



Convention on the Rights of the Child

Distr.: General
5 November 2018
English
Original: French

Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 12/2017*, **

<i>Communication submitted by:</i>	Y.B. and N.S. (represented by counsel, Ms. Sylvie Sarolea)
<i>Alleged victim:</i>	C.E.
<i>State party:</i>	Belgium
<i>Date of communication:</i>	22 March 2017
<i>Date of adoption of Views:</i>	27 September 2018
<i>Subject matter:</i>	Denial of humanitarian visa to child taken in under <i>kafalah</i> (fostering arrangement) by a Belgian-Moroccan couple
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of the complaint
<i>Substantive issues:</i>	Best interests of the child; discrimination based on ethnicity; freedom of opinion; development of the child; protection of the child from all forms of violence or neglect; protection of the child deprived of a family environment
<i>Articles of the Convention:</i>	2, 3, 10, 12 and 20
<i>Article of the Optional Protocol:</i>	7 (e) and (f)

1. The authors of the communication are Y.B., a national of Belgium born in 1953, and N.S., a national of Morocco and Belgium born in 1963. They submit the communication on behalf of C.E., a Moroccan national born in 2011. They contend that C.E. is a victim of violations of articles 2, 3, 10, 12 and 20 of the Convention. The authors are represented by counsel. The Optional Protocol entered into force for the State party on 30 August 2014.

* Adopted by the Committee at its seventy-ninth session (17 September–5 October 2018).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Jorge Cardona Llorens, Bernard Gastaud, Olga A. Khazova, Hatem Kotrane, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Mikiko Otani, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Kirsten Sandberg, Ann Marie Skelton, Velina Todorova and Renate Winter.



Facts as submitted by the authors

2.1 The authors are married to each other and are members of the commune of La Poudrière, in Péruwelz, Belgium.¹ Under a *kafalah* arrangement, they took in C.E., of Moroccan nationality, who was born in Marrakesh, Morocco, on 21 April 2011.² C.E. was born to an unknown father and was abandoned by her mother at birth. A decision declaring her abandoned was handed down by the Court of First Instance of Marrakesh on 19 August 2011.

Kafalah procedures in Morocco

2.2 On 22 September 2011, the Court of First Instance of Marrakesh designated the authors as the foster parents (under the *kafalah* system) and guardians of C.E., an abandoned child. After an investigation conducted by the competent Moroccan authorities in accordance with the instructions of the Public Prosecutor's Office, it was concluded that they had the necessary material and social qualifications to take in C.E. under a *kafalah* arrangement. On 13 October 2011, the same Court authorized the authors to travel abroad with C.E.

2.3 Under Moroccan law, *kafalah* is regulated by Royal Decree No. 1-02-172 of 13 June 2002, promulgating Act No. 15-01, the Act on the *kafalah* (fostering) of abandoned children. According to Article 2 of the Act, *kafalah* is a commitment to take responsibility for the protection, education and maintenance of an abandoned child as a father would for his own child. *Kafalah* does not entail a parent-child relationship or inheritance rights. Abandoned children are temporarily placed in a public welfare centre or other social protection facility for children. After investigations, a child may be declared abandoned. The guardianship magistrate is responsible for the supervision of children who are declared abandoned. These children may later be placed under a *kafalah* arrangement with a Muslim husband and wife or a Muslim woman.

Applications for a long-stay visa in Belgium

2.4 The authors note that because *kafalah* does not entail a parent-child relationship, they were unable to apply for a visa on grounds of family reunification. For that reason, on 21 December 2011, the authors applied for a long-stay visa on humanitarian grounds under article 9 of the Belgian Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens. In their application, they stated that C.E. was an abandoned child who had been placed in their care. They submitted certificates of good conduct and confirmed that they were in a situation that enabled them to care for the child and provide her with a home environment stable both personally and financially.

2.5 On 27 November 2012, the Immigration Office rejected the application for a visa submitted by the authors on the grounds that *kafalah* was not adoption and did not confer any right of residence, that the authors had not sought recognition of the *kafalah* arrangement by the Federal Public Service for Justice (formerly the Ministry of Justice) that an application for a residence permit on humanitarian grounds could not replace an application for adoption and that there was no evidence that the child was really in the care of the applicants or that they had sufficient means of subsistence.

2.6 The refusal of the visa was appealed to the Aliens Litigation Council. On 29 September 2015, that Council overturned the Immigration Office's decision for the following reasons: the latter Office had failed to comply with its obligation to provide an official justification for the refusal; the reference to the authors' failure to seek recognition from the Federal Public Service for Justice was mistaken, since *kafalah* was not the same as adoption; and the *kafalah* order could not be rejected simply because it did not confer a right of residence, although the legitimacy of the order was not called into question and the

¹ The authors indicate that the commune is a non-profit organization whose residents choose to live "in autarky", meaning that they live off their own activities and share their resources. The members of this commune have health insurance and their children go to public schools.

² See paragraph 2.3 of these Views.

order clearly stated that the authors had the necessary means and that the child was in their care.

2.7 After the success of their appeal, the authors applied repeatedly to the Immigration Office for a new decision but did not receive any reply. Finally, on 19 July 2016, the Immigration Office adopted a new decision refusing to issue a visa for the following reasons: (a) the authors had already begun adoption proceedings in 2012 before dropping them to apply instead for a humanitarian visa, a procedure that cannot be used to circumvent adoption procedures; (b) the *kafalah* arrangement had been authorized with the authors using an official address in Morocco, even though their principal residence was in Belgium; (c) *kafalah* does not confer the right of residence in Belgium, as it does not create family ties with the ward concerned; (d) the humanitarian grounds were not sufficiently established — the mother had abandoned the child but was still alive, and the authors had failed to show that there were no other members of the family, including third-degree relatives, who could care for the child; (e) the authors could ensure the child's education while leaving her in her own country and culture and with her own family; (f) the authors had not shown that they had the means to meet the child's needs in Belgium; and (g) the authors had not shown that the child was authorized to leave Morocco, since the Moroccan authorities had believed that they lived in Morocco.

2.8 On 25 October 2016, the authors again lodged an appeal with the Aliens Litigation Council against that second rejection, which was still pending at the time the authors submitted the present communication to the Committee.³ The authors point out that while the Council has a limited power to invalidate a decision, it cannot replace the invalidated decision with another.

Applications for a short-stay visa in Belgium

2.9 In 2014 and 2015, the authors submitted two applications for short-stay visas, which were rejected by the Immigration Office on 29 October 2014 and 2 April 2015 respectively, on the basis of article 32 of Regulation (EC) No. 810/2009 of the European Parliament and the Council of 13 July 2009, establishing a Community Code on Visas (Visa Code). Regarding the application for a visa on humanitarian grounds, the rejections mentioned serious doubts regarding the real purpose of the stay and the lack of return guarantees.

The complaint

3.1 The authors contend that the State party has violated C.E.'s rights under articles 2, 3, 10, 12 and 20 of the Convention.

3.2 The authors assert that article 2 of the Convention prohibits discrimination against children, including discrimination based on their birth. In their view, C.E.'s citizenship of a country that has an institution different from adoption, *kafalah*, in fact constitutes an obstacle to reuniting her with her family in Belgium. C.E. is treated differently from an adopted child by the immigration authorities because she was taken in under a *kafalah* arrangement, which meant that, under Belgian law, she was not entitled to legal protection. Yet *kafalah* is recognized as a measure for the protection of children by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.⁴ C.E. has the right to placement and protection. She also has the right to live with the authors in the country of which they are nationals. The authors, for their part, have the right to live together in Belgium.

3.3 The authors submit that, compared with adoption, the principle of the best interests of the child enshrined in article 3 of the Convention is even more binding, so that very clear reasons must be given. The assessment must show how due consideration has been given to the rights of the child, what criteria have been used, what reasoning has been followed and

³ In a ruling of 26 April 2018, the Aliens Litigation Council invalidated the visa refusal decision of 19 July 2016 (see para. 6).

⁴ Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

how the best interests of the child and other considerations have been counterbalanced. This assessment must be carried out by a competent authority, preferably multidisciplinary, and the child's opinion must be taken into account. Decisions must be taken quickly and must be subject to review. In the event, none of the four decisions to reject the application for a visa refers to the best interests of the child, which were disregarded. The notion of the best interests of the child appears for the first time in the observations of the State party, which contends that, unlike with adoption, *kafalah* offers no guarantee that those interests will be given really careful consideration. However, such an argument is hypothetical and does not apply to C.E.'s case. Moreover, instead of allowing its decisions to be guided by the best interests of the child, the State party insists on an extremely restrictive requirement, namely that there must exist a serious humanitarian emergency that poses a threat to life, health or integrity.

3.4 The authors assert that they have sought to be reunited with C.E. since 2011 and that their applications were twice rejected, leaving C.E. as an abandoned child with the authors as sole protectors under both Moroccan and Belgian law. *Kafalah* is recognized as a form of guardianship in Belgian law, in application of article 20 of the Belgian Code of Private International Law and the Hague Convention of 19 October 1996. It is recognized as a family tie in those legal instruments. In addition, in this case an informal guardianship agreement had been drawn up and approved in Belgium.

3.5 The European Court of Human Rights has also held that de facto family ties constitute family ties even in the absence of a biological or adoptive relationship. According to the Court, the time an adult and a child have spent living together, the quality of the relationship and the role the adult plays vis-à-vis the child must be taken into account. Where there is a family bond with a child, the State must act in such a way as to allow the bond to grow stronger and provide legal protection to facilitate the child's integration in the family.⁵

3.6 The authors point out that C.E. no longer has any family in Morocco, so that it makes no sense to suggest that she should be cared for by her biological family. In addition, as she was born in Morocco and taken in by a Belgian father and a Belgian mother who is of Moroccan background, she has a mixed cultural background. To refer to "her own country and culture" is no more than a stereotype with no relation to the facts of the case.

3.7 The authors argue that the Committee's general comment No. 12 (2009) on the right of the child to be heard requires States to ensure that children capable of forming their own views have the right to express those views freely in all matters affecting them, in accordance with their age and degree of maturity.⁶ If C.E. is too young to be heard, the State must nonetheless consider what her interest is and ensure that it is given expression.

3.8 Lastly, the authors argue that article 20 of the Convention should be read in the light of the above-mentioned Hague Convention of 19 October 1996, which applies to *kafalah*.

State party's observations on admissibility and the merits

4.1 In its observations of 26 September 2017, the State party asserts that the communication is inadmissible because not all available domestic remedies have been exhausted. An application for the annulment of the decision made by the Immigration Office on 5 September 2016 would appear to be still pending before the Aliens Litigation Council. Although the Council simply reviews the lawfulness of an administrative decision and cannot make a new decision in place of the administrative authorities, it considers the use the authorities have made of their discretionary powers in their assessment of the facts of a case. This remedy is therefore effective. In addition, the authors did not apply for a review with suspensive effect, which would have allowed them to obtain a decision from the Council more rapidly. Even though the suspensive effect does not necessarily lead to a

⁵ The authors refer to the Court's judgments in the cases *Wagner and J.M.W.L. v. Luxembourg* (No. 76240/01, 6 October 2011), *Moretti and Benedetti v. Italy* (No. 16318/07, 27 April 2010), *Harroudj v. France* (No. 43631/09, 4 October 2012) and *Chbihi Loudoudi et al. v. Belgium* (No. 52265/10, 16 December 2014).

⁶ General comment No. 12, para. 1.

permission to stay, the administrative authority that made the decision in the case must reconsider the application to determine whether a new decision is warranted.

4.2 In its comments on the merits, the State party notes that *kafalah* and adoption are two different institutions. *Kafalah* could be similar to what is known in Belgian law as special guardianship (*tutelle officieuse*), an institution that does not create a parent-child relationship, is revocable and ends when the child reaches adulthood. Adoption, on the other hand, enables the child to benefit from a parent-child relationship and affords greater protection. For that reason, adoption is strictly regulated and is subject to a number of safeguards.

4.3 Before the laws on adoption were amended, a child taken in under *kafalah* was granted permission to stay in Belgium in preparation for adoption and could stay indefinitely once the adoption was complete. The adoption laws were amended by an Act of 24 April 2003 to bring the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption into force in Belgium. The safeguards ensuring that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights were incorporated into Belgian law. As a result of this amendment, it is no longer possible for a child in whose country of origin there is no adoption or placement for adoption (such as Morocco) to be moved to Belgium in preparation for an adoption.

4.4 The Belgian Civil Code (arts. 361 to 363) was also amended to make it possible to adopt a child taken in under a *kafalah* arrangement so long as the following conditions for adoption were met: (a) the adoptive parents must have taken a course on preparation for adoption and been found fit; (b) the application for the adoption of the child must have been transmitted to the relevant community central authority by the child's country of origin; (c) no prior contact between the adoptive parents and the persons with custody of the child may take place before the relevant central authority and its counterpart in the child's country of origin have consented to the match; (d) the child eligible for adoption must be deprived of both mother and father or be declared abandoned and placed under the protection of the authorities of his or her country of origin; and (e) the competent authority of the country of origin must have placed the child under a form of State protection and given permission for the child to be taken abroad for the purpose of settling there. In 2014 and 2015, 25 children from Morocco were adopted in Belgium on the basis of *kafalah*. More children from outside the adoptive parents' families were thus adopted from Morocco than from any other foreign country except one.

4.5 The State party also refers to article 33 of the Hague Convention of 19 October 1996, according to which if an authority contemplates the placement of the child by *kafalah* and if such placement is to take place in another contracting State, it must first consult with the central authority of the latter State and transmit a report on the child giving the reasons for the proposed placement. The decision on the placement by *kafalah* may be made only after the central authority or other competent authority of the requested State consents to the placement in the light of the child's best interests.

4.6 The State party notes that, in the case in hand, the authors have not met the requirements set forth in article 365-1 of the Civil Code. It would nonetheless be very easy to obtain the information needed to plan an adoption. The Community Central Authority has a website containing information on the different procedures and a helpline. In the application for annulment submitted by the authors to the Aliens Litigation Council on 27 December 2012, however, it is stated that their wish was not to adopt C.E. According to the State party, if placement by *kafalah* involves taking a child to another country, uprooting him or her from his or her geographic and cultural environment, the persons taking in a child under such an arrangement may be expected to first consider the possibility of obtaining a residence permit for the child.

4.7 While the authors note that C.E. was abandoned by her mother and placed in an orphanage, no information has been provided on the procedure followed in Morocco for C.E. to be placed in their care, including any indication of direct contact with the orphanage or on what grounds C.E. was placed with them. There is no guarantee — as there would be in the case of an intercountry adoption — that the decision to entrust C.E. to them was

preceded by a really thorough consideration of the girl's best interests. Moreover, the order for placement by *kafalah* and the authorization to travel abroad state that the *kafalah* applicants are domiciled in Morocco. The authorization was not for the permanent settlement of C.E. abroad.

4.8 The State party indicates that special guardianship is a form of guardianship in which the special guardian undertakes to support a minor under custody, bring him or her up and prepare him or her to earn a living. The guardian has custody rights for only as long as the child habitually resides with him or her. This form of guardianship also offers no guarantees of an effective and thorough consideration of the best interests of the child.

4.9 Since the procedure for adopting a child under *kafalah*, which would have led to the issuance of a declaration of fitness after a thorough investigation by the Belgian authorities of the conditions in which the child would have been received in Belgium, had not been followed, the Moroccan authorities had also been unable to verify those conditions and the *kafalah* arrangement had not been intended to allow the child to settle abroad, the Belgian authorities did not consider that it was in C.E.'s best interests to grant her a residence permit.

4.10 The authors' choice not to adopt C.E., or their ignorance of the law, does not oblige the Belgian State to grant C.E. a residence permit in breach of the rules put in place in her interest and for her protection, except in a serious humanitarian emergency, a situation that has not been shown to exist in her case.

4.11 The European Court of Human Rights is of the view that there is no interference with the right to private and family life in the case of an initial admission.⁷ C.E. attends school, and N.S., one of the two authors, receives income from her work in Morocco, although neither she nor Y.B., her husband, has shown that either receives any income in Belgium. They live in a commune of disadvantaged people who share what they have, without the origin of those resources having been established. It is also unclear who the people surrounding C.E. in Morocco are.

4.12 The State party points out that the judgments of the European Court of Human Rights in the cases cited by the authors (*Harroudj v. France*, *Wagner and J.M.W.L. v. Luxembourg* and *Chbihi Loudoubi et al. v. Belgium*) are not comparable, as the children in those cases entered the countries concerned legally and subsequently went on to develop normal family lives there.

4.13 The State party, referring to article 12 of the Convention, notes that because C.E. was 1 year old when the first decision was made and 5 when the second was made, it was hard to maintain that she was capable of forming her own views. In addition, although there is a clear need to hear a child's views in placement or adoption proceedings affecting him or her, there is no such need when considering whether or not to grant a residence permit.

4.14 Lastly, article 20 of the Convention has been respected, since C.E. was taken into care by the Moroccan authorities and was placed in a *kafalah* arrangement in Morocco. The issue of the grant of a residence permit is not germane to article 20.

Authors' comments on the State party's observations

5.1 In comments dated 5 December 2017, the authors note that the proceedings currently pending before the Aliens Litigation Council offer no guarantee of an effective remedy. The Council, as the State party acknowledges, can only quash a decision; it cannot replace the quashed decision with another, as this case shows. Four years after its first decision to reject a visa application, the Immigration Office again made a decision virtually identical to the one that had been annulled because it was unlawful. Moreover, the suspension of a refusal to issue a residence permit would not entitle the beneficiary of the suspension to enter Belgium, as pointed out by the State party, and is thus not an effective remedy.

5.2 As to the facts, the authors explain that N.S. was hired by the Moroccan State to teach mathematics at a public school and Y.B. has lived and worked as a gardener in the

⁷ Judgment in the case *Ahmut v. the Netherlands*, 28 November 1996 (No. 21702/93).

commune of La Poudrière in Belgium since 2005. Y.B. has two children from a first marriage and three grandchildren. The authors were married in Marrakesh, Morocco, in April 2006, where they lived uninterruptedly until September 2007. In May 2009, N.S. obtained a Belgian residence permit and took steps to retire early from the Moroccan public service with a view to moving to La Poudrière.⁸ She was finally released from her status as a public servant and has collected early retirement since August 2017.

5.3 The authors note that C.E. has no family to care for her in Morocco, as she is an orphan, and has been formally recognized as being an abandoned child by the Moroccan authorities. Since C.E. was taken in by the authors, she has lived constantly in N.S.'s house in Marrakesh and has attended a nearby private school. She is occasionally cared for by N.S.'s mother or sister. C.E. is traumatized on account of having been abandoned and is deeply attached to the authors. All separations, especially from N.S., have been very painful. In 2016, she had to be hospitalized during one of N.S.'s trips to Belgium. N.S. lives mainly in Morocco and travels to Belgium between one and three times a year for periods of two weeks. Y.B. lives in Belgium and spends two to three months a year with N.S. and C.E. in Morocco.

5.4 The authors note that the judicial proceedings conducted in Morocco were not challenged. Not once in the past six years has the State party conducted any enquiry or tried to obtain information from the competent Moroccan authorities, despite having the means in Morocco to do so, such as its Consulate and Embassy. According to the authors, such inaction demonstrates the passivity of the State party and its unwillingness to find a solution for C.E. The procedures initiated by the authors, on the other hand, attest to their constant availability and activity.

5.5 The authors point out that a Moroccan court authorized C.E.'s departure and that the court was fully aware that Y.B. was Belgian. Even if the authors resided exclusively in Morocco, they should be able to settle in the country of which they are nationals.

5.6 With regard to the authors' fitness, thorough judicial proceedings were conducted in Morocco, to ascertain the authors' fitness and their living conditions in Belgium. The special guardianship approved by a Belgian judge provides another safeguard for C.E. Moreover, the authors' status as volunteers at the commune of La Poudrière is a token of their financial independence. The authors in addition own one apartment in Belgium and another in Morocco.

5.7 The authors availed themselves of the only procedures available to them in Belgium — an application for a humanitarian visa and the special guardianship procedure. The prior contacts between the authors and the child excluded the possibility of the *kafalah* arrangement being converted into adoption under Belgian law.

5.8 The authors stress that in none of the four refusals to grant a long- or short-stay visa was a reference ever made to the best interests of the child. The non-recognition of the institution of *kafalah* by Belgium denied an international family like the authors' its freedom to come and go between Morocco and Belgium, where the family has ties. The family also has the right to develop further. The effect of the State party's position is to prevent the family living together. To keep C.E. from being left alone in Morocco, N.S. lives there with her, thereby renouncing her rights to live in the country of which she is a national and to live together with Y.B. The latter must give up living in the country of which he is a national, as well as his activity and family in Belgium. This attitude also prevents C.E. from forging ties with her family living in Belgium.

Additional information from the authors

6. In a letter dated 3 May 2018, the authors indicate that the Aliens Litigation Council issued a ruling on 26 April 2018, invalidating the decision to refuse a visa of 19 July 2016. The Council considered that the contested decision had made no mention of the ruling by the Tournai Juvenile Court, in which the authors were given approval to act as C.E.'s special guardians.

⁸ She obtained Belgian citizenship in February 2013.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

7.2 The Committee notes the State party's argument that the communication is inadmissible (on grounds of non-exhaustion of domestic remedies) because the appeal for the annulment of the second refusal from the Immigration Office of 19 July 2016 was still pending before the Aliens Litigation Council at the time the present communication was submitted and because the authors did not request the suspension of the decision they appealed. The Committee, however, also notes the authors' assertion that, on 26 April 2018, the Aliens Litigation Council ruled that the decision to refuse a visa was invalid, noting that the Council merely holds a limited power to review the lawfulness of decisions and cannot replace them with other decisions. As a result, any new decision would need to be made by the Immigration Office. The latter, however, had already rejected the authors' applications on two occasions, namely on 27 November 2012 and again on 19 July 2016. It is therefore unlikely that a third application would have been successful. As for the suspension of the contested decision, the Committee notes the parties' assertion that the suspension would not imply that a residence permit would be granted and so it cannot be said to be an effective remedy. In the light of the above, and in particular the fact that seven years have passed since the authors' first visa application and that the same authority that rejected the first two applications would be dealing with the third, the Committee is of the view that the authors have exhausted all available and effective domestic remedies. The Committee therefore finds that there is no obstacle to declaring the admissibility of the communication under article 7 (e) of the Optional Protocol.

7.3 The Committee notes that, while the authors refer to article 20 of the Convention, they fail to substantiate their claims. The Committee thus concludes that these claims are manifestly unfounded and, as such, inadmissible under article 7 (f) of the Optional Protocol.

7.4 The Committee nonetheless finds that the authors' claims concerning discrimination against C.E. on the grounds of her nationality (Convention, art. 2), the disregard of the best interests of the child and of the child's right to be heard shown during the procedures conducted by the Belgian immigration authorities (Convention, arts. 3 and 12) and, lastly, family reunification (Convention, art. 10) have been sufficiently substantiated, and thus declares them admissible and proceeds to their consideration on the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

8.2 The Committee notes the authors' allegations that the best interests of the child were disregarded on the four occasions the Belgian immigration authorities refused to issue a visa. The Committee also notes the State party's arguments that those decisions were in line with its existing laws, which had been amended to give domestic effect to the Hague Convention of 1993, thereby ensuring that intercountry adoptions took place in the best interests of the child.

8.3 The Committee recalls that in all actions concerning children, the best interests of the child must be a primary consideration and that the concept "should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in the light of the specific circumstances of the particular child."⁹

⁹ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 (1)), para. 32.

8.4 The Committee also recalls that it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice.¹⁰ It is therefore not for the Committee to assess the facts of the case and the evidence in place of the national authorities but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment.

8.5 In this case, the Committee observes that the Belgian immigration authorities refused to grant a visa mainly because *kafalah* arrangements did not confer a right of residence and because the authors had failed to demonstrate that: (a) C.E. could not be taken care of by her biological family in Morocco, (b) the authors could not ensure her education by leaving her in Morocco, and (c) the authors had the financial means to support C.E. The Committee observes, however, that these reasons, which are general, reflect a failure to consider C.E.'s specific situation — in particular her situation as a child born to an unknown father and abandoned at birth by her biological mother — so that the possibility that she could be taken care of by her biological family seems unlikely and is in any case not supported. The argument that the authors lacked the necessary financial means does not appear to take account of the fact that the Moroccan authorities' decision to authorize the placement by *kafalah* had taken into consideration the authors' social and financial situation. The Moroccan authorities acknowledged that the authors' situation was satisfactory, by granting the authors a *kafalah* arrangement for C.E., while the Belgian authorities did the same by allowing the authors to act as C.E.'s special guardians. The State party questions, in general terms, the Moroccan proceedings that led to the *kafalah* arrangement but does not specify in what way those proceedings did not ensure the necessary safeguards. Lastly, the idea of leaving C.E. in Morocco would seem to ignore the difference between attending to a child's educational needs while leaving him or her in an orphanage and attending to his or her emotional, social and financial needs while living with the child as a parent would. That argument suggests that the immigration authorities have not given any consideration to the emotional ties that have bound the authors and C.E. since 2011. In addition to the legal relationship established by *kafalah*, the immigration authorities seem to have taken no account of N.S.'s life with C.E. since the latter's birth or the de facto family ties that have naturally been forged by their life together over the years.¹¹

8.6 With regard to the authors' claims based on article 12 of the Convention, the Committee notes the State party's arguments that C.E. was 1 year old at the time of the first decision and 5 at the time of the second, that she was not capable of forming her own views and that the need to allow a child to express his or her views would not be justified for the purposes of applying the rules for granting residence permits.

8.7 The Committee points out, however, that "article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice that would restrict the child's right to be heard in all matters affecting her or him. [...] It is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter [...]."¹² It also notes 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 or children to influence the determination of their best interests. [...] The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an

¹⁰ *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2, and *A.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.8.

¹¹ In this respect, see the judgments of the European Court of Human Rights in the cases *Wagner and J.M.W.L. v. Luxembourg*, *Moretti and Benedetti v. Italy* and *Harroudj v. France*.

¹² General comment No. 12 (2009), para. 21.

individual assessment which assures a role to the children themselves in the decision-making process.”¹³

8.8 The Committee observes in this case that C.E. was 5 years old when the second decision on the authors’ application for a humanitarian visa was made and that she would have been perfectly capable of forming views of her own regarding the possibility of living permanently with the authors in Belgium. The Committee does not share the State party’s view that it is not necessary to take the views of a child into account in proceedings conducted to determine whether he or she should be issued a residence permit, quite on the contrary. The implications of the proceedings in the authors’ case are of paramount importance for C.E.’s life and future, insofar as they are directly tied to her chances of living with the authors as a member of their family.

8.9 In the light of the above, the Committee concludes that the State party did not specifically consider the best interests of the child when it assessed the application for a visa for C.E. and did not allow her the right to be heard, in breach of articles 3 and 12 of the Convention.

8.10 With respect to the authors’ claims based on article 10 of the Convention, the Committee notes the State party’s arguments that there is no interference with the right to private and family life in cases of initial admission to a country and that, as a result, it would be wrong to assert that, even in the absence of biological or adoptive ties, there are de facto ties equivalent to family ties that confer the right to “family reunification”.

8.11 In the Committee’s view, article 10 of the Convention does not oblige a State party in general to recognize the right to family reunification for children in *kafalah* arrangements. The Committee is nonetheless of the opinion that, in assessing and determining the best interests of the child for the purpose of deciding whether to grant C.E. a residence permit, the State party is obliged to take into account the de facto ties between her and the authors (N.S. in particular) that have developed on the basis of *kafalah*. The Committee notes that, in assessing the preservation of the family environment and the maintenance of ties as factors that need taking into account when considering the child’s best interests, “the term ‘family’ must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5)”.¹⁴

8.12 In view of the fact that no consideration was given to the de facto family ties that existed in this case, and since it has been more than seven years since the authors submitted an application for a visa, the Committee concludes that the State party has failed to comply with its obligation to deal with the authors’ request, which was equivalent to an application for family reunification, in a positive, humane and expeditious manner and that it has failed to ensure that the submission of the request entailed no adverse consequences for the applicants and for the members of their family, in violation of article 10 of the Convention.

8.13 Having found a violation of articles 3, 10 and 12 of the Convention, the Committee does not consider it necessary to examine whether the same facts constitute a violation of article 2.

8.14 The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts of which it has been apprised amount to a violation of articles 3, 10 and 12 of the Convention.

9. The State party is under an obligation to urgently reconsider the application for a visa for C.E. in a positive spirit, while ensuring that the best interests of the child are a primary consideration and that C.E.’s views are heard. In considering the best interests of the child, the State party should take account of the family ties that have been forged de facto between C.E. and the authors. The State party is also under an obligation to do everything necessary to prevent similar violations from occurring in the future.

¹³ General comment No. 14 (2013), paras. 53 and 54.

¹⁴ General comment No. 14 (2013), para. 59.

10. The Committee notes that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Convention.

11. Pursuant to article 11 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, the Committee wishes to receive from the State party, within 180 days, information about the steps it has taken to give effect to the Committee's Views. The State party is also requested to include information about any such steps in its reports to the Committee under article 44 of the Convention. Lastly, the State party is requested to publish the present Views and have them widely disseminated in its official language.
