Copenhagen, 1 July 2016

CEDAW Communication No. 46/2012
M.W. v. Denmark
Follow-up observations of the Government of Denmark

1. Introduction

By letter of 15 March 2016, the Committee on the Elimination of Discrimination against Women (hereinafter 'the Committee') transmitted its views adopted on 22 February 2016 on the above communication to the Government of Denmark (hereinafter 'the Government').

It follows from para. 6 that the Committee is of the view that the facts before it revealed a violation of the rights of the author and her minor son O.W. under Article 2, read in conjunction with Article 1, as well as Article 5 (a) and (b) and Article 16 (1) (d) of the Convention on the Elimination of all forms of Discrimination against Women (hereinafter 'CEDAW').

Pursuant to para. 7 of the views, the Government is requested to inform the Committee, within six months, of any action taken in the light of the views and recommendations of the Committee.

2. The Government's follow-up observations

2.1. This is a very complex case concerning the issue of custody of the author's son in which two recognised and equal legal systems have made contradictory decisions concerning custody of the son.

As can also be seen in other custody cases, there is a high level of conflict with mutual allegations of child abduction, violence, etc., between the two parties – the author and the son's father – who both claim custody of the son.

2.2. The Government observes that this case relates to the issues of which parent (whether male or female) is to have custody of the son and where the son had his habitual residence, including which country's authorities are competent to make decisions regarding the son. The Government also observes that the Committee is not a supranational body tasked with ruling on disagreements between two recognised and equal legal systems on these issues.

In addition, the Committee obviously cannot have the same insight into all aspects of the case as the national authorities, including the courts, for which reason the domestic courts are better suited than the Committee to hear a case like the case at hand. In para. 5.3 of its views, the Committee also generally recalls that it does not replace the national judicial authorities in the assessment of the facts and evidence, unless the assessment was clearly arbitrary or amounted to a denial of justice.

However, the Government finds that, to a great extent, the Committee treated the author's unsubstantiated allegations of the Danish authorities' various wrongful acts and omissions as proven facts, as was also pointed out by Committee member Patricia Schulz in her dissenting opinion. In doing so, the Committee practically reversed the burden of proof since the Committee uncritically chose, due to the absence of any negative proof from the State party, to base its views on the author's unsubstantiated allegations.

The Government cannot recognise the Committee's description of the facts of the case. The Government finds that, to a great extent, the statement of facts merely reflects the author's subjective perception of the course of events.

Furthermore, the Government rejects the description of the assessments made by Danish authorities in the national case as being clearly arbitrary or amounting to a denial of justice.

Against this background, the Government finds that the Committee has sought to replace the national authorities in the assessment of the facts and evidence in the case at hand, which is a complex case concerning custody.

In doing so, the Committee reached a conclusion in which the Government does not agree. Accordingly, the Government disagrees in the view that the facts of the case revealed a violation of the rights of the author and her minor son O.W. under Article 2, read in conjunction with Article 1, as well as Article 5 (a) and (b) and Article 16 (1) (d) of CEDAW.

2.3 As regards the recommendations made by the Committee in its views, the Government observes that it follows from para. **6 (a)** that the Committee recommends that the Government take steps to ensure that the Danish Central Authority promptly collaborate with the Austrian Central Authority in order to ensure the immediate return of O.W. to the author in Austria where if necessary, new proceedings concerning custody and visitation may be conducted in the best interests of the child.

Under Danish law, as appears from the observations previously submitted by the Government, requests for the return of a child under the 1980 Hague Convention are determined by the bailiff's court, whose order in such matters can be appealed to the High Court. As also appears from the Government's observations, the relevant Danish courts have already considered the issue of the return of O.W. to Austria, and the courts have also considered a request for recognition and enforcement of an Austrian decision on custody.

Danish courts are independent, and the Government cannot and will not attempt to reverse previous decisions in this case. The Government observes in this respect that, as previously mentioned, there is no basis for assuming that the assessments made in the case by Danish authorities are clearly arbitrary

or amounting to a denial of justice, and therefore the Committee should not replace the national authorities in the assessment of the facts and evidence.

The Government observes about this issue that it requires renewed clarification of the current situation of O.W. and thus a reconsideration of the best interests of the child in the case at hand to make an assessment of whether it would be in the best interests of O.W. to take up residence with his mother, with whom he has had no contact since 2013. No such necessary information on the current situation was obtained in connection with the consideration of the matter by the Committee.

For the above reasons, the Government is unable to comply with the Committee's recommendation to ensure the immediate return of O.W. to the author.

Furthermore, the Government rejects the Committee's view that the State party has failed to ensure the author with reasonable access to O.W. The Government refers in this respect to its additional observations of 9 August 2013 and 8 June 2015, in which the Government stated that the State party has not been able to provide the author with reasonable access to her son in Denmark as requested by the Committee as the State Administration is the only Danish authority with competence to make decisions on access and as the author does not want the State Administration to process her application for access to her son. In Denmark, as elsewhere, the active involvement of the parents is necessary in cases concerning rights of access. The Government cannot remedy the author's rejection of any and all interaction with the relevant Danish authority.

For the avoidance of any doubt, the Government observes that a final judgment in civil proceedings can only be reversed if, in exceptional circumstances, the case is reopened under section 399 of the Danish Administration of Justice Act (*retsplejeloven*).

Under section 399(1) of the Administration of Justice Act, the Supreme Court may by exception permit the reopening of a case determined by the Court if (i) it may be considered on a substantial balance of probabilities that the evidence available to the Court was incorrect without the applicant's fault and that, if reopened, the case would have a significantly different outcome; (ii) it may be taken for granted that this would be the only way for the applicant to avoid or make good a loss which is drastic to him; and (iii) circumstances in general to a large extent point towards a reopening of the case.

Section 399(1) of the Administration of Justice Act only applies to cases that have been decided by the Supreme Court. However, according to section 399(2) of the Administration of Justice Act, the Supreme Court may, in the same circumstances, permit an appeal against a high court or district court judgment after the expiry of a period of one year.

2.4 The Government further observes that, according to para. **6 (b)** of the Committee's views, the State party is recommended to take a number of general measures (indents (i) to (vi)), including taking all

appropriate measures to avoid re-occurrence of similar violations in the future and reviewing and amending the Act on Parental Responsibility.

The Government refers in this respect to its additional observations of 8 June 2015 in which the Government stated that it is a fundamental principle of the Act on Parental Responsibility that, in all decisions, the best interests of the child are of paramount importance, including that the child must always be heard in decisions on parental responsibility to allow the child to express its own perspectives and views.

Danish legislation is also based on the fundamental principle that a child has the right to have access to both parents. This applies regardless of the parents' countries of habitual residence, nationality, etc. The Act on Parental Responsibility stipulates that the predominant principle is the child's right to access to both parents – not the parents' right to access to the child.

This Act is accordingly in full agreement with Denmark's international obligations, including the fundamental rights of the child as set out in the International Convention on the Right of the Child, in particular Articles 3 and 12, and the European Convention on Human Rights, in particular Article 8 on the right to respect for private and family life. The Government is also of the clear opinion that Danish legislation on parental responsibility is in agreement with CEDAW.

Finally, it is observed that the power to make decisions under the Act on Parental Responsibility is determined based on the child's habitual residence, which is a common principle under international law for the determination of custody, etc. This principle follows, *inter alia*, from the 1996 Hague Child Protection Convention, which has been acceded to by several countries, including all EU Member States.

The Government is confident that the Danish authorities handle cases on parental responsibility in accordance with both national legislation and Denmark's international obligations, taking into account the regard for the best interests of the relevant child.

The Government therefore finds that the Danish rules on parental responsibility and their administration are applied in a way that prevents the risk of disregarding the best interests of the child or that unfair discrimination may occur for reasons such as the parents' gender or nationality.

The Government also finds occasion to mention the joint letter of 7 November 2013 from both the Austrian Central Authority and the Danish Central Authority to the author and the son's father. In this letter, the two Central Authorities informed the parents that, by decisions made by the competent Austrian and Danish courts, the cases on return have been decided in accordance with the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Central Authorities informed the parents that

this means that the Central Authorities have no further duties and tasks under the conventions concerning the son. In the letter, the Austrian and the Danish Central Authorities also made a mutual offer of mediation to the author and the son's father. On the part of the Danish Central Authority, this offer of mediation still applies. On 24 May 2016, the Danish Central Authority contacted the Austrian Central Authority, who confirmed that, on their part, the mutual offer of mediation to the author and the son's father also still applies.

It is the experience of the Government that the level of conflict is often so high in cases on parental responsibility, and particularly cases in which one parent tries to prevent the child from having contact with the other parent, that the parent whose claim is dismissed may feel discriminated against. This is a premise of the administration of this field, which, however, does not affect the requirement that the decisive consideration at all times must be the best interests of the child and not the parents' desire to accommodate their own needs.

Precisely due to the nature of such cases and their significance to the parties involved, not least the children, continuous efforts are made to adapt and improve the governance and administration of the field. By the enactment of the 2007 Act on Parental Responsibility, much greater focus was given to the child's perspective and the best interests of the child as compared with previously, and subsequently further improvements have been made on an ongoing basis to the management of parents' conflicts about children.

Cases involving violations of the Danish Act on International Child Abduction (*børnebortførelses-loven*) will normally be decided by judges experienced in this kind of cases and other cases involving children, including cases on custody, access and place of residence, as well as cases on enforcement of the decisions made in such cases.

During their initial training, assistant judges must complete a number of courses on cases about children, including cases on access rights. In 2016, the Judicial Academy (*Domstolsakademiet*) of the Danish Court Administration (*Domstolsstyrelsen*), which runs courses for judges, also offers a course on discrimination at which the main subject taught is commonly experienced differential treatment, like differential treatment based on gender.

In recent years, the courts have moreover generally increased their focus on conflict management and court and reconciliation mediation. Courses have been held, *inter alia*, on conflict management at court, and almost all court employees have attended. Some courts have also organised special project days on court and reconciliation mediation.

2.5 The Government also observes that, according to para. 7 of the Committee's views, the State party is also requested to publish the present views, to have them translated into the official language of the State party and to ensure that they are widely disseminated in the territory of the State.

The Ministry of Foreign Affairs (*Udenrigsministeriet*) and the Ministry of Social Affairs and the Interior (*Social- og Indenrigsministeriet*) have made the Committee's views publicly available on their individual websites (www.um.dk and www.sim.dk).

In light of the prevalence of English language skills in Denmark, the Government sees no reason to make a full translation of the Committee's views into Danish.

3. Conclusion

With reference to the above observations, including in particular the circumstance that the Government rejects the description of the assessments made in the national cases by Danish authorities as being clearly arbitrary or amounting to a denial of justice, the Government considers itself unable to comply with the Committee's recommendation to ensure the immediate return of O.W. to the author.

Furthermore, the Government is of the opinion that Danish legislation on custody and access and the Danish authorities' case processing procedures in this field already comply with CEDAW.

In conclusion, the Government disagrees with the views adopted by the Committee on 22 February 2016 on Communication No. 46/2012.