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on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October - 5 November 2004

VIEWS

Communication No. 1222/2003

Submitted by: Jonny Rubin Byahuranga (represented by counsel,
Mr. Tyge Trier)

Alleged victim: The author

State Party: Denmark

Date of communication: 15 August 2003 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to
the State party on 27 November 2003 (not issued in
document form)

Date of adoption of Views: 1 November 2004

On 1 November 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1222/2003. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-second session

concerning

Communication No. 1222/2003**

Submitted by: Jonny Rubin Byahuranga (represented by counsel,
Mr. Tyge Trier)

Alleged victim: The author

State Party: Denmark

Date of communication: 15 August 2003 (initial submission)

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

Meeting on 1 November 2004,

Having concluded its consideration of communication No. 1222/2003, submitted to the
Human Rights Committee on behalf of Jonny Rubin Byahuranga under the Optional Protocol to
the International Covenant on Civil and Political Rights,

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

Adopts the following:

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo,
Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada,
Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen,
Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee members Ms. Ruth Wedgwood
and Mr. Maxwell Yalden is appended to the present document.

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

1.1 The author of the communication is Jonny Rubin Byahuranga, a Ugandan national born on 28 October 1956, currently residing in Denmark and awaiting expulsion to Uganda. He claims to be victim of a violation by Denmark¹ of articles 7, 17 and 23, paragraph 1, of the Covenant. He is represented by counsel.

1.2 On 27 November 2003, the communication was transmitted to the State party. On 7 July 2004, the author requested the Committee to issue a request for interim measures under Rule 86 of its rules of procedure, asking the State party not to deport him while his communication was under consideration by the Committee. On 9 July 2004, the Committee, through its Special Rapporteur on New Communications, requested the State party not to deport the author before the Committee has had an opportunity to address the continued need for interim measures. The State party acceded to this request. On 30 July 2004, the Committee informed the State party of its decision to extend its temporary request not to deport the author until the closing date of the Committee's 82nd session, i.e. 5 November 2004.

Facts as submitted by the author

2.1 The author served as an officer in the Ugandan army during the rule of Idi Amin. He fled Uganda in 1981, after he had been unlawfully detained and allegedly tortured several times by military forces. In December 1984, he entered Denmark, where he was granted asylum on 4 September 1986, under Section 7 (1) (ii)² of the Aliens Act. On 24 July 1990, he was issued a permanent residence permit.

2.2 In 1997, the author married a Tanzanian national. Together with the author's daughter from a former marriage (born in 1980), his wife united with him in Denmark in 1998. She has meanwhile become a Danish citizen and has two children with the author, who were born in Denmark in 1999 and 2000, respectively.

2.3 By judgment of 23 April 2002, the Copenhagen City Court convicted the author of drug-related offenses (Section 191 of the Danish Criminal Code), and sentenced him to two years and six months' imprisonment. It also ordered the author's expulsion from Denmark,³ finding that

¹ The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

² Section 7 (1) of the Aliens Act then in force read: "Section 7. (1) Upon application, a residence permit shall be issued to an alien in Denmark or at the border, (i) if the alien falls within the provisions of the Convention on the Status of Refugees of 28 July 1951; or (ii) if for reasons similar to those listed in the Convention or for other weighty reasons, the alien cannot be required to return to his country of origin."

³ Section 22 of the Aliens Act then in force read, in pertinent parts: "Section 22. An alien who has lawfully stayed in Denmark for more than the past seven years or an alien issued with a residence permit under sections 7 or 8 may be expelled if: [...] (iv) the alien is sentenced, pursuant to the Drugs and Narcotics Act or pursuant to sections 191 or 191a of the Criminal Code, to imprisonment [...]."

such expulsion would not amount to a violation of the right to family life under article 8 of the European Convention, and permanently barred him from re-entering Denmark. It based its decision on an opinion dated 19 April 2002 of the Danish Immigration Service, which considered that there were no circumstances which would constitute a decisive argument against the author's expulsion within the meaning of Section 26⁴ of the Aliens Act. It based itself on (a) the fact that, at the age of 45 years, the author had resided in Denmark for 17 years and four months; (b) the author's good health, i.e. the absence of any diseases which could not be treated in Uganda; (c) the fact that his expulsion would not affect the right of his spouse and children to continue residing in Denmark, given that his wife and his older daughter had meanwhile been granted permanent residence permits; (d) the absence of any risk that, in cases other than those mentioned in Section 7 (1) and (2) of the Aliens Act, he would be ill-treated in Uganda. The Immigration Service did not object to the prosecutor's claim to expel the author, despite the latter's loose ties with his Ugandan family and the fact that he had not returned to Uganda since 1981.

2.4 On 3 September 2002, the High Court of Eastern Denmark dismissed the author's appeal against the decision of the Copenhagen City Court. On 12 November 2002, the Danish Board of Appeal rejected the author's application for leave to appeal against the High Court's judgment.

The complaint

3.1 The author claims (a) that his expulsion would amount to a violation of his rights under article 7 of the Covenant, as it would expose him to a real and immediate danger of being subjected to ill-treatment upon return to Uganda; and (b) that it would constitute an arbitrary interference with his right to family life under article 17 of the Covenant and a violation of the State party's duty to respect and protect the family as the natural and fundamental group unit of society, as prescribed by article 23, paragraph 1.

3.2 The author emphasizes that he has lived in Denmark for 18 years without ever having returned to Uganda, that he has no contact with relatives in Uganda, that his wife and children

⁴ Section 26 of the Aliens Act then in force read: "Section 26. (1) In deciding on expulsion, regard must be had to the question whether the expulsion must be presumed to be particularly burdensome, in particular because of:

- (i) the alien's ties with the Danish community [...];
- (ii) the duration of the alien's stay in Denmark;
- (iii) the alien's age, health and other personal circumstances;
- (iv) the alien's ties with persons living in Denmark;
- (v) the consequences of the expulsion for the alien's close relatives living in Denmark;
- (vi) the alien's weak or non-existing ties with his country of origin or any other country in which he may be expected to take up residence; and
- (vii) the risk that, in cases other than those mentioned in section 7 (1) and (2), the alien will be ill-treated in his country of origin or any other country in which he may be expected to take up residence.

(2) An alien may be expelled under section 22 (iv) to (vi) unless the circumstances mentioned in subsection (1) constitute a decisive argument against such expulsion."

are living with him; the two youngest children were born in Denmark and have never been to Uganda.

State party's observations on admissibility and merits

4.1 On 11 February 2004, the State party submitted its observations on the admissibility and merits of the communication, challenging the admissibility because of the author's failure to exhaust domestic remedies, and denying violations of articles 7, 17 and 23, paragraph 1.

4.2 Regarding exhaustion of domestic remedies, the State party submits that, on 31 July 2003, the author requested the Copenhagen police to place the matter of revocation of the expulsion order before a tribunal, for review under Section 50 (1)⁵ of the Aliens Act. On 29 August 2003, the police requested the Danish Immigration Service to provide another opinion on the desirability of the author's expulsion. On 18 September 2003, the Immigration Service reiterated that it was not in possession of any information as to whether the author would be exposed to particularly burdensome criminal sanctions upon return to Uganda, or whether he would be at risk of double jeopardy for the same offense for which he had been convicted in Denmark. However, it had requested the Danish Foreign Ministry to investigate the risk of double jeopardy in Uganda. Apart from such risk, possible grounds for asylum set out in Section 7 (1) and (2) of the Aliens Act could not be taken into account, in accordance with Section 26 (1) (vii) of the Act. The Immigration Service concluded that, in the light of the nature of the offenses committed by, and the severity of the prison sentence imposed on, the author, his personal circumstances did not outweigh the arguments for his expulsion.

4.3 The State party adds that, on 11 November 2003, the Copenhagen City Court affirmed the expulsion order against the author, finding that its revocation was not required under article 3 of the European Convention on Human Rights, since the author still could invoke Section 31⁶ of

⁵ Section 50 (1) of the Aliens Act reads: "(1) If expulsion under section 49 (1) has not been enforced, an alien claiming that a material change in his circumstances has occurred, cf. section 26, can request that the public prosecutor put the question of resumption [revocation] of the expulsion order before court. A request to that effect must be submitted not earlier than 6 months and not later than 2 months before the date when enforcement of the expulsion can be expected. If the request is submitted at a later date, the court may decide to examine the case if it deems it to be excusable that the time-limit has been exceeded."

⁶ Section 31 of the Aliens Act reads: "(1) An alien may not be returned to a country where he will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where the alien will not be protected against being sent on to such country. (2) An alien falling under section 7 (1) may not be returned to a country where he will risk persecution on the grounds set out in article 1 A of the Convention on the Status of Refugees (28 July 1951), or where the alien will not be protected against being sent on to such country. This does not apply if the alien must reasonably be deemed a danger to national security or if, after final judgment in respect of a particularly dangerous crime, the alien must be deemed a danger to society, but cf. subsection (1)."

the Aliens Act, allowing for a further risk assessment⁷ by the Danish Immigration Service prior to his return to Uganda. On 1 December 2003, the High Court of Eastern Denmark dismissed the author's appeal against the City Court's decision. On 19 January 2004, the Danish Immigration Service, based on information from the Foreign Ministry about an amnesty for supporters of former President Amin and the risk of double jeopardy in Uganda, determined that Section 31 of the Aliens Act would not preclude the author's expulsion. The author's appeal to the Danish Refugee Board and his application to the Board of Appeal for leave to appeal the High Court's decision of 1 December 2003, were still pending when the State party made its submission. It is thus submitted that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.4 On the merits, the State party submits that the procedure before the Danish courts and immigration authorities ensures that a person will not be expelled to a country where he or she would face a real risk of being subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Danish Immigration Service, both in its opinions dated 19 April 2002 and 18 September 2003, and in its risk assessment under Section 31 of the Aliens Act, carefully examined the author's risk of being subjected to ill-treatment. It concluded that his expulsion would not contravene Sections 26 or 31 of the Aliens Act. The latter reflects Denmark's obligations under article 3 of the European Convention on Human Rights and hence article 7 of the Covenant. The State party concludes that the author's expulsion would be compatible with article 7 of the Covenant.

4.5 While conceding that the author's expulsion constitutes an interference with his right to family life under article 17, the State party argues that this interference is provided for by law, is in accordance with the provisions, aims and objectives of the Covenant, and reasonable in the circumstances of the case, given that it was based on the author's conviction for a particularly serious offense. The State party invokes its right to control the entry and residence of aliens, which included a right to expel persons convicted of criminal offenses, insofar as such expulsion was not arbitrary but proportionate to the legitimate aim pursued. For the State party, the author's expulsion would not constitute an unreasonable hardship for his wife and oldest daughter, who both only had minor ties with Denmark and could therefore reasonably be expected to accompany the author. Conversely, if they prefer to stay in Denmark, their right of residence would not be affected by the author's expulsion, as they were both issued permanent residence permits.

4.6 The State party argues that, while constituting an interference with article 23, paragraph 1, of the Covenant, the author's expulsion would not violate that provision, since nothing prevented his wife, a Tanzanian national, their children, or his oldest daughter from continuing their family life with the author in Tanzania or elsewhere outside Denmark.

⁷ See section 49a of the Aliens Act: "Section 49a. Prior to the return of an alien who has been issued a residence permit under sections 7 or 8 and who has been expelled by judgment [...], the Danish Immigration Service decides whether the alien can be returned, cf. section 31, unless the alien consents to his return. [...]."

5. On 17 March 2004, the State party informed the Committee that, by decision of 17 February 2004, the Board of Appeal dismissed the author's application for leave to appeal against the High Court's decision of 1 December 2003.

Author's request for interim measures

6.1 On 7 and 9 July 2004, the author requested the Committee to seek the State party's assurance that he will not be expelled to Uganda while his communication is under consideration by the Committee, where he would risk suffering irreparable harm, due to his former position as lieutenant during the rule of Idi Amin.

6.2 The author submits that, by decision of 28 June 2004, the Danish Refugee Board dismissed his appeal against the decision of the Danish Immigration Service dated 19 January 2004, on the ground that he would risk no harm upon return to Uganda. On 6 July 2004, the police formally notified him of this decision, and informing him that he would be deported without delay.

6.3 The author argues that he was an outspoken critic of the present Ugandan government during his time in Denmark and that he participated in conferences, where he protested against Uganda's treatment of political opponents. He identifies several current Ugandan military and government officials whom he fears particularly.

6.4 In support of his claim, the author refers to reports from non-governmental and governmental sources, which confirm the continued occurrence of extrajudicial killings, torture and arbitrary detention of political opponents or suspected rebel supporters in Uganda. By reference to the Committee's jurisprudence, he argues that his immediate expulsion from Denmark would render examination of his communication by the Committee moot.

State party's additional submission and author's comments

7. On 15 July 2004, the State party conceded that the author has exhausted domestic remedies, after his appeal against the decision of 19 January 2004 of the Danish Immigration Service was dismissed by the Immigration Board on 28 June 2004. A subsequent request to the Minister for Refugees, Immigration and Integration to grant him a residence permit on humanitarian grounds, pursuant to Section 9b (1) of the Aliens Act, was rejected on 9 July 2004, as such a permit could, at the earliest, be granted two years after an applicant's departure from Danish territory.

8. On 21 July 2004, the author observed that the State party had not addressed the risk of irreparable harm that he would face upon return to Uganda. In support of his claims, he submits a letter dated 14 July 2004 from the former chairman of the Schiller Institute in Denmark, who confirms that the author participated in conferences of the Institute in his capacity as chairman of the Ugandan Union in Denmark. His participation in a September 1997 conference, during which Ugandan President Museveni's alleged links with the Rwandan Patriotic Front were criticized, was documented in an article published in the Executive Intelligence Review on 10 October 1997, as well as in a German-language newspaper. The letter expresses concern that the Ugandan

Embassy in Copenhagen may have registered Ugandan citizens who participated in the Schiller Institute's conferences.

Author's comments on the State party's observations on admissibility and merits

9.1 On 26 August 2004, the author commented on the State party's admissibility and merits submissions of 11 February and 15 July 2004, reiterating that he has exhausted domestic remedies. He submits that the letter from the Schiller Institute clearly shows that the Ugandan authorities are aware of his political activities, on the basis of the lists of participants of the conferences he attended, which are also available online. While claiming that the danger he faces upon return to Uganda is real and a necessary and foreseeable consequence of deportation, the author criticizes that the State party failed to address the evidence he had submitted.

9.2 By merely relying on the risk assessments conducted by the Danish Immigration Service on 19 April 2002 and 18 September 2003, under Sections 50 and 26 of the Aliens Act, the State party ignored the fact that a substantial part of the author's article 7 complaint was based on information obtained *after* the risk assessments. In the absence of a response from the State party to his specific submissions, considerable weight should be given to these uncontested submissions, given that the State party had the opportunity to investigate his allegations thoroughly. It had not shown that the circumstances in Uganda had changed fundamentally, so as to render the reasons for granting him asylum, in 1986, obsolete.

9.3 In support of his claims under articles 17 and 23, the author reiterates that he and his wife have two children who were both born and raised in Denmark, speak Danish and consider Denmark as their home. The State party's failure to address this aspect could not change the importance which the Committee should accord to their upbringing in a stable and reliable environment, especially if articles 17 and 23 of the Covenant are interpreted in the light of articles 9 and 16 of the Convention on the Rights of the Child. His important role in the lives of the two children is reflected in several reports on family visits during prison leave; the reports record the happiness of the children to see their father.

9.4 On 6 August 2004, the Copenhagen City Court decided to release the author, thereby implicitly acknowledging his close family ties, as well as the hardship that the 11 months in custody on remand pending deportation after the end of his prison sentence constituted for him and his family. He argues that enabling him to resume his family life for a few months, during which he may look after his children while his wife works, only to eventually deport him to Uganda, would amount to a severe infringement of his rights under articles 17 and 23.

9.5 Regarding the State party's argument that nothing prevents his family from continuing to live together outside Denmark, the author submits that his wife would not be able to follow him to a country without any job opportunities or any prospects for schooling and day-care institutions for her children.

9.6 The author adds that the possibility of his resettling in Tanzania, as proposed by the State party, is not a realistic option, since that country is under no obligation to receive him, and most

likely reluctant to accept a non-national who had been convicted of a criminal offense. Despite occasional visits to Tanzania, he has no ties to that country.

9.7 The author reiterates that he has no contact with any family members in Uganda. His tribe members, the Toros, were likely to treat him as an outcast or to kill him, because of his service in the army of Idi Amin, who had oppressed the Toros.

9.8 The author recalls that the May 2002 judgment of the Copenhagen City Court was not unanimous with regard to his expulsion, as one of the three judges considered his expulsion incompatible with article 8 of the European Convention on Human Rights. In a case similar to this, involving the deportation of a foreign national who had lived in Denmark for a number of years together with his wife, and who also had been ordered deported on the basis of a conviction for drug related offenses, the European Court of Human Rights had found a violation of article 8 of the Convention.⁸

9.9 The author argues that, in the light of the length of his stay in Denmark and his family's interest to continue living together, the State party's decision to deport him must be considered disproportionate to the aim pursued, despite the relatively serious nature of his conviction. By reference to the Committee's jurisprudence⁹, he concludes that the expulsion order against him constitutes arbitrary interference with his rights under article 17 and 23.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained, in accordance with article 5, paragraphs (a) and (b), of the Optional Protocol, that the same matter is not being examined under another international procedure of investigation or settlement, and that the author has exhausted domestic remedies, as conceded by the State party.

10.3 The Committee considers that the author has sufficiently substantiated his claims under articles 7, 17 and 23, paragraph 1, for purposes of admissibility. It concludes that the communication is admissible and proceeds to an examination on the merits.

⁸ European Court of Human Rights, Application No. 56811/00 (*Amrollahi v. Denmark*), Judgment of 11 July 2002.

⁹ See Communication No. 1069/2002, *Bakhkiyari v. Australia*, Views adopted on 29 October 2003, at para. 9.6.

Consideration of the merits

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

11.2 The first issue before the Committee is whether the author's expulsion to Uganda would expose him to a real and foreseeable risk of being subjected to treatment contrary to article 7. The Committee recalls that, under article 7 of the Covenant, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.¹⁰ It takes note of the author's detailed account as to why he fears to be subjected to ill-treatment at the hands of the Ugandan authorities, and concludes that he has made out a *prima facie* case of such a risk.

11.3 The Committee observes that the State party, while challenging the author's claim under article 7, does not submit any substantive grounds for its position. Instead, it merely refers to the risk assessments of the Danish Immigration Service under articles 26 (opinions dated 19 April 2002 and 18 September 2003) and 31 (decision of 19 January 2004, as affirmed by the Danish Refugee Board on 28 June 2004) of the Aliens Act. After an examination of the documents, the Committee notes, firstly, that the Immigration Service's scrutiny under article 26 (1) (vii) of the Aliens Act was limited to an assessment of the author's personal circumstances in Denmark, as well as his risk of being subjected to punishment for the same offense for which he had been convicted in Denmark, without addressing the broader issues under article 7 of the Covenant, such as ill-treatment which may give rise to an asylum claim under article 7 (1) and (2) of the Aliens Act. Secondly, in its decision of 19 January 2004, the Immigration Service merely relies on an assessment made by the Ministry for Foreign Affairs concerning the risk of double jeopardy in Uganda and an amnesty for supporters of former President Amin to conclude that the author would not face a risk of being tortured or ill-treated upon return to Uganda. Similarly, the Refugee Board, after giving a detailed account of the author's statements as to his fear of being subjected to ill-treatment upon return to Uganda, dismissed his appeal on the basis of the same opinion by the Ministry, without providing any substantive reasons of its own, in its decision of 28 June 2004. In particular, the Board merely dismissed, because of late submission, the author's claim that his political activities in Denmark were known to the Ugandan authorities, thereby placing him at a particular risk of being subjected to ill-treatment upon return to Uganda. The State party has not furnished the Committee with the opinion of its Ministry for Foreign Affairs or with other documents that would make out the factual basis for the Ministry's assessment. In sum, before the Committee the State party seeks to refute the alleged risk of treatment contrary to article 7 merely by referring to the outcome of the assessment made by its own authorities, instead of commenting the author's fairly detailed account on why such a risk in his opinion exists.

11.4 In the light of the State party's failure to provide substantive arguments upon which the State party relies to rebut the author's allegations, the Committee finds that due weight must be given to his detailed account of the existence of a risk of treatment contrary to article 7.

¹⁰ General Comment 20 [44], at para. 9.

Consequently, the Committee is of the view that the expulsion order against the author would, if implemented by returning him to Uganda, constitute a violation of article 7 of the Covenant.

11.5 As to the alleged violation of the author's right to family life under articles 17 and 23, paragraph 1, the Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹¹

11.6 In the present case, and as the State party has conceded that the author's removal would constitute an interference with his family life, the Committee considers that a decision by the State party to deport the father of a family with two minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family. Although the author's life with his family was interrupted for a considerable period of time because of his incarceration and subsequent custody on remand pending deportation, he received regular visits from his wife during that period and was able to visit his children several times during prison leave. Moreover, he resumed his family life after the Copenhagen City Court's decision to release him on 6 August 2004.

11.7 The issue therefore arises whether or not such interference would be arbitrary or unlawful and thus contrary to article 17, read in conjunction with article 23, paragraph 1, of the Covenant. The Committee observes that the author's expulsion was based on Section 22 of the Aliens Act. However, it recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances.¹² In this regard, the Committee reiterates that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.¹³

11.8 The Committee notes that the State party justifies the author's removal (a) by the fact that he was convicted of drug-related offenses, and (b) on the assumption that the serious nature of these offenses is reflected by the length of the prison sentence imposed on him. It also takes note of the author's argument that his wife and children live in Denmark under stable and reliable conditions and would, therefore, not be able to follow him, if he were to be expelled to Uganda. While it may well be that the author's expulsion would constitute a considerable hardship for his wife and children, whether they remain in Denmark, or whether they decide to avoid separation

¹¹ Communication No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, at para. 7.1; Communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.7.

¹² General Comment 16 [32], at para. 4.

¹³ See Communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.8.

of the family by following the author to a country they do not know and whose language the children do not speak, the Committee notes that the author has submitted the communication solely in his own right and not on behalf of his wife or children. It follows that the Committee can only consider whether the author's rights under articles 17 and 23 would be violated as a result of his removal.

11.9 In the present case, the Committee notes that the State party has sought to justify its interference with the author's family life by reference to the nature and severity of the author's offenses. The Committee considers that these reasons advanced by the State party are reasonable and sufficient to justify the interference with the author's family life. The Committee therefore concludes that the author's expulsion, if implemented by returning him to Uganda, would not amount to a violation of his rights under articles 17 and 23, paragraph 1.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's expulsion to Uganda would, if implemented, violate his rights under article 7 of the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including revocation and full re-examination of the expulsion order against him. The State party is also under an obligation to prevent similar violations in the future.

14. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

**Individual opinion of Committee members Ms. Ruth Wedgwood and
Mr. Maxwell Yalden (dissenting)**

The majority concludes that Denmark has failed adequately to support its decision to deport the author, a Ugandan citizen, following his conviction for drug-related criminal offences and a prison sentence of 2 years, six months. The majority finds that the author, who was a former member of Idi Amin's armed forces, has shown a "prima facie" case that he would risk torture or other mistreatment in Uganda upon his return, and that the State party has not rebutted it.

States parties have a duty to observe the international legal requirements of non-refoulement. The general circumstances in Uganda are not reassuring. In the Human Rights Committee's recent review of Uganda's country report under the Covenant, for example, the Committee noted a "widespread practice of torture and ill-treatment" of persons in detention. (Concluding Observations on Uganda, May 5, 2004, at para. 17.) The State party would therefore wish to give careful consideration to the dangers claimed by the author.

Nevertheless, the Committee cannot sit in review of the facts and evidence *de novo* in each deportation case, especially where a case turns upon an evaluation of a complainant's credibility. The Committee has therefore been obliged to examine the documents available to it. The State party's response in this case describes the lengthy review of the author's status by the national authorities. This has included information obtained from the Foreign Ministry, and three reviews by the Danish Immigration Service, as well as decisions of the Copenhagen City Court, the High Court of Eastern Denmark, and the Danish Board of Appeal. The 28 June 2004 decision of the Danish Refugee Board was also submitted to the Committee by the author's counsel, though counsel chose not to provide a translation, leaving it available only to those few members of the Committee who might be able to read Danish.

The State party has assured the Committee that it is "at the disposal of the Secretary-General of the United Nations should this pleading or the case in general give rise to any questions." (State party's observations of 11 February 2004 on admissibility and merits, at p. 1.) The Committee is able to pose written requests to States parties, as well as to complainants. If the Committee had wished to have the author's full immigration file or any other documents within it, it could easily have asked the State party. Denmark has been wholly cooperative with the Committee while this complaint was pending, holding in abeyance the author's deportation at the Committee's request, and releasing him on parole to his family. The Committee has not ordinarily asked to see a foreign ministry's telex traffic, when presented with reasoned opinions, and it is doubtful that many States would agree to provide confidential material of this nature. But the Committee is certainly able to ask for the documents that it finds necessary for an evaluation, instead of deciding a case irrevocably on an incomplete record.

At a minimum, the Committee should have given the State party an opportunity to provide any additional documents it wished to inspect. And we believe that this requirement has not been met. It is true that, in the absence of any cooperation and provision of information by a State party, the Committee may, as appropriate, decide to give "due weight" to an author's allegations, and may proceed to find a violation on that basis. However, this conclusion is not

warranted in the present case, where the State party, as noted above, made an effort to cooperate with the Committee, and could readily have been asked to provide further relevant information.

The Committee has a clear duty to respect a standard of fairness that entails not only being fair to both parties but being seen to be fair, and we believe that standard has not been respected. We therefore cannot agree that the conclusion of a violation of the Covenant can be sustained in the present case.

[*Signed*] Ruth Wedgwood

[*Signed*] Maxwell Yalden

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