



Convention on the Rights of the Child

advance unedited text

Distr.: General
4 June 2024

Original: English

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. 169/2021^{*,**}

	<i>Communication submitted by:</i> H. H. (represented by counsel Neils-Erik Hansen)
<i>Alleged victims:</i>	Sa. A.A., Su. A.A.
<i>State party:</i>	Denmark
<i>Date of communication:</i>	20 December 2021
Date of adoption of Views:	24 May 2024
<i>Subject matter:</i>	Deportation of two children and their mother to Somalia, where the children would be subject to female genital mutilation and male circumcision, respectively
<i>Procedural issue:</i>	Ratione materiae, substantiation of claims
<i>Substantive issues:</i>	Prohibition of discrimination; best interest of the child; right to be heard, protection from all forms of physical and mental violence.
<i>Articles of the Convention:</i>	3, 12 and 19
<i>Articles of the Optional Protocol:</i>	7 (c) and (f)

1.1 The author of the communication is H.H., a Somali national born in 1988. She submits the communication on behalf of daughter Sa.A.A. and son Su.A.A., born in Denmark on 29 October 2018 and 21 September 2020, respectively. The author, Sa.A.A. and Su.A.A. are subject to a deportation order to Somalia. The author claims that their forceful return to their country of origin would amount to a violation of the rights of both children under articles 3, 12, and 19 of the Convention on account of the alleged risk for them of being subjected to female genital mutilation and male circumcision, respectively. The Optional Protocol entered into force for the State party on 7 January 2016.

1.2 On 27 December 2021, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested that the State party refrain from returning the family to Somalia while their case was under consideration by the

* Adopted by the Committee at its ninety-sixth session (6-24 May 2024).

** The following Committee Members participated in the examination of the communication: Suzanne Aho, Thuwayba Al Barwani, Aissatou Alassane Sidiku, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chopel, Rosaria Correa, Bragi Gudbrandsson, Philip Jaffé, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Marie Skelton, Velina Todorova, Benoit Van Kiersbilck and Tatou Zara.



Committee. On 5 January 2022, the State party suspended the execution of the deportation order against them.

Factual background

2.1 H.H. is from Eriley village, Barawe district, Shabeellaha Hoose region of Somalia. She entered the State party on 19 June 2014 and applied for asylum on 24 June 2014. She was granted temporary residency and protection status on 7 January 2015. On 6 November 2016, H.H. applied for a renewal of her residence permit. On 12 March 2018, the Danish Immigration Service decided not to renew the author's permit on the grounds that the basis of the residence had ceased as the conditions had changed in such a manner that she no longer risked persecution, and that the personal statements exposed during the proceedings were not accepted as facts in January 2015 as they were deemed non-credible.

2.2 On 29 October 2018 the author gave birth to Sa.A.A. and on 1 May 2019, she applied for asylum on her behalf. On 7 May 2019, the Refugee Appeals Board decided to process the author's asylum together with her daughter's. On 31 January 2020, during the author's screening interview, she stated that she feared that her daughter would be forced to undergo female genital mutilation in Somalia in case of return, mostly by paternal relatives, and that there was also a risk of being killed due to the conflict with al-Shabaab in the local area. The author further argued that in her home country, her daughter would be at risk of various types of abuse by members of society, as she would be regarded as an uncircumcised girl coming from Europe. On 27 March 2020, the Danish Immigration Service rejected the asylum request filed on behalf of Sa. A.A. This decision was upheld on appeal by the Refugee Appeals Board on 31 July 2020. The Refugee Appeals Board dismissed the author's arguments by considering that the author was a resourceful person and that she would be able to resist the pressure from the family and local community and protect Sa.A.A. from female genital mutilation. On 1 September 2020, the Refugee Appeals Board extended the time limit to leave the country because the author was again pregnant. On 31 September 2020, Su.A.A. was born and on 26 October 2020, the author applied for asylum on behalf of her son arguing that she feared the security situation in Somalia, that upon return she could be killed by the man with whom she had a previous conflict, and that the paternal grandmother could take her son away from her.

2.3 On 18 January 2021, the author requested to reopen Sa.A.A.'s proceedings, reiterating that she would be at risk of being subjected to female genital mutilation in case of deportation to Somalia. On 29 January 2021, the Danish Immigration Service refused to grant asylum to Su.A.A. referring to its decision of 27 March 2020, where it was assessed that the author's statements were deemed uncredible, that the fear of her son being taken away by the grandmother was an assumption and that the general situation in Somalia was not of such nature to place everyone at risk. The decision was appealed on the grounds that, upon return to Somalia and following local traditions, the author would be separated from her children, the paternal family would assume their upbringing and the children's paternal grandmother would have them circumcised, whereas the author, as an uneducated woman who had never attended school, would not be in a position to influence the decision on the circumcision of her children. On 11 March 2021, the Refugee Appeals Board rejected the author's request based on the findings made in its prior decision of 31 July 2020 regarding her ability to resist social pressure and protect her children from circumcision. On 10 December 2021, the Refugee Appeals Board upheld the decision by the Danish Immigration Service, refusing H.H.'s application on behalf of Su.A.A.

The complaint

3.1 The author claims that, if they are deported to Somalia, the rights of Sa.A.A. and Su.A.A. under articles 3, 12, and 19 of the Convention, as well as the Committee on the Elimination of Discrimination against Women General Comment no. 32, would be violated, as they would be at risk of being subjected to female genital mutilation and male circumcision, respectively. She further submits that circumcision of children of both sexes is widespread in Somalia and is deeply rooted in the country's cultural traditions. As regards female genital mutilation, 99% of girls above 15 years of age have been subjected to such practices in their country of origin; the majority of girls are subjected to the most severe type of female genital

mutilation. As to the possibility of avoiding female genital mutilation, the author alleges that available background information differs on whether certain parents can resist having their daughters undergo such practice, that the Danish Immigration Service previously stated that it could be possible and some women do manage, however, “it 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”.¹

3.2 The author further argues that, according to United Nations High Commissioner for Refugees' “Guidance Note on Refugee Claims relating to Female Genital Mutilation”,² female genital mutilation is a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution, and a girl at risk of being subjected to female genital mutilation should be regarded as the principal applicant in asylum proceedings, even if she is accompanied or represented by her parents³ and, highlights the obligation of the authorities to assess the risk of female genital mutilation when relevant.

3.3 The author claims that although the State party authorities concluded that the author would be able to resist family and social pressure and protect her children from the risk of being subjected to female genital mutilation and male circumcision, the rights of the children under Articles 3 and 19 of the Convention cannot be made dependent on such an ability of their mother.⁴ Additionally, the author claims that the domestic authorities failed to respect the principle of precaution and the child's best interests, relying on an unjustified conclusion that she would be able to resist social pressure and protect her children from circumcision. The author further alleges that she is a single mother with two children and no male family member to protect them, that she is uneducated and was brought up in a rural area in Somalia.⁵ All girls in the author's family, including herself, have been subjected to female genital mutilation and her children are the only children in the family who are not yet circumcised. The author claims that there exists an imminent risk for the children of being subjected to female genital mutilation and male circumcision, respectively, in case of their return to Somalia, as their mother would not be able to resist social pressure and protect them.

3.4 The author claims that all domestic remedies have been exhausted, since according to the State party's Constitution, all administrative decisions made by the public bodies can be invoked before the Courts except for the Refugee Board decisions.⁶ The Refugee Board is an independent court-like body, and its decisions are final.

State party's observations on admissibility and merits

4.1 On 27 June 2022, the State party presented its observations on admissibility and merits. The State party states that the author's allegations based on the Convention on the Elimination of all Forms of Discrimination against Women fall outside the jurisdiction of the Committee to examine alleged violations of the Convention on the Rights of the Child. The State party therefore requests the Committee to consider that part of the communication inadmissible under Article 7 (c) of the Optional Protocol as those allegations are incompatible with the provisions of the Convention.

4.2 In relation to the alleged violations of Article 12 of the Convention, the State party submits that Sa.A.A. and Su.A.A. are very young and could not be able to independently make a statement regarding their grounds for asylum. Therefore, it is their parent's statements,⁷ provided to the Danish immigration authorities on their behalf, which constitute the basis of the proceedings and examination of their asylum application. Furthermore, the

¹ Danish Immigration Service, “South Central Somalia: female genital mutilation/cutting”, 2016, p. 12.

² United Nations High Commissioner for Refugees “Guidance Note on Refugee Claims relating to Female Genital Mutilation (2009)”, para. 10.

³ *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (c). and European Court of Human Rights, *F.G. v. Sweden* (43611/11), para. 126.

⁴ *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8 (c).

⁵ The author refers to European Court of Human Rights *F.G. v. Sweden* (43611/11)

⁶ See also the Danish Aliens Act.

⁷ Although the children's father was not residing in Denmark at the time, he was interviewed during Sa.A.A. and Su.A.A.'s asylum proceedings.

children's views, represented through their parents, have been included and given due weight in the Board assessment in accordance with Article 12 of the Convention.

4.3 As to the author's allegations of violations under Article 19, the State party recalls the Committee's General Comment No. 13⁸ and General Comment No. 6⁹, that violation occurs only if the child to be returned will be exposed to a real risk of irreparable harm, and submits that the author has failed to establish a prima facie case for the purpose of admissibility under Article 7(f) of the Optional Protocol since it has not been sufficiently substantiated that Sa.A.A. and Su.A.A. will be exposed to a real risk of irreparable harm if returned to Somalia.

4.4 According to the State party, the author did not provide any new specific information on their situation, in addition to the information relied upon as the basis for the decisions made by the Refugee Appeals Board on 31 July 2020 and 10 December 2021 and recalls the Committee's jurisprudence 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 serious violation of the Convention exists upon return."¹⁰ The State party further states that the author has failed to identify any irregularity in the decision-making process or any risk factor that the Refugee Appeals Board has failed to properly consider.

4.5 The State party further submits that the weakened credibility of the author's statement was included as part of the basis upon which the Refugee Appeals Board based its decision, in particular, her conflict with al-Shabaab and with a man from her hometown who wanted to marry her. According to the Board, the author had been asked about the village, but she was unable to provide a precise description. The Board also observed that during the proceedings, the author stated that Sa. AA and Su.A.A.'s paternal grandmother lives in Qoyooley, whereas their father stated that her mother left to stay in Kenya for some months, but that she lives in Mogadishu. The Board could not accept the statement that the author has no male network in her area of origin. Furthermore, the State party submits that the author did not mention her fear that Su.A.A. would undergo male circumcision against her will to the Danish Immigration Service at the asylum interview on 15 January 2021 but only later at the Refugee Appeals Board hearing on 10 December 2021.

4.6 The State party submits that, while there is no dispute that female genital mutilation is contrary to the Convention, the main issue remains whether the applicant would face a real and concrete risk of being subjected to such practice upon her return to her home country.¹¹ In its jurisprudence, the European Court has observed whether the applicant's mother shows a considerable amount of strength and independence that she could be expected to protect her daughter from being subjected to female genital mutilation.¹² In the present case, the Board's assessment concluded that the author is in fact against female genital mutilation, is not without a male network in Somalia, is a resourceful person, and as a parent, would be able to resist social pressure, thus finding that the author's fear could not justify asylum under section 7 of the Aliens Act.

4.7 Concerning Su.A.A. the State party states that there are no precedents on whether the expulsion of a boy who would face a real risk of circumcision against the parents' will constitutes a violation of the Convention, and recalls that the author is, in any case, in a position to ensure that her son is not subjected to circumcision against her will. The State party further submits that the author did not mention the fear of circumcision during Su.A.A.'s asylum screening interview with the Danish Immigration Service. The State party recalls that the Refugee Appeals Board concluded that the author is a resourceful person

⁸ General comment No. 13 (2011) on the right of the child to freedom from all forms of violence, paras. 11 and 29.

⁹ General comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, para. 27.

¹⁰ See *A.Y. v. Denmark* (CRC/C/78/D/7/2016); and European Court of Human Rights, *M.E. v. Sweden* (application No. 71398/12), *R.C. v. Sweden* (application No. 41827/07) and *X. v. Sweden* (application No. 36417/16).

¹¹ European Court of Human Rights, *Emily Collins and Ashley Akaziebie v. Sweden* (application No. 23944/05)

¹² European Court of Human Rights *Sow v. Belgium* (Application No. 27081/13) of 19 January 2016 and *R.B.A.B. and others v. The Netherlands* (Application No. 7211/06) of 6 June 2016.

opposed to both female genital mutilation and male circumcision and that she would be able to protect her children against such practices.

4.8 The State party further adds that the Refugee Appeals Board's assessment of evidence is based on the author's statements to the police, the Danish Immigration Service, and background information in the authors' country of origin, including background material on Somalia and the practice of female genital mutilation. According to the background material, the provisional constitution of Somalia states that female circumcision is a cruel and degrading customary practice that is tantamount to torture and that circumcision of girls is prohibited, but there is currently no legislation to expressly criminalize and punish the use of female genital mutilation. However, background information states that women can avoid having their daughters subjected to female genital mutilation depending on the personality of the mother and whether or not she has the necessary commitment to stand firm against such practice. The 2018 Danish Immigration Service survey indicated out of that 65% of the women who had undergone female genital mutilation, only 32.6% had their daughters undergo the procedure, which indicates that many of the women had successfully chosen not to circumcise their daughters¹³.

4.9 The State party also states that the Board made the decisions of 31 July 2020 and 10 December 2021, after having conducted a comprehensive and thorough examination of the evidence and maintains that the author has not demonstrated that Sa.A.A. and Su.A.A. would be at risk if returned to Somalia and the fact that the Board failed to expressly invoke the Convention in its decision,¹⁴ cannot imply that the Board did not take the Convention into account.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 13 June 2023 the author presented her comments on the State party's observations on admissibility and merits. Concerning the State party's argument that the communication should be declared inadmissible as manifestly ill-founded, the author alleges that her personal circumstances and the situation in Somalia for women and girls substantiate that Sa.A.A. will be exposed to a real risk of irreparable harm if returned to Somalia, where 99.2% of the women and girls are subjected to female genital mutilation. The author further claims that, even if she was successful in shielding Sa.A.A. from the practice, there is a strong risk that as the girl grows older, pressure from friends or other persons will result in female genital mutilation. Furthermore, the author has repeatedly explained how she will not be able to protect her daughter upon return and provided evidence that immediate family, underlines an imminent danger to the author.

5.2 The author claims that the decisions of the Refugee Appeals Board are arbitrary and contradictory to its jurisprudence, which adds uncertainty to the State party's application of the principle of precaution in cases involving children at risk of female genital mutilation. Both the Board and the Danish Immigration Service have granted protection to Somali girls who risk being subject to female genital mutilation. The author further alleges that the Board's decision in the authors' case is in direct conflict with recommendations given the Committee's recommendations in other similar cases against the State party.¹⁵

5.3 With regard to the merits, the author reiterates her arguments on the admissibility of the communication and that she has sufficiently substantiated her claims. She adds that the State party's suggestion that the relevant background material supports the Board's decision runs contrary to material from the State party itself and the most recent data and reports. The 2019 Danish Immigration Service Country of Origin Information report on Female Genital Mutilation referenced several times that "sources disagree on the extent to which parents can oppose female genital mutilation and protect their daughters from circumcision".¹⁶ The author further notes that the Danish Immigration Service in its own Brief Report on South and Central Somalia, from 2020, on the conditions for returnees, notes the vulnerability of

¹³ See Danish Immigration Service, "Country of origin information", p. 9.

¹⁴ *A.Y. v. Denmark* (7/2016)

¹⁵ *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019); and *K.Y.M. v. Denmark*.

¹⁶ Danish Immigration Service, "Country of origin information: FGM/female circumcision, background, numbers and tendencies, p.11.

“(…) especially young girls, who might face female Gender Mutilation”.¹⁷ The author reiterates that sources indicate that girls in Somalia are at risk of being subjected to female genital mutilation against their parent's will. Additionally, returnees from Europe or Western countries might be of particular risk in terms of subjection to female genital mutilation upon return.¹⁸ According to the author, the arguments of the State party contradict the official reports produced by the immigration authorities.

5.4 In relation to the alleged lack of credibility of her statements, the author argues that “the State party stands ready to believe the authors’ statements only when they work in favour of its narrative”. The State party granted total credibility to the author’s opposition to female genital mutilation and built its dismissal on the ground that she is a resourceful parent willing and able to protect her daughter. According to the author, this is a selective approach and goes directly against the better knowledge of the situation for Somalian women and girls who are unable to avoid such procedures.

5.5 The author argues that the three criteria for obtaining asylum have been met, namely: there is a real risk faced by Sa.A.A. of being subjected to female genital mutilation, given the Somali context; Sa.A.A. is under a personal risk, insofar as the author has expressed their inability to protect her if she is returned to Somalia; and she is under a foreseeable risk, insofar as all the women in the author’s family were subjected to female genital mutilation.

5.6 With regard to the principle of precaution, the author notes that the State party insists that the crucial part of the assessment in cases such as the present one revolves around whether the parents are considered resourceful and able to protect their children. However, the State party relies solely on the statements by the author, whom they otherwise consider to be lacking credibility. The author highlights that, as evidenced by the State party’s observations, it has not changed its practice in accordance with the Committee’s guidance to adequately assess the best interest of the child and the principle of precaution.¹⁹ Deporting a girl to a country where 99% of women have been subjected to female genital mutilation, where the majority (64 %) are subjected to the Pharaonic type (cited by the European Asylum Support Office as the ‘worst type’²⁰), and where Sa.A.A., given her age is particularly vulnerable if returned to Somalia is in itself a clear violation of the Convention under Articles 3 and 19, irrespective of speculations into the resilience of her parents.²¹ The author notes that she did express her fear of Sa.A.A. being subjected to female genital mutilation in Somalia during the hearing before the Refugee Appeals Board.

Additional information

6 On 17 May 2024, the State party submitted additional observations reiterating the inadmissibility of the communication as manifestly ill-founded, pursuant Article 7(f) of the Optional Protocol. The State party also notes some factual inconsistencies in the author’s comments of 13 June 2023. In particular, the State party notes that the author refers Sa.A.A. as having been born in 2020, while she was actually born in 2018. Similarly, the author refers to ‘*real threats from the immediate family in form of both grandmothers, one of whom were recently responsible for the circumcision of the author’s sister*’ when in the present case, the maternal grandmother of Sa.A.A. is, according to H.H. herself, dead, and Sa.A.A. has no sister. Sa.A.A., however, has a brother, Su.A.A., who was not mentioned in the author’s comments. Finally, the State party indicates that the author also referred to incorrect dates of Board decisions.

¹⁷ Danish Immigration Service, “Country of origin information: Somalia, female genital mutilation”, 2021, p. 1.

¹⁸ See Danish Immigration Service (2021): *Country of Origin Information - Somalia, Female Genital Mutilation (FGM)*, p. 1,

¹⁹ See *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019); and *K.Y.M. v. Denmark*; and CRC/C/DNK/CO/5, paras. 39 (c) and (d) and 40 (c) and (d).

²⁰ See European Asylum Support Office (2021): *Somalia Targeted profiles Country of Origin Information Report*, p. 40.

²¹ See the Directorate of National Statistics, Federal Government of Somalia (2020): *The Somali Health and Demographic Survey 2020*.

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 the rules of procedure under the Optional Protocol, whether the claim is admissible under the Optional Protocol.

7.2 The Committee first notes the State party's additional observations signalling a number of factual inconsistencies or errors in the author's comments of 13 June 2023. However, the Committee considers that the factual errors contained in the author's submissions are minor and do not affect the facts of the case as summarised above. Therefore, such errors, while unfortunate, do not preclude the Committee from considering the present communication.

7.3 The Committee notes the State party's argument in the sense that the author's reference to the Convention on the Elimination of all Forms of Discrimination against Women falls outside the jurisdiction of the Committee to examine alleged violations of the Convention on the Rights of the Child. The Committee recalls that, under article 5(1) of the Optional Protocol, it is competent to examine violation of the Convention on the Rights of the Child and its two substantive Optional protocols. In light of the foregoing, the Committee finds that the author's claims based on the Convention on the Elimination of all Forms of Discrimination against Women are incompatible *ratione materiae* with the provisions of the Convention and declares these allegations inadmissible under Article 7 (c) of the Optional Protocol.²²

7.4 The Committee notes the author's argument that domestic remedies have been exhausted as decisions by the Refugee Appeals Board are not subject to judicial review (see para. 3.4 above). Accordingly, and given that the State party has not raised any objections in this regard, the Committee considers that all available domestic remedies must be deemed to have been exhausted and concludes that article 7 (e) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.²³

7.5 The Committee notes the author's allegations under article 12 of the Convention. The Committee also notes the State party's argument that Sa.A.A. and Su.A.A. are very young and could not be able to independently make a statement regarding their grounds for asylum and that their parent's statements constituted the basis of the proceedings and examination of their asylum application in compliance with Article 12 of the Convention. The Committee recalls that article 12 guarantees the right of the child of every child who is capable of forming his or her own views to be heard in any judicial or administrative proceedings affecting him or her, either directly, or through a representative. The Committee further recalls that article 12 imposes no age limit on the right of the child to express her or his views, and that it discourages States parties from introducing age limits either in law or in practice that would restrict the child's right to be heard in all matters affecting her or him.²⁴ However, in the present case, the Committee notes that both Sa.A.A. and Su.A.A. were under two years old at the time of the proceedings before migration authorities, and that they were therefore incapable of forming their views regarding their return to Somalia. The Committee therefore considers that this part of the communication is insufficiently substantiated and declares it inadmissible under Article 7 (f) of the Optional Protocol.

7.6 The Committee takes note of the author's allegations that Su.A.A.'s deportation to Somalia would expose him to the risk of being subjected to male circumcision and that the State party failed to take his best interests into account when deciding on Su.A.A.'s asylum application, in violation of articles 3 and 19 of the Convention.

7.7 The Committee notes that it has not yet determined whether exposing a child to non-medically required male circumcision may per se amount to a violation of rights enshrined in the Convention. Consequently, it has not determined either whether a risk of being

²² See, *mutatis mutandis*, H.F. v Luxembourg (CRC/ C/93/D/138/2021), para. 6.3.

²³ See, in this regard, K.Y.M. v Denmark (CRC//C/77/D/3/2016), para. 10.2; and Y.A.M. v Denmark (CRC/ C/86/D/83/2019), para. 7.2.

²⁴ Communication No. 12/2017, Y.B. and N.S., Views of 27 September 2018, para. 8.7.

subjected to non-medically required male circumcision could engage a State party's *non-refoulement* obligations under the Convention. Notwithstanding the above, the Committee notes that, in the present case, the author has failed to provide any specific information that could justify that, Su.A.A.'s return to Somalia would expose him to a real and personal risk of being forcefully subjected to male circumcision against his parents' will. It further notes the argument of the State party that the author did not mention the risk for Su.A.A. to be forcefully circumcised in case of return during his asylum screening but only later in the proceedings. In light of all the above, the Committee considers that the author has failed to sufficiently justify this claim and declares it inadmissible pursuant to article 7(f) of the Optional Protocol.

7.8 The Committee considers, however, that the author's claims under articles 3 and 19 of the Convention and relating to the risk that Sa.A.A. would be subjected to female genital mutilation in case of return, in light of the general and family context, and the failure to take her best interests as a primary consideration in the context of her asylum proceeding have been sufficiently substantiated for the purposes of admissibility²⁵. The Committee also considers that the author's allegations concerning the alleged risk of subjecting Sa.A.A. to female genital mutilation in case of return to Somalia also raise in substance issues under article 37 (a) of the Convention.

7.9 The Committee therefore declares these claims admissible and proceeds to its examination of the merits.

Consideration of 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 must determine whether Sa.A.A.'s return to Somalia would expose her to a risk of being subjected to female genital mutilation, in violation of articles 19 and 37a) of the Convention, and whether the State party failed to take her best interests into account when deciding on Sa.A.A.'s asylum application, in violation of article 3 of the Convention.

8.3 In that regard, the Committee recalls its general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, according to which States are not to 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.²⁶ The assessment of the risk of such serious violations should be conducted in an age-sensitive and gender-sensitive manner.²⁷ In that regard, the Committee advises that, when assessing refugee claims, States should take into account the development of, and formative relationship between, international human rights and refugee law,²⁸ including positions developed by the Office of the United Nations High Commissioner for Refugees (UNHCR) in exercising its supervisory functions under the 1951 Convention relating to the Status of Refugees. In particular, the

²⁵ *S.M.F. v. Denmark* (CRC/C/90/D/96/2019), para. 7.2; *Y.A.M. v. Denmark*, para. 7.3; and *K.Y.M. v. Denmark*, para. 10.4.

²⁶ General comment No. 6 (2005), para. 27.

²⁷ *Ibid.*; and 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.

²⁸ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 14: Female circumcision, 1990, (A/45/38), available at: <http://www.unhcr.org/refworld/docid/453882a30.html>; UNHCR Executive Committee, Conclusion on Refugee children and adolescents, No. 84 (XLVIII), 1997, available at <http://www.unhcr.org/refworld/docid/3ae68c68c.html>, para. (a)(v). Report of the Special Rapporteur on Violence against women, its causes and consequences: Cultural practices in the family that are violent towards women, 31 Jan. 2002, (E/CN.4/2002/83), available at <http://www.unhcr.org/refworld/docid/3d6ce3cc0.html>, paras. 12–20. See also UNCHR Guidance Note on Refugee Claims relating to female Genital Mutilation, *Op. Cit.* paras. 7 and 9.

refugee definition in the 1951 Convention must be interpreted in an age-appropriate 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, the 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 under the 1951 Convention. States should therefore give the utmost attention to such child-specific forms and manifestations of persecution, as well as gender-based violence, in national refugee status determination procedures.²⁹

8.4 In light of all the above and considering in particular the harmful and violent nature of the practice and the long-term health consequences for the children, the Committee considers that a risk of being subjected to female genital mutilation clearly constitutes a protected ground for *non-refoulement* that may engage State parties' obligations under article 37a) of the Convention.

8.5 In the present case, the Committee takes note of the author's allegations that she would be unable to protect Sa.A.A. from being subjected to female genital mutilation in a country where over 90% per cent of women has been subjected to that practice. The author has also argued that returning from a Western country makes Sa.A.A. particularly vulnerable, on account of the extra attention that will be paid to her since it is expected that she will not have undergone the procedure abroad. The author alleges in particular that she was herself subjected to female genital mutilation and that, following local traditions, the author would be separated from her children, the paternal family would assume their upbringing and the children's paternal grandmother would have Sa.A.A. circumcised, and that the author, as an uneducated woman, would not be in a position to influence the decision on Sa.A.A.'s circumcision.

8.6 The Committee takes note of the State party's argument that, according to several reports, a mother can protect her daughter from being subjected to female genital mutilation in Somalia if she is able to resist family or community pressure. The Committee also takes note of the State party's argument that, following regional jurisprudence, the crucial part of the assessment in cases concerning female genital mutilation is whether the family is in a position to ensure that their child is not subjected to the practice. The State party also argues that the Refugee Appeals Board thoroughly assessed the alleged risk of Sa.A.A.'s return, duly considering her best interests, and that the author has failed to identify any irregularity in the decision-making process or any risk factors that had not been properly taken into account. The Committee takes note of the State party's argument that the author's credibility was weakened, which was the basis upon which the Board made its decision regarding the purported fear of female genital mutilation.

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 concerned will be safe and provided with proper care and ensured the enjoyment of his or her rights.³⁰ In the present case, the Committee has considered the arguments and information submitted to it, including the assessment of the author's assumed ability to resist social pressure on the basis of her expressed opposition to the practice and on reports about the situation of female genital mutilation in Somalia. However, the Committee observes that:

(a) The Refugee Appeals Board's assessment was limited to a general statement that the author would be able to resist the pressure of the surrounding environment to circumcise Sa.A.A. Yet, such statement was made without properly assessing or justifying why or how the author could resist such pressure in practice, without evaluating the specific and personal context to which the author and Sa.A.A. would be returned and without taking the best interests

²⁹ General comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 74

³⁰ *S.M.F. v. Denmark*, para. 8.7; *Y.A.M. v. Denmark*, para. 8.7; *K.Y.M. v. Denmark*, para. 11.8; *S.H.K. v. Denmark*, para. 7.7 and 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), paras. 29 and 33.

of the child into account. In this regard, the Committee recalls its consistent jurisprudence on cases of *non-refoulement* to Somalia on the basis of an alleged risk of female genital mutilation, according to which the rights of the child under article 19 of the Convention cannot be made solely dependent on the mother's ability to resist family and social pressure, especially in the light of the reported context, and that States parties should take measures to protect children from all forms of physical or mental violence, injury or abuse in all circumstances.³¹ The Committee takes note of the State party's argument that it is relying on its interpretation of regional jurisprudence on other similar cases. However, the Committee recalls that this interpretation cannot exempt the State party from complying with its obligations under the Convention, nor can this interpretation justify non-compliance with the Committee's Views under the Optional Protocol.³² The Committee also considers that there does not appear to be any contradiction between the referenced regional jurisprudence and its previous Views, in particular given that they relate to different States, which are known to have different contexts than that of Somalia, and that, while the Committee acknowledges that the capacity of a child's parents to protect him or her might be crucial, it asserts that it is not in itself sufficient without a complete analysis of the specific, individual context;

(b) The Refugee Appeals Board based its decision on the author's weakened credibility regarding the purported fear of female genital mutilation after making an overall assessment of her various statements, during the author's asylum applications. However, the Committee recalls that determining the best interests of children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application.³³ In particular, the Committee observes that the Refugee Appeals Board did not conduct further inquiries as to the specific family context and how that context could have affected the assessment of the individual risk faced by Sa.A.A.;

(c) The evaluation of the risk that a child may be subjected to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being deported should be carried out following the principle of precaution and, where reasonable doubt exists that the receiving State cannot protect a child against such practices, States parties should refrain from deporting the child concerned.³⁴ The Committee observes that the State party has not demonstrated that this standard was met in the present case.

8.8 The Committee therefore concludes that the State party failed to consider the best interests of the child when assessing Sa.A.A.'s alleged risk of being subjected to female genital mutilation if returned to Somalia, in violation of article 3 of the Convention. The Committee further concludes that, in light of the information on file, including the general context and the specific circumstances of the case, the return of Sa.A.A. to Somalia would amount to a violation of articles 19 [and article 37 (a) of the Convention.

9. The State party is under an obligation to refrain from returning Sa.A.A. and the author to Somalia. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this regard, the State party is requested in particular to ensure that asylum proceedings affecting children include a best interest assessment and that, where a risk of a serious violation such as female genital mutilation is invoked as grounds for nonrefoulement, the specific circumstances in which the children would be returned are duly taken into account.

10. Pursuant to article 11 of the Optional Protocol, 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 requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party

³¹ *S.H.K. v Denmark*, para.7.7 (a), *S.M.F. v. Denmark*, para. 8.7 (a); *Y.A.M. v. Denmark*, para. 8.7 (b); and *K.Y.M. v. Denmark*, para. 11.8 (b).

³² *Y.A.M. v. Denmark*, para. 8.7 (b).

³³ *S.H.K. v Denmark*, para.7.7 (b), *E.A. and U.A. v. Switzerland* (CRC/C/85/D/56/2018), para. 7.3; and *S.M.F. v. Denmark*, para. 8.7 (b).

³⁴ *S.H.K. v Denmark*, para.7.7 (c), *S.M.F. v. Denmark*, para. 8.7 (c); *Y.A.M. v. Denmark*, para. 8.7 (c); and *K.Y.M. v. Denmark*, para. 11.8 (c).

is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.
