



# Convention on the Rights of the Child

## Advance unedited version

Distr.: General\*  
25 January 2018

Original: English

### 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 communications procedure in respect of communication No. 3/2016\*,\*\*

<i>Submitted by:</i>	I.A.M. (represented by counsel, Mr. N. E. Hansen)
<i>Alleged victim:</i>	K.Y.M.
<i>State party:</i>	Denmark
<i>Date of communication:</i>	12 February 2016
<i>Date of adoption of Views:</i>	25 January 2018
<i>Subject matter:</i>	Deportation of girl to Somalia, where she would face an alleged risk of being forcefully subjected to female genital mutilation
<i>Procedural issues:</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>	1, 2, 3, and 19
<i>Articles of the Optional Protocol:</i>	7 (f)

\* Adopted by the Committee at its seventy-seventh period of sessions (15 January to 2 February 2018).

\*\* The following Committee members took part in the consideration of the present communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Jorge Cardona Llorens, Bernard Gastaud, Olga A. Khazova, Hatem Kotrane, Cephass Lumina, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Pedernera, José Ángel Rodríguez Reyes, Kirsten Sandberg, Ann Skelton, Velina Todorova and Renate Winter.

GE.17-21181(E)

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1.1 The author of the communication is I. A. M., a Somali national originating from the Puntland State of Somalia and born in 1990. She is acting on behalf of her daughter, K. Y. M., born in Denmark on 5 January 2016. The author and her daughter are subject to a deportation order to the Puntland State of Somalia. She claims that her daughter's deportation would violate her rights under articles 1, 2, 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 16 February 2016 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 18 February 2017, the State party suspended the execution of the deportation order against the author and her daughter. On 16 August 2017, the State party requested that interim measures be lifted (see para. 4.1 below). On 16 January 2017, the Working Group on Communications, acting on behalf of the Committee, decided to deny the request to lift interim measures.

1.3 On 2 March 2017, the State party requested that the communication be discontinued (see para. 6 below). On 9 June 2017, the Working Group on Communications, acting on behalf of the Committee, decided not to discontinue the consideration of the communication.

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

2.1 The author entered Denmark on 25 September 2014 without valid travel documents and applied for asylum four days later together with her husband.<sup>1</sup> On 31 March 2015, the Danish Immigration Service (DIS) decided that the author's husband was to be transferred to Sweden under the Dublin III Regulation.<sup>2</sup> This decision was upheld on 22 April 2015 by the Danish Refugee Appeals Board (RAB). On 21 May 2015, the husband was transferred to Sweden.

2.2 On 5 October 2015, when the author was six months pregnant, the DIS rejected her asylum application. The author appealed this decision with the RAB, arguing a fear of being killed by her family because of her secret marriage against the family's will in 2007,<sup>3</sup> and the risk that her daughter would be subjected to female genital mutilation if returned to the Puntland State of Somalia.

2.3 On 2 February 2016, the RAB rejected the author's appeal and ordered her deportation to Somalia, without indicating the specific region. The Board considered that the author's statements were inconsistent and lacked credibility, in particular with regard to her father's reaction when he had learned about her secret marriage back in 2007,<sup>4</sup> and the fact that she had stayed in the Puntland State of Somalia until 2014 despite her husband's departure in 2007. The RAB also noted that, between 2007 and 2014, the author had lived in her home without experiencing any further retaliation. With regard to the risk that the author's daughter would be forcefully subjected to female genital mutilation, the RAB relied on the DIS report

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<sup>1</sup> The author has not specified how or when her husband, who had purportedly been residing in Sweden since 2007, joined her and arrived in Denmark.

<sup>2</sup> European Union Regulation No. 604/2013 ("Dublin III Regulation") provides a mechanism for determining which country is responsible for examining an application for international protection that has been lodged in one of the member states by a third country national or a stateless person.

<sup>3</sup> According to the RAB decision dated 2 February 2016, the author married in 2007 in secret and against her family's will to a man of a lower clan.

<sup>4</sup> According to the RAB decision dated 2 February 2016, the author had initially stated before the DIS that when her father found out about the marriage, he beat her with belts all night long and threatened to kill her husband. Before the RAB, she stated that she had been held in her room for a month, tied to her bed, and that she was beaten with metal on her feet.

on female genital mutilation in Somalia (2015)<sup>5</sup>, according to which female genital mutilation was prohibited by law throughout Somalia and it was possible for mothers to prevent their daughters from being subjected to female genital mutilation against the mother's will, in particular in the Puntland State of Somalia.

2.4 Since the RAB decision cannot be appealed to the Danish judicial system, the author notes that domestic remedies have been exhausted. The author adds that, since her daughter had not yet been born when the DIS handed down its decision, the issue of a risk of FMG was only assessed by one body, namely the RAB.

### The complaint

3.1 The author claims that her daughter's rights under articles 1, 2, 3 and 19 of the Convention will be violated if she is returned to Somalia, as she may be subjected to female genital mutilation.<sup>6</sup> She claims that the principle of *non refoulement* is applicable to the Convention, which has extraterritorial effects in certain cases such as the issue of female genital mutilation. The author notes that the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Discrimination against Women have already determined that the respective treaties had extraterritorial effects with regard to deportation cases.<sup>7</sup>

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 have been subjected to this practice. The author notes that the RAB based its decision on the DIS report on female genital mutilation in Somalia (2015), according to which it is possible for girls not to be circumcised if the mother opposes to it (see para. 2.3). 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, and that family members may perform the practice when the mother is not at home. The author adds that, although female genital mutilation is prohibited by law in Somaliland and in the Puntland State of Somalia, this legislation is not enforced in practice. She adds that she herself was subjected to female genital mutilation at age 6 and that she has suffered oppression in her country of origin due to her secret marriage and has not been able to seek protection from the authorities in a male dominated society. Finally, in the United Nations High Commissioner for Refugees (UNHCR) Position on Returns to Southern and Central Somalia (June 2014), UNHCR urged States to refrain from forcibly returning any persons to Southern and Central Somalia.

<sup>5</sup> *Thematic paper: South central Somalia: female genital mutilation/cutting, Country of Origin Information for Use in the Asylum Determination Process*, published by the DIS in January 2016 (available at [https://www.nyidanmark.dk/NR/rdonlyres/D011EB99-7FB6-4693-921A-8F912F4079CB/0/female genital mutilationnotat2016.pdf](https://www.nyidanmark.dk/NR/rdonlyres/D011EB99-7FB6-4693-921A-8F912F4079CB/0/female%20genital%20mutilationnotat2016.pdf)) According to this report (page 8), "It is possible for women to avoid having their daughters subjected to the practice of female genital mutilation 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 female genital mutilation and the strong psychological pressure it entails, both from family members and society alike." It also notes 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."

<sup>6</sup> The author does not specify what type of female genital mutilation her daughter would allegedly be subjected to.

<sup>7</sup> The author cites the decision by the Committee on the Elimination of Discrimination against Women on communication No. 33/2011, *M.N.N. v Denmark*, of 15 July 2013.

3.3 The author states that, under article 19 of the Convention, State 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 claims that her daughter was discriminated against, in violation of article 2 of the Convention, because her case was only handled by the RAB without any access to appeal. This was the result of her daughter being born in Denmark to a Somali mother and no other child in Denmark could be subjected to a similar lack of fair trial guarantees.

3.5 The author notes that the RAB did not make any reference to the Convention on the Rights of the Child in its decision.

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

4.1 In its observations dated 16 August 2016, the State party informs the Committee that the RAB decision dated 2 February 2016 was replaced by a new RAB decision dated 14 March 2016, where the Board specified that the author and her daughter were to be deported to the Puntland State of Somalia –where the author originated from- and no other part of Somalia. However, the time limit for such deportation was suspended in light of the Committee's request for interim measures (see para. 1.2 above).

4.2 The State party informs the Committee that, pursuant to article 53a of the Danish Aliens Act, decisions of the DIS are automatically appealed to the RAB unless the application has been considered to be manifestly unfounded. The RAB is an independent, quasi-judicial body that is considered as a "court or tribunal" within the meaning of article 46 of the Council Directive on common procedures for granting and withdrawing international protection (2013/32/EU). The chair and vice-chair of the RAB are required to be judges and other members must be attorneys and serve with the central administration of the Ministry of Foreign Affairs or the Ministry of Immigration, Integration and Housing. Its members appointed by the Executive Committee of the RAB upon nomination by the Danish Court Administration (in case of its judges) or by the Danish Refugee Council, the Minister of Foreign Affairs and Minister of Immigration, Integration and Housing (in case of other members). RAB members cannot seek instructions from the appointing or nominating authority or organisation and they can only be suspended or dismissed by the Special Court of Indictment and Revision (like judges serving in Danish courts). Decisions by the RAB are final so there is no avenue for judicial appeal.

4.3 The State party further notes that, pursuant to section 7 (1) of the Danish Aliens Act, a residence permit will be issued to an alien upon application if they fall within the Convention Relating to the Status of Refugees ("the Geneva Convention"). Pursuant to section 7(2) of the Aliens Act, a residence permit will also be issued to an alien if they risk being subjected to death penalty or torture or ill treatment. The Refugee Appeals Board will consider the conditions for issuing a residence permit under section 7(2) of the Aliens Act to be met when there are specific and individual factors substantiating that the asylum-seeker will be exposed to a real risk of death penalty or torture in case of return to their country of origin. The Aliens Act further requires that any refusal of an asylum request be accompanied by a decision on the existence of this risk. To ensure that the RAB makes its decision in accordance with Denmark's international obligations, the RAB and the DIS have jointly drafted a number of memoranda describing in detail the legal protection of asylum-seekers afforded by international law, in particular the Geneva Convention, the Convention against Torture, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights.

4.4 Proceedings before the RAB include an oral hearing, where the asylum-seeker is allowed to make a statement and answer questions. Decisions by the RAB are based on an individual and specific assessment of the relevant case. The asylum seeker's statements regarding his grounds for asylum are assessed in light of all relevant evidence, including what

is known about conditions in their country of origin. In that regard, the RAB conducts a comprehensive collection of background material on the human rights situation in the country of origin, such as whether there is a consistent pattern of gross and systematic violations.<sup>8</sup> The RAB sees to it that all facts of the case are brought out and decides on examination of the asylum-seeker and witnesses and the provision of other evidence. The State party notes that an asylum-seeker must provide such information as is required for deciding whether they fall within section 7 of the Aliens Act. It is thus incumbent upon an asylum-seeker to substantiate that the conditions for granting asylum are met. In cases where the asylum-seeker's statements throughout the proceedings are characterised by inconsistencies or omissions, the Board will attempt to clarify the reasons. However, inconsistent statements about crucial elements of the grounds for granting asylum may weaken the asylum-seeker's credibility. In such cases, the Board will take into account the asylum-seeker's explanation for such inconsistencies and their particular situation, such as their age, cultural background, literacy or condition as torture victims, among others.

4.5 The RAB is responsible not only for examining information on the specific facts of the case but also for providing the necessary background information, including information on the situation in the asylum-seeker's country of origin or country of first-asylum. For this purpose, the RAB has a comprehensive collection of general background material on the situation in the countries from which Denmark receives asylum-seekers, including Somalia.<sup>9</sup> This material is continuously updated.

4.6 The State party notes that, as established by the Committee's General Comment No. 13, State parties have an obligation under article 19 of the Convention to prohibit, prevent and respond to all forms of physical violence against children, including harmful practices such as female genital mutilation. The Committee's General Comment No. 18 also provides that State parties should adopt legislative measures to effectively address and eliminate harmful practices, and should ensure that legislation and policies relating to immigration and asylum recognise the risk of being subjected to harmful practices or persecuted as a result of such practices as grounds for granting asylum. Consideration should also be given, on a case-by-case basis, to extending protection to a relative accompanying the girl or woman. Also, in line with the Committee's General Comment No. 6, State parties shall not return a child to a country where there are substantial grounds for believing that he or she would be subjected to a real risk of irreparable harm, such as those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. The assessment of such risk should be conducted in an age and gender-sensitive manner. Therefore, it must be deemed that the Convention is violated only if a child would be exposed to a real risk of irreparable harm if returned. This should be the guiding principle in cases concerning the expulsion of a girl where it has been submitted that she would be subjected to female genital mutilation upon return.

4.7 The State party argues that the author has failed to establish a prima facie case as she has not sufficiently substantiated her claim that her daughter would be exposed to a real risk of irreparable harm if returned to the Puntland State of Somalia, and therefore, her claim should be declared inadmissible under article 7 (f) of the Optional Protocol.

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<sup>8</sup> The State party notes that background material is collected from various sources, including UNHCR website, the European Country of Origin Information Network, the Danish Ministry of Foreign Affairs, the Country of Origin Information Division of the Danish Immigration Service, the Danish Refugee Council, Amnesty International, Human Rights Watch and other international human rights organisations.

<sup>9</sup> The RAB background information is available on [www.fl.n.dk/da/baggrundsmateriale](http://www.fl.n.dk/da/baggrundsmateriale).

4.8 The State party notes that the author has not provided any new and specific information on her situation different to that already provided and assessed by the RAB. The RAB determines whether statements are coherent and consistent. In the present case, the author's general credibility was substantially weakened by the fact that her own grounds for asylum had been rejected by the RAB on the basis that her account seemed to be fabricated for the occasion on essential points and her statements were incoherent.

4.9 In its decision of 2 February 2016, the RAB found that the author had not rendered probable that her daughter would be subjected to female genital mutilation in case of her return to the Puntland State of Somalia. The RAB emphasised the background information available on the general situation of female genital mutilation in that region and, particularly, on the possibility for mothers to prevent that their daughters be subjected to female genital mutilation. Therefore, the RAB concluded that the mother's stated fear could not justify asylum under the Danish Aliens Act.

4.10 The State party notes that the decisive issue at stake is whether the author has the willingness and ability to protect her daughter from being subjected to female genital mutilation by resisting potential pressure from relatives or local community in general. In that regard, the author had just alluded to a fear that her maternal aunt would mutilate her daughter. The State party argues that the author has not elaborated or specified her fear that her daughter would be subjected to female genital mutilation. It is clear from the author's statements that both she and her husband opposed female genital mutilation. The State party notes that the author chose to leave Somalia in 2014 allegedly to avoid being forcefully married, and travelled to Ethiopia and then Europe with the assistance of her spouse. She therefore appears to be an independent woman with considerable personal strength who must be assumed to be able to resist any social pressure and thus be able to protect her daughter from female genital mutilation.<sup>10</sup>

4.11 The State party notes that the author relied on reports referring to the situation in Central and Southern Somalia, according to which 90 to 99% of female population have been submitted to female genital mutilation. However, these reports are irrelevant to the present case. According to the *Country Information Guidance – Somalia: women fearing gender-based harm / violence*, published by the UK Home Office in February 2015, female genital mutilation is not as widely and consistently practiced in the Puntland State of Somalia as in Central and Southern Somalia. Also, this practice is prohibited in the Puntland State of Somalia. According to the same report, UNICEF has reported that incidents of female genital mutilation appear to be declining in the Somaliland and Puntland regions and that 75% of girls aged 10 to 14 in these regions have not been subjected to female genital mutilation whereas 98% of those aged 15 and above have. Also, according to the Report of fact-finding mission to Nairobi, Kenya and Mogadishu, Hargeisa and Boosaaso in Somalia in June 2012, published by the Swedish Migration Agency, a survey conducted in 2010 in Garowe and Boosaaso –where the author originates- showed a change in attitudes toward female genital mutilation, reflected in a general decline from 85% in 2004 to 72% in 2010. Also, this report stated that incidents of grandmothers abducting their granddaughters to subject them to female genital mutilation had no longer been reported in the Puntland State of Somalia. The report also stated that the practice was more widespread in rural areas, and not in Boosaaso –the author's hometown, with 700,000 inhabitants, being the largest city in the region.

4.12 Regarding the lack of reference to the Convention by the RAB, the State party notes that this fact cannot be taken to mean that the Board failed to take the Convention into account by not expressly invoking it. It notes that the RAB takes into account the Convention, as well

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<sup>10</sup> In this line, the author cites the European Court of Human Rights' decision on case Emily Collins and Ashley Akaziebie v Sweden (application No, 23944/2005), adopted on 8 March 2007.

as other relevant international treaties as a crucial element of its examination of applications for asylum in cases involving children.

4.13 With regard to the general security situation in Somalia, the State party notes that the author has invoked the European Court of Human Rights' case *R.H. v Sweden*<sup>11</sup> referred to the return of a woman to Mogadishu, not the Puntland State of Somalia, and was therefore not applicable in the present case.

4.14 The State party notes that, according to the RAB's jurisprudence, new grounds for asylum presented after the DIS decision do not automatically result in the referral of the case to the DIS for reconsideration at first instance. In most cases, a referral is not required as it is possible for the RAB to assess the new information on a fully informed basis at the Board hearing. A case will normally be referred back to the DIS if new information has been provided on the asylum-seekers' country of origin, or in the event of changes to the legal basis that are deemed essential to the determination of the case. Also, RAB hearings are attended by a DIS representative. Therefore, the DIS considers if there are grounds for granting asylum before the RAB reaches a decision on the case. Also, no provision in the Convention affords the right of appeal in a case like the present one.

4.15 The State party submits that the author's daughter has not been subjected to discrimination of any kind due to her or her parents' race, colour, sex, religion, or other status that would justify a violation of article 2 of the Convention.

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

5.1 In her comments dated 14 December 2016, the author alleges that the State party's argument of insufficient substantiation of a risk of irreparable harm is closely linked to the merits. The author notes that she would be returned with her daughter to a country that has not ratified the Convention and where she would therefore be afforded no protection, in violation of article 1 of the Convention given that the author's daughter is a child.

5.2 The author claims that article 3 of the Convention imposes an obligation on State parties to act only in accordance with the best interests of the child. For example, if a mother had stated that she would take her daughter to Somalia to perform female genital mutilation, the State party would have an obligation to take the child away from the mother in order to secure her best interests.

5.3 The author alleges that, even though female genital mutilation is prohibited in Somaliland and the Puntland State of Somalia, the practice is still deeply embedded in society –although the incidence may be lower in Puntland than in Somalia-. The risk is therefore existent. The question is whether it is likely that the author will be able to obtain the required protection against this harmful practice if deported. Since the laws in Puntland are not enforced, there is no or very little protection against female genital mutilation in practice. A single mother cannot protect her daughter 24 hours a day and she cannot prevent this practice to be performed in her absence. The authors notes that in a decision of 27 March 2014, the RAB granted asylum to a single mother from Somalia on the assumption that she would not be able to resist social pressure for the daughter to be subjected to FMG. Even though the author did not single out the grandmother or other relatives as possible perpetrators of the female genital mutilation upon return, pressure can also come from other community members and the Somali society at large. The author contends that the RAB should have granted her protection on that basis. The State party's statement that the decisive issue is whether the author has the willingness and ability to protect her daughter against female genital mutilation, and the conclusion that she appears to be an "independent woman with considerable personal strength" is an argument that was not raised during the RAB hearing

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<sup>11</sup> Application No. 4601/2014, decision of 10 September 2015.

and the author was therefore unable to challenge. The author adds that the UNICEF statistics cited by the State party (see para. 4.11) are based on a survey and therefore the figures are unreliable.

5.4 The author insists that the RAB decision of February 2016 did not contain any reference to the Convention, which is a violation of its own. Also, on the DIS website there is a list of applicable international treaties, which does not include the Convention.

5.5 The State party was obliged to take the best interests of the child into account when adopting its decision. She claims that the European Court of Human Rights has considered that deporting single women to Somalia without a male network violates the European Convention on Human Rights because of the general security situation.

5.6 The author notes that the Committee should not “allow” the State party to correct a RAB decision, and that it should examine whether the February 2016 decision violated the Convention.

5.7 The author reiterates her claim regarding the lack of appeal. She notes that, even though the case was reopened by the RAB she was not invited to a new hearing and she instead received a new decision without being given the opportunity to challenge it.

#### **Additional submissions from the parties**

6 In its observations dated 2 March 2017, the State party notes that the author and her daughter failed to appear at the accommodation centre allocated to them, even though the RAB had suspended the time limit for their departure until the Committee reached a decision on the case. On 7 February 2017, the RAB had contacted the DIS and the National Operational Aliens Centre of the North Zealand Police to inquire about the author and her daughter’s whereabouts. Both agencies informed the RAB that they were not aware of the author and her daughter’s whereabouts. The Police further informed that they were deemed to have left Denmark. On 10 February 2017, the RAB contacted the author’s counsel, who also informed not being aware of the author’s whereabouts. Since the RAB considered it a fact that the author and her daughter had left Denmark, the State party argues that they are no longer under the Danish jurisdiction and that the daughter is no longer a victim of a potential violation of the Convention. Therefore, the communication is inadmissible under rule 13 (1) of the Committee’s Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, or alternatively, it should be discontinued under rule 26 of these Rules.<sup>12</sup>

7 On 10 April 2017, the author’s counsel notes that the State party is unable to establish that the author and her daughter are no longer in Denmark. The fact that they are no longer at the asylum centre does not suffice as a reason to automatically conclude that they have left Denmark. Even if they were no longer in Denmark, this would not suffice to preclude jurisdiction.<sup>13</sup>

8 On 18 May 2017, the State party insists that the author and her daughter had a right to remain in Denmark for the duration of the proceedings before the Committee. Also, under section 42a(1) of the Danish Aliens Act, an alien who is staying in Denmark and lodges an application for residence will have the expenses for his or her maintenance and any necessary healthcare services covered by the DIS. The DIS decides on the accommodation and may

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<sup>12</sup> The State party cites the Human Rights Committee’s discontinuance decisions in *MRR v Denmark* (communication No. 2440/2014) and *BNA v Denmark* (Communication No. 2468/2014), which were based on the fact that the authors’ whereabouts had become unknown.

<sup>13</sup> In this regard, the author notes that both the Human Rights Committee and the Committee Against Torture have adopted decisions finding cases admissible, or even finding violations of the respective treaties, where the authors had already been returned to their country of origin.



order that the alien stay at a specific accommodation centre. However, the author and her daughter have left their accommodation and have not applied for private accommodation. Also, the RAB contacts the police when asylum-seekers recorded in the immigration registries go missing for over 14 days. If the police are unaware of the location of these asylum-seekers, the RAB closes the case. In light of this, the State party argues that it can be accepted as a fact that the author and her daughter have left Denmark voluntarily.

9 On 7 November 2017, the State party reiterates its request for discontinuance, and its previous inadmissibility arguments. With regard to the author's argument regarding the non-ratification of the Convention by Puntland, the State party notes that Puntland has not been recognised as an independent state by the international community and therefore remains a region of Somalia, which has ratified the Convention. In any case, the relevant issue is not the ratification but the compliance with the Convention. The State party insists that a case will be remitted to the DIS only if new essential information has been provided, which was not the case here, and in any event, the Convention does not afford the right to appeal in cases like the present one. Finally, the State party notes that the author has invoked other RAB cases where asylum had been granted but without indicating the similarities of these cases – which did not involve deportations to Puntland- with hers. It notes that the particular ability of a mother to resist social pressure must be determined on the basis of a very specific assessment of the personal circumstances of the individual case.

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

### *Consideration of admissibility*

10.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 20 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

10.2 The Committee notes the author's statement that decisions by the Danish Refugee Appeals Board are not subject to appeal and that therefore domestic remedies have been exhausted. This has not been challenged by the State party. Therefore, the Committee considers that there is no obstacle to the admissibility of the communication under article 7 (e) of the Optional Protocol.

10.3 The Committee takes note of the author's claim based on article 2 of the Convention that her daughter was discriminated against because, as a result of having been born in Denmark to a Somali mother, her claim was only assessed by the RAB without any possibility to appeal. The Committee observes, however, that the author makes this claim in a very general manner, without showing the existence of a link between her daughter's or her own origin and the alleged absence of appeal proceedings against the decisions of the Danish Refugee Appeals Board. Therefore, the Committee declares this claim manifestly ill-founded and inadmissible according to article 7 (f) of the Optional Protocol.

10.4 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 returned to the Puntland State of Somalia. However, the Committee considers that, in light of the author's allegations regarding the circumstances under which she would be returned, the author's claims based on articles 3 and 19 of the Convention have been sufficiently substantiated for purposes of admissibility.

10.5 The Committee takes note of the State party's argument that the author and her daughter are deemed to have left the territory of the State party and, consequently, they are no longer under its jurisdiction. The Committee notes, however, that the author and her daughter's departure from Denmark is merely speculative as it has not been confirmed. Also, the deportation order issued against them remains in effect, which means that the author and

her daughter would still face deportation should they be located. The Committee therefore considers that it is not precluded from examining the present communication on the basis of Rule 13(1) of its Rules of Procedure.

10.6 The Committee therefore declares admissible the authors claims concerning the obligation of the State party to: (a) act in the best interests of the child (article 3); and (b) take measures to protect the child from all forms of physical or mental violence, injury or abuse.

*Consideration of the merits*

11.1 The Committee on the Rights of the Child has considered the present communication in light of all the information made available to it by the parties, as required under article 10, paragraph 1, of the Optional Protocol.

11.2 The Committee takes note of the author's allegations that her daughter's return to the Puntland State of Somalia would expose her to a 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 request, in violation of articles 3 and 19 of the Convention.

11.3 The Committee recalls in that respect its General Comment No. 6 that 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>14</sup> In this sense, the Committee recalls 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>15</sup>

11.4 The Committee also recalls its General Comment No. 18 that female genital mutilation may have various immediate and/or long-term health consequences;<sup>16</sup> and that the legislation and policies relating to immigration and asylum should, in particular, 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.<sup>17</sup>

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<sup>14</sup> See the Committee's General Comment No. 6, op. cit., para. 27, and the CEDAW General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 25.

<sup>15</sup> See the Committee's General Comment No. 6, op. cit., para.74

<sup>16</sup> See the Joint General recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and the General Comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), para. 19.

<sup>17</sup> See the Joint General No. 31 of the Committee on the Elimination of Discrimination against Women and the General Comment No. 18 of the Committee on the Rights of the Child, op. cit., para. 55.

11.5 The Committee takes note of the author's allegations that she would be unable to protect her daughter against female genital mutilation in a country where 98% of women have been subjected to this practice and where she would be afforded no protection by national/local authorities. Although prohibited by law throughout Somalia, the practice of female genital mutilation is still prevalent as the legislation is not enforced. Also, the author herself was subjected to female genital mutilation at age 6, suffered oppression as a result of her secret marriage and was unable to seek protection from national authorities in a male-dominated society. The State party notes that, according to several reports, a mother can protect her daughter against female genital mutilation in the Puntland State of Somalia if she resists family or community pressure. It further notes that the author has failed to explain the specific risk that her daughter would run; that the author, by leaving Somalia and travelling to Europe, has shown to be an independent woman with considerable personal strength who must be assumed to be able to resist any social pressure and protect her daughter from 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. Finally, the State party notes that incidents of female genital mutilation have declined in the Somaliland and Puntland,<sup>18</sup> and that 75% of girls aged between 10 and 14 have not been subjected to this practice according to 2013 data.<sup>19</sup>

11.6 The Committee notes that, although the prevalence of female genital mutilation appears to have declined in the Puntland State of Somalia according to reports submitted by the parties,<sup>20</sup> as a result inter alia of the 2014 law banning female genital mutilation in the region, the 2013 fatwa against all forms of female genital mutilation, and 2014 Policy against female genital mutilation,<sup>21</sup> its practice is still deeply engrained in its society.

11.7 The Committee also notes that, in its decision dated 2 February 2017, the RAB examined the author's allegations concerning her own grounds for asylum and found them non-credible. In that same decision, the RAB dedicated one paragraph to addressing the author's allegations regarding the alleged risk that her daughter would be subjected to female genital mutilation if returned to the Puntland State of Somalia and dismissed those allegations stating that the Board "attache[d] decisive importance to the background information available, including in particular the information that, in Puntland, Somalia, it is possible for mothers to prevent their daughters from being subjected to female genital mutilation against the will of the mothers." The background information relied upon was the DIS Report on female genital mutilation in Central and Southern Somalia (2015), and not the Puntland region. The RAB also ordered the author and her daughter's return to Somalia, and it was only in its later decision of 14 March 2017 that the RAB corrected that they should be returned to the Puntland region, without any further reasoning.

11.8 The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the return of a child, and that such decisions should ensure—within a procedure with proper safeguards— that the child, upon return, will be safe and provided with proper care and enjoyment of rights.<sup>22</sup> In the present case, the Committee

<sup>18</sup> Swedish Migration Agency report (June 2012).

<sup>19</sup> UK Country Information Guidance – Somalia: women fearing gender-based harm/violence (February 2015).

<sup>20</sup> In particular, the Report of fact-finding mission to Nairobi, Kenya and Mogadishu, Hargeisa and Boosaaso in Somalia in June 2012, published by the Swedish Migration Agency, and the UK Country Information Guidance – Somalia: women fearing gender-based harm/violence (February 2015), both of which situate the general prevalence rate of female genital mutilation in Puntland at around 70%.

<sup>21</sup> Female genital mutilation/cutting policy of the Ministry of Women Development & Family affairs, November 2014 (supported by UNICEF Somalia).

<sup>22</sup> 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 on the general principles regarding the human rights of children in the context of international migration, paras. 29 and 33.

notes the arguments and information submitted to the Committee, including the assessment of the mother's ability to resist social pressure based on her past experience in the Puntland region, and on reports on the specific situation of female genital mutilation in Puntland. However, the Committee observes that:

a) The RAB limited its assessment 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, in particular in light of the persistently high prevalence of female genital mutilation in the Puntland State of Somalia and the fact that the author would be returned as a single mother, without a male supporting network;

b) The State party has argued that the author, by having left Somalia, appears to be an independent woman with considerable personal strength who must be able to resist any social pressure and thus be able to protect her daughter from female genital mutilation. However, the Committee notes that the author's departure could similarly be understood as an inability to resist pressure. In any event, 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, and that State parties should take measures to protect the child from all forms of physical or mental violence, injury or abuse in all circumstances, even where the parent or guardian is unable to resist social pressure;

c) The evaluation of a risk for a child to be submitted to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being returned should be adopted 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 returning the child.

11.9 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 to be subjected to female genital mutilation if returned to the Puntland State of Somalia, and to take proper safeguards to ensure the child's wellbeing upon return, in violation of articles 3 and 19 of the Convention.

11.10 The Committee on the Rights of the Child, acting under article 10, paragraph 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 amount to a violation of articles 3 and 19 of the Convention.

12 The State party is under an obligation to refrain from returning the author and her daughter to the Puntland State of Somalia. The State party is also under an obligation to prevent similar violations in the future, in accordance with the present Views.

13 The Committee recalls that, becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Convention or its two substantive Optional Protocols.

14 Pursuant to article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the measures undertaken to give effect to the Committee's Views. The State party is also requested to include information about any such measures in its reports under article 44 of the Convention. Finally, the State party is requested to publish the Committee's Views, to have them translated into the official language of the State party and widely distributed.

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