United Nations CRC/C/85/D/34/2017

# Convention on the Rights of the Child

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**Committee on the Rights of the Child**

## Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 34/2017*, **

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| *Communication submitted by:* | U.G. (guardian of E.S., represented by counsel, Jacques Fierens and Thierry Moreau) |
| *Alleged victims:* | E.S. and her daughter, B.M. |
| *State party:* | Belgium |
| *Date of communication:* | 24 June 2017 (initial submission) |
| *Date of adoption of decision:* | 28 September 2020 |
| *Subject matter:* | Sentencing of a teenage girl; deprivation of liberty; separation from a child |
| *Procedural issue:* | Insufficient substantiation of claims |
| *Substantive issues:* | Development of the child; best interests of the child; discrimination; right to identity; unlawful or arbitrary interference with private life; protection of the child from all forms of violence or neglect; protection of the child from all other forms of exploitation prejudicial to any aspect of the child's welfare; protection of the child deprived of a family environment; deprivation of liberty; right of every child suspected or accused of or recognized as having infringed criminal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth |
| *Articles of the Convention:* | 2, 3 (1), 7 (1), 9 (1) (2) (3), 16, 19 (1), 36, 37 (b) (c) (d), and 40 (1), (2) (b) (ii), (3) and (4) |
| *Articles of the Optional Protocol:* | 5 (2) and 7 (e) and (f) |

* Adopted by the Committee at its eighty-fifth session (14 September–1 October 2020).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Olga A. Khazova, Gehad Madi, Philip Jaffé, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Renate Winter.

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1. The author of the communication is U.G., guardian of E.S., a young girl of Romanian nationality born on 26 June 1999. He is submitting the communication on behalf of E.S. and her daughter, B.M., born on 6 April 2015. The author claims that E.S. is the victim of a violation by the State party of articles 3 (1) and 40 (1), (2) (b) (ii), (3) and (4) of the Convention, read in conjunction with articles 2 and 37 (b), (c) and (d), and that she is also the victim of a violation of articles 19 (1) and 36 of the Convention. Furthermore, he claims that both E.S. and her daughter are the victims of a violation by the State party of articles 7 (1), 9 (1), (2) and (3), and 16 of the Convention. The Optional Protocol entered into force for the State party on 30 August 2014.

**The facts as submitted by the author**

2.1 E.S. was married in Romania when she was 13 years of age. She arrived in Belgium in 2013, when she was 14 years of age. Following her arrival in Belgium, E.S. committed several robberies at the behest of her in-laws, typically stealing jewellery, make-up, clothes, perfume, baby products, money and bank cards, among other items.

2.2 On 6 April 2015, E.S. gave birth to B.M.

2.3 In September 2015, given her status as an unaccompanied foreign minor, E.S. was placed under the author's guardianship.

2.4 In March 2016, E.S. was placed, as an interim measure, in the closed section of the Saint-Servais public youth protection institution. She was then separated from her daughter.

2.5 On 9 March 2016, E.S., her parents and her guardian were summoned to a hearing before the eighth division of Brussels Youth Court, in the context of criminal proceedings instituted by the Brussels public prosecutor's office. On 16 March 2016, a social study conducted by an official of the Judicial Protection Service and a report based on a medical and psychological examination were filed with the registry of the aforementioned youth court.

2.6 On 1 April 2016, Brussels Youth Court relinquished jurisdiction over the case because E.S. was already 16 years of age when she committed the offences in question. Accordingly, the case was sent back to the public prosecutor's office in order for it to be tried by the competent court. The judgment issued in this connection noted that, in the medical and psychological report, the doctor raised the question of whether E.S. should not be forced to take an oral contraceptive. The author argues that such considerations fall completely outside the doctor's remit.[1]

2.7 That same day, E.S. was brought before an examining judge and remanded in custody at the Saint-Servais public youth protection institution.

2.8 On 4 May 2016, E.S. appeared before Brussels Criminal Court.

2.9 On 22 June 2016, Brussels Criminal Court sentenced E.S. to 36 months' imprisonment, including 18 months' immediate imprisonment. The lawyer appointed to defend E.S. considered that there was no need to appeal this decision. Following her conviction, E.S. was detained in the same public youth protection institution.

2.10 On 4 October 2016, E.S. was released. After having been ordered to leave the country, she returned to Romania to find her daughter.

2.11 That same day, the new counsel of E.S. and the author appealed the judgments of 1 April 2016 (relinquishment of jurisdiction) and 22 June 2016 (sentencing).

2.12 On 19 December 2016, the youth division of Brussels Court of Appeal dismissed the appeals because they had been submitted after the legal deadline of one month.

2.13 On 17 May 2017, the Court of Cassation declared inadmissible the applications for a judicial review of the decision issued by Brussels Court of Appeal on the ground that they

[1] In the same report, the doctor also noted that it might be a good idea to have E.S. undergo training, since she had never worked and had no plan to ensure her survival, and raised the question of whether she should not be treated as a responsible adult, since her manner of speaking did not befit her stated age.

were premature. Thus, according to the Court of Cassation, the decision to relinquish jurisdiction is not final within the meaning of article 420 of the Code of Criminal Procedure, since this decision does not in itself terminate the proceedings. The author finds it absurd that it is necessary to wait for a possible final conviction in order to appeal the decision to relinquish jurisdiction.

**The complaint**

3.1 The author submits that E.S. is likely a victim of human trafficking, that she was sentenced to imprisonment as an adult, that she was separated from her daughter for eight months and that she was forced to leave Belgium.

3.2 More specifically, the author claims, firstly, that E.S. is the victim of a violation by the State party of articles 3 (1) and 40 (1), (2) (b) (ii), (3) and (4) of the Convention, read in conjunction with articles 2 and 37 (b), (c) and (d). Thus, the decisions taken by the courts, the administrative authorities responsible for ordering her expulsion and the legislative bodies that allow youth courts to decide to relinquish jurisdiction failed to take the best interests of the child into account. In particular, Belgian law allows a child to be tried under ordinary adult criminal law, even though the Committee has stated that the relinquishment procedure violates article 40 (2) of the Convention[2] and runs counter to its general comment No. 14 (2013). The State party has made no effort to promote the adoption of laws or procedures specifically designed for children suspected, accused or convicted of a criminal offence. Furthermore, the right to legal assistance entails the appointment of effective counsel. However, the appointed lawyer did not provide appropriate assistance within the meaning of article 37 of the Convention and did not serve as counsel within the meaning of article 40, as she failed to appeal the judgment whereby Brussels Youth Court relinquished jurisdiction over the case. Similarly, E.S. was not offered the possibility of release as soon as the applicable rules allowed for it.

3.3 Secondly, the author claims that E.S. is the victim of a violation by the State party of articles 19 (1) and 36 of the Convention, which include an obligation to investigate as soon as there is evidence that a child is being exploited. Even though Brussels Criminal Court noted that "the defendant seems to derive little benefit from her petty theft and often steals items that could likely be part of 'orders'", no investigation was ever conducted to ascertain whether she was acting of her own free will or was a victim of human trafficking. E.S. should have been protected rather than sentenced as an adult, and granted a residence permit.

3.4 Thirdly, the author claims that both E.S. and her daughter are the victims of a violation by the State party of articles 7 (1), 9 (1), (2) and (3), and 16 of the Convention. Thus, the relinquishment of jurisdiction, the term of imprisonment and her confinement without her daughter are totally disproportionate. Similarly, the doctor's suggestion that E.S. might be forced to take an oral contraceptive, even though it was not acted upon, constituted interference in her private and family life, which is contrary to the Convention.

3.5 As measures of redress, the State party should rescind the order for E.S. to leave the country, grant E.S. and her husband and daughter a permanent residence permit and expunge the criminal convictions obtained against E.S. from her criminal record.

3.6 Lastly, the author states that he has not been in contact with E.S. since her expulsion, and that the pressure that is likely still being exerted on her by her husband's family is preventing her from communicating with her guardian. Nonetheless, the author feels that he is authorized to submit the present communication to the Committee and is in fact obliged to do so, as the law provides that, as her guardian, he is the child's legal representative. E.S. has constantly complained about being forcibly separated from her daughter and would fully support the submission of the present communication.

[2] CRC/C/BEL/CO/3-4, paras. 82 and 83.

**State party's observations on admissibility and the merits**

4.1 In its observations of 22 May 2018, the State party submits that the communication should be declared inadmissible on the ground that it is unfounded.

4.2 The State party submits that, on 26 June 2017 (two days after the submission of the communication), E.S. reached the age of majority, at which point her guardian's mandate came to an end. The State party also points out that, since having left Belgium, E.S. has not been in contact with her guardian or her counsel.

4.3 The State party also submits that, on 7 March 2018, the thirty-fifth special youth division of Brussels Court of Appeal declared admissible her guardian's appeal against the judgment of 22 June 2016, since, as he was not notified of the judgment in question, his appeal of 10 October 2016 should have been considered admissible. Thus, the State party submits that the case is still ongoing.

4.4 The State party also explains that E.S. arrived in Belgium in 2013 and that, following her arrival, she committed numerous offences, including violent gang robberies against vulnerable persons. E.S. even initiated girls younger than her. As a result, E.S. was arrested and fingerprinted 73 times, and was placed in a public youth protection institution on several occasions by order of a youth judge. Thus, from when the Brussels public prosecutor's office referred the matter to the youth judge in August 2014 until he decided to relinquish jurisdiction on 1 April 2016, E.S. was under the supervision of the Judicial Protection Service and was the subject of six decisions ordering her placement in a public youth protection institution – five ordering her placement in an open institution and the final one ordering her placement in a closed institution. In March 2016, the summons referred to only a small number of offences – that is, only those committed by E.S. after her sixteenth birthday.

4.5 On the specific question of relinquishment of jurisdiction and deprivation of liberty, the State party submits that, when E.S. was 16 years and 8 months old, the youth judge found that no educational or protective measure was adequate, not only because of the ineffectiveness of protective measures in her case, but also because of the increasing seriousness and the multiplicity of the offences, and the unwillingness of E.S. to cooperate with her guardian. Consequently, the youth judge decided to relinquish jurisdiction, since the legal conditions for doing so had been met. Thus, E.S. was already 16 years of age when she committed the offences in question, several protective measures had already been applied in her case, and a social study and a medical and psychological examination had been conducted. The State party argues that the best interests of the child were, in fact, taken into account and that the purpose of relinquishing jurisdiction was to offer an alternative solution that addressed the precociousness of some minors for whom youth protection measures are not sufficient. The public prosecutor's office is of the opinion that educational measures are inadequate when the young person in question shirks them, fails to comply with them or when they are ineffectual. In the present case, the court repeatedly showed its willingness to help E.S. by taking numerous measures to assist her in abandoning her life of crime, but these did not bear fruit, as E.S. reoffended as soon as she regained her freedom. It is true that E.S. was tried as an adult, albeit by a special division of the Youth Court, composed of two youth judges and a criminal judge (the twenty-second special division of Brussels Youth Court). The judgment, which was handed down in the presence of E.S. and her guardian, was based on the fact that, nearly every time she was arrested, E.S. "began by denying any wrongdoing only to end up admitting the offences, apologizing and stating that she hated herself when confronted with video surveillance footage, witness accounts, observations made by police officers or the fact that her fingerprints were already in the system". Thus, according to the judgment, a harsh sentence was necessary "not only to teach the defendant respect for individuals and the property of others, thereby fulfilling the purpose of the proceedings, but also to prevent any risk of her reoffending".

4.6 In addition, the State party explains that, as the closed community centre for young people who have been the subject of a decision to relinquish jurisdiction can only accommodate boys and, as there is no equivalent centre for girls in that situation, E.S. was

detained in the closed section of the same public youth protection institution, which was in fact to her benefit, since she was not deprived of her liberty alongside adults.

4.7 By 3 September 2016, E.S. had served one third of her term of immediate imprisonment, six months after having been remanded in custody on 3 March 2016, which is deductible from her sentence. The competent institutions have diligently followed the rules on provisional release currently in force; the decision to grant her provisional release was put into effect on 4 October 2016.

4.8 The order for E.S. to leave the country took account of the fact that the members of the family of E.S. do not live in Belgium – they live in Spain and only stay in Belgium for short periods of time – and that the seriousness of the offences committed and her reoffending could prove detrimental to the peace and tranquillity of citizens and to the maintenance of order. Moreover, neither E.S. nor her family had taken any steps to obtain a residence permit, which shows that she has very few ties to and does not wish to live in the State party in the long term.

4.9 On the question of the reportedly inadequate legal assistance, the State party maintains that E.S. was indeed assisted by a specialized lawyer in all her dealings with the public prosecutor's office and her appearances before the judge. The State party explains that the lawyer in question is renowned for her professionalism and diligence, and that the author is casting aspersions on her by making unverifiable and potentially defamatory claims. The State party submits that, although the lawyer did not appeal the judgment whereby Brussels Youth Court relinquished jurisdiction over the case, it is reasonable to assume that, in view of the extensive criminal record of E.S. and the numerous protective measures applied in her case, she considered that there was little chance of the judgment being overturned. Thus, the different assessment made by the author is not sufficient in itself to prove that the lawyer was wrong.

4.10 On the suspicions of human trafficking, the State party submits that the former guardian of E.S. sent a letter to the youth section of the Brussels public prosecutor's office in July 2015 in which she expressed her concern about the situation, thereby prompting the office to open an investigation. The investigation did not, however, lead to the bringing of the charges necessary to institute legal proceedings. Moreover, the State party explains that E.S. stated that she had been stealing unchecked for several years. The judicial authorities decided to apply protective measures in an effort to educate E.S. about her situation, to protect her and to offer her tools for personal development. However, she did not wish to cooperate. The specific protection reserved for victims of human trafficking requires a minimum level of cooperation in order to be effective; such cooperation was not forthcoming from E.S.

4.11 On the requested measures of redress, the State party submits that an order to leave the country becomes moot once it has been followed. Thus, at this time, the order in question is no longer in effect, and E.S. is free to return to Belgium.

**Author's comments on the State party's observations**

5.1 In his comments of 2 January 2019, the author requests the Committee to dismiss the State party's observations, as the issue at hand is not whether the relinquishment of jurisdiction was justified or not in this case, nor whether the relevant legal requirements had been met, but whether the relinquishment of jurisdiction is not in itself contrary to the Convention.

5.2 The author also points out that the State party has lost sight of the fact that the communication also concerns the violation of the Convention rights of B.M.

5.3 Furthermore, the author maintains that the State party is refusing to take into consideration the criminal network of which E.S. was a victim. He argues that the authorities should have taken due account of the fact that she was more than likely acting under duress and protected her from the criminal network in question.

5.4 The author reiterates that the lawyer of E.S. was not competent, as successive sets of concluding observations issued by the Committee in respect of the State party have showed

that the relinquishment of jurisdiction provided for under Belgian law is not compatible with the Convention, which is why this incompatibility was a basis for appeal.

5.5 The author also submits that, on 29 May 2018, Brussels Court of Appeal ruled in his favour by finding the referral of the case to the special division of the Youth Court to be unlawful because the public prosecutor's office had failed to ensure that E.S. was properly represented by her guardian in court. However, on 10 October 2018, the Court of Cassation overturned this ruling on the following basis: "When ... the minor is a person who was 16 years of age or older at the time of the commission of the act characterized as an offence and has been the subject of a decision to relinquish jurisdiction ..., the minor shall exercise in their personal capacity, through their lawyer, if necessary, the remedies provided for by law ... Their parents or guardian are not empowered to exercise these remedies on their behalf."[3] Thus, the Court of Cassation found that the guardian was not empowered to appeal on behalf of E.S. The Court also found that the appeal lodged by E.S. on 4 October 2016 against the criminal judgment of 22 June 2016 had been submitted after the applicable deadline and was therefore inadmissible.

5.6 The author requests that the State party rescind ex post facto the order for E.S. to leave the country by way of non-pecuniary compensation. The corrective measures should be accompanied by an injunction requiring the State party to contact the foreign States where E.S. and her daughter may be present in order to inform her of the Committee's decision and the corrective measures that will accompany it.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the communication is admissible under the Optional Protocol.

6.2 The Committee takes note of the author's statement to the effect that he feels obliged to submit the communication, even though E.S. has not given her consent, and of his explanation to the effect that: (a) he has not been in contact with E.S. since her expulsion; (b) the pressure that is likely still being exerted on her by her husband's family is reportedly preventing her from communicating with the author; and (c) E.S. would fully support the submission of the present communication. While the Committee notes that the author was appointed the guardian of E.S. under Belgian law, it observes that E.S. had already left the territory of the State party when the communication was submitted and that she reached the age of majority two days later, which is why the author should have sought her permission to act on her behalf. Thus, in the absence of any justification from the author as to why he did not contact E.S. to obtain her consent, the Committee concludes, on the basis of article 5 (2) of the Optional Protocol, that the author has no standing to act, either on behalf of E.S. or on behalf of B.M.

7. The Committee therefore decides:

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

(b) That this decision shall be transmitted to the author of the communication and, for information, to the State party.

[3] Court of Cassation of Belgium, ruling P.18.0660.F of 10 October 2018.