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Case Note 2018/1

Communication 3/2016: I.A.M v Denmark

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Date of publication: 18.07.2018

Key words: Female Genital Mutilation (FGM), Non-refoulement

Subject matter: The Deportation of a girl from Denmark to Somalia, where she would face an alleged risk of being forcefully subjected to female genital mutilation (FGM), as a violation of her rights under the CRC.

CRC Provisions: art. 1, art. 2, art. 3, art. 19

CRC OP3 Provisions: art. 7(f)

Other relevant communications: N/A

Date of adoption of views: 25 January 2018

Source: http://www.ohchr.org/Documents/HRBodies/CRC/CRC-C-77-DR-3-2016.pdf

Outline of the substantive issues

No one could deny that Female Genital Mutilation (FGM) is an egregious violation of human rights, and that the return of a child to a country where she faces the risk of FGM is a violation of children's rights as contained in the CRC,[1] as well as international humanitarian law.

This communication was brought against Denmark on behalf of K.Y.M by I.A.M (who was legally represented). The facts concerned a daughter born to a Somali national from the Puntland (northern) region. The mother of this child had applied for asylum days after entering Denmark without valid travel documents, together with her husband. His

[1] See the Joint general recommendation No. 31 (2014) of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 (2014) of the Committee on the Rights of the Child on Harmful Practices, the Committees provide for States parties to adopt legislative measures to effectively address and eliminate harmful practices. They should ensure that legislation and policies relating to immigration and asylum recognize that women risk being subjected to harmful practices or persecuted as a result of such practices as grounds for granting asylum. Consideration should also be given on a case-by-case basis to providing protection to a relative accompanying the girl or woman (para. 55 (m)).

application was, however, transferred to Sweden under applicable European Union regulations, as he had purportedly been residing there since 2007.

The application of the mother, then 6 months pregnant, was turned down by the first tier authority, the Danish Immigration Board. This decision was appealed to the Refugee Appeals Board, a final authority under the Danish refugee regime. The Refugee Appeals Board, in a decision of 2 February 2016, also refused the claim, on the basis that the author's statements were inconsistent and lacked credibility, in particular with regard to her father's reaction when he learned about her secret marriage in 2007, and the fact that she had stayed in Puntland until 2014 with her family, without further retaliation, despite her husband's departure from the country in 2007.

Her daughter was born three weeks before the Refugee Appeal Board issued its decision. However, the claim of a fear of the risk of FGM was dismissed on two grounds: first, the Refugee Appeal Board found that the risk of FGM was on the decline, relying on a report on the status of FGM in Somalia (and Puntland in particular) indicating its lower incidence; and second, it dismissed the claim on the basis that it was possible for mothers to avoid having their daughters subjected to FGM in Somalia, especially in Puntland. A point was made of the fact that since the child was born after the Danish Immigration Board's initial decision, that body did not consider the position of the (unborn) child, meaning that only one body (the Refugee Appeals Board) considered the risk of FGM to the child. [This was relevant to the claim of a breach of article 2 CRC, as a child born to Danish nationals would not have suffered the lack of access to an appeal, as the child of a Somali mother was in this instance.]

A violation of the rights contained in article 1 (definition of a child), article 2 (non-discrimination), article 3 (the best interests of the child) and article 19 (the right to protection from all forms of violence) were alleged. It was claimed that the principle of *non-refoulement* is applicable under the CRC and has extraterritorial effects in certain cases such as FGM.

In an interesting turn of events, the Refugee Appeals Board decision to return the applicant to Somalia was replaced, 6 weeks later, with a fresh order in which the Board specified that the author and her daughter were to be deported to Puntland, and no other part of Somalia. This was effected a month after the communication was lodged.

Procedural issues

A number of procedural issues emerge from a careful consideration of the various dates supplied. It appears that the communication was submitted days after Denmark ratified the CRC Communication Protocol (CRC OP3) the former date was 12 February 2016, while CRC OP3 entered into force for Denmark on 7 January (the child was born on 5 January of that year.) The Refugee Appeals Board decision to refuse the asylum claim was handed down on 2 February 2016. The communication was therefore prepared and submitted within 10 days of the decision of the Refugee Appeal Board (on 12 February 2016).

The Working Group on Communications acting on behalf of the CRC Committee had requested (on 16 February 2016) that the State Party refrain from returning the author and her daughter to their country of origin while their case was under consideration (article 6 of CRC OP3). On 18 February 2016, the State Party did suspend the execution of the deportation order against the author and her daughter. However, a request by the State Party for this interim measure to be lifted in August 2016 was denied by the CRC Committee in January 2017, as was a subsequent request for the matter to be discontinued (lodged in March 2017 and denied in June 2017).[2]

The reason for the discontinuance application was that the author and her daughter had failed to present themselves at the applicable accommodation centre by the designated date, and could not be found. This, the State Party suggested, rendered the complaint inadmissible in view of Rule 13(1) of the Rules of Procedure (insofar as the complainant is no longer within the jurisdiction of the State Party) or that it should be discontinued on the ground of Rule 26 (the communication may be discontinued when, inter alia, the reasons for its submission for consideration have become moot). The author's counsel also indicated that he did not know the whereabouts of the author. The Committee was of the view that the author and her daughter's alleged departure from Denmark was merely speculative as it had not been confirmed. Should they be located, the deportation order would still be in effect.

Findings

On the merits, the outcome is not hard to predict. A decline of the incidence of FGM from 94% to 75% hardly bodes well for the chances of becoming a victim. And reliance on the potential of a strong woman to resist deep seated cultural norms as an individual has no bearing on the rights of the child, whose rights should not depend on the alleged strength of character of her care-giver: "The Committee considers that the rights of the child under article 19 of the Convention cannot be made dependent on the mother's ability to resist family and social pressures and that State parties should take measures to protect children from all forms of physical or mental violence, injury or abuse in all circumstances, even where the parent or guardian is unable to resist social pressure" (par 11.8(b) of the Communication).

Hence, the CRC Committee found violations of article 3 and 19 of the CRC in the decision of the Refugee Appeals Board.[3]

In coming to the point, the Committee referred to its own General Comments, notably General Comment No. 6 and the Joint recommendation/ General Comment 18 alluded to above.

[2] Note that the various dates provided in the recorded decision cannot be correct – this would have the denial of the request to lift the interim measures (January 2017) take place before the submission of the request to lift them (August 2017). It also seems that the suspension of the deportation order by the Danish authorities was not February 2017, but February 2016. The dates have hence been amended in this article to reflect a more likely chain of events.

[3] The claim based on a violation of article 2 (non-discrimination) was rejected as unfounded due to its vague and general nature.

Commentary

The finding confirms a line of domestic, regional and international jurisprudence to the effect that fear of FGM is a ground for asylum. This hardly establishes any new principle.[4]

So the more noteworthy aspects of I.A.M relate, in my view, to surrounding issues. First, as already noted, the speed at which the application was prepared and lodged straight after the entry into force of CRC OP3 for Denmark, and within days of the Refugee Appeal Board's decision, suggests pre-preparation as a tactic of strategic litigation. There can be little quibble with this, except that it is not quite "hearing children's complaints" as touted. It seems from the facts that there was a not inconsiderable possibility that the child was no longer even in the country, and neither child nor her mother had any contact with their counsel. It should be recalled that the collective complaints option (which obviates the need for an actual victim) was rejected during the drafting stage of CRC OP3[5] - hence the (possible) lawyerly device of preparing a case and then finding a suitable client.

Second, it is evident that the respondent State resisted strongly what was an obvious outcome, and one which will equally obviously force changes in the domestic refugee regime. The State supplied a lengthy justificatory explanation of the workings of the asylum management system in an attempt to justify the Refugee Appeals Board's decision, which altered its initial decision in an attempt to ring-fence the ambit of the deportation order, tried to have the interim measures (staying of the deportation order) lifted, and on several occasions tried to block the consideration of the communication on procedural grounds (inadmissibility due to lack of ongoing jurisdiction and mootness).

Thirdly, the nature of the "remedy" warrants a brief mention. Apart from staying the deportation order, the essence of this is found in Para 14 of the communication to the following effect:

"Pursuant to article 11 of the Optional Protocol on a communications procedure, the Committee wishes to receive from the State party within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. Finally, the State party is requested to publish the present Views and to have them widely disseminated in the official language of the State party".

This essentially merely repeats the provisions of article 11 (1) and (2) of CRC OP3, and contains no real concrete guidance to this or to other State parties (which would not be hard to fashion). It seems the value of the communications procedure may in future be limited to the "jurisprudence of violations", rather than the innovation of remedies[6] unless

[4] See for further discussion Mark Klaassen and Peter Rodrigues, "The Committee on the Rights of the Child on Female Genital Mutilation and Non-Refoulement", Leiden Law Blog (20.3.2018) https://leidenlawblog.nl/articles/the-committee-on-the-rights-of-the-child-on-female-genital-mutilation

[5] Suzanne Egan "The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children?" 2014 (vol 22: 1) International Journal on Children's Rights 205.

[6] See, for instance Monica Feria Tinta, "The CRC as Litigation Tool before the Inter-American System of Protection of Human Rights" in T Liefaard and J Doek (eds.), "Litigating the Rights of the Child: The UN

bolder steps are taken. This may suggest, however, that the CRC Committee still has to find its way in finding the right tone.

Suggested citation:

J. Sloth-Nielsen, *Communication 3/2016: I.A.M v Denmark,* Leiden Children's Rights Observatory, Case Note 2018/1, Leiden Law School, 18 July 2018.

Convention on the Rights of the Child in Domestic and International Jurisprudence" (Springer 2015) on the innovative remedies of the Inter American Court in the child rights sphere. See too the recent decision of the ACERWC in the communication brought against Mauritania (decision 03.2017, available at http://www.acerwc.org/download/acerwc-decision_communication_mauritaina_final_english/?wpdmdl=10278 for failing to prosecute persons who kept children in conditions of slavery. The remedial actions included: ensuring the effective prosecution of all members of the family concerned and ensuring that they receive sentences commensurate with the crime; ensuring that the children concerned receive birth certificates and identity cards; ensuring their enrolment in schools and well as remedial measure to enable them to 'catch up'; providing psycho-social support to enable them to overcome the mental and physical abuse they suffered; compensation to the victims for 11 years of slavery they ensured; and ensuring effective implementation of the 2015 Anti-slavery law (amongst a string of others: see par 98 (A) – (O) for the full list).