



# 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. 83/2019\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	R.H.M. (represented by counsel, N.E. Hansen)
<i>Alleged victim:</i>	Y.A.M.
<i>State party:</i>	Denmark
<i>Date of communication:</i>	26 April 2019 (initial submission)
<i>Date of adoption of Views:</i>	4 February 2021
<i>Subject matter:</i>	Deportation of a girl to Somalia, where she would allegedly risk 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 author of the communication is R.H.M., a national of Somalia and a member of the Hawiye clan, from Ceel Buur in the Galguduud region, born in 1988. She submits the communication on behalf of her daughter, Y.A.M., who was born in Denmark on 2 March 2016. The author and her daughter are subject to a deportation order to Somalia.<sup>1</sup> The author claims that her daughter's deportation would violate her rights under articles 3 and 19 of the Convention. She is represented by counsel. The Optional Protocol entered into force for Denmark on 7 January 2016.

1.2 On 30 April 2019, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to refrain from returning the author and her daughter to Somalia while their case was under

\* Adopted by the Committee at its eighty-sixth session (18 January–5 February 2021).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Philip Jaffé, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Pedernera Reyna, Aïssatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.

\*\*\* An individual opinion by Committee member Luis Pedernera Reyna (partially dissenting) is annexed to the present Views.

<sup>1</sup> The author also has a son who was born in Denmark in 2014.



consideration by the Committee. On 10 May 2019, the State party suspended the execution of the deportation order against the author and her daughter.

### **Facts as submitted by the author**

2.1 The author entered Denmark on 19 September 2013 without valid travel documents and applied for asylum on the same day. On 12 February 2014, the author was granted a residence permit pursuant to article 7 (2) of the Danish Aliens Act. During her stay in Denmark, the author gave birth to her son in 2014 and to Y.A.M. in 2016. Both of her children were also granted residence permits based on their mother's status. On 27 March 2018, the Danish Immigration Service decided to revoke the author's and her children's residence permits. The author appealed the decision to revoke her permit before the Refugee Appeals Board, which confirmed the original decision on 8 March 2019. Moreover, the Immigration Service's decision to revoke the children's permits as a result of the revocation of their mother's permit was appealed before and upheld by the Immigration Appeals Board on 11 March 2019.

2.2 On 5 December 2017, the author filed a separate asylum application on behalf of Y.A.M., claiming that, upon return to Somalia, she would face a risk of being forcibly circumcised, removed from the author and married, owing to the fact that the author had secretly married against her family's will. In her application, the author stated that she and her siblings had lived with her uncle after the death of their parents and that she had entered into a secret marriage with her husband, who could not afford a dowry. When the uncle learned about her marriage, he imprisoned her for four years. On 23 March 2018, the Danish Immigration Service rejected the author's application, finding her statements divergent and not credible. She appealed the decision to the Refugee Appeals Board, which rejected the appeal on 8 March 2019. The Board did not find as proven facts the author's statements about the conflict with her uncle or her four-year imprisonment. The Board considered that, because the author and her husband were both opposed to female genital mutilation, they would be able to counteract the social pressure to have their daughter undergo female genital mutilation.<sup>2</sup> The author notes that the Board relied on the Immigration Service report on female genital mutilation in Somalia, according to which mothers who were opposed to the practice of female genital mutilation were able to prevent their daughters from having to undergo it.<sup>3</sup>

2.3 Since the Refugee Appeals Board decision cannot be appealed in the Danish judicial system, the author states that domestic remedies have been exhausted.

2.4 The author informs the Committee that, on 10 April 2019, she submitted to the European Court of Human Rights a request for interim measures to stop her daughter's deportation to Somalia. On 18 April 2019, the European Court rejected the request and considered the remainder of the author's application inadmissible pursuant to articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

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<sup>2</sup> According to the Refugee Appeals Board decision of 8 March 2019, the author's husband left Somalia before she did, and currently resides in the United States of America.

<sup>3</sup> Danish Immigration Service "Thematic paper: south central Somalia – female genital mutilation/cutting. Country of origin information for use in the asylum determination process" (Ministry of Immigration, Integration and Housing, January 2016). Available at <https://lifos.migrationsverket.se/dokument?documentAttachmentId=43509>. In the report, the Immigration Service noted that "sources consulted in Nairobi stated that it is possible for women to avoid having their daughters subjected to the practice of FGM/C and that some women manage to do so. This, however, would highly depend on the personality of the mother and on whether or not she has the necessary commitment to stand firm against FGM/C and the strong psychological pressure it entails, both from family members and society alike" (p. 8). It also noted that, according to a women's development organization, "a strong personal conviction that her daughter should not undergo the practice is most important for a mother to succeed, with her educational background, social status, cultural or geographical affiliation also being of considerable, yet minor importance".

## Complaint

3.1 The author claims that her daughter'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.

3.2 The author claims that, as a single mother, she will not be able to withstand social pressure and protect her daughter from female genital mutilation in a country where 98 per cent of women are subjected to that practice.<sup>4</sup> The author notes that the Refugee Appeals Board based its decision on the Danish Immigration Service 2016 report on female genital mutilation in Somalia, according to which it is possible for girls not to be circumcised (see para. 2.2 above). However, the author claims that the same report indicates that, if the mother is not strong enough to stand up to the will of other women, she may succumb to pressure.<sup>5</sup> The author adds that, although female genital mutilation is prohibited by law in Somalia, it is still almost universally practised throughout the country.<sup>6</sup> She adds that she was subjected to female genital mutilation herself. She also states that her husband currently resides in the United States of America and that she is unsure how he would react to social pressure should he return to Somalia. She notes that, in a letter dated 7 November 2016, the Office of the United Nations High Commissioner for Refugees (UNHCR) urged States to refrain from forcibly returning individuals to southern and central Somalia. Furthermore, the author states that the revocation of her daughter's residence permit was in violation of article 3 of the Convention, since her daughter was born and raised in Denmark and has no ties with Somalia. The author submits that, in evaluating the risk that a child could be subjected to irreversible harm, such as female genital mutilation, the State authorities should follow the principle of precaution.<sup>7</sup>

3.3 The author contends that, under article 19 of the Convention, States parties are obliged to protect children against any harm or violence. In doing so, they must always take into consideration the best interests of the child.

3.4 The author notes that the Refugee Appeals Board did not make any reference to the Convention on the Rights of the Child in its decision.

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

4.1 In its observations dated 1 November 2019, the State party submits that the deportation of the author and her children to Somalia was suspended on 10 May 2019 (see para. 1.2 above).

4.2 The State party submits that the author's communication to the Committee does not present any new information substantiating her claims and repeats the facts that have already been assessed by the domestic authorities. The State party notes that the Committee has established in its general comment No. 13 (2011) on the right of the child to freedom from all forms of violence that States parties have an obligation under article 19 of the Convention to prohibit, prevent and respond to all forms of physical violence against children, including harmful practices such as female genital mutilation (paras. 11 and 29). Furthermore, the Committee's general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin provides that the Convention is violated only if the child to be returned will be exposed to a real risk of irreparable harm (para. 27). The State party argues that the author has failed to establish a prima facie case for the purpose of admissibility and to sufficiently substantiate that her daughter will face a real risk of

<sup>4</sup> United Nations Children's Fund, "Female genital mutilation/cutting: a global concern" (UNICEF, 2016). Available at [www.unicef.org/media/files/FGMC\\_2016\\_brochure\\_final\\_UNICEF\\_SPREAD.pdf](http://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf).

<sup>5</sup> Danish Immigration Service, "Thematic paper: south central Somalia – female genital mutilation/cutting". In the report, the Immigration Service noted that "women who are heavily dependent on their communities might not be the strong ones to refuse the practice" (p. 16) and "since FGM is about the control of women and the female body, even educated and exposed returnees from the West will continue the practice" (p. 21).

<sup>6</sup> United States Department of State, "Somalia 2016 human rights report", p. 32. Available at [www.state.gov/wp-content/uploads/2019/01/Somalia-1.pdf](http://www.state.gov/wp-content/uploads/2019/01/Somalia-1.pdf).

<sup>7</sup> *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (c).

irreparable harm if returned to Somalia. The State party contends that this part of the communication should therefore be considered inadmissible as manifestly ill-founded.

4.3 The State party submits that the Immigration Appeals Board's decision of 11 March 2019, which confirms the Immigration Service's decision to revoke the residence permits of the author's children, can be appealed to the national courts pursuant to section 63 of the Danish Constitution. Therefore, all available domestic remedies have not been exhausted regarding this part of the communication, which should be declared inadmissible pursuant to article 7 (e) of the Optional Protocol.

4.4 Should the Committee find the author's communication admissible, the State party considers that the author has not sufficiently established that her daughter 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 a risk of a serious violation of the Convention exists upon return, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice.<sup>8</sup> The State party considers that, in the present case, the author has failed to identify any irregularity in the decision-making process or any risk factors that have not been properly taken into account by the Refugee Appeals Board. The State party contends that the author merely disagrees with the Board's assessment of her daughter's circumstances and the available background information.

4.5 The State party notes that the Refugee Appeals Board took into account the author's asylum claims when assessing risk factors for her minor daughter. When assessing an asylum seeker's credibility, the Board makes an overall assessment of, inter alia, his or her statements and demeanour at the hearing, along with any additional information and background material on the country of origin.

4.6 In its decision of 8 March 2019, the Refugee Appeals Board confirmed the decision of the Danish Immigration Service to reject the asylum application submitted on behalf of the author's daughter. The Board noted that the author's background was undocumented and that she had knowingly provided incorrect information to the Immigration Service about her husband.<sup>9</sup> The Board thus considered that the general credibility of the author was substantially weakened. In particular, the Board found the author's conflict with her uncle and her four-year imprisonment to be highly unlikely and her statements to that effect not to be credible. Accordingly, the Board did not accept as fact the author's fear that her daughter would be subjected to female genital mutilation as a result of the author's alleged conflict with her uncle. The Board further found that the situation in Ceel Buur, the town from which the author originated, had changed in such a way that her return thereto would not be in breach of article 3 of the European Convention on Human Rights, on prohibition of torture and ill-treatment. The Board also took into account the author's statement that her husband had a residence permit in the United States of America. The State party argues that the author's communication to the Committee does not elaborate on her background or specify the basis for her fear concerning female genital mutilation.

4.7 The State party notes that the Refugee Appeals Board emphasized background information available on the general situation of female genital mutilation in Somalia, in particular the possibility that mothers could prevent their daughters from being subjected to female genital mutilation.<sup>10</sup> The State party indicates that female genital mutilation is

<sup>8</sup> The State party cites *A.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.8, and decisions of the European Court of Human Rights, such as *M.E. v. Sweden* (application No. 71398/12), judgment of 8 April 2015, *R.C. v. Sweden* (application No. 41827/07), judgment of 9 March 2010, and *X v. Sweden* (application No. 36417/16), judgment of 9 January 2018.

<sup>9</sup> According to the Refugee Appeals Board decision of 8 March 2019, the author initially stated that she had no knowledge of her husband's whereabouts, but she later stated that she had been in contact with her husband and that he had visited her in Denmark.

<sup>10</sup> See Danish Immigration Service, "Country of origin information: FGM/Kvindelig omskæring – baggrund, tal og tendenser" (FGM/Female circumcision – background, numbers and tendencies) (January 2019); Danish Refugee Council, "Somalia: sikkerheds-og menneskerettighedssituationen i Al-Shabaab-kontrollerede områder" (Security and human rights situation in Al-Shabaab controlled

generally prohibited in Somalia, including in Al-Shabaab controlled areas, and that according to the available background material, Al-Shabaab is against the practice and advises local communities not to practise female genital mutilation since it is not in line with sharia law.<sup>11</sup> The State party also submits that attitudes towards female genital mutilation are changing and that many women have successfully chosen not to have their daughters undergo the practice.<sup>12</sup> The State party submits that the report cited by the author indicates that it is possible for women to avoid having their daughters subjected to female genital mutilation, depending on the mother's personality and on her degree of commitment.<sup>13</sup> The report also suggests that women who are heavily dependent on their communities and might therefore lack the strength to refuse the practice are primarily those living in rural areas.<sup>14</sup> The State party notes that the author originates from Ceel Buur, a town in the central Galmudug State of Somalia, with a population of almost 80,000, and that no other information suggests that the author would be heavily dependent on her community and thus not strong enough to stand firm against female genital mutilation. Accordingly, the State party considers that, as the author and her husband oppose female genital mutilation, it had to be assumed that they would be able to resist the potential social pressure to have their daughter undergo female genital mutilation.

4.8 The State party contests the author's claim that the Danish authorities had not asked the author questions about the risk relating to female genital mutilation during her interview with the Immigration Service prior to its decision of 27 March 2018 to revoke her and her children's residence permits. In this regard, the State party submits that, on 29 November 2017, the author was asked directly, more than once, whether she had any fears concerning her children. Despite those repeated questions, the author did not mention female genital mutilation until she brought up the issue before the Refugee Appeals Board on 8 March 2019.

4.9 As for the author's claim that the Board did not speak to her husband in order to ascertain his opinion on female genital mutilation, the State party emphasizes that the author has clearly stated, including in her communication to the Committee, that her husband is against the practice. The State party adds that, according to the available background information,<sup>15</sup> decisions about female genital mutilation are ultimately taken by girls' mothers and that a girl is not likely to be subjected to the practice if at least one parent is against it.

4.10 Regarding the author's claim that the Refugee Appeals Board made no reference in its decision to the Convention, the State party contends that, notwithstanding the lack of an explicit reference to the Convention, the Board takes the Convention and other international treaties into account as crucial elements in examining asylum applications involving children.

4.11 With regard to the UNHCR letter dated 7 November 2016 urging States to refrain from returning individuals to southern and central Somalia, the State party submits that, in the present case and other similar cases, the Board has assessed the security situation in Ceel Buur and found that it does not, in and of itself, justify residence under section 7 of the Danish Aliens Act. The State party notes that the Board made its assessment on this matter based on

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areas) (July 2019); and Lifos, "Somalia – Kvinnlig könstympling" (Female circumcision) (April 2019).

<sup>11</sup> Danish Refugee Council, "Somalia: sikkerheds-og menneskerettighedssituationen i Al-Shabaab-kontrollerede områder" (July 2019), p. 18.

<sup>12</sup> Danish Immigration Service, "Country of origin information: FGM/Kvindelig omskæring" (January 2019), p. 9.

<sup>13</sup> Danish Immigration Service, "Thematic paper: south central Somalia – female genital mutilation/cutting", p. 8.

<sup>14</sup> *Ibid.*, pp. 9–10. In that paper, the Immigration Service noted that a humanitarian worker in Somalia had underlined the fact that increased access to a source of livelihood in urban centres may give women more independence from their community compared to in rural areas, where women might be more dependent on their communities and therefore not strong enough to oppose the practice.

<sup>15</sup> According to the State party, in its report entitled "Somalia – Kvinnlig könstympling" (April 2019), Lifos indicates that if the parents are not of the same opinion, it is generally the mother who determines whether a daughter should undergo female genital mutilation.

its comprehensive collection of background material on Somalia, including the UNHCR letter.

4.12 Regarding the proceedings before the Immigration Appeals Board concerning the revocation of the residence permits of the author's children, the State party notes its obligation to ensure that children are not separated from their parents against their will pursuant to article 9 of the Convention, and to take into account the preservation of the family unit when assessing the best interests of the child in decisions on immigration and family reunification.<sup>16</sup> The State party also recognizes that, in certain cases where a child or his or her parents are not entitled to asylum in Denmark, the child can have developed such strong ties with the country that the best interests of the child warrant the non-revocation of the child's residence permit. The Immigration Appeals Board's case law provides that, generally, children cannot be considered to have developed such strong ties without a continuous and uninterrupted stay in Denmark of at least six or seven years, during which they have attended school or childcare institutions.<sup>17</sup> However, the Board noted that, in the present case, the author's daughter had held a residence permit for only one year and eight months. Therefore, in its decision dated 11 March 2019, the Board found no circumstances indicating that the revocation of residence permits of the author's children must be assumed to be particularly burdensome, as their permits were based solely on family reunification with their mother, who no longer held a valid permit.

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

5.1 In her comments dated 24 January 2020, the author alleges that, despite the Views the Committee adopted in *K.Y.M. v. Denmark*, the State party's authorities have maintained their practice in cases involving the risk of female genital mutilation and have failed to apply the principle of precaution formulated by the Committee in that decision. As was the case in *K.Y.M. v. Denmark*, the author emphasizes her status as a single mother without any male network in Somalia. The author also contests the State party's argument that she is a resourceful person who can resist social pressure upon her return to Somalia. She claims that she received only a little education at a local Qur'anic school in Somalia and has never worked.

5.2 Regarding the State party's contention that Ceel Buur is a big city, the author emphasizes that it is a town controlled by Al-Shabaab. She states that, in Al-Shabaab controlled areas, it is illegal for women to have a job and she would thus have to depend completely on the community. In order to receive the necessary support from her surrounding community, the author argues that she would have to succumb to social norms, particularly female genital mutilation.

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

6.1 In its additional observations dated 1 July 2020, the State party contends that the author's comments of 24 January 2020 do not provide any new information.

6.2 As regards the follow-up procedure for the Views adopted in *K.Y.M. v. Denmark*, the State party notes that the Refugee Appeals Board found no basis for reopening the case, as in that case, the author and her daughter had left Denmark and their whereabouts were unknown. It further notes that, on 15 February 2018, its Coordination Committee<sup>18</sup> found that the Committee's Views expressed in *K.Y.M. v. Denmark* were not in accordance with the case law of the European Court of Human Rights,<sup>19</sup> according to which the crucial part of the

<sup>16</sup> Committee on the Rights of the Child, general comment No. 14 (2013), para. 66.

<sup>17</sup> The State party cites European Court of Human Rights, *Osman v. Denmark* (application No. 38058/09), judgment of 14 September 2011.

<sup>18</sup> The State party notes that the Coordination Committee is composed of the chair of the Refugee Appeals Board (a High Court judge), a member serving with the General Administration Department of the Ministry of Immigration and Integration and a lawyer appointed by the Council of the Danish Bar and Law Society. The Coordination Committee is appointed, inter alia, to discuss general guidelines concerning the work of the Refugee Appeals Board.

<sup>19</sup> The State party cites the European Court of Human Rights, *Emily Collins and Ashley Akaziebie v. Sweden* (application No. 23944/05), decision of 8 March 2007, *Sow v. Belgium* (application No.

assessment in cases concerning female genital mutilation is whether the family can ensure that their child will not be subjected to the practice. Thus, the Coordination Committee decided to apply the legal standard set forth by the European Court of Human Rights to cases concerning female genital mutilation. The Refugee Appeals Board has since assessed such cases, including the present case, in accordance with the case law of the European Court of Human Rights.

6.3 The State party submits that the information provided in the author's comments of 24 January 2020 regarding her education, employment and circumstances upon her return have already been assessed by the Refugee Appeals Board. The State party reiterates that the Board could not find as facts the author's claims that she was to be considered as a single mother without any male network in Somalia and that the decision regarding female genital mutilation ultimately lay with the mother. The State party notes that, according to the available background information, those who have been exposed to Western ideas and concepts are perceived to be more able to withstand social pressure.<sup>20</sup> As concerns Ceel Buur not being a "big city", the State party clarifies that, in its observations of 1 November 2019, it merely stated that Ceel Buur is not a rural area and that it is a town with an estimated population of almost 80,000. The State party also notes that, having resided in Ceel Buur between 1988 and 2013, the author has demonstrated her ability to make a living there.

### **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 20 of its rules of procedure, whether the claim is admissible under the Optional Protocol.

7.2 The Committee notes the author's uncontested statement that decisions taken by the Danish Refugee Appeals Board are not subject to appeal and that therefore all domestic remedies have been exhausted. The Committee also notes the State party's argument, uncontested by the author, that the Immigration Appeals Board's decision of 11 March 2019 confirming the Danish Immigration Service's decision to revoke the residence permits of the author's children can be appealed and that this part of the communication should therefore be declared inadmissible. The Committee notes, however, that in reviewing the Immigration Service's decision to revoke the permits granted on the basis of family reunification, the Immigration Appeals Board assessed only whether the author's children had developed special ties with Denmark and whether there were any other personal circumstances, including health-related, that would make the revocation especially burdensome. It also notes that, in reaching this decision, the risk of female genital mutilation was not discussed and that the Immigration Appeals Board explicitly stated that the general conditions in Somalia should be addressed under the asylum procedure, and did not form part of its assessment. Thus, the Committee considers that an appeal against the Immigration Appeals Board's decision would not have been an effective remedy within the meaning of article 7 (e) of the Optional Protocol as it would not have examined the author's claims presented to the Committee, namely, that Y.A.M. would face the risk of being subjected to female genital mutilation if she were to return to Somalia. The fact that the decision reached by the Immigration Appeals Board was appealable does not therefore preclude the Committee from examining the author's claims based on articles 3 and 19 of the Convention that her daughter runs a risk of being subjected to female genital mutilation, for which domestic remedies have been exhausted. Therefore, the Committee considers that there is no obstacle to the admissibility of the communication under article 7 (e) of the Optional Protocol.

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27081/13), judgment of 19 January 2016, and *R.B.A.B. and others v. The Netherlands* (application No. 7211/06), judgment of 7 June 2016.

<sup>20</sup> United Kingdom of Great Britain and Northern Ireland, Home Office, "Somalia: women fearing gender-based harm and violence" (2016), p. 24. Available at [www.justice.gov/sites/default/files/pages/attachments/2016/08/04/uk\\_somalia\\_women\\_fearing\\_082016.pdf](http://www.justice.gov/sites/default/files/pages/attachments/2016/08/04/uk_somalia_women_fearing_082016.pdf). See also Danish Immigration Service, "Thematic paper: south central Somalia – female genital mutilation/cutting", p. 24.

7.3 The Committee takes note of the State party's argument that the author has not sufficiently substantiated her claim that her daughter would be at risk of being subjected to female genital mutilation if she were deported to Somalia. However, the Committee considers that, in the light of the author's allegations regarding the prevalence of female genital mutilation in Somalia and the circumstances under which she would be returned, as a single mother, the author's claims based on articles 3 and 19 of the Convention have been sufficiently substantiated for the purposes of admissibility.

7.4 The Committee therefore declares admissible the author's claims concerning the obligation of the State party to: (a) act in the best interests of the child; and (b) take measures to protect the child from all forms of physical or mental violence, injury or abuse, and proceeds to their examination on the merits.

#### *Consideration of the merits*

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

8.2 The Committee takes note of the author's allegations that her daughter'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 the best interests of the child into account when deciding on the author's asylum application, in violation of articles 3 and 19 of the Convention.

8.3 In that respect, the Committee recalls its general comment No. 6 (2005), according to which States shall not 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. The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner (para. 27).<sup>21</sup> In that sense, 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 UNHCR in exercising its supervisory functions under the Convention relating to the Status of Refugees. In particular, the refugee definition in that Convention must be interpreted in an age- and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin, underage recruitment, 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 that may justify the granting of refugee status if such acts are related to one of the grounds in the Convention relating to the Status of Refugees. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures (para. 74).

8.4 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 may have various immediate and/or long-term health consequences (para. 19). They recommended that States should ensure that legislation and policies relating to immigration and asylum recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum, and that consideration should also be given, on a case-by-case basis, to providing protection to a relative who might be accompanying the girl or woman (para. 55 (m)). The Committee on the Rights of the Child notes that other treaty bodies have considered that subjecting a woman or a girl to female genital mutilation amounts

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<sup>21</sup> See also Committee on the Elimination of Discrimination against Women, general recommendation No. 32 (2014), para. 25.



to torture or cruel, inhuman or degrading treatment.<sup>22</sup> However, in the present case the author has not raised this claim, either directly or in substance.

8.5 In the present case, the Committee takes note of the author's allegation that, as a single mother, she would be unable to protect her daughter from being subjected to female genital mutilation in a country where 98 per cent of women have been subjected to that practice despite it being prohibited by law, as the law is not enforced. The author has also argued that she was subjected to female genital mutilation herself; suffered oppression as a result of her secret marriage; and would be unable to receive any support from her close family upon return to Somalia. The Committee takes note of the State party's observation 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; that the author failed to explain the specific risk that her daughter would run; that, as both parents are opposed to female genital mutilation and the author will not be returning to a rural area where she may be heavily dependent on the surrounding community, it must be assumed that she would be able to resist social pressure and protect her daughter from being subjected to female genital mutilation; and that the author's general credibility was undermined by the fact that she was not deemed credible regarding her own grounds for asylum, namely the alleged conflict with her Al-Shabaab uncle and her four-year imprisonment, and that she knowingly provided false information to the domestic authorities regarding her husband. The Committee also notes the State party's claim that the incidence of female genital mutilation has declined in Somalia.<sup>23</sup>

8.6 The Committee notes that the prevalence of female genital mutilation appears to have declined in Somalia, as a result of, inter alia, its prohibition under the 2012 Constitution<sup>24</sup> and the 2014 policy against the practice. However, the Committee notes that, according to reports submitted by the parties,<sup>25</sup> the practice is still deeply engrained in Somali society.

8.7 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 should ensure – within a procedure with proper safeguards – that the child will be safe and provided with proper care and enjoyment of rights.<sup>26</sup> In the present case, the Committee notes the arguments and information submitted to it, including the assessment of the mother's assumed ability to resist social pressure based on her 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 a general reference to a report on central and southern Somalia, without assessing the specific and personal context in which the author and her daughter would be deported and without taking the best interests of the child into account and the fact that the author would not have a male support network in Somalia, considering that her husband does not currently reside with the author and her children;

(b) The State party has argued that, as the author and her husband clearly oppose female genital mutilation and the author is not returning to a rural area where she may be dependent on the surrounding community, she would be able to resist social pressure and thus protect her daughter from being subjected to female genital mutilation. However, the Committee notes that the father's position regarding female genital mutilation alleged by the

<sup>22</sup> *Kaba and Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; *F.B. v. Netherlands* (CAT/C/56/D/613/2014), para. 8.7; and *M.N.N. v. Denmark* (CEDAW/C/55/D/33/2011), para. 8.8.

<sup>23</sup> See Danish Immigration Service, "Country of origin information: FGM/Kvindelig omskæring" (January 2019).

<sup>24</sup> Danish Immigration Service, "Thematic paper: south central Somalia – female genital mutilation/cutting", p. 7.

<sup>25</sup> See, in particular, United Kingdom, Home Office, "Somalia: women fearing gender-based harm and violence", and United States Department of State, "Somalia 2016 human rights report", both of which indicate that the practice of female genital mutilation remains almost universal in Somalia.

<sup>26</sup> 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.

State party seems irrelevant in the present case, in the light of the uncontested information provided by the author that her husband currently resides in the United States of America and is not returning to Somalia with the author and her children. As to the State party's reliance on the author's ability to resist social pressure, the Committee considers that the rights of the child under article 19 of the Convention cannot be made dependent on the mother's ability to resist family and social pressure, especially in the light of the general 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. 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 notes that this interpretation cannot exempt the State party from complying with its obligations under the Convention as interpreted by the Committee; neither can this interpretation justify non-compliance with the Committee's Views under the Optional Protocol;

(c) The evaluation of the risk that a child may be subjected to the irreversible harmful practice of female genital mutilation in the country to which the child is being deported should be carried out following the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against that practice, States parties should refrain from deporting the child.<sup>27</sup>

8.8 The Committee therefore concludes that, when assessing the alleged risk of the author's daughter being subjected to female genital mutilation if she were deported to Somalia, the State party failed to consider the best interests of the child and to take proper safeguards to ensure the child's well-being upon return. The Committee therefore concludes that the return of the author's daughter to Somalia would amount to a violation of articles 3 and 19 of the Convention.

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

9. The State party is under an obligation to refrain from deporting the author's daughter to Somalia and to ensure that she is not separated from her mother and her brother.<sup>28</sup> The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In that 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 a ground for non-refoulement, the specific circumstances in which the children would be returned are duly taken into account.

10. In accordance with article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the measures it has 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 disseminate them widely.

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<sup>27</sup> *Kaba and Kaba v. Canada*, para. 10.1; and *F.B. v. Netherlands*, para. 8.7.

<sup>28</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) on harmful practices, para. 55 (m).

## Annex

[Original: Spanish]

### **Individual opinion of Committee member Luis Pedernera Reyna (partially dissenting)**

1. I am compelled to take issue with the Committee's decision not to find a violation of article 37 of the Convention. I have the following reasons for my dissenting opinion:

(a) In its Views, the Committee states that the victim could be subjected to female genital mutilation if she were deported to Somalia and that such mutilation may amount to torture, statements that are in line with positions taken by the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, as noted in paragraph 8.4 above. The Committee on the Rights of the Child, however, arguing that in the present case the author has not raised a claim under article 37, either directly or in substance, does not invoke article 37 in its Views. I take issue with the Committee's decision not to invoke that article in its Views;

(b) The Committee, within the framework of its competence under the Optional Protocol, is to be guided, as stated in rule 1 of its rules of procedure under the Optional Protocol, by the principle of the best interests of the child. 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;

(c) The Optional Protocol does not require that authors of communications transmitted 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 (whose development is ongoing) require it to be a source of enhanced protection, it must play an educational and steering role vis-à-vis children, who are not well versed in the law or practitioners of law;

(d) In the context of the alleged facts, and following the legal principle that the court knows 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 in its actions, which are informed by the view that children transition gradually to adulthood, the best interests of the child must be a primary consideration;

(e) There is another crucial point: the facts that the Committee has been apprised of strongly suggest that the daughter of the author of the communication could be subjected to genital mutilation. Although genital mutilation is prohibited in Somalia, it is still a widespread cultural practice – 98 per cent of girls are 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 seat of judgment;

(f) Lastly, I wish to underscore the particular status of the prohibition of torture as a norm from which there is, as recognized by the international community, no possible derogation, a status that, in my view, heightens the need for the Committee to act on its own initiative to prevent and condemn torture.

2. I express my partially dissenting opinion, as I believe that for the reasons set out above, the Committee is in a position to find that article 37 of the Convention was violated, even though there was no explicit claim of such a violation in the communication submitted by the author.