



Convention on the Rights of the Child

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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. 162/2021*, **

<i>Communication submitted by:</i>	S.K. (represented by counsel, Boris Wijkström)
<i>Alleged victim:</i>	T.A.
<i>State Party:</i>	Switzerland
<i>Date of communication:</i>	21 October 2021 (initial submission)
<i>Date of adoption of decision:</i>	19 May 2025
<i>Subject matter:</i>	Removal of a child and his mother to Kosovo
<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 their parents; standard of living
<i>Articles of the Convention:</i>	3, 12, 16 and 37
<i>Articles of Optional Protocol:</i>	7 (c), (d) and (f)

1.1 The author of the communication is S.K., born in 1979, of Serbian nationality, acting on behalf of her son T.A., born in 2011. She claims that by sending her and her son back to Kosovo, Switzerland would be violating her son's rights under articles 3, 12, 16 and 37 of the Convention. The author is represented by counsel. The Optional Protocol has been in force for the State Party since 24 July 2017.

1.2 On 25 October 2021, the Committee, acting through its Working Group on Communications, rejected the author's request for interim measures to suspend her and her son's removal to Kosovo.

* Adopted by the Committee at its ninety-ninth session (12–30 May 2025).

** The following members of the Committee took part in the examination of the communication: Suzanne Aho, Thuwayba Al Barwani, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chopel, Rosaria Correa, Timothy Ekesa, Bragi Gudbrandsson, Mariana Ianachevici, Sophie Kiladze, Cephas Lumina, Faith Marshall-Harris, Benyam Dawit Mezmur, Aïssatou Alassane Sidikou, Zeinebou Taleb Moussa and Benoit Van Keirsbilck.

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 consideration of the communication. Juliana Scerri Ferrante also did not participate in the consideration of the communication.



Facts as submitted by the author

2.1 On 5 March 1999, the author fled the conflict in Kosovo and applied for asylum in Switzerland. She was refused asylum but was granted subsidiary protection. On 7 February 2008, she obtained a category B residence permit. She settled in Geneva, where she worked at a service station until July 2009, when she lost her job. On 13 September 2011, the author gave birth to T.A. from her relationship with V.I. and devoted herself full time to her son's care. On 28 November 2013, she was convicted of selling stolen goods and fined.¹ On 31 March 2015, V.I. was ordered to pay monthly alimony to the author.²

2.2 On 21 October 2014 and 2 May 2016, the Office for Civil Registration and Migration warned the author that her residence permit could be revoked because she was dependent on social welfare and urged her to do everything in her power to make a living independently. On 30 August 2019, the Office notified the author of its refusal to renew her residence permit owing to her welfare dependency from 1 October 2010 to August 2019, in the amount of 308,579 Swiss francs (SwF). According to the Office, although T.A. was attending school in Switzerland, he was only 8 years old at the time and was not so integrated in his environment that he could not easily adapt to life in Kosovo. At the Office's request, the author confirmed that her son had never met his father.³

2.3 On 30 September 2019, the author appealed, arguing that a removal would be contrary to her son's best interests and would cut him off completely from the life and world he had built in Geneva, that he would have extreme difficulty integrating in Kosovo because he did not speak the local language and that the removal would traumatize him psychologically. She explained that Serbs were a minority in Kosovo and that ethnic tensions prevailed. On 3 February 2020, the Administrative Court of First Instance of the Canton of Geneva rejected the appeal, noting that the author had made no real effort to find a job, despite the fact that her 8-year-old son was attending school and had had a place in a kindergarten since August 2014. The Court acknowledged that the author's son might face certain difficulties if he was returned but upheld the argument of the Office for Civil Registration and Migration that his integration in Switzerland was not so complete as to be deep rooted or irreversible. Although T.A. spoke only French, he had accompanied his mother to Kosovo for periods ranging from two to three months, so the language of that country should not be totally foreign to him. He could learn it with the help of his mother and grandmother. The Court noted that T.A. did not live with his father, who had a permanent residence permit, and that he did not have a close relationship with him, so he could not invoke article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The Court took note of the decision of the Office for Civil Registration and Migration of 30 August 2019, according to which the deportation of persons belonging to the Serbian minority to Kosovo was enforceable. The author appealed this decision.

2.4 On 16 June 2020, the Administrative Division of the Court of Justice of the Canton of Geneva upheld the contested decision, finding that T.A.'s integration in Kosovo would be difficult but not impossible at his age. Although the author disputed that her visits to Kosovo had lasted for the entire period covered by the visas she had obtained, the Court found that during these visits, the child might have begun a relationship with his grandmother and other family members but had no family ties in Switzerland, since he had never met his father. The author appealed, reiterating her arguments.

2.5 On 20 October 2020, the Federal Supreme Court agreed to consider the author's case in the light of article 8 of the European Convention on Human Rights. However, while recognizing that the best interest of the child to maintain close contact with his or her parents, in accordance with article 3 of the Convention on the Rights of the Child, must be taken into

¹ The author claims that she has no further criminal convictions. However, a letter from the Office for Civil Registration and Migration dated 30 August 2019 mentions that she is the subject of several investigations.

² The author claimed that T.A. and his father had begun seeing each other every other weekend and had developed a close emotional bond. This claim was based on a letter from the father dated 20 July 2021; however, during the legal proceedings, the author admitted that her son had never met his father.

³ Statement dated 17 March 2016.

account when deciding on the proportionality of a measure taken under article 8 (2) of the European Convention on Human Rights, the Court noted that the author was not integrated into society, either professionally or socially, despite her long stay in the country. It noted that the child had no right of residence of his own and that his right of residence depended on his mother. As the author no longer enjoyed the right of residence, her child's right of residence had also been extinguished. The Court concluded that there was no violation of article 8 of the European Convention on Human Rights.

2.6 On 30 April 2021, the author lodged an application with the European Court of Human Rights under article 8 of the European Convention on Human Rights. On 1 July 2021, in a summary single-judge decision of inadmissibility, the Court dismissed the application on the ground that it was unsubstantiated. The author argues that her application to the Court does not constitute "the same case" because it concerned her own situation, not that of her son, and because she did not refer to the specific rights of the child enshrined in the Convention on the Rights of the Child.

2.7 On 13 October 2021, the author requested a review of the revocation of her residence permit. This request does not have an automatic suspensive effect, nor is it likely to succeed, as the author has recently lost her job – owing to the revocation of her category B permit, she is no longer authorized to engage in paid employment – and is once again receiving social welfare.

Complaint

3.1 The author alleges a violation of T.A.'s rights under article 3 (1) of the Convention on the ground that the national courts failed to explain how the removal order was compatible with her son's best interests. The Office for Civil Registration and Migration and the courts of first and second instance did not refer to the notion of the "best interests of the child" in their decisions. They analysed only the author's right to respect for her private life under article 8 of the European Convention on Human Rights, neglecting to consider T.A.'s rights under the Convention on the Rights of the Child. In substance, the author has raised claims under articles 3, 16 and 37 of the Convention. She argues that removal would affect T.A.'s mental health because he was born in Switzerland and has lived there all his life, and his school, teachers and friends are in Geneva; that he would have extreme difficulty integrating in Kosovo, given his Serbian origin and the fact that he speaks none of the official languages; and that he would face harassment and discrimination because of his belonging to the Serbian minority. The decisions made at the cantonal level do not demonstrate how these considerations were weighed up before the decision to expel T.A. was made. The authorities focused on T.A.'s young age, which they claimed would allow him to integrate with relative ease into a new environment. The author argues that her case is not isolated, insofar as the application by the State Party of article 3 of the Convention in the context of migration and expulsion is widely inadequate.⁴

3.2 The author also alleges a violation of T.A.'s rights under article 12 of the Convention, as his views were not heard despite his being 10 years old and having been born in Geneva and lived there all his life.

3.3 The author alleges a violation of article 16 of the Convention, claiming that T.A.'s removal would "uproot" him from Switzerland, the country he considers his home, where he has his friends and social and cultural ties and is pursuing his education. This uprooting would constitute interference in his family life, as it would put an end to his relationship with his father, a permanent resident of Switzerland with whom he has a close emotional bond and from whom he receives regular financial support.

3.4 According to the author, T.A.'s removal would constitute a violation of the principle of non-refoulement set out in article 37 of the Convention, as in Kosovo he would face discrimination, harassment and inter-ethnic violence on account of his belonging to the

⁴ *E.A. and U.A. v. Switzerland* (CRC/C/85/D/56/2018), para. 7.3; see also European Court of Human Rights, *M.P.E.V. and others v. Switzerland*, application No. 3910/13, judgment of 8 July 2014, para. 57, and European Court of Human Rights, *El Ghatet v. Switzerland*, application No. 56971/10, judgment of 8 November 2016, paras. 52 and 53.

Serbian minority. His vulnerability would be heightened by the fact that he is a child who speaks neither Serbian nor Albanian and has no cultural knowledge, social relations or family other than his mother to help him. His experience in this unfamiliar and hostile environment would be traumatic and there is a real risk that he would suffer irreparable harm.

State Party's observations on admissibility and the merits

4.1 In its observations of 25 April 2022, the State Party points out that the European Court of Human Rights declared the author's application inadmissible. In the light of the evidence in its possession, the Court found that the facts complained of did not reveal any appearance of a violation of the rights and freedoms enshrined in the European Convention on Human Rights or the protocols thereto. It found that the author's allegations, in particular the claim of a violation of article 8 of the Convention (right to respect for private and family life), were manifestly ill-founded within the meaning of article 35 (3) (a) of the Convention. With regard to the question of whether the present communication relates to the same issue as the application to the Court, the State Party is of the view that since the author lodged the application, it is up to her to demonstrate that this is not the case. Mere assertions are not sufficient to provide reliable evidence of the claims raised. The author did not attach a copy of the application to the case file. As the application has not been submitted to the State Party for comment, the latter is not aware of its contents. It is hardly plausible that the author did not raise before the Court all the evidence at her disposal, including that which she has put forward before the Committee. This is not a complex case, and the author's argumentation has remained largely unchanged throughout the proceedings. The fact that the guarantees of the European Convention on Human Rights are not specific to children's rights is not sufficient to establish a difference between the procedures, since the Court regularly examines cases from the perspective of children's rights. The Court regularly refers to article 3 of the Convention on the Rights of the Child when examining the compatibility of the removal of a child to his or her State of origin with article 8 of the European Convention on Human Rights.⁵ It must be admitted that the application to the Court concerns the same issue as the communication submitted to the Committee.

4.2 The author cites a decision of the Committee against Torture, in which the Committee found that where a decision of the European Court of Human Rights gave no reasons for finding a case inadmissible, it was impossible to determine whether the Court had examined the merits and such a decision did not preclude further examination of the case.⁶ In the case in question, however, the Court found, "in the light of all the evidence in its possession, that the facts complained of do not reveal any appearance of a violation of the rights and freedoms enshrined in the Convention or the protocols thereto. It follows that these allegations are manifestly ill-founded within the meaning of article 35 (3) (a) of the Convention". The Court indicated the ground on which the application, which related to article 8 of the European Convention on Human Rights, was declared inadmissible, namely that it was manifestly ill-founded.

4.3 According to the jurisprudence of the European Court of Human Rights, an application may be rejected as manifestly ill-founded only after an examination of its merits. Claims that are manifestly ill-founded can be grouped into four distinct categories, namely: "fourth-instance" claims; claims in respect of which there is no apparent or obvious violation; unsubstantiated claims; and confused or fanciful claims. With regard to the second category, the Court considers that there is a manifest lack of substantiation when the application meets the formal conditions of admissibility, is compatible with the European Convention on Human Rights and does not constitute a fourth-instance claim but nevertheless does not disclose any appearance of a violation of the rights enshrined in the Convention. In such cases, the Court examines the substance of the claim, concludes that there is no appearance of a violation and declares the application inadmissible. The Court examined the merits of the author's case and declared her application inadmissible on the basis of that examination. The author's communication must therefore be declared inadmissible under article 7 (d) of the Optional Protocol.

⁵ European Court of Human Rights, *El Ghatet v. Switzerland*, paras. 46 et seq.

⁶ *D.Z. v. Switzerland* (CAT/C/71/D/790/2016), para. 9.1.

4.4 The State Party argues that the author has not exhausted domestic remedies in respect of her claims relating to the procedural aspects of articles 3 and 12 of the Convention, namely that the authorities did not give T.A. the opportunity to be heard as they did not hear him in person during the proceedings, and that they did not explain how T.A.'s expulsion would be compatible with the best interests of the child. In the author's submissions to the various domestic authorities, including the three appeal bodies that considered her case, she did not raise these claims, even in substance. Consequently, the claims in question must be declared inadmissible for failure to exhaust domestic remedies, and their submission borders on acting in bad faith. While the author had the opportunity to present all her arguments before four bodies, she gave very little weight to T.A.'s specific situation. In her appeal of 30 September 2019 to the Administrative Court of First Instance of the Canton of Geneva, of the four pages making up the "in law" part of the brief, less than four lines were devoted to the difficulties that T.A. would allegedly face in the event of his removal to Kosovo.

4.5 The State Party indicates that the Federal Supreme Court did in fact refer to article 3 of the Convention. The question regarding the procedural aspect of this article is not whether the authorities expressly referred to the article in their decisions but whether they took due account of the various aspects of the best interests of the child in their decisions. This was indeed the case, in particular in terms of the proportionality of the measure and its compatibility with article 8 of the European Convention on Human Rights. In its decision of 30 August 2019, the Office for Civil Registration and Migration held that, given T.A.'s schooling in Switzerland, he was still of a young age. His integration had not yet reached the point where he could no longer adapt to his home country and a different school system. His young age and adaptability would allow him to adapt to the change. Other elements of the decision indirectly concerned T.A.'s situation in the event of his removal, in particular the author's social and cultural integration in her country of origin and the fact that her mother still lived there. The Office consulted with the State Secretariat for Migration regarding the general situation of the Serbian minority in Kosovo and consequently held that the removal was enforceable.

4.6 In its judgment of 3 February 2020, the Administrative Court of First Instance of the Canton of Geneva examined T.A.'s specific situation. This is particularly clear from the following passage taken from the judgment:

The son [T.A.] was born in Switzerland. Aged 8, he is in the fourth year of primary school and seems well integrated. At this stage, however, he is essentially acquiring general knowledge that he can put to good use in his home country. Without minimizing the difficulties he will face on his return, the Court finds, in view of all the elements in the file, that his integration is not yet so deep rooted and irreversible that a return to his country of origin is no longer possible. Even admitting that [T.A.] speaks only French, it should be remembered that he has accompanied his mother on several occasions to [G.] for periods of two to three months. His mother's native language cannot be totally foreign to him. His young age and schooling will help him to learn the language and he will quickly acquire a level that will allow him to integrate into social and school life, with the help of his mother and grandmother.

The Court noted that the author continued to have family ties in her country of origin and was still young. As she was in good health and fluent in French, she could reintegrate and use her language skills to find a job more easily. The Court recalled that T.A.'s father was required to contribute SwF 500 a month towards his upkeep, an amount close to the average monthly salary in Kosovo.

4.7 The Court of Justice of the Canton of Geneva examined all the elements of the case in detail. It found that the author had provided no details about the lives of her father and siblings, despite indicating that they lived in Kosovo at the time of her asylum application in 1999. While the changes that had occurred in Kosovo during her absence made it such that reintegration would not be without difficulty for her and T.A., those changes in no way prevented reintegration. The Court noted that the author would have no less chance of supporting herself and T.A. through gainful employment there than she would in Switzerland and that she could count on the support of her family, in particular her mother, with whom she had kept in regular contact during her time in Switzerland and whom she has not claimed

to be chronically ill. The Court took due account of T.A.'s specific situation, stating the following:

Aged nearly 9, he was born in Geneva, where he has so far completed his compulsory schooling. He has not yet entered adolescence, an important period in personal, academic and professional development that often leads to greater integration into a particular environment. He has undoubtedly kept in touch with his family in Kosovo, at least his maternal grandmother, in view of the three return visa applications filed by his mother in August 2017 and February and June 2019, respectively, during the school holidays. These visas were all requested for periods of two or even three months. Even if, as claimed, the mother and her child did not spend the entire duration of the periods covered by these visas in [G.], the fact remains that the child was able to forge ties with his maternal grandmother, and even with other members of [S.K.]'s family. The child, however, has no ties to the only other member of his family in Switzerland, his father, whom he does not know. The author maintains that her son does not speak the language of Kosovo, and neither does she. At nearly 10 years of age, learning a language does not appear to be an insurmountable obstacle for a child in primary school, as children have a strong potential for adaptation. Although undeniably a significant change, the reintegration of the mother and her son in Kosovo and the continuation of the latter's schooling in that country do not appear to be out of the question.

4.8 The Federal Supreme Court (third instance) merely highlighted certain important aspects of the case, referring back to the assessment of the lower authority. As the two courts seized before it had conducted a detailed and meticulous examination of the various aspects of the case and it upheld their conclusions, there is no basis for criticizing this approach.

4.9 The State Party points out that the author's complaint is formulated in very general terms and should be deemed manifestly ill-founded within the meaning of article 7 (f) of the Optional Protocol. The author alleges a violation of the substantive part of article 3 of the Convention on the ground that the authorities expressly referred to it only once in the contested decisions. The State Party points out that the author herself did not refer to the Convention during the domestic proceedings and gave relatively little weight to aspects specifically concerning T.A. The authorities took due account of all aspects of T.A.'s situation when examining the proportionality of the removal order and its compatibility with article 8 of the European Convention on Human Rights. By disregarding the assessment of interests carried out by the authorities, the author fails to concretely demonstrate how this assessment is incompatible with article 3 of the Convention on the Rights of the Child.

4.10 The author indicates that her place of origin is now part of Kosovo, whose language she does not speak, and is no longer the same place as the one she left. The State Party acknowledges that the author and T.A. would face certain difficulties in the event of their return. However, T.A. is still young. It is generally accepted that young children are most attached to the people closest to them, especially their parents, while attachment to an environment becomes greater with adolescence. T.A. is at an age when learning a new language is relatively easy, especially as he has no known learning difficulties and could count on the support of his mother, grandmother and other people around him. He would quickly acquire a level of language sufficient to allow him to integrate into social and school life. Serbian is recognized as one of the two official languages of Kosovo and by law enjoys the same status as Albanian. The aspects of the case relating to T.A.'s identity and ethnic and cultural origin do not render the removal incompatible with the principle of the best interests of the child.

4.11 T.A. was raised by his mother. Although the author claims that T.A. is in regular and close contact with his father, these claims must be rejected, since throughout the proceedings the author indicated that T.A. does not know his father and has never met him. T.A.'s removal alongside his mother in no way affects the family environment in which he grew up. The author gave no details regarding her father or possible siblings and T.A. has already visited his grandmother in Kosovo on several occasions. His family environment would thus be preserved in the event of his removal to Kosovo.

4.12 Regarding article 37 of the Convention, the author argues that T.A. would be exposed to acts of discrimination, harassment and possibly inter-ethnic violence on account of his belonging to the Serbian minority in Kosovo. The State Party notes that the author has not provided any concrete evidence in support of her allegations concerning the situation of the Serbian minority in Kosovo and argues that this claim is insufficiently substantiated within the meaning of article 7 (f) of the Optional Protocol. According to an estimate based on data from 2010 and 2013, the Serbian minority in Kosovo numbers around 146,000, representing just under 8 per cent of the country's population. This Serbian minority is split roughly in half between the north and south of the country and makes up the majority of residents in 10 municipalities. With the support of the European Union, Kosovo and Serbia signed an agreement in 2013 to create a community of Serb-majority municipalities in the north, with autonomy over economic development, education, health and land-use planning. Several agreements were signed on the establishment of an association of Serbian municipalities, energy, telecommunications and the opening of the Mitrovica bridge. The Constitution of Kosovo prohibits racial or ethnic discrimination and provides for the adoption of transitional measures to protect and promote the rights of minorities. The Protection against Discrimination Act establishes a comprehensive system of protection against discrimination in Kosovo and designates two bodies – the Office of the Ombudsman and the Office of Good Governance, reporting to the Prime Minister – as responsible for dealing with cases of discrimination, promoting equality and monitoring the implementation of measures to combat discrimination. The Criminal Code classifies offences motivated by the victim's race or ethnicity as "acts of hatred".

4.13 In the first six months of 2021, 48 incidents targeting the Serbian minority in Kosovo were reported, including property damage, theft, physical attacks, threats and offensive graffiti. In September 2021, several people suspected of attacking a group of Kosovo Serbs in Mitrovica were arrested. Access to justice for the Serbian minority has been improved through the integration of the judicial system of Serbian-majority municipalities in northern Kosovo and of Serbian judges and staff into the overall Kosovo judicial system. The Office of the Language Commissioner monitors the implementation of legislation relating to official languages in Kosovo. In view of the size of the Serbian minority, the various measures taken to combat discrimination and the fact that, in the event of their return, the author and T.A. would be able to count on the support of the author's mother and other relatives, the State Party is convinced that their return is compatible with the principle of the best interests of the child as it relates to safety.

4.14 The author has not indicated that T.A. suffers from any health problems or is particularly vulnerable. His school reports show that he performs well, in terms of both his learning and his general behaviour. He does not appear to have any particular vulnerability that should be taken into account in the determination of his best interests.

4.15 In conformity with international legal standards, constitutional law in Kosovo protects the right of minorities to maintain and develop their culture and identity, including their language. The law of Kosovo places emphasis on the importance of education for the protection and promotion of minority rights and safeguards the right of minorities to receive State-provided education in their own languages. Members of all communities have the right to establish and manage their own schools, for which public support may be obtained. At present, two parallel education systems exist in Kosovo. One is run by the Government of Kosovo and offers teaching in Albanian, Turkish and Bosnian. The other is managed by Serbia and offers Serbian-language education in six districts. According to one estimate, 17,456 students attend Serbian-language schools, including 60 primary and 34 secondary schools. The Pejë district, where the author's mother lives, has three Serbian-language primary schools and two secondary schools. In the event of their return, the author could choose a Serbian-language school for T.A., which would allow her and her mother to support him in his adjustment to the new school environment.

4.16 The State Party recalls that the principle of the best interests of the child cannot systematically take precedence over other interests and require that all children be admitted to reside in a State if their situation is better there than in their State of origin. Rather, it requires the authorities to place children's interests at the heart of their assessment and to attach crucial importance to them. In line with the practice of the Federal Supreme Court, the

situation of individual family members must not be considered in isolation but in relation to the overall family context, since the family forms a unit. The question of children is certainly an important aspect of the family's situation, but it is not the only criterion. The Federal Supreme Court has reiterated the need to assess all the interests at stake and, consequently, to examine, for each family member, whether removal from Switzerland appears to be a proportionate measure. The private interest of the author and T.A. in remaining in Switzerland is opposed to the public interest in their removal. The author had been receiving social assistance since 2010, in the amount of almost SwF 310,000 at the time of the ruling of the Court of Justice on 20 October 2020. Since arriving in Switzerland in 1999, she has worked only from May 2004 to 2009 as a cashier at a service station.

4.17 The authorities were very tolerant of the author, repeatedly warning her of the consequences of prolonged welfare dependency. However, she has no qualifications and has done nothing since 2010 except take French courses in 2018 and complete a five-day training course in chambermaid work to improve her chances on the job market. As for her job search, she has produced no attestations from potential employers demonstrating the seriousness of her endeavours. She herself has stated on several occasions that, since the birth of her son, it has been impossible for her to manage her professional life effectively. The fact that she raises T.A. alone is not enough to explain her passive attitude over the years. T.A. began attending kindergarten in August 2014 and subsequently started school; the author's situation was no different from that of many working parents. She should have been able to find a job like the one she held at the beginning of her stay in Switzerland. According to the authorities, the author cannot claim to have demonstrated irreproachable conduct, given that she was convicted of selling stolen goods.

4.18 According to the Committee's jurisprudence, its role is not to interpret laws or to assess facts and evidence in the place of national authorities but to ensure that such assessments were neither arbitrary nor tantamount to a denial of justice and that the best interests of the child were a primary consideration. In view of the author's passive attitude and prolonged reliance on social welfare, and taking into account the various factors reviewed in relation to T.A.'s situation, the State Party maintains that the authorities' balancing of interests is beyond reproach and that the contested decision does not contravene the principle of the best interests of the child.

4.19 With regard to the possibility of hearing the child either directly or through a representative or an appropriate body, the Committee has specified that the child's representative may be the parent(s), a lawyer or another person. T.A.'s interests in the domestic proceedings were represented by his mother, who benefited from legal representation during the proceedings, thereby ensuring the defence of their identical interests. The author does not claim that there was a conflict of interest or the risk of a conflict of interest between their views. She was therefore in a position to properly represent T.A.'s interests. She does not indicate what additional elements T.A. could have presented, nor to what extent his hearing could have had an impact on the establishment of the facts or the proceedings. At the time of the decision of the Office for Civil Registration and Migration, T.A. was 8 years old. Hearing children at such a young age can affect them and may not be in their best interests if, as in this case, their interests are known and the hearing is not likely to clarify the issues raised. T.A.'s interests were adequately and sufficiently represented by the author and their legal representative, so there was no violation of article 12 of the Convention.

4.20 The guarantees set out in articles 16 and 37 of the Convention overlap with the relevant aspects of the principle of the best interests of the child. The removal of the author and T.A. to Kosovo is compatible with this principle.

Author's comments on the State Party's observations

5.1 In her comments of 14 October 2022, the author admits that the evidence and arguments she presented concerning T.A.'s relationship with his father are inauthentic. In her statements to the Committee, she exaggerated the extent of T.A.'s contact with his father. The letter from T.A.'s father was in fact written and signed by herself. She withdraws her arguments concerning the violation of article 16 of the Convention with regard to T.A.'s relationship with his father. She maintains only those aspects of her claim based on article 16

that do not concern this relationship, namely those concerning arbitrary interference in T.A.'s home. She is terrified by the prospect of removal and its consequences for her son. Her emotional distress led her to make the major error of fabricating the letter she claimed was from T.A.'s father and exaggerating the extent of T.A.'s contact with him. The author maintains her other claims, which are separate from the question of T.A.'s relationship with his father. The author did not attach her application to the European Court on Human Rights to the case file of the present proceedings because she was unable to obtain a copy of it from her former counsel.⁷

5.2 With regard to the State Party's argument that the rights she invoked in her communication to the Committee are identical to or coextensive with the rights enshrined in article 8 of the European Convention on Human Rights, the author asserts that the State Party's position is without legal basis and manifestly at odds with the nature of the Convention on the Rights of the Child. Before the European Court of Human Rights, the author invoked article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life. It is not possible for the Court to have considered the rights specific to children raised by the author in the present communication, which are not "covered" by article 8 and have no corresponding provision in the European Convention on Human Rights. The claim concerning a violation of article 12 of the Convention on the Rights of the Child could not have been dealt with by the Court.

5.3 The author claims a violation of the principle of non-refoulement under article 37 of the Convention in relation to T.A.'s removal, which was not raised before the European Court of Human Rights, given that its inadmissibility decision refers only to claims raised under article 8 of the European Convention on Human Rights, and not to article 3, which would be the corresponding article of that convention. The Court referred to article 3 of the Convention on the Rights of the Child only to support its conclusions under its own law and jurisprudence under article 8 of the European Convention on Human Rights, and not as an independent basis for its judgments. The Court has no jurisdiction on this last point.⁸ There is no legal basis for arguing that the Court interprets and applies article 3 of the Convention on the Rights of the Child in its decisions concerning children. The Committee has specific jurisprudence on the procedural and substantive aspects of article 3, which cannot be subsumed under the Court's general statements on the importance of the best interests of the child. The fact that the author is unable to provide a copy of her application to the Court should have no effect on the admissibility of her communication, as the Court could not have examined the claims specific to children's rights raised by the author.

5.4 T.A.'s situation was discussed throughout the domestic proceedings. The fact that the author's main arguments related to herself does not detract from the fact that she explicitly referred to T.A.'s situation. The author contests the State Party's arguments regarding the description of T.A.'s situation in the domestic proceedings, which she considers contradictory. The State Party itself has stated that T.A.'s situation was referred to in the domestic proceedings, albeit briefly and concisely.

5.5 The State Party's arguments concerning the non-exhaustion of domestic remedies in relation to articles 3 and 12 of the Convention should be rejected, as claims regarding T.A.'s rights have been raised and addressed by national bodies. The author asserts that these articles are inextricably linked and that it is not possible to properly determine the best interests of a child without hearing and taking into account his or her views, particularly if he or she is of an age at which those views may reasonably be taken into account. T.A. was 8 years old when the Office for Civil Registration and Migration issued its negative decision and 10 years old when the final decision was made. As the Committee has previously explained, there can be no correct application of article 3 if the components of article 12 are not respected.⁹ Since the question of T.A.'s best interests was raised and he was affected by the decision to remove him to Kosovo, he should have been given the opportunity to express his views.

⁷ The counsel was asked twice to provide a copy of the application but claimed she could not find it.

⁸ European Convention on Human Rights, art. 32 (1): "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47."

⁹ Committee on the Rights of the Child, general comment No. 12 (2009), para. 74.

5.6 T.A.'s best interests could not have been properly determined by the authorities because his views were not sought or taken into consideration. The right to be heard plays an essential role in the realization of the right of the child to have his or her interests placed at the centre of all decision-making that affects him or her. The assessment of the child's best interests must include respect for the child's right to express his or her views freely, and these views must be taken into account in all matters concerning the child,¹⁰ including any migration procedures in which he or she (or his or her parents) may be involved. The Committee has confirmed the interdependence of the rights enshrined in articles 3 and 12 of the Convention and has found that the lack of a direct hearing for the child constituted a violation of articles 3 and 12 of the Convention.¹¹ The Committee has found violations of article 12 even when such violations were not explicitly raised in domestic proceedings.¹² In the case of *M.K.A.H. v. Switzerland*, the Committee rejected the State Party's argument that the child should have demonstrated his ability to form his own views and explicitly requested a hearing.¹³ The determination of the best interests of the child requires that the child's situation be assessed separately, irrespective of the grounds on which his or her parents have applied for asylum.

5.7 The failure of the State Party to hear children involved in migration procedures, even when the migrant child makes a specific request to this effect, is a systemic problem. The Committee has noted that the general lack of implementation of article 12 of the Convention for migrant children is problematic.¹⁴

5.8 On the merits, the author asserts that the consideration given to T.A.'s situation at the domestic level was narrowly focused on his young age and the conclusion that he could easily adapt to a new environment without further analysis. None of the author's substantive claims under articles 3, 16 or 37 of the Convention was examined by the courts. The cantonal decisions focused on the "private life" aspect of article 8 of the European Convention on Human Rights in relation to the author, not to T.A., who was treated as an auxiliary rather than as a holder of rights under the Convention. The decision to deport T.A. was manifestly contrary to his best interests, and in taking this decision the authorities deliberately gave primacy to the public interest of safeguarding the economic well-being of Switzerland over T.A.'s interest in avoiding being traumatically uprooted from his home and sent to Kosovo, where he would be part of a minority that faces discrimination and harassment. When primacy is given to an interest other than that of the child, the obligation incumbent on national authorities to give reasons for their decision is particularly important and comprehensive. The decisions of the courts did not take due account of the factors defined by the Committee as being necessary for a proper analysis of the best interests of the child, and consequently the decisions of the cantonal courts and the Federal Supreme Court were arbitrary and constituted a denial of justice.

5.9 During the domestic proceedings, T.A. was old enough to be capable of voicing his views about his removal to Kosovo, where he had visited his mother's home town. He would have been capable of formulating an opinion on the situation and challenges he would face there. The failure of the authorities to hear T.A.'s point of view reflects a failure to take into account the specific circumstances of his case and to assess whether there was a risk that the situation in Kosovo could lead to a violation of the Convention.

5.10 The rights contained in articles 16 and 37 of the Convention are not "coextensive" with those of article 3. With regard to arbitrary interference in T.A.'s "home" within the meaning of article 16 and the irreparable harm he would suffer within the meaning of article 37, the author recalls that T.A. was born in Geneva, where he has lived his entire life. With the exception of two short visits to see his sick grandmother, he has no knowledge of Kosovo. He speaks only French. The author had been living in Geneva for 10 years when she gave birth to T.A. and was fluent in French, the language in which she chose to raise him. For T.A.,

¹⁰ Committee on the Rights of the Child, general comment No. 14 (2013), paras. 6 (c) and 14 (b).

¹¹ *K.S. and M.S. v. Switzerland* (CRC/C/89/D/74/2019), para. 7.8.

¹² *E.A. and U.A. v. Switzerland*, paras. 7.3 and 7.4.

¹³ *M.K.A.H. v. Switzerland* (CRC/C/88/D/95/2019), para. 10.11.

¹⁴ CRC/C/CHE/CO/5-6, para. 20 (a).

removal would represent a profound and traumatic uprooting from all that is familiar to him and would do irreparable psychological damage to him.

5.11 The author and her son belong to the Serbian Orthodox Christian minority of Kosovo, where the majority of inhabitants are Kosovar Albanians who speak Kosovar Albanian and practise Islam. Before the conflict, some 300,000 Serbs lived in Kosovo. Today, around 150,000 Serbs remain, making up less than 10 per cent of the population. The majority of Kosovo Serbs live in enclaves. The Serbian minority faces significant discrimination, harassment, stigmatization and even violence from the Albanian majority. T.A. would be exceptionally vulnerable owing to his young age and the fact that he has no cultural or social ties and speaks none of the local languages. He would be unable to understand or explain himself in any context, let alone defend himself against harassment, stigmatization and violence motivated by his ethnicity. His educational progress would be interrupted, because it would be impossible for him to integrate into school in Kosovo until he had mastered a local language, and his access to school would be hindered because he belongs to a minority that faces discrimination. His removal would be disruptive and have lasting, irreversible effects on his development.

5.12 Systemic societal discrimination, including the harassment and stigmatization of a child, has been considered by the Committee as a relevant factor in assessing compliance with the non-refoulement obligation.¹⁵ The specific difficulties that T.A. would face in Kosovo owing to systemic discrimination were raised in the proceedings but were not examined by the authorities. The latter relied on two general presumptions to justify their removal decision. The first was that the removal of Serbs to Kosovo is now authorized under Swiss law and does not generally violate the State Party's international commitments. This presumption was based on a decision by the State Secretariat for Migration and was invoked by the Office for Civil Registration and Migration and the cantonal courts to exclude the need for an individualized assessment of the foreseeable consequences of removal to Kosovo for T.A. and the author. The author's home town, in western Kosovo, is dominated by Kosovar Albanians and was the scene of inter-ethnic violence during the war. Of the 2,000 Serbs who fled that violence, only a few have returned and, for years, they have been protected by the International Security Force in Kosovo. The town would not be safe for the author and T.A. The author would have to find a new home in an unknown and ethnically fractured Kosovo, which did not exist when she arrived in Switzerland. These circumstances were never considered from T.A.'s point of view.

5.13 The second presumption was that, since T.A. had not reached adolescence, he would easily integrate into a new environment, which dispenses with an individualized analysis of the realities facing children in Kosovo. According to Swiss jurisprudence, adolescents – children aged 12 to 16 – are presumed to have developed strong social and cultural ties with their host country, and their expulsion would therefore represent a “brutal uprooting” and is potentially “unenforceable”. Children who have not yet reached this age are presumed to have strong ties not with their host country, but rather with their country of origin through their parents. Their expulsion is “enforceable” and does not contravene international obligations. By applying this age-centred analysis, the authorities claim to have fulfilled their obligations under article 3 of the Convention to consider the best interests of the child. The cantonal courts and the Office for Civil Registration and Migration applied these rules automatically to T.A., without considering other factors in their assessment, and without an individualized assessment of the consequences of removal for him. The authorities failed to take into account the specific circumstances that T.A. would face as part of an ethnic minority that faces discrimination. An individualized assessment of these circumstances would have shown that T.A.'s removal is contrary to his best interests and would violate the principle of non-refoulement set out in article 37 of the Convention.¹⁶

5.14 T.A. is an “immigrant” in name only and has no significant ties to any other country, whether “through his parents” or for any other reason. His removal would constitute arbitrary interference in his “home” within the meaning of article 16 of the Convention, as his interests have not been properly taken into account. In its removal decision, the State Party should

¹⁵ *A.B. v Finland* (CRC/C/86/D/51/2018), para. 12.2.

¹⁶ Committee on the Rights of the Child, general comment No. 14 (2013), para. 97.

have demonstrated a particularly compelling public interest in T.A.'s removal. The author is not a threat to public order; rather, she is being expelled because of her financial debt to social services. The existence of such a motive has thus not been demonstrated. In the case of *Hasanbasic v. Switzerland*,¹⁷ the European Court of Human Rights held that the expulsion of a long-term immigrant based exclusively on his debts to social services constituted a violation of article 8 of the European Convention on Human Rights, given the length of his stay and his integration in Switzerland. According to the Court, the public interest in ensuring the country's "economic well-being" was not sufficient to justify significant interference with the right to respect for private and family life. The author believes that there are good reasons for the Committee to follow the Court's reasoning.

Additional observations by the State Party

6. In its additional observations of 17 February 2023, the State Party notes that the author acknowledges that she exaggerated the relationship between T.A. and his father and that the evidence she submitted in that regard was false. This behaviour on the part of the author demonstrates that she is clearly acting in bad faith. While it is true that the contested removal will mean that T.A. will face certain difficulties, it is clear that the author will go to any lengths, even falsifying evidence, to avoid being removed. The author's argument that the counsel who represented her before the European Court of Human Rights was unable to locate her application is irrelevant insofar as the author could easily have obtained a copy from the Court. The State Party obtained a copy of her application from the latter. In the application, T.A.'s situation was given as much prominence as the author's, with several paragraphs devoted specifically to it. The claims raised before the Committee, at least those for which the author has exhausted domestic remedies, have been raised in substance before the Court. Consequently, the application concerned the same issue as that which is the subject of the proceedings before the Committee. In the case of *Hasanbasic v. Switzerland*, the Court held that economic well-being could serve as a legitimate reason for the refusal to renew a residence permit and must be assessed in the light of all the circumstances. That application concerned the non-renewal of the residence permit of a 57-year-old man who had been living in Switzerland for many years, was in poor health and had been granted a partial invalidity pension, and whose wife had a permanent residence permit in Switzerland, where she had lived for over 40 years. The circumstances are not comparable to those of the present case, which involves a young, healthy child, none of whose family members has a permanent residence permit.

Author's comments on the State Party's additional observations

7. In her comments of 12 May 2023, the author asks that her error in judgment not be attributed to her son. As for the State Party's complaint that she did not obtain a copy of her application, she explains that the European Court of Human Rights does not provide applicants with copies of their applications. The fact that the State Party was able to obtain a copy demonstrates the de facto inequality between applicants and States, rather than a lack of diligence on her part. She would not have been able to obtain a copy according to the Court's own rules.

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

8.2 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. It recalls that the "same matter" within the meaning of the

¹⁷ European Court of Human Rights, *Hasanbasic v. Switzerland*, application No. 52166/09, judgment of 11 June 2013, para. 66.

forementioned provision must be understood as relating to the same complaint concerning the same individual, the same facts and the same substantive issues.¹⁸

8.3 The Committee notes that, on 30 April 2021, the author filed an application with the European Court of Human Rights on behalf of herself and T.A. It also notes that, in a decision of 1 July 2021, the Court declared the application inadmissible, noting that, in the light of the evidence in its possession, and insofar as the facts in question fell under its jurisdiction, it did not disclose any apparent violation of the rights and freedoms guaranteed by the European Convention on Human Rights or the protocols thereto, and that the admissibility criteria set out in articles 34 and 35 of that convention had not been met. The Committee further notes that the reasoning put forward by the Court in its decision necessarily implied a degree of examination of the merits of the case, however limited, when it declared the application to be inadmissible because it did not disclose any apparent violation of the rights and freedoms guaranteed by the European Convention on Human Rights or the protocols thereto and because the admissibility criteria set out in articles 34 and 35 of that convention had not been met. The Committee therefore considers that the Court did not limit itself to a mere examination of purely formal admissibility criteria but took into account the merits of the application.¹⁹

8.4 The Committee notes that the author claims that the content of the application submitted to the European Court of Human Rights was different from the subject of the present communication but did not provide a copy of that application. It also notes the importance of verifying the content of the application lodged with the Court to ensure that the communication is admissible under article 7 (d) of the Optional Protocol. However, the author's failure to submit a copy of the application prevented the Committee from determining the existence of *res judicata*, in accordance with article 7 (d) of the Optional Protocol. The Committee also regrets that the author attached falsified evidence to the case file. In the light of the foregoing, the Committee considers that the author's failure to provide a copy of the application submitted to the Court and her submission of falsified evidence constitute an abuse of the right of submission.²⁰ It therefore declares the communication inadmissible under article 7 (c) of the Optional Protocol.

9. 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.

¹⁸ *A.B. v. Finland*, para. 11.2, and *M.F. v Switzerland* (CRC/C/94/D/125/2020), para. 6.2.

¹⁹ See, in this regard, *M.F. v Switzerland*, para. 6.3.

²⁰ *Ibid.*, para. 6.4.