



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

**Views adopted by the Committee on the Rights of the Child
under the Optional Protocol to the Convention on the Rights
of the Child on a communications procedure in respect of
communication No. 96/2019^{*,**,***}**

<i>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 the decision:</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 issues:</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>Articles of the Optional Protocol:</i>	7 (f)

* 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 Assouma, Hynd Ayoubi Idrissi, Rinchen Chopel, Bragi Gudbrandsson, Philip Jaffé, Sopi Kiladze, Gehad Madi, Faith Marshall-Harris, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, Zara Ratou, José Angel Rodríguez Reyes, Aissatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Benoit Van Keirsbilck.

*** The individual opinion of Committee member Luis Ernesto Pedernera (concurring) is attached to the present Views.



1.1 The author of the communication is S.S.F., a Somali national born in 1983. She submits the communication on behalf of her daughter, S.M.F, who was born in Denmark on 2 September 2014.¹ 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 suspended the time limit for the author's and S.M.F.'s departure from Denmark, as requested by the Committee. Considering the circumstances of the case, it also suspended the time limit for the departure of the author's three other children.

The facts as submitted by the author²

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 At the time she applied for asylum, she had three children born in Somalia and she gave birth to S.M.F. after her arrival in Denmark, on 2 September 2014.³ On 7 March 2014, the author was granted a temporary residence permit due to the general human rights and security situation in South and Central Somalia. 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, considering that the human rights and safety situation in South and Central Somalia had changed. The author upheld her original claim.

2.3 On 30 November 2017, she 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 evidence, S.M.F. does not risk persecution in her country of origin. The author appealed this decision to the Refugee Appeals Board which upheld, on 28 May 2019, the Danish Immigration Service decision to refuse S.M.F.'s application for asylum, on the grounds that the author is against circumcision and that she will be able to resist the pressure of the surrounding environment to circumcise her daughter. This decision is final.

2.5 On 26 March 2018, the same day that the Danish Immigration Board refused S.M.F.'s application for asylum, it also revoked S.M.F.'s residence permit which is 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.

¹ The author has three other children born in Somalia.

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

³ At the time of her departure from Somalia, the author was a widow with three children. In her asylum application, she stated that she left Somalia because she feared being stoned to death by Al-Shabaab as she was reported by a neighbour who saw a man enter her home, she was arrested and fled from the place of detention during prayer. On her way to Denmark, in Greece, the author met a Somali man with whom she got married and became pregnant with S.M.F. Since leaving Greece, she has not heard from him. Her three oldest children and her sister then joined her in Denmark.

The 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 She 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 the 2017 UNICEF report: "Female genital mutilation/Cutting: A global concern", 90-98% of all girls over the age of 15 in Somalia have been subjected to female genital mutilation⁴ and according to the 2013 UNFPA report "Female Genital Mutilation/Cutting: a global concern", approximately 80 percent of girls and women subjected to female genital mutilation have undergone the most severe form. UNFPA provided statistical data in 2013 showing that, while noting a slight difference in the prevalence of female genital mutilation according to rural/urban origin, level of education and wealth, in all cases the prevalence of female genital mutilation is over 98 per cent. In general, all sources, including the Danish Immigration Service report of 2016 "South Central Somalia, Female Genital Mutilation / Cutting", agree that the prevalence of female genital mutilation is extremely high and above 90 percent.⁵

3.3 The author states that, although the Provisional Federal Constitution prohibits the circumcision, background information on changes in practice and attitudes towards female genital mutilation is uncertain and poorly documented.⁶ 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.⁷

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 suffering 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. is not 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 is not 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 believes 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 differs 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 case no. 3/2016 of 25 January 2018, *I.A.M. (on behalf of K.Y.M) vs. Denmark*, adopted on 25 January 2018 and case no. 83/2019, *R.H.M. (on behalf of Y.A.M.) vs. Denmark*, adopted on 4 February 2021. In both cases, the Committee

⁴ UNICEF 2017: "Female Genital Mutilation/Cutting. A global concern", available at https://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf

⁵ Danish Immigration Service 2016: "South Central Somalia. Female Genital Mutilation/Cutting, <https://www.nyidanmark.dk/NR/rdonlyres/D011EB99-7FB6-4693-921A-8F912F4079CB/0/FGMnotat2016.pdf>.

⁶ According to Landinfo (2007)"some sources claim to have observed a transition from infibulation to sunna (type I) in recent years, however it is difficult to ascertain with any degree of certainty how extensively patterns might have changed (Landinfo 2008: female Genital Mutilation in Sudan and Somalia".

According to the US Department of State (2016): "although the provisional federal constitution describes female circumcision as cruel and degrading, equates it with torture, and prohibits the circumcision of girls, FGM is almost universally practiced throughout the country. (...) International and local NGOs conducted education awareness programs on the danger of FGM but there were no reliable statistics to measure their success (US Department of State 2016: Somalia 2015, Human Rights report)

⁷ WHO 2017: Fact Sheet no. 241, "Female Genital Mutilation", Updated February 2017.

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 UNHCR guidelines⁸ 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.

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 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, cf. the case No. 7/2016 *A.Y. vs. Denmark* adopted on 31 March 2018.

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 in the framework of her own asylum application, and making an overall assessment of her credibility.⁹ However, it considers 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. However, in the present case, 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 a considerable independent willpower and ability to act. In this regard, the State party refers to the jurisprudence¹⁰ 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. 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 FGM and she only states that she fears the community in Somalia. The background material¹¹ shows that the decision of whether or not to subject a

⁸ UNHCR (2009): *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, Geneva, p. 8.

⁹ Indeed, the Refugee Appeals Board deemed the author's explanation on how she fled from detention in a local prison guarded by Al-Shabaab unlikely. It also found it unlikely that she had let an unrelated man enter her house, when she knew it was forbidden and she therefore risked being stoned to death. It further found not credible the author's statement that she has had no contact with people 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 oldest daughter's circumcision seemed deflecting and non-specific and lacked credibility as it seemed fabricated for the occasion.

¹⁰ *Sow v. Belgium* (application no. 27081/13, 19 January 2016); and *R.B.A.B. and Others v. The Netherlands* (application no. 7211/06 of 6 June 2016)

¹¹ Lifos: Kvinnlig könsstympning (August 2019), p. 26-27

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 parent objects.

4.7 As regards the author's statement that it appears from the available background material that there are different opinions on whether or not 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 recent reports,¹² state that avoiding the practice of female genital mutilation is a possibility and that the primary success criteria in this regard is 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 thorough information about the author, such as her educational background in Somalia, educational achievement in Denmark, from where she originated, and how she fled alone from Somalia. The State party adds that these parameters have naturally formed basis for the Refugee Appeal Board's finding as to the author's demonstration of a 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.¹³

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 Somalia sees signs of a change in attitude towards female genital mutilation and in the ability of parents not to perform female genital mutilation.

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 facts that the author upon return to Somalia would be a single woman without a male network.

4.11 In light of all the above and in light 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 given the reports and data referenced in the original communication, 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.

¹² Danish Immigration Service: Country of Origin Information: FGM/Kvindelig Omskoering – Baggrund, ta log tendenser (FGM/Female circumcision – Background, numbers and tendencies) (January 2019), Lifos: Kvinnlig Könstympling (April 2019), European Asylum Support Office (EASO); Lifos, Rapport: Somalia – Kvinnlig könstympling (Report: Somalia – Female circumcision (August 2019)

¹³ UK Home Office: Country Information and Guidance. Somalia: Women fearing gender-based harm and violence (2016) and Danish Immigration Service: Thematic Paper: South Central Somalia – Female Genital Mutilation/Cutting (January 2016), p. 8. European Asylum Support Office (EASO), COI Query Response, 23 July 2019

5.4 With regard to the State party's reference to the jurisprudence of the European Court of Human Rights 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 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 As to the State party's claim that it is possible to resist subjecting one's child to female genital mutilation, the author argues that, according to the 2019 Danish Immigration Service Country of Origin Information report on FGM/Female circumcision, "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, especially 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 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 Somali.

5.6 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 author indicates 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 Country of Origin Information report on female genital mutilation in Somalia¹⁴ of the Danish Immigration Service of 2021 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." Indeed, the return of S.M.F. from the State party to Somalia 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 the similar cases no. 3/2016 of 25 January 2018, *I.A.M. (on behalf of K.Y.M) vs. Denmark*, adopted on 25 January 2018 and no. 83/2019, *R.H.M. (on behalf of Y.A.M.) vs. Denmark*, adopted on 4 February 2021, 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 (*Emily Collins and Others vs. Sweden* adopted on 8 March 2007, *Sow vs. Belgium* adopted on 19 January 2016 and *R.B.A.B. v The Netherlands* adopted on 7 June 2016).

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 case No. 56/2018, *V.A. (on behalf of E.A. and U.A.) vs. 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".

5.9 Finally, the author submits that the State party failed to properly 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.

¹⁴ Danish Immigration Service (2021): *Country of Origin Information - Somalia, Female Genital Mutilation (FGM)*, p. 1.

Additional observations by the State party

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

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 Further, 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, cf. case No. 7/2016, *A.Y. V. Denmark*, adopted on 31 March 2018.

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,¹⁵ 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,¹⁶ the State party indicates that the Refugee Appeals Board has in fact 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 and with assistance of a 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, whether or not 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. However, the Committee considers that, in the light of the author's allegations regarding the general situation of prevalence of female genital mutilation in Somalia and the circumstances under which she would be returned, as a single mother, the author's claims based on articles 3 and 19 of the Convention have been sufficiently substantiated for purposes of admissibility.

7.3 The Committee therefore declares admissible the author's 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

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

8.2 The Committee takes note of the author's allegations that her daughter's deportation to Somalia would expose her to a risk of being subjected to female genital mutilation, and

¹⁵ The author referred to the UNHCR 'Guidance Note on Refugee Claims relating to Female Genital Mutilation' of May 2009

¹⁶ The author referred to the Committee's observations in case law *V.A. v. Switzerland*, communication no. 56/2018, para 7.3

that the State party failed to take the best interests of the child into account when deciding on the author's asylum application, in violation of articles 3 and 19 of the Convention.

8.3 In that respect, the Committee recalls its general comment No. 6, according to which States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention; and that such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner.¹⁷ In that sense, the Committee advises that, "when assessing refugee claims..., States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention. In particular, the refugee definition in that Convention must be interpreted in an age- and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures."¹⁸

8.4 In its joint general comment No. 18, the Committee noted that female genital mutilation may have various immediate and/or long-term health consequences.¹⁹ It recommends 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.²⁰ 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.²¹

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 older daughter; she has no husband, family or network to support her in protecting her daughter from suffering 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. is not 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

¹⁷ See the Committee's general comment No. 6, para. 27; and the Committee on the Elimination of Discrimination against Women general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 25.

¹⁸ See the Committee's general comment No. 6, para. 74.

¹⁹ 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.

²⁰ *Ibid.*, para. 55.

²¹ 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.

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 Somalia sees signs of a change in attitude towards female genital mutilation and in the ability of parents not to subject their daughters to female genital mutilation. However, the Committee considers that these arguments must be read 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 provided with proper care and enjoyment of rights.²² In the present case, the Committee notes the arguments and information submitted to it, including the assessment of the mother's assumed ability to resist social pressure based on her expressed opposition to the practice and on reports about the situation of female genital mutilation in Somalia. However, the Committee observes that:

(a) The Refugee Appeals Board's assessment was limited to 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 case no. 3/2016 of 25 January 2018, *I.A.M. (on behalf of K.Y.M.) vs. Denmark*, adopted on 25 January 2018 and case no. 83/2019, *R.H.M. (on behalf of Y.A.M.) vs. Denmark*, adopted on 4 February 2021, 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, especially in light of the general reported context, and that State parties should take measures to protect children from all forms of physical or mental violence, injury or abuse in all circumstances.

(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. However, the Committee refers to its views in case no. 56/2018 *V.A. (on behalf of E.A. and U.A.) vs. 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".

(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.²³

8.8 The Committee therefore concludes that the State party failed to consider the best interests of the child when assessing the alleged risk of S.M.F. 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 to the Convention on the Rights of the Child on a communications procedure, is of the view that the facts before it disclose a violation of articles 3 and 19 of the Convention.

9. The State party is under an obligation to renounce the deportation of S.M.F. to Somalia and to ensure that she is not separated from her mother and siblings.²⁴ The State

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

²³ See inter alia the Committee's views in *I.A.M. vs. Denmark* (CRC/C/77/D/3/2016), para. 11.8; and *Y.A.M. v Denmark* (CRC/C/86/D/83/2019), para. 8.7.

²⁴ See the joint general recommendation No. 31 (2014) of the Committee on the Elimination of Discrimination against Women/general comment No. 18 (2014) of the Committee on the Rights of the Child on harmful practices, para. 55 (m).

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 proceeding 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. 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.

Annex

Individual Opinion of Mr. Luis Pedernera (partially concurring)

1. Acerca de la comunicación núm. 96/2019 reitero mi posición previamente expresada en el marco de la comunicación Núm. 83/2019 para sostener mi voto individual concurrente 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 párrafo 8.4 del dictamen. No obstante, el Comité no se pronuncia la violación del artículo 37 a) en su decisión final manteniendo su postura coincidente con la expresada en el caso 83/2019. Al no pronunciarse sobre la violación del artículo 37 a) en su decisión final, debo reiterar mi 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 el autor tenga asistencia letrada para promover acciones frente al Comité; indica así que no es necesario un conocimiento acabado del derecho para fundamentar las quejas individuales. Por lo tanto, el Comité, en su función de protección reforzada, debe cumplir una función pedagógica y de orientación frente al niño 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. 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. A lo anterior es necesario destacar que al ser el segundo caso en el que se reitera el mismo patrón de la comunicación y está dirigida contra el mismo Estado, el argumento de la indefensión por invocar un derecho no planteado en la queja por parte de los autores deja de tener fuerza.
7. Por último, deseo destacar la condición particular de la prohibición de la tortura reconocida por la comunidad internacional como una norma de *ius cogens*, lo que desde mi opinión refuerza la necesidad de que el Comité actúe de oficio para invocar derechos no planteados originalmente por los autores.
8. Por lo tanto, reitero mi voto parcialmente discordante concurrente en tanto considero 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.

