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Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 53/2018*, **, ***

Communication submitted by:	J.A. and E.A. (represented by counsel, Klausfranz Rüst-Hehli)
Alleged victims:	E.A. and V.N.A.
State party:	Switzerland
Date of communication:	3 August 2018 (initial submission)
Date of decision:	28 September 2020
Subject matter:	Expulsion to Nigeria of a family with two children, one of whom was under a curatorship
Procedural issues:	Inadmissibility *ratione temporis* and *ratione personae*; exhaustion of domestic remedies; insufficient substantiation of claims
Substantive issues:	Development of the child; best interests of the child; discrimination; freedom of opinion; right to identity; unlawful or arbitrary interference with private life; protection of the child against all forms of violence, neglect or negligent treatment; protection of the child deprived of a family environment
Articles of the Convention:	2, 3 (1) and (2), 6 (2), 8, 9, 11, 12, 16, 19, 20, 27, 31 and 37 (a)
Articles of the Optional Protocol:	7 (c), (e), (f) and (g)

1.1 The authors of the communication are J.A., a Nigerian national born on 1 January 1991, and her son, E.A., a Nigerian national born on 2 September 2008. They claim that E.A. and his half-brother V.N.A., also a Nigerian national born on 8 May 2014, are victims of violations by Switzerland of their rights under articles 2, 3 (1) and (2), 6 (2), 8, 9, 11, 12, 16,

* 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, Benyam Dawit Mezmur, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Renate Winter.

*** Pursuant to rule 8 (1) (a) of the Committee's rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Mr. Philip Jaffé did not participate in the consideration of the communication.

19, 20, 27, 31 and 37 (a) of the Convention. The authors are represented by counsel, Klausfranz Rüst-Hehli. The Optional Protocol entered into force for the State party on 24 July 2017.

1.2 On 28 September 2018, in accordance with article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, decided not to request the State party to grant interim measures to the authors in the form of entry visas for Switzerland.

1.3 On 21 October 2019, the working group on communications, acting on behalf of the Committee, decided to accede to the State party's request to consider the admissibility of the communication separately from the merits.

The facts as presented by the authors

2.1 On 21 June 2008, J.A. entered Switzerland illegally and filed an asylum application with the Federal Office for Migration, now known as the State Secretariat for Migration. She claimed that, in Nigeria, she had been forced to marry a 70-year-old man so that he would pay for her mother's medical treatment.[1] When the situation became unbearable, she had decided to leave Nigeria, setting off from Port Harcourt[2] and travelling through Morocco and Libya. She was raped by several men and became pregnant.[3] On 2 September 2008, E.A. was born in Switzerland.

2.2 On 13 August 2009, the Federal Office for Migration dismissed the application and ordered the removal of J.A. and E.A. On 23 November 2009, the Federal Administrative Court admitted the appeal against the decision of the Federal Office for Migration, ruling that the child's welfare had not been taken into account.[4] The Court referred the case back to the Federal Office for Migration for a new decision.

2.3 On 20 January 2010, the Fällanden municipal guardianship authority, which was replaced by the Dübendorf Child and Adult Protection Authority on 1 January 2013, found that E.A.'s development was at risk and appointed a child welfare advocate.

2.4 On 4 June 2010, the Federal Office for Migration again dismissed the authors' asylum application and ordered their removal. The Office noted that there was no situation of war or widespread violence in Nigeria that would constitute a concrete danger if they were returned. It also found that J.A. was a healthy young woman of working age who had attended primary school in Kaduna and had some education. The Office found that her claim to have been married to a 70-year-old man was not credible; it therefore considered that she could return to her parents and that she had a strong family network. It also considered that there were many institutions and organizations in Nigeria that provided support, shelter, protection and legal aid to women in situations like hers. Furthermore, the Office found that E.A., who had been living in Switzerland for a year and a half, was probably familiar with African culture because he was being brought up by his mother. Moreover, given his age and the short time he had been in Switzerland, the Office considered that the child would not be uprooted by being removed.

2.5 On 16 August 2010, the Federal Administrative Court dismissed the authors' appeal, considering that the Federal Office for Migration had duly substantiated the removal order with regard to the child's welfare.[5]

[1] The State party indicates that J.A. claims to have been forced to marry when she was 12 years old.

[2] J.A. stated before the Federal Administrative Court that she no longer remembered when she left Nigeria.

[3] It is not clear in which country she was raped or how long she stayed in the two countries.

[4] The State party indicates that the Federal Administrative Court has held in particular that in the enforcement of a removal involving children, the welfare of the child is a determining factor. The Court stated that since J.A., as a single woman with a small child, belonged to a vulnerable group, the decision to enforce the removal must be sufficiently substantiated with regard to E.A.'s welfare in the event of removal to Nigeria, in particular with regard to J.A.'s social and family network, her ability to care for her child and the situation of single women with small children in that country.

[5] The State party indicates that the Federal Administrative Court examined the reports from the child welfare services submitted by the authors in support of their appeal and found, inter alia, that J.A. was

2.6 On 25 October 2010, J.A. submitted to the Federal Office for Migration a first request for review of its decision of 4 June 2010 and highlighted the serious difficulties she faced in raising E.A. The Office rejected her request on 3 April 2013, finding that there were no new facts. The Federal Administrative Court upheld that decision on 21 May 2013.

2.7 On 17 February 2014, J.A. submitted to the Federal Office for Migration a second request for review, which was rejected on 28 July 2016. The Federal Administrative Court upheld the decision on 3 October 2016.

2.8 On 8 May 2014, J.A.'s second son, V.N.A., was born. On 23 May 2017, the court of first instance in Uster recognized as his father a man of African origin residing in Spain.

2.9 On 18 October 2015, owing to J.A.'s mistreatment of E.A., the Child and Adult Protection Authority placed E.A. in the Buechweid Foundation educational institution for an indefinite period. The Authority also began to provide financial aid to J.A for continuing education. E.A. had limited supervised contact with his mother until September 2016, when he began to spend part of the weekends at home again because his mother had gained a certain degree of confidence and his own behaviour had stabilized.[6] However, in early 2017, when they found out that they were to be removed, J.A. and E.A. became unstable and anxious again. Their relationship became difficult and E.A. stated that he wished to stay at the Buechweid institution.

2.10 On 29 June 2017, J.A. lodged a third request for review with the State Secretariat for Migration, the successor of the Federal Office for Migration. She reported that she was receiving psychiatric treatment and would be unable to raise and care for her two children in Nigeria. On 6 July 2017, the State Secretariat for Migration dismissed her request. On 3 August 2017, the Federal Administrative Court upheld the decision, considering that the enforceability of the removal had already been the subject of three proceedings, including two reviews, and that there were no new facts that would alter the previous findings.[7]

2.11 On 22 November 2017, the police arrested J.A., and the whole family was returned to Nigeria. On 17 April 2018, the Child and Adult Protection Authority lifted E.A.'s curatorship. The authors state that they have lodged an appeal against that decision with Uster District Council.

2.12 On 4 May 2018, E.A. filed an application with the State Secretariat for Migration for authorization to enter Swiss territory on the basis of unjustified infringement of his identity under article 8 (2) of the Convention. He asked for restoration of the living conditions that would enable him to live in accordance with his Swiss identity. On 5 June 2018, the State Secretariat for Migration declined to exercise jurisdiction.[8]

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caring for her child "in her own way, but appropriately". The Court concluded that, in the light of these facts and those taken into consideration by the Federal Office for Migration, E.A.'s welfare would not be at risk in the event of his return to Nigeria, his mother's country of origin, and that the considerations offered in the reports submitted by the authors did not cast doubt on those conclusions.

[6] According to an undated report from the Buechweid institution covering the period from 21 September 2015 to 22 November 2017, E.A. displayed aggressive behaviour, severe anxiety, episodes of hysteria and attention deficit.

[7] The State party indicates that both the Federal Administrative Court and the State Secretariat for Migration found that the socio-educational measures in place for the authors (curatorship for the two children, E.A.'s placement in an educational institution and family support), which had been put forward as new arguments in favour of the request for review, did not alone constitute factors likely to alter the conclusions reached in the ordinary asylum application procedure and the two subsequent requests for review. Similarly, the additional psychological burden suffered by J.A. after the rejection of her application to be considered as a hardship case and the subsequent exit interview did not change the authorities' assessment. They also noted that J.A.'s refusal, over several years, to act on the enforceable decision that the family must leave Switzerland had contributed to the family situation that she described. They further noted that the documents submitted showed that the family situation had improved as a result of the measures put in place by the Child and Adult Protection Authority. Furthermore, during her exit interview J.A. had been offered financial assistance and help in seeking support in Nigeria to care for her elder son, which she had refused.

[8] The authors indicate that this took the form of an unofficial letter.

2.13 On 22 June 2018, the authors requested the Dübendorf Child and Adult Protection Authority to provide protection and assistance to E.A. under article 8 (2) of the Convention and to formally notify the State Secretariat for Migration that it was not able to transfer the child protection measures to a State entity in Nigeria.

2.14 In an email dated 18 July 2018, the staff member at International Social Service – Switzerland in charge of the authors' reintegration in Nigeria stated that the children did not appear to be doing well and were struggling to integrate, in particular E.A., who seemed depressed. The mother was taking care of her children but feared for their safety and future. According to the authors, E.A. had not yet been placed in an educational institution in Nigeria. The authors add that J.A. is seriously unwell and cannot care for her children.

The complaint

3.1 The authors claim that by returning them to Nigeria, the State party violated the rights of E.A. and V.N.A. under articles 2, 3 (1) and (2), 6 (2), 8, 9, 11, 12, 16, 19, 20, 27, 31 and 37 (a) of the Convention.

3.2 The authors argue that the decision of the Federal Administrative Court of 3 August 2017 does not include any reference to the Convention and that cantonal and federal legislators have not established which national laws must be amended following ratification of the Convention. They explain that such negligence on the part of legislators occurs in administrative and judicial practice as well.

3.3 The authors point out that article 2 (2) of the Convention protects E.A. from being disadvantaged on account of the fact that his mother is an asylum seeker in Switzerland. Their removal to Nigeria is unlawful, as the Swiss authorities have never provided reasons justifying that decision, which, in the authors' opinion, is based on the fact that J.A. lived in Switzerland without integrating into society. Moreover, when they were removed, the two children, particularly E.A., were victims of multiple unlawful forms of discrimination forbidden under article 2 (1) of the Convention. Children whose parents have been denied asylum have the same right as local children to have their situation assessed by a competent specialized body such as the Child and Adult Protection Authority. The Federal Administrative Court usurped this function when it ignored the Authority's competence to decide whether the children's development would be compromised by the enforcement of the removal order.

3.4 With regard to the violation of article 3 (1) and (2) of the Convention, which safeguards the best interests of the child, the authors argue that neither the Federal Administrative Court nor the State Secretariat for Migration employed methodical principles in their application of that provision. In the decision of the Federal Administrative Court of 3 August 2017, there are no details about the family's living conditions in Nigeria, their financial resources, the children's medical treatment or the transfer of protective measures to State bodies, which do not even exist in Nigeria. The authors dispute the claim that the children are familiar with Nigerian culture simply because they grew up with their mother, since E.A. did not live with his mother for the last 30 months and developed an ambivalent relationship with her because of her ill-treatment of him. The migration authorities have not taken account of all the social ties E.A. built up with Switzerland during the eight years he spent there, especially during the time he lived at the Buechweid institution.

3.5 The authors also claim that E.A. and V.N.A. are victims of a violation of article 6 (2) of the Convention, since the State party did not consider their development. The psychological, physical, mental and intellectual development of the children was seriously threatened by their traumatic return to Nigeria. Their removal is harming their development, especially since both children were receiving special support in Switzerland to address their developmental disabilities: V.N.A. attended a preschool and E.A. was placed in an educational institution. The authors add that E.A. suffers from depression and is at risk of suicide.

3.6 The authors also maintain that E.A. is a victim of a violation of article 8 of the Convention and that the State party should restore his Swiss identity as soon as possible, meaning that he must return to Switzerland. E.A. became extremely accustomed to Swiss culture on account of his placement in an educational institution, which is an environment

highly conducive to integration. His first language is German and he does not know any of the languages of Nigeria. He has no friends or teachers in his daily life in Nigeria. E.A. has secular ethical values, while Nigerian society is strongly divided by religious affiliations. His Swiss identity will be "strangled and stifled" in Nigeria.

3.7 The authors claim that the State party has also violated article 9 of the Convention. By returning E.A. to his mother's care prematurely, the Swiss authorities destroyed any chance of him being able to live with her in the future in conditions suitable for his development. The Child and Adult Protection Authority did not adequately prepare for E.A.'s return to his mother's care; such preparation would be possible only in Switzerland, not in Nigeria. The Authority did not assess whether E.A.'s placement in an educational institution should be extended or whether he could be returned to his mother's care, something that was contested by the Buechweid institution. The Authority could not transfer the protection measures either, because there is no equivalent institution in Nigeria.[9]

3.8 The authors invoke article 11 of the Convention, which obliges States parties to take measures to combat the illicit transfer and non-return of children abroad, since the State party has failed to take effective measures to protect E.A. and V.N.A. from unlawful interference by the authorities that decided to return them to Nigeria.

3.9 The authors argue that the State party also violated article 16 of the Convention when E.A. was "torn away" from the Buechweid institution, as the decision to remove him from the institution was not taken by a competent authority and there was no justification for such State interference in his private life.

3.10 The authors also claim that the State party has violated article 12 of the Convention, since the State Secretariat for Migration, the Federal Administrative Court, the Zurich Cantonal Office for Migration and the Child and Adult Protection Authority did not hear E.A.'s views on the termination of his placement in the Buechweid institution. Those bodies have never explained why he was not heard, nor have they indicated any doubts as to his ability to express himself during the review procedure that concluded with the decision of the Federal Administrative Court of 3 April 2017. The authors indicate that this is in line with the recurrent practice of the State party's asylum authorities of systematically denying, almost without exception, children under the age of 15 years their rights under article 12 of the Convention.

3.11 The authors claim that the State party has also violated article 19 of the Convention. They state that the Child and Adult Protection Authority remains responsible for transferring the protection measure if a child moves to a different State, even if that State has not ratified the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. They argue that, in the present case, the asylum authorities did not consider whether it was possible to transfer the protection measures that were in place for E.A. and V.N.A. Before the removal order was enforced, the Dübendorf Child and Adult Protection Authority never took a decision as to whether E.A. could be returned to his mother's care. The Authority did not hear the authors or consult the Buechweid institution.

3.12 The authors state that, on 14 June 2017, the Director of the Dübendorf Child and Adult Protection Authority wrote to the Cantonal Office for Migration to point out that the objectives of E.A.'s placement in the educational institution were to teach him behavioural strategies to help him overcome his challenging behaviour, as well as to help his mother improve her ability to encourage and raise him. The Director indicated that he did not object to the removal of the family to Nigeria, although he admitted that the child protection measures could not be transferred there. He expressed his intention to await the enforcement of the removal order and then lift the measures. The authors argue that the decision to lift E.A.'s curatorship is void because the Authority disregarded all the procedural rights of the mother and her children, as well as its obligations to transfer the protective measures to

[9] The authors attach an email, dated 14 June 2017, from the Director of the Dübendorf Child and Adult Protection Authority to the Cantonal Office for Migration, in which he writes that the protection measure cannot be transferred to Nigeria "for the simple reason that the two legal systems are not compatible with regard to child protection; there is no authority we can partner with in Nigeria."

Nigeria, to oppose the enforcement of the removal and to keep E.A. at the Buechweid institution. The authors note that it is extremely challenging for a woman to raise a child conceived through rape and that only a very resilient, stable person with a solid support network can successfully do so. The authorities claimed that J.A.'s family could provide her with support, but did not assess whether her family was prepared to accept and support a woman who had been raped. If a child has been severely ill-treated and subsequently placed in an institution, the child should be returned to his or her mother's care only if the ill-treatment was precipitated by exceptional external circumstances and if the mother has in the meantime undergone psychotherapy.

3.13 The Dübendorf Child and Adult Protection Authority should have found an institution in Nigeria where E.A. could live; if J.A. was unable to care for him in Switzerland, she would be even less able to do so in Nigeria, where she would not have access to the necessary public services. Corruption is endemic in Nigeria, meaning that, in every sphere of life, individuals with high purchasing power have advantages that remain out of reach of those with low income. The authors consider that the Authority is the only body with the necessary expertise to conduct investigations to determine whether the child's welfare is at risk. The asylum bodies should have waited for the results of the Authority's assessment, and the Authority should have informed them of any inquiries that were necessary.

3.14 The authors also claim that the enforcement of the removal order was carried out in violation of article 20, read in conjunction with article 2 (1) of the Convention. They consider that the State party is obliged to monitor residential care facilities for children and that, in Nigeria, there are no bodies to carry out this task.

3.15 The authors also allege that the State party violated their rights under article 27 of the Convention, as the Federal Administrative Court failed to ascertain whether J.A. would be able to earn enough money to survive and ensure the development of E.A. and V.N.A. or whether she had sufficient financial resources to guarantee an adequate standard of living in Nigeria. In Switzerland, their standard of living was guaranteed. In Nigeria, there is a lack of State social assistance. The authors report that International Social Service currently provides monthly financial assistance to the family in Nigeria to make it possible for the children and their mother to survive.

3.16 The authors claim that the State party has also violated article 31 of the Convention, because it has treated E.A. and V.N.A. in a discriminatory manner by removing them from their usual environment in Switzerland, where they were able to engage in play. In Nigeria, E.A. and V.N.A. cannot play with other children because they do not speak any of the languages of Nigeria and are very isolated because their mother is marginalized and unable to care for them appropriately.

3.17 Lastly, the authors claim that by returning E.A. and V.N.A. to Nigeria, the State party exposed them to degrading and inhuman treatment, since the authorities subjected them to fear of being removed, deprived them of the State party's protection and caused them to lose all hope of a dignified life, in violation of article 37 (a) of the Convention. By neglecting the authors' procedural rights, the Child and Adult Protection Authority treated them "like objects", leaving them humiliated.

State party's observations on admissibility

4.1 In observations dated 28 November 2018, the State party submits that the communication is inadmissible *ratione personae* with regard to J.A. because she was born in 1991 and reached the age of majority in 2009. Under article 1 of the Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. In Switzerland, the age of majority is also set at 18 years of age. The State party argues that J.A. has reached the age of majority and therefore is not protected by the Convention.

4.2 The State party argues that there is no valid power of attorney. The authors' counsel, Klausfranz Rüst-Hehli, submitted to the Committee two powers of attorney dated 19 April 2018. One is signed by E.A., who is living in Nigeria, and states that he wants Mr. Rüst-Hehli to make sure that he can return to Switzerland and live there. The other is signed by J.A. and instructs Mr. Rüst-Hehli to represent her interests before the Swiss child protection

authorities and to submit a communication to the Committee on the Rights of the Child. However, in correspondence dated 3 August 2018, which accompanies the authors' communication, Mr. Rüst-Hehli states that he had received the instruction to draft the present communication a few days earlier because a non-governmental organization had had to withdraw its assistance due to unforeseen circumstances. He further states, on the first page of the communication, that the authors' current place of residence is unknown to him. In a supplement to the communication dated 9 August 2018, Mr. Rüst-Hehli indicates that, if an authorization from E.A. is required, he will take the necessary steps to obtain it. The State party notes that these contradictory facts cast serious doubt on the date of the powers of attorney and that Mr. Rüst-Hehli's authority to represent the authors in the present proceedings has not been sufficiently established.

4.3 The State party argues that the communication is inadmissible under article 7 (e) of the Optional Protocol, since the authors have failed to exhaust available domestic remedies. The State party points out that, on 11 July 2018, the Legal Advice Office for Asylum Seekers in Zurich submitted to the State Secretariat for Migration an application for a humanitarian visa on behalf of E.A. in order to allow him to return to Switzerland. The application is still being examined. The State party adds that, on 3 September 2018, J.A. brought a claim for denial of justice before the Federal Administrative Court on the grounds that her application for authorization to enter Switzerland had not been dealt with, resulting in an unjustifiable violation of her identity. In a decision of 8 November 2018, the Court allowed this claim and requested the State Secretariat for Migration to render a challengeable decision on it. The State party points out that this procedure is also pending.

4.4 The State party notes that the decision taken by the Child and Adult Protection Authority on 27 April 2018 is not the subject of the present communication. In addition, it recalls that J.A. informed the Committee that an appeal against this decision was pending.

4.5 The State party submits that the communication is also inadmissible *ratione temporis* under article 7 (g) of the Optional Protocol, as the facts which constitute the subject matter of the communication precede the date of entry into force of the Optional Protocol, namely 24 July 2017. The State party emphasizes that the subject matter of the communication is the decision, taken by the Federal Office for Migration on 4 June 2010 in the context of the asylum procedure, to return J.A. and her children to Nigeria, a decision which became binding on 16 August 2010 when it was upheld by the Federal Administrative Court.

4.6 The State party maintains that the subsequent appeals to the Federal Office for Migration, the State Secretariat for Migration and the Federal Administrative Court were submitted in the context of extraordinary procedures and were not taken up by the Federal Administrative Court because the required advance payment of costs was not made (in the case of the decision of 3 October 2016) or were considered only from the limited perspective of a request for review (in the case of the decision of 21 May 2013). That was also the case in respect of the third request for review, filed by J.A. on 29 June 2017, which concluded with the decision of 3 August 2017.

4.7 The State party also argues that the communication is inadmissible under article 7 (f) of the Optional Protocol, since it is manifestly ill-founded.

4.8 The State party submits that it appears from the decisions handed down during the asylum procedure, as well as from the subsequent review procedures, that the best interests of the child were duly considered and taken into account by the competent national asylum authorities. The State party refers to the decision of the Federal Administrative Court of 23 November 2009 indicating that when a removal order affects children, the Court's practice for many years has been to consider the child's welfare as a priority.[10] The Court decided that the Federal Office for Migration had to take up the asylum application filed by J.A. in order to examine it on its merits, given that, as a single woman with a small child, she belonged to a vulnerable group. It also ruled that the decision to enforce the removal must be sufficiently substantiated with regard to E.A.'s welfare, in particular with regard to J.A.'s social and

[10] The State party indicates that this principle derives from an interpretation, which is aligned with international law, of article 83 (4) of Federal Act No. 142.20 of 16 December 2005 on Foreign Nationals and Integration, interpreted in the light of article 3 (1) of the Convention.

family network in Nigeria, her ability to care for her child in Nigeria, and the situation in Nigeria for single women with young children. In its decision of 4 June 2010, the Federal Office for Migration reviewed these criteria and concluded that the return of J.A. and her son to Nigeria was admissible and enforceable. The Federal Administrative Court confirmed this view in its decision of 16 August 2010 and made explicit reference to the Convention.

4.9 The State party reports that the Child and Adult Protection Authority subsequently ordered several measures in favour of the authors. Those new circumstances in relation to the decision of the Federal Office for Migration of 4 June 2010 were examined by both the Office itself and the Federal Administrative Court, taking into consideration the best interests of the child. The Office and the Court concluded that the change in circumstances was not such that the removal should no longer be enforced. The Federal Administrative Court also noted that reports indicated that the relationship between mother and child and the mother's care of the child had improved.[11]

4.10 The State party emphasizes that, in the context of the third request for review, which concluded with the Federal Administrative Court decision of 3 August 2017, both the Court and the State Secretariat for Migration re-examined the situation of the authors with regard to the children's welfare. They found that the arguments put forward by the authors were not such as to alter the conclusions reached in the ordinary asylum procedure and the two subsequent requests for review. They noted in particular that the report of 22 June 2017 drawn up by the persons responsible for the authors' socio-educational and family support was not such as to alter their conclusions, especially since it showed that the family situation had stabilized thanks to the measures put in place by the Child and Adult Protection Authority. The State party adds that, in terms of the right of residence, accompanied minor children generally share the fate of their parents. In the present case, the case worker from the Dübendorf Child and Adult Protection Authority concluded that, for the welfare of the children, the family should not be separated and that keeping the family together at the time of removal was more important than J.A.'s parenting difficulties and E.A.'s behavioural problems. The case worker also found that J.A. was concerned for the welfare of her children and that E.A and his mother had a strong bond. The case worker did not object to the departure of the entire family. In addition, during her exit interview J.A. was offered financial assistance and help in seeking support in Nigeria to care for her elder son, which she refused.

4.11 The State party indicates that although the articles of the Convention invoked by the authors are considered justiciable, they do not confer an individual right to obtain asylum or residence in a specific State or region. It adds that the Convention does not confer on the authors the right to return to Switzerland. The alleged violations of article 12 of the Convention, with regard to the claim that E.A. was not heard by the national asylum authorities, are also insufficiently substantiated and manifestly ill-founded, as are the claims that the removal of the children is unlawful under article 11 of the Convention. The authors' claims of alleged violations of the Convention with regard to their life in Nigeria are also ill-founded and insufficiently substantiated, including the alleged violation of article 20 of the Convention on the ground that Nigeria does not have a body to monitor residential care facilities for children. With regard to the current situation of the authors in Nigeria, the only document submitted to the Committee is an email dated 18 July 2018, in which the case worker from International Social Service – Switzerland who is dealing with the family in Nigeria provides details of the authors' situation after having met with them the previous weekend. The case worker finds that the children, especially E.A., are having problems adapting to Nigeria and that E.A. misses his life in Switzerland. With respect to the relationship between J.A. and her sons, it can be seen from the email that J.A. was doing her best to care for her children and was doing it very well. The authors report that they are receiving financial assistance from International Social Service.

Authors' comments on the State party's observations

5.1 In their comments dated 19 August 2019, the authors state that, on 1 July 2018 and 18 April 2019, they asked the Dübendorf Child and Adult Protection Authority to assess J.A.'s

[11] The State party refers to the Federal Office for Migration decision of 3 April 2013 and the Federal Administrative Court decision of 21 May 2013.

ability to care for her two children. They also asked it to inform the State Secretariat for Migration that the Authority was unable to transfer to Nigeria the protection measures that were still in place for the two children. In the absence of a response from the Child and Adult Protection Authority, the authors filed a request for review with the State Secretariat for Migration on 20 May 2019, asking it to recognize that the Child and Adult Protection Authority's inability to transfer the protective measures in place for the two children constituted an obstacle to the family's removal, and requesting that it grant entry visas to the children and their mother. On 6 August 2019, the State Secretariat for Migration dismissed the request because the removal order had been enforced on 22 November 2017.

5.2 The authors also state that, on 5 July 2018, the Zurich Cantonal Court rejected the appeal against the decision taken on 27 April 2018 by the Dübendorf Child and Adult Protection Authority to lift the protective measure in place for E.A. On 16 April 2019, Uster District Council upheld the decision of the Authority because E.A. was outside the country and Switzerland no longer in fact had jurisdiction over him. The authors state that they are preparing to submit an appeal against this decision to the Federal Court in Lausanne.

5.3 On 23 December 2018, the State Secretariat for Migration found that it lacked competence to handle the application filed on 4 May 2018 by J.A., in which she requested authorization to enter Swiss territory on the basis of unjustified infringement of identity under article 8 (2) of the Convention. On 30 December 2018, the authors challenged the dismissal of the application before the Federal Administrative Court; the outcome of that challenge remains pending.

5.4 On 5 July 2019, the authors submitted an application for an entry visa for E.A. and V.N.A. to the Zurich Cantonal Office for Migration. On 7 August 2019, the application was denied in an informal letter. On 13 August 2019, J.A. requested a formal challengeable decision.

5.5 The authors submit that the communication is admissible *ratione personae*, as J.A. is the mother and legal representative of E.A. and V.N.A. and is therefore entitled to submit a communication to the Committee. They indicate that the State party does not dispute that E.A.'s power of attorney, dated 19 April 2018, is valid, and state that they can submit a new one if necessary.

5.6 The authors reiterate that all domestic remedies have been exhausted, which is not disputed with regard to the asylum application and the obligation to leave Switzerland. The authors consider that the State party is violating the principle of good faith and acting in a contradictory manner since it claims that domestic remedies have not been exhausted and, on 6 August 2019, it decided not to admit an extraordinary legal remedy. They state that they are motivated by the best interests of the children in using all available means to bring the family, especially the children, back to Switzerland as quickly as possible.

5.7 The authors also maintain that the communication is admissible *ratione temporis* inasmuch as the removal order was enforced on 22 November 2017, 121 days after the Optional Protocol entered into force for the State party. The decision which is the subject of the communication was handed down by the Federal Administrative Court on 3 August 2017, two weeks after the Optional Protocol entered into force for Switzerland. On the merits of the communication, they reiterate that the best interests of the children were not taken into account.

5.8 The authors claim that their communication is well-founded because the State Secretariat for Migration and the Federal Administrative Court still refuse to respect the fact that the Child and Adult Protection Authority alone has the legal, professional and technical competence to gather evidence concerning risks to a child's welfare, to take appropriate protective measures and to transfer protective measures to a third State. Moreover, they systematically refuse to resolve the dispute that exists between them and the Authority as to jurisdiction. The authors observe that the State party does not dispute the fact that E.A. and V.N.A. have a deep-rooted Swiss identity.

5.9 Lastly, the authors request that the Committee propose to the State party a friendly settlement.

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 State party's position that the communication is inadmissible *ratione personae* in respect of J.A. because she is an adult. The Committee observes, however, that the authors claim alleged violations of the rights recognized in the Convention in respect of E.A. and V.N.A. Consequently, the Committee concludes that there is no obstacle *ratione personae* to the admissibility of the present communication.

6.3 The Committee also takes note of the State party's argument that there is no valid power of attorney and that there are doubts surrounding the date of 19 April 2018 on the documents signed by the authors authorizing counsel Klausfranz Rüst-Hehli to represent them. The Committee notes, in this connection, the State party's arguments that: (a) in correspondence dated 3 August 2018, Mr. Rüst-Hehli stated that he had received the instruction to draft the present communication a few days earlier because a non-governmental organization had had to withdraw its assistance due to unforeseen circumstances; (b) Mr. Rüst-Hehli indicated on the first page of the communication that he did not know the authors' current address; and (c) in a supplement to the communication dated 9 August 2018, Mr. Rüst-Hehli indicated that if an authorization from E.A. was required, he would take the necessary steps to obtain it. The Committee notes, however, that Mr. Rüst-Hehli submitted the two documents, signed by the authors J.A. and E.A. and dated 19 April 2018, authorizing him to represent them before the Swiss child protection authorities, and that J.A.'s power of attorney included an authorization for him to submit a communication to the Committee on behalf of her children. It also notes that the State party has not demonstrated that these powers of attorney are not valid. Consequently, the Committee considers that the evidence on file does not allow it to conclude that Mr. Rüst-Hehli is not entitled to act before the Committee on behalf of the authors.

6.4 The Committee takes note of the State party's argument that the authors' communication should be declared inadmissible *ratione temporis* because the facts which constitute the subject matter of the communication occurred before 24 July 2017, when the Optional Protocol entered into force for the State party. The Committee notes in particular the State party's claims that: (a) the decision to remove the authors and V.N.A. to Nigeria was taken by the Federal Office for Migration on 4 June 2010 and was upheld and became binding in the Federal Administrative Court decision of 16 August 2010; and (b) the subsequent appeals to the Federal Office for Migration, the State Secretariat for Migration and the Federal Administrative Court were either made in the context of extraordinary procedures or did not involve an examination of the authors' case except from the limited perspective of the three requests for review of the decision taken by the Federal Office for Migration on 4 June 2010. The Committee notes that the Federal Administrative Court decision of 3 August 2017, which settled the authors' third request for review, was handed down a few days after the Optional Protocol entered into force for the State party. In that decision, the Court found that the arguments put forward by the authors were not such as to alter the conclusions reached in the ordinary asylum procedure and the two subsequent requests for review.

6.5 The Committee recalls that, in accordance with article 7 (g) of the Optional Protocol, it is prohibited *ratione temporis* from considering a communication when the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State party concerned, unless those facts continued after that date. The Committee considers that, in the particular circumstances of the present case, the possible violation of E.A.'s and V.N.A.'s rights under the Convention should be considered to result from the removal decision, which was an enforceable decision with the potential to violate the rights of the children invoked before the Committee, and not from the subsequent requests

for a review of that decision. The Committee considers that the authors' repeated requests for review do not automatically justify the Committee's competence *ratione temporis*.[12]

6.6 In the light of the foregoing, and in accordance with article 7 (g) of the Optional Protocol, the Committee concludes that it is precluded *ratione temporis* from considering the present communication.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 7 (g) of the Optional Protocol;

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

[12] European Court of Human Rights, *Blečić v. Croatia* (application No. 59532/00), paras. 77–79, 29 July 2004.