



Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 51/2018*,**

<i>Communication submitted by:</i>	A.B. (represented by counsel, Ms. Sini Majlander)
<i>Alleged victim:</i>	A.B.
<i>State party:</i>	Finland
<i>Date of communication:</i>	27 June 2018
<i>Date of adoption of decision:</i>	4 February 2021
<i>Subject matter:</i>	Best interests of the child; discrimination , non-refoulement
<i>Procedural issues:</i>	Insufficient substantiation of claims
<i>Articles of the Convention:</i>	2, 3, 13, 14, 16, 17, 19, 22, 29
<i>Articles of the Optional Protocol:</i>	7 (d), 7(f)

* Adopted by the Committee at its eighty-sixth session (18 January – 5 February 2021).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho Assouma, Amal Salman Aldoseri, Hynd Ayoubi Idrissi, Philip Jaffe, Olga A. Khazova, Gehad Madi, Benyam Dawit Mezmur, Mikiko Otani, Luis Ernesto Pedernera Reyna, Aissatou Alassane Sidikou, Ann Marie Skelton, Velina Todorova and Renate Winter.

1. The author of the communication is A.B., a Russian national born on 27 June 2010. He claims that the State party has violated his rights under articles 2, 3, 13, 14, 16, 17, 19, 22 and 29 of the Convention. The author is represented by counsel. The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (the Optional Protocol) entered into force for the State party on 12 February 2016.

Factual background

2.1 The author was born and lived in the Russian Federation until 2015. His biological mother, V.B., is a lesbian who lived with her female partner, A.S.¹ V.B. and A.S. concealed the nature of their relationship in the Russian Federation out of fear of persecution and discrimination given the very hostile environment against LGBT community within Russian society.² They also hid it from A.B., fearing that he may speak about it outside their inner circle. They disclosed their true relationship only to their closest friends and relatives. They participated in activities supporting LGBT rights anonymously. When an open internet portal published an article describing the author's family –albeit using fake names-, V.B. and A.S. were threatened in the comment box of the article.

2.2 When the author talked about his family at his kindergarten, the attitude of the staff at the kindergarten changed and they started to treat him rudely and aggressively. The author started to cry more often and became reluctant to go to kindergarten. The family had to move him to another kindergarten but the staff at the new kindergarten indicated to V.B. that her family structure was “abnormal”, and treated the author poorly, including yelling at him, hitting him, and not preventing him from eating food to which he was allergic. Other children in the kindergarten also started bullying the author, saying that “homosexuals should not exist”. The author's parents reported the bullying to kindergarten staff, to no avail. The author had no friends, and the parents of other children “took their children away from him and his family”. As a result of the situation experienced, A.B. became anxious and started to express suicidal thoughts.

2.3 In 2015, when the author was five, the family moved to Finland. On 10 April 2015, they filed requests for asylum and for humanitarian residence permit on compassionate grounds based on the persecution and discrimination they had faced and the fear of further infringement of their rights due to V.B. and A.S.'s sexual orientation.

2.4 While their application was being processed, the family lived in Finland for about two and a half years. In the meanwhile, the author started to learn Finnish and attended a preschool, where he made friends. V.B. and A.S. spoke to the author about their relationship for the first time and the author started to call both of them “mother”. The family engaged actively with other same-sex parent families and the author learned about different types of family structures. According to a preschool teacher, the author started to seem happier and more open during his stay in Finland.

2.5 After they applied for asylum and residence permit in Finland, Finnish Immigration Service interviewed V.B. and A.S. three times, where they explained that LGBT families lived in the Russian Federation under strong pressure and in constant fear of threat and persecution. However, the author was never heard in the context of these proceedings.

2.6 On 19 July 2016, the Finnish Immigration Service rejected both of their applications, concluding that the family could be deported to the Russian Federation without a risk of being

¹ Both are Russian nationals, and V.B. was born on 11 February 1980, and A.S. was born on 5 June 1981. The author alleges they are married but Russia recognizes neither same-sex marriage nor any other form of civil union for same-sex couples as of the initial submission and also July 2020.

² The homosexuality was decriminalised in the Russian Federation in 1993, and it was removed from the official list of mental disorders and conditions in 1999. However, according to the author, during the recent years, negative social attitude, violence and hostilities towards LGBT people have increased among general public and high level government officials, which was reflected in some amendment of laws and administrative code. See Code of Administrative Offenses of the Russian Federation, amended in 29 June 2003, which sets an administrative liability for the promotion of non-traditional sexual relationship among minors (“gay propaganda law”) and the Federal Law No.167-FZ, modified in July 2013, which prohibits any foreign adoption of Russian children by parents in a same-sex marriage recognised by another states.

subject to persecution, severe disadvantage, or inhumane or degrading treatment, or by being returned to a different area. The Immigration Service noted that the negative rhetoric against LGBT people had increased in the Russian Federation in recent years, both by public officials and media, and that the Gay propaganda law adopted in 2013 had legitimized that the authorities harass, arrest and even convict activists promoting their rights as sexual minorities. It also noted that the Gay propaganda law and the generally stricter societal attitudes had led to an increased violence against sexual and gender minorities, met with permissiveness and impunity from authorities. Regarding the author's family, the Immigration Service accepted as a fact that V.B. and A.S. experienced discrimination within Russian society in the past, but considered that this discrimination did not meet the threshold of persecution and did not consider that V.B. and A.S. would be in danger of severe violations of their rights if returned to their home country since they had lived as lesbians in the Russian Federation without becoming victims of violence or other severe violations of their rights, and without having experienced problems with the authorities due to their sexual orientation.³ As to the author, the Finnish Immigration Service accepted as a fact that V.B. and A.S.'s sexual orientation might have partly affected the author's negative treatment by staff and other children at the kindergarten, and that he had been bullied. However, it noted that other factors might have also influenced the said treatment and that, in any event, the bullying did not meet the criteria of persecution as the actions taken against the author were not particularly severe, and some acts such as yelling could be part of a normal discipline at the kindergarten. The author had not been prevented from attending the kindergarten or subjected to other unreasonable actions that would severely violate his rights. The Immigration Service indicated, when assessing the family's application for a residence permit on compassionate grounds, that it was in the best interests of any child to be allowed to live together with his or her parents. Thus, the Immigration Service decided that deportation of the family to the Russian Federation was not against the best interests of the child.

2.7 The Immigration Service further noted that the fear among sexual and gender minorities of having their children taken away from them had increased since 2014 in the Russian Federation. However, the Immigration Service was not aware of any cases where persons belonging to a sexual minority had lost custody of their child due to their sexual orientation, and therefore it did not accept that V.B. and A.S. would be at risk of having the author removed from their custody if returned to the Russian Federation. Thus, the Immigration Service concluded that the author and his family would not risk being subjected to serious violations of their rights in their home country.

2.8 The author's family appealed the decision of the Immigration Service to the Helsinki Administrative Court, alleging that the Immigration Service had failed to justify the absence of a risk of future persecution of the family, and insisted that the discrimination they had experienced should be considered as persecution, and that in any event, the lack of previous experience of persecution should not be considered as evidence of an absence of such risk. The family also insisted that, even if they were not considered eligible for international protection, taking into account all the facts of the case as well as a human rights centered interpretation of laws and the best interests of the child, they should have been granted residence permits on the basis of compassionate grounds.⁴

2.9 By decision of 14 March 2017, the Helsinki Administrative Court confirmed the decision of the Immigration Service. The Court noted the report submitted by the author's family documenting a case where a Russian national had lost custody of her child for having a same-sex relationship. However, the Court found that the report did not explain the case in detail and that a single case did not allow it to conclude that the family had a well-founded fear that the author might be removed from their custody if returned to the Russian Federation. The Court also recognised that sexual and gender minorities in the Russian Federation, especially those who were open about their homosexuality, may lead to a risk of becoming

³ The Immigration Service in its examination refers to the UNHCR handbook on Procedures and Criteria for Determining Refugee Status.

⁴ The family claimed that the Immigration Service had failed to take the best interest of the child as the primary consideration in their case, submitting country information on the situation of children from LGBT families and written statement supporting their allegations, especially their fear of losing custody of the author if the authority found out their relationship.

victims of violence and other severe violations of their rights. However, the court concluded that the V.B. and A.S. would not be in danger of being subjected to severe violations of their rights or serious harm if returned to their home country. In the judgement, there was no reference to the best interests of the child.

2.10 On 30 March 2017, the family applied for leave to appeal to the Supreme Administrative Court, arguing that the Immigration Service and the Helsinki Administrative Court had failed to assess the best interests of the child. The family claimed there was no assessment of how the openly hostile environment, the persecution and discrimination of LGBT families in the Russian Federation would affect the author's rights. Moreover, they alleged that neither the Immigration Service nor the Administrative Court gave any weight to the fact that, if returned to the Russian Federation, in order to protect himself and his family, the child would need to learn to conceal and lie about his family. On 4 July 2017, their leave to appeal was rejected. Consequently, the judgement of the Helsinki Administrative Court on the matter became final.

2.11 On 25 July 2017, the author, V.B. and A.S. applied for assisted voluntary return. The application was granted on 27 July 2017 and on 7 August 2017, the author left Finland together with V.B. and A.S., assisted by the International Organisation for Migration.⁵

2.12 Upon their return to the Russian Federation, V.B. and A.S. felt compelled to tell the author to conceal their true relationship. The author has not made any friends in a new school and has started to question whether there is something wrong with his parents' relationship as the society openly criticises same-sex relationships. As the attitude of the school staff became rude towards the author and V.B., the family suspects their relationship might be disclosed and they may need to move again. The family continues to live under constant fear of further persecution and discrimination.

The complaint

3.1 The author claims to be a victim of a violation of article 3 of the Convention, read in conjunction with article 22 of the Convention.⁶ He alleges that Finnish authorities neglected to conduct a proper assessment of the best interests of the child in the examination of the author and his family's application for asylum or residence permit in Finland. Although the Immigration Service mentioned the best interests of the child in its decision, it was superficial and only concerned the concept of being in the best interests of any child to be allowed to live with his or her parents. The Helsinki Administrative Court and Supreme Court did not take any stand on, or even mention, the best interests of the child in their respective decision or judgement. Thus, the author alleges that this inadequate assessment of the best interests of a child seeking refugee status, in itself, constitutes a violation by the State party of article 3 of the Convention, in conjunction with article 22 of the Convention.

3.2 The author argues that Russian gay propaganda laws constitute a continuous violation of LGBT people's and their families' right to privacy by stigmatizing their way of life. There exists a risk of children of LGBT families being taken into custody against their parents' will. To avoid future discrimination and mental and physical violence, the author is therefore forced to hide and even lie about what he knows about his parents' relationship. In Russian society, the author is also restricted from receiving any information concerning homosexuality and LGBT families, which would be pivotal to a child of an LGBT family from the point of view of his health and well-being. The author is also denied the right to education that would develop his personality as a member of an LGBT family, and guide other children to respect him and his human rights. Furthermore, an ongoing state-run media campaign described LGBT people in derogatory terms and characterises them as part of a foreign conspiracy to undermine Russian values. The author stresses that these continuous statements about the inferiority of LGBT families contribute to social intolerance towards LGBT families and that there is increasing and more coordinated use of violence by extremist

⁵ As of the time of initial submission, the family lived in Russia.

⁶ The author refers to the Committee's general comments No.14 on the concept of "the best interest of the child".

groups towards LGBT people, and failure of the police to respond adequately to such incidents.⁷

3.3 In this context, the author claims that the decision by the Finnish authorities to deport him and his family to the Russian Federation was also contrary to the best interests of the child, as any interpretation of the law or decision by Finnish authorities leading to the risk of renewed maltreatment, and subjecting him to the risk of said violations cannot be in the best interests of the child within the meaning of article 3 of the Convention.

3.4 Furthermore, the author alleges that the undisputed maltreatment of the author in the Russian Federation violates his rights not to be discriminated based on special characteristics or other status of the child or his or her family (articles 2) and the right to be protected from being hurt and mistreated, physically or mentally (article 19) of the Convention. He further asserts the violation of his rights to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds (article 13); the freedom of thought (article 14); the rights to privacy that should protect a child from attacks against his or her way of life, good name, family and home (article 16); the rights to get information that is important to the child's health and well-being (article 17); and the rights to education that develops the child's personality, talents and abilities to the fullest, and encourages children to respect others, human rights and their own and other cultures (article 29), in light of the increased hostility and violence against LGBT people in Russia.

3.5 The author asserts that even though the author's mother, V.B., filed a complaint with the European Court of Human Rights, that complaint concerned the mother's rights and not the author's, and it is thus different from the present complaint.⁸ Furthermore, the European Court of Human Rights declared that it could not examine V.B.'s application as the applicant had not complied with all the conditions set forth in the Rules of Court.⁹ The application was not amended in time and the case was thus not examined on the substance.

The State party's observation on the admissibility

4.1 In its observations dated 22 October 2018, the State party submits that the communication should be declared inadmissible.

4.2 Concerning the author's allegation based on articles 3 and 22 of the Convention, the State party claims that the same matter has been examined by another procedure of international investigation or settlement; thus the communication should be declared inadmissible under article 7(d) of the Optional Protocol. The State party notes that the fact that the author's mother did not comply with the conditions set forth in the Rules of the Court is due to her own actions, and it appears that the family is trying to find another way to challenge their asylum claim after having failed to do so through the European Court of Human Rights. Although the present communication has a different author, the matter raised in this communication is substantially the same as that raised before the European Court of Human Rights. Thus, the case should be declared inadmissible on the grounds of Article 7 (d) of the Optional Protocol and Rule 16, paragraph 3 (f) of the Committee's Rules of Procedure under the Optional Protocol.

4.3 The State party also alleges that the author's central claim is based on the fact that he is not satisfied with the outcome of the domestic asylum proceedings. In this regard, the State party states that the Committee should not be used as a fourth instance. The Committee should not reevaluate the facts and evidence duly considered by the national authorities nor

⁷ See Human Rights Watch (License to Harm: Violence and Harassment against LGBT People and Activities in Russia, December 2014), Russia LGBT Network, and ILGA-Europe. The author also stresses that international human rights bodies have condemned the Russian gay propaganda laws and the actions of the Russian authorities, and expressed deep concern as to their effects on LGBT people and their families, referring to the ECtHR recent case *Bayev and others v Russia*, nos. 67667/09 (2017).

⁸ The author's mother lodged an application concerning the same immigration proceedings to the European Court of Human Rights on 22 December 2017. The application concerned alleged violations under articles 3 (prohibition of torture), 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights.

⁹ Specifically, rule 47 of the Rules of Court. https://www.echr.coe.int/Documents/Rule_47_ENG.pdf.

question the findings and conclusions of such decisions. The State party adds that national decisions took the best interests of the child into account, together with other factors such as protection of the family life and the cultural and social connections to their home country when considering the author's request for a residence permit and his asylum application. The State party also reiterates that the author left Finland voluntarily in August 2017, assisted by the International Organisation for Migration.

4.4 The State party further argues that the author has not been able to substantiate his claims before the Committee and that the communication should be therefore inadmissible as manifestly ill-founded within the meaning of Article 7 (f) of the Optional Protocol.

4.5 Finally, the State party argues that the author's claims under articles 2, 13, 14, 16, 17, 19 and 29 of the Convention are inadmissible for failure to exhaust domestic remedies as required by article 7 (e) of the Optional Protocol. The State party adds that, in any event, this part of the author's communication should be declared inadmissible under Article 7 (f) of the Optional Protocol as insufficiently substantiated.

The author's comments on the admissibility

5.1 The author provided comments dated 5 February 2019 on the State party's observations on admissibility.

5.2 Regarding the State party's allegation that the communication should be inadmissible as the case was submitted to the European Court of Human Rights and declared inadmissible due to a failure to meet the procedural conditions, the author stresses that since the Court rejected his mother's application without taking any stand on the admissibility or the merits of the case, the matter brought before the Committee has not been examined by another international procedure within the meaning of article 7 (d) of the Optional Protocol and Rule 16 paragraph 2 (f) of the Committee's Rules or Procedure.¹⁰

5.3 As for the State party's allegation of the author using the Committee as a court of fourth instance, the author notes that he does not simply disagree with the result of the domestic proceedings, but claims that Finnish authorities failed to conduct a proper assessment of the best interests of the child in his case, which led to a decision that was clearly contrary to the best interests of the child (a denial of justice).¹¹ The author notes that although existing domestic legislation would have allowed Finnish authorities to consider the best interests of the child within the asylum proceedings, it was not done in the author's case. The issue is not the incompatibility of the domestic legislation with the rights guaranteed in the Convention as such, but the domestic authorities' failure to comply with the best interests of the child principle.

5.4 The author notes that, after they returned to the Russian Federation, he and his family have been forced to move to a different city three times already due to their local community and/or people at the author's school discovering that his parents are a same-sex couple. To this date, the author's parents continue to try to hide the nature of their relationship from the author's school by claiming that one of the mothers is actually his aunt, although maintaining this lie has become more difficult as the author himself now knows the true nature of their relationship, and sometimes accidentally shares it with other people. The situation has led to the author experiencing psychological problems and having to visit a neurologist. He is anxious and often unable to sleep. This has also entailed physical symptoms such as issues with the author's eyesight caused by the constant nervous tension which has led the blood vessels in his eyes to spasm.

¹⁰ The author also notes that the procedural requirement the mother failed to comply with was to provide the Court with English translations of the family's written statements in different phases of the Finnish legal proceedings. The Court informed the mother's legal representative that the translations needed to be submitted by way of a mailed letter dated 4 January 2018. The letter reached Finland several days after the final date for resubmitting the application had passed.

¹¹ See ECfHR, *Jeunesse v. the Netherlands*, Application no. 12738/10, 3 October 2014, § 120; *Neulinger and Shuruk v. Switzerland*, Application no. 4161 5/07, 6 July 2010, § 135; *Karrer v. Romania*, Application no. 16965/10, 21 May 2012, § 46.

5.5 With regard to exhaustion of domestic remedies, the author reiterates that he invoked a violation of his rights under article 3, read in conjunction with article 22 of the Convention in domestic proceedings. The author also asserts he has also invoked other Convention rights in the communication to demonstrate the different elements that Finnish authorities should have considered when assessing the best interests of the child in his case. The State party's observations in this regard emphasise the author's view that the Finnish authorities failed to conduct a proper best interests analysis, which is based on all the rights set forth in the Convention.

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

6.1 In its observations dated 21 February 2019, the State party reiterated its previous observations on the admissibility of this communication and submitted that the communication was without merit. The State party submits that the author's allegation that he has not been heard during the process should be declared inadmissible for non-exhaustion of domestic remedies under article 7 (e) of the Optional Protocol. The State party argues that neither the author nor his family ever invoked that the Immigration Service should have heard him in person. During the domestic proceedings, an oral hearing before the Administrative Court was requested, but it was not explicit that they wished to let the author be heard in the appeal. Therefore, the Administrative Court did not find that an oral hearing would be needed in order to elucidate the facts and make a decision on the matter.

6.2 Referring to the general legal framework to protect the rights of asylum seekers, the State party highlights that, under the Aliens Act, special attention is paid to the best interests of the child and to circumstances related to the child's development and health. Before a decision is made concerning a child who is at least twelve years old, the child shall be heard unless such hearing is manifestly unnecessary, and the child's views shall be taken into account in accordance with the child's age and level of development. A younger child may also be heard if the child is sufficiently mature to have his or her views taken into account. The State party also notes that, when considering whether to hear a minor, the authorities must emphasise the relevance of the best interests of the child and find out whether the child's interests possibly differ from those of the guardian(s). It would be unnecessary to hear a child in certain matters on which the guardian has filed the petition on the child's and his or her own behalf and the child's interests cannot be considered to conflict with those of the guardian. The State party notes that, in the present case, the author arrived in Finland at the age of four. At the time of the Immigration Service's decision, he was six years old. Taking account of his age and maturity, the Immigration Service decided not to hear him during the asylum investigation. In this connection, the best interests of the child were not considered to conflict with those of his guardians.

6.3 Regarding the alleged violation of article 3 of the Convention, the State party submits that the best interests principle is fully reflected in the national legislation outlined above and in the national authorities' decisions, which complied with article 3 requirements.¹² The State party notes that, when considering the possibility to grant a residence permit on compassionate grounds, the Finnish Immigration Service held that it is in a child's best interests primarily to live and reside together with his or her parents, who are best placed to take care of their children, to cater for their well-being and to give the children the support and guidance needed for their growth and development. Therefore, refusing them residence permits, denying them asylum in Finland, and sending them back to their home country did not conflict with the best interests of the child. Accordingly, the best interests of the child have been duly assessed not only when considering the possibility to grant a residence permit on compassionate grounds, but also when examining the family's application for asylum and return to the Russian Federation. Thus, the national authorities have carefully considered the situation of the author as a whole in accordance with the Committee's specific guidance.

¹² For the broadly agreed consensus on the best interests of the child in article 3, the State party refers to ECtHr, X v. Latvia [GC], no. 27853/09, ECfHR 2013, Jeunesse v. the Netherlands [GC], no.12738/10, 2014. The Committee's General comments no.14 (2013) (CRC/C/GC/14); General Comments no. 22 of the Committee on the general principles regarding the human rights of children in the context of international migration (CRC/C/GC/22).

Other case-specific circumstances have also been taken into account, including the author's situation of vulnerability, protection and safety of the child, and cultural / social ties.

6.4 Regarding the alleged violation of article 22, the State party notes that the Convention does not guarantee the right of children to enter or reside in a particular country.¹³ The State party stresses that the best interests principle can be used to inform the interpretation of a certain element of the definition of a refugee in the 1951 Refugee Convention,¹⁴ but not as an alternative or replacement of that definition. The State party also refers to the Committee's case law relating to the deportation of children where the Committee assessed that there was a specific and personal risk of a serious violation of the author's right or real risk of irreparable harm to the child.¹⁵ According to the case law, the State party concludes that it is clear that a certain characterisation, or a degree of gravity of the potential risk is required for the risk to imply an obligation of non-refoulement for States Parties to the Convention. The State argues that no risk of a serious violation of the author's rights or irreparable harm to the child exists, reiterating that the Finnish authorities made thorough assessments of the situation of sexual minorities in Russian Federation as well as the specific and personal situation of the author, including his fear of being removed from his family if returned to the Russian Federation, with the best interests of the child taken into account.¹⁶ Migration authorities also considered that the bullying suffered by the author did not meet the criteria of persecution, as the acts against him were not particularly serious. Therefore, migration authorities concluded that there was no relevant ground for believing that the author would face a real risk of irreparable harm in his home country, corroborated by the fact that the author does not seem to indicate that he has suffered serious harm or persecution after his return.

6.5 The State party also submits that the author's allegations under article 2, 13, 14, 16, 17, 19 and 29 do not raise any separate issues.

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

7.1 In comments dated 19 August 2019, the author reiterates his previous comments on admissibility. Regarding the State party's argument of non-exhaustion of domestic remedies concerning his allegation of not having been heard, the author notes that the fact that the Finnish authorities decided not to hear him during domestic proceedings has not been presented as a self-standing claim of violation of the Convention. The fact has been presented simply to clarify the contents of the domestic proceedings in the author's case.

7.2 The author asserts that the domestic authorities examination does not meet the criteria of a systemically conducted best interests assessment. The author contends that they should have conducted an in-depth and child-sensitive assessment of the existence of a risk of serious violation of the Convention, taking into special consideration the vulnerability of the author as part of a minority group with his lesbian parents, as well as the vast amount of information available on the current situation on the children of LGBT families. In this regard, the author adds that the domestic authorities failed to assess the psychological and emotional impact on him of the abusive treatment of the author for example in the kindergarten and the openly hostile environment and discriminatory policies in the Russian Federation towards sexual minorities. No assessment of how safe and protected the author would be if returned to the Russian Federation was also undertaken. Given that the domestic authorities had accepted as

¹³ See ECtHR, *Jeunesse v the Netherlands*. The State party also notes that the Russian Federation is bound by the same obligations under 22 and 3 of the Convention to respect the rights of the child as another state party of the Convention.

¹⁴ See the Committee's general comment no. 6 (2005).

¹⁵ For example, the case *Z. Y. and J. Y. v. Denmark* (CRC/C/78/D/7/2CII6, 31 May 2018) related to the applicants' alleged conversion from Islam and the principles of the best interests of the child in his deportation to Afghanistan. The Committee referred to the potential existence of a 'specific and personal risk of a serious violation of A.Y.'s rights enshrined in the Convention upon return' (para. 8.12), and ultimately held that the applicants had failed to justify such risk. Similarly, *I.A.M. v. Denmark* (CRC/C/77/D/3/2016, 25 January 2018) concerned the deportation of a girl to Somalia, where she allegedly would risk being forcefully subjected to female genital mutilation. The Committee 'referred to a real risk of irreparable harm to the child (para. 11.3).

¹⁶ In this sense, the State party argues this present case is different from *I.A.M. v. Denmark*.

a fact that people belonging to sexual minorities are at risk of being subjected to violence or other severe violations of their rights in the Russian Federation, an individual assessment of the author's safety as a child of an LGBT family should have been conducted. In this context, the author highlighted that, unlike the previous time, it would be impossible to hide the relationship between his mother and her female partner in the future because he had become aware of it while the family was residing in Finland and upon the family's return to the Russian Federation, knowledge of this relationship was bound to spread and make the author more prone to be victim of a violation of his rights.¹⁷

7.3 The author also argues that the existence of personal and serious risk to the author has been further substantiated by the physical and psychological symptoms he has experienced since the family's return to the Russian Federation, as well as by the fact that the family had been forced to move already three times after the author had accidentally revealed his parents' relationship causing the local community to turn hostile towards them. Accordingly, the Finnish authorities' decision to return the author to the Russian Federation has left him at risk of severe violations of his Convention rights.

Third-party intervention

8.1 On 15 April 2020, a third-party intervention was submitted by Child Rights International Network (CRIN), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGAEurop), International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World), and Network of European LGBTIQ* Families Associations (NELFA) with a purpose of providing information relevant for the assessment of the best interests of the child of LGBTI parents in the context of deportation to Russia.

8.2 The third party intervenors draw special attention to the importance of "holistic and child-centered" approach, considering the "child's individual and specific circumstances and needs", as well as two procedural aspects. First, the child's right to be heard is emphasised at the procedural level as well, demonstrating the importance that must be attached to giving the child the opportunity to express his or her views. Second, the Committee has clarified that it is not sufficient for the decision-maker to refer superficially to the child's best interests. Any decision must be motivated, justified and explained, explicitly addressing all the factual circumstances regarding the child, what elements have been found relevant in the best interests assessment, the content of the elements in the individual case, and how they have been weighed to determine the child's best interests.¹⁸

8.3 Regarding the best interests of the child and non-refoulement, the intervenors reiterate that the best interests of the child must be taken fully into consideration in granting or refusing applications on entry to or residence in a country, and that they shall be a primary consideration and thus have high priority.¹⁹

8.4 Referring to the international standards and jurisprudence, sexual orientation constitutes a fundamental aspect of an individual's identity and awareness and LGBT people are as much entitled to freedom of expression and association as others. The fact that an applicant may be able to avoid persecution by concealing or by being 'discreet' about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. Concealing one's sexual orientation requires the suppression of a fundamental aspect of one's identity,²⁰ and being compelled to conceal one's sexual

¹⁷ The author also adds that the author's case differs from the Committee's previous jurisprudence of *Z.Y. and J.Y. v Denmark*, where the Committee found inadmissible because the authors had failed to justify the existence of a personal and serious risk. In the case of *Z.Y. and J.Y.*, the domestic authorities concluded that the authors' conversion to Christianity were not genuine, but in the present case, the domestic authorities have acknowledged as the fact that the author's guardians are lesbians.

¹⁸ CRC, General Comment No. 14, Chapter V.B., para.97. It refers to ECtHR case law, *Cința v. Romania* [2020] ECtHR App. No. 3891/19, para. 52. *G.S. v. Georgia* [2015] ECtHR App. No. 2361/13, para. 45.

¹⁹ CMW and CRC Committee, Joint GC Nos. 3 and 22, para. 29. See also CRC, *Z.Y. and J.Y. v. Denmark*, CRC/C/78/D/7/2016, Views adopted on 31 May 2018.

²⁰ The UNHCR SOGI Guidelines, *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004, *I.K. v. Switzerland*, decisions on admissibility, no. 21417/17,

orientation may also result in significant psychological and other harms.²¹ This is of particular concern if asylum-seekers, whose asylum claims have been rejected, are required to conceal their or their relatives' sexual orientation on return in an attempt to avoid persecution, since fear of discovery and the resulting ill-treatment by State or non-State actors may be lifelong. The third party intervenor argues that the same applies to children required to hide their family background in an attempt to avoid bullying or being taken away from their parents, and that in some cases psychological harm is persecutory. In particular, risk of discovery is particularly high in cases of young children within LGBT families, who do not have the ability to fully restrain themselves from talking about their family background. Laws criminalising same-sex relationships and so-called "antipropaganda" laws, even if not routinely implemented, essentially require concealing one's parents' sexual orientation, as they could be used against one's LGBT parents at any time. Children in such contexts may therefore choose to cover their familial status out of fear of being teased, ostracised or losing friends, while, in doing so, risking isolation and distancing from peers.

8.5 According to the intervenors, the lack of legal recognition of their family structure as well as the existence of laws that stigmatise their parents' sexual orientation adversely impact children living in LGBT families. Evidence reveals that growing up in a hostile legal and social climate has both direct and indirect impact on the human rights of children in LGBT families, including their rights to health, education and be free from discrimination.²²

8.6 Regarding the situation of children of LGBT parents in the Russian Federation, the disproportionately negative impact of "anti-propaganda" laws adopted on LGBT children and children of LGBT families, such as harassment and violence towards LGBT children, is well documented.²³ A number of international and regional human rights bodies have expressed their concerns on the legislation in the Russian Federation, which encourages the stigmatisation of and discrimination against LGBT persons, including children, and children from LGBT families. Russia was reported in an NGO report as "the worst country in Europe for sexual and gender minorities" and that the situation worsened with the adoption of the gay propaganda law.²⁴ In the context of a broader crackdown on human rights and the rule of law, discrimination and other forms of human rights violations against the LGBT community are perpetrated in a climate of impunity and generally go unpunished, which also legitimises violence against LGBT people, influencing public opinion.²⁵ The report also highlights that children were at risk of being taken away from the parents by social services and parents

19 December 2017, *RRT Case No. 1102877* [2012] RRTA 101, Joined Cases C-199/12, C-200/12, C-201/12 X, Y and Z v. *Minister voor Immigratie en Asiel*, CJEU, Fourth Chamber, 7 November 2013, §70.

²¹ The UNHCR SOGI Guidelines, § 33, footnotes in the original omitted.

²² Kazyak, E., Woodell, B., Scherrer, K., & Finken, E. (2018), UNICEF (2014). Eliminating discrimination against children and parents based on sexual orientation and/or gender identity. *UNICEF Current Issues*, 9, 1–6. Retrieved from: https://www.unicef.org/videoaudio/PDFs/Current_Issues_Paper-_Sexual_Identification_Gender_Identity.pdf.

²³ See e.g., Anti-discrimination Centre Memorial, *Coming Out & Russian LGBT Network* (2013). Implementation of the UN Convention on the Rights of the Child and Problem of Children from Vulnerable Groups (Russia): Additional and updated information concerning the combined third and fourth periodic reports of the Russian Federation; Human Rights Watch (2013). Submission to the United Nations Committee on the Rights of the Child on Russia; LGBT Organization "Coming Out" (2013). The Situation of LGBT Children and Children of LGBT Families in St. Petersburg, Russia: Alternative submission for the Committee on the Rights of the Child; Russian LGBT Network (2013). Commentary to the fourth and fifth periodic report by the Russian Federation: NGO alternative report. [It also adds that the online survey conducted by the LGBT Organisation "Coming Out" in 2012–2013 revealed that the "anti-propaganda" laws affected LGBTI people's family lives especially in relation to raising children. For example, one of the respondents mentioned that "there are children, and we have to explain to them not to tell anybody that they have two mothers, in order to avoid bullying from children and adults at school or kindergarten". The lack of any recognition of children in same-sex families also reportedly creates many practical problems for such children and their parents, including with medical institutions, schools or kindergartens, workplaces, immigration authorities, passport and citizenship services. See LGBT Organization "Coming Out" (2013).

²⁴ ILGA-Europe report of 2012. The third party notes the situation is unchanged as of 2019.

²⁵ Finnish Immigration Service, *Russia*, 2015, p.5.

were accused under the propaganda law, referring to several examples.²⁶ In a recent case, the Russian court ruled the removal of custody rights from a Russian citizen on the sole basis that the petitioner was part of a same-sex union²⁷ and in another case a transgender parent had his two adopted children removed and lost custody over them.

Author's comments to the third party Intervention

9. On 18 May 2020, the author submitted his comments on the third-party intervention, noting his agreement with the intervention, and reiterating that, as described by the intervenors, he is forced to conceal his mothers' sexual orientation in an attempt to avoid persecution, in fear of discovery and the resulting ill-treatment by State or non-State actors. The author believes that this results in such psychological harm, which amounts to persecution. Accordingly, the Finnish authorities' decision to return the author and his family to the Russian Federation without an adequate best interests assessment clearly constituted an arbitrary refoulement.

The State party's comments on the third party intervention

10. On 20 May 2020, the State party submits its observation on the third party intervention, providing that the intervening parties have not presented anything that would lead to assessing the communication differently than what has been put in its previous observations, and reiterating its previous observations regarding the assessment of the child's best interests by migration authorities.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 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.

11.2 The Committee notes the State party's argument that the author's allegations based on articles 3 and 22 of the Convention are inadmissible as the same matter has been examined by the European Court of Human Rights. The Committee notes, however, the author's uncontested assertion that the complaint filed with the European Court of Human Rights concerned his mother's rights and that, in any event, the Court did not examine the case in substance due to the non-fulfilment of formal requirements. The Committee therefore considers that the European Court of Human Rights did not examine the same matter within the meaning of article 7 (d) of the Optional Protocol, and hence it is not precluded from examining the present communication on the basis of this provision.²⁸ 11.3 The Committee takes note of the author's claims based on articles 2, 13, 14, 16, 17, and 29 of the Convention related to the incidents and constraints that the author experienced as a child of an LGBT family in the legal and social context in the Russian Federation. The Committee, notes, however, that the author has failed to sufficiently substantiate these claims as alleged violations of the State party's non refoulement obligations, and declares this part of the communication inadmissible under article 7 (f) of the Optional Protocol.

11.4 The Committee notes, however, that the author's claims related to an alleged risk of being subjected to renewed maltreatment as a result of the decision by Finnish authorities to return him to the Russian Federation do fall within the State party's non-refoulement

²⁶ See e.g. Vachedin, D. (2019, August 12). One of the example highlighted is an openly gay journalist, who was directly advised by her adoption attorney to leave the country because she was facing a real risk of losing her son, after she organised a campaign against the 'gay propaganda law'. In another widely publicised case, in September 2019, a gay couple was forced to flee Russia after being targeted for raising two boys adopted by one of the partners.

²⁷ On 4 March 2015, the Sovietsky District Court of the city of Astrakhan.

²⁸ See E.J. and M.J.v Finland(CRC/C/81/D/6/2016), para. 9.2.

obligations, are sufficiently substantiated for the purposes of admissibility and raise issues under article 19 of the Convention.

11.5 The Committee finally notes that the author's claims under articles 3 and 22 of the Convention, regarding the alleged failure of national authorities to take the best interests of the child as a primary consideration in the context of the asylum and residence proceedings, have also been sufficiently substantiated for the purposes of admissibility.

11.6 Accordingly, the Committee declares the author's claims based on articles 3, [19] and 22 of the Convention admissible and proceeds with its consideration on the merits.

Consideration of the merits

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

12.2 The Committee takes note of the author's claim that national authorities failed to conduct a proper assessment of the best interests of the child in the examination of his application for asylum or residence permit, in violation of his rights under articles 3 and 22 of the Convention. In particular, the author alleged the absence of an individual assessment of his safety as a child of an LGBT family and the failure to consider his views during the proceedings, undisputed by the State party. The Committee recalls that the assessment of the existence of a risk of serious violations of the Convention in the receiving State should be conducted in an age- and gender-sensitive manner,²⁹ that the best interests of the child should be a primary consideration in decisions concerning the return of a child, and that such decisions should ensure that the child, upon return, will be safe and provided with proper care and the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child.³⁰ The best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the return of a child³¹, and the legal rationale for all judicial and administrative judgments and decisions should also be based on this principle.³² The Committee further recalls that the assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child.³³ The Committee also recalls that it is generally for the organs authorities of the States parties to the Convention to review and evaluate facts and evidence in order to determine whether a risk of a serious violation of the Convention exists upon return, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice.³⁴

12.3 In the present case, the Committee notes that both the Immigration Service and the Administrative Court referred to the family's past experience of threats and discrimination, and the bullying against the author, but concluded that these could not be considered as amounting to persecution. The Committee also notes that the Immigration Service's decision included a statement that the "best interests of any child was to be allowed to live together with his or her parents".

12.4 The Committee recalls that, in order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The

²⁹ General comment No. 6, para. 27.

³⁰ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, paras. 28, 29 and 33.

³¹ *Ibid.*, para. 30. *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; *Z.H. and A.H. v. Spain*, para.8.6(CRC/C/82/D/32/2017).

³² See the Committee's Concluding Observations on Finland's fourth period report (CRC/C/FIN/CO/4), para. 28.

³³ See the Committee's General Comment No. 14 (CRC/C/GC/14), para. 43.

³⁴ See *A. A. v. Spain* para. 4.2(CRC/C/73/D/2/2016), para. 4.2, *Fermín Navarro et al. v. Spain*, op. cit, para. 6.4, *A.Y. v. Denmark*, para. 8.8, *Y.B. and N.S. v. Belgium*, Views of 27 September 2018 (CCPR/C/79/D/12/2017), para. 8.4.

motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests.³⁵ In this regard, the Committee observes that the formal and general reference to the best interests of the child by the Immigration Service, without having considered the author's views reflects a failure to consider the specific circumstances surrounding the author's case and to assess the existence of a risk of a serious violation of the Convention against such specific circumstances.

12.5 The Committee further notes that the authorities of the State party, in taking the decision to deport the author, failed to properly consider the real risk of serious violation of the author's rights such as violence and harassment upon his return to Russian Federation, which was foreseeable at the time of the decision to return based on his past experience of discrimination and bullying. In particular, it notes the lack of consideration of the author's young age at the time of the decision, and of the permanent impact that constant bullying and stigmatization based on this mother's sexual orientation may have on the author. This resulted in the State party's failure to find a real risk of irreparable harm to the author as a ground for the application of non-refoulement obligations.

12.6 In light of all the above, the Committee concludes that the State party failed to adequately take the best interests of the child as a primary consideration when assessing the author's asylum request based on his mother's sexual orientation, and to protect him against a real risk of irreparable harm in case of return to the Russian Federation.

13. 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, 19, and 22 of the Convention.

14. The State notes that the V.B. and A.S. applied for assisted voluntary return, which was granted, and that they returned to the Russian Federation, together with the author, on 7 August 2017. In light of this, the Committee considers that, in the circumstances of the present case, the State party is under an obligation to provide an effective reparation to the author, including adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by ensuring that the best interests of the child is effectively and systematically taken into account in the context of asylum proceedings, and that children are systematically heard.

15. 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 measures in its reports to the Committee under article 44 of the Convention. Finally, the State party is requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

³⁵ 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, para. 1, (CRC/C/GC/14), para. 97.