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Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2379/2014*,**

Communication submitted by:	Ms [O.H.A.] (represented by the Danish Refugee Council)
Alleged victims:	The author and her four children
State party:	Denmark
Date of communication:	11 April 2014 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 17 April 2014 (not issued in document form)
Date of adoption of Views:	7 July 2016
Subject matter:	Deportation to Italy
Procedural issues:	Substantiation of claims
Substantive issues:	Torture, cruel, inhuman or degrading treatment or punishment
Article of the Covenant:	7
Article of the Optional Protocol:	2

1.1 The author of the communication is Ms. [O.H.A.] (36 years old when the communication was submitted), a Somali national[1] from Qalimow, Somalia. She submits the communication on her behalf and on behalf of her four daughters, [A.H.A.], [I.H.A.] (twin sisters, 16 years old when the communication was submitted), [M.H.A.] and [An.H.A.] (13 and 10 years old respectively when the communication was submitted).[2] The

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelic, Photini Pazartzis, Sir Nigel Rodley, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.
Two individual opinions signed by six Committee members are appended to the present Views.

1 No date of birth indicated.

2 No precise dates of birth was provided.

author and her daughters risk to be deported to Italy, following the rejection of their asylum request by the Danish authorities. The author claims that by forcibly deporting her and her daughters to Italy, Denmark would violate their rights under article 7 of the International Covenant on Civil and Political Rights. The author is represented by the Danish Refugee Council. The first Optional Protocol entered into force for Denmark on 23 March 1976.

1.2 On 17 April 2014, 24 May and 13 June 2016, pursuant to rule 92 of the Committee's 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 daughters to Italy while their case was under consideration by the Committee.

1.3 On 19 March 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the State party's request to lift its interim measures' request.

The facts as presented by the author

2.1 The author has six children. Two of them are currently residing in Somalia and four are with her in Denmark. She belongs to the Hawyie clan and is Muslim. She fled Somalia in 2008, as she feared the family members of her late husband who had been killed by Al-Shabaab in 2012, as well as the family of her late husband's second wife.

2.2 The author married in 1997. From the outset, her husband's family was opposed to the marriage as she belonged to a sub-clan, Galjal, with lower status than their sub-clan, Abgal. When her husband married a new wife in 2006, he refused to divorce from the author. From this moment, the author suffered increased harassment and mistreatment from her family-in-law and the family of her husband's new wife. Because of this, she fled Somalia in 2008, leaving her children with her mother. After being imprisoned in Libya for two months, the author entered Italy on 28 or 29 March 2009 by boat. She was registered as asylum-seeker and housed in reception facilities. Four months later, she was granted a residence permit valid three years, renewed until 29 May 2015.

2.3 Upon the issuance of her residence permit, the author was informed that she could no longer stay at the reception center. No assistance was offered in seeking alternative temporary shelter, finding work or more permanent housing. The author unsuccessfully tried to find housing and employment, and was living in the streets, sleeping alternatively at railway stations, churches or informal settlements. Her attempts at finding employment in various places in Italy all failed because she did not speak Italian well enough or because she was wearing a scarf.

2.4 Feeling desperate, the author travelled to Finland and sought asylum. Her application was rejected and she was returned to Italy in May 2010. She was informed by the Finnish authorities that she would be offered reception arrangements from the Italian authorities upon arrival in Milano. Upon her arrival in Italy, however, she was offered no assistance; she was registered by the police and told to leave the airport. Consequently, she became homeless again and could not find employment despite repeated attempts.

2.5 The author's daughter Ikraan had been forced to enter a marriage, arranged by the author's brother-in-law, associated with Al-Shabaab. On 12 August 2013, [I.H.A.] and her three other sisters [A.H.A], [M.H.A.] and [An.H.A.], arrived in Italy having fled Somalia due to the risk of forced marriage. The author fears that her daughters would be forcibly married and states that her brother-in-law is still threatening the author's mother in Somalia to bring back [I.H.A.] and her sisters. The author did not arrange their travel. The daughters were not registered by the Italian authorities and do not hold any residence permit in Italy. The author with the daughters stayed in Italy for five days, "living from food from churches".

2.6 Facing destitution and homelessness, the author decided to travel with her daughters to Denmark, where she arrived on 18 August 2013 and applied for asylum. On 16 December 2013, the Danish Immigration Service considered that because of her situation in Somalia the author was in need of subsidiary protection, but noted that she should be transferred to Italy, as it was her first country of asylum. On an unspecified date, this decision was appealed to the Refugee Appeals Board, which upheld the decision of the Danish Immigration Service on 11 March 2014. The Board stated that the author was in need of subsidiary protection but the family should be returned to Italy in accordance with the principle of the first country of asylum. The Board noted that the author can enter and stay in Italy legally as she had been granted asylum there. As to the humanitarian conditions, the Board noted that "the background information regarding the conditions for asylum seekers that have obtained temporary residence permits in Italy, to some extent supports that the humanitarian conditions for this group are coming close to a level where it no longer will be secure to refer to Italy as first country of asylum." The Board further considered that, according to the decision of 2 April 2013 of the European Court of Human Rights in the case of *Samsam Hussein and Others v. the Netherlands* ,[3] there was no "fully sufficient basis for not referring to Italy as first country of asylum for the author and her minor children". The Board highlighted in particular the fact that the author was holding an Italian ID card, an Italian Alien Passport and an Italian health insurance card.

2.7 The author claims that she has exhausted all available domestic remedies in the State party. The decision of 11 March 2014 of the Danish Refugee Appeals Board is final and cannot be appealed.

The complaint

3. The author submits that Denmark, by forcibly returning her and her four children to Italy, would violate their rights under articles 7 of the Covenant.[4] She is a single mother with four minor daughters. From the time the author was told to leave the Italian reception facilities when she was granted subsidiary protection in 2009, she was not able to find housing, work or any other durable humanitarian solution. Therefore, taking into account the reported shortcomings concerning the Italian reception conditions for asylum seekers and refugees with temporary residence permit,[5] the author maintains that there is a real risk that expulsion to Italy would expose her and especially her children to inhuman and degrading treatment i.e. "living in the streets, in destitution, with no access to housing and food and with no prospect of finding a durable humanitarian solution". In this regard, the author adds that she found no assistance in finding temporary shelter upon her return to Italy from Finland and that she is no longer eligible for housing if returned from another European country.

[3] Application No. 27725/10, decision as to the admissibility.

[4] The author cites European Court of Human Rights, *M.S.S. v. Belgium and Greece*, application No. 30696/09, judgement adopted on 15 December 2010; and *Mohammad Hussein and Others v. the Netherlands and Italy*, application No. 27725/10, decision adopted on 2 April 2013.

[5] The author refers to several reports on the situation of returnees in Italy: Swiss Refugee Council (OSAR), Reception conditions in Italy: Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, October 2013; European Network for technical cooperation of the application of the Dublin II Regulation, Dublin II Regulation National Report, Italy, December 2012; Asylum Information Database (AIDA), Country report: Italy, May 2013; United States Department of State, Country Reports on Human Rights Practices, April 2013; Jesuit Refugee Service Europe –JRS-, Protection Interrupted the Dublin Regulation's Impact on Asylum Seekers Protection, June 2013.

State party's observations on admissibility and merits

4.1 On 17 October 2014, the State party submitted that the communication is inadmissible, or, alternatively, without merit. Next, the State party describes the structure and composition of the Danish Refugee Appeals Board (RAB). The RAB activities are based on section 53a of the Aliens Act. Negative decisions of the Danish Immigration Service (DIS) are automatically appealed to the RAB unless the application has been considered manifestly unfounded by the DIS. The RAB is an independent, quasi-judicial body and is considered a court within the meaning of Article 39 of the Council of the European Union Directive on minimum standards on procedures for granting and withdrawing refugee status (2005/85/EC).[6] Under the Danish Aliens Act, the RAB members are independent and cannot seek directions from the appointing or nominating authority. The RAB decisions are final. Aliens may, however, bring an appeal before the ordinary courts which can adjudicate any matter concerning the limits to the competence of a public authority. As established by the Supreme Court, the ordinary courts' review of decisions made by the RAB is limited to a review on points of law, and the RAB's assessment of evidence is not subject to review.

4.2 Under section 7(1), a residence permit can be granted to an alien if the person's circumstances fall within the provisions of the Convention relating to the Status of Refugees (the Geneva Convention). Section 7(1) incorporates article 1 (A) of that Convention so that in principle refugees are legally entitled to a residence permit. A residence permit will further be issued to an alien upon application if s/he risks the death penalty or being subjected to torture or other serious ill-treatment or punishment in case of return to his country of origin. Section 7(2) of the Aliens Act is very similar to article 3 of the European Convention on Human Rights and according to the explanatory notes on this section, the immigration authorities must comply with the case-law of the European Court of Human Rights and the State party's international obligations when applying this provision. In practice, the RAB will generally consider the conditions for issuing a residence permit to be met when there are specific and individual factors substantiating that the asylum-seeker will be exposed to a real risk of the death penalty or ill-treatment upon return. Furthermore, pursuant to section 31(1) of the Aliens Act, an alien may not be returned to a country where he will be at risk of the death penalty or of being subjected to serious ill-treatment, or where the alien will not be protected against being sent on to such country (the principle of *non-refoulement*). This obligation is absolute and protects all aliens. The State party notes in this connection that the RAB and the DIS have jointly drafted a number of memoranda describing in detail the legal protection of asylum-seekers afforded by international law, in particular the Geneva Convention, CAT, the European Court and the Covenant.

4.3 Under section 7(3) of the Aliens Act, issuance of a residence permit may be refused if the alien has already obtained protection in another country, or if the alien has close ties with another country where he/she must be deemed able to obtain protection. Section 7 of the Aliens Act is structured so that it must first be considered whether an asylum-seeker is deemed to have a need for protection, and if so, a decision will then be made as to whether another country has a stronger obligation than Denmark to offer him/her protection The 2013 Annual Report of the Executive Committee of the RAB describes the criteria to be applied in the assessment of whether a country is able to afford protection to an asylum-seeker. The paramount requirement is that the asylum-seekers will be readmitted to the country and that they are able to stay there legally. In this regard, the State party submits that it cannot be required that they will have completely the same social living standards as

[6] Article 39 deals with the right of asylum-seekers to have a decision taken in their case reviewed by a court or tribunal.

the country's own nationals, but their personal integrity must be protected. The core of the concept of protection is that the individuals must enjoy personal safety both when they enter and stay in the country. The report also mentions a detailed review of the case-law of the RAB and the concept of protection. In this regard, the State party notes that the condition for refusing a residence permit under section 7(3) of the Aliens Act is that there is a well-founded prospect that the asylum-seeker will be able to enter and also in the future to stay in the country of first asylum without suffering attacks on his personal integrity. In addition, it is a mandatory minimum requirement that the asylum-seeker is protected against being returned to the country of persecution or to a country in which s/he is not protected against return to the country of persecution. The State party further provides detailed description of the proceedings before the RAB and its principles related to the assessment of evidence in asylum case brought before it.

4.4 As to the admissibility and merits of the communication, the State party argues that the author has failed to establish a *prima facie* case for the purpose of admissibility of her communication under article 7 of the Covenant. In particular, it has not been established that there are substantial grounds for believing that she will be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment in Italy. The communication is therefore manifestly unfounded and should be declared inadmissible. In the alternative, the State party submits that that the author has not sufficiently established that article 7 will be violated in case of her and her four children's return to Italy. It follows from the Committee's jurisprudence that States parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory where the necessary and foreseeable consequence of the deportation would be a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, whether in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The Committee has also indicated that the risk must be personal, and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.[7]

4.5 The State party observes that in her communication, the author did not provide any essential new information regarding her circumstances beyond the information already relied upon in connection with her asylum proceedings and that the RAB has already considered these circumstances in its decision of 11 March 2014. The RAB found that the author fell within section 7(2) of the Aliens Act (protection status); however, she had been granted asylum in Italy in 2009 and her residence permit was valid until 29 May 2015. Moreover, the majority of the RAB found as a fact that the author was able to enter Italy and stay there lawfully. It therefore refused to grant asylum to the author with reference to section 7(3) of the Aliens Act (the country of first asylum principle). The State party adds that when considering whether a country may serve as a country of first asylum, the RAB requires as a mandatory minimum that the asylum-seeker is protected against *refoulement*. It must also be possible for the asylum-seeker to enter legally and to get lawful residence in the country of first asylum involved, and the asylum-seeker's personal integrity and safety must be protected there. This concept of protection also includes a certain social and economic element since asylum-seekers must be treated in accordance with basic human standards.[8] However, it cannot be required that the relevant asylum-seekers will have completely the same social living standards as the country's own nationals. The core of the protection concept is that the persons must enjoy personal safety both when they enter and when they stay in the country of first asylum.

[7] Communication No. 2007/2010, Views adopted by the Committee on 26 March 2014, para. 9.2.

[8] The State party notes that the assessment includes inter alia Parts II to V of the Geneva Convention and the EXCOM Conclusion No.58 (1989).

4.6 As to the author's allegations that, if returned to Italy, she and her four children will risk having to live in the streets without access to accommodation, food or sanitary facilities, the State party refers to the European Court's of Human Rights admissibility decision of 2 April 2013 in *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*. This case concerned a female Somali national and her two minor children who had entered Italy in August 2008 and had been granted residence for the purpose of subsidiary protection in March 2009. In April 2009, she left the reception centre for asylum-seekers in Italy, and in May 2009 applied for asylum in the Netherlands. The Netherlands refused asylum to the applicant in March 2010 with reference to Italy being responsible for the processing of her asylum application pursuant to the Dublin II Regulation. In her application to the European Court, the applicant submitted that, on account of her living conditions in Italy, she had been subjected to treatment contrary to article 3 of the European Convention and that, due to the risk of similar treatment upon return, her transfer from the Netherlands to Italy would violate of her rights under the said provision. The Court found that the application was manifestly ill-founded and therefore inadmissible. In this regard, the State party observes that article 3 of the European Convention corresponds to article 7 of the Covenant.

4.7 The State party further notes that concerning the treatment of asylum-seekers in Italy, the Court noted that „a person granted subsidiary protection will be provided with a residence permit with a validity of three years which can be renewed by the Territorial Commission that granted it. This permit can further be converted into a residence permit for the purposes of work in Italy, provided this is requested before the expiry of the validity of the residence permit and provided the person concerned holds an identity document. A residence permit granted for subsidiary protection entitles the person concerned, *inter alia*, to a travel document for aliens, allows the person to work, seek family reunification and to benefit from the general schemes for social assistance, health care, social housing and education under Italian law. (Furthermore), a person granted a residence permit for compelling humanitarian reasons will be provided with a residence permit with a validity of one year which can be converted into a residence permit for the purposes of work in Italy, provided the person concerned holds a passport. A residence permit granted on humanitarian grounds entitles the person concerned to work, health care and, in case he or she has no passport, to a travel document for aliens".[9]

4.8 The State party notes that the European Court further stated[10] that the assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of article 3 must necessarily be a rigorous one and inevitably requires that the Court assess the conditions in the receiving country against the standard of this article. The Court concluded[11] that the mere fact of return to a country where one's economic position will be worse than in the expelling State is not sufficient to meet the threshold of ill-treatment proscribed by article 3, and that article 3 cannot be interpreted as obliging the States parties to provide everyone within their jurisdiction with a home; this provision does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living. The Court noted that aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a State and continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. Accordingly, the Court concluded that in the absence of exceptionally compelling humanitarian grounds against removal, the

[9] *Samsam Mohammed Hussein and Others v. the Netherlands and Italy* (application No. 27725/10), decision of 2 April 2013, paras 38-39..

[10] Ibid, para. 68.

[11] Ibid, paras. 70 and 71.

fact that the applicant's material and social living conditions would be significantly reduced if he or she were to be removed is not sufficient.

4.9 Concerning the conditions in Italy, taking into account reports of governmental and non-governmental organizations, the Court considered that "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*."[12] The Court found the applicant's allegations manifestly ill-founded and inadmissible and concluded that the applicant with her children could be returned to Italy.

4.10 In light of the above, the State party submits that the author in the present case, who has been granted subsidiary protection in Italy, will be provided with a renewable residence permit valid for three years allowing her to work, obtain a travel document for aliens, family reunification and benefit from the general schemes for social assistance, health care, social housing and education.

4.11 The State party further notes that the author in her initial submission referred, inter alia, to the European Court's decisions in *M.S.S. v. Belgium and Greece,* as well as to the report of *Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, Report following his visit to Italy from 3 to 6 July 2012*. However, the Court's decision in *M.S.S.* and the Commissioner's report were already available at the time when the inadmissibility decision was adopted by the Court in the case of *Samsam*. Furthermore, the author has mainly referred to reports and other background material concerning reception conditions in Italy that are only relevant to asylum-seekers, including Dublin Regulation returnees to Italy, and not to persons who, like the author, have already been granted subsidiary protection. The State party finally observes that, before her entry in Denmark, the author had lived for more than three years in Italy, and she holds an Italian ID card, a residence permit, an alien's passport and a health insurance card. The State party thus submits that the author has failed to render it probable that, in Italy, she and her four children will be at risk of suffering irreparable damage.

Author's comments on the State party's observations

5.1 On 28 January 2015, the author submitted her comments on the State party's observations. She asserts that the living conditions in Italy for asylum seekers *and* beneficiaries of subsidiary protection are similar, since there is no effective integration scheme in place. Asylum seekers and recipients of subsidiary protection thus often face the same severe difficulties in finding basic shelter, access to sanitary facilities, and food. The author refers to the 2013 Jesuit Refugee Service report which states that the real problem concerns those who are sent back to Italy and who were already granted some kind of protection; they may have already stayed in at least one of the accommodation options available upon initial arrival, but, if they left the centre voluntarily before the established time, they are no longer entitled to accommodation in the Government reception centres for asylum seekers (CARAs).[13] Most people occupying abandoned buildings in Rome fall in this last category. The findings show that the lack of places to stay is a big problem

[12] Ibid, para.78.

[13] Jesuit Refugee Service, Protection Interrupted – The Dublin Regulation's Impact on Asylum Seekers' Protection, June 2013, p. 152.

especially for returnees who are, in most cases, holders of international or humanitarian protection.[14]

5.2 The author further disputes the interpretation of the jurisprudence of the European Court of Human Rights referred to by the State party. In particular, in the *Samsam* case,[15] the applicant and her children had not yet been returned to Italy at the time of the adoption of the Court's decision, and the Court noted "that the Netherlands authorities will 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".[16] Accordingly, the decision that a return to Italy would not constitute a breach of article 3 of the European Convention was based on the assumption that the Italian authorities would actually prepare a suitable solution for the arrival of the family. In contrast to the *Samsam* case, the author in the present case has already experienced being transferred from Finland to Italy. She had her residence permit renewed, but she still, and especially after being reunited with her children in 2013, found the living conditions desperate.

5.3 The author considers that more relevant for the present case is the Court's judgment in the case of *Tarakhel v. Switzerland,*[17]. The author notes that in *Tarakhel*, the Court stated that the presumption that a State participating in the Dublin system will respect the fundamental rights guaranteed under the European Convention on Human Rights is not "irrebuttable".[18] The Court further noted that, in the current situation in Italy "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, cannot be dismissed as unfounded."[19] The Court further emphasized that especially children have "specific needs" and "extreme vulnerability" and that reception facilities for children "must be adapted to their age, to ensure that those conditions do not "create (…) for them situation of stress and anxiety", with particular traumatic consequences.[20] The Court required Switzerland to obtain assurances from its Italian counterparts that the applicants (a family) would be received in facilities and conditions adapted to the age of the children; if such assurances were not made, Switzerland would be violating article 3 of the European Convention by transferring them to Italy.[21] The author argues that in light of this finding, the harsh conditions faced by recipients of subsidiary protection returning to Italy would fall within the scope of article 3 of the European Convention on Human Rights which corresponds to article 7 of the Covenant.[22]

5.4 The author submits that the *Tarakhel* decision seems to indicate that the assumption premise laid out in the *Samsam* decision can no longer be regarded as sufficient. On the contrary, individual guarantees especially securing returning children from destitution and harsh accommodation conditions, are required according to the European Convention. In

[14] Ibid., p. 161. In addition, the author quotes another report indicating that persons with protection status have no access to the European Fund for Refugees (FER) accommodation either, because they are only for asylum seekers. Therefore, according to this report, it is extremely difficult for people who have been granted protection status who are returned to Italy to find accommodation; OSAR. Reception conditions in Italy-Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees, October 2013, p.5.

[15] See FN 17 above.

[16] Ibid., para 77.

[17] Application No.29217/12, Grand Chamber judgment of 4 November 2014.

[18] Ibid., para 33.

[19] Ibid., para. 115.

[20] Ibid., para 119.

[21] Ibid. paras. 120 and 122.

[22] Ibid., para 119.

this connection, the author notes, that the issue of the *Tarakhel* case was not the risk of refoulement, but the living conditions in the overcrowded reception facilities for asylum seekers. Thus the *Tarakhel* decision indicates that the fact that a person is protected from refoulement in Italy, does not exclude violations of article 3 of the European Convention due to harsh living conditions especially for families with children. Accordingly, the fact that the author in the present case has been able to renew her residence permit in Italy and holds formal Italian papers, does not exclude the risk of her and her children being faced with harsh living conditions; homelessness and destitution with no realistic prospect of improvement, constituting a breach of article 7 of the Covenant.

5.5 The author adds that returning families, who have already been granted international protection, might even face greater difficulties in finding shelter, access to sanitarian facilities and food than returning asylum seekers as the latter enjoy a minimum of protection within the Dublin Regulation system and if fortunate have access to EU-supported reception facilities. Returning families with international protection do not have access to reception facilities and thus face the risk of homelessness immediately upon return with little prospect of improving their situation due to the malfunction of the Italian integration scheme for beneficiaries of international protection. The author does not contest that lack of financial assistance and housing does not, in all cases, constitute inhuman and degrading treatment. However, she reiterates that she is a single mother with minor children and that her deportation would leave her in a desperate situation where basic rights, as described above, are not met. The author emphasizes that in the *Tarakhel* case the Court stated that the extraditing state should perform an individualized examination of the person concerned to preclude the risk of inhuman and degrading treatment in the receiving country.[23] The present case, like the *Tarakhel* case, involves minor children. The author reiterates that in the *Tarakhel* case the Court emphasized that children must be viewed as extremely vulnerable and as having specific needs.[24] In these circumstances, in the present case there is a substantial risk that the author and her children will not have any housing and therefore are destined to homelessness.

Further submissions by the parties

State party

6.1 In reply to the author's comments, on 12 June 2015, the State party noted that the *Tarakhel* case concerned the refusal by the Swiss authorities to examine the asylum application of an Afghan couple and their six children and the decision to send them back to Italy because the applicants had already applied for asylum in Italy and their application was still pending there. The Court found that, in view of the current situation concerning the reception system of asylum-seekers in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. The majority of the judges of the Grand Chamber held that there would be a violation of article 3 of the European Convention if the Swiss authorities were to send the applicants back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that they would be treated in a manner adapted to the age of the children and that the family would remain together. However, at the same time, referring to its case-law, the Court reiterated "that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home", and that article 3 does not "entail any

[23] Ibid, para. 104

[24] Ibid., para. 119.

general obligation to give refugees financial assistance to enable them to maintain a certain standard of living".[25]

6.2 According to the State party, *Tarakhel v. Switzerland,* which concerned a family with the status of asylum-seekers in Italy, does not deviate from the findings in previous case-law of the Court on individuals and families with a residence permit for Italy, as expressed in, *inter alia*, *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*. Accordingly, the State party finds that it cannot be inferred from *Tarakhel* case that Member States are required to obtain individual guarantees from the Italian authorities before returning to Italy individuals or families in need of protection who have already been granted residence there. In this regard, the State party reiterates that according to the judgment in the case of *Samsam*, those recognised as refugees or who have been granted subsidiary protection in Italy are entitled to benefit from the general schemes for social assistance, health care, social housing and education under Italian domestic law.[26]

6.3 In light of the above, the State party maintains that the communication should be rejected by the Committee as inadmissible because the author has failed to establish a *prima facie* case for the purpose of admissibility of her communication under article 7 of the Covenant and that the communication therefore is manifestly unfounded. In the alternative, the State party maintains that article 7 of the Covenant will not be violated if the author and her four children are returned to Italy.

Author

7. On 15 December 2015, the author submitted further comments. She refers to her comments of 28 January 2015 and notes the Committee's conclusions in the case of *Jasin et al.v Denmark*, where the Committee noted that various reports continue to point to a lack of available places in reception structures. Moreover, the Committee in particular noted that returnees who have already enjoyed the reception system, which is the case for the author, have no more right to be accommodated in CARAs.[27] In that case, the author notes that the Committee found that removing Ms. Jasin to Italy, also a single woman with minor children who have been granted subsidiary protection in Italy, would be a violation of article 7 of the Covenant. Accordingly, the author submits that removing her and her children to Italy "risk constituting a violation of article 7 of the Covenant".

State party

8.1 On 19 April 2016, the State party reiterated its previous observations and recalls that the author has previously been granted subsidiary protection in Italy in 2009 and that her residence permit was renewed in 2012 and expired on 29 May 2015. It reiterates that people who have been granted subsidiary protection in Italy are provided with a residence permit with a validity of three years, renewable. A residence permit entitles the person concerned, *inter alia*, to a travel document for aliens, to work, to family reunion and to benefit from the general schemes for social assistance, healthcare, social housing and education under Italian domestic law.

8.2 The State party further submits that according to a consultation response received from the Italian authorities in the summer of 2015, an alien with a residence permit in Italy who is recognised as a refugee or has protection status can apply for a renewal of the residence permit upon re-entry into Italy, also after the expiration of the residence permit.

[25] Ibid, para 95.

[26] *Samsam Mohammed Hussein and Others v. the Netherlands and Italy* (application No. 27725/10), decision of 2 April 2013, paras 37-38.

[27] Communication No.2360/2014, *Jasin et al v. Denmark*, Views of 22 July 2015, para.8.5.

In February 2016, the Italian authorities confirmed to the Danish authorities that at present an alien who has been granted residence in Italy as a refugee or has been granted protection status may submit a request for renewal of his/her residence permit upon re-entry into Italy if, as in the case at hand, the residence permit has expired when the person was abroad. The State party submits that the author will be able to enter Italy and submit a request for renewal of her residence permit even though her residence permit has expired and that no further obligations can be imposed on Denmark to ensure the author's entry, and basis for stay, in Italy. In this respect, the State party notes that according to the author's own statements, she has already had her residence permit renewed once before.

8.3 With reference to the Committee's findings in the case of *Jasin et al. v. Denmark*, the State party notes that in the present case the RAB adequately took into account the information provided by the author. The general background information available to the RAB is obtained from a wide range of sources and is compared with the statements made by the relevant asylum-seekers, including their past experiences. The State party observes that in the present case the author had the opportunity to make submissions in writing and orally before the domestic authorities and that the RAB has thoroughly examined her case on the basis of those submissions. In addition, the State party notes that case of *Jasin et al. v. Denmark*, concerned an asylum-seeker,[28] while in the present case the author had already been issued with a residence permit in Italy when she applied for asylum in Denmark in 2013. In this connection, the State party reiterates its argument that an alien with a residence permit in Italy, who was recognised as a refugee or has protection status, can apply for a renewal of the residence permit upon re-entry in Italy, after the expiry of the residence permit.

Author

9.1 On 19 May 2016, the author refers to her earlier comments and notes that the fact that she was able to renew her residence permit and that she and her four daughters left Italy while she was holding a residence permit there, does not put her and her daughters in a different situation than the one in the case of *Jasin et al. v. Denmark*. In this connection, the author reiterates that while she was holding a residence permit in Italy she was forced to a live in destitution, sleeping on the streets or in shelters dependant on food given to her from churches. When she was sent back to Italy from Finland, she again found herself facing the same living conditions that she already experienced and again was offered no help from the authorities – this also while holding a valid residence permit. Hence, the living situation for the author - who no longer holds a valid Italian residence permit and her four daughters - who at no point have held Italian residence permits, is the same regardless of the fact that the author had a residence permit that she was able to renew and might be able to renew again. In this respect, the author adds that this time in Italy she would also have to provide for and protect her four daughters.

9.2 Further, as to the State party's argument that the RAB in the present case adequately took into account the information provided by the author, the author notes that despite the fact that she specified the situation she had experienced while in Italy, i.e., her living conditions, her dependency of food from private donors and the absence of help from the Italian authorities when she approached them, the RAB disregarded these circumstances. Moreover, in its reasoning, the RAB made reference to the fact that the author could enter Italy and stay there legally and that she holds Italian papers; however, the RAB did not explain how the possibility of a renewal of her residence permit would protect her and her daughters from the extremely harsh living conditions that she had already faced twice while

[28] Communication No.2360/2014, *Jasin et al v. Denmark*, Views of 22 July 2015, para.8.4.

holding a residence permit there. Finally, as to the State party's argument that in the present case the author is not an asylum seeker and therefore the present case differs from the case of *Jasin et al*, the author submits that in the present case and in the case of of *Jasin et al. v. Denmark*, both women were at one point holders of international protection in Italy, both women left Italy and applied for asylum in Denmark and in both decisions reference was made to Italy as a first country of asylum.

State party

10.1 On 3 June 2016, in reply to the author's comments, the State party referred to its previous observations and notes that the author has not advanced any new information on her and her children's situation. It further notes that in the case of *Jasin et al. v. Denmark,* the Committee concluded that that States parties should give sufficient weight to the real and personal risk a person might face if deported. According to the State party, this requires an individualised assessment of the risk faced by the author, rather than reliance on general reports. Accordingly, given that the author has benefitted from the subsidiary protection in the past, she would in principle be entitled to work and receive social benefits. In addition, the State party observes that the case of *Jasin et al. v. Denmark* concerned the deportation to Italy of a single mother with minor children, whose residence permit for Italy had expired. The present case also concerns a single mother with children; however, two of the author's four children today are already 18 years old (the twins born on 20 February 1998) and therefore they are no longer minors. In comparison, the three children in *Jasin et al. v. Denmark* were considerably younger as they were aged 7, 5 and 1 when the Committee adopted its views. Moreover, no information is available in the present case to indicate that the author or one or more of her children suffer from any diseases requiring therapy.

10.2 Further, the State party notes that according to the information in her asylum case, from May 2010 until her entry into Denmark in August 2013, the author stayed in Italy and managed to find food and shelter. According to her own information, the author has had an Italian health insurance card, and she had the means to acquire a flight ticket to travel to Denmark. It also appears from the information provided in the author's asylum case that when entering Denmark she was in possession of a cash card, an Italian ID card and an Italian alien's passport. The State party maintains that the Board adequately took into account the information provided by the author, which is based on her own experiences. The author has had the opportunity to make submissions both in writing and orally before several bodies and the Board has thoroughly examined her case on the basis of those submissions. The State party finally notes that on 1 September 2015 the author, her two adult children and her two minor children were registered as having failed to appear at the asylum centre at which they were accommodated.

Author

11. On 8 June 2016, the author notes that in its further observations the State party merely reiterates information it already presented previously. As to the State party's particular statement that she "managed to find food and shelter", the author notes that the fact that she actually survived cannot stand alone when assessing whether her return to Italy would be in breach of article 7 of the Covenant. More relevant is the quality of the food and shelter she found and the way she managed to find it. Similarly, the possession of a health insurance card and an ID card is less relevant, than the actual value of these documents – i.e. to what extent did they actually guarantee access to services.

Consideration of admissibility

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

12.2 The Committee notes, as required by article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

12.3 The Committee notes the author's claim that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

12.4 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author's claim under article 7 of the Covenant is unsubstantiated. The Committee however considers that the inadmissibility argument adduced by the State party is intimately linked to the merits of the case and should thus be considered at that stage. Accordingly, the Committee declares the communication admissible insofar as it raises issues under article 7 of the Covenant, and proceeds to its consideration on the merits.

Consideration on the merits

13.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

13.2 The Committee notes the author's claim that deporting her and her four daughters to Italy, based on the Dublin Regulation principle of "first country of asylum", would expose them to a risk of irreparable harm, in violation of article 7 of the Covenant. The author bases her arguments on, *inter alia*, the actual treatment she had received after she was granted residence permit in Italy, and on the general conditions of reception for asylum seekers and refugees entering Italy, as found in various reports.

13.3 The Committee recalls its general comment No. 31,[29] in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant which prohibits cruel, inhuman or degrading treatment. The Committee has also indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.[30] The Committee further recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such risk exists,[31] unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[32]

13.4 The Committee notes that, according to the uncontested submissions by the author, she lived in a reception centre between March and July 2009, when she was granted subsidiary protection with a residence permit valid for three years, which was later renewed until 29 May 2015. When her residence permit was issued, the author was asked to leave

[29] See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

[30] See communications No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.2; No. 692/1996, *A.R.J. v. Australia,* Views adopted on 28 July 1997, para. 6.6; and No. 1833/2008*, X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

[31] See communication No. 1957/2010, *Lin* v. *Australia*, Views adopted on 21 March 2013, para. 9.3.

[32] See, inter alia, ibid. and communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

the reception centre without being provided with an alternative accommodation. Subsequently she lived in the streets and railway stations and was dependent on food provided by churches. She was thus left without shelter and means of subsistence. Feeling desperate, she went to Finland; however she was returned back to Italy in May 2010. Consequently, she became homeless again as she did not receive any assistance with employment or housing. When the author's four daughters arrived to Italy, on 12 August 2013, they all stayed in Italy for five days receiving food from churches. Fearing destitution and homelessness, and in the absence of a prospect in finding a humanitarian solution to their situation in Italy, the author together with daughters went to Denmark and requested asylum in August 2013. Today, the author and her four daughters, ,[33] find themselves in a situation of great vulnerability.

13.5 The Committee notes the various reports submitted by the author highlighting the lack of available places in the reception facilities in Italy for asylum seekers and returnees under the Dublin Regulations. The Committee notes in particular the author's submission that returnees, like herself, who had already been granted a form of protection and benefited from the reception facilities when they were in Italy, are no longer entitled to accommodation in the CARAs.[34]

13.6 The Committee notes the finding of the RAB that Italy should be considered the "first country of asylum" in the present case and the position of the State party that the first country of asylum is obliged to provide asylum seekers with basic human standards, although it is not required that such persons have the same social and living standards as nationals of the country (see para. 4.5 above). The Committee further notes the reference made by the State party to a decision of the European Court of Human Rights according to which, although the situation in Italy had shortcomings, it had not disclosed "a systemic failure to provide support or facilities catering for asylum seekers".[35]

13.7 However, the Committee considers that the State party's conclusion did not adequately take into account the information provided by the author, based on her own personal experience that, despite being granted residence in Italy, she faced intolerable living conditions there. In this connection, the Committee notes that the State party does not explain how, in case of return to Italy, the renewable residence permit would actually protect the author and her four children, from exceptional hardship and destitution, similar to the ones the author had already experienced in Italy.[36]

13.8 The Committee recalls that States parties should give sufficient weight to the real and personal risk a person might face if deported[37] and considers that it was incumbent upon the State party to undertake an individualized assessment of the risk that the author and her daughters would face in Italy, rather than rely on general reports and on the assumption that, as the author had benefited from subsidiary protection in the past, she would, in principle, be entitled to the same level of subsidiary protection today. The Committee considers that the State party failed to take into due consideration the special vulnerability of the author who, notwithstanding her entitlement to subsidiary protection,

[33] See para. 1.1 above.

[34] See AIDA, *Country report: Italy*, January 2015, p. 54-55, available at www.asylumineurope.org/sites/default/files/report-download/aida_italy_thirdupdate_final_0.pdf .

[35] See *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, para.78.

[36] See communication No. 2360/2014, *Warda Osman Jasin v. Denmark*, Views adopted on 22 July 2015, para. 8.8; Communication No.2409/2014, *Abdilafir Abubakar Ali et al v. Denmark*, Views of 29 March 2016, para.7.7.

[37] See for example, communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, paras.11.2 and 11.4; Communication No.2409/2014, *Abdilafir Abubakar Ali et al v. Denmark*, Views of 29 March 2016, para.7.8.

faced homelessness and was not able to provide for herself in the absence of any assistance from the Italian authorities. It has also failed to seek proper assurances from the Italian authorities that the author and her four children, i.e. in a particularly vulnerable situation, would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under article 7 of the Covenant, by requesting that Italy undertake (a) to renew the author's residents permit,[38] and to issue residents permits to her children and not to deport them from Italy; and (b) to receive the author and her children in conditions adapted to the children's age and the family's vulnerable status, which would enable them to remain in Italy.[39]

13.9 Consequently, the Committee considers that the removal of the author and her four children to Italy in these particular circumstances would amount to a violation of article 7 of the Covenant.

14. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the deportation of the author and her four daughters to Italy would violate their rights under article 7 of the International Covenant on Civil and Political Rights.

15. In accordance with article 2 (1) of the Covenant which establishes that States Parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to provide [O. H. A.] and her four daughters with an effective remedy, including full reconsideration of her claim, taking into account the State party's obligations under the Covenant, the Committee's present Views, and the need to obtain assurances from Italy, as set out in paragraph 13.8 above, if necessary. The State party is also requested to refrain from expelling the author and her four children to Italy while their request for asylum is being reconsidered.

16. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them translated into the official language of the State party and widely distributed.

[38] Taking into account the author's residence permit expired in May 2015 (see para. 2.2 above).

[39] See communication No. 2360/2014, *Warda Osman Jasin v. Denmark*, Views adopted on 22 July 2015, para 8.9; Communication No.2409/2014, *[A.A.A.] et al v. Denmark*, Views of 29 March 2016, para.7.8.

Annex I

Joint opinion of Committee members Yuval Shany, Yuji Iwasawa, Photini Pazartzis, Sir Nigel Rodley and Konstantin Vardzelashvili (dissenting)

1. We regret that we are unable to join the majority on the Committee in finding that, in deciding to deport the author and her children to Italy, Denmark would, if it implemented the decision, violate its obligations under article 7 of the Covenant.

2. According to the well-established case law of the Committee, State parties are obliged not to deport persons from their territory "where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[a] Not every exposure to personal hardship in the country of removal would, however, fall within the scope of the removing State's non-refoulement obligations.[b]

3. With the possible exceptions of those individuals who face special hardships due to their particular situation of vulnerability[c] which renders their plight exceptionally harsh and irreparable in nature, non-availability of social assistance does not constitute grounds for non-refoulement. A contrary interpretation, recognising all economically destitute individuals as potential victims of article 7 of the Covenant, has little support in the case-law of the Committee or in State practice, and would extend the protections of article 7 and the non-refoulement principle (which are absolute in nature) beyond a breaking point.

4. Although we supported the Views adopted by the Committee in *Jasin v Denmark,*[d] the facts in that case were significantly different than the facts of the present case, and do not warrant the same legal conclusion. In *Jasin,* the author was in a particularly vulnerable situation, which made it nearly impossible for her to confront the exceptional hardships expected were she to be deported to Italy: a single mother of three small children, having to contend with her own health problems, who has lost her immigration status in Italy, and whom the Italian welfare system has demonstrably failed to assist. Under these exceptional circumstances, we were of the view that, without specific assurances of social assistance, Italy cannot be considered a 'safe country' of removal for the author and her children (raising, as a result, the possibility of *de facto refoulement* from Italy to her country of origin).

5. In the present case, the author and her two 18-year old twin girls are able-bodied adults, who may, pursuant to their subsidiary protection status in Italy, lawfully work and support themselves and the two minor children accompanying them (aged 15 and 12). The facts of the present case also suggest that unlike in the case of Jasin, where there has been a demonstrable failure by the Italian authorities to attend to social needs of the author and her family, in the present case the author's daughters never registered in Italy, and have stayed in the country for five days only. Hence, it has not been established that Italy is unwilling or unable to provide social assistance to single-parent families like the author's, and such a conclusion cannot be deduced from the real difficulties in accessing social assistance

[a] General Comment 31 (2004), para. 12.
[b] *Cf. Vuolanne v. Finland,* Comm. No. 265/87, Views adopted on 7 April 1989.
[c] *Jasin v. Denmark*, Comm. No. 2360/2014, Views adopted on 22 July 2015
[d] *Ibid.*

experienced by the author on her own, before her daughters joined her. While deportation to Italy may put the authors in a more difficult situation than the one confronting them in Denmark, we do not have before us information suggesting that their plight is expected to reach the exceptional level of harshness and irreparability that would result in a violation of article 7.

6. Under these circumstances, we cannot conclude that the decision of the Danish authorities to deport the authors to Italy was manifestly arbitrary and would entail a violation of article 7 of the Covenant by Denmark.

Annex II

Individual opinion of Committee member Dheerujlall Seetulsingh (dissenting)

1. As in the case of Jasin v. Denmark (Communication No. 2360/2014) I find myself once more compelled to dissent from the views of the majority.

2. The principles applied by the Human Rights Committee in dealing with Communications from refugees alleging violations of article 7 of the Covenant if they were to be deported either to the country of origin or to the country of first asylum are clearly set out in paragraph 13.3 of the decision of the majority. However, one cannot help noting that the Committee, in exercising an almost quasi-judicial function in its examination of Communications may find itself in a situation where it becomes an appellate instance on facts. Actually the assessment of risk of a personal and irreparable harm is based on the factual circumstances surrounding a particular case, for example in this case, the situation in which the alleged victims will find themselves were they to be deported to Italy. The Refugee Appeals Board in the State Party is being taxed with having made an arbitrary appreciation of the facts concerning risk and in misapplying the provisions of the Covenant, whereas the Board may be better placed, with all the materials at its disposal, to judge the seriousness of the situation in order to reach a reasonable conclusion. Does the Committee have extraneous elements or information on which to rely? It does not seem so. The reproach made to the State Party is a failure to take into due consideration the special vulnerability of the author and her four children. Has the State Party made an error of judgment in applying the provisions of the Covenant which has resulted in a denial of justice? They have not in fact made any error of interpretation in applying the provisions of the Covenant.

3. Ultimately, the above situation gives rise to a difficulty in terms of the remedies recommended by the majority of the Committee. In many cases of deportation the case is remitted to the authorities of the State Party for reconsideration of the request for asylum and the need to obtain assurances from the country of first asylum. (see Jasin). After sending the case to be reconsidered by the Refugee Appeals Board, the State Party usually claims that it has complied with the Views of the Committee, whether or not the outcome is decided in favour of the author of the Communication. This course of action provides a leeway to the State Party to re-examine the case and grants it the possibility to come to exactly the same conclusion that its immigration authorities reached in the first instance. This may result in a virtual ineffectiveness of remedies recommended the Committee. Probably the wiser course would be to stop at a finding of violation without a request for reconsideration by the State Party, thus ensuring a 'genuine' higher rate of compliance with the Views of the Committee. Subsequently, when drawing up its Report on Follow-up to Views on Communications, the Human Rights Committee will have a better picture of State Parties' compliance with its Views.

4. As far as the present case is concerned, however much sympathy one may have regarding the sad plight of refugees, certain rules have to be applied and certain considerations borne in mind by the authorities of the State Party when assessing applications for asylum. The author has two grown up daughters and two minor daughters who joined her in Italy although the author claimed she was suffering hardship in that country and who stayed only for five days in Italy. They thereafter immediately moved to Denmark to seek asylum there. She failed to substantiate in what way Italy was not able to provide assistance to her and to show that she and her family would suffer irreparable harm in the country of first asylum where three able bodied adults should be able to look for

work to fund themselves. The State Party and its immigration authorities gave due weight to all the circumstances surrounding the case. They did not reach a decision which would enable us to conclude that they could have made such an erroneous interpretation of the situation as to justify a reversal of the decision.

5. In the circumstances I find that the decision of the State Party was not arbitrary and did not bear the characteristics of a violation of article 7 of the Covenant.