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**Human Rights Committee**

 Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3325/2019 [[1]](#footnote-2)\*,[[2]](#footnote-3)\*\*,[[3]](#footnote-4)\*\*\*

*Communication submitted by:* N.E. (represented by counsel, Finn Roger Nielsen)

*Alleged victims:* The author

*State party:* Denmark

*Date of communication:* 15 March 2019 (initial submission)

*Document references:* Decision taken pursuant to rule 92 of the Committee’s rules of procedure, transmitted to the State party on 20 March 2019 (not issued in document form)

*Date of adoption of decision:* 27 October 2021

*Subject matter:* Family reunification of the author with her mother

*Procedural issue:* Exhaustion of domestic remedies

*Substantive issue:* Children rights, family rights

*Articles of the Covenant:* 23 and 24

*Articles of the Optional Protocol:* 2 and 5 (2) (b)

1.1 The author of the communication is N.E., a Morocco national born in 1997 and currently residing in Denmark. She claims that the State party has violated her rights under articles 23 and 24 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is represented by counsel

1.2 On 20 March 2019, when registering the present communication, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to grant interim measures under rule 94 of its rules of procedure.

 The facts as submitted by the author

2.1 The author was born in 1997 in Morocco. As the author’s parents, Mr. H.M. and Ms. H.B., separated shortly after she was born, she lived with her father and her father’s family since she was one month old. After the death of her father in 2010, she lived with her paternal aunt, Ms. T.E. The author did not have contact with her mother until the summer of 2013.

2.2 The author’s mother, H.B. married a Danish citizen on 8 May 2002 and entered Denmark on 1 October 2002. H.B. has been granted residence permit in Denmark, and she had two children with her Danish husband. She regularly visited Morocco but she was not allowed by her former husband’s family to see her daughter[[4]](#footnote-5), until the summer of 2013, when her late former husband’s sister informed her of the death of the author’s father and her wish to transfer the custody of the author to her birth mother. Subsequently, H.B. travelled to Morocco to have the author’s passport issued and her visa application made to enter Denmark. The author obtained her visa and entered Denmark on 18 November 2014.

2.3 On 5 December 2014, an application for family reunification was submitted to the Danish Immigration Service. On 18 May 2015, the application was rejected on the grounds that no special grounds to grant a residence permit could be established under the Aliens Act, that denial of residence does not violate the respect of the unity of the family, nor the best interests of the author, that the author’s mother did not submit the application without delay since she had re-established contact with her daughter during the summer of 2013, but applied for family reunification on 5 December 2014 only, and that there was no special relation between the mother and the daughter after living more than 16 years apart, regardless of the alleged fact that the mother was prohibited from having contact with her daughter by her late husband’s family. The Immigration Service also found that the author had family in Morocco who could take care of her and that being over 17 years at the time of the application, her needs for care and parental love were less than that of a younger child.

2.4 On 21 December 2015, the Immigration Appeals Board upheld the decision of the Immigration Service. The decision of the Board was not delivered to the author’s counsel in compliance with the applicable procedural regulations, and instead, was sent to the author herself, even though she is registered as a resident in Denmark. Therefore, the author requested her case to be reconsidered, based on the fact that the decision was not delivered to the author in compliance with the applicable procedural regulations. In her request, the author also asked the Board to reconsider its decision based on the jurisprudence of the Court of Justice of the European Union,[[5]](#footnote-6) the European Court of Human Rights,[[6]](#footnote-7) and the Human Rights Committee[[7]](#footnote-8), which the author considered relevant to her case.

2.5 The Immigration Appeals Board reconsidered the case, and in its decision dated 1 November 2016, held that there is no reason to reconsider the decision of the Board dated 21 December 2015, considering that the author failed to demonstrate new information necessitating to change the Board’s decision, that the author’s case differs from the aforementioned cases before the Court of Justice of the European Union, the European Court of Human Rights, and the Human Rights Committee, particularly due to the fact that N.E. was 17 years and 8 months of age and thereby close to becoming an adult at the time of the application for family reunification, and that she did not have contact with her mother until the summer of 2013 when she was 16 years of age.

 The complaint

3.1 The author claims that the rejection of her application for residence permit for the purpose of family reunification and the order for her to leave Denmark constitutes a violation by the State party of her rights to family life and protection, as protected by articles 23 and 24 of the Covenant. The author also claims that the SP violated her rights under articles 3 and 9 of the Convention on the Rights of the Child.

3.2 The author claims that there are extraordinary circumstances for her case since she was separated from her mother after her parents divorced, when she was only one month old, and that her mother was prevented from contacting her for many years. The author argues that neither she nor her mother should be blamed for the previous lack of contact, in view of these extraordinary circumstances. The author also argues that her mother’s documented health conditions, such as serious heart problems for several years, as well as her family responsibilities in relation to her two small children from her marriage in Denmark have prevented her from initiating a court case or other measures in Morocco to establish contact with her daughter. The author further claims that the State party did not balance its interests in regulating its immigration policy against its obligation to respect the author’s rights to family life and protection.

3.3 The author argues that she was 16 years old when she re-established contact with her mother, and 17 years 8 months old when an application for family reunification was made, and that teenagers also need guidance, support and parental love, which cannot be substituted with a possible relation to distant relatives or a national child care system in the country of origin of the author.

3.4 The author submits that all available domestic remedies have been exhausted, as the decision of the Immigration Appeals Board of 1 November 2016 cannot be further appealed administratively. The author claims that the judicial review for which they appeal the decision of the Immigration Appeals Board is not accessible or effective, considering that her application for free legal aid was rejected and that launching a judicial review before the court does not have the effect of suspending her pending deportation.

 State party’s observations

4.1 On 20 September 2019, the State party submitted its observations on the admissibility and the merits of the author’s communication.

4.2 The State party notes that the Immigration Service rejected the author’s application for family reunification by virtue of section 9 c (1) of the Aliens Act. The State party also notes that the author appealed the decision of the Immigration Service to the Immigration Appeals Board, which informed the author that the appeal was not granted suspensive effect in regard to the deadline for departure, and that the author has to leave Denmark immediately, in compliance with the decision by the Immigration Service. On 21 December 2015, the Immigration Appeals Board upheld the decision, and on 1 November 2016, it rejected a request to reopen and reconsider the case.

4.3 The State party submits that, pursuant to section 63 of the Constitution of Denmark, decisions of the Immigration Appeals Board by which an application for residence is refused under section 9 (1) (i), with reference to section 9 (8), of the Aliens Act may be brought before the Danish courts. Therefore, the State party states that the author has had the opportunity to bring the 21 December 2015 and 1 November 2016 Board’ decisions before the Danish courts. Therefore, the State party submits that, by having refrained from bringing the decision of the Board before the courts, the author has failed to exhaust all available domestic remedies and that therefore the communication should be considered inadmissible pursuant to article 5 (2) (b) of the Optional Protocol. The State party further observes that the fact that the author has been refused free legal aid cannot lead to a different outcome, and invokes the jurisprudence of the Committee that financial considerations and doubts about the effectiveness of domestic remedies do not absolve an author from exhausting them.[[8]](#footnote-9)

4.4 The State party submits that the Committee is solely competent to hear complaints regarding violations of the Covenant, according to articles 2 and 3 of the Optional Protocol. The State party acknowledges its obligation to take into account Denmark’s international obligations, including those arising from the Convention on the Rights of the Child, when exercising its powers under the Aliens Act, however, it notes that the Committee does not have competence to decide whether a State has violated the Convention on the Rights of the Child.

4.5 If the Committee finds no basis for considering the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol, the State party contends that the author have failed to establish a prima facie case for the purpose of admissibility of their communication under articles 23 and 24 of the Covenant and that the communication should therefore be considered inadmissible as it is manifestly unfounded. In the alternative, the State party submits that the author’s claims are without merit as it has not been established that the decisions made by the Immigration Appeals Board on 21 December 2015 or 1 November 2016 are in violation of articles 23 and 24 of the Covenant.

4.6 As regards the author’s claims regarding the violation of articles 23 and 24 of the Covenant, the State party submits that the decisions by the Immigration Appeals Board were made pursuant to section 9 c (1) of the Aliens Act concerning, inter alia, children of Danish residents who fall outside the scope of section 9 (1) (ii) of the Aliens Act. The State party further submits that pursuant to section 9 c (1) of the Aliens Act, admittance of family reunification requires exceptional reasons for persons who are 15 years of age or older. The State party finds that the Immigration Appeals Board took all facts submitted by the applicant into account in its assessment. It notes that the Board attached importance to, inter alia, the age of the applicant, her attachment to Denmark and Morocco, her situation if returned to Morocco, her contact with her mother, and her possibility of remaining in contact with her mother, if she is returned to Morocco. The State party also notes that the author was 17 years of age at the time of the application, that she turned 18 years of age at the time of the decision, thus became legally competent, and that she was born and has lived her whole life in Morocco, where she attended primary school for 11 years.

4.7 The State party submits that no positive obligation can be derived from articles 23 and 24 of the Covenant for other countries than the country where the child is a national citizen, to secure residence and continued upbringing of the child, neither does the articles include an independent immigration right for a child for the purpose of obtaining better living conditions in any country, even when the child has some connection to the country as a temporary country of residence for the child.

4.8 The State party submits that in general children are not considered to have developed an independent attachment to Denmark until after six to seven years of uninterrupted stay in Denmark with a residence permit, while attending a Danish institution or school. The State party finds that the principle of the best interests of the child does not until this point call for admittance of residence permit, unless the case presents extraordinary circumstances.

4.9 The State party reiterates that the author’s mother, H.B., has not seen the author since once month after the birth of the author in 1997 and until 2013, that it was the sole choice of H.B. to apply for residence in Denmark in 2002 and leave the author in Morocco, and that H.B. did not initiate legal steps to re-establish the custody or contact with the author until she found out in 2013 that the author’s father had died in 2010, at which point the author was 16 years of age. The State party also notes that H.B. did not apply for reunification with the author until 12 years after she travelled to Denmark and one and a half years after the contact between the two had been re-established.

4.10 The State party finds that the author’s mother’s illness does not create an obligation for Denmark, but rather for the country of which the author is a national, to ensure the conditions of upbringing. The State party also notes that it has not been established that H.B.’s health condition was of such a nature that she was unable to initiate legal measures in Morocco to get custody of the author at an earlier point, considering that the surgery took place in 2010 and H.B.’s health condition has henceforth improved that she has been able to work ever since.

4.11 The State party submits that the author has never received a residence permit in Denmark, and that she has only stayed in Denmark on the grounds of a visitor’s visa, procedural stay and illegal stay. The State party finds that the author is not without a caregiver in her home country, considering that her aunt with whom she had lived before is living in Morocco and that she also has other family members. The State party also notes that the author’s mother H.B. has visited the author in Morocco on several occasions and submits that nothing prevents the author and her mother from continuing to practice their family life through visits, as they have done since re-establishing contact.

4.12 The State party finds that the present case is not comparable to the other cases referred to by the author in her communication. In regards to the author’s reference to the views by the Committee in *El-Hichou v. Denmark*, the State party notes that the two cases are not comparable since the author in the case of *El-Hichou v. Denmark* was 11 years and 8 months of age at the time of his application for family reunification and had had regular contact with his father, through visits, letters and phone calls. The State party submits that the alleged fact that the mother was prohibited from having contact with her daughter by her late husband’s family does not change this assessment. The State party further notes that the judgements in cases *Caner Genc v. Integrationsministeriet* of the Court of Justice of the European Union, and *Biao v Denmark* of the European Court of Human Rights, are also not comparable to the present case, considering that the former case concerns admittance of resident permits to children under 15 years of age, and the latter concerns the affiliation requirements for family reunification with a spouse. Finally, the State party notes that the case of *Sen v. the Netherlands* of the European Court of Human Rights is not comparable to the present case, considering that the author in *Sen v. the Netherlands* was 9 years old when the application for family reunification was submitted.

4.13 The State party concludes that the Immigration Appeals Board has considered the above factors and concluded that it would not be in violation of Denmark’s international obligations to deny family reunification. The State party reiterates that the author was 17 years 8 months of age at the time of the application for family reunification, and that she has not had contact with her mother until the age of 16, and that she until then has lived her entire life in Morocco. The State party submits that the rejection of the author’s application for a residence permit pursuant to section 9 c (1) of the Aliens Act was not in violation of articles 23 and 24 of the Covenant, and that the author and her mother, H.B. can continue practicing their family life through visits, as they have done previously.

 Author’s comments on the State party’s observations

5.1 On 5 February 2020, the author submitted her comments on the State party’s observations on the admissibility and the merits of the communication.

5.2 In her comments, the author submits that H.B. travelled to Morocco in July 2011, January 2012, October-November 2012, January 2013, October 2013, January-February 2014, May 2014, July-August 2014, November 2014 and January 2015, noting that the frequency of her visits increased after re-establishing contact with her daughter N.E. in the summer of 2013.

5.3 The author submits that it was possible to apply for the issuance of her passport only after her custody was transferred from her aunt to her mother, and for the issuance of her visa to enter Denmark during H.B.’s visit to Morocco in May 2014 and July-August 2014 to follow up on her daughter’s visa application. The author thus claims that it took time to have the necessary documentation issued by the authorities, which delayed her application for residence permit for the purpose of family reunification.

5.4 In relation to the State party’s observations on the admissibility of the communication, the author reiterates her previous arguments on the admissibility of the case and insists that article 5 (2) (b) of the Optional Protocol has to be assessed in the light of whether the specific domestic remedies that were claimed to be available by a State party were effective and available to the author in reality.

5.5 The author submits that the Immigration Appeals Board is an independent collegial, quasi-judicial administrative body that considers appeals against immigration related decisions of administrative authorities, except those relating to asylum-related decisions, which are dealt with by the Refugee Appeals Board. The author notes that the Immigration Appeals Board consists of a judge, a representative from the Ministry of the Aliens and Integration, and a representative of the Bar Association, that the Board can be compared to a specialized court for that it can call in the applicant for an interview in order to obtain information and consider arguments. The author further notes that until 2018, particular cases of family reunification for children could automatically be appealed and that a free lawyer was appointed to assist the minor and the parents, and that in 2018, this system was abandoned and that the Immigration Appeals Board took over court cases relating to particular cases of family reunification. The author also submits that the decisions of the Immigration Appeals Board can be challenged at the courts only for a limited set of legal reasons, including significant procedural errors, and that the general assessments of the facts and the merits in the case cannot be tried by the courts.

5.6 The author submits that cases referred to by the State party in its observations on the admissibility of the communication are not relevant to the present case, considering that these cases did not concern decisions made by a highly specialized, independent, collegial and quasi-judicial administrative body[[9]](#footnote-10). The author invokes the jurisprudence of the Committee that the requirement of exhaustion of the domestic remedies does not render a communication inadmissible if the specific remedy in a case does not have any prospect of offering effective redress, with reference to cases involving decisions of the Danish Refugee Appeals Board.[[10]](#footnote-11)

5.7 With respect to the merits of the case, the author claims that the provisions of the Aliens Act that foresee the issuance of residence permits for the purpose of family reunification for children below 15 years of age without a requirement of any exceptional reasons, while requiring exceptional reasons for applications of children who are 15 years of age or older, are discriminatory. The author also claims that the authorities did not strike a proper balance between the best interests of the child and the requirement of exceptional reasons for family reunification. The author therefore claims that the requirement under the Aliens Act, which provides that family reunification can be admitted for children who are 15 years of age or older, only for exceptional reasons, is incompatible with articles 23 and 24 of the Covenant, as such exceptional reasons are not defined in law and that they provide for disproportionately strict interpretation.

5.8 The author reiterates the arguments she raised on 15 March 2019 her and contends that it was not possible to act faster in terms of filing a family reunification request. The author also reiterates that H.B. has a well-established family life in Denmark with her husband and two children from her marriage, who are attending schools in Denmark. The author concludes that the decision not to allow reunification of N.E. with H.B. in Denmark would constitute an interference with her family life contrary to article 23, and a violation of article 24 due to failure to provide the author with the necessary measures of protection of a minor, which is applicable until the age of 18.

5.9 The author additionally submits that both N.E. and H.B. are the authors[[11]](#footnote-12) of this communication as they both find that their rights under articles 23 and 24 have been violated by the State party.

 State party’s additional observations

6.1 On 27 June 2016, the State party submitted additional observations on the author’s comments.

6.2 In relation to her assertion in relation to the State party’s observations that both N.E. and her mother H.B. should be considered authors of the communication, the State party observes that this is not reflected in the communication dated 2 June 2017 and completed on 15 March 2019. The State party submits that for this reason, only N.E. was regarded as the author of the communication in its observations dated 20 September 2019. The State party maintains that even if H.B. was to be considered a co-author of the complaint, there has not been a violation of articles 23 and 24 of the Covenant in relation to N.E. or H.B.

6.3 The State party submits that the Immigration Appeals Board is an independent, collegial, quasi-judicial administrative body, and that its decisions cannot be appealed to any other administrative authority,[[12]](#footnote-13) however, they can be brought before Danish courts, which have the authority to adjudicate any matter concerning the limits of the competence of a public authority and the legitimacy of its decisions.[[13]](#footnote-14) The State party admits that while the case is pending before the courts, the plaintiff must comply with its decision, as the court proceedings does not delay the effect of the decision made by the administrative body unless the court decides otherwise. The State party notes the difference between the decisions of the Refugee Appeals Board and the Immigration Appeals Board, considering that decisions of the former cannot be appealed to the Danish courts, and that this is not the case for the decisions of the latter. Therefore, the State party maintains that the author could have brought the case before the domestic courts, but has chosen not to.

6.4 The State party submits that the legislative amendments to the Aliens Act in 2018 are not relevant to the author’s case, as cases like the present one have never been subject to the special procedure under previous legislation which allowed for the exceptionally easy access to court for children. The State party rejects the author’s claims that the Immigration Appeals Board in 2018 took over appeals concerning children in order to relieve the courts. Although the State party admits that the legislator took into account the possibility of having the cases decided by the Immigration Appeals Board in deciding to revoke the exceptionally easy access to court for children in such cases under the special procedure, it noted that the amendment to the Aliens Act in 2018 did not preclude bringing the cases before the courts through the regular procedure. The State party therefore maintains that the author has not exhausted all available domestic remedies.

6.5 With regard to the author’s submission concerning the merits of the communication, the State party submits that the distinction provided under the Aliens Act regarding family reunification of children under and above the age of 15 is not illegal, unclear or discriminatory, and that it does not contravene articles 23 or 24 of the Covenant. The State party submits that such an age requirement is a legitimate way to secure the State party’s interests in securing children’s integration in the society, considering that their age of arrival in Denmark is significant for their ability to finish their education in Denmark and be able to provide for themselves.[[14]](#footnote-15) The State party notes that the Immigration Appeals Board makes a decision based on section 9 c (1) of the Aliens Act, considering all the information submitted in the case, and taking into account the State party’s legal obligations in both national and international law, including the Covenant and the case law, including in relation to family reunification and the best interests of the child. The State party observes that the best interests of the child in some cases where the child is 15 years of age or older may lead to the obligation to grant a residence permit to that child.

6.6 In relation to the author’s comments that the State party has not struck a proper balance between best interests of the child and the requirement of exceptional reasons for family reunification, the State party submits that the Immigration Appeals Board evaluated the case, attaching importance to all the facts submitted by the author, inter alia, N.E.’s age, her upbringing, her cultural ties to both Morocco and Denmark, her family ties to both her family in Morocco and Denmark, and her situation if she were to return to Morocco. The State party also notes that, since the reestablishment of their contact, N.E. and H.B. have been practicing their family life through visits, as H.B. several times has visited the author in Morocco, and that the author can continue practicing her family life through visits in Morocco and Denmark.

6.7 The State party submits that a child can obtain an independent attachment to Denmark, if the child has had a legal and uninterrupted stay in Denmark for six to seven years, while attending a Danish institution or school. The State party observes that the author entered Denmark on a tourist visa and since then has been living together with H.B. and H.B.’s family in Denmark, which does not give her an independent attachment to Denmark, considering that she has never had a residence permit in Denmark and illegally stayed in Denmark on the grounds of a tourist visa and procedural stays. The State party maintains that a long-term illegal residence cannot in itself lead to a granting of a residence permit.

6.8 The State party maintains that, should the Committee find the communication admissible, it has not been established that there are substantial grounds for asserting that the rejection of the author’s application for residence permit constitutes a violation of articles 23 and 24 of the Covenant, and that the Immigration Appeals Board adequately took into account the information provided by the author in the present case.

 Issues and proceedings before the Committee

 Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

7.3 The Committee takes note of the author’s submission that both N.E. and H.B. are the authors of this communication as they both find that their rights under articles 23 and 24 have been violated by the State party. The Committee also takes notes of the State party’s submission that this is not reflected in the author’s communication dated 2 June 2017 and completed on 15 March 2019, and that for this reason, only N.E. was regarded as the author of the communication in the State party’s observations dated 20 September 2019. The Committee recalls that rule 99 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual’s representative. In the present case, the Committee notes that N.E. was regarded as the sole author of the initial submission dated 2 June 2017 and completed on 15 March 2019, and that only the alleged victim N.E. duly issued a power of attorney to authorize counsel to represent her before the Committee. Accordingly, the Committee considers N.E. as the sole author of the communication.

7.4 The Committee observes that, under article 5 (2) (b) of the Optional Protocol, it is precluded from considering a communication unless it has been ascertained that domestic remedies have been exhausted.

7.5 The Committee notes the State party’s challenge to the admissibility of the communication on the grounds that domestic remedies have not been exhausted. The Committee further notes the State party’s argument that court proceedings do not delay the effect of the decision made by the administrative body unless the court decides otherwise (para. 6.3). The Committee notes that the author has only exhausted administrative procedures and did not institute proceedings before a court to challenge the Immigration Appeals Board decisions of 21 December 2015 or 1 November 2016, in which her application for family reunification was refused. In this connection, for the purpose of article 5 (2) (b) of the Optional Protocol, the Committee recalls that domestic remedies must not only be available, but also effective, which also depends on the nature of the alleged violation.[[15]](#footnote-16) It also recalls that an applicant must make use of all judicial or administrative avenues that offer a reasonable prospect of redress.[[16]](#footnote-17) The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result.[[17]](#footnote-18) The Committee further notes that, on the other hand, mere doubts about the effectiveness of domestic remedies do not absolve an author from exhausting them.[[18]](#footnote-19)

7.6 In the present case, the Committee notes that the author’s claims that she could not secure legal aid to submit her complaint to courts. The Committee notes the State party’s arguments that the fact that the author has been refused free legal aid cannot lead to a different outcome. In this regard, the Committee notes that that the author does not explain, why it was necessary for her to obtain legal aid and that she has not referred to any potential legal complexities of the case she was planning to file, or described in details all the efforts undertaken to secure such legal aid. The Committee further notes that the author did not provide any pertinent explanations as to why she considered the State party’s court procedures as ineffective, stating only that they would be not accessible and would not provide “effective redress” (paras. 3.4, 5.5, 5.6 above). In these circumstances, and in the light of all the submissions made by the State party, the Committee cannot conclude that the requirements of article 5 (2) (b) of the Optional Protocol were met in the present case, and therefore, declares the communication inadmissible.

7.7 In the light of the Committee’s findings in para. 7.6, it decides not to consider other admissibility criteria of the present communication.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

Annex 1

 Joint Opinion by Committee members Wafaa Ashraf Moharram Bassim and José Manuel Santos Pais(dissenting)

1. We regret not being able to concur with the Committee’s decision of finding this communication inadmissible due to non-exhaustion of domestic remedies.

2. In the present case, the author, born in Morocco in 1997, was separated from her mother since she was only one month old (§ 2.1), after her parents’ divorce. For many years, she could not see her mother, who in the meantime had married a Danish citizen and had moved to Denmark in 2002, as her father’s family did not allow any contacts between the two (§ 2.2). The author therefore did not have the love and care of her mother during her childhood and most of her teenage years.

3. The author’s father died in 2010 (§ 2.1) and she surely suffered from such a loss, being just 13 years old at the time.

4. It was only in the summer of 2013, when the author was 16 years old, that she was allowed to see her mother, at the request of her paternal aunt, who wished to transfer her custody to her mother, since the paternal family did not want to care for her anymore (§ 2.2)

5. The author’s mother quickly travelled to Morocco to have the author’s passport issued and her visa application made to enter Denmark so she could be part of her new danish family. The author obtained her visa and entered Denmark in 2014 and later submitted, in December of the same year, while still a minor, to the Danish Immigration Service, an application for family reunification, who was rejected in May 2015.

6. The reasons for the rejection by the Danish authorities are at the very least shocking (§ 2.3), particularly when concluding that denial of residence did not violate the respect of the unity of the family, nor the best interests of the author.

7. As for the argument concerning the delay in submitting the application for family reunification, it was not possible for the author’s mother to do so before the issuance of the author’s passport, which depended upon the transfer of the child’s custody from her paternal aunt to her mother, and upon the issuance of her visa to enter Denmark (§ 5.3). All these initiatives to have the necessary documentation issued by the authorities, which may have delayed the application for residence permit, only reveal the interest of the mother to take care of her daughter in the future.

8. As for the alleged lack of special relationship between the mother and her daughter after living more than 16 years apart, neither of them should be blamed for it, the interest shown by both the author and her mother to live together being clear indications they want to resume a relationship they were prevented to entertain, against their will, for so many years.

9. As for the argument that the author had family in Morocco who could take care of her (§ 4.11), it is clear the author’s paternal family refuses to take care of her anymore and that is why they contacted the author’s mother.

10. Finally, as for the argument that being over 17 years at the time of the application, the author’s needs for care and parental love are less than that of a younger child, this does not prevent that, just entering adulthood, the author is in need of particular guidance, support and parental love from her mother in this very important phase of her life.

11. In fact, the author wants to build a relationship with her mother, particularly necessary as she enters adulthood and therefore denial of residence violates the respect of the unity of the (new) family and the interests of the author, contrary to the State party’s arguments (§§ 2.3, 2.6, 3.3).

12. Both the author (§ 3.2.) and the State party (§ 4.6) recognize there are extraordinary circumstances which may allow for family reunification, namely for persons who are 15 years of age or older, and for the delay in going through the necessary procedures, justifying admittance of a residence permit according to the principle of the best interests of the child (§§ 4.8, 6.5).

13. In recent years, however, the State party changed its laws, making it much more difficult for applicants for family reunification and this situation also impacted the author’s present communication. Until 2018, particular cases of family reunification for children could automatically be appealed and a free lawyer was appointed to assist the minor and the parents, but in 2018 this system was abandoned, and the Immigration Appeals Board, an independent collegial, quasi-judicial administrative body, took over particular court cases relating to cases of family reunification (§ 5.5). The State party acknowledges this important legislative change and its consequences (§ 6.4).

14. Moreover, while decisions of the Immigration Appeals Board can be challenged at the courts, it is only for a limited set of legal reasons, including significant procedural errors. In fact, the general assessments of the facts and the merits in the case cannot be tried by the courts (§ 5.5) and the State party also acknowledges such limitation (§ 6.3), when referring that danish courts «*have the authority to adjudicate any matter concerning the limits of the competence of a public authority and the legitimacy of its decisions*».

15. Although the author did not bring the 21 December 2015 and 1 November 2016 Immigration Appeals Board’ decisions before the Danish courts, therefore allegedly not exhausting domestic remedies, she was prevented to do so, since she was refused free legal aid. And for a girl not having any means of providing for her own sustenance, having just entered adulthood and being new to a different country than his own, this is of major importance and surely prevented her to bring the case before domestic courts. And besides, as already stated earlier, decisions of the Immigration Appeals Board can only be challenged at the courts for a limited set of legal reasons.

16. The author was informed by the Immigration Appeals Board, that the appeal to this Board was not granted suspensive effect in regard to the deadline for departure, and that the author had to leave Denmark immediately (§ 4.2). Moreover, even if the author decided to launch a judicial review of the Board’s decisions before danish courts, this would not have the effect of suspending the author’s pending deportation, as the State party itself acknowledges (§ 6.3), «*unless the court decides otherwise*».

Therefore, exhaustion of domestic remedies could not prove available or effective in the circumstances of the present case (§§ 3.4, 5.6).

17. Family reunification concerns not only children and their parents, but also adults (for instance, spouses), situation which the State party acknowledges (§ 4.12). So, the argument relating to the actual age of the author is a rather weak one.

18. The decision not to allow family reunification constitutes an interference with the author’s family life and does not protect the young adult (§ 5.8). And the State party itself acknowledges that the principle of the best interests of the child, in some cases where the child is 15 years of age or older, may lead to the obligation to grant a residence permit to that child (§ 6.5).

19. We would therefore have reached an admissibility decision in this case and concluded for a violation of the author’s rights under articles 23 and 24 of the Covenant.

**Annex 2**

 Individual opinion by Committee member Hélène Tigroudja (dissenting)

1. I disagree with the conclusion reached by the majority of the Committee for the reasons thoroughly explained and detailed by my colleagues José Santos Pais and Wafaa Bassim in their dissenting opinion. I fully share their analysis, but I would like to add another element linked to the domestic legal background in force in Denmark when facts occurred, that is totally missed by the majority of the Committee.

2. The State’s Aliens Act provisions (Sections 7 and 9) applied in the present case and the question of State’s international positive obligations regarding family reunification have been severely assessed by various international bodies and especially the Grand Chamber of the European Court of Human Rights in its *M.A. v. Denmark* judgment issued on 9 July 2021.[[19]](#footnote-20) The facts and the claims are different from the present case. Nevertheless, the European Court clarified and stressed a key principle relevant for the present communication. Rebutting the State’s affirmation that there are no positive obligations when dealing with family reunification, the European Court recalled its long-standing jurisprudence in favor of granting family reunification in different circumstances and especially, when “children were involved, since their interest must be afforded significant weight.”[[20]](#footnote-21) This “child-friendly” approach to family reunification question has consequences both on the substantive and procedural dimensions of the State’s obligations that edge its “margin of appreciation” in these matters.[[21]](#footnote-22) The Human Rights Committee itself recognized in previous views against Denmark - regrettably ignored by the majority - that the best interests of a child must guide the analysis of the States’ substantive and procedural obligations under the Covenant. It stressed that: “[what is] at stake in the present case are the author’s rights as a minor to maintain a family life with his father and his half-siblings and to receive protection measures as required by his status as a minor. The Committee notes that the author cannot be held responsible for any decisions taken by his parents in relation to his custody, upbringing and residence.”[[22]](#footnote-23)

3. In the present case, the majority declared the complaint inadmissible on the ground of non-exhaustion of domestic remedies. However, it did not consider whether an exception to the exhaustion rule could apply, considering the specific situation of the author - a minor who was refused free legal aid - and the available remedies themselves - judicial review can only be done on narrow grounds and the remedies are not suspensive -. The arguments raised by the State that the author was 17 at the time of lodging her application and that she had no contact with her mother until the age of 16 are irrelevant and cannot be used *against* the author. Quite the contrary, as highlighted by the Committee in *Mohamed El-Hichou*, the author cannot be blamed or sanctioned for her father’s refusal to allow her mother to visit her.

4. The majority’s position is also at odds with the unanimous international criticism against the Danish domestic parliamentary and judicial practice on family reunification. In addition to the European Court, the Council of Europe (CoE) Parliamentary Assembly, the CoE Commissioner for Human Rights, the CoE European Commission against Racism and Intolerance, the UN Committee on Elimination of Racial Discrimination and this Committee itself in its 2016 Concluding Observations on Denmark have strongly criticized the Danish Aliens Act, the regressive rationale behind the text and the discriminatory consequences of many of its provisions.[[23]](#footnote-24) I regret that the majority decided this communication without any regard to the international standards applicable to family reunification in general but also without any consideration to the clear and universal denunciation of the Danish legislative framework applied to the author’s and her mother’s claim.

5. For all these considerations and those explained by my colleagues José Santos Pais and Wafaa Bassim in relation with the facts, I am convinced that the communication should have been declared admissible, and based on the family life existing between the author and her mother, the Committee should have concluded to a violation of Articles 23 and 24 of the Covenant.

**Annex 3**

 Individual opinion by Committee member Duncan Laki Muhumuza (dissenting)

1. The author claims that the rejection of her application for residence permit for the purpose of family reunification and the order for her to leave Denmark constitutes a violation by the State party of her rights to family life and protection, under Articles 23 and 24 of the Covenant. She also claims that the State Party violated her rights under articles 3 and 9 of the Convention on the Rights of the Child.

2. The application was rejected on the grounds that no special grounds to grant a residence permit could be established under the Aliens Act; and that denial of residence does not violate the respect of the unity of the family, nor the best interests of the author; and that the author’s mother did not submit the application without delay since she had re-established contact with her daughter during the summer of 2013, but applied for family reunification only on 5 December 2014, and that there was no special relation between the mother and the daughter after living apart for more than 16 years.

a). There needs not be a ‘special relationship’ between a mother and her child for purposes of family. It is not in contention that she is the biological mother of the author, and that fact cannot be negated by lapse of time; or by distance; or lack of proximity. The state party seems to imply that the absence of communication, and 16 years they spent apart while the author was in the care of her father’s family, nullify her motherhood of the child. Yet motherhood is the most natural basis of family (being a child’s birth parent).

b) The author’s needs for care and parental love might indeed be less than those of a younger child, but this author has clearly expressed where she would like those needs to be met; that is, by her mother. The state party should reconsider that since she is older now, her preferences and wishes can be better expressed with regard to whose care she should be under. Continually denying that requirement would be a blatant violation of the author’s best interests.

3. On the submission by the State party that no positive obligation can be derived from articles 23 and 24 of the Covenant for other countries than the country where the child is a citizen, neither do the articles include an independent immigration right for a child for the purpose of obtaining better living conditions, even when the child has some connection to the country as a temporary country of residence for the child.

a) It is important to note that the main basis of the application was family re-unification, not pursuit for better living conditions.

b) The connection that the author seeks is with her birth mother, not the state party in whose territory the mother resides. The immigration right is thus incidental to her right to family, in which case the state party is obligated to take steps to allow for the enjoyment of that right.

4. The State party submits that in general children are not considered to have developed an independent attachment to Denmark until after six to seven years of uninterrupted stay in Denmark with a residence permit.

5. The most important attachment in this case is that of the author to her mother. From the established facts, it is obvious that the separation was as a result of conditions beyond the control of the author, and her mother. Natural justice heavily inclines towards the need to maintain the currently re-established mother/daughter relationship.

6. The State party submits that the author has never received a residence permit in Denmark, and that she has only stayed in Denmark on the grounds of a visitor’s visa, procedural stay and illegal stay. The State party finds that the author is not without a caregiver in her home country, considering that her aunt with whom she had lived before is living in Morocco and that she also has other family members. The State party also notes that the author’s mother H.B. has visited the author in Morocco on several occasions and submits that nothing prevents the author and her mother from continuing to practice their family life through visits, as they have done since re-establishing contact.

7. It is unclear why the State Party should insist on family visits yet parental visits are not the normal way of raising a child, and are detrimental to their stability. It is unfortunate that the State would opt for parental visits as a preferred method of family life, yet there is a parent willing to care for her daughter. It is inconsiderate to the essence of family and its contribution to the social fabric.

8. For the State Party to state that its position is unchanged even by the fact that the mother was prohibited from having contact with her daughter by her ex-husband’s family is quite absurd. The State party observes that the best interests of the child in some cases where the child is 15 years of age or older may lead to the obligation to grant a residence permit to that child.

9. Since the State Party acknowledges that the best interests of the child in certain cases where the child is 15 years or older may lead to the obligation to grant a residence permit to that child, my considered opinion is that the State Party should indeed proceed to grant the permit as sought by the author.

1. \* Adopted by the Committee at its 133rd session (11 October-5 November 2021). [↑](#footnote-ref-2)
2. \*\* The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Christopher Arif Bulkan, Mahjoub El Haiba, Shuichi Furuya, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Kobauyah Kpatcha Tchamdja, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi. [↑](#footnote-ref-3)
3. \*\*\* Individual opinions by Committee members Wafaa Ashraf Moharram Bassim, José Manuel Santos Pais, Hélène Tigroudja, and Duncan Laki Muhumuza (all dissenting) are annexed to the present Decision. [↑](#footnote-ref-4)
4. The author submits that as a child, she was “in every way prevented” from having a contact with her mother, due to “traditional position” from the author’s father and his family, and due to the parents’ divorce. [↑](#footnote-ref-5)
5. Judgment of the Court of Justice of the European Union (Grand Chamber) of 12 April 2016, Case C‑561/14, Caner Genc v Integrationsministeriet, request for a preliminary ruling from the Østre Landsret, Judgment ECLI:EU:C:2016:247. [↑](#footnote-ref-6)
6. Judgment of the European Court of Human Rights (Second Section) of 25 March 2014, Case of Biao v Denmark, application no. 38590/10, Strasbourg. Judgment of the European Court of Human Rights (First Section) of 21 December 2001, Case of Sen v the Netherlands, application no. 31465/96, Strasbourg. [↑](#footnote-ref-7)
7. Mohamed El-Hichou v Denmark (CCPR/C//99/D/1554/2007). [↑](#footnote-ref-8)
8. P.S. v. Denmark (CCPR/C/45/D/397/1990), para. 5.4; Robert Faurisson v. France (CCPR/C/58/D/550/1993), para. 6.1; Jama Warsame v. Canada (CCPR/C/102/D/1959/2010), para. 7.6. [↑](#footnote-ref-9)
9. The author seems to refer to cases in footnote 6. [↑](#footnote-ref-10)
10. J.F. v. Denmark (CCPR/C/125/D/2672/2015); A.B.H. v. Denmark (CCPR/C/126/D/2603/2015). [↑](#footnote-ref-11)
11. This is the first time that the author refers to two authors of the present communication. The initial complaint was submitted by one person, N.E. [↑](#footnote-ref-12)
12. Section 52 a (8) of the Aliens Act. [↑](#footnote-ref-13)
13. Section 63 of the Constitution. [↑](#footnote-ref-14)
14. The State party refers to the Judgment of the European Court of Human Rights (Third Section) of 1 December 2005, Case of *Tuquabo-Tekle and others v The Netherlands*, application no. 60665/00, Strasbourg, para. 44; and the Judgment of the European Court of Human Rights (Second Section) of 30 July 2013, Case of *Berisha v Switzerland*, application no. 948/12, Strasbourg, para. 51. The State party also refers to article 4 (6) of the European Council Directive 2003/86/EC of 22 September 2003, under which the Member States of the European Union may request that an application concerning family reunification of minor children have to be submitted before the age of 15, and that they may examine whether a child meets condition for integration if the child is over the age of 12 and arrives independently from the rest of his or her family, noting that the Directive is not in force in Denmark due to Danish legal reservations thereto. Finally, the State party refers to the Judgment of the Court of Justice of the European Union (Grand Chamber) of 27 June 2006, Case C‑540/03, European *Parliament v Council of the European Union*, Judgment ECLI:EU:C:2006:429, where the Court held that the age requirement under article 4 (6) of the European Council Directive 2003/86/EC of 22 September 2003 is not incompatible with the right to family life, the obligation to take the best interests of the child into consideration or the prohibition of age based discrimination. [↑](#footnote-ref-15)
15. *Vicente et al. v. Colombia* (CCPR/C/60/D/612/1995), para 5.2. [↑](#footnote-ref-16)
16. *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2. [↑](#footnote-ref-17)
17. *Young v. Australia* (CCPR/C/78/D/941/2000), para. 9.4; and *Barzhig v. France* (CCPR/C/41/D/327/1988), para 5.1. [↑](#footnote-ref-18)
18. P.S. v. Denmark (CCPR/C/45/D/397/1990), para. 5.4; Robert Faurisson v. France (CCPR/C/58/D/550/1993), para. 6.1; Jama Warsame v. Canada (CCPR/C/102/D/1959/2010), para. 7.6. [↑](#footnote-ref-19)
19. Application No. 6698/18. In her Communication, the author also referred to another important Grand Chamber, *Biao v. Denmark*. Judgment of 24 May 2016. Application No. 38590/10, which is also relevant to understand the legislative context. [↑](#footnote-ref-20)
20. *Eur. Court H.R. (GC) M.A. v. Denmark*. Judgment of 9 July 2021, para. 135 (the Court referred to previous judgments on similar issues). [↑](#footnote-ref-21)
21. *Id.*, paras. 161-163. [↑](#footnote-ref-22)
22. *Mohamed El-Hichou v. Denmark* Views of 20 August 2010. Communication No. 1554/2007, para. 7.4. [↑](#footnote-ref-23)
23. For the reference to the materials, see *M.A. v. Denmark*. Judgment of 9 July 2021, paras. 49-60. [↑](#footnote-ref-24)