



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. 73/2019* **

<i>Communication submitted by:</i>	K.K. and R.H. (represented by counsel, Bruno Soenen)
<i>Alleged victim:</i>	A.M.K. and S.K.
<i>State party:</i>	Belgium
<i>Date of communication:</i>	30 January 2019 (initial submission)
<i>Date of adoption of Views:</i>	4 February 2022
<i>Subject matter:</i>	Administrative detention; deportation to Armenia
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claim
<i>Procedural issues:</i>	Best interests of the child; deprivation of liberty
<i>Articles of the Convention:</i>	3, 24, 27, 28, 29, 31 and 37
<i>Article of the Optional Protocol:</i>	7 (e) and (f)

1.1 The authors of the communication are K.K., a man born on 16 February 1982, and R.H., a woman born on 1 January 1980, both Armenian nationals. They submitted the communication on behalf of their two daughters, born in Belgium: A.M.K., born on 9 January 2011, and S.K., born on 3 September 2016. The authors claim on the one hand that their children, by virtue of their detention, are victims of a violation by the State party of article 37 of the Convention, read alone and in conjunction with articles 3, 24, 28, 29 and 31, and on the other hand, that their deportation to Armenia would violate article 27 of the Convention. The Optional Protocol entered into force for the State party on 30 August 2014.

1.2 On 4 February 2019, in accordance with article 6 of the Optional Protocol, the Committee, acting through the Working Group on Communications, requested the State party to release the authors and their children from the migrant detention centre but rejected their request for the suspension of their removal to Armenia.

* 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 Chopel, Bragi Gudbrandsson, Philip Jaffé, Sopia Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, Zara Ratou, José Ángel Rodríguez Reyes, Ann Marie Skelton and Velina Todorova.



1.3 At its eighty-fifth session, the Committee decided not to strike the case from the list of cases until it had received assurances from the State party that it would comply with the decision of the Federal Ombudsman.

The facts as presented by the authors

2.1 The authors are Armenian nationals and have been living in Belgium since 2009. Upon arrival, they applied for asylum, but their application was rejected in December 2010. In January 2011, they lodged an appeal to overturn this decision, which was rejected in April 2011 by the Council for Alien Law Litigation. The Immigration Office therefore issued them with an order to leave the country in October 2012. The authors filed an appeal against this order, which was rejected in February 2013.

2.2 In July 2010, in parallel with the international protection procedure, the authors applied for a residence permit on medical grounds, based on article 9 ter of the Act of 15 December 1980 on the entry into the national territory, temporary and permanent residence and removal of aliens. This application was declared admissible but unfounded by the Immigration Office in October 2010, and the decision was confirmed in September 2011. The authors applied for a second time for a residence permit on medical grounds in March 2012, which was found inadmissible in June 2012; an appeal to overrule that finding before the Council for Alien Law Litigation was rejected in October 2012. A third application for a residence permit on medical grounds was submitted in January 2013 and was also found inadmissible. On that occasion, the Immigration Office issued to the authors a ban on entry.

2.3 In addition, in January 2013 the authors submitted an application for regularization based on article 9 bis of the Act of 15 December 1980; that application was declared inadmissible in October 2013. In May 2018, they submitted a second application for regularization based on that article, which was also declared inadmissible, in December 2018.

2.4 In the meantime, during these various asylum requests, applications for residence permits on medical grounds and applications for regularization, the authors had their two children, in 2011 and 2016.

2.5 On 8 January 2019, at 5.30 a.m., the family was arrested at their home, notified of a new order to leave the country and taken to a “family house” at a closed centre for aliens near Zaventem International Airport in Brussels.

2.6 On 14 January 2019, the authors lodged an appeal for suspension on grounds of extreme urgency with the Council for Alien Law Litigation against the order to leave the country; the appeal was rejected on 18 January 2019.

2.7 On 16 January 2019, the authors also filed a motion before the Council for Alien Law Litigation to suspend and overturn the decision handed down in December 2018 to reject their second application for regularization, and on 21 January 2019 they accompanied that motion with a request for interim measures to seek the suspension of the decision of inadmissibility on grounds of extreme urgency; the request was rejected on 23 January 2019.

2.8 On 21 January 2019, the authors filed a petition for release before the Antwerp Judge’s Chambers; it was rejected on 28 January 2019. The authors would also appeal to the Indictments Division; that appeal too would be dismissed.

2.9 Pending the decision by the Antwerp Judge’s Chambers, on 23 January 2019 the authors also filed a unilateral petition with the Antwerp Court of First Instance requesting that it prohibit the removal of the family before a final decision was taken on their detention. This request was declared admissible on 24 January 2019, granting the suspension of repatriation pending a final decision by the Antwerp Judge’s Chambers on the petition for release. The Immigration Office lodged a third-party objection, which the Court upheld. The Court then considered that, since the Judge’s Chambers had ruled against the petition for release, the stay of deportation should be lifted.

2.10 In a report of 25 January 2019, a child psychiatrist noted that the elder child suffered from her detention, noting “the beginnings of the major pathological repercussions of confinement on the psychological, narcissistic and identity development [of A.M.K.], and

harmful effects that could only be seriously compounded by the enduring confinement and the prospect of an extremely traumatic expulsion”.

The complaint

3.1 The authors argue that the available remedies have been exhausted for each of the two grounds of the complaint, namely detention and expulsion. With regard to the appeals on the former grounds, they specify that decisions on deprivation of liberty may be challenged before a criminal court, the Judge’s Chambers, and, on appeal, the Indictments Division. However, such appeals do not have suspensive effect and therefore do not prevent the implementation of a removal order. In this case, the family filed a petition for release before the Antwerp Judge’s Chambers to challenge the detention. Following the rejection by the Judge’s Chambers, which found that the detention of the children was lawful, the family appealed before the Indictments Division. The authors point out that the children have no effective remedy because such remedies do not make it possible to prevent expulsion.

3.2 With regard to appeals relating to the second of the grounds, expulsion, the authors state that the decisions for termination of residence and expulsion may be appealed before administrative courts, the Council for Alien Law Litigation and the Council of State, in administrative cassation. In this case, an application on grounds of extreme urgency was lodged against the order to leave the territory, but it was rejected by the Council for Alien Law Litigation.

Grievance relating to detention on migration grounds: right to liberty; right to an effective remedy in case of deprivation of liberty; impact on other rights

3.3 The authors indicate that, since the adoption of the Royal Decree of 22 July 2018, families with children can be locked up for migration-related reasons. They argue that this is contrary to the Convention because the right to liberty is a fundamental right that cannot be subject to exceptions for reasons related to migration.¹

3.4 The authors further argue that the detention was not a measure of last resort, as no measures that would better avoid violating their fundamental rights had been previously applied. They point out that there was the possibility for them to report regularly to the authorities, to prepare their return from their home or to be placed in an open “return house”, as an alternative to imprisonment.

3.5 The authors also indicate that their detention was excessively long, as they had been held for 3 weeks and 2 days.

3.6 Furthermore, they claim that the interests of the children were not taken into account when the family was arrested and detained at a closed centre.

3.7 Lastly, the authors argue that detention violates many other rights, in particular those protected by article 3.3 of the Convention; article 24 (1) on the highest attainable standard of health, as the children suffer severely from the air and noise pollution caused by the proximity of the airport, which puts constant pressure on the family, and the regulations do not provide for the presence of a paediatrician at the closed centre; articles 28 (1) and 29 (1) on the right to education; and article 31 on the right to rest and leisure and to participate freely in cultural life and the arts.

Complaint relating to expulsion: Right to a standard of living adequate for the child’s physical, mental and social development

3.8 The authors also argue that the expulsion of the children to a country they do not know, and which their parents left almost 10 years ago, constitutes a violation of their right to an adequate standard of living for their physical, mental and social development, since, having

¹ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and general comment No. 22 of the Committee on the Rights of the Child (2017), paras. 11 and 42; and joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child, para. 5.

no ties in Armenia, the entire family would be thrown into poverty, without access to housing and means of subsistence.

Redress

3.9 The authors call for child psychiatric support for their children and compensation for the damages suffered, estimated at €10,000 per child.

State party's observations on admissibility and the merits

Clarification of the facts

4.1 On 5 August 2019, the State party clarified the facts as presented by the authors, stating that they had already had a placement in an open return house, as the authors had in 2014 been the subject of a first administrative monitoring report that noted their irregular stay in the country, and as the Immigration Office had thus issued them an order to leave the territory. However, the family had fled the open return house. For this reason, when the authors were the subject of the second administrative monitoring report, which again found them to be illegally residing in the country, and the Immigration Office issued a new order to leave the country with a view to deportation and a ban on entry, the family was transferred to a family house located within a closed centre, since the risk of flight – as defined by the regulations – was established. In this regard, the Judge's Chambers, in considering the legality of the detention in the context of the authors' appeal, observed that the detention was lawful because the authors had previously fled from a return house with the intention of going into hiding.

4.2 The State party also points out that on 9 January 2019, the day after their placement in a family house, the family members were examined by a doctor who found that their state of health did not prevent their removal to the country of origin and that it did not exclude their continued stay at a closed family house. Another assessment of the impact of the detention on the authors was carried out on 16 January 2019 and found that the family was effectively functional.

4.3 On the same day, a first attempt at repatriation was to have taken place, but it was cancelled because the authors lodged an appeal on grounds of extreme urgency against the order to leave the country. For this reason, on 21 January 2019, the Director General of the centre communicated in writing the reasons for the extension of the family's stay at the family house.

4.4 On 24 and 30 January and 2 February 2019, three further attempts at repatriation were cancelled, as the authors lodged various appeals, including an application for international protection, the latter filed after the communication was submitted to the Committee. It was because of these appeals that the Immigration Office issued a decision to keep the family in a closed centre.

4.5 On 5 February 2019, the day after the Committee adopted interim measures, the authors were transferred to an open return house, an alternative to imprisonment.

4.6 On 11 February 2019, the authors filed a second petition for release before the Antwerp Judge's Chambers, which was declared inadmissible on 15 February 2019. The authors appealed against that decision; the appeal was rejected on 15 March 2019.

4.7 On 22 February 2019, the authors filed another petition for release with the Antwerp Judge's Chambers, which was also declared inadmissible, on 1 March 2019.

4.8 On 11 March 2019, the application for international protection filed after the submission of the communication to the Committee was declared inadmissible.

4.9 On 5 April 2019, the authors were released from the return house and went back to live in their home.

Admissibility

4.10 The State party argues that the communication should be considered inadmissible for failure to exhaust domestic remedies, in respect of both the complaint regarding detention

and the one regarding expulsion. With regard to the detention, it notes that the authors were placed in a closed centre on 8 January 2019 and that a first petition for release was filed with the Antwerp Judge's Chambers only on 21 January 2019, or after the extension of the first 15-day period of detention. The initial detention was therefore not challenged by the authors and the communication must therefore be declared inadmissible. With regard to the expulsion, although the authors filed a unilateral application before the Antwerp Court of First Instance, when the Court granted it and the State party filed a third-party objection, the objection was upheld by the Court, without the authors considering it appropriate to appeal; they thus failed to exhaust domestic remedies.

On the merits

4.11 The State party then points out that under Belgian law, the possibility of detaining children at closed centres in the context of migration is provided for by law,² and that the Constitutional Court has had occasion to point out that since article 37 of the Convention does not prohibit the detention of minors in absolute terms, such detention may take place if it is carried out in accordance with the law, provided that it is not arbitrary, if it is applied as a last resort, for as short a time as possible, and if families with children are placed in a centre that is adapted to the children's needs.³ Thus, the Constitutional Court ruled that, subject to these conditions, the legislation authorizing the detention of families with minor children was legal and respected their fundamental rights.

4.12 Thus, the State party maintains that the authors' argument that minor children can never be detained for migration-related reasons is invalid, as article 37 of the Convention does not prohibit the detention of minors in absolute terms and does not contain any objection to detention for reasons related to migration. The State party also recalls general comment No. 35 (2014) of the Human Rights Committee, which states that the right to liberty is not an absolute right and that detention during immigration control proceedings is not in itself arbitrary, but must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Specifically, children should not be deprived of liberty except as a measure of last resort and for the shortest appropriate period of time, and their best interests must be the primary consideration.⁴ The State party also refers to the jurisprudence of the European Court of Human Rights, according to which a minor may be detained, in certain circumstances, if expulsion proceedings are pending.⁵

4.13 Applying these international standards to the present case, the State party begins by recalling that it is not for the Committee, in place of the national authorities, to assess the facts of the case and the evidence, but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment.⁶ In the present case, as the authors' detention was reviewed by the investigating courts, which concluded that it was lawful, without the authors alleging any denial of justice or arbitrary evaluation in the decisions of the domestic authorities, the State party argues that this claim should be rejected. In the alternative, it submits that the authors fail to explain how the detention was unlawful or arbitrary and recalls that they did not submit a petition for release for the first period of detention.

4.14 The State party also argues that the detention was indeed a measure of last resort. On this point, the authors had been issued three orders to leave the country voluntarily.⁷ After

² Possibility introduced by article 2 of the Act of 16 November 2011 inserting an article 74/9 into the Act of 15 December 1980 on the entry into the national territory, temporary and permanent residence and removal of aliens, in respect of the prohibition against detaining children at closed centres. See also the Royal Decree of 2 August 2002, amended by the Royal Decree of 22 July 2018 to arrange for the detention of families with minor children at family houses established within closed centres.

³ Constitutional Court of Belgium, Judgment No. 166/2013, 19 December 2013, para. B.14.2.

⁴ See also *Jalloh v. Netherlands* (CCPR/C/74/D/794/1998), paras. 8.2 and 8.3; and *D. et al. v. Australia* (CCPR/C/87/D/1050/2002), para. 7.2.

⁵ European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment, 12 October 2006, para. 101.

⁶ *C.E. v. Belgium* (CRC/C/79/D/12/2017), para. 8.4.

⁷ The State party indicates that it encourages the voluntary return of nationals illegally residing in its territory. Voluntary return is organized from Belgium to the country of origin, covering transport

noting their refusal to return voluntarily to their country of origin, the Immigration Office issued an order to leave the country, which included a measure of constraint enabling it to place the authors in an open return house, an alternative to the detention of families with minor children.⁸ The authors fled from the return house. When the Immigration Office rearrested them, it chose to place them in a family house within a closed centre, on the grounds that the family had previously run away from an open return house. On this point, the regulations provide that “in the event of non-cooperation in removal or resumption or effective removal, the family may be kept in detention in a closed centre”.⁹ This last decision, which has been brought before the Committee, was therefore a measure of last resort, since the authors had already had an alternative to imprisonment. Furthermore, the authors could not be kept in their home either, because they did not meet the criteria established by law, as the parents had been banned from entering the country. The State party also points out that this last decision is a measure of return under the meaning of article 6 of European Directive 2008/115/EC¹⁰ of 16 December 2008.

4.15 On the question of whether the procedures are appropriate for children, the State party argues that a five-day time limit for taking a decision on detention cannot be considered unreasonably long. In the present case, the courts decided within a time frame of urgency and the authors did not consider it useful to file their petition for release promptly; they initiated the procedure two weeks after the detention began. The fact that the time limits are the same for adults and children does not preclude the courts from working with diligence and with the urgency that is warranted by the detention of an individual.

4.16 On the duration of detention, article 13 of the Royal Decree of 22 July 2018 provides that a family with minor children can be held only “for the shortest possible period of time, which may not exceed two weeks” and which can be extended only “for a maximum of two weeks” and under certain conditions, one of which is the absence of the detention’s impact on the physical and psychological integrity of the minor. The regulations thus expressly provide that the duration of detention must be as short as possible, the two-week period not being the rule, and the possibility of an extension being exceptional and having to meet various criteria. In the case in question, a report was drawn up by the centre’s directors to decide whether it would be appropriate to extend the detention of the children. The report observed that they had integrated perfectly into the life of the centre: the elder daughter took part in the activities organized by the centre, she attended classes given at the centre, she also attended speech therapy classes, and she was cheerful and spontaneously approached the members of the team – according to the State party, the authors thus had the opportunity to benefit from medical and psychological follow-up during their detention. Earlier, a psychological report dated 16 January 2019 had stated that the family was apparently functioning properly. It was thus on the basis of these elements and the demonstration that the children were not suffering from the detention that the decision was taken by the Immigration Office to extend the detention.

4.17 Furthermore, the State party considers that the length of the detention, if considered to be excessive, is the result of the authors’ behaviour and not of the attitude of the national authorities, since a repatriation was first planned eight days after the beginning of the detention. If the detention was extended, it was only because of the procedural obstinacy of the authors, who at the last moment filed proceedings on grounds of extreme urgency and an application for international protection, which meant that the authorities had to cancel the repatriation. In this sense, the national legislation and European regulations provide for the possibility of keeping applicants for international protection in detention while their

costs, assistance with the journey and, depending on the migrant’s situation, a departure allowance and support for reintegration in the country of origin (to develop a business project, rent or renovate housing or reimburse medical expenses, etc.).

⁸ Families are accompanied by support workers who psychologically prepare them for the prospect of returning to their country of origin. As article 19 of the Royal Decree of 14 May 2009 points out, “each family member may leave the accommodation daily, without prior authorization”.

⁹ See the Royal Decree of 14 May 2009, amended by the Royal Decree of 22 April 2010.

¹⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union*, L.348, 24 December 2008, p. 98.

applications are examined, in particular when the foreigners have introduced the applications with the aim of preventing or delaying their repatriation, or when there is a risk of absconding.

4.18 The State party also maintains that the best interests of the children were taken into account at every stage of the procedure: before the family's arrest, the Immigration Office on three occasions gave them the opportunity to leave Belgian territory voluntarily in order to avoid the forced repatriation procedure. Due to its refusal to voluntarily comply with the obligation to leave the country, the family was ordered to leave the territory and this time placed in a return house, an open accommodation facility created specifically for families with children. However, the family had fled the open return house. The Immigration Office thus had no alternative but to place them in a family house within a closed centre.

4.19 With regard to the alleged violation of other rights, the State party points out that a family house within a closed centre guarantees the appropriate development of the child during the period of detention: the house, which is dedicated only for the use of the family, is completely separated from the other detainees, with access to common areas; it is, moreover, equipped with the necessary furniture and facilities, including a sufficient number of rooms and a kitchen. The psychiatrist also pointed out that the family house was comfortable, spacious and bright, and that the soundproofing was optimal. The family was able to call on the medical service daily, and a psychologist was present. As far as education is concerned, the elder daughter attended classes appropriate for her age. The air pollution cited by the authors affects the various communities around the airport, including the many homes and a primary school located nearby. The authors, who only stayed in the vicinity of the airport for a short period, have in no way demonstrated that this pollution had any adverse effects on their health. Regarding the noise cited by the authors due to the proximity of the airport, the State party indicates that according to an independent study, aircraft noise outdoors was 58 decibels on landing and 68 decibels on take-off, which complies with the regulations; indoors, the noise is reduced by sound insulation. The authors also had the option of using noise-cancelling headphones outdoors; earplugs were also available. The State party also points out that the environmental question was considered for planning permission purposes and that the family houses were constructed in a buildable area. Thus, the noise pollution is in no way comparable to the noise pollution addressed by the judgments of the European Court of Human Rights.¹¹

4.20 On the allegations of the violation, owing to expulsion to Armenia, of the right to an adequate standard of living, the State party observes that the Committee rejected the request for interim measures to suspend the authors' removal to their country of origin, and that the authors have submitted no evidence to demonstrate an actual risk of a violation of article 27 of the Convention.

Additional information provided by the parties

Authors

5.1 On 24 February 2020, after three reminders from the Committee's secretariat for the authors to comment on the State party's observations on the admissibility and merits of the communication, their counsel simply confirmed that they had returned to their home in the State party.

5.2 On 5 June 2020, the authors' counsel informed the Committee that on 3 June 2020, the Federal Ombudsman had declared, following a complaint by the authors against the Immigration Office, that their detention in the absence of alternatives to imprisonment had been prejudicial. Pointing out that the Federal Ombudsman's opinion was not a court decision, as the Ombudsman had no judicial competence, counsel requested the Committee to continue its consideration of the communication.

¹¹ European Court of Human Rights, *A.B. and Others v. France*, Application No. 11593/12, Judgment, 12 July 2016, paras. 113–115; and *R.M. and Others v. France*, Application No. 33201/115, Judgement, 12 July 2016, paras. 74–76.

State party

6.1 On 1 February 2021, the State party informed the Committee that on 1 March 2019, A.M.K. had for the first time submitted an application for regularization in her own name, on the basis of article 9 bis of the Act of 15 December 1980, and that on 21 September 2020 she had obtained a residence permit so that she could continue her schooling.

6.2 On 8 December 2020, S.K. too had submitted an application for regularization, which was currently under consideration.

6.3 With regard to the opinion of the Federal Ombudsman, the State party recalls first of all that such opinions are merely recommendations and are not binding. The competent court, i.e., the Judge's Chambers, had examined the legality of the detention, and its judicial decision could not be challenged by an opinion of the Federal Ombudsman.

6.4 The State party indicates that it does not share the opinion of the Federal Ombudsman. The authors were detained at a closed centre from 8 January to 5 February 2019, a period that does not exceed the time limit established by the domestic legislation. Furthermore, the authors were examined by a doctor, whose report, which supported the continuation of the detention, was not challenged by the authors. The State party reiterates that the best interests of the children were properly taken into account and that the detention was indeed a measure of last resort, after three orders to leave the country without coercive measures, followed by a placement in a return house, from which the family fled the next day with the intention of going into hiding. The State party observes that the Federal Ombudsman does not mention the family's unwillingness to comply with the law.

6.5 Furthermore, the State party informs the Committee that on 1 October 2020, the Council of State finally issued a ruling in the context of the proceedings to cancel the Royal Decree of 22 July 2018: it held that family houses at closed centres, provided for in the contested Royal Decree, did indeed comply with the positive obligations stemming from international standards on the detention of children for reasons related to migration.¹² Specifically, the ruling did not strike down the provision on the time limit for detention; it cancelled three provisions: a first one, which allowed families to be restricted in their access to outdoor spaces; a second one, which allowed the staff of the centres to enter the family houses without any conditions between 6 a.m. and 10 p.m.; and a third, which allowed young persons over the age of 16 who posed security threats to be held in isolation for 24 hours.

6.6 Lastly, with regard to the remedies requested by the authors, the State party indicates that: (a) the expulsion will not take place, since A.M.K. has been granted a residence permit and S.K.'s application for regularization is under consideration; (b) A.M.K. is entitled to social assistance and can therefore apply for psychological help, and S.K. is entitled to medical assistance, which covers both preventive and curative care; and (c) the claim for financial compensation of €10,000 per child cannot be accepted, as the alleged damage to their physical and psychological integrity has been neither substantiated nor demonstrated. In this respect, the State party points out that other noise studies carried out by independent experts¹³ concluded that all the measurement results were in line with the regulations, both outside and inside family houses and return houses, and were well within the recommendations of the World Health Organization (established, moreover, for long-term exposure, which is not the case here).

Authors

7. On 6 February 2021, counsel for the authors informed the Committee that the Council for Alien Law Litigation had on 15 January 2021 quashed the order to leave the country and the entry ban.

State party

8.1 On 18 March 2021, the State party pointed out that in the above-mentioned ruling by the Council for Alien Law Litigation, the Council noted that, after the order to leave the

¹² See Council of State of Belgium, Judgment No. 248.424, 1 October 2020.

¹³ The State party attaches a noise study dated 16 July 2019 and an acoustic report dated 22 July 2019.

territory and the order banning entry had been issued, the authors' elder daughter had been authorized to stay, as she was subject to compulsory education. Thus, in consideration of her best interest regarding her right to respect for private and family life, the ruling stated that it was no longer possible to argue that she should follow the administrative situation of her parents; in order to avoid a breakdown of family ties, the entire family was therefore allowed to remain in the State party.

8.2 The State party specifies that this ruling, cancelling the order to leave the territory and the order banning entry, in no way calls into question the legality of those decisions at the time they were adopted: it was subsequent events – the application for and granting of a residence permit – that changed the reasoning of the ruling.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 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.

9.2 The Committee notes the State party's arguments that the communication is inadmissible under article 7 (e) of the Optional Protocol because the authors have not exhausted all domestic remedies, on the one hand as they failed to file a petition for release for the first 15-day period of detention, and on the other hand as they failed to appeal against the order of the Antwerp Court of First Instance, which had upheld the State party's third-party objection after the Court had requested a stay of repatriation. The Committee notes, however, the authors' arguments that they have pursued all available remedies, even if such remedies were not intended to prevent expulsion.

9.3 The Committee observes that the authors, who were detained from 8 January 2019, filed a petition for release before the Antwerp Judge's Chambers on 21 January 2019, and that following its rejection, they lodged an appeal with the Indictments Division. With regard to the expulsion, the Committee observes that: (a) on 14 January 2019 the authors lodged an appeal with the Council for Alien Law Litigation for a suspension on grounds of extreme urgency of the order to leave the country; (b) on 16 January 2019, they lodged an application with the same Council to suspend and void the rejection of their application for regularization; and (c) on 23 January 2019, they lodged a unilateral application with the Antwerp Court of First Instance requesting that it prohibit their removal. In this regard, the Committee also observes that, although the authors did not appeal against the order of the Antwerp Court of First Instance, which upheld the State party's third-party complaint after the Court had requested the suspension of repatriation, the Court ultimately found that since the Judge's Chambers had in the meantime ruled against the application for release, the suspension of the deportation order should be lifted. The Committee recalls that the exhaustion of domestic remedies rule does not impose an obligation on the authors to absolutely exhaust all available domestic remedies; its purpose is to allow the national authorities to take a decision on the authors' claims. Similarly, in the context of the authors' imminent expulsion, any remedies that do not suspend the execution of the existing deportation order cannot be considered effective.¹⁴ In the present case, the Committee observes that the authorities of the State party have had the opportunity to decide on both the detention and the expulsion. Therefore, the Committee considers that the communication must be considered admissible under article 7 (e) of the Optional Protocol.

9.4 The Committee notes the authors' claim relating to article 27 of the Convention, according to which the expulsion of the children to a country they do not know, and which their parents left almost 10 years ago, would constitute a violation of their right to an adequate standard of living for their physical, mental and social development, since, having no ties in Armenia, the entire family would be thrown into poverty, without access to housing and means of subsistence. The Committee observes, however, that A.M.K. eventually submitted an application for regularization in her own name on 1 March 2019 and was thus authorized

¹⁴ *B.I. v. Denmark* (CRC/C/85/D/49/2018), para. 5.2.

to stay on 21 September 2020, and that S.K. submitted the same request on 8 December 2020. It also notes that the Council for Alien Law Litigation on 15 January 2021 revoked the order to leave the country and the ban on entry, and that the entire family is thus allowed to remain in the State party. As the authors and their children are no longer subject to removal to Armenia, the Committee considers that their complaint under article 27 of the Convention has become moot.

9.5 On the other hand, the Committee considers that the authors' claims under article 37 of the Convention, read alone and in conjunction with articles 3, 24, 28, 29 and 31, in relation to their administrative detention for reasons related to migration, have been sufficiently substantiated for the purposes of admissibility. Accordingly, it declares these claims admissible and proceeds to their consideration on the merits. It specifies that the detention that it is to consider is the detention in the family house at the closed centre that took place from 8 January to 5 February 2019, when the authors were transferred to an open return house, where they were free to leave during the day, and which they eventually left after A.M.K. submitted an application for regularization in her own name.

Consideration of the merits

10.1 The Committee has considered this 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.

10.2 The Committee notes the authors' allegations that the State party violated their children's rights under article 37 of the Convention, read alone and in conjunction with articles 3, 24, 28, 29 and 31, as a result of their administrative detention for reasons related to migration. It notes in particular that, according to the authors, the detention of the children was not a measure of last resort and was not as brief as possible, and that the proximity of the airport put constant pressure on the family.

10.3 The Committee also takes into account the State party's position that under domestic law,¹⁵ and in accordance with international law, the detention of juveniles is lawful if it is carried out in accordance with the law, is not arbitrary, is used only as a measure of last resort and for the shortest appropriate period of time, and is adapted to the children's needs. The Committee moreover takes into account the State party's position that the authors' detention was reviewed by the investigating courts, which concluded that the detention was lawful, without the authors alleging any denial of justice or arbitrary evaluation in the decisions of the domestic authorities. In this connection, the State party also points out that the courts issued rulings rapidly, amounting to respect for a time limit of urgency, whereas the authors did not consider it necessary to promptly file their application for release.

10.4 In particular, the Committee takes into account the State party's clarification that, in the present case, the detention was indeed a measure of last resort owing to several factors: the authors' refusal to comply with three orders to leave the country; the family's prior flight from the return house when such an alternative to detention had been put in place; and the fact that the conditions had not been met to keep the family in their home while waiting for the expulsion to take place. The State party specifies that, in the event of prior non-cooperation, according to the regulations, the family may be kept in detention at a closed centre.

10.5 The Committee also notes the State party's argument that the family houses at closed centres guarantee the appropriate development of children during their time in detention: the houses are completely separated from the other detainees; they are entirely reserved for families and are provided with the necessary furniture and equipment; the families are able every day to call for medical and psychological services, contrary to the authors' assertions; and the children participate in educational activities appropriate for their age.

10.6 Furthermore, the Committee notes that, according to the State party, a family with minor children can be held only for the shortest possible period of time, which may not exceed two weeks and can be extended only for a maximum of two weeks, and under certain

¹⁵ Article 2 of the Act of 16 November 2011 and Royal Decree of 2 August 2002, amended by Royal Decree of 22 July 2018.

conditions, one of which is the absence of the detention's impact on the physical and psychological integrity of the minors. In the present case, the length of the detention – from 8 January to 5 February 2019 – was the result, according to the State party, of the authors' procedural obstinacy, which forced the State party to extend their detention pending the decisions of the various courts, an extension that was moreover made following a report that noted their full integration into the life of the centre.

10.7 On the issue of the noise from the airport, the Committee also notes the State party's argument that reports by independent experts concluded that all noise measurements were in compliance with the regulations, as the family and return houses were built in a buildable area.

10.8 Lastly, the Committee notes the State party's position that the best interests of the children were taken into account at every stage of the procedure: the Immigration Office gave the family the opportunity to leave the country voluntarily on three occasions to avoid the forced repatriation procedure; the family was unsuccessfully placed in a return house, an open accommodation facility created specifically for families with minor children; and lastly, at the centre, the elder daughter took part in activities and took classes, including speech therapy classes.

10.9 The Committee recalls its general comment No. 23 (2017), issued jointly with general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which the detention of any child because of their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child, taking into consideration the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, and according to which the possibility of detaining children as a measure of last resort must not be applicable in immigration proceedings.¹⁶ Similarly, the Committee recalls its concluding observations issued in respect of the fifth and sixth periodic reports of Belgium, in which it requested the State party to put an end to the detention of children at closed centres and to use non-custodial solutions.¹⁷

10.10 The Committee observes that, in the present case, the children were detained with their parents in a family house at a closed centre for foreigners from 8 January to 5 February 2019, the day after the adoption of the interim measures by the Committee. On that day, they were transferred to a single-family, open return house, an alternative to detention, which they left on 5 April 2019 following the favourable resolution of the application for regularization submitted on 1 March 2019 on behalf of A.M.K., on the basis of article 9 bis of the Act of 15 December 1980.

10.11 The Committee notes that the children were detained for four weeks in a family house which, although it bears that name, is a closed detention centre. In this regard, the Committee considers that the deprivation of liberty of children for reasons related to their migratory status – or that of their parents – is generally disproportionate¹⁸ and therefore arbitrary within the meaning of article 37 (b) of the Convention.

¹⁶ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child, paras. 5, 9 and 10.

¹⁷ CRC/C/BEL/CO/5-6, para. 44 (a).

¹⁸ A/HRC/28/68, para. 80 ("Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children"). See also Manfred Nowak, *The United Nations Global Study on Children Deprived of Liberty*, Nov. 2019, p. 467 (noting that studies have repeatedly found that children in immigration detention experience serious harm, immigration detention has consistently been associated with physical and mental health concerns, either as a result of children being detained with existing health conditions that are exacerbated in detention (especially trauma) or of new conditions arising in detention contexts (such as anxiety and depression)).

10.12 In the present case, the Committee notes that the State party considers that the long period of detention of four weeks was due, inter alia, to the numerous requests for release submitted by the authors, obliging the State party to await the decisions of the authorities concerned. However, the Committee considers that the authors' exercise of their right to judicial review cannot justify the detention of their children. The Committee is also aware that (a) the conditions for considering the detention of children in the context of migration are governed by the State party's legislation; (b) within the closed centre for foreigners, the children had a house reserved for their family unit; (c) they took part in the activities proposed by the educators; and (d) the authors had previously failed to comply with three orders to leave the country voluntarily and had already fled from an open house.

10.13 However, the Committee notes that the State party has not considered any alternative to the detention of children; the family lived in their home, to which they returned after their release, and no evidence was presented to the Committee as to why it was not possible for the family to remain there while the appeal proceedings were under way. The Committee considers that by failing to consider possible alternatives to the detention of the children, the State party has not given due regard, as a primary consideration, to their best interests, either at the time of their detention or when their detention was extended.

10.14 In view of the foregoing, the Committee concludes that the detention of A.M.K. and S.K. constituted a violation of article 37 of the Convention, read alone and in conjunction with article 3.

10.15 Having concluded that there has been a violation of article 37 of the Convention, read in conjunction with article 3, the Committee does not consider it necessary to rule separately on the existence of a violation of article 37 of the Convention read in conjunction with articles 24, 28, 29 and 31, for the same facts.

11. Consequently, the State party should therefore provide A.M.K and S.K. with adequate compensation for the violations of their rights. It is also obliged to ensure that such violations do not recur, by ensuring that the best interests of the child in decisions concerning their detention are a primary consideration.

12. 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 such steps in its reports to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish these Views and to disseminate them widely.
