



# Convention on the Rights of the Child

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## Committee on the Rights of the Child

### Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 140/2021<sup>\*</sup>, <sup>\*\*</sup>, <sup>\*\*\*</sup>

<i>Communication submitted by:</i>	F.M.A. and H.K.A. (represented by counsel, Niels-Erik Hansen)
<i>Alleged victim:</i>	S.H.K.
<i>State party:</i>	Denmark
<i>Date of communication:</i>	2 March 2021
<i>Date of adoption of Views:</i>	16 May 2023
<i>Subject matter:</i>	Deportation of a girl to Somalia, where she would allegedly face a risk of being forcefully subjected to female genital mutilation
<i>Procedural issue:</i>	Substantiation of claims
<i>Substantive issues:</i>	Prohibition of discrimination; best interests of the child; protection of the child against all forms of violence or ill-treatment
<i>Articles of the Convention:</i>	3 and 19
<i>Article of the Optional Protocol:</i>	7 (e) and (f)

1.1 The authors of the communication are F.M.A. and H.K.A., both nationals of Somalia, born in 1989 and 1987, respectively. They submit the communication on behalf of their daughter, S.H.K., a national of Somalia born in Denmark on 15 June 2019. The authors and their daughter are subject to a deportation order to Somalia. They claim that S.H.K.'s deportation would be in violation of her rights under articles 3 and 19 of the Convention. They are represented by counsel. The Optional Protocol entered into force for Denmark on 7 January 2016.

1.2 On 7 March 2021, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested that the State party refrain

\* Adopted by the Committee at its ninety-third session (8–26 May 2023).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho, Thuwayba Al Barwani, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chopel, Rosaria Correa, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

\*\*\* A joint opinion by Committee members Sopio Kiladze, Otani Mikiko, Luis Ernesto Pedernera Reyna and Benoit Van Keirsbilck (partly dissenting) is annexed to the present decision.



from returning the authors and their daughter to Somalia while their case was under consideration by the Committee. On 10 March 2021, the State party suspended the execution of the deportation order against the authors, S.H.K. and her siblings.

1.3 On 8 December 2022, pursuant to article 6 of the Optional Protocol, the working group, acting on behalf of the Committee, rejected the State party's request to lift interim measures.

#### **Facts as submitted by the authors**

2.1 F.M.A. entered Denmark on 12 May 2014 and applied for asylum on the same day. On 18 July 2014, she was granted a temporary residence permit due to the general human rights and security situation in her home area in Somalia. She had stated that she had a specific individual conflict with Al-Shabaab, but the Danish Immigration Service did not accept her statements, deeming them as non-credible and fabricated for the occasion. On 25 June 2015, her husband, H.K.A., was granted a temporary residence permit as the spouse of a person holding a residence permit in Denmark. He entered Denmark on 5 August 2015 with their four children, who are nationals of Somalia.

2.2 On 8 February 2017, the Danish Immigration Service decided not to renew F.M.A.'s residence permit and, consequently, not to renew her husband's permit either. On 9 February 2017, F.M.A. appealed the decision. On 4 July 2017, H.K.A. applied for asylum on his behalf and on behalf of the couple's children. On 27 August 2017, the Refugee Appeals Board decided to remit F.M.A.'s case for reconsideration to the Danish Immigration Service, because of new information received on her grounds for asylum. On 30 November 2017, the Danish Immigration Service decided once again not to renew F.M.A.'s residence permit. On 1 December 2017, the Danish Immigration Service refused to grant asylum to H.K.A. and his children. On 29 October 2018, the Immigration Appeals Board upheld the decision of the Danish Immigration Service not to renew H.K.A.'s residence permit. On 21 January 2019, the Refugee Appeals Board upheld the decision by the Danish Immigration Service refusing the application for asylum of H.K.A. and the couple's children. On the same day, the Refugee Appeals Board upheld the decision by the Danish Immigration Service refusing F.M.A.'s renewal of her residence permit. However, since F.M.A. was pregnant at the time with S.H.K., the family was allowed to stay in Denmark for her birth, which took place on 15 June 2019.

2.3 On 29 July 2019, the authors applied for asylum on behalf of their newborn daughter, S.H.K. On 22 October 2019, the authors attended an interview with the Danish Immigration Service on behalf of S.H.K. where they stated, inter alia, that they feared that she would be subjected to female genital mutilation upon return to Somalia. They argued that, since S.H.K.'s mother, grandmother and older sister, had been subjected to female genital mutilation in Somalia, there was an imminent risk that she herself would also face a risk of being subjected to it. The authors explained that they were not aware that their older daughter had been circumcised until August 2019.

2.4 On 19 November 2019, the Danish Immigration Service refused S.H.K.'s application for asylum. The authors appealed against the decision. The authors note that, on 21 December 2020, the Danish Immigration Service gave two other girls from Somalia refugee residence permits on the basis of the fact that their older sisters had been subjected to female genital mutilation.<sup>1</sup> The authors mentioned those two examples before the Refugee Appeals Board. On 29 January 2021, the Refugee Appeals Board upheld the decision to reject S.H.K.'s asylum claim. Two of the three members of the Board found that S.H.K.'s parents, who had declared that they were against circumcision, must be regarded as resourceful persons who would be able to withstand any pressure from the family and the surrounding community.<sup>2</sup> The Board also affirmed that the Refugee Board was aware that S.H.K.'s parents, at the meeting of the Board, had explained that her older sister had been circumcised as a 4-year-old when she had stayed in Somalia with her grandmother, while her parents were both outside Somalia. S.H.K.'s parents only discovered that after the meeting of the Board in January 2019. However, the majority of the Board did not find that that that could lead to a

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<sup>1</sup> The authors do not annex documentation in this regard.

<sup>2</sup> Refugee Appeals Board of Denmark, case No. 19/287101. Translation provided by the authors.

changed assessment, given that the parents had not been in Somalia at the time and therefore did not have the opportunity to protect their older daughter.<sup>3</sup>

### Complaint

3.1 The authors claim that S.H.K.'s rights under articles 3 and 19 of the Convention will be violated if she is deported to Somalia, as she may be subjected to female genital mutilation. They allege that, even though they oppose female genital mutilation, it seems unlikely that they will be able to prevent S.H.K. from being subjected to it, just as they were not able to prevent it from happening to their older daughter.

3.2 The authors claim that they will not be able to protect S.H.K. in a country where almost all women have been victims of female genital mutilation. They add that, according to a report of the United Nations Children's Fund of 2017, 90 to 98 per cent of all girls and women over 15 years of age in Somalia have been subjected to female genital mutilation,<sup>4</sup> and that, according to a report of the United Nations Population Fund of 2013, approximately 80 per cent of girls and women who have been subjected to female genital mutilation have undergone its most severe form.<sup>5</sup>

3.3 The authors state that, although circumcision is prohibited under the Provisional Federal Constitution, background information on changes in practice and attitudes towards female genital mutilation is uncertain and poorly documented.<sup>6</sup> Female genital mutilation harms girls and women in many ways, including through severe pain, shock, excessive bleeding, injury to surrounding genital tissue, in addition to the long-term consequences.<sup>7</sup>

3.4 The authors allege that any information regarding the possibility for certain persons to avoid the practice of female genital mutilation should be read in conjunction with the statistics on the prevalence of the practice, including across socioeconomic groups, all of which is above 90 per cent prevalence. Families returning to Somalia from Western countries can also be exposed to a lot of social pressure, and it might be difficult for them to avoid having their daughters undergo the practice.<sup>8</sup> According to the Home Office of the United Kingdom of Great Britain and Northern Ireland, in cases where both parents oppose female genital mutilation, the question of whether the risk will reach the requisite level would need to be determined by reference to the extent to which the parents are likely to be able to withstand the strong societal pressures. Unless the parents are from a socioeconomic background that is likely to distance them from mainstream social attitudes, or there is some other particular feature of their case, the fact of parental opposition may well as a general matter be incapable of eliminating the real risk to the daughter that others, in particular relatives, would at some point inflict female genital mutilation on her.<sup>9</sup>

3.5 The authors allege that the decision of 29 January 2021 of the Refugee Appeals Board did not invoke the principle of precaution, as prescribed by the Committee. According to the Committee, the evaluation of the risk of female genital mutilation in the specific case should be carried out following the principle of precaution and, where reasonable doubt exists that the receiving State cannot protect a child against such practices, States parties should refrain from deporting the child concerned.<sup>10</sup>

3.6 Since the Refugee Appeals Board decision cannot be appealed in the State party's judicial system, the authors state that domestic remedies have been exhausted.

<sup>3</sup> Ibid.

<sup>4</sup> United Nations Children's Fund (UNICEF), "Female genital mutilation/cutting: a global concern", 2017.

<sup>5</sup> United Nations Population Fund, "Female genital mutilation/cutting, country profile: Somalia", 2013.

<sup>6</sup> Landinfo, "Female genital mutilation in the Sudan and Somalia", 2008, p. 12; and Department of State of the United States of America, "Somalia: human rights report, 2015", 2016, p. 32.

<sup>7</sup> World Health Organization, "Female genital mutilation", fact sheet No. 241, February 2017.

<sup>8</sup> Danish Immigration Service, "South Central Somalia: female genital mutilation/cutting", 2016, p. 12.

<sup>9</sup> Home Office of the United Kingdom of Great Britain and Northern Ireland, Country information and guidance, Somalia: women fearing gender-based harm and violence", 2016, p. 6.

<sup>10</sup> *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (c).

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

4.1 The State party indicates that, on 10 March 2021, the Refugee Appeals Board suspended the time limit for S.H.K. and the authors' removal until further notice. Considering the circumstances of the case, the Refugee Appeals Board also suspended the time limit for the authors' other children until further notice (see para. 1.2 above).

4.2 The State party submits that the authors' communication to the Committee does not present any new information substantiating their claims and repeats the facts that have already been assessed by the domestic authorities. The State party notes that, according to the Committee, States parties have an obligation under article 19 of the Convention to prohibit, prevent and respond to all forms of physical violence against children,<sup>11</sup> including harmful practices such as female genital mutilation. The Committee has also affirmed that the Convention is violated only if the child to be returned will be exposed to a real risk of irreparable harm.<sup>12</sup> In this respect, the State party argues that the authors have failed to establish a prima facie case for the purpose of admissibility and to sufficiently substantiate that S.H.K. would face a real risk of irreparable harm if she were to be returned to Somalia. The State party contends that the communication should therefore be considered inadmissible as manifestly ill-founded, under article 7 (f) of the Optional Protocol.

4.3 In relation to the merits, the State party contends that, should the Committee find the authors' communication admissible, the authors have not sufficiently established that S.H.K. would be exposed to a real risk of irreparable harm upon her return to Somalia. The State party notes that it is generally for the organs of the States parties to the Convention to review and evaluate facts and evidence in order to determine whether the applicant would face a risk of a serious violation of the Convention upon return, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice.<sup>13</sup> The State party considers that, in the present case, the authors have failed to identify any irregularity in the decision-making process or any risk factors that were not been properly taken into account by the Refugee Appeals Board. The State party contends that the authors merely disagree with the Board's assessment of S.H.K.'s circumstances and the available background information.

4.4 The State party observes that S.H.K. is a child who is not able to independently make a statement regarding her grounds for asylum, and therefore it is her parents who have given their statement to the domestic authorities on her behalf. The State party notes that, when assessing an asylum-seeker's credibility, the Refugee Appeals Board makes an overall assessment of, inter alia, their statements and demeanour at the hearing, along with any additional information and background materials on the country of origin.

4.5 In their decisions of 12 January 2019, concerning the authors, and of 29 January 2021, concerning S.H.K., the Refugee Appeals Board considered that the different allegations made by the authors regarding their own grounds for asylum were non-credible and fabricated for the occasion, as had the Danish Immigration Service. However, the Board accepted as facts that the authors were opposed to female genital mutilation and that it had to be assumed that they would be able to resist potential social pressure to let S.H.K. undergo the procedure. With regard to the fear of forced female genital mutilation, the State party alleges that, through various interviews with the Service in 2017, the authors asserted that they would be able to resist the pressure from their surroundings because, inter alia, F.M.A. had had a free upbringing and had had her parent's support. The authors further stated that they did not fear that someone would forcibly perform female genital mutilation on their older daughter<sup>14</sup> against their will, but they instead feared exclusion from the local community and the social consequences resulting from not succumbing to the pressure from their surroundings. The Board found that the authors were unable to present a plausible explanation as to why they,

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<sup>11</sup> General comment No. 13 (2011) on the right of the child to freedom from all forms of violence, paras. 11 and 29.

<sup>12</sup> General comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, para. 27.

<sup>13</sup> See *A.Y. v. Denmark* (CRC/C/78/D/7/2016); and European Court of Human Rights, *M.E. v. Sweden* (application No. 71398/12), *R.C. v. Sweden* (application No. 41827/07) and *X. v. Sweden* (application No. 36417/16).

<sup>14</sup> S.H.K. had not been born yet.

neither at the time of the Board hearings in 2019 concerning their older daughter nor at the hearing in 2021 concerning S.H.K., suddenly feared that female genital mutilation would be forcibly performed on the girls upon their return to Somalia. The State party highlights that, according to the Board, the allegations of fear of female genital mutilation had not been mentioned at earlier stages in the asylum proceedings, but only after the decisions of February 2017 not to renew their residence permits, even though the authors had been asked several times whether their children had any independent grounds for asylum. This generally weakened the credibility of the authors, which was the basis upon which the Board made its decision regarding the purported fear of female genital mutilation.

4.6 The State party agrees that the practice of female genital mutilation clearly constitutes a violation of article 19 of the Convention. However, the State party refers to the jurisprudence of the European Court of Human Rights, according to which the crucial part of the assessment in cases concerning female genital mutilation is whether the family is in a position to ensure that their child is not subjected to the practice.<sup>15</sup> The State party alleges that, while those cases do not concern Somalia, that position is universal and not specific to any given country. The authors alleged that they will not be able to refuse the overwhelming pressure from society to have S.H.K. undergo female genital mutilation, and they also stated that, since they had not been able to prevent the circumcision of their oldest daughter, it seems unlikely that they would be able to prevent S.H.K. from being forcibly subjected to the procedure. The State party notes that the Refugee Appeals Board's assessment of the evidence was not governed by special rules of evidence and that it conducts an overall assessment, combining the asylum-seekers' statements and other information on the case, including what is known about the conditions in their country of origin. It adds that the Board is also responsible for providing the necessary background information, which is continually updated and supplemented. The State party highlights that the background material referred to by the authors, as well as more recent reports,<sup>16</sup> are already included in the background material available to the Board. The State party alleges that, according to the background material referred to by the authors, it is possible for mothers to prevent their daughters from being subjected to female genital mutilation, depending on the mother's personality and commitment.<sup>17</sup> The State party also submits that the attitude towards female genital mutilation is changing and many women have successfully chosen not to have their daughters undergo female genital mutilation; only 32.6 per cent of the women who had undergone the procedure subjected their daughters to it.<sup>18</sup> The State party alleges that, while the authors contend that there are different opinions on the possibility for parents to stand firm against social pressure, the reports that the authors referred to do not differ on the question. On the contrary, all sources mentioned by the authors indicate that avoiding the practice is a possibility and depends on the mother's personality, commitment and strong convictions.

4.7 With regard to the authors' submission that it is unlikely that they will be able to prevent S.H.K. from being forcedly subjected to female genital mutilation in the light of what happened to their older daughter, the State party alleges that it sees no reason to depart from the assessment made by the majority of the Refugee Appeals Board. The Board deemed the authors to be resourceful persons who would be able to resist any pressure from the family and the surrounding community to prevent S.H.K. from being subjected to female genital

<sup>15</sup> European Court of Human Rights, *Emily Collins and Ashley Akaziebie v. Sweden* (No. 23944/05), *Sow v. Belgium* (No. 27081/13) and *R.B.A.B. and Others v. The Netherlands* (No. 7211/06).

<sup>16</sup> Among them, *A/HRC/45/52*, p. 17; Directorate of National Statistics of Somalia, "The Somali health and demographic survey, 2020", 2020, pp. 212–218; UNICEF, "Somalia: statistical profile on female genital mutilation", 2020; European Asylum Support Office; Lifos, "Somalia – Kvinnlig könsstympning" (Somalia – female circumcision), version 1.1, 27 August 2019; and European Asylum Support Office, "Country of origin information query response", 23 July 2019. Available at [https://coi.euaa.europa.eu/administration/easo/PLib/2019\\_07\\_23\\_EASO\\_COI\\_QUERY\\_Somalia\\_FGM\\_Q19.pdf](https://coi.euaa.europa.eu/administration/easo/PLib/2019_07_23_EASO_COI_QUERY_Somalia_FGM_Q19.pdf).

<sup>17</sup> See Danish Immigration Service, "Country of origin information: FGM/female circumcision, background, numbers and tendencies", January 2019; Danish Refugee Council, "Thematic report: Somalia, the security and human rights situation in Al-Shabaab controlled areas", July 2019; and Lifos, "Somalia – Kvinnlig könsstympning" (Somalia – female circumcision), version 1.0, 16 April 2019.

<sup>18</sup> See Danish Immigration Service, "Country of origin information", p. 9.

mutilation and that both of the authors declared that they were against the practice. The Board also found that the fact that the authors' older daughter was subjected to female genital mutilation when she was staying in Somalia with her maternal grandmother would not lead the Board to a different assessment, because the authors at the time resided outside of Somalia and therefore were unable to protect her. The Board observed that, from the background material, female genital mutilation without the presence and acceptance of the parents only occurs in exceptional cases.<sup>19</sup> Therefore, for the Board, the situations of S.H.K. and her older sister are not comparable, given that S.H.K. will return to Somalia accompanied by her parents, who will be able to protect her from being subjected to female genital mutilation.

4.8 The State party alleges that the Refugee Appeals Board thoroughly assessed the purported risk of S.H.K. being subjected to female genital mutilation and duly considered her best interests in its assessment. The State party recalls that the Board finds that the Committee's legal perception is contrary to the relevant background material and the case law of the European Court of Human Rights involving female genital mutilation. Therefore, the Board continues to find, despite the Views adopted by the Committee,<sup>20</sup> that the crucial part of the assessment in cases concerning female genital mutilation is whether the parents can be considered resourceful persons and whether they find themselves in a position to ensure that their child is not subjected to the practice. It highlights that the fact that the Board did not make explicit reference to the principle of precaution in its decision of 29 January 2021 cannot be taken to mean that the Board failed to take it into account. The State party therefore affirms that, in the present case, the authors did not demonstrate that S.H.K. would be at real risk of suffering irreparable harm if she were to return to Somalia or that it would be in violation of articles 3 and 19 of the Convention.

4.9 The State party adds that the authors have failed to identify any irregularity in the decision-making process or any risk factors that the Refugee Appeals Board failed to take properly into account. It contends that the authors are trying to have the advocated factual circumstances reassessed by the Committee acting as an appellate body. It reiterates that the Committee must give considerable weight to the findings of fact made by the Board, which is better placed to assess the factual circumstances of S.H.K.'s case.

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

5.1 In comments dated 15 March 2022, the authors alleged that they had presented ample evidence of a violation of the Convention for the purposes of the admissibility of the communication. According to the evidence: (a) both S.H.K.'s personal circumstances and the situation in Somalia for women and girls substantiate the fact that she will be exposed to a real risk of irreparable harm if she is returned to Somalia; (b) the decision of the Refugee Appeals Board was arbitrary and contradictory to its own jurisprudence, which adds to the legal uncertainty with respect to the Danish immigration authorities' application of the principle of precaution in such cases;<sup>21</sup> (c) the Board's decision is in direct conflict with the Committee's recommendations in other similar cases against the State party.<sup>22</sup> They allege that the Board's decision was therefore arbitrary and amounted to a manifest error resulting in a violation of articles 3 and 19 of the Convention.

5.2 With regard to the merits, the authors reiterate their arguments on the admissibility of the communication and that they have sufficiently substantiated their claims. They add that the State party's suggestion that the relevant background material supports the Board's decision runs contrary to material from the State party itself and the most recent data and reports. In the report of 2019 cited by the State party, the Danish Immigration Service explicitly indicates that sources disagree on the extent to which parents can oppose female genital mutilation and protect their daughters from circumcision. Some sources state that girls cannot be circumcised without the consent of their parents, especially their mother, whereas other sources state that the family members can circumcise girls, despite their parents'

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<sup>19</sup> See Lifos, "Somalia – Kvinnlig könsstympning", version 1.1.

<sup>20</sup> *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019); and *K.Y.M. v. Denmark*.

<sup>21</sup> The authors do not annex documentation in this regard.

<sup>22</sup> See *Y.A.M. v. Denmark*; and *K.Y.M. v. Denmark*.

opposition to the procedure.<sup>23</sup> Furthermore, the authors reiterate that any possibility for certain persons to avoid the practice should be read in conjunction with the statistics on the very high prevalence of female genital mutilation in Somalia.

5.3 Concerning the State party's submission that it appears that persons who have had exposure to Western ideas and concepts are perceived to be more able to withstand social pressure, the authors indicate that several sources highlight that returnees from Europe or Western countries might be of particular risk in terms of being subjected to female genital mutilation upon returning to Somalia. This is confirmed in the country of origin information report on female genital mutilation in Somalia of 2021, in which the Danish Immigration Service noted that, generally, Somalis did not expect girls returning from the West to have undergone female genital mutilation due to its illegal status in Western countries. That meant that there was extra attention paid to the issue by the surrounding society, and that makes it challenging for returnees to evade female genital mutilation. Uncut girls returning from the diaspora might be subjected to circumcision or social pressure to undergo circumcision upon return.<sup>24</sup> Indeed, S.H.K.'s return from the State party to Somalia only increases her real risk of irreparable harm.

5.4 The authors refer to the State party's assertion of their purported lack of credibility, which it highlighted as having been a factor in the Board's decision. They contend that the Board problematically engages in a selective approach to their statements. The State party stands ready to believe the authors' statements only when they work in favour of its own narrative. In contrast to the authors' statements, the State party asserts that the authors would be able to protect S.H.K. against female genital mutilation. This goes against not only better knowledge about the situation in Somalia, but also the fact that her older sister was subjected to the procedure by her maternal grandmother. They add that, even if their statements are deemed trustworthy, under no circumstances can their statements be regarded as sufficient assurances that S.H.K. would be safe from female genital mutilation if she were to be returned to Somalia.

5.5 The authors refer to the State party's affirmation, based on regional jurisprudence, that the crucial part in assessments of such cases is whether the family is in a position to ensure that their child is not subjected to the practice. They claim that, while family relations are indeed important, the cases before the European Court of Human Rights to which the State party made reference do not relate to Somalia, and the destination cannot be disregarded or removed from the equation. The State party has failed to adequately consider specific national, regional and local contexts in a child refoulement case, by referencing family resilience. However, even when applying the narrow scope suggested by the State party, the facts of the case show that the authors cannot be considered able to protect S.H.K. from female genital mutilation, just as they were not able to protect their older daughter.

5.6 The authors argue that the three criteria for obtaining asylum have been met, namely: there is a real risk faced by S.H.K. of being subjected to female genital mutilation, given the Somali context; S.H.K. is under a personal risk, insofar as the authors have expressed their inability to protect her if she is returned to Somalia; and she is under a foreseeable risk, insofar as her older sister was subjected to the procedure by their maternal grandmother.

5.7 With regard to the principle of precaution, the authors note that the State party insists that the crucial part of assessment in cases such as the present one revolves around whether the parents are considered resourceful and find themselves able to protect their child. However, the State party relies solely on the authors' statements, whom they otherwise consider to be lacking credibility. The authors highlight that, as evidenced by the State party's observations, it has not changed its practice in accordance with the Committee's guidance to adequately assess the best interest of the child and the principle of precaution.<sup>25</sup>

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<sup>23</sup> Danish Immigration Service, "Country of origin information: FGM/female circumcision, background, numbers and tendencies, p. 11.

<sup>24</sup> Danish Immigration Service, "Country of origin information: Somalia, female genital mutilation", 2021, p. 1.

<sup>25</sup> See *Y.A.M. v. Denmark*; *K.Y.M. v. Denmark*; and [CRC/C/DNK/CO/5](#), paras. 39 (c) and (d) and 40 (c) and (d).

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of the rules of procedure under the Optional Protocol, whether the claim is admissible under the Optional Protocol.

6.2 The Committee notes that the authors are challenging a decision of the Refugee Appeals Board, which is not subject to any further appeals. Accordingly, and given that the State party has not raised any objections in this regard, the Committee considers that all available domestic remedies must be deemed to have been exhausted and concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.<sup>26</sup>

6.3 The Committee takes note of the State party's arguments that the authors have failed to establish a prima facie case for the purpose of admissibility of their communication under the Convention and that they have not sufficiently substantiated their claim that S.H.K. would be exposed to real risk of irreparable harm if returned to Somalia. However, the Committee also takes note of the authors' allegations regarding the general situation of the prevalence of female genital mutilation in Somalia and the fact that S.H.K.'s older sister was circumcised by her maternal grandmother without her parents' consent. The Committee therefore considers that the authors' claims based on articles 3 and 19 of the Convention have been sufficiently substantiated for the purposes of admissibility.<sup>27</sup>

6.4 The Committee therefore declares admissible the authors' claims concerning the obligation of the State party to take the best interests of the child as a primary consideration and take measures to protect children from all forms of physical or mental violence, injury or abuse, and proceeds to its examination of the merits.

### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

7.2 The Committee takes note of the authors' allegations that S.H.K.'s deportation to Somalia would expose her to the risk of being subjected to female genital mutilation and that the State party failed to take her best interests into account when deciding on S.H.K.'s asylum application, in violation of articles 3 and 19 of the Convention.

7.3 In that regard, the Committee recalls its general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, according to which States are not to return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, and that such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.<sup>28</sup> The assessment of the risk of such serious violations should be conducted in an age-sensitive and gender-sensitive manner.<sup>29</sup> In that regard, the Committee advises that, when assessing refugee claims, States should take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by the Office of the United Nations High Commissioner for Refugees in exercising its supervisory functions under the 1951 Convention relating to the Status of Refugees. In particular, the refugee definition in the 1951 Convention must be interpreted in an age-appropriate and

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<sup>26</sup> *J.M. v. Chile* (CRC/C/90/D/121/2020), para. 7.2.

<sup>27</sup> *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 7.2; *Y.A.M. v. Denmark*, para. 7.3; and *K.Y.M. v. Denmark*, para. 10.4.

<sup>28</sup> General comment No. 6 (2005), para. 27.

<sup>29</sup> *Ibid.*; and Committee on the Elimination of Discrimination against Women, general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 25.



gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin, under-age recruitment, the trafficking of children for prostitution and sexual exploitation or subjection to female genital mutilation are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status, if such acts are related to one of the grounds under the 1951 Convention. States should therefore give the utmost attention to such child-specific forms and manifestations of persecution, as well as gender-based violence, in national refugee status determination procedures.<sup>30</sup>

7.4 In the joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019), the Committees noted that female genital mutilation might have various immediate and/or long-term health consequences.<sup>31</sup> They recommended that the legislation and policies relating to immigration and asylum should recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as grounds for granting asylum and that consideration should also be given to providing protection to a relative who might be accompanying the girl or woman concerned.<sup>32</sup> The Committee notes that other treaty bodies have considered that subjecting a woman or girl to female genital mutilation amounts to torture or cruel, inhuman or degrading treatment.<sup>33</sup>

7.5 In the present case, the Committee takes note of the authors' allegations that they would be unable to protect S.H.K. from being subjected to female genital mutilation in a country where 90 to 98 per cent of women have been subjected to that practice, despite it being prohibited by law, because the law is not enforced. The authors have also argued that returning from a Western country makes S.H.K. particularly vulnerable, on account of the extra attention that will be paid to her, since it will be expected that she will not have undergone the procedure abroad. The authors allege in particular that F.M.A. herself was subjected to female genital mutilation and that, although they are against the practice, their oldest daughter was subjected to it by her maternal grandmother, without their knowledge and consent.

7.6 The Committee takes note of the State party's argument that, according to several reports, a mother can protect her daughter from being subjected to female genital mutilation in Somalia if she is able to resist family or community pressure. The Committee also takes note of the State party's argument that, following regional jurisprudence, the crucial part of the assessment in cases concerning female genital mutilation is whether the family is in a position to ensure that their child is not subjected to the practice. The State party also argues that the review and evaluation of facts and evidence in order to determine whether a risk of a serious violation of the Convention exists upon return is generally left to the domestic authorities, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice. In this regard, it adds that the Refugee Appeals Board thoroughly assessed the purported risk of S.H.K.'s return, duly considering her best interests, and that the authors have failed to identify any irregularity in the decision-making process or any risk factors that had not been properly taken into account. The Committee takes note of the State party's argument that the authors' credibility was weakened, which was the basis upon which the Board made its decision regarding the purported fear of female genital mutilation. The Committee also takes note of the State party's argument that, given that their older daughter was circumcised without their consent, it took place while neither of the authors were in Somalia and were therefore unable to protect her, which would not be the case with S.H.K.

7.7 The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that such decisions

<sup>30</sup> General comment No. 6 (2005), para. 74.

<sup>31</sup> Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019), para. 19.

<sup>32</sup> Ibid, para. 55.

<sup>33</sup> Human Rights Committee, *Kaba and Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; Committee against Torture, *F.B. v. The Netherlands* (CAT/C/56/D/613/2014), para. 8.7; and Committee on the Elimination of Discrimination against Women, *M.N.N. v Denmark* (CEDAW/C/55/D/33/2011), para. 8.8.

should ensure, within a procedure with proper safeguards, that the child concerned will be safe and provided with proper care and ensured the enjoyment of his or her rights.<sup>34</sup> In the present case, the Committee has considered the arguments and information submitted to it, including the assessment of the authors' assumed ability to resist social pressure on the basis of their expressed opposition to the practice and on reports about the situation of female genital mutilation in Somalia. However, the Committee observes that:

(a) The Refugee Appeals Board's assessment was limited to the fact that the authors are against circumcision and that they would be able to resist the pressure of the surrounding environment to circumcise S.H.K., but was done without properly assessing or justifying why or how they could resist such pressure, without evaluating the specific and personal context to which the authors and S.H.K. would be returned and without taking the best interests of the child into account. However, the Committee recalls its consistent jurisprudence on cases of non-refoulement to Somalia on the basis of an alleged risk of female genital mutilation, according to which the rights of the child under article 19 of the Convention cannot be made solely dependent on the child's mother's or, in this case, the child's parents', ability to resist family and social pressure, especially in the light of the reported context, and that States parties should take measures to protect children from all forms of physical or mental violence, injury or abuse in all circumstances.<sup>35</sup> The Committee takes note of the State party's argument that it is relying on its interpretation of regional jurisprudence on other similar cases. However, the Committee recalls that this interpretation cannot exempt the State party from complying with its obligations under the Convention, nor can this interpretation justify non-compliance with the Committee's Views under the Optional Protocol.<sup>36</sup> The Committee also considers that there does not appear to be any contradiction between the referenced regional jurisprudence and its previous Views, in particular given that they relate to different States, which are known to have different contexts than that of Somalia, and that, while the Committee acknowledges that the capacity of a child's parents to protect him or her might be crucial, it asserts that it is not in itself sufficient without a complete analysis of the specific, individual context;

(b) The Refugee Appeals Board based its decision on the authors' weakened credibility regarding the purported fear of female genital mutilation after making an overall assessment of their various statements, in particular during their own asylum applications. However, the Committee recalls that determining the best interests of children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application.<sup>37</sup> In particular, the Committee observes that the Refugee Appeals Board did not conduct further inquiries as to the specific context of S.H.K.'s older sister's forced circumcision and how that could have affected the assessment of the individual risk faced by S.H.K.;

(c) The evaluation of the risk that a child may be subjected to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being deported should be carried out following the principle of precaution and, where reasonable doubt exists that the receiving State cannot protect a child against such practices, States parties should refrain from deporting the child concerned.<sup>38</sup> The Committee observes that the State party has not demonstrated that this standard was met.

7.8 The Committee therefore concludes that the State party failed to consider the best interests of the child when assessing S.H.K.'s alleged risk of being subjected to female genital mutilation if she were to be deported to Somalia and to take proper safeguards to ensure her

<sup>34</sup> *S.M.F. v. Denmark*, para. 8.7; *Y.A.M. v. Denmark*, para. 8.7; *K.Y.M. v. Denmark*, para. 11.8; and joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017), paras. 29 and 33.

<sup>35</sup> *S.M.F. v. Denmark*, para. 8.7 (a); *Y.A.M. v. Denmark*, para. 8.7 (b); and *K.Y.M. v. Denmark*, para. 11.8 (b).

<sup>36</sup> *Y.A.M. v. Denmark*, para. 8.7 (b).

<sup>37</sup> *E.A. and U.A. v. Switzerland* (CRC/C/85/D/56/2018), para. 7.3; and *S.M.F. v. Denmark*, para. 8.7 (b).

<sup>38</sup> *S.M.F. v. Denmark*, para. 8.7 (c); *Y.A.M. v. Denmark*, para. 8.7 (c); and *K.Y.M. v. Denmark*, para. 11.8 (c).

well-being upon return. The Committee therefore concludes that the return of S.H.K. to Somalia would amount to a violation of articles 3 and 19 of the Convention.

7.9 The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 3 and 19 of the Convention.

8. The State party is under an obligation to refrain from deporting S.H.K. and the authors to Somalia. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this regard, the State party is requested in particular to ensure that asylum proceedings affecting children include a best interests analysis and that, where a risk of a serious violation is invoked as grounds for non-refoulement, the specific circumstances in which the children would be returned are duly taken into account.

9. Pursuant to article 11 of the Optional Protocol, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

## Annex

[Original: Spanish]

### **Joint opinion of Committee members Sopio Kiladze, Otani Mikiko, Luis Ernesto Pedernera Reyna and Benoit Van Keirsbilck (partially dissenting)**

1. With regard to the present communication, we refer to the position taken by Committee member Luis Ernesto Pedernera Reyna in his individual opinions concerning communications No. 83/2019<sup>1</sup> and No. 96/2019.<sup>2</sup> We wish to echo those individual opinions in connection with the present decision of the Committee not to invoke a violation of article 37 of the Convention, for the reasons set out below.

2. In the Views adopted, the Committee states that the victim might be subjected to female genital mutilation if she were deported to Somalia. It considers that this practice amounts to torture, a position that is in line with that adopted by other human rights treaty bodies, as stated in the Views. However, in the final decision, the majority of the Committee members uphold the position that there was no violation of article 37 (a), in line with the position taken on communications No. 83/2019 and No. 96/2019. As the Committee did not find a violation of article 37 (a) in its final decision, we must submit a partially dissenting opinion.

3. Within the framework of its competence under the Optional Protocol, the Committee must be guided by the principle of the best interests of the child, as stated in rule 1 of its rules of procedure. As the communications it receives concern children, the Committee must ensure that, in respect of rights violations, its consideration of those communications is informed by an enhanced duty of care, guidance and protection.

4. Furthermore, the Optional Protocol does not require that authors of communications submitted to the Committee be represented by counsel; it is thus unnecessary to have thorough knowledge of the law to substantiate individual complaints. As the Committee's dealings with minors require it to be a source of enhanced protection, it must play an educational and guiding role vis-à-vis children, who are not well versed in the law nor are practitioners of law.

5. In the context of the alleged facts, and following the legal principle that the court is well versed in the law and thus that the parties to a dispute need not prove that a given law applies to their case, the Committee may invoke rights not mentioned in a communication. The Committee, after all, is well versed in the law, and the best interests of the child must be a primary consideration in its actions, which are informed by the view that children transition to adulthood in a gradual manner.

6. There is another crucial point: the facts of which the Committee has been apprised strongly suggest that the daughter of the author of the communication might be subjected to genital mutilation. Although genital mutilation is prohibited in Somalia, it is still a widespread cultural practice, with 98 per cent of girls subjected to it. This point is crucial to the relevance of the principle that the court is well versed in the law and that the parties to a dispute need not prove that a law applies to their case. As a protective principle, it must apply on the basis of the evidence, not as a result of an arbitrary, capricious and unsubstantiated decision by the relevant decision maker.

7. In addition to the foregoing arguments, we consider it necessary to highlight that this is the third similar case in which a communication has been submitted against the same State party. The argument that the State party cannot defend itself against claims of a violation of a right not raised by the authors can no longer prevail.

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<sup>1</sup> *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019).

<sup>2</sup> *S.M.F. v. Denmark* (CRC/C/90/D/96/2019).

8. Lastly, we wish to underscore the particular status of the prohibition of torture as a norm from which, as recognized by the international community, there can be no derogation, a status that, in our view, heightens the need for the Committee to act on its own initiative to raise violations not claimed by authors.

9. We therefore express our partially dissenting opinion, since we believe that, in the present case, the Committee is in a position to find a violation of article 37 (a) for the reasons set out above, even though the author made no explicit claim of such a violation in the communication submitted.

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