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Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 148/2021**, ***, ****

Communication submitted by:	M.F. and L.B. (represented by counsel, Boris Wijkström)
Alleged victims:	Me.F., N.F. and I.F.
State party:	Switzerland
Date of communication:	10 June 2021
Date of adoption of Views:	27 January 2025
Subject matter:	Separation of children from their father due to his removal to Algeria
Procedural issues:	Failure to exhaust domestic remedies; non-substantiation of claims
Substantive issues:	Best interests of the child; family separation; right to be heard
Articles of the Convention:	3 (1), 9, 12 and 16 (1)
Articles of the Optional Protocol:	7 (e) and (f)

1.1 The authors of the communication are M.F., a national of Algeria born in 1984, and L.B, a national of Switzerland born in 1994. They submit the communication on behalf of their children, Me.F., N.F. and I.F., three nationals of Switzerland born in 2011, 2013 and 2020, respectively. The authors claim that removing M.F. to Algeria would be in violation their rights under articles 3 (1), 9, 12 and 16 (1) of the Convention. They are represented by counsel. The Optional Protocol entered into force for the State party on 24 July 2017.

* Reissued for technical reasons on 19 March 2025.

** Adopted by the Committee at its ninety-eighth session (13–31 January 2025).

*** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Aïssatou Alassane Sidiku, Thuwayba Al Barwani, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chophel, Rosaria Correa, Bragi Gudbrandsson, Sopio Kiladze, Benyam Dawit Mezmur, Otani Mikiko, 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, Committee member Philip Jaffé did not participate in the consideration of the communication

**** A joint opinion by Committee members Bragi Gudbrandsson, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova and Benoit Van Keirsbilck (dissenting) is annexed to the present Views.

1.2 The authors requested the Committee to request the State party to take interim measures to suspend the removal order against M.F. pending the examination of the communication by the Committee. On 14 June 2021, the Committee, acting through its working group on communications, decided not to request the State party to take interim measures under article 6 of the Optional Protocol and rule 7 of the Committee's rules of procedure under the Optional Protocol.

Facts as submitted by the authors

2.1 M.F. entered Switzerland illegally in 2008 to seek employment. He met L.B. in August 2010. L.B. was born in Geneva, has lived there her entire life and became a naturalized national of Switzerland in 2016.

2.2 The authors started living as a couple when their first child, Me.F., was born, on 5 October 2011, in Geneva. M.F. recognized the paternity of his daughter on 2 February 2012. On 26 July 2012, the authors submitted an application to marry and obtain a residence permit to the Office for Civil Registration and Migration in Geneva.

2.3 On 18 January 2013, M.F. was charged with attempted murder and placed in pretrial detention. On 22 August 2013, L.B. gave birth to their second child, N.F. M.F. recognized his paternity on 9 October 2013, while he was in prison. According to M.F., despite being in prison, he established a strong connection with his children during their visits to the prison accompanied by the organization Relais Enfants Parents Romands. In August 2016, L.B. started a full-time apprenticeship as a care and community health assistant.

2.4 On 26 September 2016, M.F. was sentenced by the Criminal Chamber of Appeal to a prison term of five years and five months for attempted murder committed on 7 August 2011, illegal entry to Switzerland on 1 January 2008 and illegal stay in Switzerland from 1 January 2008 to 16 January 2013. He was conditionally released on 10 February 2017. On 29 September 2017, he was found guilty of driving a vehicle without a proper licence and consumption of illegal drugs and fined 400 Swiss francs. On 22 December 2017, he was found guilty of making false accusations concerning a prison official and a fine was imposed.

2.5 M.F. submits that, after his release from prison, he was fully involved in family life and devoted his time to his children. In 2018, his request for voluntary follow-up with the Probation and Integration Service was granted and he worked legally on a part-time basis from February 2018 to January 2019. While trying to reintegrate into professional life, he passed the forklift driver's exam. He was also gainfully employed from March to April 2019. During that period, he took care of his children and became a main reference person for them, as attested by a letter from the Child Protection Services of the Canton of Geneva dated 3 May 2021.

2.6 On 5 February 2018, the Office for Civil Registration and Migration informed M.F. of its intention to refuse to issue a residence permit on the grounds that the public interest in his removal outweighed his private interest and that of his family in his being able to stay in Switzerland. He replied in a letter dated 8 March 2018, highlighting the relationship he had with L.B. and his close ties with his two children, in whose upbringing he was actively involved. He also explained the steps that he had taken to reintegrate into the labour market and the progress that he had made since the commission of the criminal offence.

2.7 On 10 May 2019, the Office for Civil Registration and Migration refused to grant M.F. a residence permit on the basis of the application submitted on 26 July 2012, which meant that the process had taken seven years. During that period, M.F. had developed strong paternal bonds with his children. The authors contacted the child guidance service so that the children could receive psychological support in connection with the removal of their parent. Me.F. and N.F. were visited by a doctor, who attested in writing to the primordial importance of the parental presence for their proper cognitive, emotional and affective development and to the trauma that could be caused by his forced expulsion.

2.8 On 7 June 2019, M.F. appealed against the decision by the Office for Civil Registration and Migration, arguing that it violated articles 3 and 9 of the Convention and article 8 on the right to respect for private and family life of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). On

28 April 2020, the Administrative Court of First Instance of the Canton of Geneva rejected the appeal, considering that the right of M.F. to respect for private and family life did not justify the granting of a residence permit. On 28 May 2020, M.F. appealed further against that decision.

2.9 On 18 August 2020, L.B. gave birth to the authors' third child, I.F., whom M.F. formally recognized. The authors requested joint parental custody.

2.10 On 9 January 2020, M.F. initiated an unemployment measure known as "job coaching" to improve his job placement skills. He also received unemployment benefits until the end of October 2020. He affirms that he is looking actively for a job but that the lack of a residence permit constitutes a major obstacle. Since I.F. does not have a place in a day-care centre, M.F. is taking care of him full-time so that L.B. can look for a job.

2.11 On 1 December 2020, the Administrative Chamber of the Court of Justice of the Canton of Geneva, dismissed M.F.'s appeal of 28 May 2020, considering that the Office for Civil Registration and Migration had correctly weighed the interests at stake and that its decision to expel him did not violate the principle of proportionality under article 8 of the European Convention on Human Rights or articles 3 and 9 of the Convention. M.F. submits that that judgment has had a devastating effect on his family, especially on his daughter Me.F. He has submitted to the Committee a letter from the Child Protection Services of the Canton of Geneva dated 3 May 2021, accompanied by a medical certificate from a paediatrician dated 14 December 2020, attesting that Me.F. was sad, had experienced a significant loss of appetite and a drop in her ability to concentrate at school, was experiencing nightmares and required urgent psychotherapy.

2.12 On 5 January 2021, M.F. appealed before the Federal Tribunal, arguing that the domestic authorities' decision to expel him had violated his rights under article 8 of the European Convention on Human Rights because the measure constituted a disproportionate interference with his right to family life. He specifically referred to the strong bonds that he had developed with his children and L.B, the evidence of his rehabilitation after he had completed his prison sentence and all the efforts he had made to reintegrate professionally since leaving prison. He also added in the appeal that the expulsion measure constituted a violation of articles 3 and 9 of the Convention.

2.13 On 11 February 2021, the Federal Tribunal dismissed M.F.'s appeal, finding that the gravity of his criminal conviction took precedence over all other considerations in the case. The Tribunal noted, however, that Me.F. and N.F. had grown up without their father, as he had been imprisoned when the eldest child was a little over 1 year of age and was in prison when the second child was born. The Tribunal also pointed out that the couple could not have had a legitimate expectation of being able to remain together when they started a family, given M.F.'s criminal conviction and the fact that his presence in Switzerland was illegal. It also found that M.F. could maintain contact with L.B. and their children even if he were expelled to Algeria through modern means of communication.

2.14 M.F. submits in that regard that, if his expulsion from Switzerland is executed, he will be considered a "criminal alien", who will not be allowed to re-enter Switzerland. He refers to the practice of the Swiss authorities of imposing a "prohibition of entry" lasting many years, which is valid in the entire Schengen area. He also submits that his children Me.F. and N.F. do not remember the time when he was not living with them while he was imprisoned. Furthermore, the Swiss authorities took almost nine years to reach a final decision on M.F.'s application for a residence permit and the burden of separation after such a long period would be on the health and well-being of his children.

Complaint

3.1 The authors submit that the rights of their children guaranteed under articles 3 (1), 9, 12 and 16 (1) of the Convention have been violated by the decision to remove M.F. to Algeria.

3.2 The authors claim that the domestic authorities did not explain how the expulsion measure against M.F. was compatible with his children's best interests, constituting a violation of a procedural obligation under article 3 (1) of the Convention. Namely, the Federal Tribunal should have explained how the children's rights had been respected in the decision,

that is, how the children's best interests had been determined, on what criteria that determination had been based and how the children's best interests had been weighed against other considerations, whether broad issues of policy or individual cases. The Tribunal did not, however, address such issues. The authors underline that, in any decision concerning the forcible return of a so-called criminal alien, the best interests of his legally residing children need to be considered as a matter of binding international law under the Convention.

3.3 The authors also claim that there is a substantive violation of article 3 (1) of the Convention, under which a child's best interests must be a primary consideration in all actions of public authorities concerning him or her. The Federal Tribunal did not take the children's best interests as a primary consideration, while the gravity of M.F.'s criminal conviction took precedence over all other relevant factors.

3.4 Regarding the alleged violation of article 9 of the Convention, the authors argue that the rights of their children are affected by M.F.'s removal order from Switzerland, since the children are extremely attached to their father, who takes care of them on a daily basis. The expulsion of M.F. would amount to depriving his children of their father and exposing them to negative effects on their psychological health and their cognitive, emotional and affective development. Me.F., who is 9 years old, is already experiencing great distress because of the threat of her father's expulsion and needs emergency psychotherapy to help her to overcome her anxieties. The health and well-being of the children should be protected by allowing them to continue to live with their father. In essence, the children are bearing the consequences of the crime that their father committed in 2011.

3.5 The authors also claim a violation of article 12 of the Convention, because their children were not allowed to be heard in the court proceeding, even though Me.F. is 9 years old. By failing to listen to the children, the domestic authorities did not show due diligence in determining their best interests.

3.6 The authors reiterate their arguments made in relation to article 8 of the European Convention on Human Rights in justification of their claim under article 16 (1) of the Convention.

State party's observations on admissibility and the merits

4.1 In its comments dated 10 February 2022, the State party argues that the authors did not claim a violation of article 12 of the Convention before the Federal Tribunal, either expressly or in substance, and that they had therefore not exhausted the domestic remedies available to them in respect of that claim.

4.2 In addition, the State party contends that the communication is manifestly ill-founded. The State party points out that article 3 of the Convention does not confer a subjective right to obtain asylum or a right of residence in a specific State or region. The author cannot deduce from article 3 a right to reside in Switzerland.

4.3 The State party considers that it is generally for the courts of the States parties to examine the facts and evidence and to interpret and apply national law, unless the assessment made by them was manifestly arbitrary or amounted to a denial of justice. Consequently, the Committee must not substitute itself for the national authorities in interpreting legislation and assessing facts and evidence but, rather, must establish that there has been no arbitrariness or denial of justice in the assessment made by the authorities and ensure that the best interests of the child have been a primary consideration in that assessment.

4.4 Contrary to what the authors claim, it is clear from the decisions of the national courts that they took the authors' complaints into consideration and dealt with them in depth, referring expressly to the Convention and the European Convention on Human Rights. In that regard, in its judgment of 28 April 2020, the Administrative Court of First Instance analysed M.F.'s private interests in remaining in Switzerland and the children's interests in not being separated from their father. It took into account M.F.'s close and effective relationship with his children since his release from prison. It found, however, that the public interest in M.F.'s removal outweighed the interests of the children. It also noted that, in the event of removal, contact with the author could be maintained and that the children's mother was in a position to look after them alone, as she did while the author was in prison.

4.5 In its judgment of 1 December 2020, the Administrative Chamber of the Court of Justice of the Canton of Geneva also carefully weighed the interests at stake, on several pages, taking into consideration the real and close relationship of M.F. with his children, the fact that he looked after them and the fact that his removal from Switzerland would damage his relationship with them if they remained in Switzerland.

4.6 The Federal Tribunal also took account of the interests of the children in its judgment of 11 February 2021. In particular, it held that the lower court had correctly set out the applicable law, in particular regarding article 8 of the European Convention on Human Rights and articles 3 and 9 of the Convention. According to the judgment of 27 December 2017 of the Criminal Appeal Chamber, M.F. had committed an extremely serious offence, directed against the most important legal asset, namely the life and bodily integrity of a person. The Tribunal is particularly rigorous in the presence of acts of criminal violence that have seriously harmed the bodily integrity of another person. Subsequently, in 2017, M.F. received two additional convictions, namely a fine of 400 Swiss francs, for driving a vehicle with a foreign driver's licence and consuming narcotics, and a day fine of 120 days at 30 Swiss francs for the slanderous denunciation of a prison guard. The Tribunal therefore found that the public interest in the removal of M.F. was manifest and that only exceptional circumstances would allow the private interest of the person concerned in remaining in Switzerland to prevail over the public interest in removing him. From the point of view of private interest, the Tribunal held that, although M.F. had been living in Switzerland since 2008, it needed to be remembered that he had arrived illegally and had been imprisoned for four years. The time elapsed since M.F.'s conviction also had to be put into perspective, as he had spent a significant part of that period, from 18 January 2013 to 10 February 2017, serving his custodial sentence. It found that M.F.'s interest in obtaining a residence permit to remain in Switzerland lay essentially in the family relationship that he had with his partner and her children. From that perspective, it found that M.F.'s departure from Switzerland would result in the separation of the family should they not follow him to Algeria. With regard to the children's interest in living with both parents, it should be noted that the first two children, born in October 2011 and August 2013, respectively, grew up from January 2013 to February 2017 without their father, who was imprisoned when the eldest was just over 1 year old, while the second was born during his imprisonment.

4.7 Not only did the Federal Tribunal's judgment expressly mention the interests of the children as such, it also referred to family life, which, of course, included the children. The judgment thus held that M.F.'s interest in obtaining a residence permit in order to be able to remain in Switzerland lay essentially in the family relationship that he had with his partner and her children. It also noted that his departure from Switzerland would result in the separation of the family if the children did not follow him to Algeria. The ruling further examined the children's interest in living with their two parents, pointed out that the author had been looking after them since his release from prison and that they had developed a close relationship, and mentioned that the author's return to his country of origin would have a significant influence on the quality of the relationship. The Tribunal nevertheless tempered those elements by noting that, in addition to the fact that the author had never been granted a residence permit, the couple's second child had been conceived after the civil authorities, on 22 October 2012, had declared their application for marriage inadmissible. In those circumstances, the author had taken the risk of having to live his family life from a distance. On that point, the Tribunal noted that the refusal of a residence permit did not necessarily imply the separation of the family; as the author's partner was from Algeria, the family could choose to live together in that country. The State party pointed out that, insofar as the judgment mentioned the reasonable distance between Algeria and Switzerland with regard to the maintenance of relations between the author and his children, it was in reference to the travels of M.F.'s partner and her children to Algeria and not vice versa.

4.8 It is clear from the foregoing that, in its judgment, the Federal Tribunal examined the situation of the children and duly took into account their best interests, as required by articles 3 and 9 of the Convention, bearing in mind that those provisions did not confer a direct claim to the granting of a residence permit. It also examined in depth the respect for the authors' family life, as required by article 16 of the Convention, considering that the author's private interest in remaining in Switzerland could not prevail, in view of his conviction to a custodial sentence of five years and five months for attempted murder, even though the separation of

the family would have difficult consequences for the children, in the event that the author's partner and children did not follow him to Algeria. With regard to article 9 of the Convention, the Court emphasized that the family could choose to live together in Algeria. If the children's mother decided not to follow M.F. to Algeria, he would be able to maintain regular contact with his children, given the reasonable distance from Algeria and current means of communication. Moreover, the decision to refuse to grant a residence permit and to remove him from Switzerland was not made for an indefinite period. M.F. would be able to reapply for a permit if he had proven himself and his behaviour had not given rise to complaints in his country of origin for five years.

4.9 As to the complaint that it had taken the Office for Civil Registration and Migration many years to reach its decision, the Government pointed out that the length of time was due to the fact that the Office had had to wait for the outcome of the criminal proceedings against M.F. before examining the application for residence authorization. In any event, the delay in the proceedings had not prevented M.F. from maintaining family relations with his partner and children, since he had remained in Switzerland throughout the time that the Office was examining his application.

4.10 It is clear from the foregoing that, in the present case, the authors' complaints were examined in detail by the domestic courts. The authors have not shown that the examination of the facts and evidence by the various courts was manifestly arbitrary or amounted to a denial of justice. Consequently, their claims are inadmissible as manifestly ill-founded.

4.11 The State party observes that, with regard to article 12 of the Convention, the judicial proceedings concern the delinquent father's return to his country of origin and that the mother and children may remain in Switzerland. That situation differs from those envisaged by the Committee in its general comment No. 12 (2009) on the right of the child to be heard. To the best of the State party's knowledge, the Committee has not yet had the opportunity to consider how the children's point of view could be appropriately taken into account in such a situation, particularly where no request for a hearing has been made and where the courts have, in any case, taken into account the best interests of the children in maintaining close contact with the parent whose removal is under consideration.

4.12 The State party emphasizes that the Federal Tribunal expressly took the interests of the children into account in its judgment, in particular the fact that the author had been taking care of his children since his release from prison and that they had developed an intense relationship. It was also emphasized and acknowledged that the author's return to his country of origin would have a significant influence on the quality of the relationship he would be able to maintain with his children. In such circumstances, there is no reason to believe that a separate hearing of the children would have been able to make a useful contribution to establishing the facts relevant to the examination of the author's case. The State party therefore considers that that complaint is also manifestly ill-founded.

4.13 Should the Committee decide that the communication is admissible, the State party considers that there has been no violation of the provisions invoked for the reasons set out above.

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

5.1 In their comments dated 22 July 2022, the authors contend that the State party takes an excessively narrow view of the rights enshrined in article 12 of the Convention. They consider that the State party could not properly have determined their children's best interests without having heard them first and given due weight to their views. The rights under articles 3 and 12 of the Convention are inextricably linked. As the Committee has explained, there can be no correct application of article 3 if the components of article 12 are not respected.[1]

5.2 The authors argue that the requirements of article 12 of the Convention were not met because the authors' children were not heard in the immigration proceedings concerning the expulsion of their father and that, therefore, their best interests had never been properly determined. The right to be heard plays an essential role in the implementation of the right

[1] General comment No. 12 (2009), para. 74.

of the child to have his or her interests placed at the centre of all decision-making that affects him or her.

5.3 The authors also reiterate that their children have been affected by the decision to expel their father and that, therefore, their rights under articles 3 and 12 of the Convention are engaged. It is undisputed between the parties that the author's children have been affected by the decision to expel their father.

5.4 The authors point out in that connection that it has now been five and a half years since M.F.'s release from prison in February 2017. He has not been subsequently subject to administrative detention in view of expulsion, the Canton of Geneva having decided not to take any measures in that regard, and has been living with his wife and children during all that time. M.F.'s relationship with his children has only strengthened since the domestic judgments cited above, particularly since his wife is now working longer hours, including regular night shifts, and he has assumed even greater responsibility for childcare and the household.

5.5 The authors recall that their daughter Me.F. was 9 and a half years old and N.F. was 7 years old when the Federal Tribunal handed down its judgment on 11 February 2021. The children were perfectly capable of formulating their own views and describing their predicament. The authors submit that the failure of the State party to hear children who are affected by immigration proceedings is systemic in Switzerland.

5.6 The author submits that the events that led to his criminal conviction occurred at the beginning of 2011, more than 11 years earlier. Since then, the author has not committed any further violent crimes. Although he was fined for a traffic-related offence (driving without a valid licence) and possession of controlled substances (marijuana), the gravity of those offences is minor. The latter offence is due to an addiction for which he proactively and successfully sought treatment.

5.7 M.F. submits that, as evidence of his rehabilitation, he benefited from early release from prison for his good conduct while serving his sentence. Furthermore, after his release, in February 2017, the Cantonal migration authority in Geneva twice gave him a temporary work permit and issued him a re-entry visa so that he could travel to Algeria to visit his sick mother. The fact that the Swiss authorities took the above decisions, including to abstain from imposing administrative detention in view of expulsion, is entirely inconsistent with the idea that M.F. constituted a threat to the public order.

5.8 The authors note that the Office for Civil Registration and Migration took almost seven years to decide on M.F.'s request for a residence permit. The prolonged proceedings demonstrated a manifest lack of urgency to expel him, a fact that is also entirely inconsistent with the notion that he posed a threat to public safety.

5.9 The unjustified delays in processing his case have also resulted in a major prejudice for his children, who have grown up with him, cannot even remember a time when he was not present in their lives and are now suddenly faced with the prospect of his expulsion.

5.10 The authors submit that the Committee has explained that the passing of time is not perceived in the same way by children and adults. In particular, delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.[2] The author contends that the principle of celerity expressed by the Committee was not respected in the present case. Moreover, he submits that none of the Swiss authorities took account of the fact that the consequences of those major delays had had an impact on his children, even though they had borne no fault in the matter.

5.11 The authors conclude that the above considerations only reinforce the idea that there were very strong reasons to have given serious regard to the best interests of the children in the domestic proceedings and that the proper balancing of all the equities at stake would not

[2] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 93.

necessarily have gone in favour of the public interest in M.F.'s expulsion, despite his serious criminal conviction.[3]

5.12 The authors consider that the Federal Tribunal's highly summary decision examined the interests exclusively from the perspective of M.F., and to some extend L.B., and did not even refer to the best interests of the child.

5.13 The authors maintain that, where primacy is given to an interest other than the children's, the obligation of the domestic authorities to motivate that decision is particularly important and must be comprehensive.[4] Considering that the decisions of the Swiss courts did not even begin to address the factors established by the Committee as necessary for a proper analysis of the best interests of the child, the authors persist in their conclusion that the decisions of the Federal Tribunal and the lower courts were arbitrary and amounted to a denial of justice.

5.14 The authors note that the State party's observation that it was unnecessary to hear the children underlines Swiss practice with respect to immigration and explains the general failure of the national authorities to respect the rights enshrined in article 12 of the Convention.

5.15 The authors submit that any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity does not respect the possibility for the child to influence the determination of their best interests and therefore violates the procedural aspect of article 3 of the Convention.

5.16 An assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight must be given to those views in all matters affecting the child,[5] including immigration or asylum proceedings in which they or their parents might be involved. States parties have an obligation under article 12 of the Convention to respect and protect a child's right to be heard.

5.17 The importance of giving the child the possibility to express his or her views in immigration and asylum proceedings is particularly significant due to the heightened vulnerability of children in such proceedings.[6]

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 the rules of procedure under the Optional Protocol, whether the communication is admissible under the Optional Protocol.

6.2 The Committee notes the State party's claim that the authors have not exhausted domestic remedies concerning their allegations under article 12 of the Convention, as they have not raised those issues either explicitly or in substance before the domestic authorities.

[3] The author refers to European Court of Human Rights, *I.M. v Switzerland*, Application No. 23887/16, Judgment, 9 April 2019, where the applicant had been convicted of sexual coercion and rape and the Court found a violation of article 8 of the European Convention on Human Rights because the Swiss authorities had focused exclusively on the gravity of the applicant's conviction, without taking into account the factors in his favour, including his relationship with his adult children and the evolution of his conduct since the commission of the offences 12 years earlier.

[4] In paragraph 97 of its general comment No. 14 (2013), the Committee stated that if, exceptionally, the solution chosen by the domestic authorities was not in the best interests of the child, the grounds for this had to be set out in order to show that the child's best interests had been a primary consideration despite the result. It was not sufficient to state in general terms that other considerations overrode the best interests of the child; all considerations had to be explicitly specified in relation to the case at hand, and the reason why they carried greater weight in the particular case had to be explained. The reasoning also had to demonstrate, in a credible way, why the best interests of the child had not been strong enough to outweigh the other considerations. Account had to be taken of those circumstances in which the best interests of the child had to be the paramount consideration.

[5] General comment No. 14 (2013), paras. 1 and 43.

[6] The authors cite general comment No. 12 (2009), para. 123.

The Committee also notes the authors' argument that the children's best interests could not properly be determined without hearing them first and giving due weight to their views and that, consequently, they consider that the claims have, in fact, been raised, as they are inextricably linked with the rights under article 3 (1) of the Convention. The Committee considers, however, that the claims made under article 12 should have been raised autonomously before the domestic authorities to have given the State party the opportunity to remedy the alleged violation.[7] The Committee finds, therefore, that the claims raised under article 12 of the Convention have not been raised explicitly or in substance before the domestic authorities and concludes that they are inadmissible under article 7 (e) of the Optional Protocol.

6.3 The Committee also notes the State party's contention that the communication must be declared inadmissible as it is manifestly ill-founded. The Committee is of the opinion, however, that, for the purposes of admissibility, the authors have sufficiently substantiated their claims under articles 3 (1), 9 and 16 of the Convention in that the decision to remove M.F. to Algeria due to his past criminal conviction, which would result in the separation of Me.F., N.F. and I.F. from their father, was in violation of the authors' rights under the Convention. The Committee therefore declares those claims admissible and proceeds with its consideration of the merits.

Consideration of the merits

7.1 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.

7.2 The main issue before the Committee is whether, in the circumstances of the present case, the decision to remove M.F. to Algeria, due to his past criminal conviction, thereby separating him from Me.F., N.F. and I.F., violated the children's rights under articles 3 (1), 9 and 16 of the Convention. The Committee must therefore consider whether such a separation is justified in the light of the State party's obligations under the Convention and whether the children's best interests were a primary consideration in the proceedings leading to the author's removal decision.

7.3 The Committee notes that the State party's judicial authorities considered that M.F. had committed an extremely serious offence (attempted murder) and that the public interest in removing him, based on the threat that he posed to public safety, outweighed his and the children's private interests in his remaining in Switzerland. The Committee notes that, subsequently, in 2017, M.F. received two additional convictions, for driving a vehicle with a foreign driver's licence and consuming narcotics, and for the slanderous denunciation of a prison guard.

7.4 The Committee also notes the authors' argument that the State party's judicial authorities have not undertaken a children's best interests assessment and that the judicial decisions do not explain how the removal order against M.F. is compatible with their best interests. The Committee further notes the authors' argument, recognized by the courts and in medical reports, that the children are strongly attached to their father, who takes care of them on a daily basis, and that the separation would, therefore, have negative effects on their psychological health and their cognitive, emotional and affective development. It also notes the authors' argument that the circumstances giving rise to his criminal conviction took place many years ago and that he has not committed any further violent crimes. The Committee further notes the authors' argument that the Office for Civil Registration and Migration took almost seven years to decide on M.F.'s request for a residence permit, which is inconsistent with the assumption that he poses a threat to public safety, and that the passing of time had adverse effects on their children, who grew up close to him and are now suddenly faced with the prospect of his expulsion.

7.5 The Committee recalls that, pursuant to article 9 (1) of the Convention, States parties should ensure that children are not separated from their parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary in the best interests of the

[7] See, mutatis mutandis, *K.K. v. Switzerland* (CRC/C/92/D/110/2020), para. 8.3.

children. The Committee also recalls paragraph 6 of its general comment No. 14 (2013), according to which the right of children to have their best interests taken into account as a primary consideration is a substantive right, a fundamental interpretative legal principle and a rule of procedure. Therefore, the legal duty to assess the best interests of the child applies to all decisions and actions that directly or indirectly affect the child, even if they are not the direct target of the measure; the Committee has specified that, in situations in which decisions would have a major impact on children, a greater level of protection and detailed procedures to consider their best interests was appropriate.[8] In that regard, the Committee considers it indispensable to carry out the assessment and determination of children's best interests in the context of a potential separation of a child from their parents.[9] The Committee recalls that, as a general rule, it is for the national authorities to examine the facts and evidence and to interpret domestic law, unless such an examination or interpretation is clearly arbitrary or amounts to a denial of justice. It is, therefore, not for the Committee to interpret domestic law or to assess the facts of the case and the evidence in the place of the national authorities but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the children were a primary consideration in that assessment.[10]

7.6 While acknowledging the State party's legitimate interest in enforcing its criminal and migration laws and decisions, the Committee considers that this interest needs to be balanced against the children's right not to be separated from their parents.[11] In such balancing, particular weight should be given to the proportionality of the return order and the particular impact that the separation would have on the children, taking into account their views. In the present case, the Committee notes that the domestic authorities found that the public interest in the removal of M.F. was manifest and that only exceptional circumstances would allow the private interest of the person concerned in remaining in Switzerland to prevail over the public interest in removing him. The Committee also notes the State party's contention that the national courts took into consideration the best interests of the children in their decisions and the impact on M.F.'s family life. The courts took into consideration, in particular, the close relationship that M.F. had developed with his children since his release from prison. The courts considered, however, that the two older children had been taken care of by their mother alone during the four years that M.F. was in prison and that she would be able to look after the children alone again. They also considered that the family could follow M.F. to Algeria, as L.B. was also from Algeria. The courts further considered that, in case the family decided to stay in Switzerland, M.F. could still maintain regular contact with his children, given the reasonable distance from Algeria and modern means of communication. The Committee, therefore, considers that the State party did assess the specific impact of the decisions on the children and considered whether continued contact with their father could be assured in practice. In the light of the foregoing, the Committee concludes that the removal of the author to Algeria would not constitute a violation by the State party of the rights enshrined in articles 3 (1) and 9 of the Convention.

7.7 Having reached that conclusion, the Committee does not consider it necessary to separately consider the author's claims under article 16 based on the same facts.

8. The Committee, acting under article 10 (5) of the Optional Protocol, finds that the facts before it do not disclose a violation of articles 3 (1), 9 and 16 of the Convention.

[8] General comment No. 14 (2013), paras. 19 and 20.

[9] Ibid., paras. 58 and 59.

[10] See, inter alia, the Committee's decisions of inadmissibility in *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; *Navarro Presentación and Medina Pascual v. Spain* (CRC/C/81/D/19/2017), para. 6.4; and *A.R.G. v. Spain* (CRC/C/85/D/92/2019), para. 4.2.

[11] *C.C.O.U. et al. v. Denmark* (CRC/C/94/D/145/2021), para. 8.7.

Annex

Joint opinion of Committee members Bragi Gudbrandsson, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova and Benoit Van Keirsbilck (dissenting)

1. In writing the present dissenting opinion, we recognize that the State party's law and practice include measures that allow for the consideration of the impact of family separation (removing the father, M.F., to Algeria) on children, but that insufficient efforts were made that focused on the children's best interests, as detailed in paragraphs 7.5 and 7.6 of the Views in the present matter. The separate opinion focuses on decisions made by the State's party's courts, as they indicate a misunderstanding of the obligations of courts in the application of articles 3 and 12 of the Convention in the context of the separation of the father from his children due to his past criminal conviction.

2. On admissibility, we respectfully disagree with the majority of the Committee regarding their finding, in paragraph 6.2 of the majority Views, that the authors' complaints under article 12 of the Convention were inadmissible, since they had not raised those issues autonomously, either explicitly or in substance, before the domestic authorities and that, therefore, the domestic remedies concerning their allegations under article 12 had not been exhausted. We recall the Committee's firm position that the children's best interests could not properly be determined without hearing them first and giving due weight to their views. Children's right to be heard is inextricably linked with the rights under article 3 (1) of the Convention. In fact, the State party's federal courts took into consideration the best interests of the children in their decisions, in particular, the close relationship that M.F. had developed with his children since his release from prison (paras. 4.7 and 4.8 of the majority Views). The federal courts, however, never heard the older children, Me.F. and N.F., in their best interests assessment and determination efforts in the procedure. The children are clearly affected by the decision to remove their father from the State party and article 12 does give children the right to be heard in judicial or administrative proceedings affecting the child, including decisions relating to family separation. Accordingly, we would have found the claim on behalf of Me.F. and N.F under article 12 to be admissible. On the merits, we also respectfully disagree with the majority of the Committee in respect of the claims under articles 3 and 12. We acknowledge the fact that the national courts took into consideration the best interests of the children in their decisions, in particular the close relationship that M.F. had developed with his children since his release from prison. We also note the authors' argument, recognized by the courts and in medical reports, that the children are extremely attached to their father, who takes care of them on a daily basis, and that the separation would therefore have negative effects on their psychological health and their cognitive, emotional and affective development.

3. Article 3 (1) provides that in all actions concerning children, including those undertaken by courts of law and administrative authorities, the best interests of the child should be a primary consideration. It is therefore necessary to consider whether decisions relating to the removal of the father from his children are actions that "concern" children. We have no doubt that they are, and we understand that that is the opinion of the majority of the Committee, as set out in paragraph 7.4 of the majority Views. In the present case, however, the majority found that the State party had discharged its responsibilities adequately and, therefore, found that there had been no violation of article 3 (1) of the Convention.

4. In determining the best interests of the child, and in understanding the impact that the separation from the father would have on the children, it is essential to hear their views. In the present case, Me.F. and N.F. were capable of forming their own views. Article 12 requires States to assure to the child the right to express their views "in all matters affecting the child" and permits that opportunity to be provided either directly or through a representative. We see no evidence that the national courts, in the decisions related to the appeal of refusal by the Office for Civil Registration and Migration to grant a residence permit to the father, considered the views of Me.F. and N.F., either directly or indirectly, i.e. through a representative.

5. While acknowledging the State party's legitimate interest in enforcing its criminal and migration laws and decisions, we consider that that interest needs to be balanced against the children's best interests. In such balancing, particular weight should be given to the proportionality of the return order and to the particular impact that the separation would have on the children, taking into account their views. In the present case, we observe that the judicial authorities did not conduct a detailed and case-specific examination of the consequences that the separation could have on Me.F., N.F. and I.F., including: (a) the psychological impact that separation from their main caregiver would entail; (b) the financial situation of the family, to determine whether they would be able to afford visits to Algeria on a regular basis; (c) the special impact of the separation on the youngest child and the determination of how she could maintain effective communication with the author; and (d) the challenges that the children would face if they decided to follow M.F. to Algeria. Considering the five-year re-entry ban and the young age of the children, a detailed assessment of their best interests would have ensured that the decision makers were fully cognizant of all relevant factors before making their balancing decision.

6. In the light of the above, we would have found violations of the rights of Me.F. and N.F. as enshrined in articles 3 and 12 of the Convention and a violation of the right of I.F., as enshrined in article 3 (1) of the Convention.