



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2559/2015\*, \*\*

<i>Communication submitted by:</i>	I.M.Y. (represented by counsel, Tage Gøttsche)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	29 January 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 30 January 2015 (not issued in document form)
<i>Date of adoption of the decision:</i>	14 July 2016
<i>Subject matter:</i>	Deportation to Somalia
<i>Procedural issues:</i>	Admissibility — manifestly ill-founded; admissibility — incompatibility
<i>Substantive issues:</i>	Non-refoulement; family rights
<i>Articles of the Covenant:</i>	7 and 17
<i>Articles of the Optional Protocol:</i>	2 and 3

1.1 The author of the communication is I.M.Y., a Somali national born in 1986. He sought asylum in Denmark but his application was rejected and, at the time of submitting the communication, he was scheduled to be deported to Somalia on 2 February 2015. The author claims that his deportation to Somalia would constitute a violation by Denmark of his rights under article 7 of the Covenant and of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Although the author is not explicit about it in his communication, he also raises questions that appear to invoke article 17 of the Covenant. The Optional Protocol to the

\* Adopted by the Committee at its 117th session (20 June-15 July 2016).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Yuval Shany and Margo Waterval.



Covenant entered into force for Denmark on 23 March 1976. The author is represented by counsel.

1.2 On 30 January 2015, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, requested the State party not to deport the author to Somalia while his communication was under consideration by the Committee. On 3 February 2015, the Refugee Appeals Board suspended the time limit for the author's departure from Denmark until further notice, in accordance with the Committee's request.

### **The facts as presented by the author**

2.1 The author arrived in Denmark in 1992 with his mother when he was 6 years old. He was granted a residence permit.

2.2 In August 2001, his mother decided to move the family back to Somalia. She returned to Denmark in July 2003, however, and became a Danish citizen. When she returned to Denmark, she was carrying the author's passport, which was taken by the Danish authorities. The author wanted to return to Denmark because all his siblings were there, but he was unable to travel because of the missing passport. For this reason, he lived with his uncle in Galkayo, Somalia, for five years.

2.3 The author left Somalia in 2010, after members of the militant group Al-Shabaab contacted him and asked him to join the group. The author submits that refusing recruitment by Al-Shabaab means risking death and, since he did not want to join the group, he had to escape from the country as fast as possible for fear of getting killed. The author submits that he left Somalia illegally through Ethiopia, where he stayed until he travelled to Denmark without valid travel documents. He arrived in Denmark on 15 February 2013 and applied for residence and asylum.

2.4 On 26 June 2014, the Refugee Appeals Board refused to reopen his case. Instead, the case was returned to the Danish Immigration Service for an additional review, because there was new information regarding his fear of Al-Shabaab. On 11 November 2014, the Service refused to grant to the author a residence permit pursuant to the Danish Aliens Act. On 14 January 2015, the Board rejected the author's claim for asylum and protection.

2.5 On 16 January 2015, the Ministry of Justice decided to reject the author's application for a humanitarian residence permit pursuant to the Aliens Act, section 9 (b) (1).

2.6 The author maintains that all domestic remedies have been exhausted and that no complaint has been submitted before any other international body.

### **The complaint**

3.1 The author submits that he should not be returned to Somalia as there is a real risk that he will be killed by Al-Shabaab elements. He also submits that several of his friends have been killed by Al-Shabaab for not cooperating; two of his friends were killed in 2013 and another in 2012 because they did not leave Somalia in time. The author further submits that the Office of the United Nations High Commissioner for Refugees (UNHCR), in its 17 June 2014 assessment entitled "UNHCR position on returns to Southern and Central Somalia",<sup>1</sup> urged States to refrain from forcibly returning any person to areas of Southern and Central Somalia affected by military action and/or ensuing displacement. Although the town where the author lived is under the control of the State, Al-Shabaab has terrorized the inhabitants of that town and its surroundings, especially at night.<sup>2</sup> The author maintains that

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<sup>1</sup> Available from [www.refworld.org/docid/53a04d044.html](http://www.refworld.org/docid/53a04d044.html).

<sup>2</sup> The author refers to the article entitled "5 Somali troops, 7 al-Shabaab fighters killed in Baidoa attack" (2 January 2015). Available from <http://allafrica.com/stories/201501030132.html>.

Al-Shabaab has increasingly been targeting civilians and that people who live in areas under its control face widespread and grave human rights abuses.<sup>3</sup> The author, therefore, argues that his deportation would violate his rights under article 7 of the Covenant and article 3 of the European Convention on Human Rights.

3.2 The author submits that he is closely attached to the State party, that he grew up there, that his mother, father and eight siblings live there and that he fled to Denmark in order to be reunited with his family. He also submits that his deportation would violate his family life, protected under article 8 of the European Convention on Human Rights.

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

4.1 In its observations dated 14 July 2015, the State party submits that the communication should be considered inadmissible. Should the Committee find the communication admissible, the Government submits that article 7 of the Convention would not be violated should the author be returned to Somalia.

4.2 The State party confirmed that the author, a Somali national born on 19 December 1986, entered its territory on 17 December 1992 together with his mother and his siblings. On 14 May 1993, the author was granted de facto residence under section 7 (2) of the Aliens Act then in force, as the accompanying child of his mother. On 8 August 2001, the author repatriated to Somalia together with his mother and six siblings. On 26 July 2003, the author's mother re-entered the State party without the author, who remained in Somalia. On 29 March 2011, the author's father forwarded a letter to the Embassy of Denmark in Addis Ababa, in which he wrote that the author was in Ethiopia and wanted to return to Denmark. On 19 May 2011, the author submitted an application to the Embassy of Denmark in Addis Ababa requesting that his residence permit be deemed not to have lapsed. On 28 September 2011, the Danish Immigration Service decided that the applicant's residence permit had lapsed. On 12 July 2012, the author submitted a new application to the Service requesting that his residence permit be deemed not to have lapsed. The Service considered the application to be an appeal against its decision of 28 September 2011 and forwarded the appeal to the Refugee Appeals Board.

4.3 On 15 February 2013, the author re-entered Denmark without valid travel documents. On 3 June 2013, the Refugee Appeals Board decided that the author's residence permit was deemed to have lapsed. On 31 July 2013, the author requested that the application for renewal of his residence permit be reopened. On 26 June 2014, the Board refused to reopen that application. It added that the author's fear of Al-Shabaab constituted a new ground for asylum, one that had not been included in the assessment of whether his residence permit had lapsed, and forwarded a copy of the author's request to the Danish Immigration Service for further action and examination. The Service treated the request as a new application for asylum and, on 11 November 2014, refused to grant asylum to the author. On 16 January 2015, the Ministry of Justice refused the author's application for residence on humanitarian grounds under section 9 (b) (1) of the Aliens Act. On 19 January 2015, the Board upheld the refusal by the Service to grant the author asylum.

4.4 The author claims in his communication that returning him to Somalia would constitute a breach of article 7 of the Covenant and a breach of articles 3 and 8 of the European Convention on Human Rights. The State party notes that, in its decision of 19 January 2015, the Refugee Appeals Board found that the applicant would not be at a specific and individual risk of persecution, as set out in section 7 (1) of the Aliens Act, or at a real risk of being subjected to inhuman treatment, as set out in section 7 (2) of the Aliens

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<sup>3</sup> The author refers to the briefing of 23 October 2014 of Amnesty International entitled *Somalia: Forced returns to south and central Somalia, including to al-Shabaab areas: A blatant violation of international law*. Available from <https://www.amnesty.org/en/documents/afr52/005/2014/en>.

Act, in case of return to his country of origin. The Board upheld the decision of 11 November 2014 of the Service to refuse asylum to the author.

4.5 The State party proceeds to provide a detailed description of its refugee status application proceedings and information on the legal basis and the functioning of the Refugee Appeals Board.<sup>4</sup>

4.6 The State party submits that the author has failed to establish a prima facie case for the purpose of establishing the admissibility of his communication for a violation of article 7 of the Covenant. Therefore, it has not been established that there are substantial grounds for believing that the author is in danger of being subjected to inhuman or degrading treatment or punishment if returned to Somalia. The State party considers this part of the communication to be manifestly unfounded and therefore inadmissible. The State party also maintains that the author's claim of a violation of articles 3 and 8 of the European Convention on Human Rights does not concern the Covenant and therefore falls outside the scope of the competence of the Committee as set out in article 3 of the Optional Protocol. Accordingly, the State party submits that this part of the communication should be considered inadmissible *ratione materiae* pursuant to rule 96 (d) of the Committee's rules of procedure as being incompatible with the provisions of the Covenant.

4.7 Should the Committee find the author's communication admissible, the State party submits that the author has not sufficiently established that returning him to Somalia would constitute a violation of article 7 of the Covenant. The State party notes that the Committee has indicated that the risk must be personal and that there is a high threshold for providing substantial grounds for establishing that a real risk of irreparable harm exists.<sup>5</sup> The State party's obligations under article 7 of the Covenant are reflected in section 7 (2) of the Aliens Act, pursuant to which a residence permit is issued to an alien, upon application, if the alien risks being subjected to the death penalty, to torture or to inhuman or degrading treatment or punishment should he or she be returned to his or her country of origin.

4.8 The State party also notes that there is no new information in the author's communication to the Committee on his conflicts in his country of origin as compared with the information available on 19 January 2015 when the Refugee Appeals Board decided on the appeal. The State party observes that the document entitled "UNHCR position on returns to Southern and Central Somalia" and the report published by Amnesty International on 23 October 2014 entitled "Forced returns to South and Central Somalia, including Al-Shabaab areas: a blatant violation of international law",<sup>6</sup> were known to the Board when it decided on the appeal on 19 January 2015, which is why those reports, and several other reports on conditions in Somalia, were taken into account by the Board in its assessment of the matter. In its decision of 19 January 2015, the Board found that the author had not been subjected to any ill-treatment before he left Somalia that would independently justify asylum and, having considered the background information available, it also found that the author's subjective fear was not based on such objective grounds as would justify asylum.

4.9 As regards the author's subjective fear of returning to Somalia, the Government of the State party observes that, in line with article 1 A (2) of the Convention relating to the Status of Refugees, the author must have a well-founded fear of persecution to fall within the scope of the Convention. That means that the author's fear must be justified by objective facts. The Government observes in this respect that, regardless of whether the Refugee Appeals Board may have considered as a fact the author's statement that Al-

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<sup>4</sup> For a full description, see communication No. 2493/2014, *A.H.A. v. Denmark*, Views adopted on 8 July 2016, paras. 4.2-4.7.

<sup>5</sup> See, inter alia, the Views adopted by the Committee on 26 March 2014 in *J.J.M. v. Denmark*, para. 9.2.

<sup>6</sup> Available from [www.refworld.org/docid/544a20c74.html](http://www.refworld.org/docid/544a20c74.html).

Shabaab attempted to forcibly recruit him over the telephone once in 2010, the Board found that the author would not, for that reason, be at a real risk of persecution or abuse by Al-Shabaab or others if returned to Somalia. The State party notes that the author stated in support of his case that he was contacted only that one time and that he had not previously experienced any conflict with members of Al-Shabaab. It also notes that Al-Shabaab has not contacted the author since 2010, nor has it contacted his uncle, with whom he lived at the time of the alleged call from Al-Shabaab.

4.10 Moreover, the State party maintains that the attempt to recruit him in 2010 does not mean that the author belongs to a group of persons who would be at risk of persecution if returned to Somalia, nor does the background information available on Somalia support this allegation. The State party refers to the report entitled "Update on security and protection issues in Mogadishu and South-Central Somalia", published by Landinfo and the Danish Immigration Service in March 2014, in which it is stated that, according to an international non-governmental organization: "Forced recruitment to al-Shabaab is only relevant in those areas where al-Shabaab is in full control. Recruitment mostly takes place via the elders. Some elders may support al-Shabaab while others do not."<sup>7</sup> In addition, it appeared from the background information available that the city of Galkayo, which is where the author was born and had lived, was controlled by the Government.<sup>8</sup>

4.11 As regards the general conditions in Somalia, including in the author's home city of Galkayo, the State party submits that they are not at present of such a nature as to lead to the conclusion that everybody returning to that area is at a real risk of abuse, thereby justifying the granting of asylum solely as a result of their presence in the area. The State party also submits that the article dated 2 January 2015<sup>9</sup> provides information only about a blast that killed one person and injured four others outside an international school in Galkayo. The article includes no information on those responsible for the attack as alleged by the author. Accordingly, the State party maintains that the author's subjective fear of returning to Somalia is not based on such objective facts, including the background information available on forced recruitment and the general situation in the author's home region, as to constitute a sufficient basis for granting asylum.

4.12 The author has stated that the decision of the Refugee Appeals Board was contrary to section 26 of the Aliens Act, as section 26 provides that the Board must consider whether a foreigner with a close attachment to Denmark should be allowed to stay. The State party observes in this respect that the above is not a correct construction of Danish law. Section 26 (1) of the Aliens Act provides as follows:

In deciding on expulsion, regard must be had to the question whether expulsion must be assumed to be particularly burdensome, in particular because of (i) the alien's ties with the Danish society; (ii) the alien's age, health, and other personal circumstances; (iii) the alien's ties with persons living in Denmark; (iv) the consequences of the expulsion for the alien's close relatives living in Denmark, including in relation to ... family unity; (v) the alien's slight or non-existent ties with his country of origin or any other country in which he may be expected to take up residence; and (vi) the risk that, in cases other than those mentioned in section 7 (1) and (2) or section 8 (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.

4.13 The State party maintains that the provision in section 26 of the Aliens Act applies to cases concerning expulsion from Denmark. The provision also applies to cases

<sup>7</sup> Available from [www.refworld.org/docid/539193314.html](http://www.refworld.org/docid/539193314.html).

<sup>8</sup> See, in particular, page 1 of the document entitled "Addendum to 2010 UNHCR eligibility guidelines for assessing the international protection needs of asylum seekers from Somalia", which relates specifically to the city of Galkayo. Available from [www.refworld.org/docid/4f675c5e2.html](http://www.refworld.org/docid/4f675c5e2.html).

<sup>9</sup> Available from <http://allafrica.com/stories/201501030132.html>.

concerning the revocation of or refusal to renew a residence permit granted under section 7 and the first sentence of section 19 (6) of the Act. The provision does not apply to asylum cases falling within section 7 of the Act. Accordingly, the provision does not apply to the author's case.

4.14 The State party notes that the fact that the author's whole family, except for his sister, live in Denmark, that the author speaks fluent Danish and that the author has close ties with Danish society because of his family are not relevant for asylum purposes. It also notes that the fact that the author will have no close family in Somalia in case of his return because his uncle has died does not independently justify asylum. The Government observes in this respect that it appears from page 4 of the report on the asylum screening interview conducted by the Danish Immigration Service on 30 October 2014 that the author, who is now a 29-year-old man in good health, has stated that he has distant clan and family relations in Galkayo and that he maintains contact with his friends in Galkayo through Facebook.

4.15 The State party maintains that the Refugee Appeals Board included all relevant information in its decision and that the communication has not brought to light any information substantiating that the author will be at such a risk of persecution or abuse upon his return to Somalia as to justify asylum. It refers to the Committee's Views in *P.T. v. Denmark*<sup>10</sup> and in *Mr. X and Ms. X v. Denmark*<sup>11</sup> and maintains that the same guarantees of due process apply to the author in the present case.

4.16 The State party submits that the author's communication to the Committee merely reflects the author's disagreement with the assessment of the background information made by the Refugee Appeals Board and that he failed to identify any irregularity in the decision-making process or any risk factors that the Board has failed to take properly into account. Therefore, it maintains that the author was trying to use the Committee as an appellate body to have the factual circumstances advocated in support of his claim for asylum reassessed by the Committee. The State party submits that the Committee must give considerable weight to the findings of the Board, which is better placed to assess the factual circumstances of the author's case.

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

5.1 In his comments of 24 September 2015, the author submits that he has at all times "lifted the burden of proof" by describing and documenting every claim and statement he has made. He has established that there are substantial grounds for believing that he would be at risk of being subjected to persecution and mistreatment. The author denies trying to use the Committee as an appellate body to have the factual circumstances in support of his claim for asylum reassessed by the Committee. He maintains that the Refugee Appeals Board did not take his extraordinary conditions in consideration and did not apply correctly section 26 of the Aliens Act.

5.2 The author reiterates that he has close ties to Denmark. His entire family lives there and he speaks the language fluently. His parents and eight of his siblings live in Aarhus, Denmark. He fled from Somalia because he fears the militia Al-Shabaab, and fled to Denmark to be reunited with his relatives. He maintains that the Refugee Appeals Board failed to consider his close connection to Denmark. Pursuant to section 26 of the Aliens Act, if a person has a close connection to Denmark, that fact must be taken into account in considering whether he or she should be allowed to stay. Furthermore, the author does not have any relations left in Somalia. He argues that the State party would violate section 26 of the Aliens Act and article 8 of the European Convention on Human Rights.

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<sup>10</sup> See communication No. 2272/2013, Views adopted on 1 April 2015, para. 7.3.

<sup>11</sup> See communication No. 2186/2012, Views adopted on 22 October 2014, para. 7.5.

5.3 The author submits that after interim measures were granted by the Committee, he started studying in a school that offered a range of different classes for young adults. He obtained a driving licence. Most importantly, he was reunited with his family and friends. He has integrated into Danish society and is now no different from other Danish young adults. He maintains that his deportation would constitute a severe violation of article 8 of the European Convention on Human Rights. He has no family in Somalia and would be living in constant fear of Al-Shabaab. He also maintains that the current conditions in Somalia for people who have refused to join Al-Shabaab are of such character as to place him at real risk of being exposed to torture. He argues that the State party has failed to establish why he should not be granted asylum and reiterates that his planned deportation would violate his rights under article 7 of the Covenant.

#### **State party's further observations**

6.1 In its observations dated 28 October 2015, the State party submits that the author's submission of 24 September 2015 does not give rise to any further comments by the State party. It reiterates that the author's claim of an alleged violation of article 8 of the European Convention on Human Rights does not concern the Covenant and therefore falls outside the scope of competence of the Committee as set out in article 3 of the Optional Protocol. It also reiterates that section 26 of the Aliens Act does not apply to asylum cases falling within section 7 of that Act. Accordingly, the provision does not apply to the author's case.

6.2 The State party maintains that the communication is manifestly ill-founded and should be declared inadmissible. Should the Committee find the communication admissible, the State party maintains that returning the author to Somalia would not constitute a violation of the provisions of the Covenant.

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

##### *Consideration of admissibility*

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

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

7.3 The Committee notes the author's statement that his application for asylum and the application requesting that his residence permit be deemed not to have lapsed have been rejected by the Danish Immigration Service and the Refugee Appeals Board, that the decisions of the Board are not subject to appeal and that domestic remedies have, therefore, been exhausted. This has not been challenged by the State party. The Committee also notes the State party's submission that on 16 January 2015 the Ministry of Justice refused the author's application for residence on humanitarian grounds. Therefore, the Committee considers that domestic remedies have been exhausted as required by article 5 (2) (b) of the Optional Protocol.

7.4 The Committee notes the author's allegation that his return to the Somalia would put him at risk of being subjected to torture. The author bases this allegation on the fact that in 2010 members of the militant group Al-Shabaab contacted him by telephone and wanted him to join them, that he left the country because he did not want to do that and that refusing to be recruited by Al-Shabaab meant being at risk of being killed.

7.5 The Committee notes that the Refugee Appeals Board thoroughly examined the author's claim and considered his personal circumstances, as well as the general situation of young males who are at threat of being recruited by Al-Shabaab, and concluded that the author's personal background does not place him at risk of being tortured. The Committee

is aware that concerns have been expressed with respect to Al-Shabaab's continued presence in Southern and Central Somalia.<sup>12</sup> However, the Committee notes that, in examining the author's asylum request, the Board reviewed the author's allegations and made a specific and individual risk assessment.

7.6 The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of a case, unless it can be established that such an assessment was arbitrary or amounted to a manifest error or denial of justice.<sup>13</sup> The author has not explained why the decision by the Refugee Appeals Board would be contrary to this standard, nor has he provided substantial grounds to support his claim that his removal to Somalia would expose him to a real risk of irreparable harm in violation of article 7 of the Covenant. The Committee accordingly concludes that the author has failed to sufficiently substantiate his claim of a violation of article 7 for purposes of admissibility and finds the claim inadmissible pursuant to article 2 of the Optional Protocol.

7.7 The Committee notes the author's claims that he has strong ties with the State party, that he lived in the country with his family between the ages of 6 and 15, that his parents and siblings live in the State party and that he came to the country to rejoin them. The Committee also notes that the author refers to a violation of his rights under article 8 of the European Convention on Human Rights but observes that the facts as presented by the author appear to raise issues under article 17 of the Covenant and that the wording of article 8 of the Convention is similar to the wording of article 17 of the Covenant.

7.8 The Committee recalls paragraph 5 of its general comment No.16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, in which it recalls that the objectives of the Covenant require that the term "family" be given broad interpretation.<sup>14</sup> The Committee notes, however, that the author has failed to provide sufficient information indicating his strong ties with his parents and siblings between 2003 and 2013, as well as after arriving in the State party in 2013, other than making general statements that he came to the State party in order to be reunited with them. In view of the circumstances of the present case, the Committee considers that the author's allegations remain general and that he has failed to explain before the Committee why his removal to his country of origin would be a disproportionate measure, resulting in arbitrary interference with his family rights under article 17. Accordingly, the Committee considers that the author has failed to sufficiently substantiate his claims of violation of his family rights for the purposes of admissibility and finds them inadmissible pursuant to article 2 of the Optional Protocol.<sup>15</sup>

8. The Committee therefore decides:

- (a) That the communication is inadmissible pursuant to article 2 of the Optional Protocol;
- (b) That the decision shall be transmitted to the author and to the State party.

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<sup>12</sup> See, for example, "UNHCR position on returns to Southern and Central Somalia (update 1)", May 2016, para. 6. Available from [www.refworld.org/pdfid/573de9fe4.pdf](http://www.refworld.org/pdfid/573de9fe4.pdf).

<sup>13</sup> See communications No. 1616/2007, *Manzano and others v. Colombia*, decision adopted on 19 March 2010, para. 6.4; No. 1622/2007, *L.D.L.P v. Spain*, decision adopted on 26 July 2011, para. 6.3; and No. 2070/2011, *Cañada Mora v. Spain*, decision adopted on 28 October 2014, para. 4.3.

<sup>14</sup> See also communication No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 8.7.

<sup>15</sup> See communication No. 2050/2011, *E.L.K. v. the Netherlands*, decision on admissibility of 30 March 2015, para. 6.3.