



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2734/2016\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Fahmo Mohamud Hussein (represented by counsel, initially the Danish Refugee Council and subsequently Marie Louise Frederiksen)
<i>Alleged victims:</i>	The author and her son
<i>State party:</i>	Denmark
<i>Date of communication:</i>	15 February 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 18 February 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	18 October 2018
<i>Subject matter:</i>	Deportation to Italy
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Risk of torture, cruel, inhuman or degrading treatment or punishment
<i>Article of the Covenant:</i>	7
<i>Article of the Optional Protocol:</i>	2

1.1 The author of the communication is Fahmo Mohamud Hussein, born on 7 November 1991. She presents the communication on her own behalf and on behalf of her son, X, born on 27 November 2015. The author is a national of Somalia seeking asylum in Denmark and subject to deportation to Italy following the Danish authorities' rejection of her asylum application on the grounds that she already had a residence permit in Italy. The author claims that, by forcibly deporting her and her child to Italy, Denmark would violate their rights under article 7 of the Covenant. The Optional Protocol entered into force for Denmark on 23 March 1976. The author is represented by counsel.

\* Adopted by the Committee at its 124th session (8 October–2 November 2018).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas B. Zimmermann.

\*\*\* Individual opinions (dissenting) by Committee members Tania María Abdo Rocholl, Olivier de Frouville and José Manuel Santos Pais are annexed to the present Views.



1.2 On 18 February 2016, pursuant to rule 92 of its rules of procedure, the Committee, acting through its the Special Rapporteur on new communications and interim measures, requested the State party to refrain from deporting the author and her child to Italy while their case was under consideration by the Committee. On 8 December 2017, the Special Rapporteur decided to deny the State party's request to lift interim measures.

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

2.1 The author fled Somalia in 2008 and applied for asylum upon arrival in Lampedusa, Italy, on 23 August 2008. She was transferred to an asylum centre, where she stayed for approximately one year while her asylum application was being processed. In 2009, the author was granted subsidiary protection by the Italian authorities and issued a residence permit valid for three years. The residence permit expired in 2012, but was renewed until 9 April 2015.

2.2 When the author received the residence permit, she was informed by the staff that she could no longer stay at the reception centre. She was only 17 years old. For a long period of time, she spent the night at a "help centre" shelter, where she could stay if they had a place for her. If she arrived too late or there was no more room, she had to sleep on the streets. The author actively sought help from the Italian authorities and tried to find a job, without success.<sup>1</sup> She was therefore completely dependent on the help of the volunteers at the help centre and the one meal a day she received there.

2.3 The author was allegedly harassed by young people in the street.<sup>2</sup> She also witnessed how other young women were attacked if they tried to defend themselves against such harassment and slurs. Although she lived for several years in Italy, the author's situation was in no way sustainable. In the absence of a long-term solution, she decided to leave for Denmark in 2015 when she discovered that she had family living there.

2.4 The author entered Denmark on 7 June 2015 and applied for asylum three days later. She was already pregnant when she arrived in Denmark, and on 27 November 2015 she gave birth to a boy.<sup>3</sup> The author's mother, father and six siblings all have residence permits in Denmark. They have all been a great support to the author in Denmark and help her in taking care of her child.

2.5 On 22 December 2015, the Danish Immigration Service dismissed the author's asylum application because she had a residence permit in Italy. On 11 February 2016, the Danish Refugee Appeals Board upheld that decision.

### **The complaint**

3.1 The author submits that, by forcibly returning her and her child to Italy, the Danish authorities would violate her and her son's rights under article 7 of the Covenant. She fears that, upon return to Italy she will end up alone with her son, which will be extremely difficult to manage. She does not know how she will be able to provide for her son when she is not even able to provide for herself. She will face even harder challenges than the first time, because she now has a child to support. Her residence permit has expired and her son is not registered in Italy because he was born in Denmark. Based on her experience, it will be even harder for her to have access to support from the Italian authorities.

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<sup>1</sup> No further information was provided by the author in relation to this statement.

<sup>2</sup> They allegedly told her "Why don't you go back home, you monkey" or threw soda cans at her when they passed by her on their motorcycles.

<sup>3</sup> The author submits that she does not have a good relationship with the father of her son – who is still in Italy – because he does not want to assume the role of father. He feels that he is not able to live up to his responsibilities, as he cannot provide for the family. He does not have a job or a home. Sometimes he sleeps in a shelter, other times on the streets and, whenever possible, he stays with someone he knows. In her asylum screening interview of 23 July 2015, the author declared that she had been married to the father of her son since 17 December 2014. Her spouse was also from Mogadishu, but they met in Italy, as they were living in the same neighbourhood. The interview minutes also mention that the author had regular telephone contact with her spouse.

3.2 Since she was told to leave the Italian reception facilities in 2009, the author has not been able to find housing, work or any durable humanitarian solution in Italy. The Executive Committee of the Programme of the United Nations High Commissioner for Refugees, in its conclusion No. 58 (XL), stated that the principle of first country of asylum should be applied only if the applicant is permitted to remain there upon return and is treated in accordance with recognized basic human standards until a durable solution is found (A/44/12/Add.1, para. 25). Reception conditions in Italy and basic human standards for refugees with valid or expired residence permits do not comply with international obligations of protection.<sup>4</sup> It is stated in a number of reports that international protection seekers returning to Italy who had already been granted a form of protection and benefited from the reception system when they were in Italy are not entitled to accommodation in the reception facilities in Italy.<sup>5</sup> There is also no statutory procedure for identifying vulnerable persons – either in the Italian reception system or in the asylum system – and asylum seekers in Italy experience severe difficulties in gaining access to health services.<sup>6</sup>

3.3 In its general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the Committee held that it is the duty of the State party to afford everyone protection against the acts prohibited by article 7 of the Covenant, and that they must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement. The European Court of Human Rights, in particular in its judgment in *M.S.S. v. Belgium and Greece*,<sup>7</sup> considered that it was the responsibility of the Belgian authorities not to merely assume that the applicant would be treated in conformity with the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in the first country of asylum – Greece – but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks faced by the applicant were real and individual enough to fall within the scope of article 3 of the European Convention.

3.4 In its inadmissibility decision in the case of *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*,<sup>8</sup> the European Court of Human Rights stated that the return of the applicant, a single Somali woman with two children, from the Netherlands to Italy would not amount to a violation of article 3 of the European Convention on Human Rights. However, the Court noted that the Netherlands authorities would give prior notice to their Italian counterparts of the transfer of the applicant and her children, thus allowing the Italian authorities to prepare for their arrival. The Court further noted that the applicant, as a single mother of two small children, remained eligible for special consideration as a vulnerable person with regard to admission to reception facilities for asylum seekers.<sup>9</sup> In *Tarakhel v. Switzerland*,<sup>10</sup> the European Court of Human Rights found that if the family in

<sup>4</sup> The author refers to Swiss Refugee Council, *Reception Conditions in Italy: Report on the Current Situation of Asylum Seekers and Beneficiaries of Protection, in Particular Dublin Returnees* (Bern, October 2013); Asylum Information Database, *National Country Report: Italy* (May 2013); and Council of Europe, “Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 3 to 6 July 2012”, 18 September 2012 (CommDH(2012)26).

<sup>5</sup> European Council on Refugees and Exiles, *Dublin II Regulation: National Report –Italy*, European network for technical cooperation on the application of the Dublin II Regulation (19 December 2012); Asylum Information Database, *Italy* (May 2013), p. 37; United States Department of State, “Italy 2014 Human Rights Report”, Country Reports on Human Rights Practices for 2014; Swiss Refugee Council, *Reception conditions in Italy* (October 2013), pp. 4–5; and Jesuit Refugee Service Europe, *Protection Interrupted: The Dublin Regulation’s Impact on Asylum Seekers’ Protection* (Brussels, June 2013), pp. 152 and 161.

<sup>6</sup> The author cites Council of Europe, “Report by Nils Muižnieks”, paras. 143 and 160; Asylum Information Database, *Italy*, pp. 45–46; Office of the United Nations High Commissioner for Refugees (UNHCR), “UNHCR Recommendations on Important Aspects of Refugee Protection in Italy, July 2013”, p. 12; and Swiss Refugee Council, *Reception Conditions in Italy*.

<sup>7</sup> Application No. 30696/09, judgment of 21 January 2011, para. 359.

<sup>8</sup> Application No. 27725/10, judgment of 2 April 2013.

<sup>9</sup> *Ibid.*, para. 77.

<sup>10</sup> Application No. 29217/12, judgment of 4 November 2014, para. 119.

question was to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of, especially the children, there would be a violation of article 3 of the European Convention.

3.5 Therefore, if the author and her son were to return to Italy, they would be at a real risk of facing inhuman and degrading treatment contrary to the best interests of the child because, based on her previous experience and subsequent developments, they would be exposed to destitution and homelessness, with no prospect of finding a durable humanitarian solution. The author draws attention to her status as a single mother with a newborn child and recalls that she did not receive any assistance or support from the Italian authorities in securing basic needs such as food, housing or employment or in enabling her to integrate into Italian society.

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

4.1 On 18 August 2016, the State party submitted its observations on admissibility and the merits of the communication. It submits that the communication is not substantiated, as the author has not demonstrated any possible breach of the Covenant if she were deported to Italy.

4.2 The State party describes the structure, composition and functioning of the Danish Refugee Appeals Board<sup>11</sup> and the legislation applying to asylum proceedings in Italy.<sup>12</sup> Regarding the admissibility of the communication, the author has failed to establish a prima facie case for the purpose of admissibility under article 7 of the Covenant, in the absence of substantial grounds for believing that she is in danger of being subjected to inhuman or degrading treatment if she were deported to Italy.

4.3 Regarding the merits of the communication, the author has failed to establish that her return to Italy would constitute a violation of article 7 of the Covenant. According to the Committee's jurisprudence, States parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory where the necessary and foreseeable consequence of the deportation would be a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, whether in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.<sup>13</sup>

4.4 The State party recalls that it cannot be required that asylum seekers will be provided with exactly the same social living standards as the country's own nationals. The core of the protection concept is that the persons must enjoy personal safety both when they enter and when they stay in the first country of asylum. Moreover, it follows from both the jurisprudence of the Committee and the case law of the European Court of Human Rights that conditions in Italy are not generally of such a nature that it would be contrary to article 7 of the Covenant to deport individuals to Italy pursuant to the principle of the country of first asylum.

4.5 The author claimed that, upon her return to Italy, she and her son will not have access to accommodation and will consequently be faced with homelessness and destitution. This submission has not been specifically substantiated or rendered probable and is also inconsistent with the background information available on living conditions of recognized refugees in Italy,<sup>14</sup> as well as with the author's own experience. After assessing the relevant background material on Italy, the Danish Refugee Appeals Board found that the general socioeconomic conditions of refugees granted residence could not independently lead to the conclusion that the author could not be returned to Italy as her country of first asylum.

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<sup>11</sup> *Obah Hussein Ahmed v. Denmark* (CCPR/C/117/D/2379/2014), paras. 4.1–4.3.

<sup>12</sup> Sections 7 (1)–(3) and 31 (1)–(2) of the Aliens Act.

<sup>13</sup> *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

<sup>14</sup> Including material published by UNHCR, the Asylum Information Database and the Swiss Refugee Council.

4.6 The background information invoked by the author<sup>15</sup> does not contain any new information on the general conditions in Italy for persons already granted residence that was not available to the European Court of Human Rights when it ruled in *Samsam Mohammed Hussein and Others* that the return to Italy of the applicants in that case would not amount to treatment proscribed by article 3 of the European Convention on Human Rights. Moreover, the author relies primarily on reports and other background material relating to reception conditions in Italy that were relevant to asylum seekers, including returnees under Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), and not to persons – like herself – who had already been granted subsidiary protection.<sup>16</sup>

4.7 With regard to the author's material and social conditions during her stay in Italy from 2008 to 2015, the report of the asylum screening interview conducted by the Danish Immigration Service on 23 July 2015 reveals that the author stayed partially at reception centres and partially at a help centre in Cartegna. She had a job during some periods of her stay, her residence permit was renewed at least once and she received medical treatment. She also had no problems with the authorities, nor with private individuals or groups during her stay in Italy.

4.8 Regarding the author's reference to the decision of the European Court of Human Rights in *Samsam Mohammed Hussein and Others*, in that ruling, the Court reiterated that the mere return to a country where one's economic position would be worse than in the expelling State party was not sufficient to meet the threshold of ill-treatment proscribed by article 3 of the European Convention on Human Rights. It stated that article 3 could not be interpreted as obliging States parties to provide everyone within their jurisdiction with a home, and that it did not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.<sup>17</sup> Moreover, the Court indicated that, in the absence of exceptionally compelling humanitarian grounds against removal, the fact that the applicant's material and social living conditions would be significantly reduced if he or she were to be removed from the contracting State was not sufficient in itself to give rise to a breach of article 3.<sup>18</sup> Furthermore, it cannot be inferred from the judgment of the Court in *Tarakhel v. Switzerland*, which concerned a family with the status of asylum seekers in Italy, that States are required to obtain individual guarantees from the Italian authorities before deporting individuals or families in need of protection who have already been granted residence in Italy.

4.9 The Danish authorities consulted the Italian authorities in the summer of 2015 about the possibility for asylum seekers to enter Italy as their country of first asylum if their residence permits had lapsed. The Italian authorities confirmed that an alien with a residence permit for Italy who was recognized as a refugee or had protection status could apply for a renewal of the residence permit upon re-entry into Italy, even after the expiry of the residence permit. An alien whose residence permit had expired could also lawfully enter Italy for the purpose of having his or her residence permit renewed. However, during the asylum screening interview of 23 July 2015, the author had declared that she considered it a bothersome process to renew her residence permit because she had to go to the immigration office and queue up for a long time. When the author was asked why she had not had her most recent Italian residence permit renewed, she replied that she should have applied for a new residence permit on 6 July 2015, but she had other plans for that day. The European Court of Human Rights has also ruled on several occasions that Italy can serve as the

<sup>15</sup> In particular the Swiss Refugee Council report of October 2013 and the June 2015 report published by the United States Department of State.

<sup>16</sup> The report published in December 2012 by the European Council on Refugees and Exiles, the Asylum Information Database report of May 2013 and the June 2013 report published by the Jesuit Refugee Service Europe.

<sup>17</sup> *Samsam Mohammed Hussein and Others*, para. 70.

<sup>18</sup> *Ibid.*, para. 71.

country of first asylum for persons whose residence permits have expired and for persons with children.<sup>19</sup>

4.10 The Danish Refugee Appeals Board also found that the circumstance that the author's son had not been registered in Italy because he was born in Denmark could not lead to a different evaluation of her case. There was no basis for assuming that it would not be possible for the author to have her son registered in Italy. The author herself declared at the asylum screening interview that her pregnancy had been confirmed by a general practitioner in Italy, for which reason it must be assumed that it was not unknown to the Italian authorities that the author was about to give birth to a child.

4.11 Based on background information on Italy available to the Danish Refugee Appeals Board and the information provided by the author to the Danish Immigration Service, the State party contests the author's allegations that she had not received assistance or support from the Italian authorities in securing basic needs like food, employment or housing following the receipt of her residence permit. An update of December 2015 of the Asylum Information Database country report on Italy, to which the author made reference in her complaint (para. 3.2), indicates that refugees and aliens granted subsidiary protection – as in the author's case – have the same right to medical treatment as Italian nationals.<sup>20</sup> It also appears that asylum seekers and beneficiaries of international protection benefit from free health services on the basis of a self-declaration of destitution. It further appears that the right to medical assistance is acquired at the moment of the registration of the asylum request, and that this right remains applicable even while the residence permit is being renewed. This background information is confirmed by the author's own information on her stay in Italy, given that she declared at the asylum screening interview that she had braces fixed to her teeth while in Italy, free of charge, through the public dental health service. She also declared that she was in good health, did not suffer from any chronic diseases and had not received treatment for any diseases during her stay in Italy. However, she mentioned that she had received medical assistance in connection with her pregnancy.

4.12 With regard to the integration of the author in Italian society, she stated during her screening interview that she had completed elementary school following one year of study in Italy and had subsequently studied for one year at a hotel management school there. Concerning the author's fear of living on the streets, she mentioned during that interview that she had registered with a help centre in Cartegna, where it was possible to stay from 7 p.m. until 7 a.m. the following day. She also declared that she imagined that it would have been difficult for her to find other accommodation if she failed to arrive at the help centre by 7 p.m. In her communication to the Committee, the author also referred to the harassment experienced in the street, but during the screening interview she stated that she had had no conflicts with the Italian authorities, private individuals or groups during her stay in Italy.

4.13 With regard to the author's assumption that she and her newborn son are in a vulnerable situation, the State party observes that being a beneficiary of subsidiary protection in Italy gives the author the option to look for work to make a living and support herself and her son. While the author mentioned in her communication to the Committee that she had applied for jobs in vain in Italy, she declared at the asylum screening interview that she had worked for an elderly lady for four months, until that person passed away. She also cannot be considered to be a single mother because, according to her own statement, she is married and her husband, who is also the father of her son, is still in Italy. Moreover, according to her communication to the Committee, she had established contact with and received support from local relief organizations. The author also stated to the Danish Immigration Service that the reason why she chose to leave Italy after having stayed in the country for several years was that she had learned that she had family members living in Denmark. For the State party, the circumstance that some of the author's family members

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<sup>19</sup> In addition to *Samsam Mohammed Hussein and Others*, the State party also refers to the Court's inadmissibility decision in *A.T.H. v. the Netherlands* (application No. 54000/11), judgment of 17 November 2015.

<sup>20</sup> Pp. 82–85. Available from <https://www.asylumineurope.org/reports/country/italy>.

are living in Denmark cannot lead to the conclusion that she risks being subjected to ill-treatment in Italy, contrary to article 7 of the Covenant.

4.14 In conclusion, Italy can serve as the country of first asylum for the author and her child and, accordingly, their deportation to Italy would not entail a violation of article 7 of the Covenant. The communication has not brought to light any new, specific information about the author's situation. Her allegations that she has been subjected to harassment and that she fears becoming homeless and not being able to receive assistance from the Italian authorities are unsubstantiated. Such a fear is not supported by her prior experience in Italy nor by background information. In addition, according to the Committee's established jurisprudence,<sup>21</sup> considerable weight should be given to the assessment conducted by the State party unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.

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

5.1 In her comments of 12 October 2016, the author maintains that her return to Italy with her minor son would constitute a breach of article 7 of the Covenant and submits that the State party has failed to provide sufficient grounds to demonstrate that the communication is manifestly ill-founded. According to the UNHCR position on the standard of proof, "the decision-maker needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, there is a 'reasonable likelihood' that the claimant has a well-founded fear of persecution."<sup>22</sup> That view was later adopted by other international organs, most recently by the Committee on the Elimination of Discrimination against Women, which held in its general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women (para. 50 (g)) that the threshold for accepting asylum applications should be measured not against the probability but against the reasonable likelihood that the claimant had a well-founded fear of persecution or that she would be exposed to persecution on return.

5.2 The Danish Refugee Appeals Board has failed to assess whether the author's child can be registered in Italy and if the Italian authorities know about him. It has also not sufficiently substantiated whether the author and her minor son can enter lawfully and take up lawful residence in Italy. She emphasizes that her stay in Italy was insecure and inconsistent. She was only offered accommodation from 2008 to 2009, when she was 17 years old and an asylum seeker. After being granted a residence permit, she was asked to leave the centre. The work she performed in Italy was illegal and offered to her by the Somali network to which she no longer has a connection. She stayed at shelters that were open only from 7 p.m. to 7 a.m. and she was never offered any help by the authorities. If she goes back to Italy, she will be more vulnerable with her minor son. Those shelters are not suitable for a small child, and the State party has not sufficiently proved that they will not be faced with homelessness and destitution upon return.

5.3 In the author's case, it is not a question of the author's material and social conditions being reduced, but simply a question of access to a minimum standard of living conditions. The Committee also stressed in *Jasin v. Denmark* that States parties should give sufficient weight to the real and personal risk a person might face if deported rather than rely on general reports and on the assumption that, as the author benefited from subsidiary protection in the past, she would, in principle, be entitled to work and receive social benefits.<sup>23</sup> The State party should also have undertaken a necessary and individualized examination of the risks regarding registration of the author's son in Italy.

5.4 With regard to the fact that she has not renewed her residence permit, the author submits that every day struggled to find a job and housing. Whenever possible, she worked

<sup>21</sup> *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.3; *K. v. Denmark* (CCPR/C/114/D/2393/2014), paras. 7.4–7.5; *N. v. Denmark* (CCPR/C/114/D/2426/2014), para. 6.6; *Mr. X and Ms. X v. Denmark* (CCPR/C/112/D/2186/2012), para. 7.5; and *Z. v. Denmark* (CCPR/C/114/D/2329/2014), para. 7.4.

<sup>22</sup> UNHCR, *An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR, European Series*, vol. 1, No. 3, 1995/09 (Geneva, 1995), p. 87.

<sup>23</sup> CCPR/C/114/D/2360/2014, para. 8.9.

illegally as a cleaning lady. Thus money for food was more important to her than the renewal of a residence permit that had not helped her during her stay in Italy.

5.5 Concerning her previous experience in Italy, the author mentions that she had braces fitted to her teeth when she was 17 years old and only because her teacher helped her. This does not amount to a personal and general guarantee that she will receive the necessary medical treatment upon return. Moreover, the State party's assertion that she received medical treatment, was integrated into society and was eligible for housing only concerns her early years in Italy, when she was 17 years old and thus taken care of as a minor. It does not mean that she will receive the same assistance today, when the Italian asylum system is flooded due to a massive influx of refugees. This information is thus irrelevant.

5.6 With respect to her vulnerability, the author invokes the *Jasin* precedent to claim that the Danish authorities should have taken all circumstances into account instead of basing their decision on the assumption that, having lived in Italy for several years, the author is likely able to take care of herself and her son. The author has not had any contact with her husband, who has not shown any interest in her or in their son. Even if she does not wish to be married any longer, religious and cultural traditions prevent her from filing for divorce.

5.7 Finally, with regard to the State party's denial of her fear of becoming homeless and not being able to receive assistance from the Italian authorities, the author invokes the UNHCR position in the sense that "a fear must be well-founded, but this does not mean there must have been actual persecution".<sup>24</sup>

#### **Additional submission from the State party**

6.1 On 13 June 2018, the State party provided further observations to the Committee, generally referring to its observations of 18 August 2016.

6.2 While in a number of cases against Denmark the Committee has found that decisions of the Refugee Appeals Board in respect of the transfer of authors with minor children to Italy amounted to a violation of the Covenant,<sup>25</sup> those findings cannot lead to a different outcome in the present case. The case law of the Board and its assessment of the conditions of authors with minor children to be transferred to Italy are consistent with the case law of the European Court of Human Rights. Thus, according to its inadmissibility decision in *E.T. and N.T. v. Switzerland and Italy*,<sup>26</sup> the European Court of Human Rights does not require individual guarantees from the Italian authorities. The State party observes that the National Operational Aliens Centre (*Udlændingecenter Nordsjælland*) of the North Zealand Police (*Nordsjællands Politi*) will notify the Italian authorities of the deportation in advance and collaborate with the Italian authorities on the deportation of the author and her son. The European Court has previously approved this practice.<sup>27</sup>

6.3 In its observations of 18 August 2016, the State party addressed the issue of renewal of an expired residence permit. In its decision in *E.T. and N.T.*, the European Court of Human Rights considered that the fact that the second applicant was born outside of Italy was not a barrier to that person's removal to Italy. The Danish Refugee Appeals Board also took into account the author's previous experience in Italy. The author has thus not identified any procedural defects in the Board's decision.

6.4 The State party lastly refers to a recent judgment of the European Court of Human Rights, which recalled the general principle that it is for the domestic authorities to assess

<sup>24</sup> UNHCR, *An Overview of Protection Issues in Europe*, p. 87.

<sup>25</sup> *Jasin v. Denmark*; *Abdilaḥir Abubakar Ali and Mayul Ali Mohamad v. Denmark* (CCPR/C/116/D/2409/2014); *Y.A.A. and F.H.M. v. Denmark* (CCPR/C/119/D/2681/2015); *Raziyeh Rezaifar v. Denmark* (CCPR/C/119/D/2512/2014); and *Hibaq Said Hashi v. Denmark* (CCPR/C/120/D/2470/2014).

<sup>26</sup> Application No. 79480/13, judgment of 30 May 2017.

<sup>27</sup> See, e.g., European Court of Human Rights, *F.M. and Others v. Denmark* (application No. 20159/16), judgment of 13 September 2016.



the evidence before them.<sup>28</sup> In the present case, no new information has been adduced that was not available when the Refugee Appeals Board made its decision.

### **Author's comments on the State party's additional submission**

7. On 10 September 2018, the author reiterated her observations and referred to the Committee's Views cited by the State party (see para. 6.2), arguing that the State party's analysis of this jurisprudence was not thorough, and that it should rather be interpreted in her favour.

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

#### *Consideration of admissibility*

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

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

8.3 The Committee notes the author's claim that she has exhausted all effective domestic remedies available to her, and that the State party has not disputed this claim. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the present communication.

8.4 The Committee notes the State party's challenge to the admissibility of the communication on the grounds that the author's claim under article 7 of the Covenant is unsubstantiated. However, the Committee considers that, for the purpose of admissibility, the author has adequately explained the reasons for which she fears that her forcible return to Italy would result in a risk of treatment in violation of article 7 of the Covenant. As no other obstacles to admissibility exist, the Committee declares the communication admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

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

9.2 The Committee notes the author's claim that deporting her and her newborn child to Italy, pursuant to the Dublin III Regulation principle of first country of asylum, would expose them to a risk of irreparable harm, in violation of article 7 of the Covenant.

9.3 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (para. 12), in which it referred to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there were substantial grounds for believing that there was a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant. The Committee has also indicated that the risk must be personal<sup>29</sup> and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.<sup>30</sup> Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.<sup>31</sup> The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists,<sup>32</sup> unless it can be

<sup>28</sup> *X v. Sweden* (application No. 36417/16), judgment of 9 January 2018, paras. 47–51.

<sup>29</sup> *K. v. Denmark*, para. 7.3; *P.T. v. Denmark*, para. 7.2; and *X. v. Denmark*, para. 9.2.

<sup>30</sup> *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

<sup>31</sup> *Ibid.* See also, *X. v. Denmark*, para. 9.2.

<sup>32</sup> *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), paras. 11.2 and 11.4; and *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>33</sup>

9.4 The Committee notes the author's allegation that Italy granted her subsidiary protection in 2009, including a residence permit valid for three years, following which she was asked to leave the asylum centre, and that, despite having allegedly sought assistance from the local authorities, she did not receive any social or housing support and was left without shelter or means of subsistence. The Committee further notes the author's previous experience of an unsafe environment and violence, which appears to be typical of the living conditions of homeless asylum seekers in Italy.

9.5 Furthermore, the Committee notes that the author has relied on various reports on the general situation of asylum seekers and refugees in Italy that have highlighted the chronic lack of available places in the reception facilities for asylum seekers and beneficiaries of international protection. The Committee notes in particular the author's submission that returnees who, like herself, had already been granted a form of protection and benefited from the reception facilities when they first arrived in Italy are no longer entitled to accommodation in public reception centres for asylum seekers and face severe difficulties in gaining access to health services upon their return (para. 3.2).

9.6 The Committee also notes the finding of the Danish Refugee Appeals Board that Italy should be considered the first country of asylum in the present case. It further notes the position of the State party that a country of first asylum is obliged to treat asylum seekers in accordance with basic human rights standards, although it is not required that such persons have the same social and living standards as nationals of that country (para. 4.4). The Committee further notes the State party's submission that the prohibition of torture and inhuman or degrading treatment or punishment cannot be interpreted as obliging States parties to provide everyone within their jurisdiction with a home or as entailing any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.<sup>34</sup> The Committee finally notes the information submitted by the State party according to which refugees granted subsidiary protection have access to health-care services on the same terms as Italian nationals and benefit from free health services on the basis of a self-declaration of destitution.

9.7 The Committee recalls that, when reviewing challenges to decisions to remove individuals from their territory, States parties should give sufficient weight to the real and personal risk such individuals might face if deported.<sup>35</sup> In particular, any evaluation of whether individuals are likely to be exposed to conditions constituting cruel, inhuman or degrading treatment in violation of article 7 of the Covenant must be based not only on an assessment of the general conditions in the receiving country but also on the individual circumstances of the persons in question. Those circumstances include factors that increase the vulnerability of such persons and that could transform a situation that is tolerable for most into an intolerable one for others. They should also take into account, in cases considered under the Dublin III Regulation, the previous experiences of the individuals in the first country of asylum, which may underscore the special risks that they are likely to face if returned and may thus render their return to the first country of asylum a particularly traumatic experience for them.<sup>36</sup>

9.8 The Committee notes the information provided to the State party by the Italian authorities in 2015, according to which an alien who has been granted residency in Italy as a recognized refugee or who has been granted protection status may submit a request to renew his or her expired residence permit upon re-entry into Italy. The Committee further notes the author's claims, based on her personal circumstances, that despite being previously granted residency in Italy, she would face intolerable living conditions there. It also observes that, in her asylum screening interview of 23 July 2015, the author declared that she wanted to apply for asylum in Denmark rather than in Italy because her parents,

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<sup>33</sup> E.g., *K. v. Denmark*, para. 7.4.

<sup>34</sup> *Tarakhel v. Switzerland*, para. 95.

<sup>35</sup> E.g., *Pillai et al. v. Canada*, para. 11.4; and *Abdilaḥir Abubakar Ali and Mayul Ali Mohamad v. Denmark*, para. 7.8.

<sup>36</sup> E.g., *Y.A.A. and F.H.M. v. Denmark*, para. 7.7.

whom she had not seen for six years, were in Denmark and because she could not find a job in Italy.

9.9 The Committee observes that the material before it, as well as general information on the situation of refugees and asylum seekers in Italy, indicate that there may be a lack of available places in the reception facilities for asylum seekers and returnees and that these facilities are often in poor sanitary conditions. According to those sources, returnees like the author may not be entitled to accommodation in centres for asylum seekers as she had already benefited from the reception facilities when in Italy. Although beneficiaries of protection are generally entitled to work and enjoy social rights in Italy, the Committee observes that its social system is in general insufficient to attend to all persons in need. The Committee also observes that the Danish Refugee Appeals Board held that, during her previous stay in Italy the author was able to find work and accommodation for periods of time and had access to medical and educational services, and also that she was in good health. In addition, her husband, who is the child's father, lives in Italy. Furthermore, the Committee notes that the author has not explained why she would not be able to seek the protection of the Italian authorities should she be unable to find employment. Notwithstanding the fact that it is difficult in practice for refugees and beneficiaries of subsidiary protection to have access to the labour market or to housing, the author has failed to substantiate a real and personal risk if she returned to Italy. The fact that she may possibly be confronted with serious difficulties upon return by itself does not necessarily mean that she would be in a special situation of vulnerability – and in a situation significantly different to many other refugee families – such as to conclude that her return to Italy would constitute a violation of the State party's obligations under article 7 of the Covenant.<sup>37</sup>

9.10 Furthermore, the Committee finds that, although the author disagrees with the decision of the State party's authorities to return her to Italy as her country of first asylum, she has failed to explain why that decision is manifestly unreasonable or arbitrary, nor has she pointed out any procedural irregularities in the procedures before the Danish Immigration Service or the Refugee Appeals Board. Accordingly, the Committee cannot conclude that the removal of the author to Italy by the State party would constitute a violation of article 7 of the Covenant.

9.11 Without prejudice to the continuing responsibility of the State party to take into account the present situation of the country to which the author would be deported, in the light of the available information regarding the author's personal circumstances, the Committee considers that the information before it does not show that the author would face a personal and real risk of treatment contrary to article 7 of the Covenant if she were removed to Italy.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's removal to Italy would not violate her rights under article 7 of the Covenant. The Committee, however, is confident that the State party will duly inform the Italian authorities of the author's removal, in order for the author and her child to be kept together and to be taken charge of in a manner adapted to their needs, especially taking into account the age of the author's son.

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<sup>37</sup> *R.I.H. and S.M.D. v. Denmark* (CCPR/C/120/D/2640/2015), para. 8.6; and *B.M.I. and N.A.K. v. Denmark* (CCPR/C/118/D/2569/2015), para. 8.6.

## Annex I

### Individual opinion of José Manuel Santos Pais (dissenting)

1. I regret not being able to share the Committee's decision, according to which removal of the author and her son to Italy would not violate their rights under article 7 of the Covenant. Quite surprisingly, circumstances in this case are very similar to those of a recent communication, *Araya v. Denmark* (CCPR/C/123/D/2575/2015), in which the Committee concluded instead that there had been a violation of article 7.

2. The author, who fled Somalia and applied for asylum in Italy in 2008, presents the communication on her own behalf and on behalf of her son. Once she was granted subsidiary protection by the Italian authorities and issued a residence permit, the author was then informed that she could no longer stay at a reception centre. She was only 17 years old and therefore for a long period of time she slept in a "help centre" shelter, if a place was available. However, if she arrived too late or there was no more room, she had to sleep on the streets. For several years the author sought help from the Italian authorities and tried to find housing and a regular job, but without success. She therefore faced destitution and was completely dependent on the help of volunteers and the one meal she received at the help centre. She also experienced repeated harassment from young persons in the street. When in 2015 she learned that her family (mother, father and six siblings, all with residence permits) resided in Denmark, she left Italy for Denmark. She was pregnant when she arrived. Her son was born there in 2015.

3. The author's family has been a great support to her ever since and has helped her to take care of her baby. She has thus an all-encompassing and reliable family environment in Denmark. If, however, she were to be returned to Italy, the author would not benefit from such a family environment, given that her relationship with her husband, who lives in Italy, is not good, and that he does not want to assume the role of father of his newborn child.

4. Thus, if returned to Italy, the author and her son would face exceptional hardship, destitution and intolerable living conditions, similar to those the author had previously experienced in Italy, amounting to a real and personal risk of irreparable harm. There is indeed a real risk for the author of ending up on the streets or in precarious and unsafe conditions, particularly unsuitable for young children.

5. In the present case, Denmark has failed to adequately assess either the author's personal past experience in Italy, during which time she faced homelessness and destitution, or the foreseeable consequences of forcibly returning her there, and has not given due consideration to her particular and increased vulnerability as a single mother with a newborn child. It also failed to verify whether the author and her son would have effective access to financial, medical and social assistance, as well as being protected from risks to their personal safety. It would, however, be relevant to determine whether the author would actually be able to find accommodation and to provide for herself and her child in the absence of assistance from the Italian authorities. This information would be particularly relevant as she is a single parent who will have to look for a job as well as look after her child, given that the father has no resources and has not shown any interest in providing for them, has no home or job and often lives on the streets.

6. In particular, Denmark failed to seek effective assurances from the Italian authorities that the author and her son would be received in conditions compatible with their status as asylum seekers, entitled to temporary protection and guarantees under article 7 of the Covenant. It also did not request Italy to undertake: (a) to renew the author's residence permit, as part of her subsidiary protection, and to issue a permit to her child; or (b) to receive the author and her son in conditions suited to the child's age and the family's vulnerable status, enabling them to be kept together if they returned to Italy.

7. Most importantly the State party has failed to take into consideration the need to respect the right of the author's son, under article 24 of the Covenant, to adequate measures of protection, since he was born in Denmark and has several relatives residing there.

Returning the child to Italy, where he has never been, would not be in the child's best interests, which should be a primary consideration in all actions concerning children, in accordance with by article 3 of the Convention on the Rights of the Child, to which Denmark is a party.

8. Finally, Denmark has failed to consider the present general human rights and political situation in Italy, especially anti-immigration policies set up after the most recent general elections and the particularly difficult economic conditions that the country is facing within the European Union.

9. I would therefore have concluded that the State party has violated article 7 of the Covenant, since it failed to conduct a thorough and sufficient evaluation of whether the author and her son would be exposed to conditions constituting cruel, inhuman or degrading treatment if returned to Italy, thus rendering this return a particularly traumatic experience for them, especially for the child.

## Annex II

[Original: French]

### Individual opinion (dissenting) of Mr. Olivier de Frouville

1. These Views are in line with the now settled jurisprudence of the Human Rights Committee on the return, from one European Union country to another, of persons seeking refugee status or granted subsidiary protection. All such cases submitted to the Committee concern one State party: Denmark. In most cases, the country of return is Italy. The Committee has set out a number of principles applicable to these cases, based on its Views in the *Jasin v. Denmark* case, adopted on 22 July 2015.<sup>1</sup> These principles are accepted by most Committee members, but their application to specific cases still divides the members.

2. Consistent with its jurisprudence on removal from a territory, the Committee gives considerable weight to the assessment by the national authorities of a real and personal risk of harm as envisaged in articles 6 and 7 of the Covenant. The Committee considers that it is generally for the organs of the State to evaluate the facts and evidence in order to determine whether such a risk exists, unless that evaluation is clearly arbitrary or constitutes a denial of justice.

3. In addition, the Committee has identified four factors for such evaluations. The first factor relates to the situation in the country of return as regards the shelter and assistance given to asylum seekers and persons granted subsidiary protection. The second factor relates to such persons' previous experience in the country of return and, consequently, the treatment they can expect to receive upon returning to the country. The third factor relates to the author's degree of vulnerability at the time of the Committee's assessment of the communication; this takes account of any responsibility the author may have for minor children, whose best interests must be given due consideration in the decision. The fourth and last factor is whether or not the State party has sought assurances from the receiving State that the persons concerned will be taken care of in conditions that are compatible with their situation, and also, where the authors are accompanied by minor children, that they will be received in conditions appropriate to the age of the children and the family's vulnerability, without exposing them to the risk of indirect refoulement.

4. In cases where the Committee concludes that the assessment by the national authorities is clearly arbitrary, it finds that there would be a violation if the State were to return the authors without seeking the assurances specified by the Committee in the grounds for its Views. In other words, the State could always avoid this potential violation by requesting tailor-made assurances that meet the conditions set by the Committee. Regrettably, it should be noted that Denmark has never made any such request in any of the cases referred to the Committee.

5. I believe that the Committee has not correctly applied its jurisprudence to this particular case. With regard to the conditions in the country, the Committee takes note of the various reports submitted by the author, and referred to in paragraph 3.2, which show that persons returning to Italy who have already received some form of protection are not entitled to accommodation in reception facilities and that there is no statutory procedure for identifying vulnerable persons. More recent reports show that there have been no improvements in this respect and that, on the contrary, systematic problems persist.<sup>2</sup> The author's previous experience is, unfortunately, comparable to that in other cases that the Committee has had to consider: on receipt of her residence permit, the author was informed that she could no longer remain in the reception facilities, even though she was still a minor. Between 2009 and 2015, therefore, she was in an extremely vulnerable position, sleeping rough or in shelters and occasionally working illegally. On a personal level, the author

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<sup>1</sup> *Jasin v. Denmark* (CCPR/C/114/D/2360/2014).

<sup>2</sup> See, inter alia, the Swiss Refugee Council (OSAR) and the Danish Refugee Council, "Is mutual trust enough? The situation of persons with special reception needs upon return to Italy", 9 February 2017.

would be particularly vulnerable if she were to return to Italy, as a lone mother of a young child born in Denmark, while the rest of her family is legally resident in that country (para. 2.4). The author clearly explained that she had no contact with her husband, who had remained in Italy, that he had not shown any interest in her or in their son and that only the weight of tradition prevented her from filing for divorce (para. 5.6).

6. Finally, as regards the assurances, the State party cites two decisions by the European Court of Human Rights: *E.T. and N.T. v. Switzerland and Italy*,<sup>3</sup> from which it inferred that the Court would not require individual guarantees from the Italian authorities, despite the fact that, in that case, Italy submitted a letter guaranteeing the provision of care for the authors, which was duly noted by the Court; and *F.M. and others v. Denmark*,<sup>4</sup> which actually concerns the removal procedure in accordance with the Dublin III Regulation and is therefore not applicable to this case.

7. Ultimately, the national authorities' assessment did not satisfactorily take account of the personal circumstances of the author or her child as regards the general situation of persons granted subsidiary protection in Italy and the author's previous experience in the country. Their decision was, therefore, clearly arbitrary and the Committee is justified in finding a potential violation of article 7 in the event of a return without a request for assurances.

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<sup>3</sup> Application No. 79480/13, 30 May 2017.

<sup>4</sup> Application No. 20159/16, 13 September 2016.

## Annex III

[Original: Spanish]

### **Individual opinion (dissenting) of Tania María Abdo Rocholl**

1. The author, Fahmo Mohamud Hussein, arrived in Italy in 2008 from Somalia, her country of origin, and stayed in an asylum centre until 2009, when the Italian authorities granted her subsidiary protection and a residence permit valid until 2012, meaning she had to leave the reception centre. Her residence permit was subsequently extended to 2015. In all the time she was in Italy, the author was unable to maintain minimal decent living conditions or secure stable and legal employment. She survived on handouts and her situation was aggravated by occasional violent incidents.

2. It is important not to forget that the author submitted the communication not only on her own behalf, but also on behalf of her child. The child was born in Denmark in 2015, after the author had left Italy on learning that her family – her father, mother and six siblings – were residing legally in that country. Her family really supported her, taking her in and helping to take care of her child in a loving family environment, in contrast to the behaviour of the father in Italy, who never created a bond with his child. However, when her asylum application was examined, the authorities disregarded these circumstances.

3. Clearly, such events have led to uncertainty over the future of the author and her child, who, at the age of 3, has only ever known life in Denmark with all his family and who is in need of protective measures appropriate to his status, as required under article 24 of the Covenant. Furthermore, the child enjoys strengthened legal recognition as a subject of law in line with the Convention on the Rights of the Child. He is therefore entitled to protection distinct from that for adults, to ensure that his best interests are given precedence over other legitimate interests when making decisions and resolving conflicts.

4. Unfortunately, the child has been treated as an extension of the author's legal personality and not as a subject of law. The administrative decisions taken during the asylum process did not give priority to the best interests of the author's son, whereas any measures that might affect a child must take account of the possible repercussions, whether positive or negative, on the child.

5. The State party has failed to comply with the obligation not to extradite, deport, expel or otherwise remove a person from its territory where there are substantial grounds for believing that there is a real risk of irreparable harm, as set out in paragraph 12 of general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. Accordingly, the State party should have considered, among other circumstances, the general human rights situation in Italy. As it is, the State authorities failed to verify the vulnerable situation in which the author and the child would find themselves if they were to return to Italy.

6. Nor was due consideration given to the imminent uprooting of the mother and her son upon separation from their extended family, the difficulties they would face in the procedure for entering and taking up legal residence in Italy, their uncertain socioeconomic situation, or the negative impact on the development of the child's identity and personality. Crucially, no assessment was made of the Italian Government's current migration policy (protection of vulnerable migrants, humanitarian protection, expulsion criteria, criteria for staying in immigrant reception centres, and so on). It can thus be concluded that there are no minimum guarantees for the return to Italy of the author and her son.

7. It should be noted that the present communication is very similar to previous cases in which the Committee found that there had been a violation of article 7 of the Covenant. Nevertheless, while the Committee has exclusive authority to depart from its own jurisprudence, to do so in this case is, in my view, to set a worrying precedent to say the least.