



# 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. 56/2018\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	V.A. (represented by counsel, Immacolata Igljo Rezzonico and Paolo Bernasconi)
<i>Alleged victims:</i>	E.A. and U.A.
<i>State party:</i>	Switzerland
<i>Date of communication:</i>	21 September 2018 (initial submission)
<i>Date of adoption of Views:</i>	28 September 2020
<i>Subject matter:</i>	Deportation to Italy
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; manifestly ill-founded; justiciability of Convention rights
<i>Substantive issues:</i>	Discrimination; best interests of the child; development of the child; right to be heard in any judicial and administrative proceedings affecting the child; protection and humanitarian assistance for refugee children; right of the child to the enjoyment of the highest attainable standard of health; inhuman or degrading treatment
<i>Articles of the Convention:</i>	2, 3, 6 (2), 12, 22, 24 and 37
<i>Articles of the Optional Protocol:</i>	6 and 7 (e) and (f)

1.1 The author of the communication is V.A., an Azerbaijani national born in 1986. She submits the communication on behalf of her sons, E.A., born in 2009, and U.A., born in 2014, both Azerbaijani nationals. She claims that E.A. and U.A. are victims of a violation

\* 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, Otani Mikiko, 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, Philip Jaffé did not participate in the consideration of the communication.



of articles 2, 3, 6 (2), 12, 22, 24 and 37 of the Convention. The author is represented by counsel. The Optional Protocol entered into force for the State party on 24 July 2017.

1.2 Pursuant to article 6 of the Optional Protocol, on 2 October 2018, the Working Group on Communications, acting on behalf of the Committee, requested the State party to adopt interim measures to suspend the removal of the author, E.A. and U.A. to Italy pending the consideration of the case by the Committee. On 5 October 2018, the State party informed the Committee that the removal had been suspended.

### **The facts as submitted by the author**

2.1 The author and her husband are journalists and owners of the *Ilkxeber Info* newspaper. In March 2017, they fled Azerbaijan with their sons E.A. and U.A., as the situation facing opposition journalists in Azerbaijan was becoming increasingly critical and the life of the author's husband was seriously in danger. The author and her husband were forced to close down the physical office of their newspaper, which remains accessible only online.

2.2 On 20 March 2017, the family applied for asylum in Kreuzlingen, Switzerland. Due to the lack of Azeri interpreters, the family was transferred to the canton of Ticino and accommodated in a room at the Leon d'Oro guesthouse in Bellinzona. In the absence of interpreters, their communication with officials was almost non-existent. Their requests to be allowed to cook for themselves, instead of eating in the canteen, to be transferred to an apartment and to obtain medical treatment for the author's husband for a shoulder injury were not taken seriously. However, the family received the support of the APA 13 association, the Baobab centre and the DaRe association. The "precarious and degrading" accommodation conditions and the linguistic isolation had repercussions on the mental and physical well-being of the family members. The author's husband became depressed. There were episodes of domestic violence. U.A. experienced eating and digestive disorders and E.A. revealed the family's state of suffering by injuring himself in a bicycle collision with a car. On 3 November 2017, following a seven-month wait for the second asylum hearing, the family reluctantly agreed to withdraw its asylum claim and to be voluntarily repatriated. Since the author's father-in-law had bribed the Azerbaijani police to ensure that his son was not incarcerated, they believed they would be safe. On 13 November 2017, the family left Switzerland.

2.3 On 26 February 2018, the author's husband was arrested along with other journalists and intellectuals in Baku during a commemoration in honour of the Azerbaijanis who had died in the conflict between Azerbaijan and Armenia. The author also started having problems with the police. She was pressured by the Azerbaijani authorities, which threatened her so that she would stop publishing articles. Having been an observer during the presidential elections of 11 April 2018, she denounced the irregularities she had witnessed. On 16 April 2018, she was beaten by two unknown persons. On 20 April 2018, she was interrogated for four hours in the Baku Prosecutor's Office. She was threatened with imprisonment if she did not stop publishing articles, participating in demonstrations and challenging the Government. Her husband, who was still in prison, advised her to leave the country.

2.4 The smuggler contacted by the author said that the only way they would be able to return to Switzerland would be if they obtained an Italian visa. The author, E.A. and U.A. therefore returned to Switzerland via Italy on an Italian visa obtained on 9 May 2018, valid from 15 May to 8 June 2018. On 25 May 2018, the author, E.A. and U.A. arrived in Ticino and filed a new asylum application. The author's mother informed her that she was now wanted by the Azerbaijani police. On 4 June 2018, the author was heard by the State Secretariat for Migration.

2.5 The author's state of health worsened as a result of the trauma she had experienced. According to a report drawn up on 31 July 2018 by a psychologist-psychotherapist from the Baobab centre, the author developed symptoms of anxiety and depression, insomnia and somatic reactions. According to the report, the social network established by the author and her children during their first stay in Ticino, which was still "present and active", allowed them to maintain a minimum level of mental and physical well-being. The report concluded

that sending the mother and children back to their country of origin or transferring them to another country or another Swiss canton would seriously harm their mental and physical development.

2.6 Under the second subparagraph of article 19 (2) of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), any asylum application lodged after the asylum seeker has actually left the country gives rise to a new procedure for determining the Member State responsible for processing the application. On 5 July 2018, the author requested the State Secretariat for Migration to apply the sovereignty clause mentioned in article 17 (1) of the Dublin III Regulation and to declare itself competent to examine her asylum application on the basis that the case involved a vulnerable family that had already previously fled their country of origin and experienced the subsequent arrest of the father, that the children were integrated and attending school in Ticino, that the author was in a state of depression and that transferring the family to Italy would be detrimental to the rights and best interests of the children. On 13 June 2018, the State Secretariat for Migration submitted a request to Italy to take charge of the author and her children. After an initial refusal, the Italian authorities agreed to take charge of the family on 19 July 2018.<sup>1</sup>

2.7 On 20 July 2018, the State Secretariat for Migration decided not to consider the case and ordered the removal of the author and her children to Italy. The decision stated that E.A. and U.A. “have no particular ties to Switzerland, where they lived for only eight months before returning to their country of origin in 2017 and where they have currently been staying since 25 May 2018”. The State Secretariat noted that the Italian authorities had agreed to take charge of the family in accordance with the circular of 8 June 2015 concerning the Protection System for Refugees and Asylum Seekers (SPRAR). With respect to the author’s allegations regarding her depression, the State Secretariat noted that she was receiving medical treatment. The State Secretariat indicated that the Italian medical system would be able to provide treatment for illnesses of a psychiatric nature and that the country was obliged, under article 19 (1) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, to provide asylum seekers with essential treatment of illnesses and of serious mental disorders.

2.8 The complainant filed an appeal against the State Secretariat for Migration’s decision to the Swiss Federal Administrative Court on 31 July 2018. The Court rejected her appeal on 8 August 2018, noting that the author and her children had been recognized by Italy as a family nucleus. With regard to the report of 31 July 2018, the Court ruled that there were no concrete and substantiated indications in the procedural documents that the persons concerned would be unable to travel or that the alleged health problems were so serious that the family’s transfer to Italy would be contrary to the requirements of the European Court of Human Rights. The Federal Court pointed out that the alleged need for psychiatric treatment was not supported by any concrete evidence and that such treatment could, if necessary, be provided in Italy. With regard to the author’s argument that the State party should apply the sovereignty clause set forth in article 17 (1) of the Dublin III Regulation in order not to prejudice the best interests of the children, the Court noted that it could not substitute its assessment of the facts for that of the State Secretariat for Migration and that its power of review was limited to verifying whether the assessment by the State Secretariat had been carried out in accordance with objective and transparent criteria and had not been arbitrary.

2.9 Even though the Swiss authorities were informed that E.A. and U.A. had contracted chickenpox and the risk of contagion had been reported by a doctor,<sup>2</sup> at 2 a.m. on 12

<sup>1</sup> Italy initially rejected the State Secretariat for Migration’s request for lack of evidence.

<sup>2</sup> The author submitted two medical certificates, dated 7 September 2018, stating that E.A. and U.A. were in good health but, according to third-party statements, might have contracted chickenpox between 23 and 26 August 2018.

September 2018 the police came to pick up the author, E.A. and U.A. from their hotel in order to carry out their removal on a 7.30 a.m. flight from Zurich airport. The police officers showed the children a photo of a forced removal (images of people who had been restrained), telling them that if their mother did not cooperate, they would be removed in the same way. The author had panic attacks and a severe anxiety attack, as a result of which the removal could not be carried out. The police abandoned the author and her children at Zurich airport, with no money, and told them to “make their own way back” to Ticino.

2.10 The author submitted a certificate, dated 17 September 2018, issued by a psychologist-psychotherapist from the Baobab centre on the basis of an interview with E.A. According to the certificate, when E.A. spoke about the attempted removal to Italy, he looked down, withdrew, spoke of the “need to protect his mother by dealing directly with the police”, and mentioned “several moments of intense fear when in contact with the police, such as when they were unexpectedly woken up in the middle of the night, the arrival at the airport, the police officer’s gruff tone, the photo of the restrained person, and the police’s attempt to make the mother feel guilty”. The certificate quotes statements made by E.A. collected by a speech therapist and an ethno-clinical therapist over the phone, according to which “since the night he was taken to Zurich airport, where he was subjected to very serious verbal and psychological abuse by the police officers,” E.A. has been waking up several times during the night crying for fear of being taken by the police. U.A. has also woken up crying and saying that some “nasty men wanted to take him away.” The certificate concluded that E.A. shows a heightened sense of responsibility for his younger brother and mother and is suffering from post-traumatic stress disorder. According to the certificate, E.A. and U.A. require medical and psychological support and their forced removal would pose a major risk to their mental health.

### **The complaint**

3.1 The author submits that by failing to take into account the vulnerability of E.A. and U.A. when adopting the decision not to consider the application and by acting in such a way as to infringe their rights at the time of the attempted removal, the State party violated its obligation to respect the rights set forth in the Convention, in accordance with article 2.

3.2 The author alleges that, in violation of article 3 of the Convention, no meaningful assessment of the best interests of the children was made by the State Secretariat for Migration or the Federal Administrative Court or during the attempted removal. The author argues that several medical reports and pedagogical assessments point to E.A. and U.A.’s need for stability. The authorities refused to seriously examine the possibility of applying the sovereignty clause of the Dublin III Regulation. The children were not given the opportunity to be heard. No specialized body was involved in the assessment of their best interests. Such an assessment is all the more necessary given that the case involves a vulnerable mother, whose husband is in prison for political reasons and who is experiencing anxiety as she herself is wanted in her country of origin. The author argues that coming to pick up the children without warning at 2 a.m., threatening their mother and intimidating them with a terrifying photo is contrary to the protection of the best interests of the children. E.A. and U.A. have been uprooted several times and need to stay in a safe place with people they know. The author refers to the decision *A.N. v. Switzerland*, in which the Committee against Torture held that the return of a victim of torture to Italy under the Dublin III Regulation would be in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as the author would be deprived of his right to rehabilitation.<sup>3</sup> The removal to Italy of the mother of two small children who had been threatened by the Azerbaijani authorities and beaten by unknown persons, probably connected with the State, is not in conformity with this jurisprudence. Finally, the author refers to the statements of the United Nations High Commissioner for Human Rights on the problems related to migration in Italy.<sup>4</sup>

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<sup>3</sup> See *A.N. v. Switzerland* (CAT/C/64/D/742/2016).

<sup>4</sup> Office of the United Nations High Commissioner for Human Rights, “The Human Rights Council hears an update from the new High Commissioner for Human Rights”, 10 September 2018.

3.3 The author claims a violation of article 6 (2) of the Convention. According to her, the right of E.A. and U.A. to healthy development in healthy conditions has been disregarded as a result of the trauma experienced during the attempted removal.

3.4 The author claims that the State party violated E.A. and U.A.'s right to be heard and to participate in judicial proceedings, as enshrined in article 12 of the Convention. E.A. and U.A. were not involved in the proceedings and the authorities did not take into account the numerous reports and testimonies introduced during the proceedings.

3.5 The author considers that E.A. and U.A. are victims of a violation by the State party of article 22 of the Convention. The authorities did not take into consideration the family's extreme vulnerability and did not consider the application of the sovereignty clause of the Dublin III Regulation in order to allow the family to remain in Switzerland, the only country in which it had ties and a degree of stability. Article 22 was also violated during the attempted removal, as E.A. and U.A. were provided with no protection or assistance.

3.6 The author argues that the State party violated E.A. and U.A.'s right to the enjoyment of the highest attainable standard of health under article 24 of the Convention. This right would be disregarded in the event of their removal to Italy, where adequate psychological care is not available for persons who have suffered ill-treatment. The treatment inflicted on E.A. and U.A. during the attempted removal constitutes degrading treatment. A transfer to Italy would prevent them from receiving adequate psychological care following this treatment.

3.7 The author alleges a violation of the right of E.A. and U.A. to be protected against inhuman and degrading treatment under article 37 of the Convention. The way in which the attempted removal was conducted constitutes degrading treatment, especially the verbal and psychological abuse to which the police officers subjected the children.

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

4.1 In its observations of 19 March 2018, the State party explains that the first asylum procedure, initiated by the author, her husband and their children on 20 March 2017, was closed following their declaration that they wished to leave Switzerland and benefit from assistance to return. The author claimed that they had withdrawn their asylum application because of the lack of interpreters, their transfer from Kreuzlingen to the canton of Ticino and the reception conditions, which they considered precarious and degrading.

4.2 On 23 May 2018, the author and her children arrived in Italy on visas issued by the Italian authorities in Baku, valid from 15 May to 8 June 2018. After filing the new asylum application on 25 May 2018, the author was interviewed summarily about her personal profile on 4 June 2018. She stated that she did not wish to go to Italy, on the grounds that she did not know anyone there, whereas she had a network of contacts in Switzerland who could help her. E.A. and U.A. were not interviewed, as they were under the age of 14. On 13 June 2018, on the basis of article 12 (2) of the Dublin III Regulation,<sup>5</sup> the State Secretariat for Migration sent a request to the Italian authorities to take charge of the author and her children. On 19 July 2018, the Italian authorities agreed to take charge of them, specifying that they were considered a family and would be accommodated in suitable housing. By a decision of 20 July 2018, the State Secretariat for Migration chose not to consider their asylum application and ordered their removal to Italy. On 8 August 2018, the Federal Administrative Court dismissed the author's appeal against this decision. The Court found that Italy was competent to consider the asylum application since the author and her children had obtained visas from the Italian consulate in Baku and Italy had agreed to their transfer. The Court noted that the application of the second subparagraph of article 3 (2) of the Dublin III Regulation was not justified, as Italy did not have any systemic flaws in the asylum procedure and in the reception conditions for asylum seekers. Furthermore, Italy is a State party to the various international treaties on the protection of human rights. The Court found that the guarantees provided by Italy were sufficiently concrete and individualized to exclude a risk of torture or inhuman or degrading treatment. Finally, the

<sup>5</sup> According to this provision, "where the applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection".

Court established that the State Secretariat for Migration had not abused its discretion by refusing to accept that there were humanitarian reasons which could justify the processing of applications for international protection whose examination did not fall under its competence, within the meaning of article 29 (a) (3) of the Asylum Ordinance No. 1 of 11 August 1999 relating to procedure and in connection with article 17 (1) of the Dublin III Regulation.

4.3 Following the attempted deportation on 12 September 2018, the author was questioned by the unit for the repatriation of foreign nationals of the Ticino cantonal police.<sup>6</sup> She explained that she had refused to board the flight to Italy because she did not know anyone there. On 2 March 2019, the author's husband arrived in Switzerland and applied for asylum. The author's claims concerning the attempted transfer gave rise to two parliamentary procedural requests at the cantonal level and a report by the author's lawyer to the Cantonal Council of Ticino, which oversees the cantonal police. The Cantonal Council expressed its views on the matter in its reply of 7 November 2018. It recalled that all asylum decisions fall within the exclusive competence of the State Secretariat for Migration and, in the event of an appeal, the Federal Administrative Court. The Cantonal Council also noted that, given the limits of its competence and for reasons of data protection and professional secrecy, it could not rule on individual cases, but set out the manner in which deportation decisions were enforced, without going into the details of the author's case.

4.4 The State party contests the author's description of the attempted deportation of 12 September 2018 and contends that the cantonal police acted in accordance with the procedures established at the national level and in compliance with the principles of legality and proportionality. The State party refers to a report of 19 September 2018 by the unit for the repatriation of foreign nationals of the Ticino cantonal police and to the response of the Cantonal Council of 7 November 2018.

4.5 As to the author's allegations concerning the shock of the night-time transfer, the State party submits that she had been duly informed that the transfer was imminent.<sup>7</sup> It had been necessary to organize the author's deportation without informing her in detail of the procedure because she had not left Switzerland of her own accord within the deadline set by the State Secretariat for Migration in its decision of 20 July 2018. The time of the transfer was dependent on the time of the flight booked by swissREPAT, the specialized federal service of the State Secretariat for Migration. The State party denies that the police entered the author's accommodation by breaking and entering. According to the police report, the police entered the guesthouse at 1.45 a.m. and knocked on the door. The author opened the door and the police officers introduced themselves, explaining why they were there. The author packed the suitcases of her own accord and had the opportunity to call her lawyer.

4.6 With regard to the author's request of 7 September 2018 for postponement of the deportation, the State party notes that the cantonal authorities submitted the medical certificates produced by the author to the doctor appointed by the State Secretariat for Migration, who found that there were no contraindications to the family's deportation to Italy. The certificates indicated that the children were in good health and that the medical tests did not show a risk of contagion of chickenpox.

4.7 The State party contests the author's allegations that the police were insensitive towards the children, threatened their mother in front of them and showed them a photo of a transfer by special flight. During the pre-departure interview, the police at Zurich airport showed the author (and not the children) a photo of a person who had been subjected to coercive measures on a special flight. The State party indicates that the police at Zurich airport show all persons preparing to take a voluntary return flight photographs of the measures provided for in the federal protocols in the event of refusal to leave. These coercive measures are taken on special flights and not on scheduled flights. The State party

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<sup>6</sup> Minutes of the hearing of 15 October 2018.

<sup>7</sup> On 17 August 2018, the family was transferred from the civil protection centre in Biasca to the Della Santa guesthouse in Viganello pending the transfer to Italy. On 23 August 2018, the author and her children underwent a medical examination to assess their fitness to travel by air.

rejects the author's allegation that her children were subjected to abuse or degrading treatment.

4.8 The State party challenges the admissibility of part of the communication, invoking article 7 (e) of the Optional Protocol. In the author's appeal filed on 31 July 2018 with the Federal Administrative Court, reference is made to the family's time spent living in Switzerland, the ties forged in Switzerland, the alleged procedural flaw when obtaining the visa in Baku, the author's health problems and the reception conditions in Italy. Although the best interests of the children were briefly mentioned, the claims relating to the attempted deportation on 12 September 2018, in particular the alleged degrading treatment experienced by E.A. and U.A., were not raised before the national authorities. The author did not use the remedies available to her, including criminal proceedings, to pursue this complaint. The State party emphasizes that the national authorities did not have the opportunity to take into account the medical certificates and reports from psychotherapists that were drawn up after the Federal Administrative Court's decision of 8 August 2018. Consequently, the State party considers that the claims of violations of articles 2, 3, 6 (2) and 22 of the Convention in relation to the attempted removal of 12 September 2018, as well as articles 24 and 37, are inadmissible for failure to exhaust domestic remedies.

4.9 The State party further submits that the communication should be declared inadmissible under article 7 (f) of the Optional Protocol, which applies to all communications that are manifestly ill-founded or not sufficiently substantiated.

4.10 The State party considers that a distinction should be drawn between the provisions of the Convention that are directly applicable and a violation of which can be alleged, and those that are not.<sup>8</sup> Directly applicable provisions are those that are unconditional and sufficiently clear and precise as to be applied as such in a given case. Other provisions contain "general programmes" and leave States parties considerable room for manoeuvre. Such provisions are often formulated as a recognition of a child's particular "right". However, whether these "rights" can form the basis for a justiciable claim against the authorities is first and foremost a question of national law.

4.11 With regard to article 2 (2) of the Convention, the State party considers that this provision is not directly applicable and does not confer any rights that individuals could claim. The State party submits that there has been no violation of this provision, given that the author has not presented any arguments to that effect. The State party refers to the Committee's general comment No. 5 (2003), in which it recognized that the prohibition of discrimination does not mean identical treatment for all.

4.12 The State party notes that article 3 of the Convention establishes a guiding principle that must be respected in the enactment and interpretation of laws, but does not establish any subjective rights. The State party adds that it is not for the Committee to interpret domestic law and assess the facts and evidence in place of the national authorities.<sup>9</sup> The State Secretariat for Migration and the Federal Administrative Court examined the situation of the author and her children E.A. and U.A. and noted that their desire to remain in Switzerland did not influence the determination of which State was competent to examine their asylum application. The State Secretariat and the Court noted that Italy did not have systemic flaws in the asylum procedure and in the reception conditions of asylum seekers that would entail a risk of inhuman or degrading treatment. Consequently, the application of the second subparagraph of article 3 (2) of the Dublin III Regulation was not justified. The Swiss authorities found that the guarantees provided by Italy were sufficiently concrete and individualized and that there was no specific evidence to call into question its ability to accommodate the family, guarantee it adequate housing and preserve its unity. The State Secretariat for Migration noted that the family could benefit in Italy from the Protection System for Refugees and Asylum Seekers. The Court also examined this point and concluded that the State Secretariat had not committed any abuse of its discretion in

<sup>8</sup> The State party submits that in the original version of the general guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44 (1) (b), of the Convention of 11 October 1996 (CRC/C/58), the Committee recognized that not all provisions of the Convention are directly applicable.

<sup>9</sup> *C.E. v. Belgium* (CRC/C/79/D/12/2017), para. 8.4.

refusing to accept that there were humanitarian grounds within the meaning of article 29 (a) (3) of Order No. 1 of 11 August 1999. The Court noted that the applicants had not shown that Italy would not be willing to take charge and complete the procedure relating to their application for protection, or that Italy would not respect the principle of non-refoulement. It concluded that there was no evidence that the transfer to Italy would expose the applicants to the risk of being deprived of the minimum conditions for subsistence and of being subjected to undignified living conditions. The State Secretariat for Migration and the Federal Administrative Court recalled that, under Directive 2013/33/EU, Italy is required to provide applicants with the necessary health care, which includes emergency care and essential treatment of illnesses and of serious mental disorders. There was no evidence to suggest that Italy would refuse to provide the children and their mother with medical care. The Court took into account the report of 31 July 2018, which was not issued by a medical doctor. The Court found that the file did not contain any concrete and well-founded indication that the persons concerned suffered from health problems of such gravity that they could not be transferred to Italy. It noted that the file did not indicate that the author or her children required any psychiatric care. It specified that it was for the Swiss authorities responsible for carrying out the deportation to transmit to the Italian authorities information concerning any medical treatment required by the returnees. The Court concluded that the author had not provided any serious evidence to establish that the transfer to Italy would violate article 3 of the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, or that Italy would violate its obligation to provide the children with the protection and care necessary for their proper development. Contrary to the author's allegations, the State Secretariat and the Court did consider to the possibility of applying the sovereignty clause of the Dublin III Regulation. The State Secretariat found that the children had no particular ties to Switzerland. They had been living there for less than two months at the time of the State Secretariat's decision and their previous stay in Switzerland had been only eight months. The national authorities proceeded to examine the specific situation of the applicants, taking into account the interests of the children.<sup>10</sup> Nothing suggests that the consideration of the case by the national authorities was arbitrary or amounted to a denial of justice or that the best interests of the children were not taken into account in that assessment.<sup>11</sup> In these circumstances, the State party considers that the claims raised under article 3 of the Convention are manifestly unfounded.

4.13 In the alternative, the State party contests the alleged violation of article 3 of the Convention. It highlights the difference between the present communication and the case in which the Committee found a violation of article 3 because of the failure to take into account the best interests of the child when assessing the risk of female genital mutilation if a girl was deported to Puntland.<sup>12</sup> The State party points out that the best interests of the child is a principle to which Swiss case law attaches major importance when considering obstacles to the enforcement of a removal. This principle may lead to the removal of a minor being considered unenforceable if he or she is well integrated in Switzerland, in particular as a result of the relationships forged (proximity, intensity, duration), the stage and prognosis of his or her development and his or her education in the host country. In the present case, there is no question of E.A. and U.A being well integrated in Switzerland or having developed relationships that are important or decisive for their development. The children were 8 and 3 years old, respectively, at the time of the Federal Administrative Court's decision. Their main reference person, on whom their harmonious development and education depends, is their mother. The State Secretariat for Migration only transfers families with minor children to Italy if it has been given individual guarantees from the Italian authorities. The Italian authorities have given assurances that the persons concerned will be provided with care appropriate to the age of the children and that the unity of the family will be preserved. As the author and her children never stayed in Italy, their allegations about the risks of violations of the Convention if returned to that country are hypothetical. At her hearing on 15 October 2018 by the unit for the repatriation of foreign nationals of the Ticino cantonal police, the only justification the author gave for her refusal

<sup>10</sup> *C.E. v. Belgium*, para. 8.5.

<sup>11</sup> *A.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.10.

<sup>12</sup> *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016).



to be transferred to Italy was the fact that she did not know anyone there. The State party argues that if E.A. and U.A. were to consider that Italy was violating its obligation to provide them with assistance, it would be for them to assert their rights directly with the Italian authorities.

4.14 With regard to article 6 (2) of the Convention, the State party emphasizes that this provision is formulated in very broad terms and is of an eminently programmatic nature. The State party considers that the author's claims in relation to the attempted transfer to Italy are manifestly ill-founded. In the alternative, insofar as the author has not provided any additional evidence that would support a violation of article 6 (2) of the Convention, she cannot claim such a violation.

4.15 With regard to the alleged violation of article 12 of the Convention, the State party cites the jurisprudence of the Federal Administrative Court, according to which this provision does not confer on children the unconditional right to be heard orally and in person in any judicial or administrative proceedings affecting them. It merely ensures that the children can make their views known in an appropriate manner, for example in a written statement by their representative. Only if the child has the discernment, i.e. the ability and maturity to understand the meaning and purpose of the asylum procedure and to explain the reasons they risk persecution, should he or she be given the opportunity to express his or her opinion at a hearing in accordance with the Asylum Act (No. 142.31) of 26 June 1998. According to the practice of the State Secretariat for Migration, children's capacity for discernment can be presumed from the age of 14. E.A. and U.A. were only 8 and 3 years old at the time of the State Secretariat's decision. Furthermore, they are included in their mother's refugee application because they are minors. Given their very young age, it was not necessary to hear the children orally and grant them the right to be heard separately in writing. Moreover, the author does not specify the facts or elements that E.A. and U.A. could have put forward in the event that the State Secretariat had granted them a right to be heard as she understands it. There is therefore every indication that the author and her lawyer were able to ensure that the children's right to be heard under article 12 of the Convention could be exercised. It follows that the allegation of a violation of article 12 of the Convention is manifestly ill-founded or, in the alternative, that there has been no violation of that provision.

4.16 According to the State party, article 22 of the Convention imposes obligations of a programmatic nature. The author's allegations of a violation of this article are manifestly unfounded for the same reasons as her allegations of a violation of article 3. In the alternative, the State party notes that the author's fears that she would not receive the necessary protection and assistance in Italy are based on hypothetical considerations. She alleges in general terms that removal to Italy would violate article 22 of the Convention, but this does not suffice to establish a violation of that article.

4.17 As for article 24 of the Convention, according to the Federal Council, this provision contains "instructions for programmes to promote children's health". With regard to the author's allegation that removal to Italy would prevent adequate psychological treatment following the degrading treatment the children allegedly suffered during the attempted removal, the State party reiterates its observations regarding the non-exhaustion of domestic remedies and the manifestly ill-founded nature of the author's allegations in relation to the attempted removal. In the alternative, the State party concludes that there has been no violation of this article.

4.18 With regard to the alleged violation of article 37 of the Convention, the State party refers to its observations on the ill-founded nature of the communication. In the alternative, it concludes that there has been no violation of this article.

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

5.1 In her comments of 28 August 2019, the author submits that she has exhausted all available domestic remedies. The Federal Administrative Court was the highest court before which she could challenge the State Secretariat for Migration's decision of 20 July 2018. In her appeal to the Court of 31 July 2018, the author noted the non-application of the sovereignty clause of the Dublin III Regulation in the interest of the very vulnerable family

nucleus. The non-application of this clause in favour of minors who have already experienced serious trauma, whose only sources of support, outside their country of origin, are in Switzerland, represents inhuman and degrading treatment. The State party has violated E.A. and U.A.'s peace of mind since the moment it failed to take into account the emotional and psychological repercussions that their removal to Italy might have on them.

5.2 On 10 December 2018, the author submitted a complaint concerning the circumstances of the transfer on 12 September 2018 to the Cantonal Council of Ticino and a petition to the Grand Council of Ticino. The author argues that while it is the responsibility of the State Secretariat for Migration to assess the enforceability and feasibility of removal, such an assessment relates only to the minimum guarantees of reception in the country of removal, but not to the manner in which the removal will be carried out. The author stresses, however, that her communication is not based on the removal attempt of 12 September 2018, but on the decision of the State Secretariat to apply the Dublin III Regulation without taking into account the welfare and best interests of E.A. and U.A.

5.3 The author contests the State party's assertion that the asylum authorities were not given the opportunity to examine the medical certificates. Upon receipt of the medical certificates on 7 September 2018, the author sent them to the Office for Migration, the body competent at the cantonal level for carrying out deportations by order of the State Secretariat for Migration.

5.4 The author accepts that some provisions of the Convention are not directly applicable. However, she finds the State party's assertion that the indirect applicability of a norm of the Convention is not a reason to claim its violation before the Committee absolutely absurd.

5.5 The author contests the State party's allegation that her communication is ill-founded. She explains that the removal of 12 September 2018 is not the only reason for the communication. The author contests the facts contained in the police report referred to by the State party, which she claims is biased. She considers that the State party cannot base its claims on the Cantonal Council's reply, since it is a general text that does not concern her specific case. She adds that the replies of the Cantonal Council are written by the units concerned, in this case by the police itself.

5.6 The author notes that on 17 August 2018, her family was transferred from the civil protection centre in Biasca, a "bunker" whose structure was not considered adequate for reception, to the Della Santa guesthouse in Viganello. The SOS-Ticino association prepared E.A.'s school enrolment. Although the family were supposed to be awaiting a transfer to Italy, E.A. and U.A., who had been moved from a bunker, settled into a guesthouse and enrolled in school, could not have understood that this was only a temporary situation.

5.7 The author insists that the arrival of the police on the night of 12 September 2018 at the Della Santa guesthouse was unexpected, as no one had notified the family of the removal through an interpreter. The family were convinced that their stay in Switzerland would be long since E.A. had been enrolled in school and had attended his first day. Although the police officers explained in Italian what was going to happen, the author could not fully understand what they were saying and had difficulty expressing herself. The author's lawyer informed the police that she refused to board the plane and that a suspension of the flight had been requested on medical grounds. Therefore, the State party's assertion that the author packed her bags of her own accord is "a pure lie". The author points out that she did not claim that the police had broken into her accommodation. The inhuman and degrading treatment was caused by the shock of being woken in the middle of the night, the requirement that the family pack their personal belongings, and the fact that discussions between the police and the author took place without an interpreter and in the presence of the two frightened children. It is true that the author and her children had not left Switzerland within the established deadline, but it is equally true that after that deadline, it was the Swiss authorities that had assigned them new accommodation and enrolled E.A. in school.

5.8 The author regrets that neither the police report nor the State party's observations mention the fact that the children were frightened and crying, or that the police at Zurich

airport showed a photo to E.A., who was crying in fear during the discussion between his mother and the police. The State party's assertion that the children became afraid when they saw their mother's reaction must be qualified in the sense that the children were worried that their mother might be taken away from them because of her refusal to board the plane. The psychological pressure they were under and the fear led E.A. to tell his mother to get back on the plane. The author contests the entire part of the State party's observations concerning her decision to choose to return to Ticino by train.

5.9 The author argues that the national authorities have disregarded article 2 (2) of the Convention by failing to take into account E.A. and U.A.'s vulnerability and by applying the Dublin III Regulation in its most restrictive form, namely not applying the sovereignty clause. The author argues that the State Secretariat for Migration acted in a discriminatory manner in its decision not to consider her case by generalizing the issue instead of considering the specific case at hand.

5.10 Referring to articles 3 and 22 of the Convention, the author states that the Swiss authorities did not take into account the best interests of E.A. and U.A., since they did not take into consideration the trauma experienced and the ties with the persons they had met in Ticino. The author contests the presumption by the Federal Administrative Court that there are no systemic flaws in the asylum procedure and reception conditions in Italy. The mere presumption that the Italian authorities consider asylum seekers as a family nucleus and guarantee their unity is a minimum guarantee that does not take into account all of E.A. and U.A.'s interests. In the appeal against the removal order of the State Secretariat for Migration, the author argued that Italy had systemic shortcomings that would prevent the real protection of her children. The author contests the State party's assertion that Italy can provide essential treatment for serious mental illness and problems. The fact that the national authorities relied on the report of 31 July 2018 to assert that the author and her children were not suffering from serious problems and that they could be transferred to Italy shows that they did not in any way weigh up the interests at stake. The author disputes that her family could be hosted in Italy under the Protection System for Refugees and Asylum Seekers. The Italian Government passed a law that disrupted the System: Italian television keeps showing homeless families in the streets. As noted in the Federal Administrative Court appeals, projects under the Protection System for Refugees and Asylum Seekers, while perfect on paper, are a failure when it comes to their implementation. In 2018, the Ministry of the Interior promulgated a decree-law called *decreto sicurezza* which repealed humanitarian protection. The decree resulted in 60,000 foreign nationals being removed from the Protection System for Refugees and Asylum Seekers. The author claims that the violation of article 3 of the Convention is due to the fact that the Swiss authorities did not consider that removal to Italy would have traumatized E.A. and U.A. to the extent that they would have lost their points of reference and important personal relationships and would have had to undergo a further change. The author contests the claim that her children did not form any important relationships during the 10 months E.A. went to school in Switzerland. Her decision to return to Switzerland was made solely on the basis of the points of reference the family had established, such as her network of friends, school acquaintances and psychological support. The authorities did not take into account the author's statements, the testimonies of the acquaintances of the author and her children or, most importantly, the emotions and feelings of the two children, who thought they had found in Switzerland a place of stability that would give them a measure of serenity. The author claims that it was the smuggler and not her who had chosen to obtain the visas from the Italian consulate in Baku. She stresses that the risk of a violation of the Convention in the event of removal does not only concern the way her children would be received in Italy, but also the trauma they would suffer by losing their points of reference again.

5.11 The failure of the authorities to take account of the medical reports and the stress, fear and anxiety of E.A. and U.A. because of all that they had experienced constitutes a denial of protection and is detrimental to their development within the meaning of article 6 (2) of the Convention.

5.12 The author argues that the alleged violation of article 12 of the Convention does not only concern the fact that E.A. and U.A. were not heard by the State Secretariat for

Migration, but also the fact that the State Secretariat did not take into account their wishes, as reported by their lawyer and their mother, to stay in Switzerland because they felt safe there in view of the support network of people they knew. The State Secretariat does not specify how the interests of E.A. and U.A. were assessed and weighed.

5.13 With regard to article 22 of the Convention, the author considers that the State party did not do everything in its power to protect E.A. and U.A. It did not take into account their state of mind, their fears, their anxieties and their hopes when it coldly decided to send them back to Italy.

5.14 The author claims that the authorities of the State Secretariat, the police and the judiciary failed to interpret and apply domestic norms in order to effectively guarantee the right to health and the physical and mental well-being of E.A. and U.A. within the meaning of article 24 of the Convention.

5.15 With regard to the alleged violation of article 37 of the Convention, the author reiterates that the State party subjected E.A. and U.A. to inhuman and degrading treatment. She points out that at the time of their first entry into Switzerland, E.A. and U.A. had fled their country because of the persecution suffered by their parents. On arrival in Switzerland, the children experienced psychological stress due to the way their parents were treated. They returned to their country, where they experienced the disappearance of their father and a second escape with the hope of finding in Switzerland a few people who could provide them with a degree of stability. However, they were subjected to a “transfer” to Zurich airport to be sent back to Italy.

5.16 The author informed the Committee that E.A. is attending school, while U.A. is enrolled in kindergarten. Their father has arrived in Switzerland and lives with the family in a centre for asylum seekers.

## **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 argument that the author has failed to exhaust all available domestic remedies with respect to her claims in relation to the attempted removal of 12 September 2018. It notes that the author complained to the cantonal authorities – the government and parliament of the canton of Ticino – about the actions of the police during the attempted removal, but she did not institute legal proceedings. Accordingly, the Committee concludes that the claims related to articles 2, 3, 6 (2), 24 and 37 of the Convention concerning the attempted removal on 12 September 2018 and its consequences on the health of E.A. and U.A. are inadmissible under article 7 (e) of the Optional Protocol.

6.3 The Committee takes note of the author’s allegation of a violation of article 37 of the Convention in relation to the reception conditions of her family during her first stay in Switzerland. It notes, however, that it does not appear from the communication that these conditions have been challenged before the Swiss authorities. It therefore finds that this allegation is also inadmissible under article 7 (e) of the Optional Protocol.

6.4 The Committee takes note of the author’s allegation that the State party has violated its obligation to respect the rights set forth in article 2 of the Convention, as the State Secretariat for Migration failed to take into consideration the vulnerability of E.A. and U.A. It also takes note of the author’s allegation that the State Secretariat discriminated against E.A. and U.A., as prohibited by article 2 (2) of the Convention. The Committee notes, however, that the author sets out these grievances in a very general manner, without explaining the basis of the alleged discrimination. Therefore, the Committee declares these claims manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol.

6.5 The Committee takes note of the State party’s arguments that the provisions of articles 2 (2), 3, 6 (2), 22 and 24 of the Convention do not provide a basis for subjective

rights whose violation can be invoked before the Committee. In this regard, the Committee recalls that the Convention recognizes the interdependence and equal importance of all rights (civil, political, economic, social and cultural) that enable all children to develop their mental and physical abilities, personalities and talents to the fullest extent possible.<sup>13</sup> It also recalls that the best interests of the child, as enshrined in article 3 of the Convention, is a threefold concept which is at the same time a substantive right, an interpretative principle and a rule of procedure.<sup>14</sup> The Committee notes that under article 5 (1) (a) of the Optional Protocol, individual communications may be submitted against a State party to the Convention by or on behalf of individuals or groups of individuals claiming to be victims of a violation by that State party of any of the rights set forth in the Convention. Accordingly, the Committee considers that there is nothing in article 5 (1) (a) of the Optional Protocol to suggest a limited approach to the rights whose violation may be invoked in the individual communications procedure. The Committee also recalls that it has in the past ruled on alleged violations of the articles invoked under the individual communications mechanism.<sup>15</sup>

6.6 The Committee considers that, although the author's claims under article 24 of the Convention, according to which E.A. and U.A. would not receive in Italy the adequate and necessary psychological care for persons who have been subjected to ill-treatment, also appear to relate to alleged trauma experienced prior to the filing of the second asylum application, she does not produce any evidence to substantiate this allegation. Therefore, the Committee declares this claim manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol.

6.7 However, the Committee considers that the author has sufficiently substantiated her remaining claims under articles 3, 12 and 22 of the Convention for the purposes of admissibility. Accordingly, it declares this part of the communication admissible and proceeds with its consideration on the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

7.2 The Committee recalls that it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice. It is therefore not for the Committee to assess the facts of the case and the evidence in place of the national authorities but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the children were a primary consideration in that assessment.<sup>16</sup>

7.3 The Committee takes note of the author's allegation that the State party has violated article 12 of the Convention because the national authorities did not hear E.A. and U.A. and did not take into account the reports and testimonies introduced during the proceedings. The Committee takes note of the State party's arguments that E.A. and U.A. were not heard in view of their young age, the fact that the children's interests coincided with those of their mother, and that they could exercise their right to be heard through the intermediary of their mother and their legal counsel. The Committee notes that article 12 of the Convention guarantees the right of the child to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative. It points out, however, that this article imposes no age limit on the right of the child to express her or his views, and that it discourages States parties from introducing age limits either in law or in practice that would restrict the child's right to be heard in all matters affecting her or him.<sup>17</sup> The Committee does not agree with the State party's argument that E.A. and U.A. did not need

<sup>13</sup> Committee on the Rights of the Child, general comment No. 15 (2013), para. 7.

<sup>14</sup> Committee on the Rights of the Child, general comment No. 14 (2013), para. 6.

<sup>15</sup> *M.T. v. Spain* (CRC/C/82/D/17/2017), para. 12.5; *C.R. v. Paraguay* (CRC/C/83/D/30/2017), para. 7.5; and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 12.5.

<sup>16</sup> *C.E. v. Belgium*, para. 8.4.

<sup>17</sup> Committee on the Rights of the Child, general comment No. 12 (2009), para. 21.

to be heard because their interests coincided with those of their mother. The Committee recalls that determining the best interests of the children requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application. Therefore, the Committee considers that in the circumstances of the present case, the absence of a direct hearing of the children constituted a violation of article 12 of the Convention.

7.4 The Committee takes note of the author's argument that the authorities did not take into consideration the trauma experienced by the children, including twice fleeing their country of origin, once by passing through a third country, once returning to their country of birth, and another attempt under very traumatic conditions. The Committee considers that, having failed to hear E.A. and U.A. on these facts, which may have very different consequences on them from those experienced by their mother, the national authorities have not shown due diligence in assessing their best interests.

8. The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts of which it has been apprised amount to a violation of articles 3 and 12 of the Convention.

9. Consequently, the State party is under an obligation to reconsider the author's request to apply article 17 of the Dublin III Regulation in order to process E.A. and U.A.'s asylum application as a matter of urgency, ensuring that the best interests of the children are a primary consideration and that E.A. and U.A. are heard. In considering the best interests of the children, the State party should take account of the social ties that have been forged by E.A. and U.A. in Ticino since their arrival and the possible trauma they have experienced due to the multiple changes in their environment, in Azerbaijan and in Switzerland. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this regard, the Committee recommends that the State party ensure that children are systematically heard in the context of asylum procedures and that national protocols applicable to the return of children are in line with the Convention.

10. Pursuant to article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the steps it has taken to give effect to these Views. The State party is also requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. Finally, the State party is requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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