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights (1966)
IACtHR	Inter-American Court of Human Rights
L / G / B / T / I	lesbian / gay / bisexual / trans / intersex
OP	Optional Protocol to the ICCPR
SO / GI / E / SC	sexual orientation / gender identity / gender expression / sex characteristics

Table of Contents

Criminalisation of Same-Sex Relations	8
Toonen v. Australia – Human Rights Committee	8
Dean v. Australia – Human Rights Committee	13
Asylum Seekers	16
K.S.Y. v. Netherlands – Committee Against Torture	16
E.J.V.M. v. Sweden – Committee Against Torture	20
Uttam Mondal v. Sweden – Committee Against Torture	23
X. v. Sweden – Human Rights Committee	27
M. I. v. Sweden – Human Rights Committee	31
J.K. v. Canada – Committee Against Torture	35
M.K.H. v. Denmark – Human Rights Committee	40
M.Z.B.M. v. Denmark – Human Rights Committee	45
E.A. v. Sweden – Committee Against Torture	49
Z.B. v. Hungary – Human Rights Committee	52
Violence / Hate Crimes / Hate Speech	55
Ernazarov v. Kyrgyzstan – Human Rights Committee	55
D.C. and D.E. v. Georgia – Committee Against Torture	59
Freedom of Expression / Freedom of Assembly and Association	61
Hertzberg et al. v. Finland – Human Rights Committee	61
Fedotova v. Russian Federation – Human Rights Committee	65
Alekseev v. Russian Federation – Human Rights Committee	69
Praded v. Belarus – Human Rights Committee	72
Androsenko v. Belarus – Human Rights Committee	72
Nepomnyaschiy v. Russian Federation – Human Rights Committee	75

LGBTI Families

79

Joslin et al. v. New Zealand – Human Rights Committee

79

Young v. Australia – Human Rights Committee

82

X. v. Colombia – Human Rights Committee

85

C. v. Australia – Human Rights Committee

89

Legal Gender Recognition

94

G. v. Australia – Human Rights Committee

94

Criminalisation of Same-Sex Relations

Toonen v. Australia – Human Rights Committee¹

Subject Matter:	Criminalisation of consensual same-sex relations between adults
Substantive Issues:	Discrimination on the ground of sex; discrimination on the ground of sexual orientation; equality before the law; limitations of rights; privacy; restrictions of rights; unlawful interference
Articles of the ICCPR:	17 in conjunction with 2 (1); 26

FACTS

Tasmania's Criminal Code prohibited various forms of sexual contact between men, including between consenting adults in private.

Being a leading HIV/AIDS and gay rights activist, the author argued that his private life and liberty were threatened by these provisions. He noted that the Director of Public Prosecutions had announced that these proceedings would be initiated if there was sufficient evidence of the commission of a crime. Many public figures- as well as the authorities- had made derogatory or downright insulting remarks about gay men and women. It had also been suggested in a public meeting that "all Tasmanian homosexuals should be rounded up and 'dumped' on an uninhabited island, or be subjected to compulsory sterilization." This had the effect of creating constant stress

1 Communication No. 488/1992 of 25 December 1991, views of 31 March 1994, [CCPR/C/50/D/488/1992](#).

and suspicion in what ought to be routine contact with the authorities in Tasmania. Tasmania had witnessed, and continued to witness, a “campaign of official and unofficial hatred” against homosexuals and lesbians. This campaign had made it difficult for the *Tasmanian Gay Law Reform Group (TGLRG)* to disseminate information about its activities and advocate for the decriminalisation of homosexuality. For example, the TGLRG was refused permission to put up a stand in a public square in the city of Hobart; the author claims that he, as a leading protester against the ban, was subjected to police intimidation.

According to the author, the existence of the relevant Criminal Code provisions continued to have profound and harmful impacts on many people in Tasmania, including himself. He argued that it fuelled discrimination and violence against, and the harassment of, the gay community in Tasmania.

VIEWS



Article 17 in conjunction with article 2(1) ICCPR – violation (arbitrary interference)

The Committee stated that adult consensual sexual activity in private is covered by the concept of “**privacy**”, and that Mr. Toonen was **actually affected** by the continued existence of the Tasmanian laws. The Committee considered that this law “**interfered**” with the author’s privacy, even if these provisions had not been enforced for a decade. In particular, the Committee noted that the policy of the Department of Public Prosecutions not to initiate criminal proceedings then did not amount to a guarantee that no action would be brought in the future.

The Committee also noted that the prohibition of private same-sex behaviour was **provided for by law**, namely, Sections 122 and 123 of the Tasmanian Criminal Code.

As to whether it may be deemed **arbitrary**, the Committee recalled its requirement of **reasonableness** that implied **proportionality** to the end sought and **necessity** in the circumstances of any given case. The Committee did not agree with two arguments given by the State party, namely, public health and moral grounds.

With regard to the **public health consideration**, the Committee noted that the criminalisation of same-sex practices could not be considered a reasonable means or proportionate measure to prevent the spread of HIV/AIDS. On the contrary, criminalisation impeded public health programmes “by driving underground many of the people at the risk of infection” and no link had been shown between the continued criminalisation and the effective control of the spread of the HIV/AIDS virus.

Regarding the **moral argument**, the Committee noted that for the purposes of article 17 of the

Covenant, moral issues could not be seen exclusively as a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It also noted that with the exception of Tasmania, all laws criminalising homosexuality had been repealed throughout Australia and even in Tasmania, there was no consensus as to whether sections in question should not also be repealed. Additionally, as these provisions were not enforced in practice, they were not deemed essential to the protection of morals in Tasmania.

Based on these considerations, the Committee concluded that the provisions of the Tasmanian Criminal Code did not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfered with the author's right under article 17(1).

The Committee also noted that the reference to "sex" in articles 2(1) and 26 was to be taken as including sexual orientation.

Article 26 ICCPR – not necessary to consider (violation of articles 17(1) and 2(1))

REMEDIES

The Committee required the repeal of Sections 122 ("unnatural sexual intercourse" or "intercourse against nature") and 123 ("indecent practice between male persons") of the Tasmanian Criminal Code.

CASE COMMENTS

Mr. Toonen was the first person to petition any of the UN human rights Treaty Bodies concerning Australia, submitting his communication on the day the OP entered into force in Australia. See more about the history of this case and its impact, e.g. Kristen L. Walker (1999), *International Human Rights Law and Sexuality: Strategies for Domestic Litigation*. *City University of New York Law Review*, 3(1), pp. 115–131.

Admissibility: As to whether the author could be deemed a "victim" within the meaning of article 1 of the OP, the Committee noted that the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years. It considered, however, that the author had made reasonable efforts to demonstrate that the threat of

enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under articles 17 and 26 ICCPR.

References to previous jurisprudence: To sustain that sexual orientation is a protected status in international human rights law and, in particular, constitutes an “other status” for purposes of articles 2(1) and 26 ICCPR, the author referred to: the ECtHR jurisprudence ([Dudgeon v. United Kingdom](#), judgment of 22 October 1981; [Norris v. Ireland](#), judgment of 26 October 1988; and, [Modinos v. Cyprus](#), judgment of 22 April 1993). The author further refers to the Committee’s views of 9 November 1989 on [Bhinder v. Canada](#), no. 208/1986, to sustain the existence of “indirect discrimination”.

Subject being compared: Even though the Committee decided not to analyse the case under article 26 ICCPR, the author did refer to it. He stated that the Tasmanian Criminal Code did not outlaw any form of consensual same-sex activity between women in private, and criminalised only some forms of consenting heterosexual activity between adult men and women in private. In spite of the gender neutrality of “unnatural sexual intercourse,” this provision had been enforced far more often against men engaged in same-sex activity than against heterosexual men or women. At that, the provisions in question criminalised an activity practiced more often by men sexually active with other men than by heterosexual men or women.

Individual opinion by Mr. Bertil Wennergren: Disagreed with the Committee’s view that there was no need to consider a possible violation of article 26 ICCPR, stating that a finding of a violation of article 17 (1) ICCPR should be deduced from a finding of violation of article 26 ICCPR. Firstly, the provisions of the Tasmanian Criminal Code prohibited sexual intercourse between men and between women, thereby making a distinction between “heterosexuals and homosexuals.” Secondly, they criminalised other kinds of sexual contact between consenting men without at the same time criminalising such contact between women. These provisions therefore set aside the principle of equality before the law. It was the criminalisation that constituted discrimination of which individuals may claim to be victims, and thus the provisions violated article 26 ICCPR.

The *Toonen* case was widely cited in many decisions related to the rights of LGBT people – with regard to, not only the criminalisation of same-sex relations, but also other issues, such as employment discrimination, freedom of assembly and association or access to partnership benefits.

Such references have been made by different courts in different parts of the world, including the IACtHR (see e.g. [Atala Riffo and Daughters v. Chile](#), judgment of 24 February 2012, case 12.502), the ECtHR (see e.g. [Fretté v. France](#), judgment of 26 February 2002, application no. 36515/97, and [Vallianatos and Others v. Greece](#), judgment of 7 November 2013, applications nos. 29381/09 and 32684/09), as well as national courts in India ([Naz Foundation v. Government of NCT of Delhi and Others](#), decision of 2 July 2009, the High Court of Delhi), Nepal ([Sunil Babu Pant and Others v. Nepal Government and Others](#), order of 21 December 2007, Supreme Court of Nepal), Philippines ([Ang Ladlad v. Commission on Elections](#), decision of 8 April 2010, Supreme Court of the Philippines), South Africa ([National Coalition for Gay and Lesbian Equality v. Minister of Justice](#), judgment of 9 October 1998, the Constitutional Court of South Africa), Zimbabwe ([Banana v. State](#), decision of 29 May 2000, the Supreme Court of Zimbabwe), Fiji ([McCoskar and Nadan v. State](#), judgment of 26 August 2005, the High Court of Fiji at Suva) and Colombia (Sentencia C-481/98, 9 September 1998, the Constitutional Court of Colombia; [Sentencia C-075/07](#), 7 February 2007, Constitutional Court of Colombia).

FOLLOW-UP

According to *Australia Remedy*, Australia responded to this landmark decision by enacting the *Human Rights (Sexual Conduct) Act 1994 (Cth)* which effectively decriminalised consenting sexual activity between adults throughout Australia and prohibited laws that arbitrarily interfere with the sexual conduct of adults in private. Tasmania subsequently amended its Criminal Code, making it consistent with the Committee's views.

The HRCtee deemed Australia's response satisfactory.²

For more on the national implementation and impact of the case see e.g.: Kristen L. Walker (1999), *International Human Rights Law and Sexuality: Strategies for Domestic Litigation*. *City University of New York Law Review*, 3(1), pp. 115–131.

2 Remedy Australia (2014), *Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994–2014)*. Available at: http://remedy.org.au/reports/2014_Follow-Up_Report_to_treaty_bodies.pdf (accessed on 29 June 2018), pp. 42–43.

Dean v. Australia – Human Rights Committee³

Subject Matter:	Prosecution for same-sex relations with a minor
Substantive Issues:	Accused persons / convicted persons; arbitrary arrest – detention; cruel, inhuman or degrading treatment or punishment; discrimination on the ground of sexual orientation; fair trial; treatment of prisoners
Articles of the ICCPR:	26 (and other related to the arrest and trial)

FACTS



In 1995, the author entered a cinema and sat down next to a 13-year old boy. He put his hand across the boy's lap and rested it on his crotch, on top of his pants. The boy then moved away to another seat. Prior to this incident, the author had received thirteen convictions for various incidents of indecency offences spanning nearly 40 years. He had been warned that he might face a sentence of preventive detention if he came before the Court again on similar charges. The author was charged with an offence of "indecency with a boy between 12 and 16 years old", to which he pleaded guilty. The District Court declined the jurisdiction to sentence- on the grounds that it had reason to believe that the author was liable to preventive detention.

The author's case was then transferred to the High Court for sentencing. Subsequently, he was sentenced to preventive detention, with eligibility for parole in ten-years' time, in accordance with the law. The author was not granted legal aid and his appeal was initially dismissed without reason. Following judgements determining that the appeal procedure was flawed, the author applied for a rehearing of his appeal. He was granted legal aid. The Court of Appeal dismissed the appeal in 2004, and the author's application for leave to appeal to the Supreme Court was rejected in 2005.

VIEWS



Article 26 ICCPR – inadmissible (failure to substantiate the claim)⁴

Regarding the author's claim that he was discriminated against on the basis of his "homosexuality", under article 26 ICCPR, the Committee noted that he was convicted of the crime of indecency with a minor and that he had failed to substantiate, for purposes of admissibility, that he was a victim of discrimination on the basis of his sexual orientation.

REMEDIES



N/A.

CASE COMMENTS



Generally, the case concerned sexual relations with minors, and therefore not sexual orientation per se. However, as the author put forward arguments related to the alleged discrimination against him on the basis of sexual orientation, it is important to include the case in our digest.

Initially, the author claimed that he had been discriminated against by the judiciary on the basis of his sexual orientation, as he has been treated more harshly than "non-homosexuals" in respect of sentencing. In this context, he referred to the sentencing notes made by the judge who sentenced him to eight years' imprisonment in 1970, which showed, to his opinion, a clearly homophobic attitude. He also referred to section 140A (repealed) of the Crimes Act 1961, under which he was sentenced, which only criminalised indecent assaults by a man on any boy between 12 and 16 years' old. The section was only replaced with a gender neutral provision in 2003.

⁴ The Committee did find a violation of the author's rights guaranteed by article 4(9) ICCPR, but this violation did not involve any considerations related to sexual orientation.

The State party submitted that the author had failed to exhaust domestic remedies, as he had failed to raise this matter on appeal. Moreover, the State party rejected the allegation on its merits and submitted that the failure in 1995 to have a specific offence of indecency by a woman against a boy did not amount to discrimination against the author. The State party explained that, while in 1995 there was no specific offence in respect of indecency by a woman against a boy, in those circumstances the offender was charged with a more general offence such as assault. The State party further submitted that the author had failed to substantiate his claim that the sentence imposed upon him was higher because he was a “homosexual male”. It explained that the sexual activity of the author was criminalised, not because it was homosexual or heterosexual, but because it was committed against a child. The State party noted that the sentencing notes referred to by the author related to his conviction in 1970, prior to the entry into force of the ICCPR and the OP.

Finally, the author stated that he could not have raised the 1970 comments on appeal as he only became aware of it during the hearing of the appeal, after he acquired a copy of the file that had been obtained by the Court of Appeal. The author disputed the State party’s argument that he had failed to substantiate his claim that the sentence imposed upon him was higher because he was a “homosexual male”. He referred to expert reports which found that sentences of preventive detention were imposed almost four times more frequently for “homosexuals” offending than “heterosexuals” offending.

FOLLOW-UP



N/A.

Asylum Seekers

K.S.Y. v. Netherlands – Committee Against Torture⁵

Subject Matter:	Deportation of a gay man to Iran
Substantive Issues:	Risk of ill treatment, non-refoulement obligation
Articles of the ICCPR:	3

FACTS

The complainant was Mr. K.S.Y., a citizen of Iran, whose application for refugee status was rejected in the Netherlands.

K.S.Y. had problems in Iran on account of his sexual orientation and because of the political activities of his brother. He had encountered difficulties with Iranian authorities since his brother was recognised as a refugee in the Netherlands in the early eighties. He was interrogated multiple times and had to sign the next convocation after each interrogation. In March 1992, he travelled to the Netherlands for his brother's wedding. On his return to Iran, he was interrogated about the purpose of his trip and the activities of his brother. The Iranian authorities confiscated his passport, and prohibited him from travelling abroad. He had to report daily to the authorities.

In Iran, K.S.Y. had a same-sex relationship with another man, K.H. On account of his sexuality, K.S.Y. separated from his wife, with whom he had three kids.

On 10 August 1992, K.S.Y. was arrested in Iran due to complaints by neighbours about his same-sex activities. His partner was not arrested as he went into hiding. K.S.Y. was taken to a prison in

⁵ Communication No. 190/2001 of 5 January 2001, views of 15 May 2003, [CAT/C/30/D/190/2001](#).

the Lout desert and interrogated. During his detention, he was allegedly tortured and hanged to the ceiling over three weeks. He was later sentenced to death but never received a written verdict. After five months of detention, he succeeded in escaping with the help of prison cleaning services.

In August 1993, K.S.Y. and his partner K.H. travelled separately to the Netherlands.

The complainant applied for refugee status and a residence permit on humanitarian grounds, both of which were rejected. Applying for a review of the decisions, he was granted a residence permit because of his physical and psychological condition, but denied asylum. K.S.Y. and K.H. shared accommodation until K.H. started seeing other men. After a fight about the situation, K.S.Y. killed his partner. He was sentenced to six years' imprisonment. The body of K.H. was repatriated to Iran, after the intervention of the Iranian Embassy.

The complainant's application for review of the initial decision denying asylum was rejected. He then appealed to the District Court of The Hague. The State Secretary of the Department of Justice declared him an "undesirable person", and a request to review the decision was rejected. This decision was also appealed before the District Court of The Hague, but was dismissed.

K.S.Y. then introduced a new application for asylum which was rejected in a final decision on 11 May 2001.

VIEWS



Articles 3 CAT – no violation (failure to substantiated the claim that K.S.Y. would be subjected to torture upon return to Iran)

The Committee noted that the political activities of the complainant's brother took place more than 17 years ago. It stated that, these activities alone may not be enough to constitute a risk of the complainant being subjected to torture if he were returned to Iran.

Concerning the alleged difficulties faced by K.S.Y. because of his sexual orientation, the Committee noted a number of contradictions and inconsistencies in his account of past abuses at the hand of the Iranian authorities. Further, the Committee also noted that part of his account had not been adequately substantiated or lacked credibility.

The Committee also noted, referring to "different and reliable sources", that there was currently ***no active policy of prosecution on charges of "homosexuality"*** in Iran.

Consequently, the Committee found that it had not been given enough evidence by the complainant to conclude that the latter would run a personal, present and foreseeable risk of being tortured if returned to Iran.

REMEDIES

N/A.

CASE COMMENTS

Interim measures: Pursuant to rule 108 of the Committee's rules of procedure, the State party was requested not to deport the complainant to Iran pending the consideration of his case by the Committee.

Evidence: To support his claims, K.S.Y. referred to several reports on the situation of gay people in Iran, notably a report of Amnesty International of 30 July 1997 confirming that:

- Same-sex activities are a criminal offence under the Iranian Penal Code;
- The mere declaration of four witnesses may lead to punishment, as well as the opinion of a judge based purely on his own knowledge;
- A person suspected of "committing" same-sex activities risks arrest, torture or ill-treatment.

K.S.Y also referenced a report of the *United Nations Special Representative on the situation of human rights in the Islamic Republic of Iran* of 21 September 1999, according to which:

"[p]ress accounts suggest that corporal punishment is prevalent. In January 1999, an Iranian newspaper reported that two 15-year-old boys had been sentenced to a flogging for 'offending public democracy' by dressing up as girls and wearing make-up. They explained to the Court that they did this to 'extract money from rich young men'. In June an Iranian newspaper reported that a young man in Mashad had been given 20 lashes for 'wounding public moral sentiments' by plucking his eyebrows and wearing eyeshadow. In March an Iranian newspaper reported that six persons had been sentenced in Mashad to 18 months in jail and 228 lashes for goading passers-by to dance in the street."

References to the Committee's General Comments: The State party recalled that in order to be personally at risk of being subjected to torture in the sense of article 3 CAT, there must not only be a consistent pattern of gross violations of human rights in the country where the complainant is expelled, but also specific grounds indicating that the complainant is personally at risk of being

subjected to torture. It also reminded that the terms “substantial grounds” implied that torture is highly likely and that the individual must face a foreseeable, real and personal risk of being tortured, as interpreted in the light of the Committee’s [general comment No. 1 \(1998\)](#) on the implementation of article 3 CAT.

Differently from other cases – the case lacked factual substantiation, had contradictions in the statement made by the claimant and part of the grounds for his claim were deemed to be too old to be relevant.

FOLLOW-UP



N/A.

E.J.V.M. v. Sweden – Committee Against Torture⁶

Subject Matter:	Deportation of a bisexual man to Costa Rica
Substantive Issues:	Non-refoulement, refugee status, torture
Articles of the CAT:	3

FACTS



The complainant was E.J.V.M., a Costa Rican citizen, residing in Sweden clandestinely following the State's rejection of his application for asylum on 19 February 2002.

In 1975, E.J.V.M. joined the Youth Section of the *Popular Vanguard Party (Communist) of Costa Rica*. The same year, he was arrested for the first time and taken to a prison, where he was allegedly tortured until he eventually escaped.

Because of his Communist affiliations, he was prevented from working and suspended from classes. He also alleged that he was publicly attacked because he was bisexual.

In 1985, security forces raided his house, beat him up and took him to a prison, where he was tortured again. One night in the early 1990s, he was again detained, beaten, sexually assaulted and threatened with death if he told anyone what had happened.

E.J.V.M. claimed that between 1992 and 1997 he was detained and tortured on multiple occasions and taken to court four times, being accused, *inter alia*, of illegal possession of firearms, manufacture of explosives, occupation of land, aggravated threats and attempted homicide.

He also stated that his life and that of his partner, P.A.M., a trans man with whom he shared his political activities, was in danger. Their house was shot at on several occasions and although they asked for police protection, their requests were ignored.

In 1995, there was an attempt to murder E.J.V.M.

On 17 May 1997, E.J.V.M. and P.A.M. left Costa Rica and went to Canada. Although the Canadian Center for Victims of Torture took up their case and provided support, the authorities refused the application for asylum.

6

Communication No. 213/2002 of 17 May 2002, views of 14 November 2003, [CAT/C/31/D/213/2002](#).

On 12 July 2000, they fled to Sweden, applied for asylum, but were rejected.

They were living clandestinely to avoid deportation.

VIEWS



Article 3 CAT – no violation (failure to substantiate personal and current danger of torture in Costa Rica)

On the issue of the complainant's alleged difficulties in Costa Rica on account of his bisexuality, the Committee observed that the danger of being subjected to torture in Costa Rica in future was not based on grounds that go **beyond mere theory or suspicion**. In the Committee's opinion, the reports submitted by the complainant did not demonstrate substantial grounds for believing that he was personally and currently in danger of being tortured if he returned to Costa Rica. In the light of this, the Committee considered that the information afforded by the complainant did not provide substantial grounds for believing that he would personally be in danger of being tortured if he returned to Costa Rica.

REMEDIES



N/A.

CASE COMMENTS



References to previous jurisprudence: The State party cited the case of [Y. v. Switzerland](#) (views of 16 September 1994, no. 18/1994) to challenge the admissibility of the case due to lack of minimum substantiation. It also referred to cases of [S.M.R. and M.M.R. v. Sweden](#) (views of 5 May 1999, no. 103/1998) and [S.L. v. Sweden](#) (views of 11 May 2001, no. 150/1999), asserting that the circumstances invoked by E.J.V.M. were not sufficient evidence that he run a foreseeable, real and personal risk of being tortured in Costa Rica. Finally, the State party revoked the case of [G.R.B. v. Sweden](#) (views of 15 May 1998, no. 83/1997) asserting that the risk of persecution from organisations with which the complainant had been in conflict for various reasons did not fall within the purview of CAT.

Evidence: On the general human rights situation in Costa Rica, the State party asserted that there was no consistent pattern of gross, flagrant or mass violations of human rights. It based its assertion on reports on the human rights situation in the country, on the Committee's concluding observations on Costa Rica's initial report of 2001, on the fact that consensual homosexual relationships between adults were legal in that country and on the fact that Costa Rica had ratified various human rights instruments, including CAT. The author, in turn, referred to the opinion of the *Centro de Investigación y Promoción para América Central de Derechos Humanos (CIPAC/DDHH)* (*Human Rights Research and Promotion Centre for Central America*), on the discrimination to which gay people in Costa Rica were subjected, the violence against them and the fact that they could not contract same-sex marriages.

FOLLOW-UP



N/A.

Uttam Mondal v. Sweden – Committee Against Torture⁷

Subject Matter:	Deportation of a gay man to Bangladesh
Substantive Issues:	Risk of torture upon return to country of origin; prohibition of refoulement
Articles of the CAT:	3 and 16

FACTS



The complainant was Mr. Uttam Mondal, a citizen of Bangladesh awaiting deportation from Sweden.

He was a political activist in Bangladesh, for a party named *Bikolpo Dhara Bangladesh (BDB)*. In 2004, he became the chairman of the party's youth's organisation. The same year, M.C. was elected as an MP from the BDB party. The complainant worked actively for the election, and had allegedly received several death threats from the rival *Bangladesh National Party (BNP)* militants. Both the complainant and Prof. C. (a father of M.C. and a founder of BDB) were members of the BNP before founding and joining the BDB.

The complainant was warned that he would be killed, that the BNP would make false accusations against him to the police, that his brother would be kidnapped, and that his home would be destroyed. In the meantime, several supporters of the BDB were persecuted by the police. On 20 June 2004, during a celebration of the BDB victory, a close friend of the complainant was killed by the BNP supporters. The police arrested Mr. Mondal and informed him that he was suspected of having killed his friend because of political rivalry. When he refused to confess to a crime he did not commit, the police officers tortured him. He was released because M.C. bribed the police.

Mr. Mondal was then arrested again, asked to testify against other accused individuals, and raped by three officers for not doing so. He was then released after paying another bribe.

The complainant was a Hindu, a religious minority in Bangladesh, and a gay man, and because of that the Imam of the area issued a death fatwa against him. Days after his release from his second arrest, the complainant's house was surrounded by a group of Muslims searching for him; they subjected his family to violence and caused severe material damage, vandalising the family's grocery store. He further claimed that Hinduism forbids homosexual relations and that, for this

reason, he had had problems with his family. When he was leaving his home town, stones were thrown at him and his family refused to talk to him.

The complainant then decided to go to Dhaka. There he found out that not only Islamist fundamentalists but also the police were searching for him; the first because of his sexual orientation and the second because of false accusations made against him. He decided then to leave the country. M.C. organised his flight, through a smuggler. While in Dhaka, he tried to commit suicide.

After his arrival in Sweden, Mr. Mondal contacted his family and found out that the local Imam and other individuals forced them to leave the area. The complainant's boyfriend was also obliged to leave Bangladesh shortly after his departure. To support his claims, Mr. Mondal presented his national passport, the Mosque's fatwa against him, certificates of his membership in BDB, a press article, and a Swedish medical journal.

The Migration Board rejected the complainant's asylum application stating (1) that he failed to establish his identity and his passport was damaged, (2) the political activities were time and place-limited, (3) the torture was "an isolated fact", (4) there was no ongoing criminal case against him, (5) his religion had not given him problems worthy of protection, and (6) although there was life imprisonment for same-sex acts in Bangladesh, "there [was] no active persecution".

On 3 April 2007, the Court found that Mr. Mondal had failed to establish that in Bangladesh he would be persecuted because of his past political opinions and his sexual orientation. The court found no humanitarian reasons to grant a residence permit to the complainant.

VIEWS



Articles 3 CAT – violation (sufficient evidence that the complainant personally runs a real and foreseeable risk of being subjected to torture upon return to Bangladesh)

The Committee noted that the State party's argument that Bangladeshi authorities were not actively persecuting gay people **did not rule out** that such prosecution can occur.

It then considered that the State party's argument that Mr. Mondal did not know to what extent the poster with the fatwa issued against him because of his sexual orientation had been spread within Bangladesh, and that it may have only been local, was **unjustified**. It would be impossible for the complainant to prove the contrary given that he was outside the country. Furthermore, the **notion of "local danger"** did not provide for measurable criteria and was not sufficient to dissipate totally the personal danger of being tortured. The Committee also noted the State party's argument that Mr. Mondal did not appear to be of interest to Islamic fundamentalists, considering the time that had elapsed since he left Bangladesh. However, it considered that the State party did not provide a sufficient argument on how **lapse of time** had diminished the risk of persecution

based on the complainant's sexual orientation.

Taking into account the findings in the medical report, the complainant's *situation as a whole*, namely his political activities in the past and the risk of persecution on the basis of his sexual orientation, combined with the fact that he belonged to a minority Hindu group, the Committee considered that Mr. Mondal had provided sufficient evidence to show that he personally ran a real and foreseeable risk of being subjected to torture upon returning to Bangladesh.

Articles 16 CAT – inadmissible (failure to substantiate the claim)

REMEDIES

The Committee asked the State party not to expel the complainant to Bangladesh.

CASE COMMENTS

Interim measures: Under rule 108, paragraph 1, of the Committee's rules of procedure, the Committee requested the State party did not expel the complainant to Bangladesh while his complaint was under consideration by the Committee.

References to previous jurisprudence: The Committee referred to its views on [MAK v. Germany](#) of 5 May 2004 (no. 214/2002) and [M.S.H. v. Sweden](#) of 14 November 2005 (no. 235/2003), in its general notes related to the scope of the consideration and the assessment of medical documentation provided by the complainant.

FOLLOW-UP

On 14 September 2011, the State party informed the Committee that on 15 July 2010, the Migration Board decided to grant the complainant a permanent residence permit.

In the light of the measures taken by the State party, the Committee decided to close the follow-

up dialogue in the case, with a finding of a satisfactory resolution.⁸

The Committee referred to its views on the *Uttam Mondal v. Sweden* in the [general comment No. 4 \(2017\)](#) on the implementation of article 3 of the Convention in the context of article 22:

“The Committee will assess ‘substantial grounds’ and consider the risk of torture as foreseeable, personal, present and real when the existence of credible facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of his/her deportation. Indications of personal risk may include, but they are not limited to: [...] sexual orientation and gender identity [...].”

8 See: CAT (2012), *Report to the General Assembly*, [A/67/44](#).

X. v. Sweden – Human Rights Committee⁹

Subject Matter:	Deportation of a bisexual man to Afghanistan
Substantive Issues:	Risk of torture and death upon return to country of origin
Articles of the ICCPR:	6 and 7

FACTS



Initial asylum application

X. arrived in Sweden in 2002 and applied for asylum the day after. In his initial asylum application, he indicated that he was an active member of the Communist party in Afghanistan, and after the fall of the Najibullah regime, he was arrested and taken to a security prison where he was subjected to torture daily. He was imprisoned for about six months without trial or access to legal aid, and was released only after his father managed to bribe someone and secure his release. During the following years, he was constantly living in hiding, until he left the country in 2002.

On 16 August 2005, X.'s application for asylum was rejected by the Migration Board of Sweden. He appealed the decision to the Aliens Appeals Board, which rejected his claim. He was granted a temporary residence permit until 7 April 2007 due to the situation in his country. Two applications in which X. claimed new circumstances were rejected by the Migration Board on the basis that there were not substantial new circumstances.

A new application based on sexual orientation

In September/October 2008, X. filed another application in which he revealed, for the first time, his bisexuality as a reason for requesting asylum. He explained that he had his first same-sex relationship at the age of 15-16 with a boy and that they were together for about four to five years. X. said that he had never revealed his sexual orientation, not even to friends or family, as he was afraid of severe punishment by private actors or State authorities. He added that the main reason for his arrest in 1993 was a play about bisexuality that he had written and in which he had acted

himself kissing another man. He was tortured, and claimed that rape was part of the torture to which he was subjected. After his release, he continued to have sexual relations with both men and women, including during his marriage. He lived in constant fear that this would be revealed and he would be reported to the authorities and severely beaten or killed by the State or by individuals, as the State did not offer any protection.

While in Sweden, X. had several same-sex relationships and became a member of the *Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL)*. RFSL had sent letters to both the Migration Board and the Migration Court protesting against the decision to deport X.

He never told any Afghan about his sexual orientation, but it was possible that some Afghans knew and could communicate that information to persons in Afghanistan.

The Migration Board of Sweden rejected the new application, stating that X. had not given a valid excuse as to why he had not revealed his sexual orientation to the asylum authorities initially.

X. replied that this was due to the stigma associated with bisexuality and homosexuality in his culture, feelings of shame, fear of what his previous lawyer, migration authorities and interpreters would think of him, and fear of reprisal if other Afghans learned about it. Furthermore, he did not know that fear of persecution based on sexual orientation was a valid claim for refugee status and asylum in Sweden; he was unaware of the importance that this kind of argument could have.

X. stated that the Migration Board had applied the “probable test”, instead of the lower standard of proof which should be applied when new circumstances justify the reopening of a case.

RFSL made submissions on his behalf, explaining the particular problems that gay and bisexual persons may encounter during the asylum process. It also sustained that the author would be at risk of persecution and torture if he returned to Afghanistan.

The Migration Board argued that X. had not given any valid excuse for not referring to his sexuality before. It also found it contradictory that although he had been open about his sexual orientation in Sweden, and had had same-sex relations and visited gay clubs, he did not see fit to confide in the migration authorities on that issue.

The Court considered that there were no grounds to examine the new asylum application. Consequently, X. was deported to Afghanistan.

After deportation, X. was living a very difficult life, hiding and moving from city to city, between Afghanistan and Pakistan. He was afraid to go out and only managed to continue his daily life because he was financially supported by his brother who lived abroad.

VIEWS



Articles 6 and 7 ICCPR – violation (insufficient weight was given to X.'s allegations on the real risk he might face in Afghanistan)

The Committee noted that the State party's migration authorities rejected the author's application on the grounds that the sexual orientation claim had been **invoked at a late stage** in the asylum process, rather than actually considering the grounds of X.'s sexual orientation and its impact on the author in the particular circumstances. The Committee also noted that the Swedish authorities found that X. would not face any risk of torture in Afghanistan, even though the State party itself **referred to international reports** about criminalisation of same-sex relations with a maximum sentence of death.

The Committee also observed that in the assessment of X.'s risk upon return to Afghanistan, the Swedish authorities focused mainly on **inconsistencies** in the author's account of specific supporting facts and the low credibility derived from the **late submission** of the sexual orientation claim.

Consequently, the Committee found that insufficient weight was given to X.'s allegations on the real risk he might face in Afghanistan in view of his sexual orientation. Accordingly, his deportation to Afghanistan constituted a violation of articles 6 and 7 ICCPR.

REMEDIES



Effective remedy:

The State party was obliged to provide X. with an effective remedy, including taking all appropriate measures to facilitate his return to Sweden, if he so wished.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future.

CASE COMMENTS



Evidence: X. referred to information from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Ministry of Foreign Affairs of Sweden, which indicated that LGBT people could not live openly in Afghanistan without the risk of human rights violations.¹⁰

10 UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers* (December

Admissibility: Considering the claims admissible, the Committee noted that X. was deported shortly after he was notified of the decision of the Migration Court, thus *de facto* depriving him of the right to file the respective appeal. Furthermore, the Committee highlighted that when further domestic remedies are available to asylum-seekers who risk deportation they must be allowed a reasonable length of time to pursue the remaining remedies before the deportation is enforced; otherwise, such remedies become materially unavailable, ineffective and futile.

Individual opinion by Mr. Rafael Rivas Posada: Disagreed with the direct violation of article 6 (“Only the ‘deprivation of life’ gives grounds for its application, and the mere risk of being deprived of one’s life, however strong the likelihood, may not justify the conclusion that there has been a direct violation of the article”), proposing that the wording should have been as following: “in this case, there has been a violation of article 7, taken in conjunction with article 6.”

FOLLOW-UP

The author was granted a residence permit and support in facilitating his return to Sweden. Non-repetition measures were put in place, including the adoption and dissemination of legal briefs for the use of migration officers, concerning the assessment of the risk alleged by asylum seekers in relation to sexual orientation.¹¹

The follow-up dialogue was closed with a note of satisfactory implementation of the recommendation.¹²

2007); Swedish Ministry of Foreign Affairs, *Report on the human rights situation in Afghanistan in 2007* (March 2008).

11 See: [A/69/40](#); Fox, K. (2015) *Implementation of decisions under treaty body complaints procedures: Do states comply?*

12 HRCtee, *Follow-up progress report on individual communications* (30 May 2017), [CCPR/C/119/3](#).

M. I. v. Sweden – Human Rights Committee¹³

Subject Matter:	Deportation of a lesbian woman to Bangladesh
Substantive Issues:	Risk of torture and death upon return to country of origin; prohibition of refoulement
Articles of the ICCPR:	7

FACTS



The author, M.I., is a lesbian woman who used to live in Dhaka. After her parents learned about her sexual orientation, they forced her to marry a Bengali man living in Sweden. She married against her will in Dhaka, received a temporary residence permit, and went to Sweden in June 2006. Nonetheless, when her husband found out that she was a lesbian, he forced her to return to Bangladesh in July 2006. That same year, she met another woman and they started living together.

In 2008, the police learned that M.I. was a lesbian and arrested and detained her. During her detention, she was raped and beaten. During the same period, her partner was kidnapped by an Islamic student organisation, called Shator Shivar. The author did not know of her partner's whereabouts, and received threats from Shator Shivar and from the police.

As her Swedish residence permit was still valid, M.I. returned to Sweden. On 16 May 2008, she applied for asylum before the Swedish Migration Board. She stated that she had fled Bangladesh to escape abuse by the police and Shator Shivar. She claimed that she had been detained by the police for several days and raped due to her sexual orientation, and that her partner had been kidnapped. Moreover, same-sex acts were forbidden under Bangladeshi law, and no organisation can openly defend the rights of LGBT people. If returned to Bangladesh, she would be at risk of torture and inhuman treatment. She also provided a medical report stating that she was depressed and on medication.

The Migration Board rejected M.I.'s application for asylum and ordered her return to Bangladesh. The Board pointed out that she did not provide any written proof to support her claims, and concluded that her allegations were not credible. The Board did not believe that she would be at

13 Communication No. 2149/2012 of 7 May 2012, views of 25 July 2013, [CCPR/C/108/D/2149/2012](https://www.unhcr.org/refugees/article/43c9d9d9.html).

risk of persecution due to her sexual orientation. It stated that the threats allegedly made by her parents, her husband's family and/or persons from Shator Shivir were criminal acts by individuals, and should be dealt with by the Bangladeshi authorities. Likewise, the author's detention and rape by the police was an act of misconduct that should have been reported to the authorities. Although same-sex acts were forbidden by Bangladeshi law, it was not clear whether the law was actually enforced. Finally, she had left Bangladesh without any difficulties using her own passport, showing she was not wanted by the authorities. Moreover, she had arrived in Sweden for the first time in 2006, but only applied for asylum in 2008. Therefore, it concluded that she did not feel an urgent need for protection.

The author appealed this decision but the Migration Court dismissed her appeal stating that there were inconsistencies in her allegations, and the information she provided was not credible. M.I. submitted an application for leave to appeal, but was denied.

After the decision to return the author to Bangladesh, she was hospitalised six times due to deep depression and risk of suicide. She requested the non-execution of the expulsion order for medical reasons, and alleged there were misunderstandings due to translation. The Migration Board dismissed her application.

The author submitted a second application to the Migration Board, putting forward new circumstances to support her allegations. She submitted to the Board: (1) a copy of an application to the Cerani Gong police station in Dhaka about the disappearance of her partner, (2) a newspaper article on lesbian Bangladeshi women, (3) a new medical report stating that, due to her sexual orientation, she was abused by her husband, the police had arrested, beaten and raped her, and her family did not want to have contact with her, (4) reports about the human rights situation in Bangladesh and (5), reports on the risk of persecution faced by LGBT people in Bangladesh. The Migration Board rejected the application. The author appealed, but the Court concluded that there were no new circumstances to render a re-examination of the case necessary. The author then lodged an application for leave to appeal, which was also denied.

M.I. was living illegally in Sweden and stated that the decision to expel her to Bangladesh could be executed by the police at any time.

VIEWS



Articles 7 ICCPR – violation (the State failed to assess duly the alleged risk M.I. would face if returned to Bangladesh)

The Committee observed that the author's sexual orientation and her allegations of rape by Bangladeshi policemen while in detention **were not challenged** by the State party. It also observed that her sexual orientation was in the public domain and was well known to the authorities; that she suffered from severe **depression** with a high risk of committing suicide despite medical treatment

received in the State party; that section 377 of the Criminal Code of Bangladesh **forbade** same-sex acts; and that LGBT people were **stigmatised** in Bangladeshi society. The Committee considered that the existence of such a law in itself fostered the stigmatisation of LGBT individuals and constituted an **obstacle to the investigation** and sanction of acts of persecution against these persons. The Committee considered that in deciding her asylum request the State party's authorities focused mainly on **inconsistencies and ambiguities** in the author's account of specific supporting facts. However, the inconsistencies and ambiguities mentioned were not of a nature as to undermine the reality of the feared risks. In the particular case of the author, the State party failed to take into due consideration her allegations regarding the events she experienced in Bangladesh because of her sexual orientation — in particular her mistreatment by the police — in assessing the alleged risk she would face if returned to her country of origin. Accordingly, M.I.'s deportation to Bangladesh would constitute a violation of article 7 ICCPR.

REMEDIES



Effective remedy:

The State party was obliged to provide M.I. with an effective remedy, including full reconsideration of her claim regarding the risk of treatment contrary to article 7 ICCPR if she is returned to Bangladesh. The State party was also requested to refrain from expelling the author to Bangladesh while her request for asylum was under reconsideration.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future.

CASE COMMENTS



The case is the only one related to a lesbian woman's asylum application reviewed by Treaty Bodies to date.

References to the Committee's General Comments: The Committee recalled its [general comment No. 31 \(2004\)](#) in which it referred to the obligation of State 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 risk of irreparable harm, such as that contemplated by articles 6 and 7 ICCPR.

FOLLOW-UP



On 1 November 2013, the Migration Board decided to grant the author permanent residence in Sweden.

Several projects and activities of the Swedish Migration Board were introduced to enhance the Board's competence in dealing with LGBT issues. The Government instructed the Swedish Migration Board to give special attention to such considerations. The Board has reported on the way in which it maintains and develops its competence in this area. In its 2014 directions, the Migration Board was asked to report on progress related to legal quality and to a uniform application in asylum cases in which sexual orientation and gender are invoked.

The views were published in September 2013 on the "Lifos" database, which lists legal and country of origin information, and is easily accessible to all. The views come with a summary in Swedish to be published on the Government Human Rights' website.¹⁴

14 See: HRCtee, *Follow-up progress report on individual communications* (5 September 2014), [CCPR/C/112/R.3](#); Fox, K. (2015) [Implementation of decisions under treaty body complaints procedures: Do states comply?](#)

J.K. v. Canada – Committee Against Torture¹⁵

Subject Matter:	Deportation of a gay man and LGBT activist to Uganda
Substantive Issues:	Risk of torture upon return to country of origin
Articles of the CAT:	3

FACTS



The complainant was J.K., a national of Uganda residing in Canada.

J.K. had known that he was gay since he was a teenager. In 2004, his parents forced him to marry a woman in order to dispel the rumours about his sexual orientation. The marriage lasted for three years. After the divorce, he joined the *Gay and Lesbian Association*.

In August 2007, he was arrested and beaten up by the police during a public gay rights demonstration near Parliament in Kampala. He was then taken to a dark interrogation room and tortured. He was kept there for three days without food or water and was regularly beaten by the police. He was released in the middle of the night on the Kampala Northern Bypass; he could barely walk and could not see.

He started receiving emails from strangers and faced discrimination by his neighbours. He became very fearful for his life.

One day he was arrested due to a denouncement by a spy within the *Gay and Lesbian Association*. He was arrested, interrogated and charged with recruiting children using “homosexual propaganda”. He was released but was told he would be watched – and killed if he continued his activities in the Association.

He worked in Iraq from 2008 to 2010 and extended his employment as long as possible as to avoid returning to Uganda, where he feared being arrested, tortured and killed for being gay.

When he returned, Parliament was debating an anti-homosexuality bill that would give the Government the legal right to imprison and torture gay people, and impose more severe punishments

15 Communication No. 562/2013 of 29 September 2013, views of 23 November 2015, [CAT/C/56/D/562/2013](#).

on LGBT individuals and activists. The law also imposed a duty to report same-sex activity within 24 hours; failure to do so would result in up to 3 years' imprisonment. Just before the bill was passed into law, J.K. and his family were harassed by neighbours, while the media called for a "genocide of gays".

J.K. fled to Canada, and applied for refugee status on 15 February 2011.

His application was rejected on the ground that he was not in need of protection by Canada. The Federal Court of Canada dismissed his appeal.

J.K. alleged that Canadian law prevented him from presenting new evidence in relation to his case, which included seven articles. Among the seven pieces of evidence was a newspaper article, published in November 2012, bearing the complainant's photograph and stating that he was a gay and was wanted by the Security Agency forces.

VIEWS



Articles 3 CAT – violation (substantial grounds existed for believing that the complainant would be in danger of torture or ill-treatment if returned to Uganda)

The Committee noted that the State party had acknowledged that the **situation of LGBTI persons** in Uganda was problematic and that it **worsened** after the Anti-Homosexuality Act was adopted. The Committee also noted that, despite the fact that the Anti-Homosexuality Act was nullified by the Constitutional Court in August 2014, the Court based its decision on a procedural issue (the law was adopted without the necessary quorum) and the Act could be brought before the Parliament again at any time. The Committee further noted that, according to publicly available information, after the adoption of the Act, there was **an increase in the number of cases** of arbitrary arrest, police extortion, eviction and attacks on the reputation of LGBTI persons and in the number who became homeless. Furthermore, the Committee noted that there were **reports** indicating that some LGBTI persons had been beaten and groped by police and detainees while in custody. The Committee therefore considered that the author might be at risk of torture or ill-treatment upon returning to Uganda, taking into account not only his sexual orientation, but also his **militancy in LGBTI organisations** and the fact that he could be detained pursuant to the criminal charges **brought** against him.

Accordingly, the Committee found that, taking into account all the factors in the case, substantial grounds existed for believing that the complainant would be in danger of torture or ill-treatment if returned to Uganda.

REMEDIES



The State party was obliged to refrain from forcibly returning the complainant to Uganda or to any other country where he ran a real risk of being expelled or returned to Uganda.

CASE COMMENTS



Interim measures: On 2 October 2013, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested that the State party did not extradite the author to Uganda while the complaint was being considered.

Admissibility: The State party claimed that J.K. had not exhausted all the available and effective domestic remedies as he did not apply for permanent residence on humanitarian and compassionate grounds. J.K. argued in turn that the earliest date on which he could have filed a humanitarian and compassionate application was after the date of his deportation to Uganda, which would have prevented him from applying. He also added that the humanitarian and compassionate application was a two-step process, and that the first step took approximately 28 months, during which there was no stay of removal. The Committee noted that although the right to assistance on humanitarian grounds might be a remedy under the law, such assistance was granted by a minister on purely humanitarian grounds, rather than on a legal basis, and was thus *ex gratia* in nature.

The Committee had also observed that when an application for judicial review was approved, the Federal Court returned the file to the body that took the original decision, or to another decision-making body, and did not itself conduct the review of the case or hand down any decision. Rather, the decision depended on the discretionary authority of a minister and, thus, of the executive. Based on those considerations, the Committee concluded that, in the present case, the possible failure to exhaust that remedy did not constitute an obstacle to the admissibility of the complaint.

Evidence: Stating that, although there had been arrests in the past under section 145 of the Penal Code for same-sex acts in Uganda, there were no reported cases of conviction or prosecution under the new Law; the State party cited publications by the *US Department of State*¹⁶ and *Human Rights Watch*.¹⁷

16 US Department of State, [Uganda 2013 Human Rights Report](#).

17 Human Rights Watch, [Uganda: Anti-Homosexuality Act's Heavy Toll](#) (May 2014).

When assessing the situation on the rights of LGBTI people in the country, the Committee made its conclusion based on reports by *Human Rights Watch*,¹⁸ *Human Rights First*,¹⁹ *Amnesty International*,²⁰ *Home Office of the UK*,²¹ and *Chapter Four*.²²

The Committee also considered supporting letters from the *Uganda Human Rights Commission*, the *Local Council of Kafero Zone*, an attestation from the *Gay and Lesbian Association in Uganda* and a medical report as reliable documentation provided by J.K. The Committee consequently concluded that he had provided sufficient reliable information for the burden of proof to shift to the State party.

References to previous jurisprudence: The State party referred to the Committee's jurisprudence in [K.S.Y. v. The Netherlands](#), in which it found that the return of an individual claiming to be gay to Iran would not violate article 3 CAT, noting "*a number of contradictions and inconsistencies in his account of past abuses at the hands of the Iranian authorities, as well as the fact that part of his account has not been adequately substantiated or lacks credibility.*" Moreover, the State party distinguished the complainant's circumstances from those of the complainant in [Mondal v. Sweden](#), in which the Committee considered that the return to Bangladesh of an individual alleging to be gay would constitute a breach of article 3 CAT, because a death fatwa had been issued against him and he had provided credible evidence of past persecution and pursuit by the police. Finally, the State party referred to the Committee's views on [P.S.S. v. Canada](#) of 13 November 1998 (no. 66/1997) stating that the author had not exhausted all the available and effective domestic remedies as he did not apply for permanent residence on humanitarian and compassionate grounds.

The Committee referred to numerous cases in its general notes relating to the scope of the consideration.²³

FOLLOW-UP

On 1 November 2016, the State party submitted that the complainant's application for permanent residence had been approved on 6 September 2016, subject to the standard condition that the complainant cohabit in a conjugal relationship with his spouse for a continuous period of two years from the date of approval. As a result of that decision, the complainant was entitled to live

18 Human Rights Watch, [Is it now legal to be gay in Uganda?](#) (August 2014).

19 Human Rights First, [Communities under siege: LGTBI Rights Abuses in Uganda](#).

20 Amnesty International, [Rule by Law – Discriminatory Legislation and Legitimized Abuses in Uganda](#) (October 2014).

21 Home Office of the UK, [Country Information and Guidance. Uganda: Sexual Orientation and Gender Identity](#).

22 Chapter Four, [UGANDA: Where Do We Go for Justice? The Abuse of the Rights of Sexual Minorities in Uganda's Criminal Justice System](#) (February 2015).

23 See [CAT/C/56/D/562/2013](#), fns. 20 to 25.

and work in Canada. He would not be at risk of removal as long as he complied with his obligations relating to permanent residence status, including residency requirements, and was not convicted of a serious crime. Once the complainant had resided in Canada as a permanent resident for the requisite period of time, he would be entitled to apply for Canadian citizenship.

At the same time, the State party disagreed that the complainant's removal to Uganda would be in violation of the Convention. In its view, the Committee failed to accord appropriate deference to the domestic decision makers. The complainant was provided with multiple opportunities to have his allegations of risk considered and assessed in Canada. Independent and impartial domestic decision makers had thoroughly assessed the complainant's allegations of risk and found that the evidence did not establish that he would be at risk in Uganda. The complainant was granted permanent resident status in Canada because it was determined that he met the requirements of the 'Spouse or Common-Law Partner in Canada' class and not because the State party agreed that his removal would expose him to a risk of irreparable harm. In any event, given that the complainant was granted permanent resident status, the State party considered that no additional measures were necessary in his case.

On 7 November 2016, the State party's observations were transmitted to the complainant for comments (by 7 January 2017). The Committee decided to keep the follow-up dialogue open, sent a reminder to the complainant to submit his comments and, subject to those comments, eventually close the follow-up dialogue with a note of satisfactory resolution.²⁴

The Committee also referred to its views on this case in its [general comment No. 4 \(2017\)](#) on the implementation of article 3 of the Convention in the context of article 22:

To determine whether there are substantial grounds for believing that a person would be in danger of being subjected to torture if deported, the Committee considers crucial the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights referred to in Article 3, paragraph 2, of the Convention. These violations include, but they are not limited to: [...] widespread gender-based violence [...].

24 See: CAT, *Follow-up report on decisions relating to communications submitted under article 22 of the Convention* (20 October 2017), [CAT/C/60/4](#).

M.K.H. v. Denmark – Human Rights Committee²⁵

Subject Matter:	Deportation of a gay man to Bangladesh
Substantive Issues:	Risk of torture and ill-treatment upon return to country of origin
Articles of the ICCPR:	7

FACTS



From July 2010 to July 2011, the author maintained a same-sex relationship with a friend. They were caught one evening in a rice field, following which they were brought to a village council where they were beaten and tortured. The author was rejected by his family, expelled from his village and was threatened with death if he returned. He first went to Rangpur; from there he fled after being recognised by one of the villagers. He went to Dhaka, then to India. From India he left for Europe. In 2012, the author arrived in Denmark and applied for asylum.

The police interrogated the author about his identity and travel route. He explained that he left his home country because citizens in his village had found out his sexual orientation and he feared for his life if he returned to Bangladesh. During the interview with the Immigration Service, he referred to his same-sex relationship with a friend. On 28 August 2012, the Immigration Service rejected the author's asylum claim as not credible. His age was also questioned; M.K.H. had stated that he was under 18 during the time the incidents had occurred in Bangladesh.

The author appealed claiming that he was at risk of persecution from the local community and that he would not be able to seek protection in Bangladesh, where same-sex relations are illegal. He further submitted that he could not be forced to hide his sexual orientation to avoid persecution and, that as a member of a particular social group exposed to persecution, he was in need of protection in accordance with article 1A (2) of the 1951 Convention relating to the Status of Refugees. The Board upheld the rejection of the application.

In April 2013, the author requested the Refugee Appeals Board reopen the asylum proceedings and submitted new documents in support of his claim; a newspaper article alleging that the author's mother had committed suicide because of problems related to the sexual orientation of her son and a copy of his birth certificate, stating that he was born on 21 December 1994. The author

25 Communication No. 2462/2014 of 26 September 2014, views of 12 July 2016, [CCPR/C/117/D/2462/2014](#).

also submitted that it was difficult for a minor, who had grown up in a country in which same-sex relations were linked to stigma and shame, to talk openly about his sexual orientation. He submitted it was difficult for him to be open about, and elaborate on, the grounds of his asylum application when they were linked to his sexual orientation.

On 4 March 2014, an NGO “LGBT Asylum” confirmed that the author had been a member of the organisation since October 2013 and had been taking part in their meetings.

The Refugee Appeals Board confirmed its decision refusing to reopen the asylum proceedings, without examining the new documents submitted by the author. The Board considered that even if same-sex relations were illegal in Bangladesh, the relevant legislation was not enforced. The author asserted that the Board should have followed the procedure as applied in other countries. In that regard, he referred to the jurisprudence of the Supreme Court of the United Kingdom when determining whether an asylum seeker is gay and whether, if returned to his country of origin, he risks persecution or abuse that would make him entitled to asylum.

As part of the asylum procedure, M.K.H. stated that the authorities in his country of origin were unable to protect him from the people of his village. The author admitted he did not know about the law, but he was clear that same-sex relations were unacceptable from a religious and social perspective. He also feared starvation if he returned to his country of origin, as he had no home and no clothing.

Since the decisions of the Board could not be appealed before the Danish courts, the author maintained that he had exhausted all available and effective domestic remedies.

VIEWS



Articles 7 ICCPR – violation (the State failed to adequately take into account relevant information and thereby arbitrarily dismissed the author’s claims)

The Committee noted three failures on the part of the State when assessing whether his return to Bangladesh would constitute a violation of article 7 ICCPR. Firstly, that the State party did not consider that the author could be a **minor**. Secondly, it did not provide him with any of the assistance he was entitled to as a minor during the asylum procedure. Thirdly, it did not take into account the fact the author could be a minor likely to face a personal risk if he returned to Bangladesh. The Committee considered this practice amounted to a procedural defect in the examination of the author’s request for asylum.

The Committee also noted that the Board did not explain on which grounds it had **disregarded the author’s self-identification** as a gay person and his allegations of a real risk of persecution or abuse if he was returned to Bangladesh. Furthermore, since the Immigration Service and the Board found the author’s homosexuality suspicious, they did not take into account the author’s

claims about his and his partner's experience in Bangladesh. Further, they did not take into account his claims that no protection could be expected from the national authorities and that the **criminalisation of same-sex relations and societal stigma** constituted an obstacle to the investigation and sanction of acts of persecution against LGBT persons. In addition, the Committee noted that the author was **Muslim**, and that at the date of the decision, such people in Bangladesh were frequently the victims of threats of violence, particularly after homophobic public comments by Islamic leaders.

Consequently, the Committee considered that, when assessing the risk faced by M.K.H., the State party failed to adequately take into account a **compilation of evidence**, including his version of the events he faced in Bangladesh, the documents he provided and the available background information about the risks faced by LGBT people in Bangladesh, thereby arbitrarily dismissing the author's claims.

In such circumstances, the Committee considered that the author's deportation to Bangladesh would amount to a violation of article 7 ICCPR.

REMEDIES

The State party was obliged to proceed to a review of the author's claim, taking into account the State party's obligations under the ICCPR and the Committee's views on the case. It was also requested that the State party refrain from expelling the author while his request for asylum was being reconsidered.

CASE COMMENTS

Interim measures: When registering the communication on 29 September 2014, the Committee, acting through its Special Rapporteur on new communications and interim measures pursuant to rule 92 of its rules of procedure, requested that the State party refrain from deporting M.K.H. to Bangladesh, while his case was under consideration by the Committee. The Committee also indicated that it might review the necessity of maintaining this request upon receipt of the State party's observations. On 29 September 2014, the Refugee Appeals Board suspended the time limit for the author's departure from Denmark until further notice, in accordance with the Committee's request. The two subsequent State party's requests to review the Committee's requests for interim measures made on 4 June 2015 and on 26 February 2016 have been rejected by the Committee.

Evidence: The author submitted to the Committee reports on the situation of gay people in Bangladesh, which indicated that same-sex relations were illegal in that country, that the police used the law to discriminate, exercise violence against, and constantly threaten gay persons.

References to previous jurisprudence: The author referred to the Committee's jurisprudence in [M.I. v. Sweden](#), where it considered that the deportation to Bangladesh of the author, a lesbian woman, would constitute a violation of article 7 ICCPR. The State party contested the author's reference to *M.I. v. Sweden*, as this case differed from the author's case on essential points. In *M.I. v. Sweden*, the author's sexual orientation and her allegations of rape by Bangladeshi policemen while in detention were not challenged by the State party and the authorities of the State party had considered it a fact that the author had been subjected to abuse in her country of origin. In the author's case, the State party's authorities carried out an assessment of the author's statements and of the documents provided by the author and the Board rejected crucial elements of the author's statements as being non-credible and fabricated for the occasion.

References to the Committee's General Comments: The Committee recalled its [general comment No. 31 \(2004\)](#), on the nature of the general legal obligation imposed on State parties to the Covenant, in which it referred to the obligation of State parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 7 ICCPR.

FOLLOW-UP



On 10 March 2017, the State party submitted information to the Committee about the implementation of the recommendations.

On 25 October 2016, the Refugee Appeals Board (RAB) reopened the author's asylum case for a review at an oral hearing, before a new panel, to reconsider his claims. The hearing took place on 19 December 2016.

The RAB accepted for a fact that the author was gay, and that he could not return to his village for that reason. However, the RAB determined that there was no basis for assuming that the author risked persecution, within the meaning of article 7 of the Aliens Act, in other parts of Bangladesh. Accordingly, the RAB determined that, despite the difficult conditions for gay people in Bangladesh, the author- who had not become known as gay outside his village- could be expected

to take up residence elsewhere; for example, in the town where he resided without any problem for a period of four and a half months after being banished from his village.

Consequently, the RAB upheld the decision of the Immigration Service. The author was ordered to leave Denmark within seven days from service of the RAB's decision.

The views of the Committee in cases against Denmark involving the RAB were reported in the Board's annual report, which was distributed to all members of the Board and included a chapter on cases brought before international bodies. The RAB and the Danish Ministry of Foreign Affairs have also made the Committee's views publicly available on their individual websites (www.fln.dk and www.um.dk).

In light of the prevalence of the English language in Denmark, the Government sees no reason for a full translation into Danish.

Based on this, the Committee assessed implementation of its recommendations as following:

■ **Effective remedy:** A (Response largely satisfactory)

■ **Publication of views:** A (Response largely satisfactory)

■ **Non-repetition:** B (Action taken, but additional information or measures required)

The Committee decided to close the follow-up dialogue, with a note of satisfactory implementation of the Committee's recommendations.²⁶

26 HRCtee, *Follow-up progress report on individual communications* (16 November 2017), [CCPR/C/121/R.1](https://www.unhcr.org/refugees/article/2017/11/ccpr-c-121-r-1.html).

M.Z.B.M. v. Denmark – Human Rights Committee²⁷

Subject Matter:	Deportation of a transgender woman to Malaysia
Substantive Issues:	Risk of torture or ill-treatment; arbitrary or unlawful interference with privacy; freedom of thought, conscience and religion; equality before the law; prohibition of discrimination
Articles of the ICCPR:	7, read in conjunction with 17 (1), 18 (1) and 26

FACTS

M.Z.B.M. was a trans woman who grew up in Seramban district, north of Kuala Lumpur. She was ethnically Malay and a registered Muslim, but she considered herself Hindu. At the age of 16, she left her family and moved to Kuala Lumpur. She also started wearing women's clothing and receiving hormone treatment. She worked at a restaurant and volunteered for a local NGO. In 1998 or 1999, the author was raped by several unknown individuals. In 2007, she underwent gender reassignment surgery in Thailand. However, she was not able to change her documentation as there was no procedure for legal gender recognition in Malaysia. She also appeared as a Muslim on her identity card. Between 2001 and 2010, following several incidents of being stopped on the street and having her identity card checked, the author was taken into custody by Malaysian police for up to 24 hours and physically and sexually abused. On one occasion, the author went to a police station in Kuala Lumpur to report the rape, but the police refused to register her complaint, after which she did not dare to report any further abuse.

In April 2012, the police in Melaka took her to an office of the Department of Islamic Affairs, 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 was forbidden for men to wear women's clothing. Upon her release, representatives of the Department of Islamic Affairs informed her that her case would be sent for adjudication.

27 Communication No. 2593/2015 of 31 March 2015, views of 20 March 2017, [CCPR/C/119/D/2593/2015](#).

The author arrived in Denmark on 25 January 2014 and applied for asylum on 4 February 2014.

Following three interviews with the Danish Immigration Service, her asylum application was rejected. The Danish Immigration Service found the author's account of her detention and sexual abuse by the police in Malaysia inconsistent and implausible; the author had not been charged with any criminal offence and she had not been detained after her last arrest in April 2012. The Refugee Appeals Board upheld the decision of the Danish Immigration Service.

The author requested the reopening of her case based on the fact that there was a case pending against her before the Sharia court in Melaka, for posing as a woman and wearing women's clothing, which could entail a fine or imprisonment of up to six months.

The Board assessed the new evidence, but rejected the author's request for the reopening of her case, arguing that there was no new significant information. The author renewed her request for the reopening of her case, but the Board rejected it.

VIEWS



Article 7 ICCPR read in conjunction with article 18 (1) – inadmissible (insufficiently substantiated)

The Committee noted the author's claim that her return to Malaysia put her at risk of imprisonment due to her alleged conversion to Hinduism, as conversion is not permitted by Sharia law in Malaysia. The Committee noted, however, the State party's submission that the author informed the Danish authorities that she **had not formally converted** to Hinduism. Furthermore, the author had not provided any details regarding her alleged conversion, or the consequences thereof. She had not claimed that the alleged case against her before the Sharia court was related to her joining Hinduism, or that she had otherwise been subjected to persecution as a result of her conversion, nor had she provided any details regarding the likely risk and nature of such persecution if she were returned.

Article 7 ICCPR read in conjunction with articles 17 (1) and 26 – no violation (lack of substantiation)

The Committee noted that the State party had acknowledged the author's gender identity and the fact that she may have been detained in the past. However, the national authorities 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. In this regard, the Committee noted that the author described those incidents in a generic manner in her **communication**.

Regarding the alleged criminal proceedings against the author under Sharia law, and the threats of imprisonment made in 2012 as a result, the Board also reviewed the Sharia court documents presented by the author. The Board 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 difficulty, and that she had not been detained or harassed during that time.

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

REMEDIES

//////

N/A.

CASE COMMENTS

//////

The case is the only one related to a trans person's asylum application reviewed by Treaty Bodies so far.

Interim measures: On 1 April 2015, 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 refrain from deporting M.Z.B.M. to Malaysia while her case was under consideration by the Committee.

Complaints: Interestingly, the author claimed the violation of not only article 7 ICCPR per se (as was done in previous cases), but also that this article be read in conjunction with article 18 (1) ICCPR (her conversion from Islam to Hinduism, not permitted by Sharia law in Malaysia, put her at risk of imprisonment upon her return to Malaysia), and in conjunction with articles 17 (1) and 26 ICCPR (in the context of the case pending against her before the Sharia court, her gender identity and appearance would be being made public, thereby violating her right to privacy; in the light of her national identity documents, if sentenced to imprisonment, she would be held together with men, thereby exposing her to further abuse).

Evidence: The author cited several reports by governmental and non-governmental organisations on the situation of trans people in Malaysia. First, a report by *Human Rights Watch* noted that discrimination against trans people was pervasive and that the Federal Court decided to overrule a lower court decision that had declared unconstitutional a provision in the Islamic law of the Negeri Sembilan State criminalising cross-dressing. Second, a report by the *US Department of State*, according to which trans individuals were often charged under the Minor Offences Act for “indecent behaviour” and might be fined or, in the case of repeat convictions, sentenced to up to three months’ imprisonment.

References to the Committee’s General Comments: The Committee recalled para 12 of its [general comment No. 31 \(2004\)](#) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it referred to their obligation 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 IC-CPR, which prohibits cruel, inhuman or degrading treatment or punishment.

FOLLOW-UP



N/A.

E.A. v. Sweden – Committee Against Torture²⁸

Subject Matter:	Deportation of a gay man to Lebanon
Substantive Issues:	Risk of torture upon return to country of origin; prohibition of refoulement
Articles of the CAT:	3

FACTS



The complainant, E.A., was a gay man, and a Lebanese national born in 1992. He sought asylum in Sweden but his application was rejected and he risked deportation to Lebanon.

Since 2013, E.A. had been in a same-sex relationship with a Swedish partner. While his mother had accepted his sexual orientation, his father, who lived in Israel, did not know about it and, the complainant claimed, would never accept it. E.A. and his mother decided not to inform his father or other relatives about his sexual orientation. However, a friend of E.A. saw him with his boyfriend and revealed the information to his relatives in Lebanon. The Lebanese authorities also knew about E.A.'s sexual orientation. His story has been in the newspapers in Sweden and, although the articles did not reveal his name, the Lebanese Embassy there informed him that they knew the articles referred to him.

The complainant came to Sweden with his mother and two sisters in 2006, when he was a minor. The family applied for asylum on the grounds of his father's involvement in fighting for the Government of Israel. Their claim was rejected in 2007 by the Migration Agency, and in 2008 by the Migration Court.

On 9 March 2013, the day the expulsion order became statute-barred, the complainant applied again for asylum on the grounds that he was a gay man and as such, was at risk of being detained and tortured by police and would be at risk of ill-treatment by his relatives if returned to Lebanon. The complainant's request for asylum was rejected on 17 September 2014 by the Migration Agency. His appeal was rejected on 17 December 2014 by the Migration Court. On 16 February 2016, the Migration Court of Appeal refused leave to appeal and the decision to expel the complainant became final.

28 Communication No. 690/2015 of 20 July 2015, views of 11 August 2017, [CAT/C/61/D/690/2015](#).

E.A. claimed that article 534 of the Lebanese Criminal Code criminalised “unnatural sexual intercourse”, which was punishable by up to one year imprisonment. In practice, same-sex relations fall under that law. The complainant stated that gay men arrested under article 534 were abused by the police in detention. He alleged that, if deported to Lebanon, he would be at a risk of torture or other forms of inhuman or degrading treatment from the police. He would risk honour-related violence or killing by his relatives and would not be able to turn to the authorities for protection.

VIEWS



Article 3 CAT – no violation (no substantiation of current present danger)

Based on several sources, the Committee concluded that **not every homosexual man** in Lebanon was a target of persecution by the authorities. It further concluded that E.A. did not provide information about any **concrete threats** from his family and relatives. Consequently, the Committee found that the complainant’s allegations that he would be at a personal risk of treatment contrary to article 3 CAT were hypothetical and did not go **“beyond mere theory or suspicion”**.

REMEDIES



N/A.

CASE COMMENTS



Interim measures: On 27 July 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party did not deport the complainant while the complaint was being considered.

References to the Committee’s General Comments: The State party referred to para. 9 of the Committee’s [general comment No. 1 \(1998\)](#) on the implementation of article 3, in which the Committee stated that it was for the courts of the State parties to the Convention, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it could be ascertained that the manner in which such facts and evidence were evaluated was clearly arbitrary or amounted to a denial of justice. The Committee recalled the same general comment noting that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

References to previous jurisprudence: The Committee referred to its views on [A.R. v. the Netherlands](#) of 14 November 2003, no. 203/2002, and [N.S. v. Switzerland](#) of 6 May 2010, no. 356/2008, in its general notes related to the scope of the consideration.

Assessment of the situation of LGBT persons in Lebanon: The State party submitted that there is no consistent pattern of gross, flagrant or mass violations of human rights in Lebanon. According to the *Country Report on Human Rights Practices for 2014 by the United States Department of State*, article 534 of the Lebanese Criminal Code (hereinafter – article 534 LCC) was rarely applied and, when applied, it often resulted in a fine. It was reported that the number of cases of harassment of LGBT activists had recently decreased and that, in 2009, an important judgment had been delivered stating that homosexual acts were not unnatural because they were consensual. According to the report, with reference to the NGO “*Helem*”, there had been fewer than 10 prosecutions under article 534 LCC in 2010. According to the statement from the *Swedish Embassy in Amman*, there were no ongoing trials under that article in 2013. The State party concluded that the current human rights situation in Lebanon, including as regards human rights of LGBT persons, did not in itself suffice to establish that the forced removal of the complainant would breach State party’s obligations under article 3 CAT.

E.A., in turn, claimed that, according to many reliable sources, article 534 LCC was still applied in practice to arrest and torture gay people and that he therefore faced an individual threat. He claimed that the State party had not presented any real and substantial evidence supporting the position that article 534 LCC would not be applied in practice. Even if the prison term was substituted with a fine, it constituted a criminal record, which was often requested to have access to jobs, services, etc., which thus increased the risk of social discrimination. Despite the efforts in the country to make LGBT persons more accepted, being a homosexual in Lebanon was still a risk. On a later stage, E.A. also a new report by the *Swedish Migration Agency* on cases concerning LGBT persons in Lebanon, and claimed that the report proved that article 534 LCC had been used to a greater extent in 2016, that people had been kept in detention only because they were suspected of being gay, and that anal examinations were still performed.

The Committee referred to the 2017 concluding observations on Lebanon, where it expressed concern over isolated incidents of ill-treatment of men suspected of being gay who had been held in custody by Security Forces officers. At the same time, the Committee noted that the reported incidents could not be viewed as constituting a general and widespread practice towards gay men. It also noted that, in 2015 and in 2016, 76 arrests per year were made under article 534 LCC (here the Committee referred to a shadow report submitted to the HRCtee by *Helem*). While expressing its concern over the existence of a provision that enables criminal prosecution of gay persons, the Committee was not able to conclude that every gay man in Lebanon was a target of persecution by the authorities.

FOLLOW-UP



N/A.

Z.B. v. Hungary – Human Rights Committee²⁹

Subject Matter:	Deportation of a woman, who allegedly suffered from violence based on her sister's sexual orientation in Cameroon, to Serbia, where she had been raped and captured
Substantive Issues:	Risk of torture, cruel, inhuman or degrading treatment or punishment; non-refoulement; effective remedy
Articles of the ICCPR:	2(3)(a); 7; 13

FACTS

Z.B. was born in Cameroon. She resided in Duala, Cameroon, with her son and her sister who was a lesbian woman.

On 8 February 2015, while the author and her son were away, unidentified persons broke into her apartment and severely beat her sister. As a consequences of the attack, the author's sister had to undergo surgery to have her ovaries removed. The attack was motivated by her sister's sexual orientation. Homosexuality was illegal in Cameroon. Following the attack, the Cameroonian authorities issued an arrest warrant for the author and her sister, accusing the author of "facilitating homosexuality." Therefore, the author fled with her son and her sister to Northern Cameroon.

Soon afterwards, the arrest warrant was extended to the whole territory of the country. Consequently, in June 2015, the author fled to Yambio, South Sudan, together with her son and sister, to live with her father and half-brother. South Sudan was in a state of civil war at that time. One night in November 2015, a group of around 30 armed men broke into the author's father's house, committed sexual violence against Z.B. and members of her family, and killed all the men. Following the attack, Mr. B., a friend of the author's father, offered to help the author and her sister to flee to Europe.

The author and her sister flew to Istanbul, Turkey, accompanied by Mr. B. At the airport, Mr. B. took their possessions and left, promising to return. Instead, two strangers took them to a van

29 Communication No. 2768/2016 of 23 May 2016, decision of 19 July 2018, [CCPR/C/123/D/2768/2016](#).

with other people. Two weeks later, Z.B. and her sister were forcibly transferred to Belgrade. The traffickers kept the author and her sister captive, and they were subjected to sexual violence.

One night in February 2016, the traffickers abandoned Z.B., her sister and several other captives in a forest close to the Hungarian border, informing them that they were already in Hungary; in reality they were still in Serbia. On 23 February 2016, after walking in the direction indicated by the traffickers, the author and her sister entered Hungary through holes in the border fence. They were caught by the police and brought to the Border Control field office of Szeged, where they submitted an asylum application.

On 11 April 2016, the Office of Immigration and Nationality (OIN) conducted the author's first and only interview. A French-speaking interpreter was present. However, at the end of the interview, the interviewer did not read the minutes back to the author and therefore she was not able to correct the errors. The author alleged that, for example, the minutes incorrectly recorded that she was lesbian, like her sister, and that this was the reason why she had left Cameroon.

On 15 April 2016, the OIN declared the author's application inadmissible with the ground that she had arrived through Serbia, which was considered a safe third country.

After that, Z.B. and her representative tried, in vain, to appeal this decision.

VIEWS



Articles 2(3)(a), 7 and 13 ICCPR – inadmissible (on 5 December 2016, Z.B. received refugee status based on her second application and following the interim measures granted by the Committee)

REMEDIES



N/A

CASE COMMENTS



While the sexual orientation of the applicant's sister has been referred to in the case facts, it was not relevant for the future developments and violations claimed by the author.

Interim measures: On 25 May 2016, pursuant to rule 92 of the Committee's rules of procedure, the Special Rapporteur on new communications and interim measures requested the State party to refrain from deporting the author to Serbia while her case was under consideration by the Committee.

FOLLOW-UP



N/A.

Violence / Hate Crimes / Hate Speech

Ernazarov v. Kyrgyzstan – Human Rights Committee³⁰

Subject Matter:	Death of a person convicted of a “forced sodomy” in a police station as a result of inter-prisoner violence against gay men and sex-offenders
Substantive Issues:	Life; effective remedy; torture; prompt and impartial investigation
Articles of the ICCPR:	Articles 6 (1) and 7 alone and in conjunction with article 2 (3)

FACTS

The author's brother, R.E., was arrested in 2005, as a result of a complaint that he had committed forced sodomy against the father of his former girlfriend. During his detention, R.E. was in sound physical and mental health. He was formally charged with violating article 130 of the Criminal Code of Kyrgyzstan, which prohibits forced sodomy. The local prosecutor ordered that R.E. be transferred to a pretrial detention centre, but he continued to be held at the police station. He was found in his detention cell, which he shared with six other men, unconscious and bleeding profusely from numerous cuts. R.E. was taken by ambulance to a hospital, where he died shortly after his arrival. The autopsy stated that the “prisoner R.E. cut his throat for the purpose of committing suicide.”

30 Communication No. 2054/2011 of 11 March 2011, views of 25 March 2015, [CCPR/C/113/D/2054/2011](#).

The author maintained that throughout the course of his confinement R.E. had been subjected to psychological and physical abuse by other men in his cell because he was charged with a sexual offence against another man, and because of the nature of the offence R.E. was particularly vulnerable to abuse. Throughout his detention, the author's brother could not be visited by his family and saw his lawyer on only one occasion. On one occasion when his sisters attempted to visit him they were told by the investigating officer in charge of his case that he was "better off dead."

The Prosecutor's Office led the investigation on the death of R.E., and the Department of Internal Security of the Ministry of Internal Affairs also ordered an internal investigation. Both investigations concluded that R.E. had committed suicide. However, no cutting instrument was ever recovered from the cell. The author also submitted that an alleged suicide note, written on a cigarette pack, was recovered from the detention cell of R.E. The investigation ordered a forensic assessment of the handwriting, that concluded that the note had been written by R.E. himself. However, family members familiar with the handwriting of the victim maintained that it was not written by him.

All available domestic remedies had been exhausted.

VIEWS



Article 6(1) ICCPR – violation (State acquiescence)

The authorities **were aware** of R.E.'s daily ill-treatment by his cellmates, and in the absence of any information on measures taken to protect his life, the Committee concluded that the Kyrgyz authorities were responsible for not taking adequate measures of protection.

Article 7 ICCPR – violation (State responsibility for security of detained individuals)

The State party is responsible for the security of any person in its custody. When an individual is injured while in detention, it is incumbent on the State party to produce evidence refuting the allegations that the State party's agents are responsible and to show that they applied due diligence in protecting the detainee. The author's claims were substantiated and had been corroborated by the official autopsy report and its independent evaluation; therefore, there was a violation of article 7 of ICCPR with regard to R.E.

Article 2 (3), read in conjunction with articles 6 (1) and 7 – violation (no prompt and proper investigation of the case)

The investigation **had failed to seize** important evidence and question key witnesses. It was undisputed that no cutting instrument had been recovered from the cell, despite the fact that the victim died from cuts on his throat. The victims' family was not informed of the progress of the

investigation nor was a final report of the investigation made available to the family. The failure of the State party's authorities to investigate promptly and properly the circumstances of R.E.'s death effectively denied a remedy to the author, and the rest of the family, in violation of his rights under article 2 (3), read in conjunction with articles 6 (1) and 7 ICCPR.

REMEDIES



Full reparation:

The State party was obliged to provide the author with an effective remedy. The remedy should include an impartial, effective and thorough investigation into the circumstances of the author's brother's death, prosecution of those responsible and full reparation, including appropriate compensation.

Non-repetition:

The State party was obliged to prevent similar violations in the future.

CASE COMMENTS



While the case did not per se tackle LGBT rights, it concerned the problem of hostile attitudes and aggression against gay or bisexual men in detention.

The same problem was addressed more explicitly, for example, by the CAT in its 2016 concluding observations on Armenia in a paragraph titled "Inter-prisoner violence and violence and degrading treatment against homosexual prisoners and sex-offenders." The Committee was

"concerned about reports of high incidence of inter-prisoner violence in penitentiary institutions, including incidents of self-harm, and notes the lack of official statistics in this regard. It notes with concerns that the incidence of such violence may be the result of the existence of a criminal subculture and informal hierarchy in prisons which, despite its decrease in recent years, appears still to exercise substantial influence within the penitentiary system."

It further recommended the State Party “put an end to the discrimination and violence against homosexual prisoners and sex-offenders, abolish the practice of their degrading and involuntary segregation and all other degrading and humiliating practices that still persist in the vast majority of prisons; investigate effectively all such allegations, and bring perpetrators to justice.”³¹

FOLLOW-UP



According to the Committee's reports, the follow-up dialogue is ongoing.³²

31 CAT, *Concluding Observations: Armenia* (26 January 2017), [CAT/C/ARM/CO/4](#).

32 HRCtee, *Follow-up progress report on individual communications* (30 May 2017), [CCPR/C/119/3](#).

D.C. and D.E. v. Georgia – Committee Against Torture³³

Subject Matter:	Vulnerability of a detained person subjected to torture, including attempted rape, by police
Substantive Issues:	Torture; torture – prompt and impartial investigation; treatment of prisoners
Articles of the CAT:	1, 11, 12, 13 and 16

FACTS



The complainants were a doctor and his son. In 2010, the authorities accused them of kidnapping and illegal possession of ammunition and narcotics. The complainants were arrested and subjected to torture by police. The second complainant was subjected to attempted rape.

In 2011–2013, the complainants wrote 101 complaints regarding the torture they had experienced, to different institutions, but did not receive a response to the majority of those complaints. However, the complainants' case was taken up by the Ombudsman of Georgia, who forwarded it to the Prosecutor's Office of Georgia, who opened an investigation into their allegations. The complainants alleged that the State party had not undertaken an effective investigation into their complaints, and believed that the Prosecutor's Office of Georgia intended to close the investigation once the statute of limitations expired.

VIEWS



Article 11 CAT – inadmissible (insufficiently substantiated)

Article 12 and article 13 in conjunction with article 1 CAT – violation (delayed investigation)

Article 16 (1) CAT – violation (inadequate treatment)

33 Communication No. 573/2013 of 1 July 2013, views of 12 May 2017, [CAT/C/60/D/573/2013](#).

REMEDIES

The Committee urged the State party to conduct an impartial investigation into the incidents in question, with a view to bringing those responsible for the victims' treatment to justice, and to provide the complainants with an effective remedy, including fair and adequate compensation for the suffering inflicted, as well as medical rehabilitation.

CASE COMMENTS

The only explicit mention of sexual orientation was para. 5.3 as noted:

*"5.3. The complainants contest the State party's claim that the second complainant never raised with the domestic authorities his allegations concerning attempted rape and being burned with cigarettes. The complainants also note the risks that arise for prisoners who raise allegations of sexual assault, as they are likely to be labelled as **homosexuals** and exposed to a high risk of abuse by other prisoners. (...)".*

Nonetheless, rape was mentioned in both the facts and the complaint of the applicants.

FOLLOW-UP

N/A.

Freedom of Expression / Freedom of Assembly and Association

Hertzberg et al. v. Finland – Human Rights Committee³⁴

Subject Matter:	Censuring radio and TV programmes dealing with sexual orientation
Substantive Issues:	Freedom of expression; limitations of rights; restrictions of rights
Articles of the ICCPR:	19

FACTS



The authors of this communication were five individuals – L.R.H., A.N., U.M., M.P. and T.P.

Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company (FBC), censored radio and TV programmes dealing with homosexuality, or imposed sanctions against participants in such programmes..

At the heart of the dispute was para 9 of chapter 20 of the Finnish Penal Code (hereinafter – 20 (9) FPC):

If someone publicly engages in an act violating sexual morality, thereby giving offense, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine.

Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1.

³⁴ Communication No. 061/1979 of 7 August 1979, views of 2 April 1982, [U.N. Doc. Supp. No. 40 \(A/37/40\) at 161 \(1982\)](#).

In September 1976, L.R.H., a lawyer, was interviewed for a radio programme entitled “*The Outcasts of the Labour Market.*” In the interview, he asserted, on the strength of his knowledge as an expert, that there was job discrimination on the ground of sexual orientation existed in Finland. As a consequence of this programming, criminal charges were brought against the editor (not L.R.H.) before the court. Although the editor was acquitted, L.R.H. claimed that through those penal proceedings his right to seek, receive and impart information was curtailed. In his view, the court exceeded the limits of reasonable interpretation by construing 20 (9) FPC as implying that the mere “praising of homosexual relationships” constituted an offence under that provision.

A.N. prepared a radio programme conceived as part of a young listeners series in December 1978. This programme included a review of the book “*Boys must not cry,*” and an interview with a gay person about young, gay identity and about life as a gay person in Finland. When it was ready for broadcasting, it was censored by the responsible director of FBC, against the opposition of the editorial team for the series. The author claimed that no remedy against the censorship decision was available to her.

U.M. participated in a discussion about the situation of the young, gay person depicted in A.N.’s production. The discussion was designed to form part of the broadcast. Like A.N., the author stated that no remedy was available to him to challenge the censorship decision.

In 1978, M.P. and T.P., together with a third person, prepared a TV series on different marginal groups of society such as Jewish, Roma and gay persons. Their main intention was to provide factual information and to thereby remove prejudices against those groups. The responsible programme director, however, ordered that all references to gay people be cut from the production, indicating that its transmission in full would entail legal action against FBC under 20 (9) FPC.

The authors claimed that their case was an illustration of the adverse effects of the wide interpretation given to 20 (9) FPC, which did not permit an objective description of homosexuality. According to their allegations, it was extremely difficult, if not impossible, for a journalist to start preparing a programme in which gay people were portrayed as anything else than sick, disturbed, criminal or wanting to change their sex. They contended that several of these programmes had been broadcast by FBC in the recent past.

VIEWS



Articles 19(2) ICCPR – no violation (margin of appreciation on what are public morals)

The Committee concluded that the authors advanced no valid argument which could indicate that the construction placed upon 20 (9) FPC by the Finnish tribunals was not made bona fide.

The Committee then decided that the fact that L.R.H. took a personal interest in the dissemi-

nation of information about homosexuality, taking into account that ***no sanctions were imposed*** against him and that he had not claimed that the FBC's programme restrictions would in any way personally affect him, did not make L.R.H. a victim in the sense required by the OP.

With regard to the two censored programmes of A.N., M.P. and T.P., the Committee accepted the contention of the authors that their rights under article 19 (2) ICCPR had been restricted.

However, the Committee noted that ***public morals*** differed widely, and a certain margin of discretion must be accorded to the responsible national authorities.

The Committee decided that it could not question the decision of the responsible organs of the FBC- that radio and TV were not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging same-sex behaviour. As far as radio and TV programmes were concerned, the audience could not be controlled, and in particular, ***harmful effects on minors*** could not be excluded.

REMEDIES

N/A.

CASE COMMENTS

Arguments of the State party: It stressed that the purpose of the prohibition of public encouragement to indecent behaviour between members of the same sex, was to reflect the prevailing moral conceptions in Finland as interpreted by Parliament and by large groups of the population. It further contended that discussion in Parliament indicated that the word "*encouragement*" was to be interpreted in a narrow sense. Moreover, the Legislative Committee of the Parliament expressly provided that the law should not hinder the presentation of factual information on homosexuality.

Arguments of the authors: The authors presented an additional submission in which they discussed in general terms the impact of 20 (9) FPC on journalistic freedom. They argued that article 19, in connection with article 2 (1) ICCPR, required Finland "to ensure that FBC not only deals with the subject of homosexuality in its programmes but also that it affords a reasonable and, in so far as is possible, an impartial coverage of information and ideas on the subject, in accordance with its own programming regulations."

References to previous jurisprudence: The Committee referred to the case [*S. Aumeeruddy-Czifra and 19 other Mauritian women v. Mauritius*](#) of 9 April 1981, no. 35/1978, stating that it could not review in the abstract whether national legislation contravenes the ICCPR, although such legislation may, in particular circumstances, produce adverse effects which directly affects the individual, thus making them a victim in the sense contemplated by articles 1 and 2 of the OP.

Individual opinion of Mr. Torkel Opsahl (joined by Mr. Rajsoomer Lallah and Mr. Walter Surma Tarnopolsky): The Committee's conclusion prejudged neither the right to be different and live accordingly, protected by article 17 ICCPR, nor the right to have general freedom of expression in this respect, protected by article 19. Everyone must in principle have the right to impart information and ideas, positive or negative, about homosexuality, and discuss any problem relating to it freely, through any media of their choice and on their own responsibility. The conception and contents of public morals referred to in article 19 (3) ICCPR were relative and changing. Therefore, even if such laws as 20 (9) FPC reflected prevailing moral conceptions, this was in itself not sufficient to justify it under article 19 (3) ICCPR. It must also be shown that the application of the restriction was "necessary".

However, this law had not been directly applied to any of the alleged victims. The question remained whether they have been more indirectly affected by it in a way which can be said to interfere with their freedom of expression, and if so, whether the grounds were justifiable.

It is clear that nobody – and in particular no State – had any duty under the ICCPR to promote ideas of all kinds. Access to media operated by others was always, and necessarily, more limited than the general freedom of expression. It followed that such access may be controlled on grounds which do not have to be justified under article 19 (3) ICCPR.

While self-imposed restrictions on publishing, or the internal programme policy of the media, may threaten the spirit of freedom of expression, such decisions either entirely escape control by the Committee, or must be accepted to a larger extent than externally imposed restrictions, such as enforcement of criminal law or official censorship, neither of which took place in the present case. Not even media controlled by the State can under the ICCPR be under an obligation to publish all that may be published. And it is not possible to apply the criteria of article 19 (3) ICCPR to self-imposed restrictions.

The role of mass media in public debate depended on the relationship between journalists and their superiors who decided what to publish. The freedom of journalists was important, but the issues arising in the case could only partly be examined under article 19 ICCPR.

FOLLOW-UP

N/A.

Fedotova v. Russian Federation – Human Rights Committee³⁵

Subject Matter:	Administrative fine for “gay propaganda among minors” for displaying LGBT posters
Substantive Issues:	Right to impart information and ideas; permissible restrictions; right to the equal protection of the law without any discrimination
Articles of the ICCPR:	19; 26

FACTS



The author, I.F., was an openly lesbian woman and an LGBT activist in Russia.

In 2009, together with other individuals, she tried to hold a peaceful assembly in Moscow which was banned. A similar initiative to hold a march and a “picket” to promote tolerance towards gay and lesbian people was banned in the city of Ryazan in 2009.

On 30 March 2009, the author displayed posters that declared “*Homosexuality is normal*” and “*I am proud of my homosexuality*” near a secondary school building in Ryazan. According to I.F., the purpose of this action was to promote tolerance towards gay and lesbian individuals in the Russian Federation.

The author’s action was interrupted by police and she was convicted by the Justice of the Peace of an administrative offence under section 3.10 of the Ryazan Region Law on Administrative Offences (hereinafter – section 3.10 RRL) for having displayed the posters in question. The relevant provision read: “*Public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors shall be punished with administrative fine of between one thousand five hundred and two thousand roubles.*” The author was ordered to pay a fine of 1,500 Russian roubles (approx. US\$ 44.9/33.6 euros).

I.F. appealed the ruling, asking for it to be revoked it and requested that the Constitutional Court assess the compatibility of section 3.10 RLL with the Russian Constitution (that prohibited discrimination on the ground of social status and guaranteed the right to freedom of expression and thought). She further submitted that it was unclear from the wording of section 3.10 RLL what

35 Communication No. 1932/2010 of 10 February 2010, views of 31 October 2012, [CCPR/C/106/D/1932/2010](#).

was meant by “*propaganda of homosexuality*.” From the constitutional point of view, “*propaganda*” was an essential component of the exercise of the right to freedom of expression. Therefore, she had a right to promote certain points of view in relation to homosexuality. I.F. argued that section 3.10 RLL unreasonably discriminated against individuals with “*non-standard sexual orientation*” by prohibiting any dissemination of information about them. She also asked to suspend proceedings in her case, pending the ruling of the Constitutional Court on the matter.

On 14 May 2009, the ruling of the Justice of the Peace was upheld. The Court concluded that section 3.10 RLL was not contrary to the Constitution and that it established restrictions (administrative liability) on the right to freedom of expression, including freedom to impart information, if these restriction were aimed at protecting morals, health, rights and legitimate interests of minors.

VIEWS



Article 19(2) ICCPR in conjunction with article 26 – violation (the State failed to demonstrate necessity of the restriction for one of the legitimate purposes)

The Committee observed that the wording of section 3.10 RLL was **ambiguous** as to whether the term “*homosexuality (sexual act between men or lesbianism)*” referred to one’s sexual identity or sexual activity or both.

The Committee further considered that the State party had not shown that a restriction on the right to freedom of expression in relation to “*propaganda of homosexuality*” – as opposed to **propaganda of heterosexuality or sexuality generally** – among minors was based on reasonable and objective criteria and was necessary for one of the legitimate purposes of article 19(2) ICCPR.

By displaying her posters near a secondary school building, I.F. had not made any public actions aimed at involving minors in any particular sexual activity or at advocating any particular sexual orientation. Instead, she was giving **expression to her sexual identity and seeking understanding for it**.

Accordingly, the author’s conviction of an administrative offence for “*propaganda of homosexuality among minors*” on the basis of the ambiguous and discriminatory section 3.10 RLL, amounted to a violation of her rights under article 19(2) read in conjunction with article 26 ICCPR.

REMEDIES



Full reparation:

The State party was obliged to provide the author with an effective remedy, including reimbursement of the value of the fine as of April 2009, and any legal costs incurred by the author, as well as compensation.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future and to ensure that the relevant provisions of the domestic law were made compatible with articles 19 and 26 ICCPR.

CASE COMMENTS

Evidence: The author submitted a copy of the legal opinion prepared by the International Commission of Jurists which referred to the Committee's views on [Hertzberg et al. v. Finland](#) and explained that equality law, in the jurisprudence of the Committee and other human rights bodies, had developed significantly since 1982, when sexual orientation had not been yet recognised as a status protected from discrimination. She also drew the Committee's attention to the findings of the ECtHR in [Alekseyev v. Russia](#) (applications nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010) concerning the ban by the Moscow authorities on gay pride events in 2006–2008 and expressing the position of the ECtHR with regard to the public morality arguments raised by the State party.

References to the Committee's Concluding Observations: The author referred to the Committee's own concluding observations on the sixth periodic report of the Russian Federation,³⁶ where the Committee noted with concern *"the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including hate speech and manifestations of intolerance and prejudice by public officials, religious leaders and in the media."*

References to the Committee's General Comments: The Committee referred to its [general comment No. 34 \(2011\)](#) on article 19 ICCPR (freedoms of opinion and expression) recalling that freedom of opinion and freedom of expression were indispensable conditions for the full development of the person, that they were essential for any society, and that they constituted the foundation stones for every free and democratic society. Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and *"must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on*

36 See: HRCtee, *Concluding Observations, Russian Federation* (24 November 2009), [CCPR/C/RUS/CO/6](#), para. 27.

which they are predicated". At that, "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination."

References to previous jurisprudence: The Committee referred not only to its jurisprudence on general issues related to the concepts raised in the case, but also to cases of [Toonen v. Australia](#), [Young v. Australia](#) and [X. v. Colombia](#) when recalling that the prohibition of discrimination under article 26 ICCPR also comprised discrimination based on sexual orientation.

Subject being compared: The Committee observed that section 3.10 RLL established administrative liability for "public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism)" – as opposed to propaganda of heterosexuality or sexuality generally – among minors.

FOLLOW-UP

On 26 September 2013, the Ryazan Regional Court held a supervisory review of I.F.'s case. The Court overrode the ruling of the Justice of the Peace and ordered the dismissal of the case against I.F. on procedural grounds (due to the expiration of the statute of limitation).³⁷

After the Committee made its recommendation on the case, the Russian authorities not only refused to repeal the regional "anti-propaganda" laws, but also instituted a federal ban on 11 June 2013. These laws have been criticised by numerous bodies, including UN Treaty Bodies,³⁸ but no positive developments followed from the Russian State.

According to the Committee's reports, the follow-up dialogue is ongoing.³⁹

In 2017, the ECtHR made a judgment on [Bayev v. Russia](#) case (applications nos. 67667/09 and 2 others, judgment of 20 June 2017) stating that the legislation in Russia banning "gay propaganda" breached freedom of expression and was discriminatory. In this judgment, the ECtHR referred to the HRCtee's views on this case.

³⁷ The decision is available in Russian here: https://oblsud--riz.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=241936&delo_id=2550001&new=0&text_number=1&case_id=224916.

³⁸ See: HRCtee, *Concluding Observations, Russian Federation* (28 April 2015), [CCPR/C/RUS/CO/7](#), paras. 10–11; CEDAW, *Concluding Observations, Russian Federation* (20 November 2015), [CEDAW/C/RUS/CO/8](#), para. 41; CESCR, *Concluding Observations, Russian Federation* (16 October 2017), [E/C.12/RUS/CO/6](#), para. 23; CRC, *Concluding Observations, Russian Federation* (25 February 2014), [CRC/C/RUS/CO/4-5](#), paras. 24–25.

³⁹ HRCtee, *Follow-up progress report on individual communications* (30 May 2017), [CCPR/C/119/3](#).

Alekseev v. Russian Federation – Human Rights Committee⁴⁰

Subject Matter:	Refusal to authorise a picket against execution of gay people in Iran
Substantive Issues:	Unjustified restrictions to the right of peaceful assembly
Articles of the ICCPR:	21

FACTS



The author, N.A., was a gay person and a human rights activist. From 2006 to 2008, together with other activists, he tried to organise a number of peaceful assemblies (gay pride marches) in Moscow, which were all banned by the municipal authorities.

On 11 July 2008, together with two other activists, N.A. submitted a request to the Prefect of the Central Administrative District of Moscow to hold a stationary meeting, a picket, in front of the Iranian Embassy in Moscow. The purpose of the gathering was to express concern over the execution of gay people and minors in the Islamic Republic of Iran and to call for a ban on such executions. The author informed the authorities of the purpose, date, time and place of the event.

On the same date, the Deputy Prefect refused to authorise the event, considering that the aim of the picket would trigger “*a negative reaction in society*” and could lead to “*group violations of public order which can be dangerous to its participants.*”

The author filed a complaint against this refusal with the Tagansky District Court of Moscow. He argued that the Russian law did not permit a blanket ban on conducting a peaceful assembly, as long as the purpose of the assembly is in conformity with constitutional values. He added that if the Prefecture had any serious grounds to believe that the proposed picket would trigger mass riots, they should have arranged sufficient police protection for participants of the assembly in order to secure the exercise of their constitutional right to peaceful assembly.

40 Communication No. 1873/2009 of 25 March 2009, views of 25 October 2013, [CCPR/C/109/D/1873/2009](#).

The Tagansky District Court rejected the complaint and endorsed the municipal authority's argument that it was impossible to ensure security of the participants of the event and avoid riots, as the proposed event would provoke a strong public reaction.

The author's appeal was rejected by the Moscow City Court as well.

VIEWS



Article 21 ICCPR – violation (State failed to provide any information to support the claim that a “negative reaction” to the author's picket would involve violence or that the police would be unable to prevent such violence; the obligation of the State was to protect the author's rights and not to contribute to suppressing them)

The denial of permission to hold a picket in front of the Iranian Embassy was **an interference** with the author's right of assembly, but the parties disagreed as to whether it was a permissible restriction. The State party had not provided any information to support the claim that a “**negative reaction**” to the author's proposed picket by members of the public would involve violence or that the police would be unable to **prevent such violence** if they properly performed their duty. Therefore, the restriction on the author's rights **was not necessary** in a democratic society in the interest of public safety, and violated article 21 CCPR.

In light of this conclusion, the Committee decided not to examine the author's additional claim that the denial of permission was not in conformity with the law on the grounds that the national law referred only to safety concerns, such as the risk of collapse of a building, and that it obligated the authorities to designate an alternative location for the assembly when they rejected the original application.

REMEDIES



Full reparation:

The State party was obliged to provide the author with an effective remedy, including adequate compensation and reimbursement of any legal costs paid by him.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future.

CASE COMMENTS



While the public event in question was directly related to LGBT rights, the author had not advanced any arguments on discrimination based on sexual orientation, and neither did the Committee.

Admissibility: The same author submitted a number of other applications to the ECtHR regarding the State authorities' refusals to allow him to hold public events concerning the rights of LGBT people. The applications were registered by the ECtHR.

The State party submitted that the complaints before the ECtHR and the present communication were of a similar nature as they had been submitted by the same person, concerned the rights of the same group of persons ("belonging to sexual minorities") and concerned the actions of the same authorities.

However, the Committee did not uphold the State party's arguments noting that the applications before the ECtHR concerned different factual circumstances (the prohibition to hold pride marches), while this case concerned the prohibition to protest the execution of gay people and minors in Iran.

In 2010, restrictions on other public LGBT events organised by Nikolai Alekseev was declared a violation of the right to freedom of assembly and non-discrimination by the ECtHR (see [Alekseyev v. Russia](#), applications nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010).

FOLLOW-UP



According to the Committee's reports, the follow-up dialogue is ongoing.⁴¹

The author continued to apply to different Russian authorities to hold LGBT-related public events, and continued to be refused, then lodging complaints to international bodies.⁴²

41 HRCtee, *Follow-up progress report on individual communications* (30 May 2017), [CCPR/C/119/3](#).

42 See e.g.: [communicated cases](#) at the ECtHR.

Praded v. Belarus – Human Rights Committee⁴³

Androsenko v. Belarus – Human Rights Committee⁴⁴

Subject Matter:	Arrest and imposition of a fine for holding of a peaceful assembly against killings of gay people in Iran without prior authorisation
Substantive Issues:	Right to freedom of expression; right to freedom of peaceful assembly; permissible restrictions
Articles of the ICCPR:	19 (2) and 21

FACTS



S.A. was the head of the LGBT human rights project “*Gay Belarus.*”

On 16 December 2009, the authors, S.P. and S.A., participated with only a few other people in a peaceful demonstration. A poster that read, “*Stop killings of gays in Iran*”, was displayed in front of the Embassy of Iran in Minsk, and a petition to representatives of the Embassy calling for an end to the punishment of gay people in that country was handed in. S.P. and S.A. were apprehended and brought to a police station, where official records of administrative offence were made, and where they were charged under article 23.34 (1) of the Belarusian Code of Administrative Offences.

On 23 December 2009, the Court of the Soviet District in Minsk found the authors guilty and fined them 350,000 Belarusian roubles (S.P.) and 875,000 Belarusian roubles (S.A.). The court found that the authors had taken part in an unauthorised mass event without obtaining a prior authorisation that was required by the Law on Mass Events.

On 19 January 2010, the Minsk City Court rejected the authors’ appeal and upheld the decisions of the District Court. On 7 April 2010, the Supreme Court dismissed the authors’ application for a supervisory review.

43 Communication No. 2092/2011 of 20 June 2010, views of 10 October 2014, [CCPR/C/112/D/2029/2011](#).

44 Communication No. 2092/2011, of 20 June 2010, views of 30 March 2016, [CCPR/C/116/D/2092/2011](#).

VIEWS



Articles 19(2) and 21 ICCPR – violation (State failed to demonstrate that the apprehension and fine imposed on the author, although made on the basis of a law, was necessary and proportionate to achieve one of the legitimate purposes)

Any restrictions on the exercise of rights under article 19(2) and article 21 ICCPR must conform to strict tests of necessity and proportionality and be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. While ensuring the security and safety of an embassy may be regarded as a **legitimate purpose** for restricting the right to peaceful assembly, the State party must justify why the apprehension of the author and imposition on him of an administrative fine were **necessary and proportionate** to that purpose. In the absence of any pertinent explanations from the State party, the Committee considered that due weight must be given to the authors' allegations. The Committee therefore concluded that the facts as submitted revealed a violation, by the State party, of the authors' rights under article 19 (2) and article 21 ICCPR.

REMEDIES



Full reparation:

The State party was obliged to provide the authors with an effective remedy, as well as adequate compensation and reimbursement of the fine imposed on them as a result of the administrative proceedings.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future. The Committee reiterated that the State party should review its legislation, in particular the Law on Mass Events of 30 December 1997, as it had been applied in the two cases, with a view to ensuring that the rights under articles 19 and 21 ICCPR may be fully enjoyed in the State party.

CASE COMMENTS



While the public event in question was directly related to LGBT rights, the authors had not advanced any arguments on discrimination based on sexual orientation, and neither did the Committee.

References to previous jurisprudence: The authors referred to some cases reviewed by the Committee ([Velichkin v. Belarus](#), views of 20 October 2005, no. 1022/2001, [Park v. Republic of Korea](#), views of 20 October 1998, no. 628/1995, and [Iskiyaev v. Uzbekistan](#), views of 20 March 2009, no. 1418/2005) to support their arguments on the violation of their rights by the Belarusian authorities. The Committee also recalled its jurisprudence on the freedom of assembly, including numerous cases against Belarus.

References to the Committee's General Comments: The Committee referred to its [general comment No. 34 \(2011\)](#) on article 19 ICCPR (freedoms of opinion and expression) recalling that that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person; such freedoms are essential for any society and constitute the foundation stones for every free and democratic society; and, such freedoms form a basis for the full enjoyment of a wide range of other human rights- for instance, they are integral to the enjoyment of the right of freedom of assembly.

FOLLOW-UP

Praded v. Belarus: According to the Committee's reports, the follow-up dialogue is ongoing.⁴⁵

Androsenko v. Belarus: No information available yet.

⁴⁵ HRCtee, *Follow-up progress report on individual communications* (30 May 2017), [CCPR/C/119/3](#).

Nepomnyaschiy v. Russian Federation – Human Rights Committee⁴⁶

Subject Matter:	Administrative fine for “gay propaganda among minors” for displaying LGBT posters
Substantive Issues:	Right to impart information and ideas; permissible restrictions; right to the equal protection of the law without any discrimination
Articles of the ICCPR:	19; 26

FACTS



The author, K.S.N., was an openly gay man and a Russian LGBT activist. Since 2006, he, together with others, had tried to hold annual peaceful assemblies in Moscow (“Moscow Gay Pride”), which were all banned by the authorities. Similar initiatives, to hold marches, pickets and rallies to promote tolerance towards gay and lesbian people, were banned several times in the city of Arkhangelsk in 2011 and 2012.

On 1 January 2012, the author displayed a poster, which read *“Homosexuality is a healthy form of sexuality. This should be known by children and adults!”* The poster was displayed near the entrance to the Arkhangelsk regional children’s library. The purpose of this action was to promote the idea of tolerance towards gay and lesbian minorities in the Russian Federation.

The author’s actions were interrupted by the police and he was convicted by the Justice of the Peace of committing an administrative offence under section 2.13 of the Arkhangelsk Regional Law “On Administrative Offences”. According to this provision, *“public actions aimed at propaganda of homosexuality among minors shall be punished with an administrative fine in the amount from 1500 to 2000 roubles.”* The author was ordered to pay a fine of 1800 roubles (approx. 60 USD).

He appealed the ruling of the Justice of the Peace to a district court, which rejected the appeal on 26 April 2012. The author maintained that this was the last effective remedy available to him.

46 Communication No. 2318/2013 of 5 October 2013, views of 17 July 2018, [CCPR/C/123/D/2318/2013](#).



Article 26 ICCPR – violation (the State party had failed to establish that the ban on propaganda of homosexuality of minors, applied to the author, was based on reasonable and objective criteria, in pursuit of a legitimate aim, and this discriminated against him on the basis of SOGI)

The Committee recalled that sexual orientation and gender identity (SOGI) were grounds **protected** under article 26 ICCPR. The Committee then considered that the Regional Law prohibiting “*propaganda of homosexuality*,” as opposed to heterosexuality or sexuality in general, expressly drew a distinction based on SOGI and thus constituted a differentiation on grounds prohibited under article 26 ICCPR.

It further studied whether the differentiation in question was based on reasonable and objective criteria and were in pursuit of a legitimate aim.

While noting that the State party invoked the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considered that the State party had not shown that the restriction on expression under national and Regional law relating to “*propaganda of homosexuality*” – as opposed to heterosexuality or sexuality generally – was based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors that might justify such a distinction had been advanced.

The Committee noted that the restriction limited the ability of individuals, including adolescents, to receive information and education about sexual orientation. Finally, it referred to its previous conclusions on [Fedotova v. Russian Federation](#).

Article 19 ICCPR – violation (the author’s conviction of an administrative offence for “*public actions aimed at propaganda of homosexuality among minors*” on the basis of the ambiguous, disproportionate and discriminatory provision of law, which was applied to the poster he displayed at the entrance to the children’s library)

The Committee noted that the State party did not dispute the author’s claims that his right to freedom of expression was restricted. Therefore, the Committee considered whether this restriction was justified, i.e., provided by law and strictly necessary and proportional to a legitimate aim, and directly related to the specific need.

The Committee then recalled that the concept of “*prohibited by law*” under article 19(3) ICCPR required that laws be sufficiently precise to enable an individual to regulate their conduct accordingly; they may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. The Committee observed that the wording of section 2.13 of the Regional Law, including “*promoting propaganda of homosexuality*,” was highly ambiguous as to the actions being prohibited, and therefore did not satisfy the requirement of lawfulness.

With regard to the other requirement, the Committee mentioned that the State party failed to demonstrate why it was strictly necessary and proportionate to one of the legitimate purposes of article 19(3) ICCPR to restrict the author's right to freedom of expression through conviction for an administrative offence and a subsequent fine. The restriction imposed on the author was not limited to sexually explicit obscenities, but constituted a blanket restriction on legitimate expression of sexual orientation.

REMEDIES

Full reparation:

The State party was obliged to provide K.S.N. with an effective remedy, that should include, *inter alia*, reimbursing the value of the fine paid and any legal costs incurred by the author, as well as providing appropriate compensation.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future and to ensure that the relevant provisions of the domestic law were made compatible with articles 19 and 26 ICCPR.

CASE COMMENTS

References to previous jurisprudence: The author himself referred to the Committee's views on [Fedotova v. Russian Federation](#), as well as the European Court of Human Rights' case [Alekseyev v. Russia](#) (applications nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010).

The Committee mentioned that the inclusion of SOGI in the scope of article 26 ICCPR followed from its precedential jurisprudence, including cases [Fedotova v. Russian Federation](#), [Toonen v. Australia](#), [Young v. Australia](#) and [X. v. Colombia](#). The Committee also recalled its jurisprudence on the conception of discrimination and its components.

References to the Committee's General Comments: The Committee recalled its [general comment No. 18 \(1989\)](#) on non-discrimination, that article 26 ICCPR entitled all persons to equality before the law and equal protection of the law, prohibited any discrimination under the law and guaranteed to all persons equal and effective protection against discrimination on any ground.

The Committee also recalled its [general comment No. 34 \(2011\)](#) on article 19 (freedoms of opinion and expression), which stated, inter alia, that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stones for every free and democratic society. The concept of morals is derived from many social, philosophical and religious traditions; consequently, limitations for the purpose of protecting morals must be based on principles, not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

References to the Committee's Concluding Observations: Mentioning negative effects of the "anti-propaganda" laws, the Committee referred to its own Concluding Observations on Russia ([CCPR/C/RUS/CO/7](#), para. 10), as well as the Concluding Observations by CRC ([CRC/C/RUS/CO/4-5](#)), paras. 24-25.

Evidence: Assessing the quality of legislation, the Committee referred to the European Commission for Democracy through Law's [Opinion on the Issue of the Prohibition of so-called "Propaganda of Homosexuality" in the light of Recent Legislation in some Member States of the Council of Europe](#) (2013).

This views of the Committee developed its position on [Fedotova v. Russian Federation](#), where the facts were very similar. However, in this case, views addressed "sexual orientation and gender identity" on several occasions (and not "sexual identity," as in Fedotova).

While in *Fedotova* the Committee analysed articles 19 and 26 ICCPR together, here it provided more detailed research in relation to each of the articles. Particularly, it noted that *"the restriction limited the ability of individuals, including adolescents, to receive information and education about sexual orientation."* The Committee also mentioned the negative effects of the "anti-propaganda" legislation:

"[These laws] exacerbate negative stereotypes against individuals on grounds of sexual orientation and gender identity and represent a disproportionate restriction of their rights under the Covenant."

FOLLOW-UP

No information available yet. LGBTI

LGBTI Families

Joslin et al. v. New Zealand – Human Rights Committee⁴⁷

Subject Matter:	No access to marriage for two lesbian couples
Substantive Issues:	The right to recognition as a person before the law; interference with one's privacy and family; protection of the family and the right to marry; discrimination on the basis of sex and sexual orientation
Articles of the Covenant:	16, 17, on its own and in conjunction with 2 (1); 23 (1), in conjunction with 2 (1); 23 (2) in conjunction with 2 (1); and 26

FACTS



The authors were two lesbian couples, Ms. Joslin and Ms. Rowan, and Ms. Zelf and Ms. Pearl, all of New Zealand nationality. Partners in the both couples shared responsibility for the children of a previous marriage, pooled financial resources and maintained sexual relations.

On 14 December 1995, Ms. Joslin's and Ms. Rowan's application on intended marriage was rejected by the Deputy Registrar-General.

On 22 January 1996, the local Registry Office refused to accept Ms. Zelf's and Ms. Pearl's notice of intended marriage. On 12 February 1996, the Registrar-General informed them that another

47 Communication No. 902/1999 of 30 November 1998, views of 17 July 2002, [CCPR/C/75/D/902/1999](#).

notice filed by them could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

All four authors thereupon applied to the High Court. On 28 May 1996, the High Court declined the application. Observing, *inter alia*, that the text of article 23, paragraph 2, of the ICCPR “does not point to same-sex marriages,” the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors’ appeal stating that a marriage could only be concluded between a man and a woman, and that such an approach was not discriminatory.

VIEWS



Articles 16, 17, 23 (1), 23 (2), or 26 ICCPR – no violation (given the scope of the right to marry as being granted only to a man and a woman wishing to marry each other)

Given the existence of a specific provision in the ICCPR on the right to marriage, any claim that this right had been violated must be considered in the light of this provision.

Article 23 (2) of the ICCPR is the only substantive provision in the ICCPR which defines a right by using the term “**men and women**,” rather than “every human being,” “everyone” and “all persons.” Use of the term “men and women,” rather than the general terms used elsewhere in Part III of the ICCPR, had been consistently and uniformly understood as indicating that the treaty obligation of State parties, stemming from article 23 (2) of the ICCPR, was to recognise marriage as the union between only a man and a woman wishing to marry each other.

REMEDIES



N/A.

CASE COMMENTS



References to previous jurisprudence: The authors referred to the [Toonen v. Australia](#) case to show that discrimination based on sexual orientation was prohibited under ICCPR, and argued that “the right of men and women to marry must be interpreted in the light of article 2 (1), which forbids distinction of any kind.” The State also referred to the Toonen case claiming that while

that case addressed criminal legislation, the New Zealand Marriage Act neither authorised intrusions into personal matters, nor otherwise interfered with the authors' privacy or family life, nor generally targeted the authors as members of a social group.

References to the Committee's General Comments: The State party referred to the [general comment No. 16 \(1988\)](#) on the right to respect of privacy and family, which states that article 17 ICCPR protects against "*all such interferences and attacks*" on a person's expression of identity. However, according to the State, the requirements of the Marriage Act did not constitute an interference or attack on the authors' family or privacy, which were protected by general legislation. The authors were not subject to any restriction on the expression of their identity or their entry into personal relationships, but rather sought the State's conferral of a particular legal status on their relationship. The State party further referred to the [general comment No. 19 \(1990\)](#) on the protection of family, the right to marriage and equality of the spouses that recognised that law and policy relating to families may vary from one form of family to another.

In their **concurring individual opinion**, the Committee members Mr. Rajsoomer Lallah and Mr. Martin Scheinin specifically stated that the conclusion reached out in the present case "*should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26 [of ICCPR].*" In a certain sense predicting the Committee's views on future cases [Young v. Australia](#) and [X v. Colombia](#), they argued that "*a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 [of ICCPR], unless otherwise justified on reasonable and objective criteria.*" Indeed, the authors in the present case did not base their claims on the argument that they were denied any specific rights, but instead on the lack of access to the institution of marriage.

One of the arguments used in the case by the State and the Committee, was one on the lack of same-sex marriages in any country in the world at that time, and a very few examples of other forms of legal recognition of same-sex relationships.

The case was cited by the Hong Kong Court of First Instance in a case [W v. Registrar of Marriages](#) (judgment of 5 October 2010) regarding a refusal to grant the applicant, a transgender woman, a license to marry her male partner, and by the Constitutional Court of South Africa in a case [Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others](#) (judgment of 1 December 2005) considering whether the common law and statutory definitions of marriage were unconstitutional.

FOLLOW-UP

N/A.

Young v. Australia – Human Rights Committee⁴⁸

Subject Matter:	Refusal to grant a pension to a same-sex partner of a deceased man
Substantive Issues:	Discrimination on the ground of sex; discrimination on the ground of sexual orientation; effective remedy
Articles of the ICCPR:	26

FACTS



Mr. Young had a long-term relationship with Mr. C, who was a war veteran. After Mr. C's death, Mr. Young, who cared for the former in the last years of his life, applied to the Repatriation Commission for a pension, as a veteran's dependant. However, he was refused on the ground that he was not a dependant as defined by the law. The Veterans Review Board affirmed the Commission's decision. The Human Rights and Equal Opportunity Commission denied Mr. Young's complaint, stating that because the exclusion of Mr. Young from certain benefits resulted directly from legislation, the Commission had no jurisdiction to intervene.

VIEWS



Article 26 ICCPR – violation (State failed to provide arguments on how the distinction was reasonable and objective)

The Committee found that the State party provided no arguments on how the distinction between same-sex partners, who were excluded from pension benefits under law, and unmarried heterosexual partners, who were granted such benefits, was **reasonable and objective**. Further, the State party provided no evidence which would point to the existence of factors **justifying** such a distinction has been advanced.

48 Communication No. 941/2000 of 29 June 1999, views of 6 August 2003, [CCPR/C/78/D/941/2000](https://www.unhcr.org/refugees/pdf/ccpr/C/78/D/941/2000.pdf).

REMEDIES



Effective remedy:

An effective remedy, including the reconsideration of Mr. Young's pension application without discrimination based on his sex or sexual orientation, if necessary, through an amendment of the law.

Non-repetition:

The State party was obliged to ensure that similar violations would not occur in the future.

CASE COMMENTS



References to previous jurisprudence: Both the author and the Committee recalled the latter's earlier jurisprudence ([Toonen v. Australia](#)), that the prohibition against discrimination under article 26 of ICCPR also comprises discrimination based on sexual orientation. In their individual concurring opinion, the Committee members Mrs. Ruth Wedgwood and Mr. Franco De-Pasquale also made a reference to the same case stating that while Toonen did consider article 17 of ICCPR (privacy), it did not frame the problem under article 26 of ICCPR (right to equal treatment).

While the Committee did not refer explicitly to its views in [Joslin et al. v. New Zealand](#), it is important to understand the difference between the two cases. In Joslin the four authors, two lesbian couples, claimed that the very denial of the State authorities to register their marriages constituted a violation of ICCPR, in the present case (just like in the future case [X v. Colombia](#)), the author challenged the denial of a very specific right, to which persons in different-sex unmarried couples had been entitled. See also the concurring individual opinion by the Committee members Mr. Rajsoomer Lallah and Mr. Martin Scheinin in *Joslin*.

Admissibility: In this case, the State argued that the author has not exhausted domestic remedies. However, the Committee found the communication admissible stating that *"it is clear from the legislation that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex" and recalling that "domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result."*

Subject being compared: The Committee recalled its previous jurisprudence ([Danning v. Netherlands](#), communications no. 180/1984, views of 9 April 1987) where it found that differences in benefit entitlements between **married couples and heterosexual unmarried couples** were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. It further stated that the author, as a same-sex partner, did not have the possibility of entering into marriage, neither was he recognised as a cohabiting partner of Mr. C, because of his sex or sexual orientation. Consequently, the Committee found discrimination in the distinction between **same-sex partners**, who were excluded from pension benefits under law, and **unmarried heterosexual partners**, who were granted such benefits.

The Young case was cited in decisions made by the IACtHR (see e.g. [Atala Riffo and Daughters v. Chile](#), judgment of 24 February 2012, and [Duque v. Colombia](#), judgment of 26 February 2016) and the Constitutional Court of Colombia ([Sentencia C-075/07](#), 7 February 2007, challenge to the constitutionality of excluding same-sex couples from the economic protections afforded under the national law).

FOLLOW-UP

According to *Remedy Australia*, Australia rejected the Committee's views and did not remedy the case.

A change of government in 2007, however, led to the amendment of 68 instances of same-sex discrimination in federal legislation in a broad range of areas, including veterans' entitlements. The new government cited *Young v Australia* as an influencing factor.

Notably, at the tabling of the *Same-Sex Relationships Bill* in the House of Representatives, Melissa Parke MP said:

*With this bill, the Rudd Labor government is saying to Edward Young, and to all those who find themselves in similar situations, that this Government respects the undertakings it has made in international law and will ensure that such injustices are not perpetuated.*⁴⁹

*At the time of writing, Mr. Young has still not received the pension, as the Department of Veterans' Affairs now contests his claim that Mr. C died of war-related causes. While there are numerous precedents supporting Mr. Young's claim, the dispute is now a question of medical evidence.*⁵⁰

*The HRCtee has deemed Australia's response unsatisfactory. Follow-up dialogue is reputedly ongoing.*⁵¹

49 Remedy Australia (2014), *Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014)*. Available at: http://remedy.org.au/reports/2014_Follow-Up_Report_to_treaty_bodies.pdf (accessed on 29 June 2018), p. 45.

50 *Ibid*, pp. 45–46.

51 See: [A/63/40\(Vol. II\)](#); HRCtee, *Follow-up progress report on individual communications* (30 May 2017), [CCPR/C/119/3](#).

X. v. Colombia – Human Rights Committee⁵²

Subject Matter:	Refusal to grant a pension to a same-sex partner of a deceased man
Substantive Issues:	Equality before the courts; arbitrary or unlawful interference in privacy; equality before the law and right to equal protection of the law without discrimination
Articles of the ICCPR:	2 (1), 3, 5, 14 (1), 17 and 26

FACTS



Mr. X had a long-term relationship with Mr. Y, on whom the former was economically dependent. In 1994, after Mr. Y's death, Mr. X applied to the Social Welfare Fund for a pension transfer. His application was rejected on the ground that the law did not permit the transfer of a pension to a person of the same sex. The courts and the Ombudsman also rejected Mr. X's claims because the law did not recognise same-sex unions as families, and certain rights, such as the right to marry or to apply for a pension transfer on a partner's death, were provided only to different-sex couples.

VIEWS



Article 2(1) ICCPR – not necessary to consider (violation of article 26 ICCPR)

Article 3 ICCPR – inadmissible (not sufficiently substantiated)

The Committee noted Mr. X's argument that as a partner in a same-sex couple, he was denied the rights granted to different-sex couples, and that if the pension request had been submitted by a woman after her male partner's death, the pension would have been granted – positively a discriminatory situation. However, the Committee pointed out that Mr. X did not allege that discrimination was exercised in the treatment of *“female homosexuals”* in situations similar to his own.

52 Communication No. 1361/2005 of 13 January 2001, views of 30 March 2007, [CCPR/C/89/D/1361/2005](https://www.unhcr.org/refugees/1361/2005).

Article 5 ICCPR – inadmissible (the provision does not give rise to any separate individual right)

Article 14(1) ICCPR – inadmissible (not sufficiently substantiated)

Article 17 ICCPR – not necessary to consider (violation of article 26 ICCPR)

Article 26 ICCPR – violation (State did not show that the distinction in question was reasonable and objective)

The Committee noted that, while it was not open to the author to enter into marriage with his same-sex, long-term partner, the State's law did not make a distinction between married and unmarried couples, but between same-sex and different-sex couples. Consequently, the Committee found that the State party had not put forward an argument that might demonstrate that a distinction between same-sex partners, who were not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, was **reasonable and objective**. Nor had the State party adduced any evidence of the existence of factors that might **justify** making such a distinction.

REMEDIES

An effective remedy, including reconsideration of Mr. X's request for a pension without discrimination on grounds of sex or sexual orientation.

The State party was obliged to take steps to prevent similar violations in the future.

CASE COMMENTS

References to previous jurisprudence: The author himself referred to [Toonen v. Australia](#) and [Young v. Australia](#). The Committee recalled its earlier jurisprudence in *Young v. Australia*, that the prohibition against discrimination under article 26 of ICCPR also comprised discrimination based on sexual orientation. Then, in their separate dissenting opinion, Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil wrote that *"the Committee's decision in fact repeats the conclusion reached in 2003 in Young v. Australia, in what is clearly a perspective of establishment and consolidation of consistent case law in this area, binding on all States parties to the Covenant,"* and further stated that they *"cannot subscribe either to this approach or to the Committee's conclusion."*

This case developed the Committee's views in **Young v. Australia**. However, in *Young*, the State party did not really contest the author's claim that the differential treatment was discriminatory. *"In every real sense, this is not a contested case,"* wrote the Committee members Mrs. Ruth Wedgwood and Mr. Franco DePasquale in their individual concurring opinion. In the present case, however, the State did provide arguments noted by the Committee (*"a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together," "the State party has no obligation to establish a property regime similar to that established in [the law] for all the different kinds of couples and social groups, who may or may not be bound by sexual or emotional ties," and "the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm."*)

Subject being compared: The Committee referred to its previous jurisprudence ([Danning v. Netherlands](#), communications no. 180/1984, views of 9 April 1987, and Derksen and [Bakker v. Netherlands](#), communication no. 976/2001, views of 1 April 2004) where it found that differences in benefit entitlements between **married couples and heterosexual unmarried couples** were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. It then, however, noted that in the present case, while the author was not able to enter into a marriage with his same-sex, long-term partner, it was not married and unmarried couples, but **"homosexual and heterosexual" ones** who were subjected to differential treatment.

In their **separate dissenting opinion**, the Committee members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil disagreed with the majority's findings on article 26 ICCPR violations. Particularly, they claimed that *"[t]he situation of a homosexual couple in respect of survivor's pension [...] is neither the same as nor similar to the situation of a heterosexual couple."*

The *Young* case was cited in the IACtHR's judgment on [Atala Riffo and Daughters v. Chile](#) (24 February 2012, case 12.502).

FOLLOW-UP

A year after the Committee's views, Colombia's Constitutional Court found that same-sex partners should be given the same pension and health benefits as any family is. The court acknowledged that to exclude same-sex partners would violate the principle of non-discrimination and

human dignity as the expression of personal autonomy, protected by international law.⁵³

The present case has been discussed by the Committee with the Colombian Government on several occasions. The State Party provided information about steps of more general nature; for example, the two Constitutional Court Decisions of 2007, that protected economic rights of same-sex couples and recognised their right to health-related social security benefits, and the Draft law no. 130 of 2005 on “*social protection of homosexuals*.”⁵⁴ Mr. X also informed the Committee that the Government changed their initial intention to implement the views “*to avoid setting a precedent which would have a major economic impact*.”⁵⁵ At the time of writing, the Committee considers the follow-up dialogue ongoing, while noting that its recommendation has not been satisfactorily implemented yet.⁵⁶

During its review of the 7th periodic report of Colombia, the Committee asked the State party about “*any progress made on the rights of same-sex couples and efforts to ensure that those rights are observed in practice*.”⁵⁷ As a result of the review, the Committee welcomed “*the decisions of the Constitutional Court that guarantee the rights of same-sex couples to enter into civil marriages and to adopt children*” and recommended that the State party “*continue its efforts to uphold the rights of same-sex couples in practice*.”⁵⁸

53 Human Rights Watch, [Colombia: Court Extends Benefits to Same-Sex Couples. Same-Sex Partnerships Entitled to Health and Pension Benefits](#) (17 April 2018).

54 See: [A/63/40\(VOL. II\)](#).

55 *Ibid.*

56 HRCtee, *Report to the General Assembly, sessions 105th to 107th*, [A/68/40 \(VOL.1\)](#).

57 HRCtee, *Concluding Observations: Colombia* (26 April 2016), [CCPR/C/COL/Q/7](#), para. 7.

58 *Ibid.*, paras. 16–17.

C. v. Australia – Human Rights Committee⁵⁹

Subject Matter:	Denial of access to divorce proceedings for a lesbian couple married abroad
Substantive Issues:	Equal access to courts and tribunals; discrimination on the basis of sexual orientation
Articles of the ICCPR:	14 (1) in conjunction with 2 (1); 26

FACTS



For ten years, Ms. C. lived with Ms. A. as a couple in Australia. In 2001, Ms. C. gave birth to a girl after artificial donor insemination, and both women were recognised as the child's legal parents. In 2014, Ms. C. and Ms. A. married in Canada. However, shortly after they separated and Ms. C. became the sole carer for the couple's daughter. In 2016, all contact between the women ceased. Ms. A. did not have any contact with her daughter either, and provided no financial support towards her care. Ms. C. no longer knew of Ms. A.'s whereabouts.

Ms. C. wished to dissolve her Canadian marriage due for a number of substantial reasons. However, according to Queensland law, marriage was defined as "the union of a man and a woman," and same-sex unions were not recognised as a marriage in Australia.

Ms. C. did not make any application for divorce in Australia. She did not apply to any court because of the direct exclusion of her marriage status from law; because Australia did not have a federal Bill of Rights that would allow challenging discrimination on the basis of sexual orientation in Commonwealth laws; and, because the Australian Human Rights Commission could only make recommendations without any binding effect.

Ms. C. also contended that she could not get a divorce in any other related country because she did not reside there; neither in Canada, where her marriage was solemnised, nor in the UK, where she was also a citizen and where her Canadian marriage was recognised as a civil partnership.

59 Communication No. 2216/2012 of 27 April 2012, views of 28 March 2017, [CCPR/C/119/D/2216/2012](https://www.unhcr.org/refugees/article/43c9d9d9.html).

VIEWS



Art 26 ICCPR – violation (State provided no persuasive arguments on why the distinction in question was reasonable, objective and legitimate)

The Committee looked into the differential treatment in the author's access to divorce proceedings in Australia following her same-sex foreign marriage, with respect to persons who entered **different-sex foreign marriages**. The Committee considered that the State party's explanation as to the **reasonableness, objectivity and legitimacy** of the distinction for such differential treatment was not persuasive. Therefore, the Committee found that the differentiation of treatment based on sexual orientation- to which Ms. C. was subjected regarding access to divorce proceedings- was not based on **reasonable and objective** criteria and therefore constituted discrimination.

Art 14(1) ICCPR read together with article 2(1) ICCPR – not necessary to consider (because of the found violation of article 26 ICCPR)

REMEDIES



Full reparation:

The State party was obliged to provide Ms. C. with full reparation for the discrimination suffered through the lack of access to divorce proceedings.

Non-repetition:

The State party was obliged to take steps to prevent similar violations in the future and to review its laws in accordance with the views.

CASE COMMENTS



Subject being compared: In this case, the author's situation- as a person wishing to obtain a divorce after concluding her same-sex marriage abroad- was compared to the situation of **different-sex couples whose foreign (polygamous and underage) marriages**, normally being not recognised in Australia, could be nevertheless dissolved. The Committee concluded that the State party failed to provide a reasonable justification for why the reasons provided for recognising the exceptions for the two situations (foreign polygamous and underage different-sex marriages), were not also applied to the author's foreign same-sex marriage.

References to previous jurisprudence: The Committee referred to its views in [Toonen v. Australia](#), [Young v. Australia](#) and [X v. Colombia](#), repeating that the prohibition against discrimination under article 26 of ICCPR comprises discrimination based on sexual orientation. At the same time, in his dissenting individual opinion, Committee member Mr. Yadh Ben Achour referred to *Young v. Australia* and *X v. Colombia*, the two previous Committee's cases on same-sex couples, arguing that the relationship between article 23 and the ICCPR's non-discrimination prohibitions had not been addressed in the Australian context.

References to the Committee's General Comments: In his dissenting individual opinion, Committee member Mr. Yadh Ben Achour referred to para 13 of [general comment No. 18 \(1989\)](#) on non-discrimination, stating that not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. He concluded that in the case in question, the differentiation of treatment afforded to persons whose situations are not comparable under article 23 ICCPR, read in conjunction with article 26, did not constitute discrimination, inasmuch as it is possible to consider such treatment as having been based on acceptable, that is, reasonable and objective, criteria.

The situation of the author's daughter: Ms. C. asked the Committee to address the harm allegedly faced by her daughter and requested that her daughter be considered as co-author in the communication. However, the Committee declared this part of communication inadmissible on the ground that Ms. C failed to show that her daughter's legal situation was hampered by the author's lack of access to divorce proceedings. Furthermore, Ms. C. had not demonstrated that her daughter tried unsuccessfully to maintain some form of relationship with her co-mother or that the author was unable to seek child support from her estranged spouse.

In his **dissenting individual opinion**, Committee member Mr. Yadh Ben Achour disagreed with the majority's findings on the basis that, to his view, the State party's position did not constitute discrimination and was based on reasonable and objective criteria. As Mr. Yadh Ben Achour's wrote, the persons in the three categories (namely, "*homosexuals, polygamists and persons between the ages of 16 and 18*") were not in comparable situations from the perspective of the ICCPR, as "*homosexuals*," in contrast to the other two categories, did not meet "*one of the basic requirements laid down in the Covenant for the conclusion of a marriage.*" Affording them differential treatment did not, therefore, constitute discriminatory treatment.

In her **concurring individual opinion**, Committee member Ms. Sarah H. Cleveland stated that "*even if Australia had provided a reasonable, objective justification, based on a legitimate aim, for granting divorce to some prohibited foreign marriages but not foreign same-sex marriages, this would not have ended the inquiry.*" She also mentioned that "*nothing in Australia's submission explains*

why monogamous same-sex unions between consenting, unrelated, adults, which otherwise are fully protected in Australia, are properly analogized to the ‘void’ (and criminal) bigamous, incestuous, non-consensual, and child marriages for purposes of marriage and divorce.”

In their **separate dissenting opinion**, Committee members Anja Seibert-Fohr, joined by Committee member Photini Pazartzis disagreed with the majority’s findings. In their opinion, exceptions provided to the foreign polygamous and underage marriages were aimed at the protection of a party in a vulnerable situation and “*a matter of equal protection of women.*” Therefore, the legal distinctions referred to by the author could be explained on reasonable and objective grounds. The reason for the difference in treatment is not the author’s sexual orientation but the particular vulnerability of adolescents between 16 and 18 years and women in polygamous marriages. Their protection is not only legitimate, but required under the ICCPR.

FOLLOW-UP

In 2017, in its concluding observations on Australia, the Committee expressed its concerns about:

“...the explicit ban on same-sex marriage in the Marriage Act 1961, which results in discriminatory treatment of same-sex couples, including in matters relating to divorce of couples who married overseas. While noting that the State party is currently conducting a voluntary, non-binding postal survey on the legalization of same-sex marriage, the Committee is of the view that resort to public opinion polls to facilitate upholding rights under the Covenant in general, and equality and non-discrimination of minority groups in particular, is not an acceptable decision-making method and that such an approach risks further marginalizing and stigmatizing members of minority groups.”⁶⁰

The Committee recommended Australia to:

“...revise its laws, including the Marriage Act, to ensure, irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford equal protection to lesbian, gay, bisexual, transgender and intersex persons, couples and families, also taking into account the Committee’s Views in communications No. 2172/2012, G. v. Australia, and No. 2216/2012, C. v Australia.”⁶¹

On 2 February 2018, the State party submitted to the Committee information about implementation of the recommendations contained in the views.

60 HRCtee, *Concluding Observations: Australia* (1 December 2017), [CCPR/C/AUS/CO/6](#), para 29.

61 *Ibid*, para 30.

At the time of writing, the views are intended to be published on the website of the Australian Attorney-General's Department.

On 9 September 2017, the Australian Parliament adopted a number of legislative amendments, allowing same-sex couples, including those in the author's circumstances, to marry and divorce. These amendments directly addressed the Committee's views.

The sex or gender of the parties to the marriage no longer affects access to divorce in Australia from a marriage entered into overseas. The requirements for access to divorce, including for marriages entered into overseas, are the same for both opposite-sex and same-sex marriages.

In relation to the requirements for divorce from a foreign marriage, the Family Law Act requires that the parties to the marriage have lived separately and apart for at least twelve months prior to filing the application for divorce and that there be no reasonable likelihood of reconciliation between the parties.

Australia noted that based on the information provided to the Committee regarding the cessation of her relationship with her spouse, the author would likely satisfy the requirements for access to divorce in Australia, and she could apply in court for a divorce if she chose to do so.

Thus, according to the State party, the above legislative changes have provided the author with access to divorce proceedings. The changes have removed wholly the difference in Australian law upon which the Committee's finding of violation is based. As the changes apply to same-sex couples who entered into foreign marriages before 9 December 2017 as well as those who do so after that date, they have also ensured that no similar situation can occur.

The Committee assessed implementation of the recommendations as following:

- | Full reparation: C (Reply/action not satisfactory)
- | Non-repetition: A (Reply/action largely satisfactory)

The Committee decided that the follow-up dialogue is ongoing.⁶²

62 HRCtee, *Follow-up progress report on individual communications* (29 May 2018), [CCPR/C/122/R.2](#).

Legal Gender Recognition

G. v. Australia – Human Rights Committee⁶³

Subject Matter:	Divorce requirement for legal gender recognition
Substantive Issues:	Right to privacy and family; right to non-discrimination; right to an effective remedy
Articles of the ICCPR:	2 (1), 2 (3), 17 and 26

FACTS



The author, G., was a trans woman born in New South Wales. In 2000, the author began hormone treatment. In 2002, she had her name on her birth certificate changed to G. Her driver's license, Medicare card and bank and credit cards were changed as well. In 2005, G. applied for an interim passport for travelling abroad to undergo gender reassignment surgery. On 7 July 2005, she was issued with a passport valid for a year listing her as female. In September 2005, G. married another woman. In October 2005, she underwent gender reassignment surgery.

Gender reassignment was lawful in Australia. Trans individuals were able to obtain their legal gender recognition after surgery and were also protected from discrimination. All states and territories had legislation that allowed a trans individual to alter their passport or obtain an identity document that reflected their preferred gender.

In New South Wales, the new certificate did not reveal a trans person's history. However, the federal Sex Discrimination Act permitted Governments to *"refuse to make, issue or alter an official*

63 Communication No. 2172/2012 of 2 December 2011, views of 17 March 2017, [CCPR/C/119/D/2172/2012](#).

record of a person's sex if a law of a State or Territory requires the refusal because the person is married."

In 2006, G. applied to the New South Wales Registry to change her gender marker on her birth certificate, but was rejected. In 2007, she applied for and received her passport which stated that she was female. She applied for the change of her gender marker on her birth certificate two more times, but was again refused. The refusal letter stated that a person must be unmarried at the time of their application. In this context, G. submitted that she was in a loving relationship with her spouse and did not intend to apply for a divorce.

For the purpose of the majority of laws in Australia, an individual had to be treated according to their gender marker recorded on their birth certificate. However, since 2007, an individual was able to obtain a passport denoting their preferred gender even without changing their birth certificate.

An individual was often required by various organisations and service providers to produce their birth certificate to prove their identity, including when applying for some employment positions.

It was stated on the author's birth certificate that she was born male but presented and identified as female, which revealed her personal history to persons viewing her birth certificate.

In October 2010, G. filed a complaint with the Australian Human Rights Commission, alleging discrimination on the grounds of sex and marital status under section 22 of the Sex Discrimination Act 1984, but the complaint was terminated by the Commission as misconceived, on the basis that section 22 did not apply to the conduct of the New South Wales Registry.

The report and recommendations of the Commission (including that "*Marital status should not be a relevant consideration as to whether or not a person can request a change in [gender marker]*") were provided to the federal and state Governments for consideration, but were not implemented; as they were non-binding, the federal and state Governments were not required to act upon them.

G. concluded that no effective remedy was available to her under the Australian Human Rights Commission Act 1986, and all available domestic remedies had been exhausted.

VIEWS



Art 17 ICCPR – violation (arbitrary interference)

The Committee noted that it was its established jurisprudence that article 17 ICCPR included protection of a **person's identity**, such as their **gender identity**.

The Committee considered that the operation of the State party's legislative provisions, to deny the author a birth certificate consistent with her gender without divorce, **interfered** with her privacy and family.

As the requirement for a person to be unmarried at the time of their application for legal gender recognition was provided for by **domestic law**, the Committee decided to consider whether the interference was **arbitrary**.

The Committee acknowledged that a person was allowed to change their gender marker on other kinds of official identification, such as a passport, (G. had in fact obtained a new passport) and noted that no explanation of this **inconsistency** had been provided by the State party. The Committee then noted that **federal law** allowed individual state and territorial Governments to issue new birth certificates to married trans persons, but the State party had not explained why denying altered birth certificates to married trans persons was **necessary** to ensure consistency with the Marriage Act 1961.

The Committee also considered **further inconsistencies** in the State party's approach to gender identity. Namely, the Marriage Act 1961 provided that any union solemnised in a foreign country between two persons of the same sex must not be recognised as a marriage in Australia. However, should a then-heterosexual couple marry overseas and one person subsequently change their official documentation in the foreign State, the marriage would continue to be valid in Australia. Thus, it was unrefuted that had these same facts occurred overseas – had the author married her current spouse, completed gender reassignment surgery and changed the gender marker on her birth certificate, before returning to Australia – her marriage would be recognised in Australia. The State party had not explained, why recognition of foreign marriages based on the official documentation at the time the marriage was solemnised was consistent with the Marriage Act 1961, but equivalent treatment of **marriages solemnised in Australia** was not.

Taking into account that gender reassignment was **lawful** in Australia, G. was **lawfully issued** with a variety of documents, and had lived on a day-to-day basis in a loving, **married relationship** with a female spouse, which the State party had recognised in all respects as valid, the Committee found **no apparent reason** for refusing to amend the author's birth certificate to this lawful reality.

Based on these considerations, the Committee decided that the interference with the author's privacy and family was not **necessary and proportionate** to a legitimate interest, and was therefore **arbitrary** within the meaning of article 17 ICCPR.

Art 26 ICCPR – violation (no objective and reasonable motive)

The Committee observed that the prohibition against discrimination under article 26 ICCPR encompassed discrimination on the basis of marital status and gender identity, including **transgender status**.

The Committee then recalled that not every differentiation amounted to discrimination, as long as it was based on **reasonable and objective** criteria, in pursuit of an aim that was **legitimate** under the ICCPR. However, denying married trans persons a birth certificate that correctly identified their gender, in contrast to unmarried trans and cisgender persons, the State party was failing to afford the author, and similarly situated individuals, equal protection under the law as a married trans person.

This treatment was not based on reasonable and objective criteria, and therefore constituted discrimination on the basis of *marital and transgender status*, under article 26 ICCPR.

REMEDIES

Full reparation:

The State party was obliged to provide G. with an effective remedy, specifically to provide her with a birth certificate consistent with her preferred gender.

Non-repetition:

The State party was obliged to prevent similar violations in the future and to revise its legislation to ensure compliance with the ICCPR.

CASE COMMENTS

Evidence: The author referred to the *Australian Human Rights Commission* report entitled “*Violence, harassment and bullying and the LGBTI communities*” confirming that discrimination and stigma around trans persons was still high in Australia, including in New South Wales.

The author also stated that both the *United Nations High Commissioner for Human Rights* ([A/HRC/19/41](#)) and the [Yogyakarta Principles](#) called for legal recognition of gender identity regardless of marital status.

Subject being compared: Married and unmarried transgender individuals; couples married in Australia and abroad.

References to the Committee’s Concluding Observations: The author noted in her application that the Committee had previously indicated that States should “*recognize the right of transgender persons to a change of gender by permitting the issuance of new birth certificates*” under, inter alia, article 17 ICCPR (see [CCPR/C/IRL/CO/3](#), para. 8).

References to previous jurisprudence: The State party referred to [Joslin v. New Zealand](#) claiming that the right to marry under article 23 ICCPR only applied to heterosexual marriages, and also cited decisions of the ECtHR ([Schalk and Kopf v. Austria](#), application no. 30141/04, judgment of 24 June 2010, and [Gas and Dubois v. France](#), application no. 25951/07, judgment of 15 March 2012).

The author referred to the ECtHR's case of [Hämäläinen v. Finland](#) (application no. 37359/09, judgment of 16 July 2014) distinguishing her situation from that of Hämäläinen (particularly, no same-sex marriages or civil unions were available for G. in contrast to the situation in Finland). She also referred to Hämäläinen v. Finland and [Goodwin v. United Kingdom](#) (application no. 28957/95, judgment of 11 July 2002), where the ECtHR reiterated that *"a post-operative transsexual may claim to be a victim of a breach of his or her right to respect for private life ... on account of the lack of legal recognition of his or her change of gender."* In this regard, the author also referred to the Committee's views on [X. v. Colombia](#) where it held that distinctions between married and unmarried heterosexual couples were reasonable and objective because *"the couples in question had the choice to marry or not, with all the ensuing consequences."* However, same-sex couples did not have the opportunity to choose to marry in Australia.

The Committee pointed to [Toonen v. Australia](#), addressing the inconsistency of the State party's legislation and the lack of consensus and enforcement regarding the provisions at issue. The Committee considered that this implied that they were not deemed essential to the State's stated aim.

References to the Committee's General Comments: The Committee referred to its [general comment No. 18 \(1989\)](#) on non-discrimination, in which it was stated that article 26 ICCPR entitled all persons to equality before the law and equal protection of the law, prohibited any discrimination under the law and guaranteed to all persons equal and effective protection against discrimination on any ground.

FOLLOW-UP

In 2017, in its Concluding Observations on Australia, the Committee recommended the State party to:

*"...revise its laws, including the Marriage Act, to ensure, irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford equal protection to lesbian, gay, bisexual, transgender and intersex persons, couples and families, also taking into account the Committee's Views in communications No. 2172/2012, G. v. Australia, and No. 2216/2012, C. v Australia."*⁶⁴

64 HRCtee, *Concluding Observations: Australia* (1 December 2017), [CCPR/C/AUS/CO/6](#), para 30.