



# Convention on the Rights of the Child

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## Committee on the Rights of the Child

### Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 96/2019\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	S.S.F. (represented by counsel, N.E. Hansen)
<i>Alleged victims:</i>	S.M.F. (the author's daughter)
<i>State party:</i>	Denmark
<i>Date of communication:</i>	2 September 2019
<i>Date of adoption of Views:</i>	27 May 2022
<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>	Non-refoulement; prohibition of discrimination; best interests of the child; protection of the child against all forms of violence or ill-treatment
<i>Articles of the Convention:</i>	3 and 19
<i>Article of the Optional Protocol:</i>	7 (f)

1.1 The author of the communication is S.S.F., a national of Somalia born in 1983. She submits the communication on behalf of her daughter, S.M.F, who was born in Denmark on 2 September 2014. The author and her daughter are facing removal to Somalia. The author claims that her daughter's deportation would violate her rights under articles 3 and 19 of the Convention. She is represented by counsel. The Optional Protocol entered into force for the State party on 7 January 2016.

1.2 On 4 September 2019, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to refrain from returning S.M.F. and the author to Somalia while their case was under consideration by the Committee. On 12 September 2019, the Danish Refugee Appeals Board

\* Adopted by the Committee at its ninetieth session (3 May–3 June 2022).

\*\* The following members of the Committee participated in the examination of the communication:

Suzanne Aho, Aïssatou Alassane Moulaye, Hynd Ayoubi Idrissi, Rinchen Chöpel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

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



suspended the time limit for the departure of S.M.F and the author from Denmark, as requested by the Committee. In the light of the circumstances of the case, it also suspended the time limit for the departure of the author's three other children.

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

2.1 The author is a single woman, belonging to the Ashraf clan and originating from Qoryooley, near Mogadishu. She arrived in the State party on 3 January 2014 and applied for asylum the same day.

2.2 When the author applied for asylum, she was a widow with three children who had been born in Somalia. In her asylum application of 3 January 2014, the author stated that she had left Somalia because she feared being stoned to death by Al-Shabaab, as she had been reported by a neighbour who had seen a man enter her home. She was arrested but fled from the place of detention during a prayer service. On her way to Denmark, in Greece, the author met a Somali man whom she married, and she then became pregnant with S.M.F. Since leaving Greece, she has not heard from her husband. Her three older children and her sister joined her once she arrived in Denmark. On 7 March 2014, the author was granted a temporary residence permit owing to the general human rights and security situation in southern and central Somalia. The author gave birth to S.M.F. on 2 September 2014. On 25 July 2016, S.M.F. was granted a residence permit on the basis of her mother's residence permit. In 2017, the Danish Immigration Service initiated proceedings concerning the revocation of the author's residence permit, in the light of the change in the human rights and safety situation in southern and central Somalia. The author upheld her original claim.

2.3 On 30 November 2017, the author applied for asylum on behalf of S.M.F., stating that she feared that her daughter would be subjected to female genital mutilation upon return to Somalia.

2.4 On 26 March 2018, the Danish Immigration Service refused S.M.F.'s application for asylum, concluding that, based on the Danish Immigration Service's assessment of the evidence, S.M.F. did not risk persecution in her country of origin. The author appealed against this decision to the Refugee Appeals Board, which upheld, on 28 May 2019, the decision of the Danish Immigration Service to refuse S.M.F.'s application for asylum, on the grounds that the author was against female circumcision and that she would be able to resist the pressure from the surrounding environment to circumcise her daughter. This decision was final.

2.5 On the same day, namely 26 March 2018, the Danish Immigration Board revoked S.M.F.'s residence permit, which was based on family reunification. The author lodged an appeal against this decision to the Immigration Appeals Board. On 31 July 2019, the Immigration Appeals Board upheld the revocation of S.M.F.'s residence permit based on family reunification. The author states that, although this decision can be appealed, such an appeal is not relevant as it cannot address the issue of female genital mutilation.

#### **Complaint**

3.1 The author claims that her daughter's rights under articles 3 and 19 of the Convention will be violated if returned to Somalia, as her daughter may be subjected to female genital mutilation.

3.2 The author submits that, as a single mother, she will not be able to protect her daughter in a country where almost all women have been victims of female genital mutilation. She adds that, according to a United Nations Children's Fund (UNICEF) report from 2016, 98 per cent of all girls and women between 15 and 49 years old in Somalia had been subjected to female genital mutilation<sup>1</sup> and, according to a 2013 United Nations Population Fund (UNFPA) report,<sup>2</sup> approximately 80 per cent of girls and women subjected to female genital mutilation have undergone the most severe form of female circumcision. The United Nations

<sup>1</sup> UNICEF, "Female genital mutilation/cutting: a global concern", February 2016.

<sup>2</sup> UNFPA, Female Genital Mutilation/Cutting Country Profile: Somalia, 22 October 2013. Available at <https://www.refworld.org/docid/527a02d34.html>.

Population Fund provided statistical data in 2013 showing that, while noting a slight difference in the prevalence of female genital mutilation according to rural or urban origin, level of education and wealth, in all cases the prevalence of female genital mutilation was over 98 per cent. In general, all sources, including a Danish Immigration Service report from 2016, agree that the prevalence of female genital mutilation is extremely high and above 90 per cent.<sup>3</sup>

3.3 The author states that, although the Provisional Federal Constitution of Somalia prohibits female circumcision, background information on changes in practice and attitudes towards female genital mutilation is uncertain and poorly documented.<sup>4</sup> Female genital mutilation harms girls and women in many ways, including by causing severe pain, shock, excessive bleeding and injury to surrounding genital tissue, and has long-term consequences.<sup>5</sup>

3.4 The author adds that she did not succeed in opposing the circumcision of her older daughter, she has no husband, family or network to support her in protecting her daughter from undergoing female genital mutilation, S.M.F. is the only girl in her family who has not been subjected to female genital mutilation, it will be known in Somalia that S.M.F. has not been cut because she has reached the age at which girls are usually circumcised (7–10 years old), she will not be able to hide the fact that she has not been cut because girls talk about cutting among themselves and S.M.F. will not be able to marry in Somalia if she is not circumcised.

3.5 The author further indicates that the Refugee Appeals Board, in its decision of 28 May 2019, did not explain why it believed that she will be able to resist pressure from the surrounding environment to circumcise her daughter, neither did it seem to use relevant parameters in its reasoning. The author indicates that the available background information provides differing views as to whether some parents are able to prevent their daughters from being subjected to female genital mutilation. She adds that the potential ability of some individuals to avoid the practice must be read in conjunction with statistics on the prevalence of female genital mutilation in Somalia. The author also recalls the cases of *K.Y.M v. Denmark*<sup>6</sup> and *Y.A.M. v. Denmark*.<sup>7</sup> In both cases, the Committee considered 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.

3.6 The author also refers to the guidelines of the Office of the United Nations High Commissioner for Refugees (UNHCR)<sup>8</sup> indicating that a girl at risk of being subjected to female genital mutilation should be regarded as the principal asylum applicant, regardless of whether she is accompanied or not.

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<sup>3</sup> Danish Immigration Service, “Thematic paper: south central Somalia – female genital mutilation/cutting”, Copenhagen, January 2016.

<sup>4</sup> According to the Norwegian Country of Origin Information Centre (Landinfo), some sources claim to have observed a transition from infibulation to sunna in recent years but it is difficult to ascertain with any degree of certainty how extensively patterns might have changed. See Landinfo, “Report: Female genital mutilation in Sudan and Somalia”, 10 December 2008. According to the Department of State of the United States of America, although the Provisional Federal Constitution of Somalia describes female circumcision as cruel and degrading, equates it with torture and prohibits the circumcision of girls, female genital mutilation/cutting is almost universally practised throughout the country. International and local non-governmental organizations have conducted education awareness programmes on the dangers of female genital mutilation/cutting but there are no reliable statistics to measure their success. See: Department of State of the United States of America, “Somalia 2015 human rights report”, 2016.

<sup>5</sup> World Health Organization, “Fact sheet on female genital mutilation”, updated in February 2017.

<sup>6</sup> [CRC/C/77/D/3/2016](https://www.refworld.org/docid/53a2a2a04.html).

<sup>7</sup> [CRC/C/86/D/83/2019](https://www.refworld.org/docid/53a2a2a04.html).

<sup>8</sup> UNHCR, “Guidance note on refugee claims relating to female genital mutilation”, Geneva, May 2009, p. 8.

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

4.1 The State party indicates that, on 19 December 2019, the Danish Immigration Appeals Board decided to reopen S.M.F.'s case regarding revocation of her residence permit and decided to uphold the revocation decision on 2 March 2020.

4.2 The State party submits that the author has failed to establish a *prima facie* case for the purpose of admissibility of her communication, as it has not been sufficiently substantiated that S.M.F. will be exposed to a real risk of irreparable harm if returned to Somalia. The State party concludes that the communication should therefore be considered inadmissible as manifestly ill-founded.

4.3 The State party adds that, should the Committee find the communication admissible, it has not been established that there are substantial grounds for believing that the author's deportation to Somalia would constitute a violation of articles 3 or 19 of the Convention. The State party recalls that it is generally for the organs of the State parties to the Convention to review and evaluate facts and evidence in order to determine whether risk of a serious violation of the Convention exists upon return, unless it is found that such an evaluation was clearly arbitrary or amounted to denial of justice.<sup>9</sup>

4.4 In the present case, the State party observes that the author has not identified any irregularities in the decision-making process or any risk factors that the Refugee Appeals Board has failed to consider in the processing of S.M.F.'s asylum case.

4.5 The State party questions the author's credibility after taking into account all of her statements, including those that formed part of her own asylum application.<sup>10</sup> It does, however, consider as a fact that the author is against circumcision.

4.6 The State party agrees that the practice of female genital mutilation clearly constitutes a violation of article 19 of the Convention. In the present case, however, the Refugee Appeals Board concluded on 28 May 2019 that the author will be able to resist the pressure of her surroundings to circumcise her daughter and that she demonstrated considerable independent willpower and ability to act. In this regard, the State party refers to the jurisprudence of the European Court of Human Rights,<sup>11</sup> according to which the crucial part of the assessment in cases concerning female genital mutilation is assessing whether the family is in a position to ensure that their child is not subjected to the practice. The State party indicates that the author has not provided any information on close family members who are in favour of her daughter being subjected to female genital mutilation and she only states that she fears the community in Somalia. The background material<sup>12</sup> shows that the decision as to whether or not to subject a girl to female genital mutilation is ultimately the mother's decision and that a child is most likely to be protected from female genital mutilation if one of her parents objects.

4.7 As regards the author's statement that background material appears to show that there are differing opinions as to whether it is possible for parents in Somalia to stand firm against social pressure and choose not to continue the practice of female genital mutilation, the State party indicates that all sources mentioned by the author in the communication, as well as

<sup>9</sup> See, for example, *A.Y. v. Denmark* (CRC/C/78/D/7/2016).

<sup>10</sup> The Refugee Appeals Board deemed unlikely the author's explanation as to how she fled from detention in a local prison guarded by Al-Shabaab. The Board also found it unlikely that the author had let a man who was not related to her enter her house when she knew it was forbidden and that she therefore risked being stoned to death. Furthermore, it did not find credible the author's statement that she has had no contact with anyone in Somalia since 2013, as it was asserted during the interview with the Danish Immigration Service that several outgoing calls to Somalia had been registered on her phone and the author's statement about a friend having used her phone was not convincing, as she had given diverging statements on how long her friend had stayed with her. The Danish Immigration Service also found that the statement about the circumstances of her eldest daughter's circumcision seemed deflecting, not specific enough and lacking in credibility, as it seemed fabricated for the occasion.

<sup>11</sup> *Sow v. Belgium* (application No. 27081/13, 19 January 2016); and *R.B.A.B. and Others v. Netherlands* (application No. 7211/06, 6 June 2016).

<sup>12</sup> Lifos, "Somalia – Kvinnlig könsstymplning" (Somalia – female circumcision), version 1.1, August 2019, pp. 26–27.

recent reports,<sup>13</sup> state that avoiding the practice of female genital mutilation is a possibility and that the primary success criteria in this regard are the personality of the mother and her commitment and strong conviction on the issue.

4.8 With regard to the author's reference to the fact that the Refugee Appeals Board did not take into account parameters such as the level of education and place of origin of the author in assessing whether she will be able to withstand the pressure of her environment, the State party indicates that the case material presented before the Refugee Appeals Board included detailed information about the author, such as her educational background in Somalia, educational achievements in Denmark, from where she originated and how she fled alone from Somalia. The State party adds that these parameters have naturally formed the basis for the Refugee Appeal Board's finding that the author has demonstrated considerable independent willpower and ability to act. The State party adds that it appears that persons who have had exposure to Western ideas and concepts are perceived to be more able to withstand social pressure.<sup>14</sup>

4.9 The State party further submits that it appears that there is no indication that controls or physical checks of girls and women are carried out to verify that they have been circumcised. It adds that there are signs of a change in attitude in Somalia towards female genital mutilation and in the ability of parents not to have female genital mutilation performed on their daughters.

4.10 As regards the author's reference to the fact that she has no husband or other male family member to protect her, the Refugee Appeals Board stated that, after having heard the author, it could not accept as a fact that the author upon return to Somalia would be a single woman without a male network.

4.11 In the light of all the above and of the thorough assessment made by the Refugee Appeals Board, the State party maintains that the author has not demonstrated that S.M.F. would be at real risk of suffering irreparable harm if returned to Somalia.

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

5.1 On 10 February 2022, the author provided her comments on the State party's observations on admissibility and the merits of the communication.

5.2 She submits that the reports and data referred to in the original communication show that the evidence of a clear risk of irreparable harm upon return is undeniable and clearly admissible.

5.3 With regard to the State party's argument that it is for the organs of the State party to examine and evaluate the facts and evidence in order to determine whether a risk of a serious violation of the Convention exists in case of return, unless it is established that such an evaluation was manifestly arbitrary or amounted to a denial of justice, the author argues that the decision of the Refugee Appeals Board in the present case is arbitrary and amounts to a manifest error and denial of justice, thus resulting in a violation of articles 3 and 19 of the Convention.

5.4 As regards the State party's reference to the jurisprudence of the European Court of Human Rights that notes that the crucial element of the assessment in cases of female genital mutilation is whether the family is in a position to guarantee that its child is not subjected to the practice, the author notes that the cases in question do not concern Somalia and that the

<sup>13</sup> Danish Immigration Service, "Country of origin information: female circumcision – background, numbers and tendencies", January 2019; European Asylum Support Office "Country of origin information query response", 23 July 2019; Lifos, "Somalia – Kvinnlig könsstyrmpning" (Somalia – female circumcision), version 1.0, 16 April 2019 and version 1.1, 27 August 2019.

<sup>14</sup> Home Office of the United Kingdom of Great Britain and Northern Ireland, "Country information and guidance. Somalia: women fearing gender-based harm and violence", version 3.0, 2 August 2016; Danish Immigration Service, "Thematic paper: south central Somalia – female genital mutilation/cutting", January 2016, p. 8; and European Asylum Support Office, "Country of origin information query response", 23 July.

State party has therefore not sufficiently taken into account the national, regional and local contexts in its decision on deportation in the present case.

5.5 With regard to the State party's claim that it is possible to resist subjecting one's child to female genital mutilation, the author notes that the country of origin information on female circumcision in Somalia of the Danish Immigration Service of 2019 states that sources disagree on the extent to which parents can oppose female genital mutilation and protect their daughters from circumcision. Some sources state that girls cannot be circumcised without the consent of the parents, in particular that of the mother, whereas other sources state that family members can circumcise girls, despite the parents' opposition to the procedure. Furthermore, the author reiterates that any possibility that certain persons could avoid the practice should be considered in the light of the statistics on the very high prevalence of female genital mutilation in Somalia.

5.6 As regards the State party's submission that persons who have had exposure to Western ideas and concepts are perceived as being more able to withstand social pressure, the author indicates that several sources highlight that returnees from Europe or other Western countries might be of particular risk in terms of subjection to female genital mutilation upon returning to Somalia. This is confirmed in the country of origin information on female genital mutilation in Somalia of the Danish Immigration Service of 2021,<sup>15</sup> which states that, generally, Somalis do not expect girls returning from the West to have undergone female genital mutilation owing to its illegal status in those countries. This means that extra attention is paid to this issue by the surrounding society, making 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. The return of S.M.F. from the State party to Somalia therefore only increases the real risk of irreparable harm that she would face.

5.7 The author highlights the fact that the Refugee Appeals Board publicly refused to follow the Committee's recommendations in similar cases, namely *K.Y.M v. Denmark* and *Y.A.M. v. Denmark*, that the State party take all necessary measures to prevent similar violations in the future. The Board stated that it did not accept the Committee's criticism and that the Committee's legal view was contrary to the Board's general practice in cases of female genital mutilation and to the case law of the European Court of Human Rights in similar cases, such as *Collins and Akaziebie v. Sweden*, *Sow v. Belgium* and *R.B.A.B. v. The Netherlands*.<sup>16</sup>

5.8 Furthermore, the author submits that her daughter's rights under the Convention should be properly considered as such, and not on the basis of speculation about the mother's asylum claim. She refers to the Committee's Views in the case of *V.A. (on behalf of E.A. and U.A.) v. Switzerland*,<sup>17</sup> according to which 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.

5.9 Finally, the author submits that the State party failed properly to take into account the best interests of the child and to follow the precautionary principle in its assessment. It also failed to identify the real risk of irreparable harm in the form of female genital mutilation facing S.M.F. if returned to Somalia, thus demonstrating that the Refugee Appeals Board's decision is arbitrary and amounts to a manifest error and denial of justice.

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

6.1 On 18 March 2022, the State party submitted additional observations. It states that no new essential information has been provided in support of the author's submission, nor has the author made any new claims. All of the information provided has therefore already been assessed by the Refugee Appeals Board in its decision of 28 May 2019.

<sup>15</sup> Danish Immigration Service, "Country of origin information – Somalia: female genital mutilation", 2021, p. 1.

<sup>16</sup> Application No. 23944/05, Decision on Admissibility, 8 March 2007; Application No. 27081/13, Judgment, 19 January 2016; and Application No. 7211/06, Judgment, 6 June 2016, respectively.

<sup>17</sup> [CRC/C/85/D/56/2018](#).

6.2 The State party recalls that the author's communication merely reflects a disagreement with the outcome of the assessment of the author's statements and the facts of the case, including the background information that has been considered by the Refugee Appeals Board. The State party observes that the author has not identified any irregularities in the decision-making process or any risk factors that the Board has failed to consider in the processing of the author's asylum case.

6.3 Furthermore, the State party recalls 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 an evaluation was clearly arbitrary or amounted to denial of justice.<sup>18</sup>

6.4 Concerning the author's references to the fact that a girl at risk of female genital mutilation should be considered as the principal asylum-seeker, whether accompanied or not,<sup>19</sup> and that the assessment of the best interests of a child requires that his or her situation be assessed separately, irrespective of the reasons why his or her parents have lodged an asylum application,<sup>20</sup> the State party indicates that the Refugee Appeals Board has in its decision of 28 May 2019 made a specific and comprehensive assessment of S.F.M.'s asylum claim, including an oral and written processing of the case, with assistance from legal counsel.

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

#### *Consideration of admissibility*

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

7.2 The Committee takes note of the State party's argument that the author has failed to establish a *prima facie* case for the purpose of admissibility of her communication under the Convention and that she has not sufficiently substantiated her claim that her daughter would be exposed to a real risk of irreparable harm if returned to Somalia. The Committee considers, however, that in the light of the author's allegations regarding the general prevalence of female genital mutilation in Somalia and the circumstances under which she would be returned, as a single mother, the author's claims on the basis of articles 3 and 19 of the Convention have been sufficiently substantiated for purposes of admissibility.

7.3 The Committee therefore declares admissible the author's claims concerning the obligation of the State party to take the best interests of the child as a primary consideration and to take measures to protect the child from all forms of physical or mental violence, injury or abuse, and proceeds to their examination on the merits.

#### *Consideration of the merits*

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

8.2 The Committee takes note of the author's allegations that her daughter's deportation to Somalia would expose her to 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 application, in violation of articles 3 and 19 of the Convention.

8.3 In that respect, the Committee recalls its general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, 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

<sup>18</sup> See, for example, *Z.Y and J.Y (on behalf of A.Y.) v. Denmark* (CRC/C/78/D/7/2016).

<sup>19</sup> UNHCR "Guidance note on refugee claims relating to female genital mutilation", Geneva, May 2009.

<sup>20</sup> *V.A.(on behalf of E.A. and U.A.) v. Switzerland* (CRC/C/85/D/56/2018), para 7.3.

intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner.<sup>21</sup> Furthermore, the Committee advises in its general comment that when assessing refugee claims of unaccompanied or separated children, 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 Convention relating to the Status of Refugees. In particular, the refugee definition in that Convention must be interpreted in an age- and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; 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 grounds of the Convention relating to the Status of Refugees. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.

8.4 In joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, it was noted that female genital mutilation may have various immediate and/or long-term health consequences. It is recommended that the legislation and policies relating to immigration and asylum recognize the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum and that consideration also be given to providing protection to a relative who may be accompanying the girl or woman. In addition, the Committee notes that other treaty bodies have considered that subjecting a woman or girl to female genital mutilation amounts to torture or cruel, inhuman or degrading treatment.<sup>22</sup>

8.5 In the present case, the Committee takes note of the author's allegations that, as a single mother, she would be unable to protect her daughter from being subjected to female genital mutilation in a country where 98 per cent of women have been subjected to that practice despite it being prohibited by law, as the law is not enforced. The author has also argued that she herself was subjected to female genital mutilation, she did not succeed in opposing the circumcision of her elder daughter, she has no husband, family or network to support her in protecting her daughter from undergoing female genital mutilation, S.M.F. is the only girl in her family who has not been subjected to female genital mutilation, it will be known in Somalia that S.M.F. has not been cut because she has reached the age at which girls are usually cut (7–10 years old) and she will not be able to hide the fact that she is not cut. The Committee takes note of the State party's observation that, according to several reports, a mother can protect her daughter from being subjected to female genital mutilation in Somalia if she is able to resist family or community pressure.

8.6 The Committee notes the State party's statement that the author's general credibility was undermined by the fact that she was not deemed credible regarding her own grounds for asylum; it appears that there is no indication that controls or physical checks of girls and women are carried out in Somalia to verify that they have been circumcised and there are signs in Somalia of a change in attitude towards female genital mutilation and in the ability of parents not to subject their daughters to female genital mutilation. The Committee considers, however, that these arguments must be considered in the light of statistics and reports on the prevalence of female genital mutilation in Somalia, which show that the practice is still deeply engrained in Somali society and the prevalence of female genital mutilation is extremely high.

8.7 The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that such decisions should ensure, within a procedure with proper safeguards, that the child will be safe and

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

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

provided with proper care and enjoyment of rights.<sup>23</sup> In the present case, the Committee notes the arguments and information submitted to it, including the assessment of the mother's assumed ability to resist social pressure based on her expressed opposition to the practice and on reports about the situation of female genital mutilation in Somalia. The Committee observes, however, that:

(a) The assessment of the Refugee Appeals Board was limited to the fact that the author is against circumcision and that she will be able to resist the pressure of the surrounding environment to circumcise her daughter, without properly assessing why and how she could resist such pressure, and without taking the best interests of the child into account. In this regard, the Committee recalls its Views in the cases of *K.Y.M v. Denmark* and *Y.A.M. v. Denmark*, in which it considered 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, in particular in the light of the general reported context, and that State parties should take measures to protect children from all forms of physical or mental violence, injury or abuse in all circumstances;

(b) The Refugee Appeals Board partly based its decision on the author's insufficient credibility after making an overall assessment of her statements, in particular in her own asylum application. The Committee refers, however, to its Views in the case of *V.A. (on behalf of E.A. and U.A.) v. Switzerland*, according to which 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;<sup>24</sup>

(c) The evaluation of the risk that a child may be subjected to the irreversible harmful practice of female genital mutilation in the country to which the child is being deported should be carried out following the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from deporting the child.<sup>25</sup>

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

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

9. The State party is under an obligation to renounce the deportation of S.M.F. to Somalia and to ensure that she is not separated from her mother and siblings.<sup>26</sup> The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this regard, the State party is requested to ensure that asylum proceedings affecting children include a best interests analysis and that, where a risk of a serious violation of the rights of a child is invoked as a ground for non-refoulement, the specific circumstances in which the children would be returned are duly taken into account.

10. In accordance with article 11 of the Optional Protocol on a communications procedure, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the measures it has taken to give effect to the Committee's Views. The State party is requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party is also requested to publish the present Views and to disseminate them widely.

<sup>23</sup> Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration, paras. 29 and 33.

<sup>24</sup> [CRC/C/85/D/56/2018](#), para. 7.3.

<sup>25</sup> See, for example, *K.Y.M. v. Denmark*, para. 11.8; and *Y.A.M. v. Denmark*, para. 8.7.

<sup>26</sup> Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, para. 55 (m).

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## Annex

[Original: Spanish]

### **Individual opinion of Luis Ernesto Pedernera Reyna (partially concurring)**

1. Regarding communication No. 96/2019, I reiterate the position I previously expressed with regard to communication No. 83/2019 to support my individual concurring opinion with respect to the present decision adopted by the Committee not to raise a violation of article 37 of the Convention, in accordance with the following considerations.

2. In the Views as adopted, the Committee states that female genital mutilation is a practice to which the victim could be subjected if she is deported to Somalia. It therefore considers that this practice constitutes torture, a position in line with that of other human rights treaty bodies as stated in paragraph 8.4 of the present Views. However, the Committee does not rule on the violation of article 37 (a) in its final decision, and maintains a position coinciding with that expressed in case No. 83/2019. Since it has failed to rule on the violation of article 37 (a) in its final decision, I must reiterate my partial dissent.

3. The Committee, within the framework of its competence under the Optional Protocol, is to be guided, as stated in rule 1 of its rules of procedure, by the principle of the best interests of the child. Accordingly, in the case of petitions submitted by children and adolescents, the duty of care, guidance and protection imposed on us must be reinforced by a key consideration, namely, that their development as persons is ongoing.

4. The Optional Protocol does not require authors of communications transmitted to the Committee to be represented by counsel; it is thus unnecessary to have a thorough knowledge of the law to substantiate individual complaints. Therefore, the Committee, as a source of enhanced protection, must play an educational and guiding role vis-à-vis children, who are not well versed in the law or practitioners of law.

5. Thus, in the context of the alleged facts, and following the legal principle that the court knows the law (*iura novit curia*), the Committee may invoke rights not mentioned in a communication. The Committee, after all, is well versed in the law, and in its actions, which are informed by the view that children transition gradually to adulthood, the best interests of the child must be a primary consideration.

6. There is another crucial point: the facts that the Committee has been apprised of strongly suggest that the daughter of the author of the communication could be subjected to genital mutilation. Although genital mutilation is prohibited in Somalia, it is still a widespread cultural practice – 98 per cent of girls are subjected to it. This aspect is crucial to the relevance of the principle that the court is well versed in the law. As a protective principle, it needs to be supported by the evidence provided or weighed in the deliberation process and not as a result of an arbitrary, capricious and unsubstantiated decision by the relevant seat of judgment. In this regard, it should be noted that, since this is the second case in which the same type of communication is submitted against the same State party, the argument that to invoke a right that the authors did not raise in the complaint would prevent the mounting of a proper defence ceases to have any force.

7. Lastly, I wish to underscore the particular status of the prohibition of torture as a norm from which there is, as recognized by the international community, no possible derogation, a status that, in my view, heightens the need for the Committee to act on its own initiative and invoke rights not originally raised by the authors.

8. I therefore reiterate my partially concurring opinion, as I believe that, for the reasons set out above, the Committee is in a better position in the present case to find a violation of article 37 of the Convention, even though there was no explicit claim of such a violation in the communication submitted by the author.

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