Universiteit Leiden
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**Case Note 1/2020**

**Communication 33/2017 EP and FP v Denmark**

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**Key words:** migration, deportation, best interests, remedies, children's rights

**Subject matter:** deportation of children from Denmark to Albania, alleging risk of persecution and harm

**CRC Provisions:** arts. 2, 3, 6 and 28

**CRC OP3 Provisions:** arts. 7 (d), (e) and (f)

**Other relevant communications:** N/A

**Date of adoption of views:** 25 September 2019

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## (I) *Outline of the Substantive Issues*

The complaint was submitted by parents, Albanian nationals, on behalf of their children whose rights under the CRC, Articles 2, 3, 6 and 28, they submitted, would be violated by their deportation from Denmark to Albania. The authors submitted in particular that the deportation would risk harm to the children, on account of a blood feud, and that the children's education would be interrupted.

The family had arrived in Denmark in 2012, claiming asylum shortly thereafter on the grounds of a blood feud in Albania that threatened their lives. Their application was rejected as 'manifestly unfounded' without the right to appeal, after which they applied for residence on humanitarian grounds as a result of the father's hospitalisation. This second application was also rejected and the authors were ordered to leave Denmark. Around this time, the authors initiated a lawsuit against the Danish Immigration Service claiming a right to asylum, which was rejected by the High Court in 2015. Although their request to suspend their deportation during the judicial proceedings had been denied, the authors were entitled to remain in Denmark as a result of interim measures, suspending their deportation, made by the UN Human Rights Committee, to whom the authors had also made an application.[1]

Finally, in 2016, the authors then applied for a right to residence on humanitarian grounds on the basis that the deportation would be against the children's best interests. In this application, a

[1]See *E.P. and F.P. v. Denmark* (CCPR/C/115/D/2344/2014).

psychologist report described the children's connection to Denmark and their anxiety over the prospect of returning, highlighting in particular the boy's fear of "being at risk and life threatened". The Danish Immigration Service rejected this application in 2017 finding that the deportation would not be contrary either to the CRC or the European Convention on Human Rights. Noting that the children had spent their formative years in school in Denmark and that the children feared their deportation, the Danish Immigration Service found nothing 'special' about their circumstances or the children's welfare that would justify a right to remain. In July 2017, the authors appealed this decision to the Danish Immigration Appeals Board, with the request to suspend their deportation. On 4 August 2017, the request to suspend the deportation was rejected while the appeal was still pending before the Board.

## (II) *Procedural Issues*

The individual communication was made to the CRC Committee on 10 September 2017. On 18 September 2017, the Working Group on Communications, acting on behalf of the CRC Committee, requested that the State Party refrain from returning the authors and their children to Albania while their case was under consideration by the CRC Committee. On 21 September 2017, Denmark suspended the execution of the deportation order against the authors and their children.

The State Party submitted that the claim was inadmissible on account of the authors' failure to exhaust domestic remedies. In particular, it noted that the communication was inadmissible under article 7 (e) of the CRC OP3, as the appeal before the Danish Immigration Appeals Board was pending when the communication was initially submitted to the CRC Committee, and the authors had not requested a judicial review of the Board's subsequent refusal of the appeal.

On the merits of the communication, the State Party asserted that the domestic authorities had rejected the various applications by the authors following a thorough review of the available evidence, ultimately finding the claims to be manifestly ill-founded. They had taken into account the welfare and rights of the children and found no new evidence had been brought to the CRC Committee in support of a different conclusion on the matter. The State Party also drew attention to the fact that both the Danish Immigration Service and the UN Human Rights Committee found that the family had failed to substantiate the claim that they were exposed to irreparable harm if returned to Albania. With respect to Article 3 CRC, the State Party drew attention to the fact that the family is the primary carer of the children and that it is the parents who have the main responsibility for safeguarding the best interests of their children. Given that family unity would be protected in the deportation process, this right was not violated.

## (III) *Findings*

With respect to admissibility, the CRC Committee made two findings.

First, it considered that because the remedies in question (the pending appeal and any request for judicial review) would not have suspended the execution of the existing deportation order (which was only in place as a result of the UN Human Rights Committee's 'interim measures') these remedies could not be considered effective. In this respect, the CRC Committee referred to its decision in NBF v Spain.[2]

[2] See, in this regard, the Committee's Views on *N.B.F. v Spain* (CRC/C/79/DR/11/2017), para. 11.3. See also, John Dorber & Mark Klassen, *Communication 11/2017: N.B.F. v. Spain*, Leiden Children's Rights Observatory, Case Note 2019/4, Leiden Law School, 24 September 2019.

Second, the CRC Committee limited the admissibility claim to the matters that were not before the UN Human Rights Committee. In particular, the CRC Committee decided it was precluded by article 7 (d) of the CRC OP3 from considering the authors' claims that the blood feud in Albania would expose their children to a risk of irreparable harm if the family were to be removed to Albania. However, as the authors' claims with respect to Article 3 and 28 CRC had not been considered by the UN Human Rights Committee, it found those matters to be admissible.

On the question of whether the children's deportation was not in their best interests and would constitute a serious setback in their education, in violation of articles 3 and 28 of the CRC, the CRC Committee recalled that the assessment of the existence of 'a real risk of irreparable harm in the receiving State' should be conducted in a child and gender-sensitive manner.[3] Drawing on its General Comment on human rights in the context of international migration with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter: 'CRC GC 23'), the CRC Committee noted 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'.[4] It further recalled that the child's best interests should be expicitly protected through individual procedures, as an integral part of any administrative or judicial decision concerning the return of a child.[5]

The CRC Committee noted, in line with its previous decisions,[6] that it is for the national authorities to review and evaluate facts and evidence in order to determine whether a real risk of irreparable harm exists upon return, and that its role will be limited to circumstances where such evaluation was clearly arbitrary or amounted to a denial of justice. In this regard, the CRC Committee noted that the Danish Immigration Service had thoroughly examined the authors' claims and that their rejection as manifestly ill-founded was upheld on appeal. It notes that the children would have been able to continue their schooling and that the allegations arising from the blood feud were found to have been without sufficient basis. In this regard, while they noted that the authors disagreed with the findings of the domestic authorities, they had not demonstrated that their examination of the facts and the evidence had been either arbitratry or unjust.

In conclusion, the CRC Committee concluded that the authors failed to justify the existence of a real risk of irreparable harm upon return to Albania. As the communication had not been sufficiently substantiated, it declared it inadmissible in accordance with article 7 (f) of the CRC OP3.

## (IV) *Commentary*

At initial reading, this communication concerns a relatively straight forward case of a family challenging, under the CRC OP3, the rejection by the domestic authorities of their application for asylum and/or a right to remain. The family were unable to present a sufficiently compelling case to support a successful asylum claim before the Danish authorities and had made an application both to the UN Human Rights Committee and to the CRC Committee under the respective Optional Protocols to the International Covenant on Civil and Political Rights and the CRC. In line with its

[3] UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* par 27, 1 September 2005, CRC/GC/2005/6.

[4] UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and their Families, and No. 23 (2017) of the Committee on the Rights of the Child, on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return,* par 29 and 33, 16 November 2017, CMW/C/GC4-CRC/C/GC/23.

[5] Ibid., par. 30.

[6] See *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; and *Z.Y and J.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.8.

previous jurisprudence, the CRC Committee set out its test in such cases to be that that unless the domestic decision was demonstrated to be arbitrary or unjust, the communication would not be admissible. As the authors failed to demonstrate such failings in their domestic process, the communication was deemed inadmissible.

It is well established that asylum claims can be difficult to present with success. Applicants who may be in a precarious legal position often experience evidentiary challenges against States Parties committing to protecting their borders with tight immigration policies.[7] In the context of children's rights, much of the international guidance has focused on the especially vulnerable unaccompanied and/or separated children[8] with relatively little attention focused on how States should approach the autonomous asylum claims of children in the company of their parents.[9] In this context, it is perhaps disappointing that the CRC Committee did not take the opportunity in the instant case to set out the requirement that in their consideration of asylum claims States Parties must give the claims of children individual consideration to ensure their rights under the CRC are fully protected. According to CRC GC 23, the CRC Committee has highlighted the importance of ensuring that children in the context of migration are treated 'first and foremost' as children, regardless of their parents' status.[10] The CRC Committees has stressed the primacy of the rights of the child in the context of international migration and to this end have highlighted the importance of having specific policies and procedures in place to ensure that decision-making takes account of the child's rights and the impact on those rights in international migration.[11] With respect to compliance with the best interests of the child principle in Article 3, CRC GC 23 makes clear that this principle has 'high priority' in migration decision-making and is not just one of many factors.[12] For this reason a 'larger weight' must be attached to what serves the child's best interests. Further in the CRC GC 23, the CRC Committee highlights the need to ensure that the best interests of the child are ensured explicitly 'through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child'.[13] Drawing on the CRC General Comment No 14 on the best interests principle (hereinafter: 'CRC GC 14'), the CRC Committee set out clearly the key elements that a best interests determination should involve.[14]

The CRC Committee is clearly aware of the challenges it faces as an international treaty body requested to evaluate the impact on the child's rights of a domestic decision to deport him/her. Aware of the importance of second guessing the merits of the application considered in detail at a national level by bodies more proximate to the process and the parties, the CRC Committee has determined its place to be mainly one of procedural review. However legitimate this preference for

[7] See Smyth C. (2018) 'Migration, Refugees, and Children's Rights' In Kilkelly U. and Liefaard T. (eds) *International Human Rights of Children*. Springer, Singapore.

[8] See Committee on the Rights of the Child, General Comment 6. Treatment of unaccompanied and separated children outside their country of origin. CRC/GC/2005/6.

[9] See Stern, R. (2010) **'**Unaccompanied and Separated Asylum-seeking Minors: Implementing a Rights-based Approach in the Asylum Process' in *Child Friendly Justice*: a Quarter Century of the Convention on the Rights of the Child. Stockholm Series in Child Law and Children's Rights. Brill. 242-255.

[10] Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, para 11.

[11] Ibid, paras 13-15.

[12] Ibid, para 28.

[13] Ibid, para 30.

[14] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration (art. 3, para. 1),* Section V., 29 May 2013, CRC/C/GC/14.

an approach that seeks to review a national decision only where it is shown to be arbitrary or unjust, it is arguable that this approach places insufficient demand on national authorities for a child-rights based approach to migration, so clearly articulated in the CRC Committee's General Comments.

It is welcome that the CRC Committee, in its consideration of the instant communication, reminded the State Party to ensure that the determination of whether deportation were to cause irreparable harm to the children should be undertaken in a 'child and gender-sensitive manner'. At the same time, in reaching its conclusion, the CRC Committee spent remarkably little time setting out what this involves, instead moving, fairly swiftly, to reiterate the conclusion of the domestic authorities that the matter was inadmissible due to the lack of a demonstrable case that deportation would have such an effect. In addition, while the CRC Committee sought to distance itself from the UN Human Rights Committee's determination of the complaint by finding admissible only those elements not considered by that Committee, ultimately it relied on the conclusion of its fellow treaty body in finding the complaint to be unsubstantiated.

If the Committee is to maximise the contribution of the CRC OP3 to remedies for breaches of children's rights in the asylum context, the CRC Committee is encouraged to take every opportunity to articulate more precisely the key elements of a child-rights based approach to migration decision-making. This should include a requirement that, in line with its General Comments, priority be given to the rights of the child through the adoption of an individual decision-making process for children's claims, regardless of whether they are accompanied or not. It should also incorporate a required focus on the best interests of the child as a procedural right, in line with the CRC GC 14. While asylum applicants, especially children, may nonetheless continue to struggle to avail of CRC protection, given the many other hurdles they must overcome, by articulating in its OP3 decisions the CRC requirements on matters of substance and procedure would at least set out the requirements with which States Parties must comply.

## (V) *Further Reading*

Lawrence, J.A.; Dodds, A.E.; Kaplan, I.; Tucci, M.M., 'The Rights of Refugee Children and the UN Convention on the Rights of the Child', *Laws* 2019, *8*, 20.

Kilkelly, U. Rap, S. Coron, G. and Moschos, G., *Promoting child-friendly approaches in the area of migration - Standards, guidance and current practices, Council of Europe, 2019.*

Smyth C. (2018), 'Migration, Refugees, and Children's Rights' In Kilkelly U. and Liefaard T. (eds) *International Human Rights of Children*. Springer, Singapore.

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