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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. 74/2019*, **

Communication submitted by:	Z.S. and A.S. (represented by counsel, Klausfranz Rüst-Hehli)
Alleged victims:	K.S. and M.S.
State party:	Switzerland
Date of communication:	20 September 2018 (initial submission)
Date of adoption of Views:	10 February 2022
Subject matter:	Deportation to the Russian Federation; access to medical care
Procedural issues:	Lack of authorization; failure to exhaust domestic remedies; non-substantiation of claims; inadmissibility *ratione temporis*; justiciability of Convention rights
Substantive issues:	Best interests of the child; effective remedy; right to health; torture and ill-treatment
Articles of the Convention:	2, 3, 4, 6 (2), 8 (2), 11, 12, 13, 14, 16, 17, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 34, 36 and 37 (a)
Articles of the Optional Protocol:	7 (c), (e), (f) and (g)

1.1 The authors of the communication are Z.S., born in 1982, and A.S., born in 1975, both Russian nationals from Chechnya. They submit the communication on behalf of their children, K.S., born in 2006, and M.S., born in 2012, who are also both Russian nationals. The authors allege that the State party has violated the rights of K.S. and M.S. under articles 2, 3, 4, 6 (2), 8 (2), 11, 12, 13, 14, 16, 17, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 34,

* Adopted by the Committee at its eighty-ninth session (31 January–11 February 2022).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Sopio Kiladze, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, Zara Ratou, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Benoit Van Keirsbilck.

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 examination of the communication.

36 and 37 of the Convention. They are represented by counsel, Klausfranz Rüst-Hehli. The Optional Protocol entered into force for the State party on 24 July 2017.

1.2 On 6 February 2019, the Working Group on Communications, acting on behalf of the Committee and in accordance with article 6 of the Optional Protocol, decided not to issue a request for interim measures under article 6 of the Optional Protocol and rule 7 of its rules of procedure under the Optional Protocol.

Facts as submitted by the authors

2.1 On 26 April 2012, the authors and K.S. arrived in Switzerland, where they applied for asylum on the grounds that the Chechen authorities had threatened them following A.S.'s refusal to spy on an acquaintance. In a decision issued on 27 September 2012, the Federal Office for Migration rejected the authors' application on the grounds that their allegations did not meet the applicable credibility requirements. The Federal Administrative Court upheld the decision in a ruling issued on 5 February 2013. On 16 December 2013, the authors, along with K.S. and M.S. (who was born during the proceedings), voluntarily returned to the Russian Federation.

2.2 On 3 August 2015, the family returned to Switzerland and orally submitted another asylum application. The family was placed in the Seeben centre for failed asylum seekers, where they had no access to schooling or public social assistance, despite the fact that no formal decision concerning this placement, or the withdrawal of social assistance, had been issued. Such decisions are required under the St. Gallen Administrative Justice Act. On 9 October 2015, without holding a hearing, the State Secretariat for Migration[1] rejected the application on the grounds that the authors' accounts did not meet the requirements concerning refugee status established in article 3 of the Asylum Act (No. 142.31 of 26 June 1998) or the requirements concerning the credibility of allegations established in article 7 of the same Act. On 21 September 2017, the Federal Administrative Court rejected the authors' appeal.

2.3 When M.S. was born, in August 2012, she was almost completely deaf and required a cochlear implant. During the family's stays in Switzerland, she received training in German Sign Language, which was not sufficient for her to develop her language skills.[2] In its ruling of 5 February 2013, however, the Federal Administrative Court did not consider whether she would have access to a cochlear implant in the Russian Federation. An attending physician of the Child and Adolescent Psychiatric Service issued a request for M.S. to be provided with appropriate medical support and special education, in accordance with article 443 of the Swiss Civil Code. In its response of 9 November 2016, the Toggenburg Child and Adult Protection Authority replied that such a request, while appropriate from a medical point of view, had already been made by the Child Neurology, Development and Rehabilitation Centre of the Children's Hospital of Eastern Switzerland and had been rejected by the Association of Mayors of the Canton of St. Gallen. In addition, the Cantonal Office for Migration had verbally refused to provide funding for an implant. According to a letter dated 31 August 2016 from the Cantonal Hospital of St. Gallen, M.S. is almost completely deaf in both ears and her linguistic and general development has been hindered. The letter states that a cochlear implant is recommended, that such implants may be inserted only in the early years of a child's life and that at least two to three years of follow-up would be required. The authors also cite a report issued by the Children's Hospital of Eastern Switzerland on 24 July 2017, which confirms this information and states that M.S. should attend a special school for hard-of-hearing children.

2.4 K.S., who was not heard in the earlier proceedings, filed his own asylum application on 6 February 2018. On 15 February 2018, without having heard him, the State Secretariat for Migration dismissed the application, which it classified as a request for reconsideration. In the view of the State Secretariat for Migration, the grounds for K.S.'s application,

[1] The State Secretariat for Migration succeeded the Federal Office for Migration on 1 January 2015.

[2] The authors refer to an assessment conducted by the St. Gallen School of Speech Therapy on 11 April 2017, which states, inter alia, that M.S. can use sign language to express certain intentions but lacks the language skills to express more complex ideas and will probably have to depend on a carer in the future.

including his diagnosis of post-traumatic stress disorder[3] and the impact that returning to the Russian Federation would have on his academic, social, mental, intellectual, linguistic and psychological development, had already been examined in the earlier proceedings. On 5 March 2018, the Federal Administrative Court rejected his appeal.

2.5 On 20 March 2018, the authors filed a request for the reconsideration of their asylum application on the grounds that M.S. was to undergo a magnetic resonance imaging scan to determine whether she met the anatomical conditions for a cochlear implant. In an interim ruling issued on 27 March 2018, the State Secretariat for Migration refused to waive the enforcement of the removal. The next day, the family was detained and returned to the Russian Federation. They were never informed of the State Secretariat's decision and were therefore unable to provide a correspondence address in accordance with the ruling. Pursuant to an internal decision taken on 20 April 2018, the State Secretariat dismissed the request for reconsideration.

2.6 On 24 April 2018, the Child and Adult Protection Authority ordered the closure of a procedure involving a review of child protection measures for M.S. and K.S. on the grounds that, following the family's departure, the procedure had become moot.[4] The authors claim that the Authority failed to inform their representative of the issuance of its decision or the time limit for filing an appeal when he came to consult the relevant documents. In a decision issued on 2 July 2018, the Appeals Commission of the Canton of St. Gallen struck out an appeal filed by a counsel who had not been authorized by the authors and who had failed to make use of an additional period granted for the securing of authorization.

2.7 In accordance with an internal decision issued on 21 June 2018, the State Secretariat for Migration dismissed a new application for reconsideration and for visas that would have enabled the family to return to Switzerland. On 24 July 2018, the Federal Administrative Court dismissed the appeal against this decision. Also in July 2018, in response to correspondence claiming that M.S. and K.S. were not receiving schooling or medical treatment in the Russian Federation, the Toggenburg Child and Adult Protection Authority stated that it would take no further action.

Complaint

3.1 The authors complain that the State party, in violation of article 4 of the Convention, has failed to sufficiently incorporate the Convention into the Federal Asylum Act, the Federal Act on Foreign Nationals and Integration, and the St. Gallen Administrative Justice Act. On 1 January 2008, the federal legislature authorized the cantons to replace social assistance with emergency assistance for asylum seekers whose applications have been dismissed, thereby reducing the amount of assistance that they receive. This violates article 4 of the Convention as it undermines the principle that the status quo at the time when a State becomes a party to the Convention should be maintained.

3.2 The authors claim that the State party has violated K.S.'s rights under article 22 of the Convention as its authorities failed to take the Convention into account when they processed his asylum application, failed to consider child-specific forms of persecution, failed to provide him with legal assistance and charged him high fees in connection with the proceedings. In violation of article 12 of the Convention, K.S. was not questioned, although the State Secretariat for Migration did not cast any doubt on his discernment and the Convention does not establish a minimum age at which a child may be heard. Furthermore, K.S.'s parents have always been considered his legal representatives, but he did not choose to have them represent him.

[3] According to a letter issued by the Child and Adolescent Psychiatric Service of the Canton of St. Gallen, dated 5 July 2016, K.S. was diagnosed with severe post-traumatic stress disorder and is suspected of having suffered multiple traumas in his country of origin.

[4] In the authors' letter to the Toggenburg Child and Adult Protection Authority, dated 1 March 2018, they argue that their living conditions in the centre are incompatible with M.S. and K.S.'s development and that the children's right to education, under article 6 (2) of the Convention, has not been respected. They also cite the Authority's letter of 9 November 2016.

3.3 According to the authors, the Cantonal Office for Migration refused to provide M.S. with a cochlear implant and failed to ensure that she was taught sign language, in violation of articles 23 (1), 24 (1), 26 (1) and 27, read in conjunction with articles 2 and 3 of the Convention. The State party's authorities sent her back to the Russian Federation in the knowledge that she was not guaranteed to receive a hearing implant there and without considering whether she would be able to learn sign language in the country. According to the authors, the State party's authorities should have conducted an investigation into access to special care services in the Russian Federation, which, owing to corruption, is not guaranteed. In violation of article 37 (a) of the Convention, M.S. is at risk of being isolated for the rest of her life because she is hard of hearing. She is also at risk of being subjected to abuse as she is unable to express herself. Furthermore, she is at risk of being discriminated against as a child, as a member of an ethnic and religious minority, as a person with a disability, as a girl, as an illiterate person and even, following the disappearance of her father after the family's removal, as the child of a single parent family. She is therefore at risk of being exploited, in violation of articles 32, 34 and 36 of the Convention. In view of M.S.'s personal connections, the State party was in a better position to protect her against such risks than the Russian Federation. Where K.S. is concerned, the State party also violated article 23 (1) of the Convention as it failed to conduct any research into whether he could receive psychotherapeutic treatment in the Russian Federation.

3.4 In addition, and in violation of articles 12, 13, 14 and 17 of the Convention, the State party's authorities prevented M.S. from acquiring the ability to express herself and be understood and respected by adults and made it difficult for her to develop her own views. Thus, neither M.S. nor K.S. had access to the State Secretariat for Migration or the Federal Administrative Court. Despite the provisions made in article 24 of the St. Gallen Administrative Justice Act, they were never informed of the decisions issued by the Cantonal Office for Migration or the Child and Adult Protection Authority concerning the refusal of a cochlear implant. Nor were they informed of their right to file a complaint against their placement at Seeben, their resultant lack of access to social services, or the refusal of a cochlear implant.

3.5 The authors claim a violation of article 3 of the Convention as the State party's authorities did not routinely consider the interests of M.S. or K.S. They claim that the State party's authorities have violated their right not to be discriminated against on the grounds of their respective disabilities and in relation to adults under article 2 of the Convention, read in conjunction with article 3. The authorities have also violated article 2 of the Convention, read in conjunction with article 19, because the Toggenburg Child and Adult Protection Authority failed to assess the dangers facing the children, thereby depriving M.S. and K.S. of protection as migrant children. Furthermore, the failure of the Authority to support the parents' efforts to care for the children constitutes a violation of article 19. The Authority also failed to inform its Russian counterparts of the protection measures that it considered necessary, as required by the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

3.6 The authors claim that the conditions in the centre for asylum seekers constitute a violation of articles 27 (1) and 31 of the Convention, read together with article 2 (1). M.S. and K.S. had very limited opportunities to relax, engage in leisure activities, form stable relationships and participate in cultural life owing to their lack of money, the distance from the centre to the nearest village and the fact that the family had only one room. Their lack of social contact and stimuli prevented them from developing social skills comparable to those of Swiss children, in violation of article 6 (2) of the Convention, read together with article 2. M.S. and K.S. did not receive any schooling, in violation of articles 28 (1) and 29 of the Convention. As a result, M.S. is likely to spend the rest of her life without language skills. The authors also claim a violation of article 2 (2) of the Convention as the family were deprived of social services from the start of the second set of asylum proceedings. However, as the children of Z.S. and A.S., who had claimed asylum for the first time, M.S. and K.S. were entitled to such services.

3.7 The authors claim that the State party's authorities did not conduct any research into the minimum standards of living in the Russian Federation and did not attempt to determine

whether M.S. would be able to receive special education in that country, in violation of article 20 of the Convention, read in conjunction with articles 3, 25 and 27 (1).[5] They also failed to determine whether the Russian Federation upholds the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Furthermore, in violation of articles 8 (1) and 16 (1) of the Convention, M.S.'s removal broke off her contact with the educational audiologist, who was the only person with whom she could communicate. Moreover, she was born in Switzerland, lived there for 47 months and had no memory of the Russian Federation on her return.

3.8 Lastly, in view of the violations cited, the authors claim that M.S.'s removal from Switzerland constituted a violation of article 11 of the Convention.

State party's observations on admissibility and the merits

4.1 In its observations of 20 September 2019, the State party notes that, on 22 October 2018, following the submission of the present communication, M.S. filed an application with the State Secretariat for Migration for authorization to enter Switzerland on the grounds that article 8 of the Convention had been violated. In a decision issued on 27 December 2018, the State Secretariat dismissed the application on the grounds that it lacked jurisdiction to examine it. On 23 April 2019, the Federal Administrative Court dismissed the appeal, noting that M.S. had had the opportunity to state her case at first instance and on appeal, and that she had in fact sent it several letters.

4.2 The State party argues that the communication is inadmissible owing to the lack of valid authorization. The authorization submitted was presented only by K.S. and the authors and does not mention M.S. Therefore, Mr. Rüst-Hehli is not authorized to represent her. Moreover, the document was dated only by Mr. Rüst-Hehli and not by the authors. Furthermore, the communication states that the family's address in the Russian Federation is unknown, which suggests that he is no longer in contact with them.

4.3 Referring to the case law of the Federal Court, the State party argues that, apart from article 12 of the Convention, none of the other articles cited is directly applicable, including article 3, which only sets out a guiding principle.

4.4 The State party maintains that the authors have not exhausted domestic remedies in relation to their claims concerning protection measures or M.S. and K.S.'s stay in the centre for asylum seekers. First, they were aware of the decisions issued by the Association of Mayors of the Canton of St. Gallen and the Child and Adult Protection Authority but did not take any steps to appeal them. Second, they did not take any steps to file a complaint about their placement in the centre for asylum seekers, the conditions in the centre or their access to education. From 2015, M.S. had regular access to early childhood education, attended the playgroup run by the audio education service and received sign language tuition. From 2016, she attended the centre's nursery school and was supported by a specialist teacher from the audio education service. From the start of 2017, Z.S. also participated in the sign language course. Furthermore, the authors did not submit any complaints of discrimination on the grounds of disability and did not exhaust the remedies available in relation to their application for readmission to Switzerland, in connection with which the State Secretariat for Migration was not competent to issue a decision on the merits.

4.5 The State party maintains that the claims regarding the first set of asylum proceedings and the decision issued by the Association of Mayors of the Canton of St. Gallen are inadmissible *ratione temporis* as the decisions concerned were taken before the entry into force of the Optional Protocol for the State party on 24 July 2017.

4.6 The State party affirms that a number of claims are inadmissible as they are insufficiently substantiated. In claiming violations under articles 2 (2), 13, 14 and 17 of the Convention, the authors do not explain how the rights of M.S. and K.S. were violated. Furthermore, the authors provide no evidence to support a violation of article 8 of the Convention and fail to substantiate their claim that M.S.'s identity is Swiss rather than Russian. With regard to the claim made under article 11 of the Convention, the Swiss

[5] E/C.12/RUS/CO/6, paras. 40 and 44.

authorities have examined whether the family's return was lawful, reasonable and practical. With regard to the claim made under article 16 of the Convention, the authors fail to demonstrate how the termination of M.S.'s relationship with the educational audiologist constitutes unlawful or arbitrary interference with M.S.'s private life. The claims made under articles 32, 34, 36 and 37 are of an abstract and hypothetical nature.

4.7 The State party also argues that the other claims are manifestly ill-founded. With regard to the complaint made under article 12 of the Convention, the State party points out that, according to the practice of the State Secretariat for Migration in asylum proceedings, children are generally presumed to have sufficient discernment from the age of 14 years. However, M.S. and K.S. were only 3 and 9 years old, respectively, when the decision of 9 October 2015 was issued. In considering whether they qualified for refugee status, the State Secretariat for Migration included them in their parents' asylum applications as their interests were the same. The family was also provided with legal representation. In its ruling of 5 March 2018, the Federal Administrative Court noted that there were no grounds for supposing that the representative was unable to defend the children's interests and concluded that a hearing of K.S. was not necessary. The second set of proceedings concerned a second asylum application and was therefore decided without a new hearing. Furthermore, requests for reconsideration do not imply a right to be heard. The authors do not specify which facts M.S. and K.S. were prevented from putting forward by the authorities' decision not to hold a separate hearing.

4.8 The State party also maintains that the claims made under article 3 of the Convention are manifestly ill-founded. It notes that the State Secretariat for Migration and the Federal Administrative Court conducted a detailed examination of K.S. and M.S.'s health problems and the issues of appropriate schooling and the minimum level of subsistence. In its ruling of 5 February 2013, the Court concluded that K.S.'s haemophilia could be treated in the Russian Federation,[6] as it had been in the past. With regard to M.S.'s hearing impairment, the Court noted that children up to the age of 14 years received free medical treatment in the Russian Federation if they were insured and that the Russian Constitution guaranteed free basic medical treatment to all citizens. The Court therefore concluded that her hearing impairment could be treated in the Russian Federation. In its ruling of 21 September 2017, the Court concluded that there were no exceptional circumstances that would preclude removal, in accordance with the case law of the European Court of Human Rights. It acknowledged that K.S. was unlikely to be able to receive treatment for his post-traumatic stress disorder in Chechnya but pointed out that he could receive the required treatment if the family took a domestic flight to Moscow or another city where they had previously stayed and where they had contacts, family and friends. The Court also considered the welfare of the children and noted that K.S. had spent most of his life in the Russian Federation while M.S., who was still of preschool age, had spent two years there. The Court found that they had not integrated into life in Switzerland to any significant extent and did not face any risk of being exposed to torture or cruel, inhuman or degrading treatment or punishment. In its ruling of 5 March 2018, the Court found that K.S.'s claims, as well as the claims brought by his parents before the Child and Adult Protection Authority, had already been considered in the earlier proceedings and that the family's situation had not changed significantly.

4.9 The State party notes that, after the closure of the first set of asylum proceedings, the family decided to return voluntarily to Chechnya without taking advantage of a reintegration project that includes financial and medical assistance and without using the medical services available in the Russian Federation. The allegations concerning the risks of a violation of the Convention are therefore hypothetical in nature. In addition, the family may assert their rights by making use of the legal remedies available in the Russian Federation.

4.10 With regard to the claims made under articles 2 and 19 of the Convention, concerning the Child and Adult Protection Authority, the State party notes that the Authority could not order a cochlear implant for a person whose residence status was uncertain. According to the Children's Hospital of Eastern Switzerland, persons who do not have resident status do not receive such treatment as ongoing follow-up is required for at least two to three years. The

[6] K.S.'s haemophilia was not cited by the authors in the communication.

State party notes that the asylum authorities take account of the decisions of the Child and Adult Protection Authority, as they did in the present case, but are not bound by them.

4.11 In addition, the State party maintains that the communication is ill-founded, for the reasons cited above.

Authors' comments on the State party's observations

5.1 In their comments of 19 December 2019, the authors state that neither the Toggenburg Child and Adult Protection Authority nor the Association of Mayors of the Canton of St. Gallen informed them of their decisions. In particular, the Child and Adult Protection Authority's letter of 9 November 2016 was not sent to them and they were not informed of any possible legal remedies, including in connection with social assistance or their treatment in the centre for asylum seekers. The educational service at the centre, including the provision of sign language tuition, was rudimentary and did not meet the legal criteria governing staff qualifications and numbers, teaching time or curricular content. In addition, their representatives in the asylum proceedings lacked the financial means to represent them elsewhere. Furthermore, they were not notified of the State Secretariat for Migration's decision of 27 March 2018 before their removal, which took place the following day, and were therefore unable to provide a correspondence address or file an appeal.

5.2 The authors contest the assertion that the authorization does not apply to M.S. They note that the authorities provided emergency assistance to M.S. only during her second stay in Switzerland and claim that the State party did not provide her with the support that she needed to develop her language skills. Under the Swiss Civil Code and article 5 of the Convention, Z.S. is her legal representative. Counsel contacts the authors through the educational audiologist, although the process is very laborious.

5.3 The authors contest the assertion that the communication is inadmissible *ratione temporis* insofar as it concerns the Federal Administrative Court's rulings of 21 September 2017 and 5 March 2018, and the State Secretariat for Migration's decision of 27 March 2018. In addition, M.S.'s need for a cochlear implant became urgent in 2018, that is, after the entry into force of the Optional Protocol for the State party.

5.4 Citing article 3 of the Convention, the authors claim that the State party's authorities disregarded the importance of stability, continuity and security in a child's development. Furthermore, the authorities failed to consider M.S.'s inability to communicate effectively with her mother and other persons, the situation of deaf persons in Chechnya, or the security situation. The authors contest the assertion that they can make use of legal remedies in the Russian Federation.[7] Counsel notes that it is very difficult for him to obtain information on the family's current living conditions in the Russian Federation and that they have had to live in hiding since their removal.

5.5 With regard to article 4 of the Convention, the authors argue that, given the difference in the national products of Switzerland and the Russian Federation, the State party has failed to undertake measures, to the maximum extent of its available resources. They argue that the State party's authorities have never questioned the direct applicability of article 2 of the Convention and that the articles invoked are all directly applicable.

5.6 The authors claim that the State Secretariat for Migration failed to demonstrate that M.S. could receive a cochlear implant in the Russian Federation and did not consider that she understood only Swiss German Sign Language and faced a risk of discrimination in the Russian Federation. Nor did the State Secretariat identify any interests that might prevail over M.S.'s interest in living in Switzerland. Her linguistic identity is Swiss German and she has no knowledge of her Russian nationality. The educational audiologist plays an important emotional and linguistic role for her. The removal decision has therefore prevented her from developing her identity and acquiring a language, in violation of articles 8 and 12 of the Convention.

5.7 The authors reiterate that the State Secretariat for Migration's policy of hearing only children aged 14 years or over is in violation of article 12 of the Convention. They state that

[7] CEDAW/C/RUS/CO/8, paras. 11, 21 and 35 (a).

children's interests are always different from those of their parents. However, K.S. was never given the opportunity to choose his own representative.

5.8 Under article 19 of the Convention, the authors argue that the Toggenburg Child and Adult Protection Authority's lack of resources does not justify the failure to provide a cochlear implant. The provision of such an implant is a protective measure guaranteed under article 307 of the Swiss Civil Code and article 19 of the Convention. The Authority recognized M.S.'s need for an implant but wished to avoid creating an obstacle to her removal. According to the authors, the Association of Mayors of the Canton of St. Gallen is a private entity that has usurped responsibility for providing emergency aid without having concluded an agreement in this regard with any commune.

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 notes the State party's arguments that the communication is inadmissible on grounds of lack of proper authorization because M.S. did not give her consent to be represented, the authors did not date their signatures, and counsel has lost contact with the family since their removal to the Russian Federation. With regard to the issue of M.S.'s consent, the Committee notes the authors' argument that she was unable to give her express consent to being represented by their counsel. It considers that the authors, as M.S.'s parents, have justified their action and that, on the basis of the information in the case file, the submission of the communication is in her best interests, in accordance with rule 13 (3) of the rules of procedure under the Optional Protocol. As for the fact that the authors' signatures are not dated, the Committee notes that the power of attorney, as signed by the authors and K.S., authorizes their counsel to submit an individual complaint on their behalf before the Committee and to represent them in the proceedings before it.[8] Lastly, the Committee notes the counsel's explanation that he remains in contact with the family. The Committee notes that counsel has difficulty in contacting the authors because the family were expelled from Switzerland and that the case file does not contain any indication that they have lost interest in pursuing the communication.[9] Consequently, the Committee considers that rule 13 of its rules of procedure under the Optional Protocol does not preclude it from finding the communication admissible. In the light of the above, the Committee considers that it is not precluded by article 5 (2) of the Optional Protocol from examining the communication.

6.3 The Committee notes the State party's argument that only article 12 of the Convention is directly applicable in respect of the authors' various claims. 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.[10] 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.[11] 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

[8] *M.S.P.-B. and S.P. v. the Netherlands* (CCPR/C/123/D/2673/2015), para. 6.4.

[9] European Court of Human Rights, *N.D. and N.T v. Spain*, applications No. 8675/15 and No. 8697/15, judgment of 13 February 2020, paras. 72 and 73.

[10] Committee on the Rights of the Child, general comment No. 15 (2013), para. 7.

[11] Committee on the Rights of the Child, general comment No. 14 (2013), para. 6.

procedure. The Committee also recalls that, in the past, it has ruled on alleged violations of the articles invoked under the individual communications mechanism.[12]

6.4 In accordance with article 7 (d) of the Optional Protocol, the Committee has ascertained that the same matter had not already been examined by the Committee and had not been, or was not being, examined under another procedure of international investigation or settlement.

6.5 The Committee notes the State party's contention that the authors have failed to exhaust domestic remedies in connection with their claims concerning the lack of medical, educational and social protection measures taken and M.S. and K.S.'s living conditions in the centre for asylum seekers. It also notes the authors' argument that they were never informed of the decisions of the Child and Adult Protection Authority, the Association of Mayors of the Canton of St. Gallen, or the Cantonal Office for Migration, and that the Child and Adult Protection Authority's letter of 9 November 2016 was not sent to them. The Committee notes that, according to information in the case file, M.S.'s disability has been documented since at least 16 January 2013. While the authors state that they have made various requests in this regard, they do not appear to have taken any legal action in response to the failure to notify them of decisions. Similarly, the family does not appear to have taken any legal action in connection with their placement in the centre in August 2015 or the living conditions in the centre. The Committee notes that there is no indication that it would have been ineffective for the authors to have complained about the lack of decisions or the lack of notification of these decisions. Furthermore, the Committee cannot conclude that no remedy was available to the authors merely on the basis of their assertion that their representatives in the asylum proceedings had insufficient financial means to represent them elsewhere. Consequently, the Committee concludes that the claims made under articles 2, 3, 6, 12, 13, 14, 17, 19, 23, 24, 26, 27, 28, 29 and 31 of the Convention are inadmissible under article 7 (e) of the Optional Protocol insofar as they relate to the placement of M.S. and K.S. in the centre for asylum seekers and the lack of medical, educational and social protection measures.

6.6 The Committee notes the State party's argument that the claims concerning the first set of asylum proceedings are inadmissible *ratione temporis*. However, the Committee considers that the effects of these proceedings, including the examination by the State party's authorities of M.S.'s prospects of receiving a cochlear implant in the Russian Federation, continued after the entry into force of the Optional Protocol for the State party. Therefore, the Committee concludes that article 7 (e) of the Optional Protocol does not preclude it from examining claims related to these proceedings.

6.7 The Committee considers that the authors have failed to substantiate their claims under articles 4 and 11 of the Convention and therefore finds them inadmissible under article 7 (f) of the Optional Protocol.

6.8 The Committee also notes the State party's argument that the claims concerning the asylum proceedings are manifestly ill-founded or insufficiently substantiated. However, the Committee considers that this part of the communication raises substantive issues under article 12 of the Convention, insofar as it concerns K.S.'s right to be heard, and under articles 3, 6 (2), 24 and 37, in connection with the decision to return M.S. to the Russian Federation in the knowledge that she has a hearing impairment. The Committee therefore considers that this part of the communication is admissible and proceeds to consider it on the merits.

Consideration of the merits

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

7.2 The Committee notes the authors' claim that the decision of the State party's authorities to return M. S. to the Russian Federation violated her rights under articles 3, 6 (2),

[12] *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 12.5; *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; *E.A. and U.A. v. Switzerland* (CRC/C/85/D/56/2018), paras. 6.5 and 6.7.

24 and 37 of the Convention, as the Federal Administrative Court failed to consider whether she would have access to a cochlear implant and special education in the Russian Federation and decided to return the family to that country in the knowledge that she was not guaranteed to receive such an implant and that, without one, her hearing impairment would result in her being isolated and at risk of being exploited and ill-treated. According to the authors, the Federal Administrative Court also failed to consider whether K.S. would have access to psychotherapeutic treatment in the Russian Federation. The Committee notes that the State party contests the authors' allegations and claims that its authorities have respected the children's rights under the Convention.

7.3 The Committee recalls in that respect that States must not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.[13] The risk of such a serious violation should be assessed in accordance with the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such risks, States parties should refrain from deporting the child.[14] The best interests of the child should be a primary consideration in decisions concerning the deportation of a child and such decisions should ensure – within a procedure with proper safeguards – that the child will be safe, will be provided with proper care and will enjoy his or her rights.

7.4 The Committee also 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 interpret domestic law or 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.[15] The Committee also recalls that the principle of non-refoulement does not confer a right to remain in a country solely on the basis of a difference in health services that may exist between the State of origin and the State of asylum, or a right to continue medical treatment in the State of asylum, unless such treatment is essential for the life and proper development of the child and would not be available and accessible in the State of return.[16]

7.5 In the present case, the Committee notes that the Federal Administrative Court, in its judgment of 5 February 2013, concluded that hearing loss could be treated in Chechnya as the Russian Constitution guarantees free basic health care for all citizens and Chechen children receive free health care up to the age of 14 years, provided that they are enrolled in the compulsory health insurance scheme. The Committee further notes that the Federal Administrative Court, in its judgment of 21 September 2017, considered M.S.'s health problems but noted that there was no evidence that she faced a specific danger within the meaning of section 84 (4) of the Federal Act on Foreign Nationals and Integration, such as the unavailability of essential medical treatment in the country of origin. The Court conducted an examination of the availability of psychiatric treatment for K.S. in the Russian Federation and found that, while such treatment was unlikely to be available in Chechnya, the necessary medical infrastructure was available in cities in other parts of the country to which the family could relocate. The Court also examined access to the health-care system and noted that the procedures for declaring a temporary or permanent place of residence in the Russian Federation had been greatly simplified for Chechens and that there was no systematic discrimination against this group. It also examined the consequences of the children's removal on their social, academic and personal environment and on their physical and mental development and noted that, according to medical reports, the children's psychological

[13] Committee on the Rights of the Child, general comment No. 6 (2005), para. 27.

[14] *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8; and *X.C. et al. v. Denmark* (CRC/C/85/D/31/2017), para. 8.3.

[15] *C.E. v. Belgium* (CRC/C/79/D/12/2017), para. 8.4; and *E.A. and U.A. v. Switzerland*, para. 7.2.

[16] *G.R. et al. v. Switzerland* (CRC/C/87/D/86/2019), para. 11.6.

difficulties and developmental disorders could be treated in a stable environment, which could be created by their parents.

7.6 However, the Committee notes that, according to the available information, cochlear implants can be inserted only in the early years of a child's life and that failure to provide such an implant in a timely manner can cause significant harm to a child's health and development. The Committee also notes that M.S. was 6 years old on 28 March 2018, when the family was returned to the Russian Federation. Furthermore, according to the information available to the Committee, a paediatrician confirmed on 14 March 2018 that M.S. should receive a cochlear implant as a matter of medical urgency, by the end of the year at the latest, as this was the only way to improve her hearing response. The Committee is concerned to note that, despite the medical urgency of the procedure having been confirmed, the State party's authorities do not appear to have specifically established whether M.S. would be guaranteed timely access to a cochlear implant in the Russian Federation, especially given that the family had to resettle and move to a place outside their native Chechnya in order to ensure K.S.'s continued access to psychiatric treatment, which would not have been available in Chechnya. Given the situation, it seems unlikely that the family will be able to secure immediate access to a cochlear implant for M.S. In this regard, the Committee recalls that effective reintegration measures, including immediate protection measures, must be taken in cases where children are returned to their country of origin, particularly to ensure their effective access to health care. Furthermore, the Committee notes that the State party's authorities do not appear to have specifically considered the additional support that M.S. would need as a child with disabilities, or whether she would be able to learn another kind of sign language in the Russian Federation. In this regard, the Committee notes that, according to a medical certificate dated 31 August 2015, M.S. has shown signs of developmental delay since she left Switzerland for the first time in December 2013. Taking into account all the specific circumstances of the present case, the Committee considers that the State party's authorities did not take every measure necessary to ensure that M.S. would have access to the urgent medical care and support required for her satisfactory development. Accordingly, the Committee considers that the State party has violated M.S.'s rights under article 24, read in conjunction with articles 3 and 6 (2) of the Convention.

7.7 Having reached this conclusion, the Committee decides not to examine the authors' other claims under article 37 (a) of the Convention, which are based on the same facts.

7.8 The Committee notes the authors' argument that K.S. was not heard in the asylum proceedings. It also notes the State party's arguments that he was not heard because of his young age, because the children's interests coincided with those of their parents, and because he could exercise his right to be heard through the authors and their counsel. The Committee notes that article 12 of the Convention guarantees children's right to be heard in any judicial or administrative proceedings affecting them, 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.[17] Furthermore, the Committee recalls that States parties must ensure that the views of the child are not only heard as a formality, but are taken seriously.[18] It also recalls that children involved in immigration and asylum proceedings are in a particularly vulnerable situation, which is why it is urgent to fully implement their right to express their views on all aspects of such proceedings, including by ensuring that they have the opportunity to present their reasons leading to the asylum claim.[19] The Committee points out that determining the best interests of the children also requires that their situation be assessed separately, notwithstanding the reasons for which their parents made their asylum application. It does not share the State party's view that K.S. should not be heard because his interests coincided with those of his parents. Therefore, the Committee considers that, in the circumstances of

[17] Committee on the Rights of the Child, general comment No. 12 (2009), para. 21. and *E.A. and U.A. v. Switzerland*, para. 7.3.

[18] Committee on the Rights of the Child, general comment No. 12 (2009), para. 45.

[19] Ibid., para. 123.

this case, the State party's failure to hold a direct hearing for K.S. constituted a violation of articles 3 and 12 of the Convention.

8. The State party should therefore provide M.S. with effective reparation, including adequate compensation. The State party is also required to take all steps necessary to prevent any further violations of the rights provided for in articles 3, 12 and 24 of the Convention. In this regard, the Committee recommends that the State party ensure that children are routinely given the opportunity to be heard in connection with any decision concerning them, that they receive information, in a language they understand, about this opportunity, the relevant context, and the consequences of the hearing in connection with asylum proceedings, and that national protocols for the removal of children are in line with the Convention. The State party should also ensure that consideration of children's asylum applications based on the need for medical treatment necessary for a child's development includes an assessment of the availability and practical accessibility of such treatment in the State to which the child is returned.

9. 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 measures it has taken to give effect to the Committee's Views. The State party is also requested to include information about any such steps in its reports to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish the present Views and have them widely disseminated in its official languages.