



# Convention on the Rights of the Child

Distr.: General  
21 November 2023  
English  
Original: French

## Committee on the Rights of the Child

### Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 125/2020\* \*\*

<i>Communication submitted by:</i>	E.A. (represented by counsel, Klausfranz Rüst-Hehli)
<i>Alleged victim:</i>	M.F.
<i>State party:</i>	Switzerland
<i>Date of communication:</i>	20 May 2020 (initial submission)
<i>Date of decision:</i>	20 September 2023
<i>Subject matter:</i>	Return of a child to Eritrea
<i>Procedural issues:</i>	Exhaustion of domestic remedies; non-substantiation of claims; abuse of right of submission; other procedure
<i>Substantive issues:</i>	Non-refoulement; best interests of the child; education; interference in family life; separation of children from parents; standard of living
<i>Articles of the Convention:</i>	2, 3, 6, 9, 12, 16, 18, 22, 28 and 37 (a)
<i>Articles of the Optional Protocol:</i>	7 (c)–(f)

1. The author of the communication is E.A., an Eritrean national acting on behalf of her daughter M.F., born on 19 May 2009, also an Eritrean national. The author claims that the State party has violated M.F.'s rights under articles 2, 3, 6, 9, 12, 16, 18, 22, 28 and 37 (a) of the Convention. The Optional Protocol entered into force for the State party on 24 July 2017. The author is represented by counsel.

#### Facts as submitted by the author

2.1 M.F.'s father was a soldier in the Eritrean army and deserted. After a lengthy search, the author located him in Seghnety prison, from which, after some time, he escaped. The

\* Adopted by the Committee at its ninety-fourth session (4–22 September 2023).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho, Aïssatou Alassane Moulaye, Hynd Ayoubi Idrissi, Mary Beloff, Rosaria Correa, Rinchen Chophel, Bragi Gudbrandsson, Sopia Kiladze, Faith Marshall-Harris, Benyam Dawit Mezmur, Luis Ernesto Pedernera Reyna, 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.



author attempted to leave Eritrea but was herself detained several times. Without M.F.'s father, M.F. and the author fled Eritrea for Italy, where they were registered as asylum-seekers in July 2016. The author and M.F. were subsequently accepted as asylum-seekers by the State party. On 15 August 2019, M.F.'s father applied for asylum in Israel.

2.2 On an unspecified date, the author and M.F. arrived in Switzerland. On 14 September 2017, they filed a new asylum application there. On 2 November 2017, the State Secretariat for Migration rejected their asylum application on the grounds that it did not accept the reasons why the author had had to leave Eritrea. On 3 July 2019, the Federal Administrative Court upheld the decision of the State Secretariat for Migration. The Court also noted that M.F. had spent most of her life in Eritrea and only 30 months in Switzerland.

2.3 In a letter dated 25 July 2019 entitled "First asylum application", M.F. requested the State Secretariat for Migration to grant her asylum. In a letter dated 6 August 2019, the State Secretariat for Migration replied that no asylum application was pending. In an interim ruling issued on 6 September 2019, the State Secretariat for Migration informed M.F. that it considered the letter of 25 July 2019 to be an application for re-examination within the meaning of article 111 (b) of the Asylum Act, that it considered the application to have no prospect of success and that it required an advance payment of SwF 600 to be made before 18 September 2019. In a decision issued on 9 October 2019, the State Secretariat for Migration dismissed the application because the advance payment had not been made. In a judgment issued on 4 December 2019, the Federal Administrative Court rejected the author's and M.F.'s appeal and upheld the decision of 9 October 2019 by which the State Secretariat for Migration had dismissed the application. On 13 January 2020, the Federal Administrative Court rejected new applications from the author and M.F. dated 2 and 6 January 2020.

2.4 The author states that she has not submitted the matter for examination under another procedure of international investigation or settlement.

### **Complaint**

3.1 The author considers that the State party has violated M.F.'s rights under article 12 of the Convention on the grounds that she has not been heard. The State party has not taken into account the opinion of M.F., who wished to remain in Switzerland with the author. Moreover, the State party's asylum agencies have never informed her of her procedural rights.

3.2 The author argues that the State party has violated M.F.'s rights under article 3 of the Convention by failing to consider her interests in an individual and specific way. According to the author, the State party has failed to make M.F.'s best interests its primary consideration and to demonstrate that the public interest and the interests of M.F. were in contradiction. The author submits that, by denying M.F. refugee status on the basis of the rejection of the author's own asylum application, the State party has engaged in discriminatory conduct prohibited by article 2 (2) of the Convention. Moreover, the public education system of Eritrea is weak and politicized, which is contrary to article 28 of the Convention. The obligation to return to Eritrea thus violates M.F.'s rights under article 6 (2) read in conjunction with article 2 of the Convention.

3.3 The author maintains that enforcing M.F.'s return would separate them from each other, in violation of articles 9 and 37 (a) of the Convention. She also refers to articles 16 and 18 of the Convention, arguing that the State party's authorities have failed to take into account the fact that M.F.'s father had to leave Eritrea in order to avoid persecution and that she will therefore not be able to live with him in the country.

3.4 The author claims that the State party's authorities have not allowed M.F. to be educated in a public school and therefore have not ensured her development to the maximum extent possible, in violation of article 6 (2) of the Convention. She also submits that the State party's authorities have violated article 2 of the Convention and that it is the discrimination suffered by M.F. that is preventing her from mastering German.

3.5 The author maintains that the State party has not fulfilled its obligation to bring its domestic legislation into line with the Convention in accordance with article 4 of the Convention.

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

4.1 In its observations of 19 July 2021, the State party maintains that the author has not exhausted domestic remedies in accordance with article 7 (e) of the Optional Protocol, on the grounds that the appeal against the decision of the State Secretariat for Migration contained no claim relating to M.F.'s situation or her procedural rights. In addition, M.F.'s current counsel took numerous steps on her behalf after the initial asylum proceedings. The author's arguments therefore fell well outside the applicable procedural framework. As the advance payment required to consider the application for re-examination was not made, the State Secretariat for Migration dismissed the application in a decision issued on 9 October 2019, which was upheld by the Federal Administrative Court on 4 December 2019. Even if the application had been admissible, it could only have been examined insofar as it was based on one of the applicable grounds for re-examination.

4.2 In addition, the State party maintains that M.F.'s rights under the Convention have not been violated. The author was heard on two occasions. The State Secretariat for Migration and the Federal Administrative Court concluded, based on a detailed analysis, that her assertions lacked credibility because her answers were vague and evasive or contained numerous contradictions. The State party notes that M.F. did not adduce any grounds for persecution specific to her. The State party concludes that the domestic authorities have rightly considered that neither M.F. nor the author face a foreseeable and present risk of exposure to inhuman or degrading treatment if returned to Eritrea.

4.3 The State party maintains that the domestic authorities have properly examined the compatibility of returning M.F. to Eritrea with the best interests of the child. In its decision of 2 November 2017, the State Secretariat for Migration noted that M.F. and the author had a family network in Eritrea that had supported them until they left the country. In its ruling of 3 July 2019, the Federal Administrative Court referred to the Convention and the improvement in living conditions in Eritrea. The Court noted that M.F. and the author were in good health and that the author had a certain level of education, knowledge of agriculture and a family network. The Court noted that M.F. had spent most of her life in Eritrea and was not very well integrated in Switzerland. The State party maintains that there is no reason to consider that enforcing her return would be incompatible with the best interests of the child. The State party is of the view that the domestic authorities therefore duly took M.F.'s best interests into consideration and made sure that she was safe and was cared for and enjoyed her rights in appropriate conditions.

4.4 With regard to the author's allegations under article 12 of the Convention, the State party notes that, according to its domestic case law, this article only guarantees children the right to express their views in an appropriate manner; it is only from around 12 years of age that children have the ability to form their own views and should be given the opportunity to express their opinion at a separate hearing during asylum proceedings. Even if it was accepted that M.F. was able, at the time of the hearings, when she was 8 years of age, to form an opinion about where she wished to live, this desire would not have been decisive either for the purpose of granting refugee status or for the decision concerning her return. The State party notes that M.F. has not adduced any grounds for asylum specific to her in any of the proceedings initiated, and that she has been included in the proceedings relating to the author.

4.5 The State party submits that it is not clear from the author's explanations how the refusal to grant asylum to M.F. would constitute discrimination within the meaning of article 2 of the Convention.

4.6 The State party maintains that the Convention does not guarantee the right to reside in a State solely on the grounds that schooling there is of better quality than in the State of origin, and there is no indication that M.F. might face obstacles to her schooling in Eritrea.

4.7 The State party asserts that returning M.F. is compatible with the Convention from the standpoint of the right to protection of personal and family life. There is no real and foreseeable risk that the author would, in the event of her return, be exposed to prosecution which could lead to her and M.F. being separated. Furthermore, the situation of M.F.'s father is not a bar to her being returned to Eritrea.

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

5.1 In her comments of 23 January 2022, the author asserts that the State party has never informed M.F. of her rights under the Convention, and that it is therefore violating the principle of good faith by claiming that the communication is inadmissible. The author has challenged the decision issued by the State Secretariat for Migration on 9 October 2019 before the Federal Administrative Court. She has therefore exhausted domestic remedies.

5.2 The author reiterates that the domestic authorities have not taken into consideration, in a specific and individual manner, why it is in M.F.'s interest, in the light of article 3, to not be returned to Eritrea. According to the author, the State party has not demonstrated in a specific and individual manner that the public interest and M.F.'s interest in remaining in the State party were in contradiction; she adds that M.F. is unaware of her father's illegal desertion and the fact that their family reunification in Eritrea is impossible. She reiterates that the State party has violated articles 2 (2) and 12 of the Convention by basing its refusal to grant asylum to M.F. on the author's own statements. In her view, it is incumbent on the State party's authorities to prove that M.F.'s rights under the Convention would not be at risk of violation if she was returned to Eritrea. The author refers to reports which, in her opinion, show that not all of the freedoms guaranteed by the Convention are respected in Eritrea.

5.3 The author reiterates that M.F. was able to form her own views from the beginning of the asylum proceedings. She disputes the State party's observation that M.F. had not adduced any grounds for asylum different from those of the author. According to the author, the State party's observation that M.F. was included in the author's asylum application denies her status as an individual being with her own interests. The author reiterates that the State party has saddled M.F. with the disadvantages resulting from the author's failure to convince the domestic authorities of her own status as a refugee and her alleged failure to promote M.F.'s interests; the author claims that the State party has thus violated article 2 (2) of the Convention. M.F.'s return would constitute degrading treatment under article 37 (a) of the Convention because the State party has not allowed her to prove her status as a refugee.

5.4 The author notes that M.F. has never attended an Eritrean school and is unfamiliar with the Eritrean writing system. The education that she has received in the State party is incompatible with the "communitarian values" of Eritrean schools. She adds that, as the daughter of a deserter, she would be subject to discrimination by the Eritrean authorities. She would thus be marginalized, in violation of article 8 of the Convention, owing to her absence from Eritrea for more than six years and her having developed a Swiss, rather than an Eritrean, identity.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

6.2 The Committee notes the author's assertion in her initial submission that she has not submitted the same matter for examination under another procedure of international investigation or settlement. The Committee notes that, under article 7 (d) of the Optional Protocol, it declares a communication to be inadmissible when the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement. The Committee notes that the "same matter" within the meaning of the aforementioned provision must be understood as relating to the same complaint concerning the same individual, the same facts and the same substantive issues.<sup>1</sup>

6.3 The Committee notes that, on 8 October 2020 and 28 November 2020, the author, through the counsel who represents her before the Committee, brought the matter before the European Court of Human Rights on her own behalf and on that of M.F. The Committee

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<sup>1</sup> *A.B. v. Finland* (CRC/C/86/D/51/2018), para. 11.2.

notes that, by letters dated 3 December 2020 and 25 March 2021, respectively, the Court declared the applications to be inadmissible, noting that, in the light of all the evidence in its possession, and insofar as the facts in question fell under its jurisdiction, they did not disclose any apparent violation of the rights and freedoms guaranteed by the Convention or the Protocols thereto, and that the admissibility criteria set out in articles 34 and 35 of the Convention had not been met. The Committee notes that the reasoning put forward by the European Court of Human Rights in its decisions necessarily implied a degree of examination of the merits of the cases, however limited, when it declared the applications to be inadmissible because they did not disclose any apparent violation of the rights and freedoms guaranteed by the Convention or the Protocols thereto and because the admissibility criteria set out in articles 34 and 35 of the Convention had not been met. The Committee therefore considers that the European Court of Human Rights did not limit itself to a mere examination of purely formal admissibility criteria, but took into account the merits of the applications. The Committee must therefore determine whether these decisions concerned the same facts and rights invoked before it.

6.4 The Committee notes that, further to the requests that it sent to the author on 7 and 19 July 2023 asking her to provide copies of the applications submitted to the Court, the author asserted that the content of those applications was different from that of the present communication, but did not provide the requested copies. The Committee notes the importance of checking the content of applications lodged with the European Court of Human Rights to make certain that the communication is admissible under article 7 (d) of the Optional Protocol. However, despite the Committee's two requests, the information provided by the author remains incomplete. As the author is the only person who has a copy of the applications in question, the Committee considers that she has thus obstructed the consideration of the admissibility of the communication. Consequently, the Committee considers that the author's refusal to provide copies of the applications that she had submitted to the European Court of Human Rights constitutes an abuse of the right of submission.<sup>2</sup> The Committee therefore declares the communication to be inadmissible under article 7 (c) of the Optional Protocol.

7. The Committee therefore decides:

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

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<sup>2</sup> European Court of Human Rights, *Hadrabová et al. v. Czech Republic*, Applications No. 42165/02 and No. 466/03, Decision on Admissibility, 25 September 2007; *Pedrescu v. Romania*, Application No. 21447/03, Judgment, 2 December 2008, paras. 25–27; *Gross v. Switzerland*, Application No. 67810/10, Judgment, 30 September 2014, paras. 28–37; and *Dimov et al. v. Bulgaria*, Application No. 30044/10, Judgment, 7 July 2020, paras. 42–47.