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Committee on the Rights of the Child**Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 140/2021^{*,**,*}**

<i>Communication submitted by:</i>	F.M.A. and H.K.A. (represented by counsel, N.E. Hansen)
<i>Alleged victim:</i>	S.H.K. (authors' daughter)
<i>State party:</i>	Denmark
<i>Date of communication:</i>	2 March 2021
<i>Date of adoption of Views:</i>	16 May 2023
<i>Subject matter:</i>	Deportation of a girl to Somalia, where she would allegedly 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)

1.1 The authors of the communication are F.M.A. and H.K.A., both Somali nationals born in 1989 and 1987, respectively. They submit the communication on behalf of their daughter, S.H.K., a Somali national born in Denmark on 15 June 2019. The authors and their daughter are subject to a deportation order to Somalia.¹ They claim that S.H.K.'s deportation would violate her rights under articles 3 and 19 of the Convention. They are represented by counsel. The Optional Protocol entered into force for Denmark on 7 January 2016.

1.2 On 7 March 2021, pursuant to article 6 of the Optional Protocol, the Working Group on Communications, acting on behalf of the Committee, requested that the State party refrain from returning the authors and their daughter to Somalia while their case was under

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

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

*** The text of a joint opinion by Committee members Sopio Kiladze, Otani Mikiko, Luis Pedernera Reyna y Benoit Van Keirsbilck (partly dissenting) is annexed to the present decision.

¹ The authors have four other children born in Somalia.

consideration by the Committee. On 10 March 2021, the State party suspended the execution of the deportation order against the authors, S.H.K., and her other siblings. On 8 December 2022, pursuant to article 6 of the Optional Protocol, the Working Group on Communications, acting on behalf of the Committee, rejected the State party's request to lift interim measures.

The facts as submitted by the authors²

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

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

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

2.4 On 19 November 2019, the Danish Immigration Service refused S.H.K.'s application for asylum. The authors appealed against this refusal decision. The authors note that, on 21 December 2020, the Danish Immigration Service gave two other girls from Somalia refugee residence permits based on the fact that their older sisters had been subjected to female genital mutilation.³ The authors mentioned these two examples before the Refugee Appeals Board. On 29 January 2021, the Refugee Appeals Board upheld the decision to reject S.H.K.'s asylum. Two of the three composing members of the Board found that S.H.K.'s "parents, who have declared that they are against circumcision, must be regarded as resourceful persons who will be able to withstand any pressure from the family and the surrounding community"⁴. The decision also affirmed that:

"The Refugee Board is aware that [S.H.K.]'s parents at the meeting of the Refugee Board have explained that [her] older sister, [Sa.H.K.], had been circumcised as a 4-year-old when she stayed in Somalia with her grandmother, while the parents both stayed outside Somalia. The parents only discovered this after the meeting of the Refugee Board in January 2019. However, the majority of the Refugee Board does not find that this can lead to a changed assessment, as

² Information on the asylum procedure has been supplemented with data provided by the State party

³ The authors do not annex documentation in this regard.

⁴ Case num. 19/287101, translation provided by the authors.

the parents were not in Somalia at the time and thus did not have the opportunity to protect [Sa.H.K.]”⁵

The complaint

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

3.2 The authors claim that they will not be able to protect S.H.K. in a country where almost all women have been victims of female genital mutilation. They add that, according to a 2017 UNICEF report, 90-98% of all girls over the age of 15 in Somalia have been subjected to female genital mutilation⁶ and according to a 2013 UNFPA report, approximately 80% of girls and women subjected to female genital mutilation have undergone its most severe form.⁷

3.3 The authors state that, although the Provisional Federal Constitution prohibits circumcision, background information on changes in practice and attitudes towards female genital mutilation is uncertain and poorly documented.⁸ Female genital mutilation harms girls and women in many ways, including severe pain, shock, excessive bleeding, injury to surrounding genital tissue as well as long-term consequences.⁹

3.4 The authors allege that any information regarding the possibility for certain persons to avoid the practice of female genital mutilation should be read in conjunction with the statistics on the prevalence of the practice, also across socio-economic groups, all above 90%. They add that families returning to Somalia from western countries can also be exposed to a lot of social pressure, and it might be difficult for them to avoid having their girlchildren undergo the practice.¹⁰ They add that according to the United Kingdom Home Office, in cases where both parents oppose female genital mutilation:

“the question of whether the risk will reach the requisite level will need to be determined by reference to the extent to which the parents are likely to be able to withstand the strong societal pressures. Unless the parents are from a socio-economic background that is likely to distance them from mainstream social attitudes, or there is some other particular feature of their case, the fact of parental opposition may well as a general matter be incapable eliminating the real risk of the daughter that others (particularly relatives) will at some point inflict female genital mutilation on her”¹¹

3.5 The authors allege that the Refugee Board of Appeals’ decision of 29 January 2021 did not invoke the principle of precaution as prescribed by the Committee. According to the Committee, the evaluation of the risk of female genital mutilation in the specific case “should be carried out following the principle of precaution and, where reasonable doubt exist that the receiving State cannot protect the child against such practices, State parties should refrain from deporting the child”.¹²

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

⁵ Ibid.

⁶ UNICEF (2017), “Female Genital Mutilation/Cutting. A global concern”.

⁷ UNFPA (2013), “Female Genital Mutilation/Cutting Country profile: Somalia”.

⁸ See Landinfo (2008), “Female Genital Mutilation in Sudan and Somalia”, p. 12; and US Department of State (2016), “Somalia 2015, Human Rights report”, p. 32.

⁹ WHO (2017), Fact Sheet no. 241, “Female Genital Mutilation”, Updated February 2017.

¹⁰ Danish Immigration Service 2016: “South Central Somalia. Female Genital Mutilation/Cutting, p. 12.

¹¹ UK Home Office (2016): Country Information and Guidance. Somalia: Women fearing gender-based harm and violence, p.6.

¹² *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 c.

State party's observations on admissibility and the merits

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

4.2 The State party submits that the authors' communication to the Committee does not present any new information substantiating her claims and repeats the facts that have already been assessed by domestic authorities. The State party notes that, according to the Committee, States parties have an obligation under article 19 of the Convention to prohibit, prevent and respond to all forms of physical violence against children (paras. 11 and 29),¹³ including harmful practices such as female genital mutilation. Also, the Committee has affirmed that the Convention is violated only if the child to be returned will be exposed to a real risk of irreparable harm.¹⁴ In this respect, the State party argues that the authors have failed to establish a *prima facie* case for the purpose of admissibility and to sufficiently substantiate that S.H.K. will face a real risk of irreparable harm if returned to Somalia. The State party contends that the communication should therefore be considered inadmissible as manifestly ill-founded, under article 7 (f) of the Optional Protocol.

4.3 In relation to the merits, the State party contends that, should the Committee find the authors' communication admissible, the authors have not sufficiently established that S.H.K. would be exposed to a real risk of irreparable harm upon her return to Somalia. The State party notes that it is generally for the organs of the States parties to the Convention to review and evaluate facts and evidence in order to determine whether 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.¹⁵ The State party considers that, in the present case, the authors have failed to identify any irregularity in the decision-making process or any risk factors that have not been properly taken into account by the Refugee Appeals Board. The State party contends that the authors merely disagree with the Refugee Appeals Board's assessment of S.H.K.'s circumstances and the available background information.

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

4.5 In their decisions of 12 January 2019, concerning the authors, and of 29 January 2021, concerning S.H.K., the Refugee Appeals Board considered that the different allegations by the authors regarding their own grounds for asylum were non-credible and fabricated for the occasion, as did the Danish Immigration Service before. However, the Refugee Appeals Board accepted as facts that the authors were opposed to female genital mutilation, and that it had to be assumed that they would be able to resist a potential social pressure to let S.H.K. undergo the procedure. With regards to the fear of forced female genital mutilation, the State party alleges that through various interviews with the Danish Immigration Service in 2017, the authors asserted that they would be able to resist the pressure from their surroundings because, *inter alia*, F.M.A. had received a free upbringing and had her parent's support. The authors further stated that they did not fear that someone would forcibly perform female genital mutilation on their oldest daughter¹⁶ against their will, but they instead feared exclusion from the local community and the social consequences resulting from omitting to succumb to the pressure from their surroundings. The Board found that the authors were unable to present a plausible explanation as to why they, at the time of the Board hearings in 2019 concerning their oldest daughter and at the hearing in 2021, concerning S.H.K.,

¹³ General comment No. 13 (2011), paras. 11 and 29.

¹⁴ General comment No. 6, para. 27.

¹⁵ 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).

¹⁶ S.H.K. had not been born yet.

suddenly feared that the female genital mutilation would be forcibly performed on them, respectively, upon return to Somalia. The State party highlights that according to the Board the allegations of fear of female genital mutilation had not been mentioned at earlier stages in the asylum proceedings, but only after the decisions not to renew their permits in February 2017, even though they had been asked several times if their children had any independent grounds for asylum. This generally weakened the credibility of the authors, which was the basis upon which the Board made its decision regarding the purported fear of genital mutilation.

4.6 The State party agrees that the practice of female genital mutilation clearly constitutes a violation of article 19 of the Convention. However, the State party refers to the jurisprudence of the European Court of Human Rights according to which the crucial part of the assessment in cases concerning female genital mutilation is whether the family is in a position to ensure that their child is not subjected to the practice.¹⁷ The State party alleges that, while those cases do not concern Somalia, that position is universal and not specific to any given country. The authors alleged that they will not be able to refuse the overwhelming pressure from the society to have S.H.K. undergo female genital mutilation, and also stated that, since they were not able to prevent the circumcision of their oldest daughter, it seems unlikely that they will be able to prevent S.H.K. from forcibly undergoing the procedure. The State party states that the Refugee Appeals Board's assessment of evidence is free and thus not governed by special rules of evidence, and that it conducts an overall assessment combining the asylum seekers' statements and other information of the case, including what is known about the conditions in their country of origin. It adds that the Board is also responsible for providing the necessary background information, which is continually updated and supplemented. The State party highlights that the background material referred to by the authors as well as more recent reports¹⁸ are already included in the background material available to the Board. The State party alleges that according to the background material referred to by the authors themselves, it is possible for mothers to prevent their daughters from being subjected to female genital mutilation, depending on the mother's personality and commitment.¹⁹ 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 (only 32.6% of the women who had undergone the procedure subjected their daughters to it).²⁰ The State party alleges that, while the authors contend that there are different opinions on the possibility for parents to stand firm against social pressure, the reports referred by them do not differ on the question. On the contrary, all sources mentioned by the authors state that avoiding the practice is a possibility and depends on the mother's personality, commitment, and strong conviction.

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

¹⁷ *Emily Collins and Ashley Akaziebie v. Sweden* (No. 23944/05); *Sow v. Belgium* (No. 27081/13); and *R.B.A.B. and Others v. The Netherlands* (No. 7211/06).

¹⁸ Among them, UN General Assembly Human Rights Council, *Report on the Independent Expert on the situation of human rights in Somalia* (2020), p. 17, Directorate of National Statistics, the Federal Republic of Somalia, *The Somali Health and Demographic Survey 2020* (2020), pp. 212-218, UNICEF, *Somalia – Statistical Profile on Female Genital Mutilation* (2020), Lifos, *Somalia – Kvinnlig könsstympning* (2019) and European Asylum Support Office (EASO), *COI Query Response – 1. Legal framework – Female Genital Mutilation/Cutting (FGM/C) in Somalia 2. Current prevalence of FGM/C in Somalia, according to socio-economic factors (age, education, ethnicity, religion, place of residence, wealth) 3. Social sanctions/other consequences against girls and their parents refusing FGM/C (ethical and urban/rural dimension)* (2019).

¹⁹ 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).

²⁰ See Danish Immigration Service, "Country of Origin Information, FGM/Female circumcision - Background, numbers and tendencies" (January 2019), p. 9.

and the surrounding community to prevent S.H.K. from being subjected to female genital mutilation, and that they both declared that they were against the practice. The Board also found that it could not lead to a different assessment that the authors' older daughter was subjected to female genital mutilation when she was staying in Somalia with her maternal grandmother, because the authors at the time resided outside of Somalia and therefore were unable to protect her. The Board observed that from the background material female genital mutilation without the presence and acceptance of the parents only occurs in exceptional cases.²¹ Therefore, for the Board the situations of S.H.K. and her older sister are not comparable since S.H.K. will return to Somalia accompanied by her parents who will be able to protect her from being subjected to female genital mutilation.

4.8 The State party alleges that the Refugee Appeals Board thoroughly assessed the purported risk of S.H.K. being subjected to female genital mutilation and duly considered her best interests in its assessment. The State party recalls that the Refugee Appeals Board finds that the Committee's legal perception is contrary to the relevant background material and the case-law of the European Court of Human Rights involving female genital mutilation. Therefore, the Board continues to find -despite the Views adopted by the Committee²² that the crucial part of the assessment in cases concerning female genital mutilation is whether the parents can be considered resourceful persons and whether they find themselves in a position to ensure that their child is not subjected to the practice. It highlights that the fact that the Board did not make explicit reference to the principle of precaution in its decision of 29 January 2021 cannot be taken to mean that the Board failed to take it into account. The State party therefore affirms that in the present case, the authors did not demonstrate that S.H.K. would be at real risk of suffering irreparable harm if returned to Somalia and that therefore it is in violation of articles 3 and 19 of the Convention.

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

Authors comments on the State party's observations

5.1 In their comments dated 15 March 2022, the authors allege that they have presented ample evidence of a violation of the Convention for the purposes of the admissibility of the communication. According to the evidence: a) both S.H.K.'s personal circumstances and the situation in Somalia for women and girls substantiate that she will be exposed to a real risk of irreparable harm if returned to Somali; b) the decision of the Refugee Appeals Board was arbitrary and contradictory to its own jurisprudence, which adds to the legal uncertainty with respect to Danish immigration authorities' application of the principle of precaution in these cases;²³ c) the Board's decision is in direct conflict with the Committee's recommendations in other similar cases against the State party.²⁴ They allege that the Board's decision was therefore arbitrary and amounted to a manifest error resulting in a violation of articles 3 and 19 of the Convention.

5.2 With regards to the merits, the authors reiterate their arguments on the admissibility with regards to sufficient substantiation. They add that the State party's suggestion that the relevant background material supports the Board's decision runs contrary to material from the State party itself and the most recent data and reports. The 2019 Danish Immigration Service report cited by the State party, explicitly says that "sources disagree on the extent to which parents can oppose FGM and protect their daughters from circumcision. Some sources state that girls cannot be circumcised without the consent of the parents, especially the mother, whereas other sources state that the family members can circumcise girls, despite the parents'

²¹ Lifos, *Somalia – Kvinnlig könsstympning* (2019) (Unofficial translation), p. 26.

²² *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019); and *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016).

²³ The authors do not annex documentation in this regard.

²⁴ *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019); and *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016).

opposition to the procedure”.²⁵ Furthermore, the authors reiterate that any possibility for certain persons to avoid the practice should be read in conjunction with the statistics on the very high prevalence of female genital mutilation in Somalia.

5.3 Concerning the State party’s submission that it appears that persons who have had exposure to western ideas and concepts are perceived to be more able to withstand social pressure, the authors indicate that several sources highlight that returnees from Europe or Western countries might be of particular risk in terms of subjection to female genital mutilation upon returning to Somalia. This is confirmed by the Danish Immigration Service of 2021’s Country of Origin Information report on female genital mutilation in Somalia according to which, “generally, Somalis do not expect girls returning from the West to have undergone female genital mutilation due to its illegal status in western countries. This means that there is extra attention paid to this issue by the surrounding society and this makes it challenging for returnees to evade female genital mutilation. Uncut girls returning from the diaspora may be subjected to circumcision or social pressure to undergo circumcision upon return.”²⁶ Indeed, S.H.K.’s return from the State party to Somalia only increases her real risk of irreparable harm.

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

5.5 The authors refer to the State party’s affirmation, based on regional jurisprudence, that the crucial part in assessments of these cases is whether the family is in a position to ensure that their child is not subjected to the practice (see para. 4.6 above). They claim that while family relations are indeed important, the European Court of Human Rights’ cases in reference do not relate to Somalia, and the destination cannot be disregarded or removed from the equation. Failure to adequately consider specific national, regional, and local contexts in a child refoulement case by referencing family resilience cannot be accepted. However, even when applying the narrow scope suggested by the State party, the facts of the case show that the authors cannot be considered able to protect S.H.K. from female genital mutilation, just as they were not able to protect their older daughter.

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

5.7 With regards to the principle of precaution, the authors note that the State party insists that the crucial part of assessment in these cases revolve around whether the parents are considered resourceful and find themselves able to protect their child. However, the State party relies solely on the authors statements, whom they otherwise consider lacking credibility. The authors highlight that, as evidenced by their communication, the State party

²⁵ Danish Immigration Service (2019): *Country of Origin Information: FGM/Kvindelig Omskæring – Baggrund, tal og tendenser* [FGM/Female circumcision - Background, numbers and tendencies], p. 11.

²⁶ Danish Immigration Service (2021): *Country of Origin Information - Somalia, Female Genital Mutilation (FGM)*, p. 1.

has not changed its practice in accordance with the Committee's guidance to adequately assess the best interest of the child and the principle of precaution.²⁷

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the authors are challenging a decision by the Refugee Appeals Board, which is not subject to any further appeals. Accordingly, and since the State party has not raised any objections in this regard, the Committee considers that all available domestic remedies must be deemed to have been exhausted and concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.²⁸

6.3 The Committee takes note of the State party's argument that the authors have failed to establish a prima facie case for the purpose of admissibility of their communication under the Convention and that they have not sufficiently substantiated their claim that S.H.K. would be exposed to real risk of irreparable harm if returned to Somalia (see para. 4.2 above). However, the Committee takes note of the authors' allegations regarding the general situation of prevalence of female genital mutilation in Somalia and the fact that S.H.K.'s older sister was circumcised by her maternal grandmother without her parents' consent (see paras. 2.3, and 3.1-3.4 above). The Committee therefore considers that the authors' claims based on articles 3 and 19 of the Convention have been sufficiently substantiated for the purposes of admissibility.²⁹

6.4 The Committee therefore declares admissible the authors' claims concerning the obligation of the State party to: (a) take the best interests of the child as a primary consideration; 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

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

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

7.3 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.³⁰ The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner.³¹ In that

²⁷ *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019); *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016); and Concluding observations on the fifth periodic report of Denmark (CRC/C/DNK/CO/5), paras. 39 (c) and (d); and 40 (c) and (d).

²⁸ *J.M. v. Chile* (CRC/C/90/D/121/2020), para. 7.2.

²⁹ *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 7.2; *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019), para. 7.3; *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 10.4.

³⁰ General comment No. 6, para. 27.

³¹ *Ibid.*; 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.

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.”³²

7.4 In the joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child, the Committees noted that female genital mutilation may have various immediate and/or long-term health consequences.³³ 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 and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman.³⁴ 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.³⁵

7.5 In the present case, the Committee takes note of the authors’ allegations that they would be unable to protect S.H.K. from being subjected to female genital mutilation in a country where 90 to 98 per cent of women have been subjected to that practice despite it being prohibited by law, as the law is not enforced (see paras. 3.2 and 3.3 above). The authors have also argued that returning from a western country makes S.H.K. particularly vulnerable on account of the extra attention paid since she is expected not to have undergone the procedure abroad (see paras. 3.4 and 5.4 above). The authors particularly allege that M.F.A. herself was subjected to female genital mutilation and, although they are against the practice, their oldest daughter was submitted to it by her maternal grandmother, without their knowledge and consent (see paras. 2.3, 3.1 and 5.5).

7.6 The Committee takes note of the State party’s argument that, according to several reports, a mother can protect her daughter from being subjected to female genital mutilation in Somalia if she is able to resist family or community pressure (see para. 4.6 above). The Committee also takes note of the State party’s argument that, following regional jurisprudence, the crucial part of the assessment in cases concerning female genital mutilation is whether the family is in a position to ensure that their child is not subjected to the practice (see para. 4.6 above). The State party also argues that the review and evaluation of facts and evidence in order to determine whether a risk of a serious violation of the Convention exists upon return is generally left to domestic authorities, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice (see para. 4.3 above). In this sense, it adds that the Refugee Appeals Board thoroughly assesses the purported risk of S.H.K.’s return, duly considering her best interests, and that the authors have failed to identify any irregularity in the decision-making process or any risk factors that have not been properly taken into account (see paras. 4.3 and 4.8 above). The Committee takes note of the State party’s argument that the authors’ credibility was weakened, which was the basis upon which the Board made its decision regarding the purported fear of genital mutilation (see para. 4.5 above). The Committee also takes note of the State party’s argument that, given that although

³² General comment No. 6, para. 74.

³³ 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.

³⁴ Ibid, para. 55.

³⁵ 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.

their daughter was circumcised without their consent, this took place while neither of the authors were in Somalia and were therefore unable to protect her, which would not be the case with S.H.K. (see para. 4.7 above).

7.7 The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that such decisions should ensure — within a procedure with proper safeguards — that the child will be safe and provided with proper care and enjoyment of rights.³⁶ In the present case, the Committee notes the arguments and information submitted to it, including the assessment of the authors' assumed ability to resist social pressure based on their expressed opposition to the practice and on reports about the situation of female genital mutilation in Somalia. However, the Committee observes that:

(a) The Refugee Appeals Board's assessment was limited to the fact that the authors are against circumcision and that they will be able to resist the pressure of the surrounding environment to circumcise S.H.K., but without properly assessing or justifying why and how they could resist such pressure, without evaluating the specific and personal context to which the authors and S.H.K. would be returned to, and without taking the best interests of the child into account. However, the Committee recalls its consistent jurisprudence on non-refoulement cases to Somalia on the basis of an alleged risk of female genital mutilation according to which the rights of the child under article 19 of the Convention cannot be made solely dependent on the mother's -or, in this case, the parents'-ability to resist family and social pressure, especially in light of the reported context, and that the State parties should take measures to protect children from all forms of physical or mental violence, injury or abuse in all circumstances.³⁷ The Committee takes note of the State party's argument that it is relying on its interpretation of regional jurisprudence on other similar cases (see para 4.6 above). However, the Committee recalls that this interpretation cannot exempt the State party from complying with its obligations under the Convention; neither can this interpretation justify non-compliance with the Committee's Views under the Optional Protocol.³⁸ The Committee also considers that there does not appear to be any contradiction between the referenced regional jurisprudence and its prior Views, particularly given that they relate to different States -known to have different contexts than that of Somalia-, and that while the Committee acknowledges that the parents' capacity to protect the child might be crucial, it asserts that it is not in itself sufficient without a complete analysis of the specific, individual, context.

(b) The Refugee Appeals Board based its decision on the authors' weakened credibility regarding the purported fear of genital mutilation after making an overall assessment of their different statements, in particular during their own asylum applications (see para. 4.5 above). However, the Committee recalls that "determining the best interests of the children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application"³⁹. Particularly, the Committee observes that the Refugee Appeals Board did not conduct further inquiries as to the specific context of S.H.K.'s older sister's forced circumcision and how that could have affected the assessment of the individual risk.

(c) The evaluation of the risk that a child may be subjected to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being deported should be carried out following the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such practices, State

³⁶ See *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 8.7; *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019), para. 8.7; *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8; and 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.

³⁷ See *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 8.7 (a); *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019), para. 8.7 (b); and *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (b).

³⁸ *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019), para. 8.7 (b).

³⁹ *E.A. and U.A. v. Switzerland* (CRC/C/85/D/56/2018), para. 7.3; and *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 8.7 (b).

parties should refrain from deporting the child.⁴⁰ The Committee observes that the State party has not demonstrated that this standard was met.

7.8 The Committee therefore concludes that the State party failed to consider the best interests of the child when assessing S.H.K.'s alleged risk of being subjected to female genital mutilation if 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 S.H.K. to Somalia would amount to a violation of articles 3 and 19 of the Convention.

7.9 The Committee, acting under article 10 (5) of the Optional Protocol 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.

8. The State party is under an obligation to refrain from deporting S.H.K. and the authors to Somalia. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this regard, the State party is requested, in particular, to ensure that asylum proceeding 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.

9. 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.

⁴⁰ See *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 8.7 (c); *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019), para. 8.7 (c); and *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (c).

Annexe

[Original: español]

Voto particular conjunto (parcialmente disidente) firmado por Sopio Kiladze, Otani Mikiko, Luis Pedernera Reyna y Benoit Van Keirsbilck, miembros del Comité

1. Sobre la presente comunicación nos referimos a la posición previamente expresada en los votos individuales del miembro del Comité Luis Pedernera Reyna en el marco de las comunicaciones Núms. 83/2019⁴¹ y 96/2019⁴². Deseamos así sostener la opinión respecto de la presente decisión adoptada por el Comité de no invocar la violación al artículo 37 de la Convención sobre los Derechos del Niño de acuerdo con las siguientes consideraciones.
2. En el dictamen adoptado, 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. Por lo tanto, la considera tortura, postura que lo alinea con la adoptada por otros Órganos de Tratados según se manifiesta en el dictamen. No obstante, el Comité mayoritariamente mantiene su posición de no pronunciarse acerca de la violación del artículo 37 a) en su decisión final manteniendo su postura coincidente con las expresada en los casos 83/2019 y 96/2019. Al no pronunciarse sobre la violación del artículo 37 a) en su decisión final, debemos referirnos a la mencionada disidencia parcial.
3. El Comité, en el marco de su competencia bajo el Protocolo Facultativo, se rige, como señala el artículo 1 del Reglamento interno, por el principio del interés superior del niño y por ello el deber de diligencia, dirección y protección que se nos impone debe ser reforzado frente a las peticiones presentadas por niños, niñas y adolescentes por una condición central, son personas en desarrollo.
4. El Protocolo además no exige que un autor o autora 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. Por lo tanto, el Comité, en su función de protección reforzada, debe cumplir una función pedagógica y de orientación frente al niño o niña en tanto no es un conocedor experto o un profesional del derecho.
5. Por lo 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.
6. 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.
7. 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 o ponderada en el proceso de deliberación y no producto de un uso arbitrario, caprichoso y sin sustento por parte del decisor.
8. A los argumentos precedentes consideramos necesario agregar y destacar que este es el tercer caso en el que se reitera el mismo patrón de la comunicación dirigida contra el Estado parte, por lo que el argumento de la indefensión por invocar un derecho no planteado en la queja por parte de los autores deja de tener fuerza.
9. Por último, deseamos destacar la condición particular de la prohibición de la tortura reconocida por la comunidad internacional como una norma de *ius cogens*, lo que desde

⁴¹ Y.A.M. c. Dinamarca (CRC/C/86/D/83/2019).

⁴² S.M.F. c. Dinamarca (CRC/C/90/D/96/2019).

nuestra opinión refuerza la necesidad de que el Comité actúe de oficio para invocar derechos no planteados originalmente por los autores.

10. Por lo tanto, nos referimos al voto mencionado en tanto consideramos que por las razones expuestas estamos en esta oportunidad en mejores condiciones de establecer la violación del artículo 37 a) de la Convención sobre los Derechos del Niño, aunque no haya sido planteado expresamente en la demanda por la autora.
