



Convention on the Rights of the Child

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Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 55/2018* ** ***

<i>Communication submitted by:</i>	E.B. (represented by counsel, Hind Riad)
<i>Alleged victims:</i>	E.H. et al.
<i>State party:</i>	Belgium
<i>Date of communication:</i>	17 September 2018 (initial submission)
<i>Date of adoption of Views:</i>	3 February 2022
<i>Subject matter:</i>	Administrative detention; deportation to Serbia
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Best interests of the child; deprivation of liberty
<i>Articles of the Convention:</i>	3, 9, 24, 27, 28, 29, 31 and 37
<i>Articles of the Optional Protocol:</i>	7 (e) and (f)

1.1 The author of the communication is E.B., a Serbian national born in Kosovo on 3 October 1994. She is submitting the communication on behalf of her four minor children, who were all born in Belgium: E.H., born on 13 February 2012, R.B., born on 6 July 2013, S.B., born on 16 November 2014, and Z.B., born on 10 August 2017. The author claims that her children, by virtue of their detention, are victims of a violation by the State party of article 37 of the Convention, read alone and in conjunction with articles 3, 24, 28, 29 and 31, and that their expulsion to Serbia would violate articles 9 and 27 of the Convention. She is represented by counsel, Hind Riad. The Optional Protocol entered into force for the State party on 30 August 2014.

1.2 On 25 September 2018, in accordance with article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to release the author and her children from the migrant detention centre, but rejected the request to suspend their removal to Serbia.

* Adopted by the Committee at its eighty-ninth session (31 January–11 February 2022).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Hynd Ayoubi Idrissi, Rinchen Chopel, Bragi Gudbrandsson, Philip Jaffé, Sopia Kiladze, Gehad Madi, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ratou Zara, José Ángel Rodríguez Reyes, Ann Skelton and Velina Todorova.

*** A joint opinion by Committee members Luis Ernesto Pedernera Reyna and José Ángel Rodríguez Reyes (partially concurring) is annexed to the present Views.



1.3 On 27 September 2018, in accordance with article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, reiterated its request to the State party to release the author and her children from the migrant detention centre.

1.4 At its eightieth session, the Committee decided to reject the State party's request to discontinue consideration of the case.

Facts as submitted by the author

2.1 The author was born in Kosovo and belongs to the Roma community. In 2010, she moved to Belgium; in 2011, she filed an application for regularization, which was rejected by the Immigration Office in April 2012. She was served with orders to leave the country on 13 December 2012, 18 September 2013, 14 March 2017 and 5 December 2017.

2.2 The author decided not to leave the country. Between 13 February 2012 and 10 August 2017, she gave birth to four children. All of them lived with the children's paternal grandmother; the children's father was serving a prison sentence in the State party following various criminal convictions.

2.3 On 14 August 2018, at 6 a.m., the children were arrested with their mother at their home. As they were subject to a removal order, they were taken to a "family home" in a closed centre for foreigners near Zaventem international airport in Brussels.

2.4 On 17 August 2018, the children were examined by the head of the paediatrics department at Saint-Pierre University Hospital in Brussels, who found that they were missing their grandmother, not eating much and having difficulty sleeping.

2.5 On 18 August 2018, the author lodged an emergency appeal against the removal order.

2.6 On 21 August 2018, she filed a petition to be released from detention with the Antwerp Council Chamber.

2.7 On the same day, the Aliens Litigation Council rejected the appeal against the removal order.

2.8 On 22 August 2018, the children were due to be deported with their mother but the deportation did not take place as the author had filed a petition with the Antwerp Court of First Instance, seeking to stop the deportation pending a decision on the appeal against their detention.

2.9 On 23 August 2018, an asylum application was filed for the children.

2.10 On 24 August 2018, the Antwerp Court of First Instance responded favourably to the author's petition and requested the State party not to deport the family until the Antwerp Council Chamber had handed down its ruling. The State party then filed a third-party objection, which was upheld by the Court.

2.11 On 27 August 2018, the Antwerp Council Chamber declared the petition for release unfounded. Citing a Constitutional Court ruling that article 37 of the Convention allows for the detention of a child if it is carried out in conformity with the law, as a last resort and for the shortest appropriate period of time, the Chamber considered that it was in the children's interest not to be separated from their mother, who had to leave the country, and that their detention was a last resort because their mother had already ignored several orders to leave the country and had twice absconded from the detention centre where she had been held pending expulsion.

2.12 On 28 August 2018, the author filed a new petition for release with the Antwerp Council Chamber, claiming that her children should be released because they had filed an asylum application.

2.13 On 31 August 2018, the Office of the Commissioner General for Refugees and Stateless Persons rejected the children's asylum application.

2.14 Consequently, on 4 September 2018, the Antwerp Council Chamber declared the second petition for release to be unfounded.

2.15 On 7 September 2018, the author lodged an appeal with the Aliens Litigation Council against the decision to reject the asylum application.

2.16 The same day, the Antwerp Court of First Instance, having rejected the petitions for release, dismissed the request not to expel the family until the authorities had ruled on the matter.

2.17 The author says that, on the same day, a medical report documented concerns relating to the sadness expressed by the children about the possibility of going to Serbia.

2.18 On 10 September 2018, the family was transferred from the family home in the closed centre – where they had been for four weeks, the maximum permitted by law¹ – to an open “pre-departure house” (*maison de retour*), another form of detention, from which families can be absent during the day.

2.19 On 11 September 2018, the family filed an emergency petition with the Brussels Court of First Instance asking for an end to their detention, as the maximum detention period of four weeks had been exceeded. The petition was rejected, as the family had been placed in an open pre-departure house.

2.20 On 13 September 2018, as the State party did not consider the family to be in detention and as she wished to move to a more comfortable place, the author left the pre-departure house with her children.

2.21 On 14 September 2018, the author and her children were again arrested and were taken to a family home in a closed centre.

Complaint

3.1 The author argues that the available remedies have been exhausted for each of the two claims, regarding, respectively, detention and deportation. With regard to the remedies for the first claim, she states that decisions on deprivation of liberty can be appealed to a criminal court, to the Council Chamber and, on appeal, to the Indictments Chamber. However, such appeals do not have suspensive effect and therefore do not prevent the implementation of a removal order. In the present case, two petitions for release were lodged with the Council Chamber to challenge the first detention – from 14 August to 10 September 2018 – both of which were dismissed; after being placed in detention for the second time, on 14 September 2018, the author appealed to the Committee without waiting to submit another appeal, as it would not have prevented the removal anyway.

3.2 With regard to remedies for the second claim, regarding deportation, the author says that decisions on the termination of residence and removal may be appealed to the administrative courts, to the Aliens Litigation Council and, for administrative review, to the Council of State. In the present case, an emergency appeal was lodged against the removal order but was dismissed; an appeal against the rejection of the children’s asylum application is still pending.

Complaint relating to migration-related detention: rights to liberty and to an effective remedy in cases of deprivation of liberty; impact on other rights

3.3 The author argues that her children, as a result of their detention, are victims of violations of their rights to liberty and to an effective remedy in case of deprivation of liberty. She points out that migration-related detention is contrary to the Convention, since the right to liberty is a fundamental right subject to only extremely limited exceptions, which do not include migration-related grounds.² The author also points out that the courts responsible for examining their detention hand down their rulings within time limits that are incompatible with the specific situation of children. She further argues that there were alternatives to

¹ Belgium, Royal Decree of 22 July 2018, art. 83/11.

² Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No.22 of the Committee on the Rights of the Child (2017), paras. 11 and 42; joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), para. 5.

detention, as the family was living in a residence known to the authorities and was in no danger of disappearing. Finally, she alleges that the first time the children were detained, the detention was not for the shortest appropriate period of time, as it lasted the legal maximum of four weeks, and that they had no sooner been released than they were detained again.

3.4 Furthermore, the author argues that the conditions of detention, in particular the fact that the regulations do not provide for the presence of a paediatrician in the closed centre, the location a few hundred metres from the airport runways, the duration and the context seriously infringe upon many other rights, including children's right to physical and mental integrity and the rights protected by articles 3, 24, 28, 29 and 31 of the Convention.

Complaint relating to deportation: right to a standard of living adequate for physical, mental and social development; right to respect for private and family life

3.5 The author also argues that the deportation of the children to a country they do not know would violate their right to a standard of living adequate for physical, mental and social development, as Roma in Serbia are discriminated against and live in poverty, without access to housing or a livelihood.

3.6 Lastly, the author submits that deportation to Serbia would also constitute a violation of her children's right to maintain contact with both parents, since their father lives in Belgium, and also with their grandmother, who is resident in Belgium.

Remedies

3.7 The author requests the provision of child psychiatric support for her children and compensation for the harm suffered, estimated at €10,000 per child.

Additional information submitted by the author

4.1 On 26 September 2018, the author informed the Committee that the State party had refused to comply with the request for interim measures issued the previous day.

4.2 On 3 October 2018, the author informed the Committee that the Aliens Litigation Council had rejected the children's asylum application on the grounds that Serbia had drawn up action plans to improve the situation of persons belonging to the Roma community.

4.3 On 9 October 2018, the Committee was informed that the children and their mother had been returned to Serbia, and that the author had agreed to a voluntary return in order to receive assistance there. The Committee was also informed that, upon arrival in Belgrade, S.B. had had some serious health problems and had been immediately admitted to hospital.

Request by the State party to discontinue consideration of the case

5.1 On 6 November 2018, the State party noted that the reason the author and her children had continued to live in a closed centre despite the request for interim measures was that the author had not complied with any of the removal orders and had already absconded several times from open, single-family pre-departure houses, which are an alternative to confinement in that the occupants can go out freely during the day. Specifically, on 25 April 2017, the author had absconded from such a house with the three children she had at the time; on 5 December 2017, she had again been stopped in the street and returned to an open pre-departure house, but had absconded the very next day with, this time, her four children, the youngest having been born in August 2017.

5.2 The State party thus considers that a more humane and peaceful alternative to confinement had already been provided on two occasions, but the family had run away each time. It was for this reason that, when the author and her children were arrested again on 14 August 2018, they were placed in a closed centre. On 10 September 2018, the family was transferred to an open pre-departure house, as the legal time limit for detention in a closed centre had run out owing to the numerous appeals filed by the author to prevent deportation, and, for the third time, they absconded. When they were arrested on 14 September 2018, the family was placed in a closed centre pending the ruling on their application for international protection and subsequently the organization of the logistics of their repatriation, which finally took place on 9 October 2018.

5.3 The State party explains that, because the family had absconded three times when an alternative to detention was put in place, and also because of the author's repeated refusal to comply with the five removal orders and the numerous proceedings brought by the author to block the family's deportation, it was considered that to release them would effectively make it impossible to remove them if the children's application for international protection was rejected. Moreover, the regulations provide that detention is an option where there is a flight risk.

5.4 Lastly, the State party requests the Committee to discontinue consideration of the case as the author has voluntarily left the country.

Author's comments on the State party's observations

6.1 On 12 January 2019, the author clarified that the family's deportation was not a voluntary return; she had been forced to accept being deported in order to receive financial assistance on her return to pay for the rent, water and electricity for three months, receive food parcels, register the family at the town hall and school and with the social services, and buy school supply kits for the children and any necessary medicine.

6.2 An escort had accompanied the family to Belgrade and given them €800 before leaving Serbia. The family had gone to live in the town of Niš with the children's father's grandmother, their great-grandmother. The author said that the children were not in school and had no access to health care; she therefore asked the Committee not to discontinue its consideration of the case and to oblige the State party to repatriate them so that the children could enjoy their fundamental rights.

State party's observations on admissibility and the merits

7.1 On 26 March 2019, the State party wrote that the communication should be declared inadmissible because domestic remedies had not been exhausted. The author had not filed a new petition to be released from detention after she and her children had again been placed in a closed centre after absconding from the pre-departure house. Nor had she appealed against the ruling of the Antwerp Court of First Instance upholding the State party's third-party objection after the Court had requested a suspension of the removal order pending a final decision on their detention.

7.2 On the first substantive claim, the State party submits that the author's argument that minor children can never be detained on migration-related grounds is invalid, as article 37 of the Convention does not absolutely prohibit the detention of minors and does not contain any objection to migration-related detention. On the contrary, referring to the case law of the European Court of Human Rights,³ the State party notes that children may be deprived of their liberty provided that it is a last resort, for the shortest appropriate period of time, and that their best interests are a primary consideration in determining the duration and conditions of detention. Furthermore, under Belgian law, the possibility of detaining minors in a closed centre on migration-related grounds is provided for by law,⁴ and the Constitutional Court has confirmed that it is legal, provided that the detention is carried out in accordance with the law, is not arbitrary, is decided upon only as a last resort and for the shortest appropriate period of time, and is adapted for children.⁵ Applying these criteria to the present case, the State party notes that the detention of the author and her children was reviewed by the investigating courts and by the court of first instance, which found the detention to be lawful. The author has not complained of any denial of justice or arbitrary assessment in the decisions of the national authorities.

³ European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application No. 13178/03, judgment, para. 101.

⁴ The possibility was provided for under article 2 of the Act of 16 November 2011 inserting an article 74/9 into the Act of 15 December 1980 on the entry, temporary or permanent residence and removal of aliens, as regards the prohibition on detaining children in closed centres. See also Royal Decree of 2 August 2002, as amended by Royal Decree of 22 July 2018 with a view to organizing the detention of families with minor children in family homes in a closed centre.

⁵ Constitutional Court of Belgium, decision No. 166/2013, 19 December 2013, para. B.14.2.

7.3 Specifically, the State party reiterates that the measure was a last resort, pointing out that the author was issued with five voluntary departure orders between July 2010 and March 2017, after the Serbian authorities had agreed to issue travel documents for her and her children. Because of her refusal to comply, a removal order was issued with, this time, placement in a pre-departure house (as an alternative to family detention); the author and her children absconded from this accommodation each time. The State party therefore considers that, after the failure of these alternatives to confinement, it could implement the measure provided for by law, which, in the event of non-cooperation, permits the family to be held in detention in a closed centre. This was the case for the detention that is the subject of this communication, when the family was placed in a family home in a closed centre. The State party also states that the option of keeping the family in their home was not applicable because the conditions laid down by the law were not met: the father, who had various criminal convictions, was a threat to public peace, the deadline for a voluntary departure had already passed, and the author was unable to post a financial guarantee. It was therefore, according to the State party, a measure of last resort.

7.4 The State party also argues that the best interests of the children were taken into account at every stage of the procedure: before the family's arrest, the Immigration Office gave it five opportunities to leave the country voluntarily in order to avoid the forced repatriation procedure; the family was unsuccessfully placed in a pre-departure house, an open accommodation facility created specifically for families with minor children; the eldest child was heard during her detention and attended, with her mother, a meeting on returning home, where she had the opportunity to express her views on both the expulsion and the extension of the detention. The other children were not heard because the Immigration Office considered that they did not have sufficient discernment to answer the questions.

7.5 Regarding the conditions of detention, the State party maintains that the family homes in the closed centre guarantee the proper development of the child. The family home is in fact set completely apart from the other detainee accommodation, is for the sole use of the family and is furnished and fully equipped, including with a kitchen so that the parents can satisfy their children's nutritional needs and prepare their own meals with ingredients chosen from an order list, so that, as far as possible, the family's eating habits are respected. Moreover, and contrary to the author's claim, family members can call on the medical and psychological services on a daily basis. On arrival, each member of the family was given a medical examination and, as they all had lice, they were prescribed appropriate treatment; in addition, the children were wearing dirty clothes, so they were given second-hand clothes. Furthermore, the children took part in age-appropriate educational activities in the centre. Regarding the issue of noise from the nearby airport, which was raised by the author, the State party notes that an independent study has shown that, from the outside, the noise of aircraft is 58 decibels on landing and 68 decibels on take-off, which is within the applicable limits; the necessary planning permission was obtained for these family homes. Thus, with regard to the right to be protected from inhuman and degrading treatment, the State party cites the case law of the European Court of Human Rights⁶ to argue that the conditions of detention were adequate and that the threshold of severity was not met in this case.

7.6 Concluding its observations on the first claim, the State party submits that the length of the detention was the result, not of the position adopted by the national authorities, but of the author's aggressive pursuit of procedural remedies; for example, she submitted an application for international protection on the eve of the planned repatriation, thereby obliging the State party to extend the detention pending the outcome of the asylum proceedings. Moreover, the renewal of the period of detention was subject to a number of safeguards that took into account the best interests of the children: a report by the management of the centre highlighted the fragile state of the children on their arrival at the centre, but noted that they became perfectly integrated in the life of the centre. Specifically, the children took part in the activities proposed by the childcare workers, played with them, borrowed DVDs from the toy library and played in the playground with bicycles and

⁶ European Court of Human Rights, *A.B. and others v. France*, application No. 11593/12, judgment, 12 July 2016, paras. 113–115; and *R.M. and others v. France*, application No. 33201/11, judgment, 12 July 2016, paras. 74–76.

skateboards. In particular, the report notes that “the structure and daily routine they are offered at the centre is welcomed by the children” who “seek out contact with the staff present on site [to give them] a hug”. The extension could be granted precisely because of this evidence that the children were not suffering as a result of their detention.

7.7 As for the second claim, the State party notes that the Committee rejected the author’s request for an interim measure to suspend the family’s deportation to Serbia. The State party also observes that the author does not demonstrate that there is any real risk of a violation of article 27 (1) of the Convention in Serbia, where, on the contrary, S.B. received medical care on arrival.

7.8 With regard to the right to respect for private and family life in relation to the removal, the State party points out that the national authorities have already found that the removal order did not entail any such violation, and the author has not claimed there was any denial of justice or arbitrary assessment. In point of fact, even if the children had not been deported, their father, whose prison sentence for criminal acts runs until 16 November 2022, would have been absent from their upbringing and there is no evidence that the children visited him regularly in prison.⁷ Moreover, at the end of his sentence, he could apply to the competent authorities for a Serbian residence permit, as his family lives in Serbia.⁸ The State party also points out that the right to private and family life is not an absolute right and that the family could not reasonably have expected to be able to lead a family life in Belgium when the author and her partner entered the country illegally and remained there illegally despite several deportation decisions, having in the meantime had four children. In this regard, the State party recalls that the European Court of Human Rights has held that “confronting the authorities of the host country with family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation ... to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them.”⁹

Author’s comments on the State party’s observations

8.1 On 8 October 2019, the author reiterated that the right to liberty is a fundamental right that cannot be subject to exceptions on migration-related grounds. She cites, in this regard, a global study on the situation of children deprived of liberty, which states that “migration-related detention of children cannot be considered as a measure of last resort and is never in the best interests of the child”.¹⁰ The author also cites the case law of the European Court of Human Rights, according to which “the protection of the child’s best interests involves ... considering alternatives so that the detention of minors is only a measure of last resort”.¹¹

8.2 The author also reiterates that the detentions caused serious health problems for the children; the noise caused sleep disturbances and affected their daily lives because they did not always wear noise-cancelling headphones, which are cumbersome to wear when you are playing and which had to be requested and returned systematically each time.

8.3 The author also states that, although three of her four children had in fact finally received identity cards in Serbia in May 2019, her eldest daughter had not got one. The children do not attend school and the author neither works nor receives any financial support from the Serbian State, which constitutes inhuman and degrading treatment of the children.

⁷ The children’s father was sentenced on 9 February 2015 to 18 months in prison for burglary; on 2 January 2017 to three months in prison for theft; and on 3 October 2018 to 40 months in prison for breaking and entering and burglary with violence at night.

⁸ In addition to his wife and children, his grandmother lives there and his father was successfully repatriated there.

⁹ European Court of Human Rights, *Jeunesse v. the Netherlands*, application No. 12738/10, judgment, 3 October 2014, para. 103; *Chandra and others v. the Netherlands*, application No. 53102/99, decision, 13 May 2003; *Benamar v. the Netherlands*, application No. 43786/04, decision, 5 April 2005; and *Priya v. Denmark*, application No. 13594/03, decision, 6 July 2006.

¹⁰ *A/74/136*, para. 56.

¹¹ European Court of Human Rights, *Popov v. France*, applications No. 39472/07 and No. 39474/07, judgment, 19 January 2012, para. 141 (see also paragraphs 91 and 140).

8.4 Finally, in addition to the €10,000 in damages that she is claiming for each child, the author is calling for the repatriation of the family to the State party.

Third-party intervention

9.1 On 20 December 2019, the organization Defence for Children International-Belgium submitted a third-party intervention claiming that the detention of a child on grounds related to their migration status or that of their parents constitutes a violation of their rights according to a consensus supported by the 2019 “Global study on children deprived of liberty”. In this regard, the Committee had requested the State party in 2019, in its concluding observations on the State party’s combined fifth and sixth periodic reports, to put an end to the detention of migrant children in closed centres.¹²

9.2 The third party observes that, in the State party, between 2008 and July 2018, children were no longer detained in closed centres because of their migration status: they were held in pre-departure houses, which are open detention facilities that offer an alternative to closed centres. However, since the adoption of the Royal Decree of 22 July 2018, the State party has resumed the detention of children in closed centres. The detention of children in closed centres on migration-related grounds is therefore based on the Act of 15 December 1980, as amended in 2011, and on the Royal Decree of 22 July 2018, which specifies the conditions of detention. Following its adoption, associations lodged an appeal for annulment with the Council of State. On 4 April 2019, the Council of State temporarily suspended article 13 of the Royal Decree of 22 July 2018, which states that a stay in a family home in a closed centre can last for up to one month; the appeal for annulment is still pending.

9.3 The third party also notes that exposure to noise and air pollution could exacerbate the harm already caused to children in detention.

9.4 The third party draws the Committee’s attention to two essential safeguards with regard to the deprivation of a child’s liberty: a review of the legality of the child’s detention and a review of the places where he or she is deprived of liberty.

9.5 Lastly, the third party argues that migration control considerations cannot override the best interests of the child, which must be assessed by a child protection authority.

Additional information provided by the parties

The author

10. On 22 June 2020, the author endorsed the position set forth in the third-party intervention, reiterating that no child can be deprived of liberty on migration-related grounds.

The State party

11.1 On 25 June 2020, the State party pointed out that, in Belgian law, the possibility of detaining minor children in a closed centre in a migration context was established by article 2 of the Act of 16 November 2011 inserting an article 74/9 into the Act of 15 December 1980 on the entry, temporary and permanent residence and removal of aliens. In this regard, the Constitutional Court has had occasion to point out that, since article 37 of the Convention does not absolutely prohibit the detention of minors, such detention may take place if it is carried out in conformity with the law and is not arbitrary, if it is a measure of last resort that lasts the shortest appropriate period of time, and if families with children are placed in a centre adapted to the needs of the children. Thus, the Constitutional Court has ruled that, subject to these conditions, Belgian legislation authorizing the detention of families with minor children is legal and respects their fundamental rights.

11.2 The State party says that the legislation provides for a sequential system for the detention of families with minor children: they are first given the opportunity to leave voluntarily and are informed of the possibilities of an assisted voluntary return; if the family, for valid reasons, cannot leave within the time limit set, they may ask to postpone their departure; if the family does not leave within the time limit set, a support officer is assigned

¹² CRC/C/BEL/CO/5-6, para. 44 (a).

and invites the family to a voluntary return interview; if they decide not to return within the time limit set, they are transferred to a pre-departure house, an open accommodation facility that family members can leave during the day without prior authorization, for example to go to school or to do shopping; from this accommodation, they may still decide to leave voluntarily and without coercion while receiving the necessary assistance; if they refuse to leave, a forced return will be organized. In this last case, a decision will be taken to transfer the family to a closed centre adapted to the needs of families with minor children for as short a period as possible in order to organize their removal.

11.3 Regarding the duration of detention, article 13 of the Royal Decree of 22 July 2018 provides that a family with minor children can only be held “for the shortest possible period of time, which may not exceed two weeks” and which can only be extended “for a maximum of two weeks” and on certain conditions, including the absence of any ill effects of detention on the physical and psychological integrity of the minor. The regulations therefore expressly provide that the duration of detention must be as short as possible, and that the two-week period is not the rule and that any extension is exceptional and subject to compliance with various requirements.

11.4 Regarding the distances between the centre and the airport runways, the State party says that the nearest runway is about 250 metres away and is used only for landing, which is less noisy than take-off, and that there is a second runway about one kilometre away and a third two kilometres away. The State party refers to its comments on noise pollution and says that, since those comments were submitted, new noise studies have been carried out and reports by independent experts have concluded that all measurement results comply with the regulations. The night-time noise level is 19.8 decibels, which is well within the World Health Organization (WHO) recommended maximum of 40 decibels, as is the daytime noise level, since the WHO recommended maximum is 45 decibels and the measurements gave a figure of 28 decibels.

11.5 With regard to monitoring the impact of detention on the physical and psychological integrity of children, the State party specifies that not only must the well-being of children be monitored if they are kept in detention for more than 14 days, but they must also receive regular medical and psychological care before then. The regulations also provide that where the medical practitioner objects to the removal or is of the opinion that the child’s mental or physical health is seriously jeopardized by the detention, the Director General may suspend the enforcement of the removal or detention order.

11.6 The State party also indicates, with regard to the right of any detained child to challenge the legality of his or her detention, that, if families detained with minor children consider that there is an emergency or absolute necessity and that the legal time limit of five days for the authority to make a decision is therefore too long, they may seek a summons or submit an *ex parte* application to an urgent applications judge, and a decision can be obtained the same day.

11.7 As to the monitoring of places where children are deprived of their liberty, the State party indicates that the regulations provide for accredited non-governmental organizations to visit places of detention.

11.8 Lastly, the State party argues that the statements by experts taken from the global study on the situation of children deprived of liberty do not have the status of a legal norm, and that it applies the applicable international and national legal provisions. In this regard, article 37 of the Convention sets out no objection to the detention of minors on migration-related grounds. Similarly, the New York Declaration for Refugees and Migrants, of 19 September 2016, in no way prohibits the detention of minor children; it stresses that detention should be a last resort, that the duration of detention should be as short as possible and that the conditions of detention should take into account the best interests of the child and respect his or her fundamental rights, which is the case under Belgian law. Moreover, article 17 of European Union Directive 2008/115/EC of 16 December 2008¹³ provides for the detention

¹³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *Official Journal of the European Union*, L 348, 24 December 2008, p. 98.

of minor children and families. In its general comment No. 35 (2014), the Human Rights Committee states that the right to liberty is not absolute, that children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, and that their best interests should be a primary consideration with regard to the duration and conditions of detention.¹⁴ Similarly, the European Court of Human Rights has held that a minor may be detained in certain circumstances to prevent him or her from effecting an unauthorized entry into the country or if deportation or extradition proceedings are under way.¹⁵ The State party also points out that the situation in the present communication is different from that in *R.M. and others v. France*, where a young child was confined in conditions that, although necessarily a source of considerable stress and anxiety, were not found to be sufficiently serious to fall within the scope of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), even though the detention centre was located in an area where construction was not permitted precisely because of the high levels of noise pollution; in the present case, the centre is in a buildable zone.

Issues and proceedings before the Committee

Consideration of admissibility

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

12.2 The Committee notes the State party's arguments that the communication is inadmissible under article 7 (e) of the Optional Protocol because the author has not exhausted all domestic remedies, having failed to either file a new application for release when the family was again placed in a detention centre after it absconded from the pre-departure house or appeal the ruling of the Antwerp Court of First Instance that upheld the State party's third-party objection after the Court had requested a suspension of repatriation pending a final decision on the family's detention. However, the Committee notes the author's argument that the submission of a new appeal against the second detention would not have suspended the deportation of the author and her children. The Committee considers that, in the context of the authors' imminent expulsion, any remedy that does not suspend the execution of the existing removal order against them cannot be considered effective.¹⁶ The Committee also considers that there is no indication that an appeal against the second detention would have led to a decision by the State party's authorities that was different from the decisions in the appeals already lodged against the first detention. It also recalls that the rule on exhaustion of domestic remedies does not require the authors to exhaust absolutely all existing domestic remedies; rather, it is designed to allow the national authorities to rule on the authors' claims. In the present case, the State party's authorities had the opportunity to rule on both detention and expulsion on several occasions. Similarly, although the author did not appeal the ruling of the Antwerp Court of First Instance upholding the State party's third-party objection after the Court had requested a suspension of repatriation pending a final decision on the family's detention, the Committee observes that the domestic proceedings subsequently took their course and that the Antwerp Court of First Instance finally declared its initial request not to deport the family moot, the authorities having in the meantime ruled on the matter and dismissed the author's complaints. Thus, the Committee considers the communication admissible under article 7 (e) of the Optional Protocol.

12.3 The Committee notes the author's claim under article 27 of the Convention that deportation to Serbia would violate her children's right to an adequate standard of living for their physical, mental and social development, as Roma in Serbia are discriminated against and live in poverty, without access to housing or means of subsistence. The Committee, having rejected the request for an interim measure to suspend the deportation of the author

¹⁴ See also *Jalloh v. Netherlands* (CCPR/C/74/D/794/1998), paras. 8.2 and 8.3; and *D. et al. V. Australia* (CCPR/C/87/D/1050/2002), para. 7.2.

¹⁵ European Court of Human Rights. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application No. 13178/03, judgment, 12 October 2006, paras. 100–101.

¹⁶ *B.I. v. Denmark* (CRC/C/85/D/49/2018), para. 5.2.

and her children to Serbia, observes that she has subsequently failed to substantiate this claim, which is still presented in a very general manner. Therefore, the Committee declares this claim to be manifestly unfounded and inadmissible under article 7 (f) of the Optional Protocol.

12.4 The Committee also notes the author's claim under article 9 of the Convention that deportation to Serbia would violate her children's right to respect for private and family life, as their father and paternal grandmother are in Belgium. It is of the view that, as a general rule, it is for the organs of States parties to examine and evaluate the facts and evidence in order to determine whether there is a risk of a serious violation of the Convention upon return, unless it is found that such examination was clearly arbitrary or amounted to a denial of justice.¹⁷ In addition, the Committee notes the State party's arguments that, even if the children had not been deported, their father, who has been in prison since 2015, would have been absent from their upbringing and that there is no evidence that the children visited him regularly. The Committee considers that, although the author disagrees with the decisions taken by the national authorities, she has not demonstrated that the examination of the facts and evidence by these authorities was clearly arbitrary or amounted to a denial of justice or that the children's best interests were not a primary consideration in the domestic proceedings. The Committee also notes that the author eventually accepted a voluntary return to her country of origin and that she and her children went to live with their paternal great-grandmother in Serbia, where their paternal grandfather also lives. Consequently, the Committee considers that the author's claim under article 9 of the Convention has not been sufficiently substantiated and declares it inadmissible under article 7 (f) of the Optional Protocol.

12.5 On the other hand, the Committee considers that the author's claims under article 37 of the Convention, read alone and in conjunction with articles 3, 24, 28, 29 and 31, in relation to the family's administrative detention on migration-related grounds, have been sufficiently substantiated for the purpose of admissibility. The Committee therefore declares those claims admissible and proceeds with its consideration of the merits.

Consideration of the merits

13.1 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.

13.2 The Committee takes note of the author's allegations that the State party violated her children's rights under article 37 of the Convention, read alone and in conjunction with articles 3, 24, 28, 29 and 31, by reason of their administrative detention on migration-related grounds. The Committee notes in particular that, according to the author, her children's detention was not a measure of last resort, since alternatives to detention were available; that it was not for the shortest appropriate period of time; and that the noise resulting from proximity to the airport caused sleep disturbances and affected their daily lives, while there was no full-time paediatrician in the centre.

13.3 The Committee also takes into account the State party's position that, under domestic law¹⁸ and in accordance with international law, the detention of minors is lawful if it is carried out in accordance with the law, is not arbitrary, is used only as a measure of last resort and for the shortest appropriate period of time, and is adapted to the needs of children.

13.4 In particular, the State party states that there are several phases before a family with minor children is detained in a closed centre but, in the present case, the detentions of 14 August and 14 September 2018 were indeed a measure of last resort for several reasons: the author's repeated refusal to comply with the five removal orders; her history of repeatedly absconding whenever an alternative to detention was put in place for her and her children; and the fact that the conditions for keeping the family in their home pending the organization of their expulsion were not met.

¹⁷ *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; *A.Y. v. Denmark* (CRC/C/78/D/7/2016), para. 8.8; and *B.I. v. Denmark*, para. 5.4.

¹⁸ Article 2 of the Act of 16 November 2011; and Royal Decree of 2 August 2002, as amended by Royal Decree of 22 July 2018.

13.5 The Committee also notes the State party's argument that the family homes in the closed centre do ensure the appropriate development of the child during his or her time in detention: they are set completely apart from the other detainee accommodation, are solely for the use of families and are fully furnished and equipped; families can call on the medical and psychological services on a daily basis; and children take part in age-appropriate educational activities.

13.6 The Committee further notes that, according to the State party, a family with minor children can only be detained for the shortest possible period of time, which may not exceed two weeks or be extended for a maximum of two weeks except on certain conditions, including the absence of any ill effects of detention on the child's physical and psychological integrity. In the present case, the length of the detention was the result, according to the State party, of the author's aggressive pursuit of procedural remedies, which obliged the State party to extend the detention pending the decisions of the various bodies involved – an extension that was, moreover, made following a report that noted the children's full integration into the life of the centre.

13.7 On the issue of airport noise, the Committee also notes the State party's argument that reports by independent experts have concluded that all measurements comply with the regulations.

13.8 Lastly, the Committee notes the State party's position that the best interests of the children were taken into account at every stage of the procedure: the Immigration Office gave the family five opportunities to leave the country voluntarily in order to avoid the forced repatriation procedure; the family was placed, in vain, in a pre-departure house, an open accommodation facility created specifically for families with minor children; and the oldest child was interviewed during her detention and attended a meeting on the return process with her mother.

13.9 The Committee recalls joint general comment No. 23 of the Committee/No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2017), which states that the detention of a child on the basis of the migration status of his or her parents constitutes a child rights violation and contravenes the principle of the best interests of the child, given the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, and that the possibility of detaining children as a measure of last resort should not apply in immigration proceedings.¹⁹ Similarly, the Committee recalls its concluding observations on the combined fifth and sixth periodic reports of Belgium, in which it requested the State party to put an end to the detention of children in closed centres and to use non-custodial solutions.²⁰

13.10 The Committee notes that, in the case at hand, the children were detained with their mother in a family home in a closed centre for foreigners from 14 August to 10 September 2018, on which date they were provided with an alternative to detention: an open, single-family "pre-departure house". The family absconded from that open pre-departure house on 13 September 2018, was arrested the very next day and was again placed in a family home in a closed centre. The children and their mother remained there until their repatriation to Serbia on 9 October 2018.

13.11 The Committee remarks that the children were detained in a closed centre for four weeks the first time – from 14 August to 10 September 2018 – and for three weeks and four days the second time – from 14 September to 9 October 2018.

13.12 The Committee observes, to begin with, that although the place of detention was called a family home, it was still in a closed detention centre. On this point, the Committee considers that depriving children of liberty on the basis of their migration status – or that of

¹⁹ Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), paras. 5, 9 and 10.

²⁰ [CRC/C/BEL/CO/5-6](#), para. 44 (a).

their parents – is generally disproportionate²¹ and therefore arbitrary within the meaning of article 37 (b) of the Convention.

13.13 In the case at hand, the Committee notes the State party's view that the long periods of detention were due in particular to the many remedies pursued by the children's mother; for example, the author filed an application for release the day before the scheduled deportation and then filed a series of appeals, forcing the State party to await the decisions of the authorities concerned. However, the Committee is of the view that the author's exercise of her right to judicial review cannot justify the detention of her children. The Committee is also aware that: (a) the State party's laws circumscribe the conditions under which migration-related detention of children is permissible; (b) the children lived in a house reserved for their family's use in the closed centre for foreigners; (c) they participated in games and recreational activities organized by the childcare workers; and (d) their mother had not complied with any of the five orders to leave the country voluntarily and had absconded with her children each time that the family had been placed in an open pre-departure house.

13.14 However, the Committee notes that the State party considered no alternatives to confining the children. The Committee notes, in this regard, that the children had been living with their paternal grandmother, and there is no evidence that the national authorities considered maintaining these living arrangements or applying any other appropriate alternatives, or that a best-interests assessment was carried out in connection with the decisions to detain the children or to extend their detention. The Committee considers that, by failing to consider possible alternatives to the detention of the children, the State party did not duly take their best interests into account as a primary consideration either when it detained them or when it extended their detention.

13.15 On the basis of the foregoing, the Committee finds that the detention of E.H., R.B., S.B. and Z.B. constituted a violation of article 37 of the Convention, read alone and in conjunction with article 3.

13.16 Having found a violation of article 37 of the Convention, read alone and in conjunction with article 3, the Committee does not consider it necessary to also rule on whether the same facts constituted a violation of article 37 of the Convention read in conjunction with articles 24, 28, 29 and 31.

14. Consequently, the State party should provide E.H., R.B., S.B. and Z.B. with adequate compensation for the violations of their rights. It is also under an obligation to prevent the recurrence of such violations by ensuring that children's best interests are a primary consideration in decisions about their returns.

15. In accordance with article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the measures it has taken to give effect to the Committee's Views. The State party is requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party is also requested to publish the present Views and to disseminate them widely.

²¹ A/HRC/28/68, para. 80 (“Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.”). See also Manfred Nowak, *The United Nations Global Study on Children Deprived of Liberty*, November 2019, p. 467 (which states that studies have repeatedly found that children in immigration detention experience serious harm and that immigration detention has consistently been associated with physical and mental health concerns, either as a result of children being detained with existing health conditions that are exacerbated in detention – especially trauma – or of new conditions arising in detention contexts – such as anxiety and depression).

Annex

[Original: Spanish]

Joint opinion of Luis Ernesto Pedernera Reyna and José Ángel Rodríguez Reyes (partially concurring)

1. We concur with the Views adopted by the Committee with respect to communication No. 55/2018 for the reasons set forth below.
2. Although paragraph 13.9 includes a reference to joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No.22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration, there were certain elements of the joint general comment that were not deemed necessary for inclusion in the Views. We refer, in particular, to the principle of non-refoulement.
3. Paragraph 45 of the general comment referred to above states the following:

States parties should respect non-refoulement obligations deriving from international human rights, humanitarian, refugee and customary international law. The Committees highlight that the principle of non-refoulement has been interpreted by international human rights bodies, regional human rights courts and national courts to be an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights. It prohibits States from removing individuals, regardless of migration, nationality, asylum or other status, from their jurisdiction when they would be at risk of irreparable harm upon return, including persecution, torture, gross violations of human rights or other irreparable harm.
4. It should be noted that, as indicated in paragraph 5.4 of the Views, the State party requested the Committee to discontinue consideration of the case as the author had voluntarily left Belgian territory. However, the author clarified in her comments that the family's removal had not constituted a voluntary return; she had been forced to accept being deported in order to receive financial assistance on her return to pay for the rent, water and electricity for three months, receive food parcels, register the family at the town hall and school and with the social services, and buy school supply kits for the children and any necessary medicine (Views, para. 6.1). The author also stated that an escort had accompanied the family to Belgrade and given them €800 before leaving Serbia. The family had gone to live in the town of Niš with the children's father's grandmother, their great-grandmother. The author said that the children were not in school and had no access to health care and she asked the Committee not to discontinue its consideration of the case and to oblige the State party to repatriate them so that the children could enjoy their fundamental rights (Views, para. 6.2).
5. Furthermore, according to paragraph 7.7 of the Views, the State party observed that the author had not demonstrated that there was any real risk of a violation of article 27 (1) of the Convention in Serbia, where, on the contrary, S.B. received medical care on arrival. However, paragraph 8.3 indicates that the author refuted these arguments by stating that, although by the end of May 2019 three of the four children finally had an identity card in Serbia, her eldest daughter had not got one. In addition, the children do not attend school and the author neither works nor receives any financial support from the Serbian State. These circumstances reveal the lack of a return plan capable of ensuring sustainable reintegration under a human rights-based approach, with provision made for immediate protection measures and long-term solutions, in particular effective access to education, health, psychosocial support and family life.
6. On the basis of the foregoing, we can conclude that the deportation of the four children, who are today between 5 and 10 years of age, to a place that they do not know and where they do not speak the local language – that is, where they are foreigners in the fullest sense of the word – in itself constitutes a violation of their rights. It is clear that, by depriving them of their family and community environments, the children's deportation disrupted the

activities that form part of the process of growing up. The children were taken away from the place where they were born, where they lived and where they had learned their language and culture, and the consequences included the breaking of friendships and emotional ties.

7. The mother's statements are powerful in confirming that, in their new situation, the children have experienced delays in obtaining their documents, with the oldest daughter still not having received hers, and – more importantly – they have been unable to attend school and live in financial insecurity, since their mother, as mentioned, has no job and receives no State aid to ease her situation.

8. It should be noted that the Committee has, on previous occasions,¹ made adjustments to the principle of non-refoulement. In other words, the Committee has gone beyond the requirements of physical violence, acts of torture or cruel, inhuman and degrading punishment and recognized that the principle must be adapted to take account of the particular circumstance of being a minor when dealing with cases like this one.

9. In this regard, the Committee has recalled 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-sensitive and gender-sensitive manner, 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, upon return, the child will be safe, provided with proper care and ensured the full and effective enjoyment of the rights recognized in the Convention and his or her holistic development.²

10. These considerations should therefore be reiterated in the present Views so as to affirm the need to take the principle of non-refoulement into account, given that, because of their return to Serbia, the children are experiencing harm that can be considered irreparable.

11. We also believe that the best interests of the child should have been discussed in more detail. In paragraph 13.14 of the Views, the Committee notes, in this regard, that the children had been living with their paternal grandmother, and there is no evidence that the national authorities considered maintaining these living arrangements or applying any other appropriate alternatives, or that a best-interests assessment was carried out in connection with the decisions to detain the children or to extend their detention. The Committee considers that, by failing to consider possible alternatives to the detention of the children, the State party did not duly take their best interests into account as a primary consideration either when it detained them or when it extended their detention.

12. While the foregoing is true, it should also have been indicated to the State party, as in *A.B. v. Finland*,³ that 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 child, and the legal rationale for all judicial and administrative judgments and decisions should also be based on that principle.

13. In the light of the foregoing, we maintain that, in the present case, there is a need to refer to the violation of the principle of non-refoulement in order to point to the violation of articles 6, 8, 24, 29 and 31 of the Convention, read in conjunction with article 3, and to expand on and clarify the manner in which the principle of the best interests of the child should be applied, noting in particular the need to tailor its application to the situation of each child.

¹ *A.B. v. Finland* (CRC/C/86/D/51/2018).

² *Ibid.*, para. 12.2.

³ *Ibid.*