



Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 81/2019*, **

<i>Communication submitted by:</i>	L.S. (represented by counsel, Gabriella Tau and Boris Wijkström)
<i>Alleged victim:</i>	R.S.
<i>State party:</i>	Switzerland
<i>Date of communication:</i>	1 February 2019 (initial submission)
<i>Date of adoption of decision:</i>	30 September 2020
<i>Subject matter:</i>	Family reunification
<i>Procedural issues:</i>	Admissibility – <i>ratione materiae</i> ; admissibility – manifestly ill-founded; reservations
<i>Substantive issues:</i>	Best interests of the child; children's rights; discrimination; family rights
<i>Articles of the Convention:</i>	2 (2), 3, 6, 7 (1), 22, 24 and 27
<i>Article of the Optional Protocol:</i>	7 (c) and (f)

1.1 The author of the communication is L.S., a national of Eritrea born on 1 January 1982. She submits the communication on behalf of her minor daughter, R.S., a national of Eritrea born on 21 August 2014. The author and R.S. currently reside in Switzerland. The author submits that the State party has violated R.S.'s rights under articles 2 (2), 3, 6, 7 (1), 22, 24 and 27 of the Convention by rejecting the family reunification application filed on behalf of R.S.'s father. The Optional Protocol to the Convention entered into force for the State party on 24 July 2017. The author is represented by counsel.

1.2 On 2 August 2019, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, decided to grant the State party's request to consider the admissibility of the communication separately from the merits.

* Adopted by the Committee at its eighty-fifth session (14 September–1 October 2020).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Hynd Ayoubi Idrissi, Bragi Gudbrandsson, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Marie Skelton, Velina Todorova and Renate Winter.



Facts as submitted by the author

2.1 The author was born in Eritrea. She was married there and had a son with her husband. In 2000, the author's husband passed away. In 2012, the author fled political persecution in Eritrea and travelled to the Sudan, where she met F.W., a national of Eritrea born on 5 May 1989. The author and F.W. lived together for two years in Khartoum and entered into a customary marriage on 10 November 2013. Because they had no right to reside in the Sudan, they were in a precarious situation. In addition, they were subjected to persecution, and the author was twice caught up in raids and imprisoned by the Sudanese authorities. Thus, when the author became pregnant with F.W.'s child, R.S., the couple decided that the author would flee the Sudan with her son for a safe country and that F.W. would join them once they were settled elsewhere.

2.2 In May 2014, when she was six months pregnant with R.S., the author and her son left the Sudan. On 24 June 2014, they entered Switzerland and the author applied for asylum on the same date. On 21 August 2014, R.S. was born in Switzerland. On 20 April 2015, the author was heard by the State Secretariat for Migration. During the hearing, she explained that she wished to be reunited with R.S.'s father in Switzerland. On 24 April 2015, the State Secretariat for Migration denied the author's asylum application but granted the author, her son and R.S. temporary admission residence permits (F permit).

2.3 On 11 October 2016, the author and R.S., with the assistance of the non-governmental organization Caritas, submitted to the State Secretariat for Migration an application for family reunification on behalf of R.S.'s father. They invoked their rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). They provided to the State Secretariat for Migration a medical report dated 6 March 2017, issued by doctors affiliated with the Mental Health Network of Fribourg. In the report, the doctors diagnosed the author with post-traumatic stress disorder, a depressive episode and personality disturbances. They stated in the report that the author had been undergoing treatment since 29 July 2015. According to the doctors, the author had stated that for the previous two years she had been suffering from several health issues, including stress, irritability, pain in her back and legs, gastrointestinal pain, lack of appetite, sleeping difficulties and feelings of injustice and despair. The doctors stated in the report that the long-term separation of the author from her husband would newly traumatize the author. The doctors stated that the author's husband represented a "guarantor" for the author and her children. The author also provided to the State Secretariat for Migration a complementary medical report issued on 2 May 2017 by two doctors affiliated with the Mental Health Network of Fribourg. The doctors stated in the report that the author was completely unable to work for an indeterminate period. In a letter dated 10 August 2017, the author provided a statement to the State Secretariat for Migration, indicating that R.S.'s father was willing to undergo a DNA test to prove his relationship to R.S. On 19 September 2017, the State Secretariat for Migration rejected the application for family reunification on the grounds that: (a) Swiss law only permits temporarily admitted refugees to apply for family reunification three years after the issuance of the decision temporarily admitting them into Switzerland; (b) the author had not demonstrated financial independence, as required by law; (c) the filial relationship between R.S. and her father had not been proven; and (d) the customary marriage certificate the author provided was not an original and was therefore not proof of marriage.

2.4 On 20 October 2017, the author and R.S. filed an appeal of the decision of the State Secretariat for Migration to the Federal Administrative Tribunal. In her submission, the author acknowledged that the statutory three-year waiting period had not yet elapsed for her to be able to obtain family reunification under the statute. However, she argued that the State Secretariat for Migration had failed in its obligation to consider the best interests of R.S. under article 8 of the European Convention on Human Rights and had not provided a sufficient basis for its decision. The author also emphasized that the presence of the father was necessary for maintaining R.S.'s mental health and education.

2.5 On 11 April 2018, the Federal Administrative Tribunal rejected the appeal on the grounds that: (a) there was a serious risk that the author would remain entirely dependent on social welfare in the long term; (b) even if R.S.'s biological relationship to her father were proven, she had never resided with her father, as she had been born in Switzerland; (c) although the author argued that she was having difficulty educating R.S., she was receiving medical treatment and social welfare for the benefit of R.S. and for the latter's education; (d)

the author could continue to maintain contact with R.S.'s father from abroad; and (e) the father's prospects of finding employment after learning the French language were hypothetical, thus indicating a risk that he too would become a public charge. The Federal Administrative Tribunal concluded that the State Secretariat for Migration had not violated R.S.'s rights under article 8 of the European Convention for Human Rights.

2.6 On 28 September 2018, the Justice of the Peace in Sarine appointed an educational guardian for R.S. The author's situation had been signalled to a child protection agent in Fribourg after R.S. had been found in the corridors of her building by the building concierge and twice in the street by the police. The guardian was appointed because on one occasion, due to depression, the author had lost track of time and had not come to collect R.S. from school, causing R.S. to be temporarily placed in an emergency home. According to the child protection agent, the author was very tired and lacked patience, and therefore had difficulty caring for R.S. by herself.

2.7 At the time the communication was submitted, R.S. was attending a specialized nursery/kindergarten. The author stated that, according to R.S.'s teachers, R.S. exhibited unpredictable and aggressive behaviour and was not ready to attend school, as she needed specialized early childhood education. At the time of submission, the Mental Health Network of Fribourg was providing child psychiatric services to R.S. According to her child psychiatrist, R.S. was in a phase of development where a paternal presence was important.

Complaint

3.1 The author claims that the State party violated R.S.'s rights under articles 2 (2), 3, 6, 7 (1), 22, 24 and 27 of the Convention by denying the family reunification application filed on behalf of R.S.'s father. R.S. was subjected to discrimination in violation of her rights under article 2 of the Convention. Swiss law allows refugees who have received a B residence permit to bring over members of their nuclear family immediately after having been granted asylum, regardless of their financial situation. However, refugees who have been granted temporary admission through the receipt of an F residence permit must fulfil certain conditions to obtain reunification with members of their nuclear family. Namely, they must wait three years before filing an application and they must demonstrate financial independence. For reasons beyond their control, the author and R.S. are not financially independent, since the author is unable to work due to illness. In the determination of entitlement to family reunification, there is no legitimate basis for the distinction between refugees holding B and F residence permits.

3.2 In violation of article 3 of the Convention, the State party's authorities did not take into account R.S.'s interests as a refugee child living in a household where the only parent present was gravely ill. Had this factor been adequately considered, R.S.'s father would have been granted entry into Switzerland, especially given the precariousness of R.S.'s situation. Under article 3 of the Convention, in matters affecting children, their best interests must be a higher priority than other considerations, and thus must be given more weight. According to the Committee's general comment No. 14 (2013), the following factors must be taken into account when assessing a child's best interests: (a) the child's views; (b) the child's identity; (c) preservation of the family environment and maintaining relations; (d) care, protection and safety of the child; (e) situations of vulnerability; (f) the child's right to health; and (g) the child's right to education. In the present case, the State party's authorities did not clearly articulate their reasoning concerning R.S.'s best interests. The author informed the State party's authorities that R.S. needed the presence of her father for her psychological health and for her education. The author's poor state of health, which renders her incapable of working, constitutes a vulnerability that the authorities have failed to take into account.

3.3 In breach of articles 6 (6), 7, 24 and 27 of the Convention, the State party violated R.S.'s rights to development, to enjoy the highest possible level of health and to know and be cared for by her father. The medical, social and educational specialists who are familiar with the author's case unanimously agree that the presence of R.S.'s father is necessary, not only for the author, but also for R.S.'s psychological and educational health. R.S. is a fragile child and it is thus certain that the daily presence of her father would allow her to develop in the best possible conditions.

3.4 Finally, the State party has violated R.S.'s rights under article 22 of the Convention by denying her appropriate protection and thereby not allowing her to enjoy the rights set forth in the Convention and other international human rights instruments, specifically the right to protection of family life. The obligation to protect family life requires States parties to the Convention to take positive measures to maintain family unity, including by reunifying family members who have been separated.

State party's observations on admissibility

4. In its observations dated 24 May 2019, the State party considers that the communication is inadmissible *ratione materiae* under article 7 (c) of the Optional Protocol. According to the State party's reservation to article 10 (1) of the Convention, Swiss legislation, which does not guarantee family reunification to certain categories of aliens, is unaffected. The validity of this reservation has not been called into question, either by another State party to the Convention or by the Committee. The author's claims are based on her request for family reunification. While the author invokes articles 2, 3, 6, 7, 22, 24 and 27 of the Convention, she contests Swiss legislation pertaining to family reunification. This falls within the scope of the State party's reservation to article 10 (1) of the Convention. The reservation makes perfectly clear the State party's position on this issue.

Author's comments on admissibility

5. In her comments dated 25 June 2019, the author argues, inter alia, that: (a) in the communication, she did not invoke article 10 (1) of the Convention but instead invoked articles 2 (2), 3, 6 (6), 7 (1), 22, 24 and 27; (b) the precise effect of the reservation is unclear and ambiguous, and reservations must be specific in order to be valid; (c) it does not follow from a reading of the reservation that the principles of non-discrimination and best interests of the child, which are fundamental rights that embody the very rationale of the Convention, would not apply to family reunification proceedings; (d) if the State party intended to limit the scope of articles 2 or 3 of the Convention, it should have done so in precise and expressly worded terms; (e) during domestic proceedings, the Federal Administrative Tribunal did not question the applicability of any provision of the Convention; (f) to the extent that the reservation purports to negate the State party's obligations under articles 2 or 3 of the Convention, it is inconsistent with the object and purpose of the Convention and is therefore null and void; (g) accepting the State party's position would yield absurd results, as the European Court of Human Rights has considered in its jurisprudence on family reunification that the obligation of Switzerland to respect the right to family life under the European Convention on Human Rights must be interpreted in a manner consistent with the obligations stemming from article 3 of the Convention on the Rights of the Child;¹ (h) the reservation is incompatible with articles 8 (2) and 11 of the Swiss Constitution, which protect the right to non-discrimination on the basis of age, origin or social background, and the right of young people to particular protection of their integrity and the encouragement of their development; and (i) the fact that other States parties to the Convention have not objected to the reservation made by Switzerland is not dispositive since the Convention is a multilateral human rights treaty to which the principle of reciprocity does not apply.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that the State party does not contest that the author has exhausted domestic remedies. The Committee further notes that after the State Secretariat for Migration issued a decision denying the author's request for family reunification, the author appealed that decision to the Federal Administrative Tribunal, which denied the

¹ The author cites European Court of Human Rights, *El Ghatet v. Switzerland*, application No. 56971/10, judgment of 8 November 2016, paras. 27, 28 and 53.

appeal on 11 April 2018. Accordingly, the Committee considers that it is not precluded by article 7 (e) of the Optional Protocol from examining the communication.

6.3 The Committee takes note of the State party's reservation to article 10 (1) of the Convention, which requires that applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner. The Committee further notes that the State party's reservation to this provision reads as follows: "Swiss legislation, which does not guarantee family reunification to certain categories of aliens, is unaffected." The Committee notes that the author has not invoked article 10 (1) but has instead invoked other articles of the Convention. Accordingly, the Committee considers that the author's claims are not affected by the reservation in question.

6.4 The Committee notes the author's claims under articles 2 and 3 of the Convention to the effect that the rejection of her and her daughter's asylum application on the basis of their lack of financial independence was discriminatory and that the State party's authorities have failed to take into account R.S.'s interests as a refugee child living in a household where the only parent present is gravely ill. The Committee also takes note of the author's claims under articles 6, 7, 22, 24 and 27 of the Convention to the effect the State party has violated R.S.'s rights to develop, to enjoy the highest possible level of health, to know and be cared for by her father and to receive the kind of protection appropriate for a refugee child, through family reunification. 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.² It is therefore not for the Committee to assess the facts of the case and the evidence in the place of the national authorities but, rather, to ensure that the assessments were not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment.³ In the present case, the Committee notes that the author challenges the application of national laws establishing different family reunification eligibility conditions between refugees and asylum seekers who have been admitted into Switzerland temporarily. The Committee also notes that the author contests the conclusions reached by the national authorities as to R.S.'s best interests. However, the Committee notes that article 22 does not provide a refugee child with the right to have his or her family members granted residence status for the purpose of family reunification. Therefore, the Committee considers that the author's claims under articles 2 and 22, which are based on the assumption that R.S. has such a right, are manifestly ill-founded and therefore inadmissible under article 7 (f) of the Optional Protocol. Furthermore, noting that the State party's authorities have thoroughly examined the author's claims and provided detailed reasons for determining that R.S.'s best interests have not been jeopardized by the three-year waiting period to request reunification with her father, the Committee considers that the author has not demonstrated that courts' assessments of the facts and the evidence were clearly arbitrary or otherwise amounted to a denial of justice in relation to her claims under article 3, 6, 7, 24 and 27 of the Convention. Therefore, the Committee considers that the author's claims under those articles are insufficiently substantiated and declares them inadmissible under article 7 (f) of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 7 (f) of the Optional Protocol; and
- (b) That the present decision shall be transmitted to the author of the communication and, for information, to the State party.

² *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; *A.B.H. and M.B.H. v. Costa Rica* (CRC/C/74/D/5/2016), para. 4.3; and *A.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.8.

³ *C.E. v. Belgium* (CRC/C/79/D/12/2017), para. 8.4.