United Nations CRC/C/92/D/101/2019

Convention on the Rights of the Child

Distr.: General
21 February 2023
English
Original: French

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. 101/2019*, **, ***

Communication submitted by:	Z.M. (represented by counsel, Boris Wijkström and Gabriella Tau)
Alleged victims:	Z.T., T.T. and S.T.
State party:	Switzerland
Date of communication:	10 October 2019 (initial submission)
Date of adoption of Views:	25 January 2023
Subject matter:	Deportation to Austria
Procedural issues:	Exhaustion of domestic remedies; substantiation of claims; justiciability of Convention rights
Substantive issues:	Best interests of the child; protection and humanitarian assistance for refugee children; private and family life; right of the child to the enjoyment of the highest attainable standard of health; inhuman or degrading treatment; physical and psychological recovery
Articles of the Convention:	3, 16, 22, 24, 37 and 39
Articles of the Optional Protocol:	7 (e) and (f)

1.1 The author of the communication is Z.M., a national of the Russian Federation born on 10 June 1982. She claims that her children, Z.T., born on 8 August 2005, T.T, born on 1 August 2006, and S.T., born on 12 December 2008, all nationals of the Russian Federation, would be victims of a violation by Switzerland of their rights under articles 3, 16, 22, 24, 37 and 39 of the Convention if she and they were to be removed to Austria under Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for

* Adopted by the Committee at its ninety-second session (16 January–3 February 2023).

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

*** 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.

examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation). She also claims that her children's rights under article 3 of the Convention were violated during the asylum procedure. She is represented by counsel. The Optional Protocol entered into force for the State party on 24 July 2017.

1.2 On 20 November 2019, the Working Group on Communications, acting on behalf of the Committee and in accordance with article 6 of the Optional Protocol, requested the State party not to deport the author and her children to Austria without having obtained from the Austrian authorities individual guarantees that the author and her children would receive the necessary medical care, including emergency treatment, if they needed it, while their case was being examined by the Committee. On 28 November 2019, the State party informed the Committee that it would not take any steps to deport the author and her children while their situation was being examined by the Committee or, as the case might be, until individual guarantees regarding necessary medical care had been obtained from the Austrian authorities.

Facts as submitted by the author[1]

2.1 In 2011, the author left Chechnya with her ex-husband and children and sought asylum in Austria. They were fleeing the persecution of her ex-husband by the regime of Ramzan Kadyrov.[2]

2.2 On 2 December 2013, the author and her family arrived in Switzerland and once again applied for asylum. In a decision of 6 January 2014, the State Secretariat for Migration dismissed their application for asylum and ordered their return to Austria in accordance with article 18 (1) (b) of the Dublin III Regulation. The author's subsequent appeal against the removal decision was declared inadmissible by the Federal Administrative Court in a decision handed down on 17 April 2014.

2.3 On 13 June 2014, the family were returned to Austria. The author claims that, following their return to Austria, she was beaten by her ex-husband and accused by him of adultery on a regular basis. She claims that, although his abuse was not directed at the children, they witnessed it directly and continually for years. The author claims that she did not seek police protection in Austria because she feared that the police would take her children away from her and because she feared her ex-husband's reaction. Moreover, they were living in a small village in the mountains and she did not know of any shelters for women victims of violence or other forms of protection. In May 2018, her ex-husband struck her violently in the face. She fled with the children and went to hide at the house of some friends in Vienna. During a medical consultation, she told the doctor that she had fallen on a bedpost.

2.4 In the meantime and without her knowledge, her ex-husband had signed an agreement with the Austrian authorities on the voluntary repatriation of the family to Chechnya. He subsequently returned to Chechnya alone and has reportedly continued to threaten the author with death or punishment for adultery under sharia if she returns to Chechnya.

2.5 On 1 August 2018, the Austrian Federal Administrative Court rejected the family's asylum application, which had been withdrawn by the author's ex-husband, noting that the author had not submitted a specific application for protection for herself. The Court noted that the family's asylum application had been based on claims that the author's ex-husband was facing political persecution, and that the author had filed only a brief statement indicating that she intended to continue the asylum process and citing "family problems" as the reason why she had been unable to present a detailed argument in her appeal. The Court therefore found that the author had failed to provide the necessary information in a timely manner and ordered the family's removal to the Russian Federation.

2.6 The author then consulted two lawyers about the possibility of having her asylum application reconsidered on the grounds that the authorities of Chechnya would not protect

[1] The information on the asylum procedure in Switzerland has been supplemented with data provided by the State party.

[2] Her ex-husband's brother was reportedly granted asylum in Switzerland on the grounds of political persecution by the regime of Ramzan Kadyrov.

her from gender-based violence. The lawyers reportedly told her that her chances of success were low. In order to avoid being sent back to Chechnya, the author decided to return to Switzerland.

2.7 On 31 October 2018, the author and her children applied for asylum in Switzerland on the grounds that the authorities of Chechnya and the Russian Federation would not protect her from potentially fatal acts of violence committed by her ex-husband, his family or even her own family. Moreover, as a single mother of three children, she would not be able to settle elsewhere in the Russian Federation without family support. She would therefore be forced to return to Chechnya, where she would be at risk of severe domestic violence and even death, and where her children would be taken away from her.

2.8 On 20 December 2018, the Austrian authorities accepted a request from the Swiss State Secretariat for Migration to take the author back under the Dublin III Regulation. On 7 January 2019, the State Secretariat for Migration decided to dismiss the author's second asylum application and ordered the family's removal to Austria. On 22 February 2019, the removal order was declared void by the Federal Administrative Court after the author appealed against it, arguing that the State Secretariat for Migration had not taken into account the family's medical situation and had thus violated their right to be heard. The Court ordered the State Secretariat for Migration to take a new decision.

2.9 On 24 May 2019, the author submitted three medical reports from the children's doctors to the State Secretariat for Migration. The reports show that the children's medical situation is extremely serious and worrying. They are all suffering from post-traumatic stress disorder and a severe stress reaction, for which they are undergoing close psychiatric monitoring and psychotherapy. The reports state that the children's illnesses are linked to the traumatic experience of domestic violence over an extended period, which has been compounded by their being uprooted several times from Switzerland to Austria and vice versa, and the chronic uncertainty of their situation. In November 2018, Z.T. committed self-harm by cutting her wrist and forearm. She has withdrawn into herself and her mental state is worrying. T.T.'s mental state is deteriorating and there is a risk of severe depression. S.T. suffers from urinary and faecal incontinence, epilepsy and social withdrawal. He was hospitalized in a closed psychiatric ward from 28 January to 6 February 2019 and is at risk of cognitive decline, a gradual loss of abilities, academic failure and additional mental health problems. The doctors stated that, for the children's health to improve, it was essential for them to live in stable conditions and a safe and predictable environment, and that the prospect of another move posed a direct threat to the children's health and well-being. The doctors informed the Genevan child protection authorities that there was an imminent risk to the three children's health and well-being. The author's medical situation, which is equally serious, was also presented to the State Secretariat for Migration. According to her doctor, her removal to Austria could lead to her being unable to cope psychologically, a loss of parenting ability and a risk of suicide.

2.10 On 4 June 2019, the State Secretariat for Migration once again dismissed the family's asylum application and ordered their transfer to Austria, stating that it was not minimizing the family's suffering but that Austria had medical facilities where they could receive appropriate treatment. The State Secretariat for Migration noted that, in this case, there were no grounds for applying the sovereignty clause set forth in article 17 (1) of the Dublin III Regulation.[3] With regard to the risk of suicide, the State Secretariat for Migration stated that it was understandable that some people might develop suicidal tendencies following the dismissal of their asylum application and the issuance of an order for their removal from Switzerland. However, it would not be right for the authorities to be forced to reconsider their decision because there had been mention of a risk of suicide. The State Secretariat for Migration stressed that neither a suicide attempt nor suicidal tendencies were in themselves

[3] Article 17 (1). "By way of derogation from Article 3 (1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation. The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility."

an obstacle to the enforceability or execution of a removal order and that only specific acts of endangerment should be taken into consideration. Moreover, the State Secretariat for Migration added that the author and her children would be able to consult a doctor and, if necessary, undergo further treatment in Austria, where the necessary medical infrastructure was available, and that it was the responsibility of their doctors to prepare them as well as possible for their departure from Switzerland.

2.11 On 18 June 2019, the author filed an appeal with the Federal Administrative Court, arguing that the family's removal to Austria would constitute inhuman and degrading treatment and that the State Secretariat for Migration had failed to take into account the best interests of the child and had "abused its discretionary power". The author referred in particular to the ruling of the European Court of Justice in the case *C.K. and others v. Republic of Slovenia*, in which the Court had held that, in circumstances in which the transfer (under the Dublin III Regulation) of an asylum-seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his or her state of health, that transfer would constitute inhuman and degrading treatment.[4] The author argued that the family's removal itself would put their health, development, and family life in immediate danger, regardless of the reception conditions in Austria. The author also asserted that they were at risk of "chain refoulement" to Chechnya and that there was nothing to indicate that they would be able to have their case reopened in Austria.

2.12 On 17 September 2019, the Federal Administrative Court rejected the author's appeal on the grounds that it could be presumed that Austria would comply with its regional and international human rights obligations. The Court noted that the author would be able to submit another asylum application for consideration by the Austrian authorities but, according to the author, did not provide any evidence that this would be possible after two unsuccessful applications. The Court also considered that the medical risks that the family would face if they were returned to Austria did not qualify as inhuman or degrading treatment.

Complaint

3.1 The author claims that her children's rights under article 3 of the Convention have been violated by the State party. She considers that the State party has violated the procedural obligation established in article 3 (1) of the Convention, because the decision of the Federal Administrative Court contained no justification for finding that the removal order was not contrary to the best interests of the children. The Court should have taken into account the medical necessity of their remaining in Switzerland in order to benefit from a stable environment and uninterrupted psychiatric treatment, the risk that her and her children's conditions would be worsened by their removal to Austria, the consequences of breaking the children's therapeutic bond with their doctors, the consequences of uprooting the children from an environment in which they had begun to feel settled and had formed relationships with friends, teachers and neighbours over the 12 months that the asylum procedure in Switzerland had lasted, and the uncertainties they would face if they were returned to Austria, including in terms of access to medical treatment, further asylum procedures, and the possibility of refoulement to Chechnya. Furthermore, the conclusion that medical treatment is available in Austria does not address the author's assertion that, in their case, the removal itself would harm them. The Federal Administrative Court did not take into account the criterion established by the European Court of Justice in the case *C.K. and others v. Republic of Slovenia*. The author notes that the Dublin III Regulation itself states that the best interests of the child should be a primary consideration in the application of the Regulation.

3.2 In addition, the author considers that the return of her children to Austria would be contrary to their best interests and would result in a substantive violation of article 3 (1) of the Convention. There is no public interest that would tip the balance in favour of deportation, especially given the unrefuted medical evidence demonstrating that returning the children to Austria would have extremely harmful effects. The author refers to the medical reports concerning her children and the risks that removal would pose to their health (see para. 2.9

[4] European Court of Justice, *C.K. and others v. Republic of Slovenia*, Case No. C-578/16 PPU, Judgment of 16 February 2017, para. 74.

above). She also refers to the medical report of Dr. L.L. of the Geneva University Hospitals that was submitted to the Federal Administrative Court, which stated that the removal of the family to Austria was medically inadvisable, that the author had "exhausted her mental resources" and that it was foreseeable that she might commit "a desperate act" that would require hospitalization in a psychiatric unit (if she did not actually kill herself) and would lead to her children's being placed in care, further exacerbating their psychological distress. The author states that, in her dealings with the Swiss authorities, she did not contest the fact that medical infrastructure exists in Austria; rather, she argued that receiving medical care in that country would in itself constitute another uprooting, especially for her three children, as new bonds of trust would need to be established with new therapists, and all the work done in Switzerland would need to be redone.

3.3 The author also states that the removal order constitutes a violation of the State party's obligation under article 39 of the Convention. Her children were exposed to serious domestic violence over an extended period. This experience left them traumatized and constitutes a form of "neglect" and "abuse" within the meaning of article 39 of the Convention. In the medical reports, the risk of removal was clearly identified as a direct threat to their development and a stress factor that could exacerbate their mental disorders and prevent their rehabilitation. The State party is therefore responsible for taking appropriate and proactive measures to ensure the children's rehabilitation, including by assuming responsibility for deciding on the author's asylum application under the sovereignty clause of the Dublin III Regulation.[5] For the same reasons, the author considers that the removal of her children to Austria would also violate their rights under article 24 of the Convention.

3.4 The author also draws attention to the jurisprudence of the Committee against Torture, which establishes that removal should not be carried out in cases where it would violate the right to rehabilitation enshrined in article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including where it would aggravate the author's illness and entail a risk of suicide.[6] In this instance, the adverse effects include the risk of suicide in the case of Z.M. and Z.T., severe depression in the case of T.T. and severe developmental and personality disorders in the case of S.T.

3.5 The family's removal to Austria would constitute arbitrary interference with the children's family life within the meaning of article 16 of the Convention insofar as it would put the author at greater risk of suicide or self-harm and could therefore result in the children's being placed in an institution or in foster care. It would be "arbitrary" because the State party has not properly evaluated the interests at stake.

3.6 The author submits that the family's removal to Austria would also violate article 37 of the Convention, as it would retraumatize the children.

3.7 Furthermore, the author considers that the above-mentioned rights should be interpreted in the light of the State party's positive obligations to provide appropriate protection to asylum-seeking children, under article 22 of the Convention. The extreme vulnerability of asylum-seeking children imposes particular duties of care and diligence on States.

Author's additional observations

4.1 In her additional observations of 14 November 2019, the author presented the medical reports concerning the family that had been drawn up in connection with their planned removal to Austria. The medical report concerning the author dated 14 November 2019 states that she is suffering from severe mental stress in addition to post-traumatic stress disorder and depression and that she is at risk of suicide. This stress is also fuelled by the psychological distress of her children: S.T. has also mentioned suicide in the event of their removal. The return of the author is, from a medical perspective, wholly inadvisable.

4.2 The medical reports concerning S.T. and Z.T., dated 7 and 8 November 2019 respectively, state that an inability to cope psychologically and a real risk of self-harm or

[5] Dublin III Regulation, art. 17 (1).

[6] *A.N. v. Switzerland* (CAT/C/64/D/742/2016), para. 8.8.

even suicide are to be expected if they are forcibly returned to Austria. The reports state that the authorities must arrange for psychiatric support to be provided immediately upon their arrival in Austria in order to prevent such acts and ensure continuity of medical care. The reports note that deportation would be contrary to their basic needs as children and that they need a predictable and stable environment. The report concerning S.T. states that he should not be uprooted again because he finds it very difficult to adjust to a new environment. In addition, the author asserts that the State party did not inform the Austrian authorities of her medical situation, as it is not mentioned in the request that she be taken back.

State party's observations on admissibility and the merits

5.1 In its observations dated 23 June 2020, the State party maintains that articles 3, 16, 22, 24, 37 and 39 of the Convention do not provide a basis for any individual right and are therefore not directly applicable.[7] In addition, the State party argues that part of the communication is inadmissible under article 7 (e) of the Optional Protocol, as the author has not exhausted domestic remedies in relation to the alleged violations of articles 16, 22, 24, 37 and 39 of the Convention. The State party notes that the author did not allege any violation of these articles of the Convention in her asylum application.

5.2 The State party also asserts that the communication is inadmissible under article 7 (f) of the Optional Protocol, as it is manifestly ill-founded or insufficiently substantiated. The State party maintains that, during the asylum proceedings, the state of health of all members of the family was a concern for the Swiss authorities and they endeavoured to gather all the relevant information, even though the transfer concerned Austria, a country that could undoubtedly offer the author and her children the same protection and support as Switzerland.

5.3 Regarding the alleged violation of article 3 of the Convention, the State party clarifies that, contrary to the author's claims, the Federal Administrative Court did give reasons for its decision of 17 September 2019, taking into account the best interests of the child. The Court considered that Austria would, like Switzerland, honour its obligations under international conventions by examining the fears expressed by the author, especially any new allegations that she had not already made before the family's departure from that country. It noted that there was no reason to believe that the Austrian authorities would not provide adequate protection in the event of threats, and mentioned that the author's ex-husband was no longer in Austria. The Court referred to all the documents relating to the children's medical situation and care needs. It expressly stated that their treatment should not be interrupted and that there were guarantees that it would not be. It emphasized that Austria has care and support structures similar to those in Switzerland and that the family would therefore be able to continue receiving the necessary medical and social care. The Federal Administrative Court concluded that, although the family's apprehension about returning to Austria was understandable, there was no reason to doubt that they would have access to appropriate care and support in that country, and that it was up to the children's therapists to prepare them in the best possible way for returning to Austria. Ultimately, it held that the author and her children were not at risk of treatment prohibited by international law and that Austria would provide the necessary framework for the children's healthy development, emphasizing again that there was no reason to believe that Austria would not give due consideration to their care needs. The State party also points out that the State Secretariat for Migration noted in its decision of 4 June 2019 that S.T. was already suffering from epilepsy when the first asylum application was filed in 2013 and that this did not prevent his removal to Austria. The State party adds that Austria has sufficient medical infrastructure and that, according to information from the State Secretariat for Migration, S.T. received treatment in that country.

5.4 The State party notes that the decisions of the Swiss authorities are based not on general reasoning but on an assessment of the family's actual situation that takes into account the interests of the children. As for the need to create a predictable and stable environment, the State party points out that the family spent a much longer period in Austria than in Switzerland, as they were in Austria from 13 June 2014 until the end of October 2018. The creation of an environment conducive to the children's healthy development was therefore

[7] The State party makes a general reference to the case law of the Federal Supreme Court.

possible in Austria, a country that the author decided to leave of her own free will, even after her ex-husband had returned to Chechnya. According to the decision of the Federal Administrative Court, the State Secretariat for Migration noted in its decision that the author had not provided any concrete evidence that the family's asylum application had not been or would not be dealt with through the proper procedure in Austria.

5.5 The State party notes that the Dublin III Regulation does not confer on applicants the right to choose the member State in which they would like to have their asylum application examined, as it falls solely to the States parties to the Regulation to make this decision in accordance with the criteria established by the Regulation. It is in this context that the best interests of the child must be taken into consideration.

5.6 The State party notes that the author is claiming that the family's removal to Austria would constitute a violation of article 16 of the Convention because it would put her at high risk of suicide and could jeopardize the stability of her mental state and her parenting ability. The State party recognizes that the removal of the author and her children would constitute a change in their lives. However, this does not change the outcome of the Dublin procedure, especially as they decided of their own accord in October 2018 to move voluntarily from Austria to Switzerland, thus disrupting their own routines and stability. The Austrian authorities may take whatever child protection measures they deem appropriate. The State party considers that the scenario of the children's being separated from their mother and placed in care is purely hypothetical.

5.7 The State party maintains that the author's claims under article 22 of the Convention are also ill-founded, as the author does not explain in her communication how the Swiss authorities failed to comply with this provision. The children did not by any means lack support while they were seeking refugee status.

5.8 With regard to the alleged violations of article 37, the State party maintains that the authorities ensured that the family received medical care and psychological treatment during their stay in Switzerland. It considers that the children would not face further trauma if they returned to Austria, because their father is no longer in the country. In addition, the Austrian authorities will be informed of the concerns of the children and their mother, and the relevant medical information will be conveyed to them as required by law. The protection provided in Switzerland is not better than in Austria. Furthermore, the family's removal would not, from a material and psychological perspective, entail a risk that would be sufficiently real and imminent for it to constitute inhuman or degrading treatment under international law, especially as the author and her children are to be returned to a country that they know and that has medical facilities where they can receive the necessary care.

5.9 Regarding the alleged violations of articles 24 and 39 of the Convention, the State party submits that, by transferring the children to Austria, Switzerland is in no way denying them access to appropriate measures. In response to the claim that the family's return to Austria could represent a stress factor that could worsen their health condition, the State party maintains that their mental state will be taken into consideration when their capacity to be transferred is evaluated and that the Swiss authorities will pass on to the Austrian authorities the information needed to ensure continuity of medical treatment. They will have access to similar care if they are transferred to Austria, and their doctors and therapists in Switzerland will be able to help them to overcome or ease any anxieties they may have about being returned to Austria and to prepare them in the best way for the transfer. The State party points out that the case *A.N. v. Switzerland* cited by the author differs significantly from the situation of the author and her children, since they do not claim to have been subjected to torture in their country of origin or during their migration. Moreover, if they were to return to Austria, they would not be at risk of torture or ill-treatment.

5.10 The State party, as a subsidiary argument, submits that there has been no violation of the provisions invoked by the author, for the same reasons as those set out in its argument regarding the inadmissibility of the communication. Special attention has been paid to the children because of their experiences. They lived in Austria for four years, and there is no reason to believe that they will be unable to receive the necessary therapy or that they will not receive proper support. It does not appear that their removal from Switzerland would cause them to feel uprooted, hinder their development or deprive them of their basic rights.

Author's comments on the State party's observations on admissibility and the merits

6.1 In her comments of 23 February 2021 on the State party's observations on the admissibility and merits of the communication, the author states that, on 29 May 2020, she formalized her separation from her ex-husband by filing an application for "measures to protect the marital union" with the Court of First Instance of the Canton of Geneva. She initiated these proceedings with a view to seeking a unilateral divorce. The author presented extensive medical evidence demonstrating the heavy toll that prolonged exposure to domestic violence had taken on all members of the family, in addition to the stress caused by their migration status. On 23 September 2020, the author filed an urgent request with the Court for interim measures to protect her and her children while the separation and divorce proceedings were under way. The second chamber of the Court ordered the following protective measures: (a) awarding the author sole custody of the children; (b) revoking her ex-husband's right to visit the children in order to protect them in the event that he returned to Switzerland; and (c) establishing guardianship arrangements to help the author to provide the necessary support to her children, in view of her extreme fragility and the children's complex medical situation.

6.2 The author states that the court-appointed guardian recently initiated additional proceedings for the appointment of an educator for S.T., her youngest child and the one who is facing the most serious health problems and learning difficulties. She explains that the educator is a guardian who provides educational assistance to children with special needs in order to ensure that they can follow the regular school curriculum and are not left behind because of their needs.

6.3 The author provides the Committee with written statements from her children showing that they are well integrated: they say that they have good friends whose company they enjoy, that they like their school and that they desperately want to stay in Switzerland. They also express their constant fear of being deported to Austria, a place that is associated with the trauma of domestic violence and with the fear that their father will come back for them and separate them from their mother or take them back to Chechnya, which they left in 2011 and no longer know. The author also submits school records showing the excellent grades achieved by the children, especially Z.T. and T.T., and their teachers' admiration for the effort they put in and their level of interest. Z.T. and T.T. are adolescents and S.T. will soon be an adolescent too. They are at a crucial time in their lives when they are forging an identity and must acquire and consolidate skills and experiences ready for adult life.

6.4 The author argues that the constant threat of deportation to Austria is a major source of anxiety for her children and an obstacle to their development, as explained by the doctors at the Le Lignon branch of the Child Guidance Centre. The doctors, while noting their efforts and their willingness to integrate in Switzerland, state that "the fear of deportation is constant and prevents them from processing the trauma that they have experienced and from moving forward. The psychoemotional development of these children is in great danger."[8]

6.5 In addition, the author rejects the State party's argument that she has not exhausted domestic remedies in relation to her claims under articles 16, 22, 37 and 39 of the Convention and asserts that she raised these claims in substance before the Federal Administrative Court.

6.6 With regard to her claims under article 16 of the Convention, the author maintains that, in her appeal to the Federal Administrative Court, she argued that, because of her fragile mental health, deportation to Austria would seriously jeopardize the well-being of her children, as there was a real risk that she would no longer be able to care for them properly and a risk of being left unable to cope psychologically and of suicide, with serious negative consequences, including the possibility that her children would be placed in foster care. Each of these circumstances would clearly result in interference with the family life of her children within the meaning of article 16 of the Convention.

6.7 The author also argues that she has exhausted domestic remedies in relation to her claims under article 37 and refers to her appeal to the Federal Administrative Court. While

[8] Report by Dr. O.Z. and by Dr. G. of the Le Lignon branch of the Child Guidance Centre, 18 February 2021.

she acknowledges that she expressly invoked only article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and article 4 of the Charter of Fundamental Rights of the European Union and did not specifically mention article 37 of the Convention, she points out that these instruments both contain language identical to that of the Convention concerning the prohibition of "inhuman or degrading treatment". She notes that, in her submission to the domestic authorities, she argued that it was the transfer itself, and not the conditions in Austria, that would lead to catastrophic consequences for her family and would amount to inhuman and degrading treatment because of the risk of a serious and permanent deterioration in their mental health and the risk of suicide in the case of several family members.

6.8 The author reiterates that her children witnessed her being beaten by their father over an extended period and that this constituted a form of "neglect, exploitation, or abuse" within the meaning of article 39 of the Convention. It led to the children's developing a severe mental illness and requiring sustained psychiatric treatment, as has been demonstrated. The State party therefore had a positive obligation under the Convention to promote their "physical and psychological recovery and social reintegration" and should have assumed responsibility for processing their asylum application under the sovereignty clause of the Dublin III Regulation. The author maintains that all of the evidence presented in her appeal to the Federal Administrative Court was directly or indirectly related to her children's objectively established medical need for stability as a prerequisite for their recovery and to their continuing need for psychiatric treatment in the secure environment provided by the State party.

6.9 The author also argues that her claims under article 16 of the Convention are sufficiently substantiated and refers to the medical evidence and arguments submitted to the authorities of the State party. In addition, she argues that, in their decisions, the cantonal courts and child protection services in Geneva have confirmed her claims that deportation to Austria would pose a real risk to her children's family life, as they have explicitly recognized her extreme vulnerability and her need for immediate professional assistance in raising her children. She points out that the evidence on which the cantonal decisions were based was in many ways identical to that submitted to the Swiss migration authorities.

6.10 The author also maintains that she has sufficiently substantiated her claims under articles 37 and 39 of the Convention and refers to her arguments justifying the exhaustion of domestic remedies in relation to those articles.

Author's additional observations

7.1 In her additional observations of 14 January 2022, the author reports that, on 16 November 2021, the second chamber of the Court of First Instance of the Canton of Geneva confirmed all the protective measures previously granted as interim measures. The Court rendered its decision without a hearing because the evidence in the case file concerning the domestic violence to which the author had been subjected and its dramatic impact on her mental health and that of her children was undisputed and overwhelming.

7.2 The author states that, on 9 June 2021, the special educator began working with S.T. and the rest of the family because she felt that a comprehensive approach was needed given the extent of the family's psychological and social problems. In her six-month progress report, the educator noted that it had taken a lot of time and effort to persuade the family, especially S.T., to commit and cooperate but that a constructive relationship had eventually been established. She noted some improvements in S.T.'s health and social integration, including that he was less isolated and no longer had problems with urinary and faecal incontinence. She also noted some improvements concerning Z.T. and T.T. However, with regard to S.T., she stated: "He nevertheless continues to suffer from overwhelming anxiety that prevents him from growing up in a relaxed and spontaneous way. His traumatic past and the ongoing uncertainty as to his future are still affecting his daily life. Simple, mundane things like receiving mail remain a major source of anxiety for him, as he fears being sent back to Austria or the family's country of origin at any time." On 13 January 2021, the period for which the educator had been appointed was extended for six months by the Child Protection Service.

7.3 Since the family is still in need of professional support, the educator contacted another organization that specializes in providing support to migrants and managing intercultural challenges in order to request family and individual psychotherapy for the author and her children. The author concludes that the family's recovery and social reintegration is a long-term, continuous process that cannot be suddenly interrupted without jeopardizing the children's development and reversing the progress made so far. She argues that their removal to Austria will hinder her children's recovery, which the State party is obliged to ensure under article 39 of the Convention, read alone and in conjunction with the obligation arising from article 22 of the Convention.

7.4 In her additional observations of 28 September 2022, the author refers to the report of the special educator dated 15 June 2022, which covers the therapy provided to the family since 5 May 2022 by the association Pluriels. The specialist notes that her close monitoring and daily home visits are appreciated by the author and her children, who have now developed a constructive relationship with her. She considers that the period for which she is appointed needs to be extended by the Child Protection Service with the aim of ensuring that lasting arrangements are in place for the provision of therapy by Pluriels. In her report, she also notes that the children's father has apparently returned to Austria and that the author has been informed that he wants to come to Switzerland to fetch their children and take them back with him to Austria, whether they are willing to go or not.

7.5 In addition, the author submits a letter dated 23 September 2022 from the Child Protection Service of the Canton of Geneva to the Social Welfare Office, in which the Office is requested "to make every effort ... to give this family access to more suitable housing, as the children are in urgent need of a welcoming space where they can finally rebuild their lives".[9] The Child Protection Service refers to "the family's excessively painful journey" and to the fact that "the children are trying to recover from the after-effects of the terrible events that they have been through". It states that it is very concerned about the mental development of the three children. It notes that "accommodating this family in a dilapidated and cramped residential facility where, as we know, the conditions may be unsanitary and unsafe exacerbates the trauma experienced by these children, who are unable to flourish for lack of a safe living space".

7.6 The author concludes that it is best for the children and their normal development if there is no interruption or disruption to the long-term process of rehabilitation in which they are engaged and that involves regular, multidisciplinary sessions (education and psychotherapy).

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee notes the State party's argument that the author has not exhausted the available domestic remedies with respect to her claims under articles 16, 22, 24, 37 and 39 of the Convention. The Committee notes that the author did not raise issues relating to the alleged violations of article 22 of the Convention, concerning the provision of protection and humanitarian assistance to asylum-seeking children, either explicitly or in substance, during the domestic proceedings. The Committee therefore concludes that the claims made by the author under article 22 of the Convention, regarding in particular the protection of her children as asylum-seeking children, are inadmissible under article 7 (e) of the Optional Protocol.

8.3 On the other hand, the Committee considers that the claims relating to articles 16, 24, 37 and 39 of the Convention were raised in substance by the author during the asylum

[9] The author explains that the Social Welfare Office is the authority in charge of housing asylum-seekers.

proceedings and that article 7 (e) of the Optional Protocol does not preclude their admissibility.

8.4 The Committee notes the State party's argument that articles 3, 16, 22, 24, 37 and 39 of the Convention do not provide a basis for individual rights that may be the subject of a complaint to the Committee.[10] 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.[11] The Committee also recalls that all the rights of children enshrined in the Convention must be regarded as justiciable and that States parties have a positive obligation to provide effective and accessible remedies for breaches of these rights.[12] The Committee recalls that the notion of the best interests of the child, enshrined in article 3 of the Convention, is a threefold concept that refers at once to a substantive right, an interpretative principle and a rule of procedure.[13] 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 an individual or group of individuals claiming to be victims of a violation by that State party of any of the rights set forth in the Convention or the Optional Protocols thereto. Accordingly, the Committee is of the view that there is nothing in article 5 (1) (a) of the Optional Protocol to suggest a limited approach to the rights that may be asserted in the context of the individual communications procedure. The Committee also notes that in the past, it has, under the individual communications mechanism, ruled on alleged violations of the articles invoked in the present communication.[14]

8.5 The Committee also notes the State party's argument that the communication is inadmissible under article 7 (f) of the Optional Protocol because it is manifestly ill-founded or insufficiently substantiated. In this regard, the Committee finds that the author has not provided sufficient evidence to substantiate her claims under articles 24 and 39 of the Convention and considers that these claims are, in any case, encompassed by her claim under article 37 (a) of the Convention. The Committee also notes the author's claims that her children's rights under article 16 of the Convention would be violated if the family was returned to Austria, as she runs the risk of being left unable to cope psychologically and of suicide, which could result in her children's being placed in foster care. However, the Committee notes the State party's allegations that the author has not sufficiently substantiated her claims, since the possibility raised by the author of her being separated from her children and their being placed in a care facility or foster home appears to be only hypothetical and the family's doctors could help them to prepare for their return to Austria in order to avoid that eventuality. The Committee therefore declares the claims relating to articles 16, 24 and 39 insufficiently substantiated and inadmissible under article 7 (f) of the Optional Protocol.

8.6 However, the Committee is of the opinion that, for the purposes of admissibility, the author has sufficiently substantiated her claims under articles 3 and 37 (a) of the Convention that: (a) the State party failed to take into account the best interests of her children when considering their asylum application; and (b) the removal of the author and her children to Austria would constitute inhuman or degrading treatment of the children, as their mental health is very fragile and they are receiving psychiatric and psychotherapeutic treatment in Switzerland. The Committee therefore declares this part of the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

9.1 The Committee has considered the 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] *V.A. v. Switzerland* (CRC/C/85/D/56/2018), para. 6.5.

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

[12] Committee on the Rights of the Child, general comment No. 5 (2003), paras. 24 and 25.

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

[14] *M.K.A.H. v. Switzerland* (CRC/C/88/D/95/2019), para. 11; *M.T. v. Spain* (CRC/C/82/D/17/2017), para. 12.5; *C.R. v. Paraguay* (CRC/C/83/D/30/2017), para. 7.5; and *J.A.B. v. Spain* (CRC/C/81/D/22/2017), para. 12.5.

9.2 The Committee notes the author's claims that the family's removal to Austria would violate her children's rights under article 37 (a) of the Convention because, as children already traumatized by the domestic violence the author suffered at the hands of their father in Austria and by their experiences as asylum-seekers in Austria and Switzerland, they would be retraumatized and at risk of a deterioration in their mental health. The Committee notes that the author's family has been returned to Austria once already, in 2014, following the Swiss authorities' dismissal of their initial asylum application. It also notes that the author left Austria in 2018 after her ex-husband had returned to Chechnya. The Committee also notes the author's claims that the State party violated article 3 of the Convention by failing to take into account the best interests of her children when examining their asylum application, which was filed on 31 October 2018 under the Dublin III Regulation. It notes in particular her allegations that the Swiss authorities, in their decision to return the family to Austria, did not take into account: (a) the children's need to grow up in a stable environment, as recommended by their doctors, and to continue receiving psychiatric and psychotherapeutic treatment without interruption (see para. 2.9 above); (b) the risk that her and her children's mental health conditions would be worsened by their removal, including the risk of suicide; (c) the consequences of uprooting the children from an environment in which they had already begun to feel settled; and (d) the uncertainties they would face if they were returned to Austria, including in terms of access to: (i) necessary medical treatment; and (ii) further asylum procedures to avoid "chain refoulement" to Chechnya, where, according to the author, the authorities would not protect her from potentially fatal acts of violence committed by her ex-husband, his family or even her own family.

9.3 However, the Committee also notes the State party's argument that the Federal Administrative Court, in its decision of 17 September 2019, found that: (a) Austria, in accordance with its obligations under international conventions, could examine any new allegations made by the author in the context of an asylum application and could also provide adequate protection to the family if the author's ex-husband were to make threats, although it was worth noting that he was no longer in Austria; and (b) the Austrian authorities would be able to continue providing the family with access to the necessary medical care.

9.4 The Committee recalls 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 (1) and 37 of the Convention,[15] and that such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner.[16] The risk should be assessed in accordance with the principle of precaution and, where there are reasonable doubts as to the ability of the receiving State to protect the child against such risks, States parties should refrain from deporting the child.[17]

9.5 The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that 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.[18] It also recalls that the burden of proof does not rest solely with the author of the communication, especially considering

[15] 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 No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, para. 46.

[16] *M.K.A.H. v. Switzerland*, para. 10.4; see also Committee on the Elimination of Discrimination against Women, general recommendation no. 32 (2014), para. 25.

[17] *K.Y.M. v. Denmark* (CRC/C/77/D/3/2016), para. 11.8.

[18] 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 No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, paras. 29 and 33.

that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.[19]

9.6 The Committee recalls that it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice. The Committee's role is therefore not to interpret domestic law and to assess the facts and 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 child were a primary consideration in that assessment.[20] In that regard, the Committee considers that the Dublin III Regulation should be applied and interpreted in the light of the Convention. In the present case, the Committee notes the State party's arguments that, in their decision to return the family to Austria, the authorities took into account the fact that the author and her children had spent a much longer period of time in Austria (from 13 June 2014 until the end of October 2018) than in Switzerland (approximately 12 months when the Swiss authorities decided to dismiss their asylum application), and that Austria had offered an environment conducive to the children's healthy development that would be available to them again if they were to return. The Committee also notes that the author has not provided any evidence or justification countering the State party's argument that the author would be able to submit another asylum application for consideration by the Austrian authorities based on her claims of domestic violence in order to avoid being sent back to Chechnya.

9.7 The Committee also notes the State party's argument that the Federal Administrative Court, in its decision of 17 September 2019, did take into account all the medical reports submitted by the author and concluded that the family's medical treatment was unlikely to be interrupted because Austria had care and support structures similar to those in Switzerland, meaning that the family would be able to continue receiving the necessary medical and social care. In this regard, the Committee notes the author's assertion that, in her dealings with the Swiss authorities, she did not contest the fact that adequate medical infrastructure exists in Austria; rather, she argued that the removal itself had been deemed inadvisable by the family's doctors and would constitute inhuman or degrading treatment of the children given their fragile mental health, the trauma they have been through as witnesses of domestic violence and their experiences as asylum-seekers in Austria and Switzerland. Nevertheless, the Committee notes the State party's argument that the authorities considered that, although the removal of the author and her children would cause them anxiety and additional stress, it would not constitute inhuman or degrading treatment, especially as they are to be returned to a country that they know and that has medical facilities where they can receive the necessary care. The Committee notes that the family already spent more than four years in Austria without reporting any incidents relating to the children's health and linked to their stay. The Committee also notes the State party's claims that the authorities did not believe that the children would be retraumatized, because their father was no longer in Austria when the removal order was issued, and that the Austrian authorities would be informed in advance of the children's concerns. Regarding the possibility that the children's father has returned to Austria, the Committee notes that, when assessing the family's asylum application, the authorities of the State party considered that the Austrian authorities would be able to protect the family if he were to make threats. The Committee notes that the Federal Administrative Court was also of the view that the children's therapists in Switzerland would be able to prepare them in the best possible way for returning to Austria. In addition, the Committee notes the State party's argument that the State Secretariat for Migration pointed out, in its decision of 4 June 2019, that S.T. was already suffering from epilepsy when the first asylum application was filed in 2013 and that this did not prevent his removal to Austria, where he subsequently received treatment for his condition.

9.8 The Committee notes that, in its decision of 4 June 2019, the State Secretariat for Migration took into account the risk of suicide in the family and determined that, in the

[19] *M. T. v. Spain*, para. 13.4; *El Hassy v. Libyan Arab Jamahiriya* (CCPR/C/91/D/1422/2005), para. 6.7; and *Medjnoune v. Algeria* (CCPR/C/87/D/1297/2004), para. 8.3.

[20] *C.E. v. Belgium* (CRC/C/79/D/12/2017), para. 8.4; *E.A. and U.A. v. Switzerland* (CRC/C/85/D/56/2018), para. 7.2; and *G.R., H.R, V.R. and D.R. v. Switzerland* (CRC/C/87/D/86/2019), para. 11.4.

particular circumstances of the case, the risk did not justify a review of the removal order. The Committee also notes that the European Court of Human Rights has held that the fact that a person whose expulsion has been ordered has threatened to commit suicide does not require the State to refrain from enforcing the envisaged measure, provided that concrete measures are taken to prevent those threats from being realized.[21] In this connection, the Committee notes the State party's assertions that: (a) the mental state of the author and her children will be taken into consideration when their capacity to be transferred is evaluated; (b) as required by law, the Swiss authorities will pass on to the Austrian authorities the information needed to ensure continuity of medical treatment in Austria; and (c) the family's doctors will be able to help them to prepare for their transfer and to overcome any stress or anxiety that they may experience. The Committee notes that the State party's procedure for carrying out removals appears to take into account the state of health of the persons concerned and is supposed to include taking whatever measures are necessary to protect their health. In this regard, the Committee notes that the medical reports drawn up in connection with the removal to Austria scheduled for November 2019 (see para. 4.2 above) included a recommendation that the authorities should arrange for psychiatric support to be provided to the family immediately upon their arrival in Austria in order to prevent acts of self-harm and ensure continuity of medical care. The reports also stated that the family's fitness for transfer would be assessed at a later stage by the company responsible for providing medical assistance, on the basis of the available information and any clarifications that might be needed.

9.9 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 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 or accessible in the State of return. In the present case, the Committee notes that the information in the case file does not indicate that the medical treatment needed for the children's development and recovery would not be available, accessible or adequate in Austria.

9.10 The Committee considers that it cannot conclude from the information in the case file that the Swiss authorities' assessment was clearly arbitrary or amounted to a denial of justice, or that the best interests of the author's children were not a primary consideration in the assessment.

9.11 In the light of the foregoing, the Committee concludes that the removal of the author and her children to Austria would not constitute a violation by the State party of the rights enshrined in articles 3 and 37 (a) of the Convention. The Committee trusts that the State party will take appropriate measures to ensure continuity of the family's medical treatment during their transfer and, in cooperation with the Austrian authorities, upon their arrival in the country.

10. The Committee, acting under article 10 (5) of the Optional Protocol on a communications procedure, is of the view that the facts before it do not disclose a violation of articles 3 and 37 (a) of the Convention.

[21] European Court of Human Rights, *Lumilda Kochieva and others v. Sweden*, Application No. 75203/12, decision of 30 April 2013, para. 34; and European Court of Human Rights, *Fazlul Karim v. Sweden*, Application No. 24171/05, decision of 4 July 2006.