Third party intervention in M.K.A.H. v Switzerland, 95/2019

To the UN Committee on the Rights of the Child

Interveners: AIRE Centre (Advice on Individual Rights in Europe), ECRE (European Council on Refugees and Exiles), DCR (Dutch Council for Refugees)

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Summary

I. State Parties to the Convention on the Rights of the Child (CRC) are obliged to ensure respect for the child's best interests, protection and care necessary for the child's well-being as well as the other child-specific guarantees, in particular the right to nationality, family life and a standard of living adequate for their physical, mental, spiritual, moral and social development. In the context of immigration or return proceedings affecting children, children must be afforded the opportunity to meaningfully raise objections to their transfer from one jurisdiction to another.

II. The prohibition of *refoulement* under international human rights law is absolute and entails positive duties on the part of States, including performing an individualised assessment to diligently verify and evaluate the risks of removal. A child's best interests must not only inform all measures and decisions related to refoulement, the determination of the best interests of the child should be a primary consideration and has to be carefully reflected in all decisions concerning children. The assessment of individual circumstances should include close scrutiny of all particular vulnerabilities of the child. Furthermore, States must make sure that the country to which removal is proposed offers sufficient guarantees to ensure adequate protection against the risk of ill-treatment.

I. Specific safeguards for children (Articles 3, 12, 22 and 7 CRC)

Best interests of the child principle

1. The principle that the best interests of the child shall be a primary consideration in all actions concerning children is a fundamental principle, substantive right and a rule of procedure under international law on the rights of the child.[1] This principle is clearly expressed in the Committee on the Rights of the Child (CRC) General Comment No. 14, which provides an authoritative interpretation of article 3(1) and gives orientation for the practical implementation of the best interests principle.[2] The CRC as well as other international human rights treaties oblige States to provide specific safeguards and guarantees for the protection and care of children and acknowledge that they often find themselves in vulnerable situations.[3] In that connection, this Committee has stated that, in the case of a displaced child, the "best interest "principle must be respected during all stages of the displacement.[4]

2. The best interest principle requires that any decision-making process involving children includes an evaluation of the possible impact of the decision on the child's best interests.[5] This assessment should be clearly reflected in any decision affecting children. In the migration context, it requires a special regime in respect of asylum procedures and reception conditions, distinct from that applicable to adults, whereby an assessment of all elements of a child's interests in a specific situation is undertaken.[6] In particular, the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial

[1] UN General Assembly, Convention on the Rights of the Child, articles 2(1), 22(1) and 39; UN General Assembly, International Covenant on Civil and Political Rights, article 24; and UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series vol. 993, p. 3, article 10.
[2] Article 31 of the 1965 Vienna Convention on Law of Treaties stipulates that treaties need continuous contextual interpretation. Furthermore, with their initial ratification of the treaty States accept that the treaty bodies play a key role in the interpretation of human rights treaties.
[3] UN General Assembly, International Covenant on Civil and Political Rights, article 24; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, article 10; UN Convention on the Elimination of all Forms of Discrimination against Women, article 5(b).
[4] UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 19 and 20.
[5] UN Committee on the Rights of the Child (CRC), 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), 29 May 2013, CRC /C/GC/14, paras. 6(c) and 14(b).
[6] CRC, GC No. 6, *op. cit.*, paras. 54, 75 and 76.

decision concerning the entry, residence or return of a child, or expulsion of a parent associated with his or her own migration status.[7]

3. The UN CRC and the Committee on the Protection of the Rights of All Migrant Workers (UN CMW) in their Joint General Comments No. 23 and 4 (No. 4/23) reaffirmed that in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to: (a) […] be referred to authorities in charge of evaluating their needs in terms of protection of their rights, and ensuring their procedural safeguards; (b) be notified of the existence of a proceeding and of the decision adopted in the context of the immigration and asylum proceedings, its implications and possibilities for appeal; (c) have the immigration proceedings conducted by a specialized official or judge, and any interviews carried out in person by professionals trained in communicating with children; (d) be heard and take part in all stages of the proceedings and be assisted without charge by a translator and/or interpreter […]; (j) be fully informed throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them.[8]

4. The best interests assessment should be carried out by actors independent of the migration authorities in a multidisciplinary way, including a meaningful participation of authorities responsible for child protection and welfare and other relevant actors, such as parents, guardians and legal representatives, as well as the child.[9] State Parties should conduct a best interests determination in cases that could lead to the expulsion of migrant families due to their migration status, in order to evaluate the impact of deportation on children's rights and development, including their mental health.[10] The Committees have stressed that State Parties should develop and put into practice, with regard to [..] children with families, a best interests determination procedure aimed at identifying and applying comprehensive, secure and sustainable solutions, including the possibility of further integration and settlement in the country of current residence. Such solutions may include medium-term options and ensuring that there are possibilities for children and families to gain access to secure residence status in the best interests of the child. Best interests determination procedures should be guided by child protection authorities within child protection systems.[11]

5. If determined that it is in the best interests of the child to be returned, an individual plan should be prepared, together with the child where possible, for his or her sustainable reintegration.[12] In cases of children returning to their countries of origin or third countries, their effective reintegration through a rights-based approach should be ensured, including immediate protection measures and long-term solutions, in particular effective access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence. The Committees have highlighted that return and reintegration measures should be sustainable from the perspective of the child's right to life, survival and development.[13]

6. This Committee noted that the best interests of the child (*l'intérêt supérieur de l'enfant*) have not been explicitly incorporated into all related federal and cantonal legislation in Switzerland, nor systematically applied in all administrative and judicial proceedings, or policies and programmes relating to children and recommended, in light of the best interests of the child principle, that the State Party ensures that this right is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and decisions[…] that are relevant to and have an impact on children. It also encouraged the State Party to develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child in every area and for giving them due weight as a primary consideration.[14]

7. The CMW and CRC, in their joint General Comments Nos. 3/22 and 4/23, have also recognized that vulnerability of children in the migration context requires that these children are "treated first and foremost as children" and regarded as "individual rights holders", unaffected by their parents' or guardians' migration status.

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[7] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 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*, 16 November 2017, par. 30.

[8] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 17.

[9] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (c).

[10] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (g).

[11] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (j).

[12] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (k) and European parliament and Council, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, Art. 5.

[13] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (k).

[14] UN CRC, Concluding observations on the combined second to fourth periodic reports of Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, section B; best interests of the child.

In the context of international migration, children may be in a situation of double vulnerability as children and as children affected by migration.[15] This Committee has also stressed that the right of the child to have his or her best interests taken as "a primary consideration" means that the child's interests have high priority and are not just one of several considerations.[16] Therefore, a greater weight must be attached to what serves the child best. This Committee further stated that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the CRC, and the holistic development of the child.[17] A best interests assessment involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children.[18]

8. Consonant with the views of the CRC, the European Court of Human Rights (ECtHR) has established that where children are also seeking asylum they are in a situation of enhanced and extreme vulnerability.[19] Respect for this enhanced vulnerability of child asylum seekers,[20] *qua* child and *qua* asylum seeker, must be a primary consideration, taking precedence over their irregular migration status.[21] The ECtHR has recognized the right of children to have their best interests assessed and taken as a primary, and in some contexts even paramount consideration[22] in all actions concerning children, and that it is a fundamental interpretive legal principle, a substantive right and a rule of procedure under international law on the rights of the child.[23] In *Rahimi v. Greece* the Court confirmed that in all actions relating to children an assessment of the child's best interests must be undertaken separately and prior to any decision that will affect that child's life.[24]

The right to be heard

9. An assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight must be given to these views in all matters affecting the child,[25] including immigration or asylum proceedings in which they might be involved. State Parties have an obligation under article 12 of the CRC to respect and protect a child's right to be heard. This Committee in its General Comment No. 12 emphasized the importance of a child-friendly environment and information provision for the effective realization of child's right to be heard.[26] The relevant and accessible information should include, inter alia, "information on their rights, the services available, means of communication, complaints mechanisms, the immigration and asylum processes and their outcomes. Information should be provided in the child's own language in a timely manner, in a child-sensitive and age-appropriate manner, in order to make their voice heard and to be given due weight in the proceedings."[27] The Committee has previously stressed that "[c]hildren who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason, it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. (…) In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim."[28]

10. This Committee has also pointed out that article 12 imposes no age limit on the right of the child to express her or his views. It has consistently held that it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of

[15] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 3.
[16] CRC, GC No. 14, *op. cit.*, para. 39.
[17] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 28.
[18] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 31.
[19] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, no. 13178/03 para. 55; *Popov v. France*, ECtHR, Application Nos. 39472/07 and 39474/07, Judgement of 19 April 2012, para. 91; *Tarakhel v. Switzerland*, ECtHR [GC], Application No. 29217/12, Judgement of 4 November 2014, para. 99.
[20] *M.S.S. v. Belgium and Greece [GC]*, ECtHR, *op. cit.*, para. 232.
[21] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, *op.cit.*, para. 55.
[22] *Neulinger and Shuruk v. Switzerland*, ECtHR, no. 41615/07, para.135; *Yousef v. Netherlands*, ECtHR, no. 33711/96, para. 73; *Wagner and J.M.W.L. v. Luxembourg*, ECtHR, no.76240/01, para. 133. A commentary on this line of jurisprudence can be found in C. Simmonds, "Paramountcy and the ECHR: A conflict resolved?", Cambridge Law Journal, Volume 71, Issue 3 November 2012, pp. 498-501.
[23] *Rahimi v. Greece*, ECtHR, Application No. 8687/080, Judgment of 5 July 2011, para. 108. It is established in Article 3(1) CRC and applies to public or private social welfare institutions, courts of law, administrative authorities or legislative bodies who must assess and be guided by the principle in all their acts. See also: CRC, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, pp. 7-9; and *Neulinger and Shuruk v. Switzerland [GC]*, ECtHR, Application No. 41615/07), Judgment of 6 July 2010, para. 135.
[24] In the same vein, see also EASO Practical guide on the best interests of the child in asylum procedures, 2019, which sets out that *"any best interests process must give due consideration to the child's family situation; the situation in their country of origin; particular vulnerabilities; safety and the risks they are exposed to; protection needs; level of integration in the host country; and mental and physical health, education and socioeconomic conditions"* (p.17). According to EASO *"giving primary consideration to the Best interest of the child in any written recommendation should be explained and should be motivated. Any recommendation should indicate clearly how it has been reached"* (p.25).
[25] CRC, GC No. 14, *op. cit.*, para. 43.
[26] CRC, GC No. 12, The right of the child to be heard, UN Doc. CRC/C/GC/12, para. 34.
[27] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 35.
[28] CRC, GC No. 12, *op. cit.*, para. 123.

appropriately forming her or his own views on the matter.[29] Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests. Furthermore, the fact that the child is very young or in a vulnerable situation (e.g. a migrant) does not deprive him of the right to express his views, nor does it reduce the weight given to the child's views in determining his best interests.[30] Similarly, the UN High Commissioner for Human Rights has also repeatedly emphasized that the views of children must be given due consideration.[31]

11. The UN CRC in its Concluding observations on the periodic report of Switzerland, has expressed the concern that respect for the views of the child is not systematically ensured and implemented in practice in all matters that affect children and that cantonal disparities exist in implementation. The Committee has also stressed the insufficient training of professionals working with and for children.[32]

12. **The interveners submit that in order to comply with the best interests of the child principle (article 3 CRC) and benefit from appropriate protection (Article 22), children in the migration context must have access to procedures and measures that respect their fundamental rights including the right to be heard (article 12 CRC). These procedures should guarantee access to child-friendly information regarding all relevant actions involving children and the provision of free legal assistance. They also require a clear and comprehensive assessment of the child's identity, including cultural and linguistic background, particular vulnerabilities and protection needs.**

II. *Non-refoulement* and the right to an adequate standard of living and family environment

13. States have the general authority to control the entry and presence of non-nationals in their territory.[33] Nevertheless, this authority is not unlimited, and must be exercised in conformity with a State's international legal obligations, including the obligation to respect the principle of *non-refoulement*. This principle, which entails both negative and positive obligations on States, is a rule of customary international law[34] and is explicitly provided for in a variety of international treaties and regional frameworks of human rights protection. Non-refoulement provisions have been established inter alia by the UN Convention Against Torture,[35] the International Covenant on Civil and Political Rights,[36] and the International Convention for the Protection of All Persons from Enforced Disappearance.[37]

14. The principle of *non-refoulement* under international human rights law prohibits States from expelling, deporting, returning, or otherwise transferring any individual to another country when there are substantial grounds to believe that they are at real risk of being subject to a serious violation of human rights.

15. Regional human rights instruments and jurisprudence also reiterate such prohibition under international human rights law. To illustrate, the Inter-American Court has recognized that the principle of *non-refoulement* is applicable to any migrant regardless of their legal status and migratory situation.[38] The protection against *refoulement* is further enhanced in the case of children, where the individualized assessment entails the evaluation of personal circumstances such as age and gender, and the determination of the best interests of the child as a central aspect of any decision concerning the child.[39] Similarly, the prohibition of refoulement is also

[29] CRC GC No. 12, *op. cit.*, para. 21.
[30] General comment No. 14 (2013), paras. 53 and 54.
[31] Human Rights Council, Report on Access to justice for children, UN Doc. A/HR COMMITTEE/25/35 (2013), para. 59.
[32] UN CRC, Concluding observations on the combined second to fourth periodic reports of Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, Section B: respect for the views of the child..
[33] *Riad and Idiab v. Belgium*, ECtHR, Application Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para. 94.
[34] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.
[35] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations Treaty Series vol. 1465, p. 85, article 3.
[36] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series vol. 999, p. 171; and Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13.
[37] UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, United Nations, Treaty Series, Treaty Series vol. 2716, p. 3, article 16.
[38] Inter-American Court of Human Rights, Advisory Opinion OC-21/14, op. cit., para 215.
[39] Inter-American Court of Human Rights, Advisory Opinion OC-21/14, op. cit., paras 232-233.

reflected in European Union (EU) law, particularly under Articles 4 and 19 of the Charter of Fundamental Rights of the EU (CFR EU) and in Article 78 of the Treaty on the Functioning of the EU.[40]

16. In regard to the prohibition of torture or other cruel, inhuman or degrading treatment or punishment under article 37 (1), this Committee has further established in its General Comment no. 6 that "States must fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of CAT".[41] This Committee has further clarified that:

> *"in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services."*[42]

17. This Committee has also recalled that "when assessing refugee claims, States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by the UN High Commissioner for Refugees (UNHCR) in exercising its supervisory functions under the 1951 Refugee Convention*"*.[43] According to UNHCR, the *non-refoulement* principle applies not only in respect of return to the country of origin, but also to any other country where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being exposed to such a risk.[44] UNHCR explicitly recognized that asylum-seeking children and refugees benefit from all provisions under the Convention including 'the principle of *non-refoulement*'.[45]

18. The legal obligations and underlying standards set by the CRC are supported by other international treaties which under principles of treaty law [46] should be taken into account when interpreting obligations under the CRC. In cases where the right which would be protected by the principle of *non-refoulement* is an absolute right, such as freedom from torture or other cruel, inhuman or degrading treatment or punishment or the arbitrary deprivation of the right to life, or a real risk of enforced disappearance,[47] the principle is equally absolute and is not subject to any exceptions, whether in law or in practice.[48]

19. Severe violations of basic economic and social rights may fall within the scope of the prohibition of *non-refoulement* when amounting to degrading living conditions, indigence, extreme precarity or lack of medical treatment. In this regard, the Human Rights Committee (HR Committee) has recalled that State parties should, when reviewing challenges to decisions to remove individuals from their territory, give sufficient weight to the real and personal risk such individuals might face if deported.[49] It has stated particularly that any evaluation of whether individuals are likely to be exposed to conditions constituting cruel, inhuman or degrading treatment in violation of article 7 of the Covenant must be based not only on an assessment of the general conditions in the receiving country, but also on the individual circumstances of the persons in question. Those circumstances

[40] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407 and Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012, p. 47–390.*

[41] CRC, GC No. 6, *op. cit.*, para. 26.

[42] Ibid., para. 27.

[43] *I.A.M. (on behalf of K.Y.M.) v Denmark*, communication No. 3/2016, CRC/C/77/D/3/2016, UN Committee on the Rights of the Child (CRC), 25 January 2018, para 11.3.

[44] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 8.

[45] UNHCR, Observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum, 1 June 2015.

[46] Vienna Convention on the law of treaties, 23 May 1969, Article 3.

[47] UN General Assembly, Convention on the Rights of the Child, *op. cit.*, article 16; and UN Declaration on the Protection of all Persons from Enforced Disappearance, Resolution 47/133 of 18 December 1992, UN Doc. A/RES/47/133, article 8.

[48] *Zhakhongir Maksudov and Others v. Kyrgyzstan*, HR Committee, Communication Nos. 1461, 1462, 1476 and 1477/2006, Views of 31 July 2008, UN Doc. CCPR/C/93/D/1461,1462,1476,1477/2006, para. 12.4; *Tebourski v. France*, Committee Against Torture (CAT), Communication No. 300/2006, Views of 11 May 2007, UN Doc. CAT/C/38/D/300/2006, paras. 8.2 and 8.3. The principle is upheld by Article 10 of the International Convention on the Rights of Migrants Workers (CRMW): "No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[49] See, for example, communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, paras. 11.2 and 11.4; and No. 2409/2014, *Ali and Mohamad v. Denmark*, Views adopted on 29 March 2016, para. 7.8.

include factors that may increase the vulnerability of such persons and that could transform a situation that is tolerable for most into an intolerable one for others.[50]

20. It is incumbent upon the State Parties to undertake an individualized assessment of the risk that a child will face in the country of return in view of its obligation to afford children special measures of protection, "rather than rely on general reports and on the assumption that, as the author had benefited from subsidiary protection in the past, she would, in principle, be entitled to the same level of subsidiary protection today".[51] Such assessment should adequately take into account the previous personal experiences of the individuals in the country of removal and to the foreseeable consequences of forcibly returning them, which may underscore the special risks that they are likely to face and may thus render their return to the first country of asylum a particularly traumatic experience for them.[52]

21. The HR Committee also stated that States should seek proper assurance from the authorities that the individuals, especially children, would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under article 7 of the Covenant, by ensuring that State Parties will receive the child in conditions adapted to his/her age and the family's vulnerable status, which would enable them to remain in said country.[53]

22. Similarly, the ECtHR has established that, in assessing whether an expulsion or other transfer amounts to *refoulement*, what matters are not the reasons for expulsion, but only the risk of serious violations of human rights in the country of destination.[54] Having to determine whether a situation of extreme material poverty could raise an issue under Article 3, the ECtHR has reiterated that it had not excluded "the possibility that the responsibility of the State [might] be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity".[55]

23. The presumption that a Contracting State which is also the "receiving" country will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country.[56] Hence, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create...for them a situation of stress and anxiety, with particularly traumatic consequences".[57] Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention. With more specific reference to children, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.[58]

24. Under EU Law, the EU Court of Justice (CJEU) has ruled that an asylum seeker may not be transferred to the Member State that has previously granted him international protection if such living conditions would expose the applicant to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment within the meaning of Article 4 of the CFR EU. The CJEU held that this threshold is met where such deficiencies, in light of all the circumstances of the individual case and information obtained from objective, reliable and up-to-date reports, attained a particularly high level of severity, going beyond a high degree of insecurity or a significant degradation of living conditions.[59] In this regard the CJEU has underlined the need to take the particular vulnerability of an individual into consideration.

25. UNHCR has recently observed, referring to Bulgaria, that "the lack of adequate reception conditions and integration prospects compel many applicants to leave the country before their claims have been processed or shortly after they have been granted asylum" and "there are no targeted support measures for integration [in Bulgaria], nor measures for persons with specific needs, and refugees face a number of legal and practical barriers in accessing specific rights, notably in housing and social assistance. Once granted status, they may be allowed to remain in SAR centres, on a discretionary basis for a period of up to six months but are not entitled

[50] HR Committee, *Bayush Alemseged Araya v. Denmark*, 3 May 2019, para. 9.7.
[51] HR Committee, *Hibaq Said Hashi v. Demark*, 9 October 2017, para. 9.10; and *Bayush Alemseged Araya v. Denmark*, 3 May 2019, para. 9.7.
[52] HR Committee, *Y.A.A. and F.H.M. v. Denmark*, CCPR/C/119/D/2681/2015, 21 April 2017, para. 7.7.
[53] HR Committee, Warda Osman Jasin v. Denmark, CCPR/C/114/D/2360/2014, 25 September 2015, para. 8.9
[54] *Saadi v. Italy*, ECtHR, *op.cit*., para. 138.
[55] *Tarakhel v. Switzerland* [GC], ECtHR, no. 29217/12, para. 98.
[56] Ibid, para. 104.
[57] *Tarakhel v. Switzerland* [GC], ECtHR, no. 29217/12, para. 119.
[58] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, no. 13178/03 para. 55; *Popov v. France*, ECtHR, Application Nos. 39472/07 and 39474/07, Judgement of 19 April 2012, para. 91
[59] CJEU, Ibrahim et Al, C- 297/17, ECLI:EU:C:2019:219, § 90, 19 March 2019.

to food. There is real risk of homelessness. Access to social housing is difficult, as available houses are limited and legal provisions require the person to have resided in a particular area for an extended period and one of the family members having to be a Bulgarian citizen. Beneficiaries of international protection do not have access to all benefits granted to Bulgarian nationals".[60]

26. The CRC 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 a child and gender-sensitive manner,[61] 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 enjoyment of rights, including non-discrimination, family unity, protection from abuse, the receipt of appropriate protection and health care, a standard of living adequate for the child's development as well as full access to education.[62]

27. Under Article 27 of the CRC, State Parties must respect the right of children to have a standard of living adequate to their physical, mental, spiritual, moral and social development. In implementing this right States have undertaken to ensure that the child is provided with such protection and care as is necessary for his or her well-being when assessing and determining the child's best interests.[63] This should be interpreted as requiring States to take into account the child's basic material, physical, educational, and emotional needs, as well as needs for affection and safety.[64]

28. Protection of the right to a family environment for migrants frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit. The Committee has explicitly recognized that "family" refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community based arrangements, provided these are consistent with children's rights and best interests.[65] The interveners note that preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment[66], and may be particularly relevant in cases where the child has lost one of the parents.

29. The Committee on the Rights of the Child has recalled the growing body of theory and research which confirms that young children are best understood as social actors whose survival, well-being and development are dependent on and built around close relationships. These relationships are normally with a small number of key people, most often parents, members of the extended family and peers, as well as caregivers and other early childhood professionals.[67] In this regard, the CRC has acknowledged that several migrant and refugee children may experience severe emotional distress and may have particular and often urgent mental health needs due to structural determinants such as poverty, migration displacement, violence, discrimination and marginalization.[68] They should therefore have access to specific care and psychological support.

30. Finally, the UN CRC and the UN CMW have also recognised that all children in the context of migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education, on the basis of equality with nationals of the country where those children are living. This obligation implies that States should ensure that all migrant children have equal access to quality and inclusive education irrespective of their migration status.[69]

31. On a procedural level, respect for the "best interest" principle read together with the obligation of *non-refoulement*, requires States to ground any decision to return a child to his/her country of origin or a third State on "evidentiary considerations on a case-by-case basis and pursuant to a procedure with appropriate due process safeguards, including a robust individual assessment and determination of the best interests of the child [ensuring], inter alia, that the child, upon return, will be safe and provided with proper care and enjoyment of rights".[70] The best interests of the child should be ensured explicitly through individual procedures, as an integral

[60] UNHCR, Submission for the Universal Periodic Review-Bulgaria, UPR 36th Session (2019), 9 January 2020, pages. 1 and 3.
[61] General comment No. 6, para. 27.
[62] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 and 33.
[63] CRC, Article 3(2).
[64] CRC General comment No. 14, paras. 71; UN CRC, General comment no. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, paras 44-45; HR Committee, *Jasin v. Denmark* – Communication no. 2360/2014 - Views adopted by the Committee at its 114th session (29 June - 24 July 2015); HR Committee, *Rezaifar v. Denmark* – Communication no. 2512/2014 - Views adopted by the Committee at its 119th session (6-29 March 2017); HR Committee, *Y.A.A. and F.H.M v. Denmark* – Communication no. 2681/2015 - Views adopted by the Committee at its 119th session (6-29 March 2017).
[65] CRC GC No. 7, para. 15.
[66] CRC General Comment No. 14, para. 70.
[67] CRC GC No. 7, Implementing Child rights in early childhood, para. 8
[68] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, paras. 29 and 33.
[69] CMW and CRC, Joint GC No. 4 and No. 23, *op. cit.*, para. 59.
[70] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 33.

part of any administrative or judicial decision concerning the return of a child.[71] State Parties should review and evaluate facts and evidence in order to determine whether a risk of a serious violation of the Convention exists upon return.

32. **The interveners invite the Committee to recall that the prohibition of *refoulement* is absolute under international human rights law. It entails positive duties on the part of States to carry out individualised assessments to determine whether the return of a child is in their best interests and to evaluate whether that return would be contrary to the prohibition of *refoulement* .**

33. **Where children are involved, the assessment of a risk of *refoulement* should be conducted in an age and gender-sensitive manner and in compliance with the child-specific guarantees under international law. State authorities must, taking into account available reliable, objective and up-to-date information, also ascertain whether the overall situation with regard to the reception arrangements in the country of return and the applicants' specific situation comply with article 37 (freedom from torture and ill-treatment), article 6 (right to life and right to development), article 24 (right to adequate health care), article 27 (right to adequate standard of living), article 28 (right to education) and article 3 (best interest of the child principle).**

III. International and European standards on statelessness and children

34. The UN CRC sets out the right to a nationality for every child[72]. In addition, a number of universal conventions refer to the general right to a nationality[73] or to acquire a nationality[74] as a human right that should be ensured to all, without discrimination. In the same vein, the 1954 Convention relating to the status of stateless persons,[75] the 1961 United Nation Convention on the reduction of statelessness,[76] the 1997 European Convention on Nationality[77] and the 2006 Council of Europe Convention on the avoidance of Statelessness[78] set out conditions for States to grant their nationality in order to avoid statelessness. In its Concluding Observations, this Committee recommended Switzerland to ratify the 1961, the 1997 and the 2006 Conventions that are presently not applicable in this country.[79]

35. Despite the fact that citizenship is not a right contained in the ECHR *per se*, the ECtHR has considered the issue of citizenship in a number of cases. In *Genovese v. Malta*, the ECtHR confirmed that in certain circumstances a denial or deprivation of nationality can result in a violation of Art. 8.[80] In the case of *Hoti v. Croatia*[81] the ECtHR looked at the concept of 'stateless migrant' as a special category of rights-holder under the ECHR. The Committee will also recall that the ECtHR in the cases of *Kuric v Slovenia*[82] and *Ponomaryov v Bulgaria*[83] took note of the adverse impact that statelessness can have on individuals and enjoyment of their rights under the ECHR.

36. UNHCR has also clarified that the obligations imposed on States are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through parentage or residence.[84]

Statelessness determination procedure in Bulgaria

37. Bulgaria is party to relevant international and regional instruments set out above apart from the 2006 Convention

[71] Ibid., para. 30.
[72] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series vol. 1577, p.3, article 7
[73] UN International Covenant on Civil and Political Rights, Article 24 and UN International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (iii).
[74] UN Convention on the Elimination of All Forms of Discrimination against Women, Article 29 (1); and UN Convention on the Rights of Persons with Disabilities, Article 18 (1) (a).
[75] UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1984, United Nations Treaty Series vol. 360, p.117
[76] UN General Assembly, Convention on the reduction of statelessness, 30 August 1961, United Nations Treaty Series vol. 989, p.175, art. 6
[77] Council of Europe, European Convention on Nationality, 6 November 1997, European Treaty Series vol. 166, articles 6, 7, 14
[78] Council of Europe, Convention on the Avoidance of Statelessness in Relation to State succession, 15 March 2006, entered into force on 1 May 2009, Council of Europe Treaty Series 200, article 10
[79] UN CRC, Concluding observations on the combined second to fourth periodic reports of Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, para. 31
[80] *Genovese v. Malta*, ECtHR, Application no. 53124/09, Judgment of 11 October 2011, §30
[81] *Hoti v. Croatia*, ECtHR, Application no. 63311/14, Judgment of 26 April 2018
[82] *Kuric v Slovenia*, ECtHR, Application no. 26828/06, Judgment of 26 June 2012
[83] *Ponomaryov v Bulgaria*, ECtHR, Application no.5335/05, Judgment of 21 June 2011.
[84] UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04, para. 11. Please also consider the forthcoming report of the European Network on Statelessness, "*Noone of Europe's Children should be Stateless*" available at https://www.statelessness.eu/statelesskids-no-child-should-be-stateless.

on the avoidance of Statelessness.[85] However, Bulgaria has retained reservations to both 1954 and 1997 Conventions, concerning the right to housing (Art.21), public relief (Art.23), social security (Art. 24§1), labour legislation (Art.24(2)), identity papers (Art.27), travel documents (Art. 28) and expulsion (Art. 31) for the 1954 Convention, and the motives for decisions related to acquisition, retention, loss and recovery of nationality (Art. 11), the right to a review (Art. 12), the conservation of a previous nationality (Art. 16) and the rights and duties related to multiple nationality (Art. 17), for the 1997 Convention. Those reservations have a direct impact on the effectiveness of the rights of stateless people in Bulgaria[86].

38. The protection of stateless people in Bulgarian domestic law is limited. In 2016, Bulgaria has amended its *Foreigners in the Republic of Bulgaria Act*[87] in order to introduce a Statelessness determination procedure (SDP) into national law. Statelessness is defined in compliance with the 1954 Convention.[88] The reform has been positively welcomed because it prohibits the short-term detention of unaccompanied children[89] but also provides some procedural safeguards during a statelessness determination procedure, such as mandatory interviews[90] for applicants and legal assistance on appeal.[91] In practice however, the SDP presents some substantial obstacles for the applicants: the application must be written in Bulgarian;[92] the burden of proof lies with the applicant; and the threshold is higher than for asylum procedures, i.e. a birth certificate shall be attached to the application,[93] in contrast with UNHCR principles.[94] Additionally, statelessness status can be denied if the applicant does not provide the documents required within a given short term (usually 3 days)[95] or if he/she resides illegally in the country at the date of the application.[96]

39. Moreover, no protection status or access to basic rights is provided to applicants during the procedure.[97] Once recognised as stateless, individuals will be issued a permit for permanent or long-term residence in Bulgaria.[98] Following the amendments to the LFRB in 2019, a continuous residence permit is issued to recognised stateless persons providing them with legal stay in the country, but with a limited access to labour market rights or healthcare.[99]

40. Stateless persons may acquire Bulgarian citizenship,[100] if they fulfil the conditions[101] established in the law and have a permit for permanent or long-term residence in Bulgaria of at least 3 years from the date of submission of the application for naturalisation. Refugees over 18 years old who have been recognised for 3 years or more, and humanitarian status holders over 18 who have been granted protection for 5 years or more may apply for Bulgarian citizenship. However, Bulgarian law has a wider interpretation of cessation than in the EU Qualification Directive[102], adding to the causes that lead to cessation the non-renewal of the Bulgarian

[85] The ECHR, Convention relating to the Status of Stateless Persons (28 September 1954), Convention on the Reduction of Statelessness (30 August 1961), Convention on the Rights of the Child (20 November 1989), Council of Europe, European Convention on Nationality (6 November 1997), Council of Europe, Convention on the avoidance of statelessness in relation to State succession (19 May 2006), Convention relating to the Status of Refugees (21 April 1951).
[86] Foundation for Access to Rights Institute on Statelessness and Inclusion and the European Network on Statelessness, Joint submission to the Human Rights Council at the 36th Session of the Universal Periodic Review, Bulgaria, 3 October 2019, p. 2 §7. Please see further European Network on Statelessness, Statelessness Index, Bulgaria, Country Briefing available at https://index.statelessness.eu/country/bulgaria.
[87] Law on Foreigners in the Republic of Bulgaria (LFRB) - State Gazette on 6 December 2016. ENS, "Bulgaria introduces a statelessness determination procedure into national law" (15 December 2016), at https://www.statelessness.eu/news-events/news/bulgaria-introduces-statelessness-determination-procedure-national-law
[88] Article 1: "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law." UNTS vol. 360, p. 117.
[89] Foreigners in the Republic of Bulgaria Act 1998, article 44(3)(9)
[90] Ibid., Article 21(2)
[91] Ibid., Article 21(g)
[92] Ibid., Article 21 c. (1)
[93] In the course of the proceedings related to the recognition of statelessness, the applicant must prove of substantiate his or her status as a stateless person, in particular: 1. Place of birth; 2. Previous residence; 3. Citizenship of family members and his/her parents; 4. attach of birth certificate. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_inform_statelessness_en.pdf, 4-5. See Foundation for Access to Rights Institute on Statelessness and Inclusion and the European Network on Statelessness, Joint submission to the Human Rights Council at the 36th Session of the Universal Periodic Review, Bulgaria, 3 October 2019, p.3 §12
[94] The burden of proof should not be too high and should be shared between the applicant and the authorities. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 89 and 91.
[95] Foreigners in the Republic of Bulgaria Act 1998, article 21(f)(2)(5)
[96] Ibid., Article 21 d (2) (2)
[97] Foundation for Access to Rights Institute on Statelessness and Inclusion and the European Network on Statelessness, Joint submission to the Human Rights Council at the 36th Session of the Universal Periodic Review, Bulgaria, 3 October 2019, p.3 § 12
[98] Foreigners in the Republic of Bulgaria Act 1998, Article 21 i. (1)
[99] Article 8 of the Labour Migration and Labour Market Act 2016 does not include stateless persons in the category of workers having a right of access to the labour market. Holders of 'continuous' residence permit are also outside the scope of the health insurance system and thus health care to stateless persons is not covered by the National Health Insurance fund.
[100] Bulgarian citizenship Act 1998, article 14
[101] These conditions are laid in article 12 paragraph 1, items 1, 3, 4 and 5 of Bulgarian Citizenship Act 1998
[102] Articles 11 and 14, Qualification Directive (2011/95/EU).

identification documents for a period exceeding 3 years and introducing *de facto* an additional cessation ground in violation of national and EU legislation.[103] The cessation of protection status affected 2,608 persons in 2019, including individuals from Syria (1,981), Iraq (177), stateless (267).[104] Those, whose protection has been ceased as a result will not be eligible for Bulgarian citizenship.

41. **The interveners submit that State Parties must implement children's right to a nationality in a way that ensures the best interest of the child principle. This obligation entails that States shall take proactive measures to guarantee that the rights of stateless children are protected. Children's right to acquire a nationality (article 7 CRC) interpreted in conjunction with the best interests' principle requires that State Parties' return policies and/or decisions include a rigorous assessment of all facts and circumstances of the child ensuring this right is implemented in a way not to render a child stateless and their other fundamental rights under CRC are not impacted /nullified as a result.**

[103] The grounds upon which international protection status may be lost are exhaustively stated in the relevant provisions; that is, no additional grounds would justify a conclusion that international protection is no longer required. In this regard, see UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, para. 116..

[104] AIDA, "Country report: Bulgaria" (2019) at https://www.asylumineurope.org/sites/default/files/report-download/aida_bg_2019update.pdf, 78.