

## **International Covenant on Civil and Political Rights**

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Human Rights Committee

### **Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2387/2014 \* , \*\* , \*\*\***

*Communication submitted by:* A.B. (represented by counsel Laura Brittain, then Benjamin Liston)

*Alleged victim:* The author

*State party:* Canada

*Date of communication:* 29 April 2014 (initial submission)

*Document references:* Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 5 May 2014 (not issued in document form)

*Date of adoption of Views:* 15 July 2016

*Subject matter:* Deportation from Canada to Somalia

*Procedural issues:* Non-exhaustion of domestic remedies; level of substantiation of claims; incompatibility with the Covenant

*Substantive issues:* Right to an effective remedy; right to life; risk of torture or cruel, inhuman or degrading treatment; right to privacy, family and reputation; protection of the family

*Articles of the Covenant:* 2 (3), 6 (1), 7, 17 and 23 (1)

*Articles of the Optional Protocol: 2, 3 and 5 (2) (b)*

1.1 The author of the communication is A.B., a national of Somalia born in 1979. He is a member of the Somali Darod clan. He was recognized as a refugee in Canada in 1993. However, he faces deportation to Somalia owing to his criminal record in Canada. He claims that if Canada proceeds with his deportation to Somalia, it would amount to a violation of his rights under articles 2 (3), 6 (1), 7, 17 and 23 (1) of the Covenant, as he fears he would be exposed to threats to his life and torture. The Optional Protocol entered into force for Canada on 19 May 1976. The author was represented by counsel, Laura Brittain; on 4 February 2016, Benjamin Liston replaced her as the author's counsel.

1.2 On 5 May 2014, 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 to refrain from deporting the author to Somalia while his case was under consideration by the Committee. On 13 March 2015, the State party informed the Committee that it had temporarily deferred the enforcement of the author's removal, and requested that the Committee lift the interim measures with respect to the author, arguing that he had failed to establish a prima facie case, that he has a criminal record, and that his communication does not present any new evidence. That request was rejected by the Committee on 27 July 2015. The author currently resides in Canada where he remains in immigration detention.

**The facts as presented by the author**

2.1 The author was born and lived in Mogadishu until the age of 11. He comes from a high-profile political family in Somalia. His mother is the daughter of one of the founders of the Federal Republic and he is related to the first and second Presidents of Somalia and the first Chief of Police; her first husband was the Mayor of Galkayo and later the Minister of the Interior and a Member of Parliament from 1964 to 1969. Her second husband, the author's father, was a member of the Somali Youth League and an influential businessman and political adviser. He owned property adjacent to that of the first President of Somalia, and he allegedly remains well-known throughout Somalia.

2.2 In 1990, the author and his mother left Somalia for Kenya. On 5 December 1992, he arrived in Canada with his mother and three siblings. His mother claimed refugee protection in Canada for herself and her four children. On 12 March 1993, the author, his mother and his three siblings were recognized as refugees. In 2007, the author's half-brother returned to Somalia from Kenya to

reclaim his family land. He was publicly critical of Al-Shabaab and the Union of Islamic Courts. He was killed within a month of his return as a result of his profile. The author's cousin and one of his uncles were also killed within a month of returning to Somalia from abroad.

2.3 The author has been convicted in Canada 12 times since 1998, including for the use of weapons, threats of bodily harm, stalking, harassment, aggravated assault and robbery. He submits that his crimes were linked to alcohol abuse and addiction. On 7 April 2008, the Immigration and Refugee Board of Canada issued a deportation order for the author to be expelled for "serious criminality", as defined in section 64 of the Immigration and Refugee Protection Act. Although the removal order was legally enforceable, no date was set for the deportation. As the author has no travel documents, he fears being removed to Somalia on the basis of a statutory declaration by the Border Services Agency, which he refused to sign out of fear. His refusal to sign the declaration has prevented the State party from removing him, and he remains in immigration detention.

2.4 On 1 May 2008, the author submitted an appeal to the Immigration Appeal Division against the deportation order. On 8 April 2009, it rejected the appeal for lack of jurisdiction under section 64 (2) of the Immigration and Refugee Protection Act, which provides that a person sentenced for two and more years of imprisonment has no right of appeal. On 19 November 2009, the Canada Border Service Agency requested the Minister of Citizenship and Immigration to issue a danger opinion, pursuant to section 115 (2) of the Act and the author's case was referred to the Minister to that end. On 15 June 2012, the Minister's delegate determined that the author would not be at personal risk if returned to Somalia and that the author represented a danger to the public in Canada on the basis of the seriousness and nature of his criminal offences and the likelihood that he would reoffend in the future. In that decision, it was considered that humanitarian and compassionate hardships did not outweigh the danger the author posed to the public. On 16 July 2012, the author applied for leave for judicial review of the danger opinion that had been issued by the Minister's delegate. On 30 November 2012, the Federal Court of Canada dismissed the author's request for leave. On 10 April 2014, the author requested the Minister to reconsider his decision on the author's danger opinion, including the supporting documentation the author submitted. As at 13 March 2015, a decision on the author's request for reconsideration remained outstanding.

2.5 The author submits that he has exhausted all available and effective domestic remedies. He indicates that the same subject matter is not being examined under another procedure of international investigation or settlement.

### **The complaint**

3.1 The author claims that if forcibly returned to Somalia, he runs a serious risk of being deprived of his life and subjected to torture or cruel, inhuman or degrading treatment or punishment, in violation of articles 6 (1) and 7 (1) of the Covenant. He faces that risk owing to his family's prominent political profile, which resulted in part from his half-brother's public criticism of Al-Shabaab, and because he is a returnee from the West who grew up in Canada, and would not have any family or clan protection in Somalia. He would face a risk of forced recruitment or of accusation of spying by Al-Shabaab. The situation in Mogadishu, despite the withdrawal of Al-Shabaab in early August 2011, is far from stable and is not safe. The author cannot relocate anywhere in southern or central Somalia or seek refuge in either of the country's semi-autonomous regions because he is not from there and would be considered an outsider and a threat. He argues that the risk assessment of the danger that the individual faces if returned should not be limited to the assessment of the personalized risk, but should take into account the general risk of torture or cruel and unusual treatment or punishment faced by the population in general. The author refers to the Committee's jurisprudence in *Warsame v. Canada*, in which it found that the forced removal to Somalia of the author, who was also a young man who had been raised in Canada, would breach his rights under articles 6 (1), 7, 17 and 23 (1), read in conjunction with article 2 (3) of the Covenant.

3.2 The author claims that his deportation to Somalia would constitute arbitrary and unlawful interference with his family life, contrary to articles 17 and 23 of the Covenant. His family ties would be irreparably severed if he were deported to Somalia, as his family could not visit him there and the means of maintaining regular correspondence between him and his family are limited. Moreover, for a significant period of time, it would be impossible for him to apply for a visitor's visa for Canada to visit his family. He has lived in Canada for over 20 years and does not have any connection to Somalia other than his nationality. His mother, sisters and brothers all reside in Canada. His mother is very ill, and the author, before he was detained, was his mother's primary caregiver, taking care of both housework and her health, as the other siblings and family in Canada do not have the time to help her. Therefore, his deportation would interfere with the daily support and care he provides to his ailing mother. He has a significant network of family friends and role models, many of whom have provided written statements of their support.

Consequently, he claims that in case of deportation to Somalia, he would be deprived of all family ties and support, which would result in drastic interference with his family life. He refers to the Committee's jurisprudence according to which such interference would be disproportionate to the legitimate aims pursued by the State party, namely the prevention of criminal offences. He adds that most of his criminal convictions relate to alcohol abuse, and that his family has attested to the positive changes they have seen in him to that regard.

3.3 Furthermore, the author alleges a violation of articles 12 (4), 13 and 18 of the Covenant, in part by reference to the *Warsame v. Canada* case, without providing additional substantiation.

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

4.1 On 13 March 2015, the State party submitted its observations on the admissibility and merits of the communication. It submits that the author has an extensive criminal history in Canada, which began in 1998 when the author was 18, and has continued for over 13 years. The author has 12 criminal convictions, several of which relate to violent crimes involving bodily harm and the use of a firearm, and are punishable with long prison terms. He committed his most recent offence, armed robbery, while he was on conditional release from immigration detention. The author was described by the State party's court handing down a criminal judgment as having clearly shown disregard for human life.

4.2 On the basis of his extensive criminal activity, the author was found to be inadmissible to Canada on 28 January 2002, following his January 1998 convictions for assault causing bodily harm and obstruction of a peace officer, and on 20 February 2008, following his September 2007 conviction for aggravated assault. On the basis of the inadmissibility report, the Immigration and Refugee Board of Canada issued a removal order on 7 April 2008. The author filed an appeal against the removal order with the Board's Immigration Appeal Division. The appeal was dismissed on 8 April 2009, as section 64 of the Immigration and Refugee Protection Act provides that if the individual concerned has been found to be inadmissible on grounds, inter alia, of serious criminality, he or she has no right to appeal to the Division.

4.3 In recognition of his status as a refugee, and in compliance with article 33 (2) of the Convention relating to the Status of Refugees, the opinion of the Minister of Citizenship and Immigration was sought as to whether the author should not be allowed to remain in Canada because he constitutes a danger to

the public. The Minister's delegate determined that the author constitutes a present and future danger to the public in Canada owing to his serious criminality. In addition, the delegate considered the documentary evidence, including the author's additional submissions, and concluded that there was insufficient evidence to demonstrate that the author faced any personal risk to his life or a risk of torture or of cruel or unusual treatment or punishment upon his return to Somalia. Despite that finding, the Minister's delegate also undertook an exercise to find the balance between danger and risk, and found that the danger the author poses to the public greatly outweighs any minimal risk the author could face in Somalia. Moreover, the humanitarian and compassionate considerations relating to the author's particular circumstances are insufficient to overcome that finding. The author was notified of his removal order on 15 June 2012 and has been in immigration detention since 1 November 2012. His application for leave to seek judicial review of the danger opinion, including the risk assessment, was denied by the Federal Court on 30 November 2012.

4.4 The State party submits that the author's communication is inadmissible on three counts. Firstly, the author has failed to exhaust all available domestic remedies because he did not apply for permanent residence on humanitarian and compassionate grounds, and did not file an application for leave to seek judicial review of the Immigration Appeal Division's decision. Second, the author's communication is inadmissible under article 2 of the Optional Protocol because he has not substantiated, on even a prima facie basis, that he faces a real and personal risk of death, torture or ill-treatment in Somalia, specifically in Mogadishu, where he is to be returned. Recent country reports indicate that Al-Shabaab is no longer in control of Mogadishu, having withdrawn its forces from parts of the city that it controlled in August 2011. The State party recalls that general allegations of human rights abuses and poor country conditions are not sufficient to establish that the author would be personally at risk upon return. Rather, reliable and authoritative reports confirm that some personal characteristic is needed to expose a Somali civilian to a real risk. The author does not fall into the "risk profile categories" identified in the protection guidelines drawn up by the Office of the United Nations High Commissioner for Refugees (UNHCR) in January 2014. The author has not established, and the country reports do not support, his claim that he would be targeted by Al-Shabaab because of his personal profile as a member of a family with a high political profile, as a Western returnee, or as a young, non-extremist Muslim male. Accordingly, the evidence provided by the author does not support the conclusion that the necessary and foreseeable consequence of the deportation would amount to a violation of his rights under articles 6 (1) and 7. Third, the

State party submits that it is not the Committee's role to review the evaluation of facts, evidence and credibility assessments made by domestic authorities.

4.5 The State party considers that the author has not substantiated his allegations under articles 17 and 23 (1), that the decision to remove him was lawful and was adopted after careful deliberation and analysis of his case. The interference with the author's family life caused by his removal was weighed against the legitimate interest of Canada in preventing the commission of future crimes in the State party, and his deportation was found reasonable and proportionate to the seriousness of the author's crimes. Therefore, the State party considers the author's allegations under articles 17 and 23 (1) of the Covenant to be inadmissible pursuant to article 2 of the Optional Protocol.

4.6 As regards the author's reference to articles 2 (3), 12 (4), 13 and 18 of the Covenant, the State party submits that the author does not set out any allegation, and does not provide any evidence in that regard. It therefore submits that the corresponding claims are manifestly unsubstantiated and inadmissible.

4.7 Regarding the author's allegation under article 2 (3), the State party considers that it implies a reference to a free-standing right to an effective remedy. The State party refers to the Committee's jurisprudence, which establishes the accessory character of article 2 (3), and therefore submits that the allegation is inadmissible pursuant to article 3 of the Optional Protocol.

4.8 The State party refutes the author's argument that the exception to the non-refoulement principle, as provided in section 115 (2) of the Immigration and Refugee Protection Act, can be exercised only in circumstances of extreme crisis, where the danger presented by the person leaves the Government with no viable alternative to refoulement, and where the risk to the person falls short of death, torture, or cruel and unusual treatment or punishment. The State party notes that it is not within the scope of the Committee's review to consider its refugee protection system in general but to consider only those processes applied to the individual complaint. In that context, it refutes the author's argument that the assessment of the danger that the individual faces if returned should not be limited to a personalized risk, but that a general risk of torture or cruel and unusual treatment or punishment faced by the population in general should also be included in the consideration. The State party recalls that according to the Federal Court, while general country conditions are relevant to the inquiry, the author must still show that he would personally be at risk if removed to his country of origin. It also reiterates that persons who are removable on grounds of their serious criminality and constitute a danger to the

public, such as the author, have their allegations of personal risk in their country of origin thoroughly considered and assessed at the different stages of the danger opinion process. The author, through his counsel, was given and took the opportunity at each stage to present evidence and make submissions on his personal risk if returned to Somalia. Moreover, the danger opinion issued by the Minister's delegate assessed humanitarian and compassionate considerations particular to the author's circumstances. Accordingly, the State party holds that the author's allegations about its refugee protection system and domestic processes are unjustified.

4.9 The State party submits that the author has not provided any new evidence to support his claims, which should therefore be held inadmissible for lack of substantiation. In the event that the Committee considers the communication admissible, the State party submits that it is without merit, and requests the Committee to lift the interim measures.

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

5.1 On 24 July 2015, the author provided comments on the State party's observations, reiterating his claims under articles 2 (3), 6 (1), 7, 17 and 23 (1) of the Covenant and regretting the confusion caused by the mistaken reference to articles 12 (4), 13 and 18 in his initial complaint.

5.2 The author submits that the State party's arguments are without merit, since recent reports on country condition in Somalia support his claims under article 6 (1) and 7 of the Covenant. He also submits that the domestic proceedings did not constitute a complete assessment of his personal circumstances and were gravely flawed.

5.3 Recalling the jurisprudence of the Committee, the author asserts that interim measures are essential to the Committee's role and mandate, and deportation risking harm prior to consideration of his complaint would "render examination by the Committee moot and the expression of its Views nugatory and futile". The author submits that where there is a risk of irreparable harm, the right to an effective remedy requires that the alleged victim has the possibility to submit a communication to the Committee and to have it examined before being subjected to the alleged irreversible harm. He maintains that imposing a higher threshold on any class of individuals involves a determination that some individuals are more deserving of relief under the Covenant than others, in violation of the right to equality before the law enshrined in article 26 of the Covenant.

5.4 The author argues that, as articles 6 and 7 of the Covenant are non-derogable, an individual's criminal record is irrelevant to the examination of a complaint by the Committee. The author states that he is currently in immigration detention and maintains that his last conviction was for an offence that occurred on 8 September 2010, and that the State party has submitted no evidence to suggest that he would currently represent a danger to the Canadian public. He maintains that there is no urgency to remove him from Canada and that he has proposed a plan of release that is highly restrictive, mitigating any concerns about his past criminality, and does not rely on public funds. Concerning the State party's assertion that the author's communication provides no new arguments or additional evidence, he contends that the risk-related evidence he submitted is more recent than that considered by the domestic authorities when they assessed his case on 15 June 2012.

5.5 The author argues that in a situation as volatile as that in Somalia, current conditions must be considered in order to assess the personal risk for him. He submits that domestic proceedings in his case were arbitrary and manifestly unjust. The author maintains that the State party's observation that interim measures are non-binding is inconsistent with the Committee's position on the issue.

5.6 The author claims a violation of article 2 (3) of the Covenant as the available domestic proceedings have not prevented the violation of his rights under articles 6 (1) and 7 of the Covenant. He argues that the risk of torture that he faces should have been better scrutinized. He submits that the danger opinion proceedings in his case were manifestly unjust and arbitrary as the evaluation of risk contemplated only evidence available prior to the decision of 15 June 2012. He considers that the conclusions of the Minister's delegate dismissed the rest of the evidence without justification, disregarding the arguments that the danger the author posed to the public in Canada did not outweigh the absolute prohibition of refoulement of persons facing a risk of death, torture or ill-treatment. He adds that his claims of a violation of his right to family life were not duly assessed, submitting that the State party has breached its obligation to provide for an effective remedy to contest his expulsion under article 2 (3) of the Covenant, read together with articles 6 (1), 7, 17 and 23 (1).

5.7 Regarding the alleged violation of articles 6 (1) and 7, the author claims that the State party failed to take into account the current country conditions, noting that civilians continued to suffer from conflict-related abuses, including killings, displacement and the diversion or confiscation of humanitarian assistance by armed groups, principally Al-Shabaab. The author submits that he

is at risk as a returnee from the West, which would exclude him from the domestic system of protection, and he reiterates that his family profile puts him at risk of persecution from Al-Shabaab and from the Federal Government or pro-Government forces. In that context, he claims that he fits into several of the risk categories identified by UNHCR:

(a) Individuals perceived as being critical of Al-Shabaab, based on the actions of his brother;

(b) Individuals perceived as supportive of the Federal Government and the international community, because he is westernized.

5.8 Regarding the alleged violation of articles 17 and 23 (1) of the Covenant, the author argues that his deportation would result in permanent severance of his family life; he would no longer be able to support his ailing mother, which would have a disproportionate effect to the aims pursued by the State party, in violation of those articles.

5.9 The author reiterates that he has exhausted all available effective domestic remedies. He submits that there was no prospect of success in applying for leave for judicial review of the Immigration Appeal Division's decision as there was not a "fairly arguable case" or a "serious question to be determined". He refers to the Committee's jurisprudence to the effect that "article 5 (2) (b) of the Optional Protocol does not require resort to remedies which objectively have no prospect of success". Moreover, even if leave for judicial review had been granted, it would still have been necessary to prove that the Immigration Appeal Division had made an error in law or of jurisdiction. The author claims that an application for permanent residence on humanitarian and compassionate grounds was not an effective remedy because it would not have stayed or prevented his deportation to Somalia. He argues that such an application would have been assessed by the same office that had assessed the humanitarian and compassionate considerations in the decision issued by the Minister's delegate, pursuant to section 115 (2). He submits that the Minister's delegate found the humanitarian and compassionate considerations insufficiently compelling, and he therefore does not consider the humanitarian and compassionate process to represent an effective domestic remedy, as it is entirely discretionary.

5.10 The author also submits that his request that the danger opinion be reconsidered is not a domestic remedy that must be exhausted, as it would be evaluated by the same Minister's delegate. Such a request for reconsideration would not have resulted in preventing his removal to Somalia either, as only new evidence can be considered in that context.

5.11 The author requests the Committee to: (a) hold his communication admissible; (b) reject the State party's request to lift interim measures; (c) conclude that his deportation to Somalia would amount to a violation of articles 2 (3), 6 (1), 7, 17 and 23 (1) of the Covenant; (d) request the State party not to remove him to Somalia; and (e) allow him to remain in the State party.

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

6.1 On 6 May 2016, the State party submitted additional observations, reiterating the arguments presented in its initial submission. It maintains that the communication is inadmissible because the author has failed to exhaust the available domestic remedies, parts of the communication are incompatible with the Covenant, and the author has failed to substantiate his allegations. In the alternative, the State party considers that the communication should be held without merit for lack of substantiation.

6.2 The State party indicates that the author has failed to file an application for permanent residence on humanitarian and compassionate grounds, pursuant to subsection 25 (1) of the Immigration and Refugee Protection Act. Although the submission of a humanitarian and compassionate application does not serve to automatically stay an enforceable removal order, a regulatory stay of removal would have been granted until a final decision was made on his application for permanent residence. In addition, humanitarian and compassionate decisions are reviewable, with leave, by the Federal Court.

6.3 The State party contests that the officials in the Department of Citizenship and Immigration, who consider humanitarian and compassionate applications, would lack independence because they are in the same department that considers danger opinions. Even if humanitarian and compassionate applications can be considered a discretionary remedy, they remain effective, as demonstrated by *J.K.M. v. Canada*, which the Committee decided to discontinue. In the case of *S.S. v. Canada*, the Committee suspended consideration of the communication. The State party recalls the Committee's consistent views that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them. Given the author's allegation that his circumstances have changed and merit reconsideration, including the alleged steps he has taken to address his anger and alcohol issues, secure employment and renew his close family relations, it is incumbent upon him to bring a humanitarian and compassionate application.

6.4 The State party reiterates that the author's allegations under article 2 (3) of the Covenant should be held inadmissible pursuant to article 3 of the Optional

Protocol. The author's allegations regarding the flawed character of the domestic proceedings in his case are identical to the ones he made to the Federal Court in his application for leave and for judicial review of the danger opinion. The Federal Court determined that the author had failed to meet the Court's stated test for granting leave, as he did not demonstrate that there was a "fairly arguable case" or "a serious question to be determined". The State party disputes that, in the danger opinion, the Minister's delegate ignored specific risk factors that the author had set out in his submissions to the delegate. The State party recalls that the author is being removed pursuant to paragraph 115 (2) (a) of the Immigration and Refugee Protection Act, which requires the delegate to demonstrate that the author is inadmissible on grounds of serious criminality and that he constitutes a danger to the public in Canada. The removal of the author is a proportionate response.

6.5 The State party submits that the author has failed to substantiate his claims under articles 6 (1) and 7 for the purposes of admissibility. In particular, he did not substantiate the claim that he would face an individualized or personalized risk upon removal to Somalia. The State party submits that the majority of the alleged risk profiles (returnee outside of local protection systems; at risk from Al-Shabaab; at risk from government or pro-government forces) relate in fact to being a "Westernized" returnee without local connections. As regards the risk related to the alleged profile of the author's family in Somalia, the State party submits that the family's persecution in 1991 is not a valid concern any more, given the numerous political changes that have occurred in Somalia since 1991. Additionally, there is no evidence that other family members were at risk in 2007 because of the brother's activities against Al-Shabaab, and the 2014 UNHCR international protection considerations did not identify the profiles cited by the author as recognized risk profiles. The State party refers to the findings of the Upper Tribunal of the United Kingdom in the country guidance in the case of *MOJ & Others (Return to Mogadishu)*, which did not recognize any of the profiles relied on by the author as factors of risk and did not consider ordinary civilians to be at risk of persecution or harm upon return to Mogadishu.

6.6 The State party submits that the author has failed to substantiate his claims under articles 17 and 23, and it urges the Committee to find that the communication is inadmissible in its totality pursuant to article 2 of the Optional Protocol. It considers that the author's deportation cannot be considered to amount to arbitrary or unlawful interference with his family life. The decision to remove the author was made in compliance with Canadian law. The author was given the opportunity at each stage of the proceedings to make

submissions, and he did so with the assistance of a lawyer. In her decision, the Minister's delegate considered the following circumstances and their impact on the author's family: the limited degree of establishment of the author in Canada; the fact that he is a single adult male; the frequent and prolonged interruptions of his family relations owing to his continuous periods of incarceration and detention since the age of 19; the availability of independent support for his mother; his limited contact with his siblings; the lack of involvement of his family in his rehabilitation; and the fact that the family ties and support did not prevent the author from committing criminal offences. The Federal Court declined to interfere with the decision of the Minister's delegate. While the author tries to give the impression that he has maintained a close relationship with his mother and sisters, he was not close to his family in Canada prior to 4 December 2009; his family could have helped to facilitate his rehabilitation, but was unable to exert a positive influence on his lifestyle, as demonstrated by his criminal records.

6.7The State party underlines the fact that its goal is not just to prevent the commission of future criminal offences, but to protect the Canadian public from a dangerous individual. Although the author claims that his criminal records resulted in large part from alcohol abuse, which is now allegedly resolved, the State party finds it difficult to rely on his promises. It underscores that it did not take steps to deport the author when he was first made subject to an inadmissibility report in January 2002, but gave him another six years to stop committing criminal offences. Detention has been the only effective mechanism to date to prevent the author from committing future criminal offences and to protect the public.

6.8The State party concludes that, under international law, States have a right to control the entry, residence and expulsion of non-nationals and to remove those who have been determined not to be in need of protection. Recognition of that principle is particularly important where such individuals pose a significant risk to the safety and security of a State's citizens. It recalls that, as of January 1998 and his detention in July 2011, the author engaged in criminal conduct, which escalated in frequency and severity. When he was released on court orders, he continually demonstrated a flagrant disregard for those orders and for the national justice system in general. The State party concludes that the author presents a serious danger to the Canadian public, does not face a real danger in Somalia, and can therefore be deported.

6.9The State party requests that the Committee review its request for interim measures as the author failed to present even a prima facie and personal or individualized risk of irreparable harm in case of return to Somalia.

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

### **Consideration of admissibility**

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

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

7.3 With regard to the exhaustion of domestic remedies, the Committee notes the numerous applications made by the author to prevent his deportation to Somalia, including an appeal of his deportation order, submissions in response to a request for a danger opinion issued against him, and an application for judicial review of the danger opinion issued in his case. The Committee notes that, according to the State party, the author did not exhaust domestic remedies because he failed to make an application for permanent residence on humanitarian and compassionate grounds, and he failed to submit an application before the Federal Court for leave to seek judicial review of the negative decision of the Immigration Appeal Division of 8 April 2009. The Committee also notes the author's submission that judicial review of the Division's decision of 2009 had objectively no prospect of success and that, in view of the discretionary nature of the assessment on humanitarian and compassionate grounds, those remedies are not effective and therefore do not need to be exhausted.

7.4 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies insofar as such remedies appear to be effective in the given case, and are de facto available. The Committee observes that a humanitarian and compassionate application for permanent residence does not shield the author from removal to Somalia during the consideration of his application and therefore does not constitute an effective remedy. With regard to the author's failure to appeal the negative decision by the Immigration Appeal Division, the Committee observes that the decision was based on section 64 (2) of the Immigration and Refugee Protection Act, which provides that an author has no right of appeal if "he was found to be inadmissible because of serious criminality". In 2008, the author was found to be inadmissible and a deportation order was issued on 7 April 2008. On 1 May 2008, the author appealed that decision before the Immigration Appeal Division. His appeal was rejected on 8 April 2009. The Committee observes

that an appeal would only have been successful if the author had been able to raise a “fairly arguable case”, a “serious question to be determined” or an error in law or jurisdiction. It notes that the State party has not explained how the author could have met that threshold considering the clear domestic legislation and jurisprudence in that regard. In the specific circumstances of the case, the Committee considers that an application for leave to appeal to the Federal Court did not constitute an effective remedy. Therefore, the Committee concludes that it is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.5 The Committee notes the State party’s challenge to the admissibility of the communication on the ground that the author failed to sufficiently substantiate his claims under article 2 (3), read in conjunction with articles 6 (1), 7, 12 (4), 13, 17, 18 and 23 (1) of the Covenant. The Committee considers that those issues are intimately linked to the merits of the case, and finds that the claims of violation of article 2 (3), which is accessory in nature to the substantive rights allegedly violated, have been sufficiently substantiated for the purposes of admissibility.

7.6 With respect to the author’s claims under articles 6 (1) and 7 of the Covenant, the Committee notes that on 15 June 2012, the Minister’s delegate found that the author did not face an individualized risk of serious harm, that he posed a danger to the Canadian public due to “serious criminality” and that, despite his refugee status, he could be deported to his country of origin. The Committee notes that the author has provided details about the alleged risk of being deprived of his life or suffering torture or ill-treatment. It also notes his claims of a generalized risk of irreparable harm owing to the insecurity and living conditions in Somalia and because of his family profile and his status as a young, non-extremist Muslim man. The Committee further notes the author’s assertions about the killing of his relatives, the absence of clan protection, his Western identity and appearance and lack of local knowledge and support networks. The Committee accordingly considers the author’s claims under articles 6 (1) and 7 to have been sufficiently substantiated for the purposes of admissibility.

7.7 As to the author’s allegations that his prospective removal to Somalia and separation from his family would constitute arbitrary or unlawful interference with his family life, the Committee notes the author’s argument that his deportation would interfere with his relations and ability to maintain contact with his immediate family and significant network of friends in Canada. The Committee also notes his argument that before his detention, the author was providing daily support and care to his ailing mother. The Committee therefore

considers that the author's situation raises issues under articles 17 and 23 (1) and proceeds to their consideration on the merits.

7.8The Committee notes that the author has indicated that he is not pursuing his claims under articles 12 (4), 13 and 18 of the Covenant, and left them without substantiation. Accordingly, the Committee concludes that that part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

7.9The Committee therefore declares the communication admissible insofar as it raises issues under articles 6 (1), 7, 17 and 23 (1), read in conjunction with article 2 (3) of the Covenant, and proceeds to its examination on the merits.

### **Consideration of the merits**

8.1The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

### **Articles 6 (1) and 7**

8.2The Committee notes the author's claim that he would face torture or ill-treatment in case of return to Somalia as he fits into several of the risk categories identified by UNHCR, and that he faces specific, personal risks in Somalia. It also notes that, according to the State party, the domestic decision makers were not satisfied that the author would be targeted by Al-Shabaab if he were returned to Somalia.

8.3The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant (para. 12). The Committee has also indicated that the risk must be personal, and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin. The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.

8.4 While noting the author's assertions about his family profile, killing of his relatives, the absence of clan protection, his Western identity and appearance, his lack of local knowledge, experience and support networks in Somalia, the Committee observes that the author's claims were thoroughly examined by the State party's authorities in the context of his pre-removal risk assessment application and the danger opinion issued by the Minister's delegate on 15 June 2012. The Minister's delegate found that the general human rights abuses and poor country conditions were not sufficient to establish that the author would be personally at risk if returned to Somalia. She also found that the author posed a danger to the Canadian public owing to "serious criminality".

8.5 The Committee notes that, although the author contests the assessment and finding of the Minister's delegate as to the risk of harm he faces in Somalia, he has not presented any new evidence to substantiate his allegations under articles 6 and 7. The Committee considers that the information available demonstrates that the State party took into account all the elements available to evaluate the risk faced by the author, and that the author has not identified any irregularity in the decision-making process. The Committee also considers that, while the author disagrees with the factual conclusions of the State party's authorities, he has not shown that they were arbitrary or manifestly erroneous, or amounted to a denial of justice. In view thereof, the Committee is not able to conclude that the information before it shows that the author's rights under articles 6 (1) and 7 of the Covenant would be violated if he were removed to Somalia.

### **Articles 17 and 23 (1)**

8.6 As to the alleged violation under articles 17 and 23 (1), read alone and in conjunction with article 2 (3), 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 on its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference. The Committee recalls its general comments No. 16 (1988) on the right to privacy and No. 19 (1990) on the family, according to which the concept of the family is to be interpreted broadly. It also recalls that the separation of a person from his family by means of expulsion can amount to arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case, the separation of the author from his family and its effects on him would be disproportionate to the objectives of the removal.

8.7 In the present case, the Committee considers that the author's deportation to Somalia would constitute "interference" with his family relations in Canada, within the meaning of article 17 of the Covenant. The Committee therefore must examine if that interference could be considered either arbitrary or unlawful. The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. The Committee also recalls that the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.

8.8 The Committee notes that in the present case, the State party's Immigration and Refugee Protection Act expressly provides that the permanent residency status of a non-national may be revoked if the person is convicted of a serious offence carrying a term of imprisonment of at least two years. The Committee also notes the State party's observation that the authorities acted neither unlawfully nor arbitrarily and that the minimal disruption to the author's family life was outweighed by the gravity of the author's crimes. The Committee further notes the author's criminal record, which started in 1998, at the age of 19, and has continued for over 13 years, totalling 12 criminal convictions including for offences of a violent nature and punishable by long prison terms. It notes that the author's convictions led to inadmissibility reports, first in January 2002, and a removal order of 7 April 2008.

8.9 The Committee also notes the author's claim that he maintains a close relationship with his mother, sisters and brother; that he used to be his mother's primary caregiver; that he is planning to support her further; and that his deportation would lead to a complete disruption of his family ties due to the impossibility for his family to travel to Somalia and for him to apply for a visitor's visa to visit them in Canada for a long time.

8.10 The Committee observes that the author has not resided in Somalia since 1990 and that he does not have any family there; that he has lived in Canada for over 23 years where his mother, sisters and brothers all live; that he would have only limited clan support in his country of origin; and that the means to maintain regular correspondence between the author and his family would be limited. It notes the author's claim that his criminal offences arose from alcohol addiction and that he has committed to a rehabilitation programme. The Committee also notes that the intensity of the author's family ties with his

mother, sisters and brothers is questioned by the State party, which submits that the author has limited contact with his siblings; that as a result of his detention his family was not involved in his rehabilitation and that the family ties and support did not prevent him from committing criminal offences. The Committee further notes the State party's assertion that independent support is available to the author's mother; that the author lived in Somalia until the age of 11; that he speaks Somali, albeit with difficulty; and that he is a member of a majority clan.

8.11 In the light of the above, the Committee considers that the interference with the author's family life, while significant, would not be disproportionate to the legitimate aim of preventing the commission of further crimes and protecting the public. The Committee therefore concludes that the author's deportation to Somalia, if implemented with due account of the ongoing need to assess the security situation in Mogadishu and southern and central Somalia, including for so-called Western returnees with limited family and clan support, would not constitute a violation of articles 17 and 23 (1), read alone and in conjunction with article 2 (3) of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not permit it to conclude that the author's removal to Somalia would, if implemented, violate his rights under articles 6 (1), 7, 17 and 23 (1), read alone and in conjunction with article 2 (3) of the Covenant.

## **Annex I**

[Original: French]

### **Individual opinion of Committee member Yadh Ben Achour**

1. I concur with the Committee's decision to reject, on the merits, communication No. 2387/2014, *A.B. v. Canada*. However, I would like to point out that the Committee has not taken into account a number of elements that, in my view, must be considered in order to reach the same conclusions on the merits.

2. In paragraph 8 (5) of the Views, the Committee states that it is not able to conclude that the information before it shows that the author's rights under articles 6 (1) and 7 of the Covenant would be violated if he were removed to Somalia. Therefore, neither the right to life nor the right to protection against torture or cruel, inhuman or degrading treatment or punishment is at stake here.

3. In these circumstances, it is imperative to recall the duties of every foreigner, whether he or she is a temporary resident, a permanent resident, an asylum seeker or a refugee in a host country. These duties are recognized by international law, in particular the Convention relating to the Status of Refugees and the International Covenant on Civil and Political Rights.

4. The author had refugee status in Canada. This status entails obligations established by articles 2 and 33 of the Convention relating to the Status of Refugees. Article 2 provides that “Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.” Article 33, which provides protection against the expulsion or refoulement of refugees, makes that prohibition subject to a sine qua non condition defined by article 2 (2): “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

5. These provisions, which are applicable to refugees, apply to all aliens. Article 13 of the International Covenant on Civil and Political Rights states that: “An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion.” While compelling reasons of national security may militate against allowing the victim of an expulsion to submit the reasons against his expulsion, these same compelling reasons may, a fortiori, constitute the cause of the expulsion itself. Let us recall that, in the present case, the deportation decision was taken by the Canadian authorities “in accordance with the law” and due process, which gave the author a chance to defend his case.

6. These obligations have been seriously violated by the author, whose antisocial actions have exhibited a significant degree of criminality. The actions in question are not merely offences but crimes. The author has therefore become, through his own doing, a threat to public order in Canada. The Government of Canada is therefore right to maintain that the author is a danger to the public.

7. Having discarded the possibility that the author would face risks relating to the right to life and freedom from torture, as stated in paragraph 2 of the present annex, it was necessary to strike a fair balance between the author’s duties and

his rights, including the right to be protected against expulsion, and between the danger he poses to public order and the risks that he would face if returned to Somalia. In this regard, the question of proportionality must be considered. Yet from this point of view, the Committee has not taken sufficient account of this need for balance between the rights and duties of foreigners in host countries. Nor has it sufficiently considered the Canadian Government's arguments that the danger posed by the author to the public greatly outweighs any risk that he would face in Somalia and that the deportation measure was not disproportionate to the danger he poses to the Canadian public (paragraph 4 (3) of the Views).

8. It is the duty of States to host and protect refugees and the right of refugees to be hosted and protected. But this right must be deserved and it is unacceptable for a refugee to act as a criminal in a host state. In rejecting the communication on its merits, the Committee should have taken these essential considerations into account in its Views.

## **Annex II**

[Original: Spanish]

### **Individual opinion of Víctor Manuel Rodríguez-Rescia**

1. Regrettably, I must dissent from the opinion of the majority of the Committee on communication No. 2387/2014.

2. I find that, notwithstanding the State's concern over the author's criminal record, there was evidence of a personal estrangement from his country of birth, his family and his culture that would put the author's bodily and mental integrity at imminent risk if he was deported to Somalia, a country in which he was not guaranteed minimum living conditions and where family and clan support networks are essential for persons with a profile such as his. The author's deportation to a third country could have been a less drastic option than the removal ordered.

3. However, the State chose to centre the case on the argument that the author represented "a danger to the public in Canada", that this danger greatly outweighed "any minimal risk the author could face in Somalia", and that "the humanitarian and compassionate considerations relating to the author's particular circumstances are insufficient to overcome this finding". In my opinion, there were more than humanitarian reasons for not deporting the

author to Somalia, a country which he left more than 20 years ago and to which his only connection is his nationality.

4.If the author was deported to Somalia, he would not only be forced to be a “foreigner in his own country”. Having spent so much time away and thus become rootless and “westernized”, he would face risks to his physical and psychological integrity on account of the prominent political profile of his family, who were forced to flee to Canada, while his lack of family or clan support would leave him in a situation of extreme vulnerability, as the Committee concluded previously in a similar case (communication No. 1959/2010, *Wa r same v. Canada*, Views adopted on 21 July 2011). I find that the author’s profile would place him in one of the risk categories identified by the Office of the United Nations High Commissioner for Refugees (UNHCR) in relation to the situation in Somalia.

5.Any restrictions imposed by a State party on the rights set out in the Covenant regarding a person under its jurisdiction must satisfy the test of legality, necessity, reasonableness and proportionality. I believe that in this case the State party has not been able to demonstrate that the deportation measure was reasonable, much less proportionate to the aim pursued. Nor has it shown that such a measure, in lieu of other, less restrictive measures, is necessary to ensure public safety.

6.In the light of the above, I find that, if the author is deported, the State will be violating the rights set forth in articles 6, 7, 17 and 23 of the Covenant, read alone and in conjunction with article 2 (3) of the Covenant.

## **Annex III**

[Original: Spanish]

### **Dissenting opinion of Committee member Fabián Omar Salvioli**

1.I regret that I must dissent from the majority on the Committee in its reasoning and findings in the case of *A.B. v. Canada*, for the reasons set out below.

2.Regarding the risk to the life and integrity of the author in the event that he would be returned to Somalia, it is incumbent on the State party, if it considers that such a serious risk does not exist, to substantiate its views. The State party’s claims are general in this regard, which leaves me unable to conclude that its internal assessment meets the Committee’s general requirements. The

State party rather seems to rely on the argument that the author represents a danger to public safety in Canada. However, the non-refoulement principle is a peremptory norm that must be applied in the case of the two reasons given, without it being necessary to refer to any additional arguments — especially not the conduct of the person in question, no matter how reprehensible.

3. I consider that deportation by the State party, should it take place, will violate the rights covered in article 17 of the Covenant. In its Views, the Committee considers that the interference with the author's family life would not be disproportionate to the legitimate aim of preventing the commission of further offences and protecting the public (para. 8 (11)).

4. I cannot accept this reasoning: the State party failed to provide reasons for not applying other measures less detrimental to the family life of A.B. (and that of his family).

5. Any restrictions imposed by a State party on the rights set out in the Covenant regarding a person under its jurisdiction must satisfy the test of legality, necessity, reasonableness and proportionality. I believe that in this case the State party has not been able to demonstrate that the measure is reasonable, much less proportionate to the aim pursued. Nor has it shown that such a measure, in lieu of other, less restrictive measures, is necessary to ensure public safety.