



# Convention on the Rights of the Child

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## Committee on the Rights of the Child

### Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 36/2017\*, \*\*

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| <i>Communication submitted by:</i>       | A.S. (represented by counsel, N.E. Hansen)  |
| <i>Alleged victim:</i>                   | The author  |
| <i>State party:</i>                      | Denmark   |
| <i>Date of communication:</i>            | 18 October 2017 (initial submission)  |
| <i>Date of adoption of decision:</i>     | 26 September 2019   |
| <i>Subject matter:</i>                   | Deportation of a child and his mother to Pakistan   |
| <i>Procedural issues:</i>                | Exhaustion of domestic remedies; lack of substantiation   |
| <i>Substantive issues:</i>               | Prohibition of discrimination; best interest of the child; rights implementation; right to life; right of the child to be cared for by his parents; right of the child to preserve his identity |
| <i>Articles of the Convention:</i>       | 2, 3, 4, 6, 7 and 8   |
| <i>Article of the Optional Protocol:</i> | 7 (c), (e) and (f)  |

\* Adopted by the Committee at its eighty-second session (9–27 September 2019).

\*\* The following Committee members took part in the consideration of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Philip Jaffe, Olga A. Khazova, Cephas Lumina, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Aissatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.

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1.1 The author of the communication is A.S., a national of Pakistan born in 2008. The author and his mother are the subjects of a deportation order. The author claims that his deportation from Denmark to Pakistan would violate his rights under articles 2, 3, 4, 6, 7 and 8 of the Convention. He is represented by counsel. The Optional Protocol entered into force for Denmark on 7 January 2016.

1.2 On 23 October 2017, 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 author and his mother to their country of origin while the case was under consideration by the Committee.

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

2.1 In May 2011, when the author was 2 years old, he and his parents entered Denmark. On 18 June 2012, the family was granted asylum and given a residence permit. On an unspecified date, the author's parents divorced, and since then the author has been living with his mother. Although the author maintains contact with his father, who lives in the same town, the father, due to a "mental disability", is unable to care for the author. The author alleges that his paternal family, who lives in Pakistan, is angry about the divorce and about the fact that his father has "lost his status as head of the family". Thus, his father's family has threatened the author and his mother from Pakistan.

2.2 In January 2013, a Danish magazine published an article accusing the author's father of having received refugee status under false circumstances. As a result, the case was presented by a right-wing party to the Danish Parliament as an example of asylum fraud and the family's residency case was reopened by the Danish Immigration Service. On 17 December 2014, the Service discontinued and withdrew the residence permits of the author and his parents.

2.3 The author's mother appealed the decision of the Danish Immigration Service before the Danish Refugee Appeals Board, alleging that she and the author feared persecution in Pakistan because of her divorce and because she was a single mother. She challenged separately the withdrawal of the residence permits for the author and herself, on the basis of the divorce and the fact that the family was no longer a "collectivity". She argued that, as a child, the author should not suffer the negative consequences of his father's alleged fraudulent actions.

2.4 On 24 March 2015, the Danish Refugee Appeals Board upheld the Danish Immigration Service decision. The Board considered that the mother's asylum case was identical to the father's case and that the crucial information provided in that context had been proved as fabricated. It further noted that the mother had no connection with Denmark resulting from the years spent in that country, that she had family in Pakistan, and that she had not proved it probable that she would face any problems if returned to Pakistan.

2.5 The author applied individually for a residence permit, arguing that he had spent five strong formative years of his life in Denmark and had no memories of Pakistan, as he had arrived at the age of 2, and it was therefore in his best interests to stay. On 22 September 2015, the Danish Immigration Service rejected his application. On 9 December 2015, the Immigration Appeals Board also rejected the author's appeal against that decision. The author emphasizes that the Immigration Appeals Board considered that "since the author is 7 years old and, thus, a minor, the Refugee Board has in its decision assumed that the author's mother is the actual client".

2.6 On 9 February 2016, the author applied to the Department of Civil Affairs for free legal aid to appeal the decision by the Immigration Appeals Board before the courts. On 5 July 2016, the author's application for free legal aid was rejected and, on 20 October 2016, this rejection was confirmed by the Danish Appeals Permission Board.

### **Complaint**

3.1 The author claims that his deportation to Pakistan would violate the principle of non-refoulement under article 2, read in conjunction with articles 6, 7 and 8 of the Convention. He adds that, by failing to consider the risk of persecution and threat to his life

in the event of his return to Pakistan, the Danish Refugee Appeals Board failed to consider the serious nature of the consequences of irreparable harm or death.<sup>1</sup>

3.2 Returning the author to Pakistan would also be against the best interests of the child as a primary consideration under article 3 of the Convention. The deportation would place the author at risk of separation from his mother if returned to Pakistan, in violation of articles 7 and 8 of the Convention. He claims that, under Pakistani law, a male child “belongs” to the mother until age 7 and thereafter to his father and, in this case, to the father’s family in Pakistan.

3.3 The author claims that his return to Pakistan would place his life, survival and development at serious risk, in violation of article 6 of the Convention. It would violate his right to be registered, to acquire nationality and to be cared for by his parents pursuant to article 7 of the Convention. It would also disregard the State party’s obligation to protect the author from being deprived of his identity pursuant to article 8 of the Convention.

3.4 By denying the author free legal aid to bring his case before Danish courts, the State party violated article 4 of the Convention, as it prevented him from accessing a process to determine violations under the Convention in domestic courts. In addition, the author claims that the lack of children’s access to free legal aid under new Danish rules fails to consider the needs of children.

#### **State party’s observations on admissibility**

4.1 In its observations dated 22 December 2017, the State party claims that the communication is inadmissible for non-exhaustion of domestic remedies. On 9 December 2015, the Immigration Appeals Board upheld the decision by the Danish Immigration Service not to examine the author’s application for residence. The decision by the Immigration Appeals Board can be further appealed to the courts pursuant to section 63 of the Constitution. Therefore, the decision is only final once the decision has been appealed and the right to a judicial review has been exhausted.

4.2 The State party submits that the fact that the author was refused free legal aid does not change the outcome that the author failed to exhaust domestic remedies. The State party refers to the Human Rights Committee decision in *P.S. v. Denmark*, in which the Committee held that financial considerations and doubts about the effectiveness of domestic remedies did not absolve the author from exhausting them.<sup>2</sup> The State party contends that the Committee should be bound by the case law of the Human Rights Committee and that domestic remedies have not been exhausted in the present case.

#### **Author’s comments on the State party’s observations on admissibility**

5.1 In comments dated 5 February and 30 April 2018, the author alleges that since he had no right to free legal aid, the Danish Immigration Service dismissed his case, and he had no means to appeal. On 20 October 2016, the Danish Appeals Permission Board had upheld the decision to refuse free legal aid to the author. On 15 November 2017, the national Supreme Court held in a different case that an asylum seeker had no right to stay in Denmark during proceedings and that decision was not subject to appeal. The author contends that these decisions leave him with no effective remedies to pursue.

5.2 The author submits that the State party’s argument that financial considerations and doubts about effective remedies do not absolve him from exhausting those remedies is void and reinforces his assertion that decisions made by the Danish Refugee Appeals Board are not really subject to appeal.

5.3 Finally, the author claims that due to his status as an accompanied child, he has no possibility to have his case reviewed by the court system,<sup>3</sup> therefore, domestic remedies have been exhausted.

<sup>1</sup> The author refers to the Committee’s general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

<sup>2</sup> Communication No. 397/1990, para. 5.4.

<sup>3</sup> The author does not provide further information on this issue.

**State party's observations on the merits**

6.1 In its observations dated 3 December 2018, the State party claims that the author, as a child, has no independent grounds for asylum. It also claims that the author's residence permit derived solely from the permit of his parents. Hence, the facts submitted in the author's case warranted the revocation of his residence permit for the same reasons that his parents' residence permits were revoked. The State party adds that the Danish Refugee Appeals Board considered the author's rights under the Convention when determining the revocation of his residence permit.

6.2 The State party notes that the evaluation by the Danish Refugee Appeals Board of the parents' asylum cases was valid. The Board considered that the father's statements were the family's grounds for asylum and that the mother had been aware of the fact that her residence permit and that of her ex-husband had been obtained through fraud. Because the father's statements were inconsistent, imprecise and incoherent and because the author's father had secured residence permits through fraudulent means, the asylum applications of the author and his mother were also rejected and their residence permits revoked.

6.3 Regarding the author's ties to Denmark, the State party argues that the Danish Refugee Appeals Board included the author's particular circumstances (that is, age, attendance at a Danish school, good knowledge of the Danish language and a lack of extended family residing in Denmark) as an integral part of its assessment of his case when it decided to revoke his residence permit. The Board found that it would not be particularly burdensome for the author to return to Pakistan as he was very young when he arrived in Denmark, and it was in his best interest to remain with his parents.

6.4 The State party asserts that the author has failed to identify any irregularity in the decision-making process or risk factors for which the Danish authorities have failed to properly consider.

6.5 The State party claims that the author has not sufficiently established that his return to Pakistan would constitute a violation of articles 2, 3, 6, 7 or 8 of the Convention. Drawing upon the language in paragraph 27 of the Committee's general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, the State party claims that it is not a violation of the Convention to return a child to his or her country of origin, as long as the child will not be exposed to a real risk of irreparable harm. The State party also argues that new information regarding the threats made by the author's paternal relatives is unreliable and elaborative and thus the author does not face a risk of being separated from his mother if returned to Pakistan. As Danish domestic law takes the best interests of the child into account, the refugee board and the Immigration Appeals Board have already assessed that the circumstances described by the author are not such that the author is at risk of irreparable harm.

6.6 The State party further notes that the author's claim that article 3 of the Convention would be violated if he were returned to Pakistan is without grounds. The State party claims that the author has not provided information or documentation of circumstances showing that the author and his mother cannot reside together in their country of origin.

6.7 Regarding article 2 of the Convention, the State party observes that the author has not been subjected to discrimination of any kind due to his or his parents' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

6.8 Furthermore, the State party claims that it did not violate article 4 of the Convention by denying the author free legal aid. The State party submits that the author has not sufficiently established that he or his representative did not have adequate effective remedies available to address potential violations of the Convention. Relying on the case law of the European Court of Human Rights, including *Steel and Morris v. The United Kingdom*, in which the Court held that "the right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and

are proportionate”,<sup>4</sup> the State party claims that the Appeals Permission Board, following a set legal protocol, did not find conditions for granting free legal aid in the author’s case. As such, the State party did not violate article 4 of the Convention.

#### **Author’s comments on the State party’s observations on the merits**

7.1 In his observations dated 18 March 2019, the author notes that the issue of free legal aid at the national and international level is crucial as it might affect the ability of children to appeal judicial decisions. The author further notes that free legal aid ensures that human rights mechanisms are accessible to all children, not just to those who can afford a lawyer. The author notes that this is relevant to Danish cases as no person pursuing a deportation case has been awarded free legal aid by Danish authorities since the rules for international legal aid were changed in the country.

7.2 The author claims that the State party put great emphasis on the author’s father’s asylum case, instead of on the facts related to the author himself. He claims that his particular circumstances (that is, the age at which he entered Denmark, the time he spent in the country, his attendance at a Danish kindergarten, his knowledge of the Danish language, among others) were not considered by the Danish authorities. The author argues that these circumstances make the author’s and his father’s asylum applications quite distinct.

7.3 The author claims that the State party, when considering whether the author would be removed from his mother once returned to Pakistan, mistakenly suggested that Pakistan would respect a decision made by Danish authorities on the matter of custody.<sup>5</sup>

7.4 Finally, the author requests that his case be reopened, and in that connection refers to *L.G. and X.C. v. Denmark*.<sup>6</sup>

#### **State party’s additional observations**

8.1 In its observations dated 3 June 2019, the State party claims that the author has not produced any new information in his comments.

8.2 Regarding the author’s request that his case be reopened, the State party argues that *L.G. and X.C. v. Denmark* is not a comparable case since, in that case, undisputed new circumstances have been presented (that is, the author’s mother was pregnant), whereas the author in the present case has not established substantial grounds to believe his life would be threatened if returned to Pakistan, as no new circumstances have arisen.

8.3 The State party reiterates that the author has not sufficiently established that he or his counsel did not have adequate effective remedies available to address potential violations of the Convention. The State party also argues that it is not the Committee’s task to decide in abstract whether or not national legislation is compatible with the Convention, but to consider whether there has been a violation in the particular case.

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

##### *Consideration of admissibility*

9.1 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 or not it is admissible under the Optional Protocol.

9.2 The Committee notes the State party’s arguments that the author has not exhausted domestic remedies because: (a) he did not appeal the decision of the Immigration Appeals Board dated 9 December 2015 before the courts; and (b) the refusal of free legal aid does not change the outcome of the author failing to exhaust domestic remedies. However, the Committee also notes the author’s arguments that decisions by the Danish Refugee Appeals

<sup>4</sup> European Court of Human Rights, *Steel and Morris v. The United Kingdom*, Application No. 68416/01, Judgment, 15 February 2005, para. 62.

<sup>5</sup> The author does not provide further information in this regard.

<sup>6</sup> Committee on the Rights of the Child, communication No. 31/2017.

Board are not subject to appeal,<sup>7</sup> the fact that he tried to pursue legal aid services to be able to access the relevant judicial review and that such aid was refused, leaving him with no means to appeal. In light of the above, the Committee considers that there is no obstacle to the admissibility under article 7 (e) of the Optional Protocol.

9.3 The Committee notes the author's claims based on articles 2, 6, 7 and 8 of the Convention. It observes, however, that the author's claims are general in nature and do not provide any information or arguments to justify how his rights under the invoked provisions would be violated in the event of his deportation to Pakistan. Therefore, the Committee considers that these claims are manifestly ill-founded and declares them inadmissible under article 7 (f) of the Optional Protocol.

9.4 The Committee also notes the author's claim based on article 3 of the Convention, referring to the fact that returning the author to Pakistan would be against the best interests of the child, placing him at risk of separation from his mother, and that Danish authorities did not take the author's particular circumstances into account during relevant procedures. However, the Committee takes note of the State party's arguments that due consideration was given to the author's best interests throughout all relevant procedures, considering his particular circumstances (including his age, school attendance, language skills and family situation) as an integral part of those procedures and that the author has failed to identify any concrete irregularity in the decision-making process or risk factors for which the Danish authorities have failed to properly consider.

9.5 The Committee recalls that the assessment of the existence of a risk of serious violations of the Convention in the receiving State should be conducted in an age- and gender-sensitive manner,<sup>8</sup> that the best interests of the child should be a primary consideration in decisions concerning the return of a child, and that such decisions should ensure that the child, upon return, will be safe and provided with proper care and enjoyment of rights.<sup>9</sup> The best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the return of a child.<sup>10</sup>

9.6 The Committee also 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 evaluation was clearly arbitrary or amounted to a denial of justice.<sup>11</sup>

9.7 In the present case, the Committee notes that the Danish Refugee Appeals Board and the Immigration Appeals Board have assessed the authors' new ground for requesting asylum, namely, the alleged threats made by the author's paternal relatives in Pakistan, together with the author's particular circumstances, but rejected this ground, considering it unreliable and elaborative. These organs concluded that the author would not face a risk of being separated from his mother if returned to Pakistan and that it was in the author's best interest to remain with his mother.

9.8 The Committee observes that, while the author disagrees with the conclusion reached by the Danish Refugee Appeals Board and Immigration Appeals Board, he has not shown that their assessment of the facts and evidence presented by the author was arbitrary or otherwise amounted to a denial of justice. The Committee therefore considers that this part of the communication is also insufficiently substantiated and declares it inadmissible under article 7 (f) of the Optional Protocol.

<sup>7</sup> See also *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 10.2; and *A.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.2.

<sup>8</sup> General comment No. 6, para. 27.

<sup>9</sup> Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, paras. 29 and 33.

<sup>10</sup> *Ibid.*, para. 30.

<sup>11</sup> See *A.Y. v. Denmark*, para. 8.8.

9.9 Finally, the Committee notes the author's claim that the State party violated its obligations under article 4 of the Convention, since the Danish Appeals Permission Board rejected the author's application for free legal aid to bring his asylum case before Danish courts. The Committee also notes the State party's statement that the Danish Appeals Permission Board, following a set legal protocol, did not find conditions for granting free legal aid in the author's case. The Committee considers that article 4 of the Convention, which provides that States parties are to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention, includes the right to an effective remedy where a violation of the Convention has been found. However, the Committee considers that article 4 establishes general obligations that can be invoked only in conjunction with other rights of the Convention in the context of the individual communications procedure under the Optional Protocol. Considering that the author of the present communication has failed to substantiate, for purposes of admissibility, his claims of alleged violations of his rights under articles 2, 3, 6, 7 and 8 of the Convention, his allegation of a violation of article 4 of the Convention is also inadmissible under article 7 (f) of the Optional Protocol. The Committee therefore declares the author's claim under article 4 inadmissible under article 7 (f) of the Optional Protocol.

10. The Committee therefore decides:

- (a) That the communication is inadmissible under article 7 (f) of the Optional Protocol;
- (b) That the present decision shall be transmitted to the author of the communication and, for information, to the State party.

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