



**Convention on the  
Rights of the Child**  
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**Committee on the Rights of the Child**

**Views adopted by the Committee on the Rights of the Child under the  
Optional Protocol to the Convention on the Rights of the Child on a  
communication 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
<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>Articles of the Optional Protocol:</i>	7 (e) and (f)

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\* 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 Jaffe, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Mikiko Otani, Luis Pedemera Reyna, Aissatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.



1.1 The author of the communication is R.H.M., a Somali national of the Hawiye clan, from Ceelbuur in the Galgaduud 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> She 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 Based on article 6 of the Optional Protocol, on 30 April 2019, the Working Group on Communications, acting on behalf of the Committee, requested that the State party refrain from returning the author and her daughter to their country of origin while their case was under consideration by the Committee. On 10 May 2019, the State party suspended the execution of the deportation order against the author and her daughter.

### **The 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. Also, the Immigration Service's decision to revoke the children's permits as a result of the revocation of their mother's permit was appealed to 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 as a result of the author's secret marriage 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 pay for the 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<sup>2</sup> were both against female genital mutilation, they would be able to oppose the social pressure to have their daughter undergo female genital mutilation. The author notes that, in this respect, the Board relied on the Immigration Service report on female genital mutilation in Somalia,<sup>3</sup> according to which mothers who were against the practice of female genital mutilation were able to prevent having their daughters undergo this practice.

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

<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> See Denmark, Ministry of Immigration, Integration and Housing, "South central Somalia: female genital mutilation/cutting: thematic paper — country of origin information for use in the asylum determination process" (January 2016). Available at <https://lifos.migrationsverket.se/dokument?documentAttachmentId=43509>. In the report, it is stated that "it is possible for women to avoid having their daughters subjected to the practice of FGM/C and 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 is also noted that "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".

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 European Convention on Human Rights.

### **The 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 against female genital mutilation in a country where 98% of women are subjected to this practice.<sup>4</sup> The author notes that the Refugee Appeals Board based its decision on the Danish Immigration Service report on female genital mutilation in Somalia (2016), 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 against the other women's will, then 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 practiced.<sup>6</sup> She adds that she herself was submitted to female genital mutilation. She also states that her husband currently resides in the United States of America and that it is unknown how he would react to the social pressure should he return to Somalia. She also notes that, in its letter dated 7 November 2016, UNHCR urged States to refrain from forcibly returning individuals to Southern and Central Somalia. The author also 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. Finally, 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 states 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 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

<sup>4</sup> See UNICEF report, "Female Genital Mutilation: Global Concern". Available at [https://www.unicef.org/media/files/FGMC\\_2016\\_brochure\\_final\\_UNICEF\\_SPREAD.pdf](https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf).

<sup>5</sup> See Denmark, Ministry of Immigration, Integration and Housing, "South central Somalia: female genital mutilation/cutting: thematic paper — country of origin information for use in the asylum determination process" (January 2016). In the report, it is stated 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> See U.S. Department of State, "Somalia Human Rights Report 2016", p. 32. Available at <https://www.state.gov/wp-content/uploads/2019/01/Somalia-1.pdf>.

<sup>7</sup> See *I.A.M. vs. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (c).

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 (paras. 11 and 29), including harmful practices such as female genital mutilation. Also, the Committee's general comment No. 6 (para. 27) provides that the Convention is violated only if the child to be returned will be exposed to a real risk of irreparable harm. In this respect, 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 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 Refugee Appeals 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 materials 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 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 statements about the conflict with her uncle and the four-year imprisonment to be highly unlikely and non-credible. Accordingly, the Board did not accept as a 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 Ceelbuur 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 (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. Finally, the State party argues that the author's communication to the Committee does not further 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 for mothers to prevent their daughters from being subjected to

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

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

female genital mutilation.<sup>10</sup> The State party states that female genital mutilation is 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 practice female genital mutilation since it is not in line with Sharia law.<sup>11</sup> The State party also submits that the attitude toward female genital mutilation is changing, and many women have successfully chosen not to have their daughters undergo female genital mutilation.<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 whether she has necessary commitment.<sup>13</sup> Also, the report suggests that women who are heavily dependent on their communities and thereby might not be the strong ones to refuse the practice, are primarily women living in rural areas.<sup>14</sup> In this respect, the State party notes that the author originates from Ceelbuur, a town in the central Somali state of Galmudug, 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 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 had been directly asked, more than once, whether she had any fears on behalf of her children. Despite repeated questions in this respect, the author had not mentioned female genital mutilation until she did before the Refugee Appeals Board on 8 March 2019.

4.9 As concerns the author's claim that the Board did not speak to the author's husband in order to know his opinion about 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> a decision about female genital mutilation is ultimately the mother's and that a child is most likely not 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 to the Convention in its decision, the State party contends that, notwithstanding the lack of explicit reference to the Convention, the Board takes the Convention as well as other international treaties into account as a crucial element in examining asylum applications involving children.

4.11 With regard to the UNCHR 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

<sup>10</sup> See Danish Immigration Service, "Country of Origin Information: FGM/Female circumcision - Background, numbers and tendencies" (January 2019); Danish Refugee Council, "Thematic Report: Somalia – The Security and Human Rights Situation in Al-Shabaab Controlled Areas" (July 2019); and Lifos, "Report: Somalia – Female circumcision" (April 2019).

<sup>11</sup> See Danish Refugee Council, "Thematic Report: Somalia – The Security and Human Rights Situation in Al-Shabaab Controlled Areas" (July 2019), p. 18.

<sup>12</sup> See Danish Immigration Service, "Country of Origin Information, FGM/Female circumcision - Background, numbers and tendencies" (January 2019), p. 9.

<sup>13</sup> See Denmark, Ministry of Immigration, Integration and Housing, "South central Somalia: female genital mutilation/cutting: thematic paper — country of origin information for use in the asylum determination process" (January 2016), p. 8.

<sup>14</sup> *Ibid.*, p. 9-10. It is stated that "the higher access to livelihood in urban centers may give women more independence from their community as compared to the rural areas, where women might be heavily dependent on their communities and therefore not strong enough to stand against the practice".

<sup>15</sup> According to the State party's observations of 1 November 2019 (p. 19), Lifos's report, "Female Genital Mutilation" (April 2019) 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".

Ceelbuur and found that it is not of such nature as to, 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 its comprehensive collection of background materials on Somalia, including the aforementioned letter.

4.12 Regarding the proceedings before the Immigration Appeals Board concerning the revocation of 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 preservation of the family unit when assessing the best interests of the child in immigration and family reunification cases.<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 sufficiently strong ties with the country so that the best interests of the child warrant that the child's residence permit should not be withdrawn. The Immigration Appeals Board's case law provides that, generally, children cannot be considered to have developed such sufficiently strong ties without at least 6 or 7 years of continuous and uninterrupted stay in Denmark, during which they have attended school or other childcare institutions.<sup>17</sup> However, the Board noted that, in the present case, the author's daughter had held a residence permit only for 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 solely based on family reunification with their mother who no longer held a valid permit.

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

5.1 In her comments dated 24 January 2020, the author alleges that, despite the Committee's Views adopted in *I.A.M. v. Denmark* (CRC/C/77/D/3/2016), the State party's authorities have maintained its practice in cases involving the risk of female genital mutilation and failed to apply the principle of precaution formulated by the Committee in that decision. As was the case in *I.A.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 the social pressure upon her return to Somalia, and claims that she has only had a little education at a local Koran school in Somalia and has never worked.

5.2 Regarding the State party's contention that Ceelbuur 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 completely depend on the community. In order to have 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 *I.A.M. v. Denmark*, the State party notes that the Refugee Appeals Board found no basis for reopening the case, as the author and her daughter of that case 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 *I.A.M. v. Denmark* were not in accordance with the case

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<sup>16</sup> See the Committee's general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 66.

<sup>17</sup> The State party cites the European Court of Human Rights, *Osman v. Denmark* (application no. 38058/09).

<sup>18</sup> The State party informs 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.

law of the European Court of Human Rights,<sup>19</sup> according to which the crucial part of assessment of cases concerning female genital mutilation is whether the family can ensure that their child is not 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 claim that she was to be considered as a single mother without any male network in Somalia and that the decision regarding female genital mutilation is ultimately the mother's. The State party further 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 Ceelbuur not being a "big city", the State party clarifies that, in its observations of 1 November 2019, it merely stated that Ceelbuur is not a rural area and that it is a town with an estimated population of almost 80,000. The State party also states that, by having resided in Ceelbuur 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 or not the claim is admissible under the Optional Protocol.

7.2 The Committee notes the author's uncontested statement that decisions 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 only assessed 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 further notes that, in this decision, the risk of female genital mutilation was not discussed and that the Immigration Appeals Board explicitly stated that the general conditions of Somalia may be a question of asylum, which was not 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, the risk that Y.A.M. would face the risk of being subjected to female genital mutilation in case of return to Somalia. The fact that the decision 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 female genital mutilation, for which domestic remedies have

<sup>19</sup> The State party cites the European Court of Human Rights, *Emily Collins and Ashley Akaziebie v. Sweden* (application No. 23944/05), *Sow v. Belgium* (application Np. 27081/13), and *R.B.A.B. and Others v. The Netherlands* (application No. 7211/06).

<sup>20</sup> See UK Home Office, "Country Information and Guidance. Somalia: Women fearing gender-based harm and violence" (2016), p. 24. Available at [https://www.justice.gov/sites/default/files/pages/attachments/2016/08/04/uk\\_somalia\\_women\\_fearing\\_082016.pdf](https://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" (January 2016), p. 24.

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.

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 deported to Somalia. However, the Committee considers that, in the light of the author's allegations regarding the general situation of 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 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 communication in the light of all the information submitted 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, 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.<sup>21</sup> In that sense, the Committee advises that, "when assessing refugee claims..., States shall 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 1951 Refugee Convention. 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; under-age 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 which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. 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."<sup>22</sup>

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, the Committees noted that female genital mutilation may have various immediate and/or long-term health consequences.<sup>23</sup> They recommend that the legislation and policies relating to immigration and asylum should recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum

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<sup>21</sup> See the Committee's general comment No. 6, para. 27; and the Committee on the Elimination of Discrimination against Women general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 25.

<sup>22</sup> See the Committee's general comment No. 6, para. 74.

<sup>23</sup> See the joint general recommendation No. 31 (2014) of the Committee on the Elimination of Discrimination against Women/general comment No. 18 (2014) of the Committee on the Rights of the Child on harmful practices, para. 19.



and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman.<sup>24</sup> The Committee further notes that other treaty bodies have considered that subjecting a woman or girl to female genital mutilation amounts to torture or cruel, inhuman or degrading treatment.<sup>25</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 allegations 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 herself was subjected to female genital mutilation; 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 become heavily dependent on the surrounding community, it must be assumed that the author would be able to resist social pressures 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 conflict with her al-Shabaab uncle and the 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 incidents of female genital mutilation have declined in Somalia.<sup>26</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>27</sup> and the 2014 policy against the practice.<sup>28</sup> However, the Committee notes that, according to reports submitted by the parties,<sup>29</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>30</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 any male

<sup>24</sup> Ibid, para. 55.

<sup>25</sup> See *Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; *F.B. v. The 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>26</sup> See Danish Immigration Service, "Country of Origin Information: FGM/Female circumcision - Background, numbers and tendencies" (January 2019).

<sup>27</sup> See Danish Immigration Service, "Thematic Paper: South Central Somalia - Female Genital Mutilation/Cutting" (January 2016), p. 7.

<sup>28</sup> See Somalia, Ministry of Women's Development and Family Affairs, Female genital mutilation/cutting policy of November 2014 (supported by UNICEF Somalia).

<sup>29</sup> See in particular, UK Home Office, "Somalia: women fearing gender-based harm and violence" and US Department of State, "Somalia Human Rights Report 2016", both of which indicate that the practice of female genital mutilation remains almost universal in Somalia.

<sup>30</sup> See joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child, paras. 29 and 33.

supporting network in Somalia, considering that her husband currently does not 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 more dependent on the surrounding community, she would be able to resist any 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 State party seems irrelevant in the present case, in 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 light of the general reported context, and that State 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 the 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 such practices, State parties should refrain from deporting the child.<sup>31</sup>

8.8 The Committee therefore concludes that the State party failed to consider the best interests of the child when assessing the alleged risk of the author's daughter being subjected to female genital mutilation if deported to Somalia 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 to the Convention on the Rights of the Child 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 brother.<sup>32</sup> The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this regard, the State party is requested, in particular, to ensure that asylum proceedings affecting children include a best interests analysis and that, where a risk of a serious violation is invoked as a ground for non-refoulement, the specific circumstances in which the children would be returned are duly taken into account.

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

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<sup>31</sup> See *Kaba v. Canada* (CCPR/C/98/D/1465/2006), para. 10.1; and *F.B. v. The Netherlands* (CAT/C/56/D/613/2014), para. 8.7.

<sup>32</sup> See the joint general recommendation No. 31 (2014) of the Committee on the Elimination of Discrimination against Women/general comment No. 18 (2014) of the Committee on the Rights of the Child on harmful practices, para. 55 (m).

**Annex.****Individual Opinion of Mr. Luis Pedernera (partially dissenting)**

1. Me siento en la obligación de expresar mi opinión disidente respecto de la decisión adoptada por el Comité de no invocar la violación al artículo 37 de la Convención sobre los Derechos del Niño. Fundamento mi disidencia en las siguientes consideraciones:

(a) En la decisión adoptada, el Comité indica que la mutilación genital femenina es una práctica a la que podría ser sometida la víctima, si se hace efectiva su deportación a Somalia, puede constituir tortura, postura que lo alinea con la adoptada por el Comité de Derechos Humanos y el Comité contra toda Discriminación hacia la Mujer según se manifiesta en el párrafo 8.4. No obstante, el Comité no invoca el artículo 37 en su decisión final argumentando que “en el presente caso la autora no ha planteado esta alegación, ni directamente ni en sustancia”. Es decir, el Comité no invoca el artículo 37 en su decisión final, con la cual disiento.

(b) El Comité, en el marco de su competencia bajo el Protocolo Facultativo, se rige, como señala el artículo 1 del Reglamento del Comité en relación con el Protocolo Facultativo, por el principio del interés superior del niño y tiene un deber de diligencia, dirección y protección reforzado frente a las peticiones presentadas y su ponderación en relación a los derechos violados, en especial, porque los sujetos de la acción son niños.

(c) El protocolo no exige que el autor tenga asistencia letrada para promover acciones frente al Comité; indica así que no es necesario un conocimiento acabado del derecho para fundamentar las quejas individuales. El Comité, en su función de protección reforzada en tanto se encuentra frente a personas menores de edad (en desarrollo), debe cumplir una función pedagógica y de orientación frente al niño en tanto no es un conocedor experto o un profesional del derecho.

(d) Es por ello que el Comité puede, en el marco de los hechos alegados, actuar invocando derechos no planteados en la queja bajo el principio de *Iura Novit Curia* en tanto es quien conoce el derecho y debe actuar guiado por el criterio de autonomía progresiva y el principio del interés superior del niño como consideración primordial.

(e) Hay otro aspecto crucial: los hechos presentados ante el Comité indican de manera rotunda que las posibilidades de que se produzca la mutilación genital son reales y ciertas. Pese a estar prohibida en Somalia, sigue siendo una práctica cultural extendida al punto que son sometidas a ella un 98% de las niñas. Este aspecto se vuelve central para que el principio *Iura Novit Curia* opere. En tanto principio que brinda protección, necesita estar sustentado en elementos y hechos que hayan sido parte de la prueba aportada en el proceso y no producto de un uso arbitrario, caprichoso y sin sustento por parte del órgano decisor.

(f) Por último, deseo destacar la condición particular de la prohibición de la tortura reconocida por la comunidad internacional como una norma de *ius cogens*, lo que desde mi opinión refuerza la necesidad de que el Comité actúe de oficio para prevenirla y condenarla.

2. Por lo tanto, expreso mi voto parcialmente disidente en tanto considero que por las razones expuestas estamos en condiciones de establecer la violación del artículo 37 de la Convención sobre los Derechos del Niño aunque no haya sido planteado expresamente en la demanda por la autora.