



International Covenant on Civil and Political Rights

Distr.: General
26 August 2015

Original: English

Human Rights Committee

Communication No. 2428/2014

Decision adopted by the Committee at its 114th session (29 June–24 July 2015)

<i>Submitted by:</i>	I.A.A. et al. (represented by the Danish Refugee Council)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Denmark
<i>Date of communication:</i>	17 June 2014 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 June 2014 (not issued in document form)
<i>Date of adoption of decision:</i>	23 July 2015
<i>Subject matter:</i>	Deportation from Denmark to Italy
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Prohibition of torture or cruel, inhuman or degrading treatment
<i>Articles of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

GE.15-14444(E)



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Annex

Decision of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (114th session)

concerning

Communication No. 2428/2014*

Submitted by: I.A.A. et al. (represented by the Danish Refugee Council)

Alleged victim: The author

State Party: Denmark

Date of communication: 17 June 2014 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 2015,

Having concluded its consideration of communication No. 2428/2014, submitted to the Human Rights Committee on behalf of Ms. I.A.A. et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Decision on admissibility

1.1 The author of the communication dated 17 June 2014 is Ms. I.A.A., born on 31 May 1984. She brings the complaint on behalf of herself and her two minor children: F.A.A., born on 19 April 2005, and M.A.H.H., born on 6 July 2012. They are Somali nationals residing in Denmark and, at the time of submission of their communication, were subject to a deportation order to Italy, scheduled on 20 June 2014.

1.2 The author claims that, by forcibly deporting her and her children to Italy, Denmark would violate their rights under article 7 of the Covenant. The author is represented by the Danish Refugee Council. The Optional Protocol entered into force for Denmark on 23 March 1976.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvio, Dheerujall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

1.3 On 19 June 2014, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to deport the author and her children to Italy while their case was under consideration by the Committee.

1.4 On 28 January 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to deny the State party's request of lifting the interim measures.¹

The facts as presented by the author

2.1 The author originates from Mogadishu. She is 31 years old and belongs to the Habergidir clan. She is Muslim. She has two daughters, F.A.A., born on 19 April 2005, and M.A.H.H., born on 6 July 2012. In 2006, she divorced her former husband, the father of F.A.A. She fled Somalia out of fear of the Al-Shabaab militia. The author sold tea at the Parkara market, in the government-controlled area of Mogadishu. In 2008, she was threatened by members of Al-Shabaab, who accused her of being a spy for the Government and demanded that she stop selling tea as women should not work in public places. They further threatened to pass an Islamic judgement against her. After the author fled Somalia, Al-Shabaab looked for her and threatened her parents to give information about her current whereabouts.

2.2 The author left Somalia alone, leaving her daughter behind, and reached Italy on 13 October 2008. Upon arrival, she was accommodated in a reception camp near Rome, where she lived until April 2009, when she received subsidiary protection and a corollary residence permit for three years, which was renewed in April 2012 until 9 April 2015.

2.3 The day after she received her residence permit, the author was informed that she could no longer stay in the shelter and was asked to leave. As she was offered neither an alternative solution or temporary shelter, nor any assistance finding work or more stable housing, the author was left homeless. On occasion, she would be hosted by private individuals or in churches near Sienna. In August 2009, she moved into an apartment close to Florence, together with other Somali refugees, where she lived for three years. The apartment was overcrowded and, as the tenants could not afford to pay for electricity or water, the conditions were insalubrious and unhygienic.

2.4 The author looked for work on a daily basis. In August 2009, she started working as a cleaner, including in a biscuit factory for six months. She then worked as a cleaner in private homes from 2010 to 2012. During periods of unemployment, she would turn to the church for food assistance.

2.5 In 2010, the author married her second husband, who resided in Ethiopia.

2.6 In February 2011, the author reunited with her daughter, with the help of a local Italian family and the Italian authorities. Her daughter was issued a residence permit with the same expiry date as the author's. The author was informed by the municipality that she could not register her daughter in school, because she lacked a formal address and permanent housing. Furthermore, the author could not afford to pay the school bus fare.

2.7 As the author found the situation desperate in Italy, she travelled to Ethiopia in October 2011, to unite with her husband. She stayed in Ethiopia for two months, but returned to Italy to find employment. Returning from Ethiopia, the author was pregnant. Living in Italy as a single, pregnant woman, with only occasional work, while caring for a

¹ Communicated as part of the State party's observations on admissibility and merits, dated 19 December 2014.

small daughter and without access to food, was extremely difficult. She found the sanitary conditions in the apartment where she used to live had worsened. The author did not receive any medical assistance or examinations during her pregnancy, as she was informed that, to do so, she would need a permanent address.

2.8 Having failed to find a stable job, schooling for her child, decent accommodation and access to medical care in Italy, the author travelled to Denmark on 31 May 2012, where she applied for asylum on the same day. On 6 July 2012, she gave birth to her second child. The author had a disagreement with her husband, and she has not been in contact with him since 2012.

2.9 In her asylum claim, the author sought protection against the situation in Somalia. On 12 October 2013, the Danish immigration service rejected her application for asylum, as it found the author to lack credibility. The decision was upheld by the refugee appeals board on 15 November 2013, and the author and her children were ordered to leave Denmark and return to Somalia. The asylum authorities did not address the author's claim regarding the situation in Italy, although the author had mentioned the harsh and degrading living conditions she faced there. On 6 March 2014, the author applied to the refugees appeals board for it to reopen the case on the grounds that its assessment of the case had not been consistent with other similar cases of Somali asylum seekers. This request was rejected on 16 June 2014.

2.10 Meanwhile, the Danish National Police made arrangements to return the author to Italy under the European Union Return Directive.

2.11 The author claims that she has exhausted domestic remedies, as decisions of the Danish refugee appeals board cannot be appealed. The application for the reopening of the case lacks suspensive effect.

The complaint

3.1 The author submits that, by forcibly returning her and her children to Italy, the State party would violate their rights under article 7 of the Covenant.² Since she was requested to leave the reception centre after being granted subsidiary protection, the author has been unable to find either a durable housing solution or assistance in finding employment, social benefits or access to education for her eldest daughter.

3.2 The author submits that reception conditions in Italy and basic standards for refugees with valid or expired residence permits do not comply with international obligations of protection.³ On this issue, the author cites a report stating that, if international protection seekers returning to Italy have already been granted a form of protection and already enjoyed the reception system when they were in Italy, they have no more right to be accommodated in reception facilities in Italy.⁴ She asserts that asylum seekers in Italy

² The author also cites the following decisions of the European Court of Human Rights: *M.S.S. v. Belgium and Greece* (30696/09); *Samsam Mohammad Hussein and others v. the Netherlands and Italy* (27725/10).

³ The author refers to Organisation Suisse d'aide aux réfugiés, "Reception conditions in Italy – Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees", October 2013, p. 11; Asylum Information Database, Country Report – Italy, May 2013, p. 34; and Council of Europe, Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 3 to 6 July 2012, 18 September 2012, p. 150.

⁴ The author cites European Network for technical cooperation of the application of the Dublin II Regulation, "Dublin II Regulation National Report on Italy", available at: www.dublin-project.eu/dublin/Dublin-news/New-report-Dublin-II-regulation-lives-on-hold. Regarding resettlement conditions in Italy for asylum seekers, the author also cites the Asylum Information

experience severe difficulties gaining access to health services.⁵ In view of this situation, Italy does not currently meet the necessary humanitarian standards for the principle of first country asylum to be applied.

3.3 The author adds that, if they were to return to Italy, she and her children would be at a real risk of facing inhuman and degrading treatment, because they would be fully dependent on charity. The author further fears that she would be in a desperate situation whereby she would not be able to provide her children with food or shelter.

State party's observations on admissibility and merits

4.1 On 19 December 2014, the State party submitted that the communication should be declared inadmissible as the author had failed to exhaust domestic remedies or, alternatively, considered inadmissible as the author had failed to establish a prima facie case. The State party informed the Committee that, after the author's asylum application was rejected — a decision that was confirmed by the refugee appeals board on 15 November 2013 — the author informed the national police on 10 December 2013 that she did not want to return voluntarily to Somalia but instead wanted to return to Italy, a country which had issued her and her eldest child residence permits that were valid until 2015. Against this background, the national police contacted the Italian authorities, which confirmed that both the author and her eldest daughter held valid residence permits, but that the author should contact the Italian authorities in Sienna to apply for a permit for her youngest daughter.

4.2 By its letter of 6 March 2014, the author's counsel applied for a reopening of the asylum proceedings in Denmark. The reasons put forward to reopen the proceedings were, inter alia, that the author would be at risk if returned to Somalia because there was still unrest, that she had been persecuted by Al-Shabaab and that she would prefer to go to Italy if she had to be returned from Denmark. The author referred to the general conditions in Somalia, including the methods of attack used by Al-Shabaab; to increases in attacks by Al-Shabaab in 2013; and to the fact that the Somali authorities were unable to provide protection to civilians persecuted by Al-Shabaab in Mogadishu.

4.3 On 2 June 2014, the author confirmed to the national police that she still wanted to leave for Italy. Accordingly, the national police planned an assisted voluntary return of the author and her two children to Italy on 20 June 2014.

4.4 On 16 June 2014, the refugee appeals board refused to reopen the asylum proceedings, as it found no reason to do so, given that no substantial new information had been exposed, beyond the information available to the board at the time of the original hearing.

Database, Country Report – Italy (May 2013), p. 37; the United States of America Department of State, 2012 Country Report on Human Rights Practices – Italy, 19 April 2013, available from www.refworld.org/docid/517e6e2214.html; Organisation Suisse d'aide aux réfugiés, "Reception Conditions in Italy – Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees", October 2013, Sects. 4 and 5; and Jesuit Refugee Service, "Protection interrupted – The Dublin regulation's impact on asylum seekers' protection", June 2013, pp. 152 and 161.

⁵ The author cites Council of Europe, Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Italy from 3 to 6 July 2012, 18 September 2012, p. 143; and Organisation Suisse d'aide aux réfugiés, "Reception conditions in Italy – Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees", October 2013.

4.5 On 17 June 2014, the author brought the case before the Committee under article 7 of the Covenant, with a request for interim measures. Accordingly, on 19 June 2014, the national police suspended the time limit for the author's and her daughters' departure from Denmark until further notice, to comply with the Committee's request.

4.6 The State party recalled that the refugee appeals board, in its decision of 15 November 2013, had determined that the author had not been a member of any political or religious association or organization. In its assessment, the refugee appeals board found that the applicant had made inconsistent and thus non-credible statements about her conflicts with Al-Shabaab and that her statements appeared fabricated for the occasion. The refugee appeals board further found that it was unlikely that Al-Shabaab would continue to persecute the author considering her very modest role and that even if part of the applicant's statements was accepted as a fact, the author would no longer be of any interest to Al-Shabaab. As regards the general situation in Mogadishu, the Board observed that it appeared from the background information available about Southern and Central Somalia that the security situation in the area had improved considerably since the European Court of Human Rights delivered its judgement in *Sufi and Elmi v. the United Kingdom*,⁶ including a reduction in the number of attacks on and killings of civilians and a considerable reduction in armed fighting. The refugee appeals board therefore determined that the author had failed to render probable that she would be at a real risk of persecution or abuse in the event that she were returned to Somalia. It further determined that the fact that she is a single woman with children could not lead to a different assessment of the case.

4.7 The State party further informed the Committee that, in response to a question from the immigration and integration affairs committee of the Danish parliament, the Ministry of Justice had ordered the suspension of all pending forced returns under the Dublin Regulation from Denmark to Italy of families with minor children, where the family comprised either a child under five years old, or a family member with a serious physical or mental disorder, pending a decision in the *Tarakhel v. Switzerland* case. However, the State party stressed that, in the present case, the deportation decision was not to be undertaken under the Dublin Regulation and that the author had indicated on 10 December 2013 that she voluntarily sought to go back to Italy, and had later confirmed this on 2 June 2014.

4.8 In the light of the author's present communication before the Committee, in which she alleges that her deportation to Italy would constitute a breach of article 7 of the Covenant by Denmark, the State party deems her preliminary consent to return to Italy to have been withdrawn.

4.9 The State party first notes that the author has never claimed, before the Danish authorities, that her return to Italy would constitute a violation of article 7 of the Covenant. Thus, the State party authorities have never had the chance to rule upon this claim. Consequently, the State party submits that the communication should be declared inadmissible. Additionally, it should be declared manifestly ill-founded as the author has failed to sufficiently substantiate, for admissibility purposes, to be a victim of any of the Covenant rights in her communication.

4.10 On the merits, the State party submitted that the refugee appeals board determined on 15 November 2013 that the author was not in need of protection with respect to the alleged risk faced in Somalia. The author has not challenged this conclusion before the Committee. Furthermore, the author subsequently demanded to return to Italy. The State party authorities accordingly arranged her removal. Thus, the planned deportation of the

⁶ Applications Nos. 8319/07 and 11449/07. Judgement of 28 June 2011.

author and her two children to Italy was not a consequence of the decision made by the State party authorities, nor because of the existence of the author's permit in Italy, and it is therefore not based upon the principle of "first country of asylum" under the Dublin Regulation. The Danish authorities have taken steps to return the author and her children to Italy solely because the author herself had requested such return.

4.11 In response to the author's allegations concerning the humanitarian situation in Italy, the State party refers to the 2013 inadmissibility decision delivered by the European Court of Human Rights in *Samsam Mohammed Hussein*.⁷ Taking into account the reports drawn up by both Governments and non-governmental organizations, the Court found that, concerning the then-current conditions in Italy, "while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings, it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece*". The Court found that the applicant's allegations had been therefore manifestly ill-founded and inadmissible and that the applicant could be returned to Italy. The State party considers that, although the author has relied upon the Court's finding in *M.S.S. v. Belgium and Greece* (2011), the Court's decision in the *Hussein* case (2013) is more recent and specifically addresses the conditions in Italy. Indeed, in its decision in *Hussein*, the Court noted that those who had been granted subsidiary protection in Italy would be provided with a three-year renewable residence permit that allows the holder to work, obtain a travel document for aliens and benefit from family reunification and from the general schemes for social assistance, health care, social housing and education.

4.12 According to the State party, the decision of *Tarakhel v. Switzerland* cannot be interpreted as implying that States should obtain individual guarantees from the Italian authorities where the applicants, like the author, hold a valid residence permit, and are thus entitled to work and to social benefits.

4.13 Consequently, the State party concludes that it will not constitute a breach of article 7 to deport the author and her children to Italy, which the author herself has requested.

Author's comments on the State party's observations

5.1 In her comments dated 23 February 2015, the author disputes the State party's statement that she had agreed to return "voluntarily" to Italy, and states that it is not and was not the request of the author to return to Italy, having sought protection in Denmark. In practice, upon final rejection of asylum in Denmark, applicants are provided with a deadline to leave Denmark, typically within 15 days of the rejection. If the asylum seeker does not leave voluntarily, the national police is responsible for arranging the deportation, and the failed asylum seeker is called for a hearing, during which he or she is asked whether he or she wishes to leave voluntarily. The asylum seeker is asked to sign a "statement of cooperation". If the asylum seeker informs the hearing that he or she does not wish to leave voluntarily, the police then informs the asylum seekers of the possibility of sanctions, such as reduced or no financial benefits, the duty to report to the police or detention. Therefore, although the author signed a "statement of cooperation", it is not possible to speak of a genuine voluntary departure. The author only wanted to cooperate with the authorities in order to be allowed to stay in her current asylum camp, where her oldest daughter went to school. Thus, she was signing to avoid detention.

⁷ *Samsam Mohammad Hussein and others v. the Netherlands and Italy* (27725/10).

5.2 On 13 June 2013, the author's counsel was contacted by a social worker at the asylum camp, who reported that the author did not wish to return to Italy. On 16 June 2014, the author's counsel informed the national police by phone that the author did not wish to leave voluntarily and that the planned deportation could not be regarded as a voluntarily departure. The police replied that they were planning to return the author on 20 June 2014, regardless of the non-voluntary nature of the return.

5.3 The author reiterates that it is peculiar that the refugee appeals board ruled that the author and her children could be forcibly deported to Somalia, although the national police were planning to deport her to Italy owing to her Italian residence permit. However, neither the immigration service nor the refugee appeals board have approved the deportation to Italy or given the Italian immigration authorities prior notice of the deportation in order to secure basic reception facilities upon arrival.

5.4 With respect to exhaustion of national remedies, the author stresses that, as an uneducated Somali woman, she has not in verbal or written form explicitly expressed her claim regarding article 7 of the Covenant. This, however, does not exempt the Danish authorities from their general responsibility and international obligations. The author had left Italy owing to urgent humanitarian reasons and had applied for asylum in Denmark. She had, in her own practical terms, described her problems in Italy to the Danish immigration service and the Danish refugee appeals board. It was then incumbent on the board to make sure that the deportation to Italy would not violate the international obligations of Denmark, regardless of whether the applicant explicitly invokes the relevant legal provisions.

5.5 With respect to the case law from the European Court of Human Rights adduced by the State party, the author stresses that the decision in *Samsam Mohammed Hussein* that a return to Italy would not constitute a breach of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms was made on the assumption that "the Netherlands authorities [would] give prior notice to their Italian counterparts of the transfer of the applicant and her children, allowing the Italian authorities to prepare for their arrival" (paragraph 77). The author referred to the Grand Chamber of the European Court of Human Rights decision of 4 November 2014 in *Tarakhel v. Switzerland* regarding an asylum seeking family with six minor children, who were to be transferred to Italy from Switzerland in accordance with the Dublin Regulation. The living conditions and difficulties in finding shelter for asylum seekers and beneficiaries of international protection in Italy is relevant to the present case. The Court found that, even though the current situation in Italy could not be compared to the situation in Greece at the time of the judgement in *M.S.S. v. Belgium and Greece*, a similar approach should be adopted, namely, to examine "the applicant's individual situation in the light of the overall situation prevailing in Greece at the relevant time" (para. 101).

5.6 Regarding the current situation in Italy, the Court, still following the approach from the *M.S.S.* judgement, stated that "the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, [could] not be dismissed as unfounded" (para. 115). The Court concluded that, if no proper reception facilities adapted to children were available, "the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under article 3 of the Convention" (para. 119). Accordingly, the Court found it to be "incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that, on their arrival in Italy, the applicants will be received in facilities and in conditions adapted to the age of the children" (para. 120).

5.7 The author submits that the *Tarakhel* decision is relevant to her case, as the living conditions for asylum seekers and beneficiaries of international protection must be regarded

as similar. Furthermore the Court's reasoning regarding article 3 of the European Convention on Human Rights can be regarded as corresponding to article 7 of the Covenant. According to the author, the *Tarakhel* decision seems to indicate that the assumption premise laid out in the *Hussein* decision can no longer be regarded as sufficient. On the contrary, individual guarantees, especially to secure returning children from destitution or harsh accommodation conditions, are required according to the Court.

5.8 The author reiterates that the fact that she might be able to renew her residence permit in Italy does not exclude the risk she or her children could be faced with harsh living conditions, homelessness or destitution in Italy, as a single mother with two minor children without access to basic shelter, sanitation facilities, food or sufficient medical care, in breach of article 7 of the Covenant. Finally, the author adds that returning families who have already been granted international protection might face even greater difficulties in finding shelter, access to sanitation facilities or food in Italy than returning asylum seekers, as the latter enjoy a minimum of protection within the Dublin Regulation system and may have access to European Union-supported reception facilities.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93, of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author has failed to exhaust domestic remedies, as she did not invoke claims related to a possible violation of article 7 of the Covenant, in relation to her return to Italy, before domestic authorities. The Committee observes that her claim before the refugee appeals board was that "she feared being killed by Al-Shabaab in the event that she were returned to Somalia, because she had run away from them". In addition, the Committee observes that, in the author's application to appeal the refugee appeals board decision of 15 November 2013, she reiterated that she faced persecution by Al-Shabaab in Mogadishu, and thus would be at real risk of persecution or abuse in the event that she were returned to Somalia (paras. 2.9 and 4.2). Once the decision to return her to Somalia became enforceable and the police contacted her for deportation arrangements, the author raised the preference to be returned to Italy on 10 December 2013 (para. 4.1), which she confirmed on 2 June 2014 (para. 4.3). On 6 March 2014, the author sought that proceedings be reopened with respect to her deportation to Somalia, which was rejected on 16 June 2014. In this application, the author did not raise concerns with respect to living conditions in Italy.

6.4 Immediately after, on 17 June 2014, the author brought the case before the Committee, raising allegations under article 7 of the Covenant with respect to living conditions in Italy, which were never formally brought as an asylum ground per se before the Danish authorities, even though the author was legally represented during domestic proceedings. The author has not challenged the availability or effectiveness of such recourse before the State party's jurisdictions. Consequently, the latter were deprived of the opportunity to examine such claims, which are at the heart of the author's communication before the Committee. Accordingly, the Committee finds that the author has failed to exhaust domestic remedies.

7. The Human Rights Committee therefore decides:
 - (a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;
 - (b) That the present decision shall be communicated to the author and to the State party.
-