



# International Covenant on Civil and Political Rights

Distr.: General  
18 February 2022

Original: English

## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2796/2016\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	J.O. Zabayo (represented by counsel, Judith Pieters)
<i>Alleged victims:</i>	The author and E, her daughter
<i>State party:</i>	Netherlands
<i>Date of communication:</i>	16 July 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 10 August 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	13 October 2021
<i>Subject matter:</i>	Deportation to Nigeria
<i>Procedural issue:</i>	None
<i>Substantive issue:</i>	Risk of the author's daughter being subjected to excision if removed to Nigeria
<i>Articles of the Covenant:</i>	1, 2 (3) (a), 7, 9 (1) and 24 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is J.O. Zabayo, a Nigerian national born in 1984. She submits the communication on her own behalf and on behalf of her minor daughter, E, a Nigerian national born in Amsterdam on 24 June 2014. The author states that her removal to Nigeria with her daughter would violate their rights under articles 1, 2 (3) (a), 7, 9 (1) and 24 (1) of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. The author is represented by counsel.

1.2 The case was registered on 10 August 2016 and, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications

\* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

\*\* The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobuyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

\*\*\* A joint opinion by Committee members Furuya Shuichi, Marcia V.J. Kran and Gentian Zyberi (dissenting) is annexed to the present Views.



and interim measures, requested that the State party refrain from deporting the author and her daughter to Nigeria while their case was pending before the Committee.

#### **Facts as submitted by the author**

2.1 The author is a Christian from Nigeria whose mother chose not to circumcise her. She was traditionally married to a Christian man from Owa East, and, after she got pregnant, her Muslim mother-in-law attempted to force her to undergo circumcision during her pregnancy. The author claims that, following the verbal and physical abuse that she sustained during her one-year marriage, she decided to flee Nigeria for fear of forced circumcision. She received help from a human trafficker, who took her to France but intended to force her into prostitution once she had given birth. The author refused and fled to the Netherlands by train.<sup>1</sup> She entered the Netherlands on 26 April 2014 and was granted a temporary residence permit as a victim of human trafficking on 6 August 2014, after filing a complaint against her traffickers. During an interview, the author informed the police of the reasons why she had fled Nigeria, however, they did not refer her to the asylum procedure.

2.2 The author's residence permit was later withdrawn,<sup>2</sup> and she applied for asylum. On 24 September 2015, the Immigration and Naturalization Service of the Netherlands rejected her application, finding that her identity<sup>3</sup> could not be clearly established, that information on her marriage and related fear of forced circumcision by her husband's family were not credible<sup>4</sup> and that she had the possibility of internal flight in Nigeria. On 25 September 2015, the author submitted her views in response to the decision of the Service, claiming that the authorities had not assessed her and E's fear of forced circumcision upon their return to Nigeria. She explained that she could not present a marriage certificate, because she had been married in a traditional ceremony and that she had not been in contact with her husband since fleeing Nigeria. Regarding an internal flight alternative, she claimed that she was a traumatized single mother with psychiatric problems<sup>5</sup> and that her widowed mother could not offer protection from the author's husband's family. The author cites a report of the Office of the United Nations High Commissioner for Refugees (UNHCR) in which the Office stated that, in countries with near-universal practise of female genital mutilation, internal flight was not an option and that, even in countries where female genital mutilation was criminalized, the authorities might not be able to provide protection against an act committed by private actors in a family setting.<sup>6</sup>

2.3 On 28 September 2015, the Immigration and Naturalization Service rejected the author's claims.<sup>7</sup> On 2 October 2015, the author appealed the Service's decision. She argued that her identity was proven by her birth certificate and a letter addressed to her from the Embassy of Nigeria and that, under Nigerian law, her husband would receive custody of the

---

<sup>1</sup> The author provides no further details on her travel from Nigeria to France or from France to the Netherlands.

<sup>2</sup> The author provides no information on why the permit was withdrawn or on the proceedings granting her temporary residence permit as a victim of trafficking.

<sup>3</sup> The author submitted a birth certificate attesting to her identity, but the Immigration and Naturalization Service of the Netherlands found that, because it contained no picture, it was not attributable to the author. The author also provides an affidavit of age declaration from her mother, dated August 2015 (the day is illegible).

<sup>4</sup> The author does not submit a translation of the full decision, but provides a translation of the "intention" of the Immigration and Naturalization Service, in which the Service summarizes its conclusions.

<sup>5</sup> The author provides a medical report (page missing) dated 20 August 2015, which attests that the author takes antidepressants, sleep-inducing medication and a high dose of paracetamol, that she suffers from symptoms of anxiety, depression, sleep deprivation and physical complaints and that she has minimal social contact due to her depressed state.

<sup>6</sup> The author cites UNHCR, "Guidance note on refugee claims relating to female genital mutilation", May 2009, paras. 28–32.

<sup>7</sup> The author does not submit a translation of the full decision, but provides a translation of the Immigration and Naturalization Service order, in which the Service stated that the birth certificate was not credible due to lack of an attached passport photo and that the author's uncertain identity was gravely detrimental to the rest of her statements.

child upon her and E's return, thereby exposing her daughter to a risk of circumcision.<sup>8</sup> On 20 October 2015, the Regional Court of Utrecht declared the appeal ill-founded, finding that previous courts had incorrectly determined the lack of credibility of the author's marriage, but that there were internal flight alternatives for the author, who did not substantiate the claim that she needed a social network to survive outside her community.<sup>9</sup> On 9 March 2016, the Council of State dismissed the author's appeal of the Court's decision.<sup>10</sup>

### Complaint

3.1 The author asserts that articles 1, 2 (3) (a), 7, 9 (1) and 24 (1) of the Covenant have been violated by the Netherlands.

3.2 She refers to the Committee's jurisprudence in *Kaba and Kaba v. Canada*,<sup>11</sup> in which the Committee acknowledged that female genital mutilation constituted a violation of article 7 of the Covenant. She also claims that E's very young age – she is 2 years of age – puts her at a higher risk of being subjected to female genital mutilation without her consent if she were to be expelled to Nigeria, in violation of articles 7 and 24 (1) of the Covenant.

3.3 The author claims that, if expelled to Nigeria, she would be deprived of her right to self-determination, which constitutes a violation of article 1 (1) of the Covenant. With regard to article 9 (1) of the Covenant, she claims that, even if she tries to relocate within the country, she would not be able to survive, would face the risk of being accused of kidnapping E and would be at risk of being deprived of her liberty. The author also claims that it would be a violation of article 2 (3) (a) of the Covenant if the State party were to deport her and E to Nigeria, where they would be at real risk of being victims of female genital mutilation.

3.4 The author submits that the criminalization of female genital mutilation does not necessarily prevent its widespread practice and that, in patriarchal societies, a father's family can enforce the practice of female genital mutilation.<sup>12</sup> She argues that the State party's authorities did not dispute that female genital mutilation is common in Edo State or that she lived in a strictly patriarchal society where her husband's family exerted control over her and her daughter.<sup>13</sup>

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

4.1 On 3 February 2017, the State party provided its observations on the admissibility and the merits of the communication.

4.2 The State party submits that the communication is inadmissible. It submits that article 1 of the Covenant is not justiciable under the Optional Protocol and that the Committee has observed in numerous cases that an individual cannot claim to be the victim of a violation of the right to self-determination, enshrined in article 1 of the Covenant, given that the article

<sup>8</sup> The author cites an article written by a judge (name unspecified) at the Edo State Customary Court of Appeal, entitled "Women's rights and status under Edo native law and custom – myths and realities", in which the author of the article states that the father of adult children always has custody under our customary law. Where the wife is deserted or divorced, custody of the children remains with the husband.

<sup>9</sup> The author submits a judgment from The Hague District Court sitting in Utrecht, dated 22 October 2015, which does not correspond to her timeline of the court proceedings. In the judgment, the Court concluded that the author had not been asked sufficient questions in the initial asylum and court proceedings to determine the credibility of her marriage. However, it found that the author did not substantiate why she could not seek an internal flight alternative.

<sup>10</sup> The author provides the decision of the Council of State, which does not contain a reasoning of its decision.

<sup>11</sup> See *Kaba and Kaba v. Canada* (CCPR/C/98/D/1465/2006).

<sup>12</sup> *Ibid.*

<sup>13</sup> The author submits several reports indicating the prevalence of female genital mutilation in Nigeria, including the following: Department of State of the United States of America, "Country report on human rights", 25 June 2015; National Bureau of the Netherlands, "Prevalence of female circumcision"; Home Office of the United Kingdom of Great Britain and Northern Ireland, "Operational guidance note: Nigeria", 10 December 2013; and European Asylum Support Office, "Country of origin information report on Nigeria: sex trafficking of women".

deals with rights conferred upon peoples.<sup>14</sup> While it accepts that article 2 (1) of the Covenant may be invoked in certain individual cases, it submits that article 2, being of a general nature and containing general obligations of States parties, should be read in conjunction with other articles, which suggests that article 2 of the Covenant is not intended to be applied by the Committee in the context of a procedure under article 2 of the Optional Protocol.

4.3 The State party asserts that the author has failed to sufficiently substantiate her claim with regard to articles 9 (1) and 24 (1) of the Covenant. She has not in any reasoned manner substantiated why she believes that a return to Nigeria would lead to a violation of the right to liberty or of the right to protection of the child.

4.4 For those reasons, the State party is of the view that the communication should be declared inadmissible with regard to articles 1, 2, 9 and 24 of the Covenant.

4.5 The State party submits that the author's and E's asylum application processes were conducted through the Dutch asylum procedure, with due consideration given to article 7 of the Covenant. It submits that the author was interviewed several times during the asylum application procedure on behalf of E and herself. She was questioned on the facts and circumstances of her departure from Nigeria and on the reasons why she believed that she and/or her daughter would expect treatment contrary to article 7 of the Covenant if they were to be returned to Nigeria.

4.6 Concerning the human rights situation for women and girls in Nigeria, the State party asserts that, even though the continued practice of female genital mutilation, including in Edo State, remains a cause for concern, there is no reason to assume that every woman or girl from Edo State or elsewhere who has not been subjected to female genital mutilation would be subjected to treatment contrary to article 7 of the Covenant upon her return to Nigeria.

4.7 It falls to the author to make a persuasive case, on the basis of personal facts and circumstances, regarding her fear that there would be a breach of article 7 of the Covenant if she and her daughter were to be expelled to Nigeria. The risk of such a breach must be based on grounds that go beyond mere theory or suspicion. The author must demonstrate that there is a foreseeable, real and personal risk.

4.8 The State party admits that subjecting a child or an adult to female genital mutilation amounts to treatment proscribed by article 7 of the Covenant.<sup>15</sup> A considerable number of girls and women in Nigeria have traditionally been, and continue to be, subjected to that harmful practice, despite its prohibition in law. However, the State party submits that it is necessary to assess whether the author and her daughter would face a real and personal risk of being subjected to female genital mutilation upon their return to Nigeria.

4.9 The State party submits that the Immigration and Naturalization Service did not find the author's statements regarding her marriage to a man from Owa East to be credible.<sup>16</sup> Nor did it find the account of the author's flight to avoid female genital mutilation to be credible, referring to the lack of credibility of her alleged marriage. Because the marriage, and therefore the threat posed by the author's husband's family, are not regarded as credible, the threat posed to E is not considered credible either. Even if it should be assumed that the account were credible, the Service considered that it would still not lead to residence permits being granted, because the author and her daughter have a flight alternative or alternative places of residence in Nigeria.

4.10 The State party acknowledges that the district court ruled that the Immigration and Naturalization Service had given insufficient reasons for not finding the alleged marriage to be credible. It agreed with the author that the Service had posed few questions on the subject. However, the district court agreed with the Service's alternative argument that, even if the

---

<sup>14</sup> *Kitok v. Sweden*, communication No. 197/1985, Views of 27 July 1988.

<sup>15</sup> Corresponding to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. See in that context, European Court of Human Rights, *Collins and Akaziebie v. Sweden*, application No. 23944/05, decision of 8 March 2007; and *Izevbekhai and others v. Ireland*, application No. 43408/08, decision of 17 May 2011.

<sup>16</sup> There is no indication in the submissions of why the Immigration and Naturalization Service authorities did not find the author's marriage to be credible.

statements should be assumed to be credible, the author and her daughter could return to, and reside elsewhere in, Nigeria.

4.11 The State party submits that the author and her daughter have not satisfactorily established that they would face a real and personal risk of being forced to submit to female genital mutilation in Nigeria and that they are therefore able to return to Nigeria. The State party recalls that female genital mutilation is now prohibited by federal Nigerian law and that any person who is convicted of an act prohibited by the law is liable to a fine or imprisonment or both. In addition, various non-governmental organizations have been active in the fight against female genital mutilation in Nigeria. However, the State party acknowledges that, despite the legislation that has been passed, the tradition of female genital mutilation has persisted as a result of social pressure. Although there are indications that female genital mutilation is more prevalent in the south, where Edo State is situated, the rate for the whole country in 2015 was 27 per cent, which is lower than it was 10 years ago.<sup>17</sup>

4.12 The State party is of the view that, given that the author's mother opposed female genital mutilation, she is likely to do everything to protect her daughter and granddaughter. The mother of the author was able to protect her from female genital mutilation during the author's youth, despite living in a state where there was a relatively high prevalence of female genital mutilation (41.6 per cent). The State party is therefore of the view that the author and her daughter could be expected to move to a different place in Nigeria. No evidence has been presented of any social exclusion of the author or her family as a result of the author's not having been excised. She went to secondary school and worked as a trainee hairdresser. Hairdressing is a trade that can be pursued anywhere and from which she can earn money. Furthermore, she was not forced to marry against her will.

4.13 The State party disagrees with the author's argument that there is a real risk of E being subjected to female genital mutilation because, under Edo native law, the father has authority over her. It follows from the article submitted by the author, entitled "Women's rights and status under Edo native law and custom – myths and realities", that children are not by definition subject to the authority of the father. With respect to children of a very young age, such as E, the principle is that each case must be considered and determined on its own merits. That also follows from national legislation.<sup>18</sup> More importantly, however, even if E's father were to obtain authority over E under Edo native law, it does not mean that she would be subjected to female genital mutilation by her father. In addition, it cannot be assumed that, in that respect, there is a real and personal risk that the author's daughter would be abducted. It is also questionable whether E's father would even be aware of the author's return and/or of the existence of his daughter. The marriage between the author and E's father was conducted in the traditional manner and is not registered with the Nigerian authorities. Furthermore, E was born in the Netherlands, and the author has declared that she is no longer in contact with E's father, whose name is also not mentioned on E's birth certificate.

4.14 With regard to the comparison made by the author with *Kaba and Kaba v. Canada*, the State party submits that, unlike Diene and Fatoumata Kaba, who were from Guinea, the author and her daughter are from Nigeria, where the prevalence of female genital mutilation is much lower than in Guinea and, in large parts of the former country, even uncommon. The author argues that she would be unable to find work, because she is uneducated, but she has provided no objective information to substantiate that claim. The fact that her situation will not be easy, as a returning single mother with a child, is insufficient to constitute a real risk of a violation of any article of the Covenant.<sup>19</sup>

<sup>17</sup> According to a World Health Organization study conducted in 2008, 29.6 per cent of girls and women between 15 and 49 years of age in Nigeria had undergone female genital mutilation. See also United States State Department, "Nigeria 2015 human rights report".

<sup>18</sup> Section 71 (1) of the Matrimonial Causes Act of Nigeria provides that: "In the proceeding with respect to the custody, guardianship, advancement or education of children of the marriage, the court shall regard the interest of those children as the paramount consideration, and subject thereto the court may make such order in respect to these matters as it thinks proper."

<sup>19</sup> European Court of Human Rights, *Collins and Akaziebie v. Sweden*. See also European Court of Human Rights, *S.J. v. Belgium*, application No. 70055/10, decision of 27 February 2014, para. 125.

4.15 In addition, the State party contends that the author could make thorough preparations for her return and, in doing so, obtain financial and material assistance from such organizations as the International Organization for Migration, to ensure that her return and reintegration proceeds as smoothly as possible. Other non-governmental organizations may provide assistance to the author and her daughter if they experience any problems. Therefore, the State party is of the view that there is no real, personal and foreseeable risk that the author and her daughter would be subjected to female genital mutilation upon their expulsion to Nigeria.

4.16 In view of the above, the State party is of the opinion that the communication should be declared inadmissible, with regard to articles 1, 2, 9 and 24 of the Covenant, and that it has not been satisfactorily established that the author and her daughter would be subjected to treatment contrary to article 7 of the Covenant upon their expulsion to Nigeria. Therefore, the communication is unfounded in its entirety.

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

5.1 On 26 May 2017, the author submitted comments on the State party's observations on the admissibility and the merits of the communication.

5.2 While the author agrees with the State party that the communication is inadmissible under articles 1 and 9 of the Covenant, she persists in her view that she has sufficiently substantiated her claims under article 7, read in conjunction with articles 2 (3) and 24, of the Covenant.

5.3 With regard to article 7, the author asserts that there are substantial grounds for believing that she and E face a real and personal risk of being subjected to female genital mutilation upon their expulsion to Nigeria and that there is no flight alternative to escape that risk. She submits that female genital mutilation can be considered as a form of inhuman or degrading treatment and that the State party must refrain from removing her to a country where she and her daughter run a real risk of being excised. With regard to article 24, read in conjunction with article 7, of the Covenant, the author submits that the communication addresses the case of a young child who is in need of special protection by the State against the risk of being circumcised upon her expulsion to Nigeria. Given the fairly high incidence of female genital mutilation in Nigeria and that E is only two years old, there is a real risk that she would be subjected to female genital mutilation without her consent if she were to be expelled to Nigeria.

5.4 The author notes that, in its observations, the State party accepts that the district court ruled that the Immigration and Naturalization Service had given insufficient reasoning for not finding the alleged marriage credible. The author also notes that the State party recognizes that the continued practice of female genital mutilation, including in Edo State, remains a cause for concern, despite the prohibition of the practice by the Violence Against Persons Act in Nigeria. Perpetrators are still rarely prosecuted.

5.5 The author objects to the State party's argument that she and E have a flight alternative elsewhere in Nigeria. Female genital mutilation is common in the entire southern part of Nigeria. Therefore, there is not any part of Nigeria where she could be safe and avoid that risk. She is not able to survive on her own, and she cannot rely on a social network where she would be protected against circumcision. To support her claims, the author relies on the UNHCR guidance note on refugee claims relating to female genital mutilation, in which UNHCR stated that, in determining whether there was an internal flight or relocation alternative in cases involving female genital mutilation, it was necessary to determine whether such an alternative was both relevant and reasonable. The lack of effective State protection in one part of the country was an indication that the State would not be able or willing to protect the girl or woman concerned in any other part of the country. In the same report, UNHCR pointed out that internal flight in female genital mutilation-related claims had mostly been considered by decision makers in the case of countries where it was not a general practice or was less widespread. Even in countries where female genital mutilation

was criminalized, it could not be assumed that the claimant would be protected by the authorities, given that the law might not be enforced or not consistently enforced in all areas.<sup>20</sup>

5.6 The author objects to the State party's view that she and E could find shelter with her mother. She believes that the fact that her mother was able to protect her from the risk of being circumcised does not mean that she would be able to protect her granddaughter from the pressure of her granddaughter's father and his family. It is not disputed that the relatives from the child's father's side want the girl to be circumcised, because all his other daughters have undergone female genital mutilation. The author states that, upon customary law in Edo State, the father has custody over the children and has the power to decide whether his children are going to be circumcised. That means that the author is not allowed to withdraw E from E's father's authority. Nigerian law usually grants the father full custody over his children and often denies the mother equal rights to move with the children without the father's consent.

5.7 The author submits that it is not possible to find protection from a non-governmental organization against the risk of female genital mutilation. The State party recognized that in Nigeria there are limited opportunities to find shelter for women and girls who wish to escape domestic violence, female genital mutilation or forced marriage. That is why the majority of victims of domestic violence, female genital mutilation or forced marriage will not readily turn to a shelter.

5.8 The author reiterates that she is not well-educated and cannot survive on her own. Her personal circumstances must be taken into account when considering a realistic flight alternative. Given the fact that it is extremely difficult for uneducated single women to find a job, the proposal that she would be able to economically survive in another part of Nigeria without the support of a social network is illusory. Women in Nigeria are often dependent on their spouses or other male relatives.<sup>21</sup> In addition, as a single mother, the author is extremely vulnerable to becoming a victim of violence or forced prostitution. Given her personal circumstances, a flight alternative is therefore not reasonable. In view of the above, the author requests the Committee to declare her communication well-founded.

#### **State party's additional observations**

6.1 On 6 February 2018, the State party provided further observations on the admissibility and the merits of the communication. In its observations, the State party maintains that it has not been satisfactorily established that the author and her daughter would be subjected to treatment contrary to article 7 of the Covenant upon their return to Nigeria.

6.2 The State party contends that there is a clear trend towards a lower prevalence of female genital mutilation among younger women in Nigeria<sup>22</sup> and that, according to the findings of a fact-finding mission conducted by the French Office for the Protection of Refugees and Stateless Persons, nowadays, there are no consequences if parents refuse to have their daughters excised. According to persons interviewed by the Immigration and Refugee Board of Canada, women may seek assistance for protection from the police, the Lagos State Ministry of Social Welfare, the Office of the Public Defender, numerous non-governmental organizations, churches or mosques, community leaders, traditional rulers, priests and pastors.<sup>23</sup>

<sup>20</sup> UNHCR, "Guidance note", paras. 28–29.

<sup>21</sup> European Asylum Support Office, "Country of origin information report: Nigeria"; and United States Department of State, "Nigeria: 2013 human rights report".

<sup>22</sup> Between 2008 and 2013, the overall prevalence of female genital mutilation among women between 15 and 49 years of age in Nigeria fell, from 29.6 per cent to 24.8 per cent. See <https://www.28toomany.org/research-resources>. However, because the age range is so broad, overall prevalence alone does not fully reflect the extent of the progress that has been made in recent years. Breaking down the most recent data by age group shows that the prevalence of female genital mutilation among women between 45 and 49 years of age is 35.8 per cent, whereas among the youngest age group, it has fallen to 15.3 per cent, according to data from the National Population Commission of Nigeria, from June 2014.

<sup>23</sup> Immigration and Refugee Board of Canada, "Nigeria: prevalence of female genital mutilation", 13 September 2016.

6.3 The State party disagrees with the author's statement that E's father would automatically be granted custody of their daughter without the acquiescence of the author. According to Nigerian law,<sup>24</sup> and in Edo State, under the Customary Court Law of 1984 of the former Bendel State (now Edo and Delta States), in any matter relating to the guardianship of children, the interests and welfare of the child must be the first and paramount consideration.<sup>6</sup> In Nigeria, the trend is that the courts consider that daughters are better protected when they remain in the custody of their mothers, if the parents' marriage is dissolved.<sup>25</sup>

6.4 The State party argues that there is no universal practice of female genital mutilation in Nigeria. The author incorrectly refers to passages from the UNHCR guidance note that address countries with a universal, or near-universal, practice of female genital mutilation. That information is not applicable to the situation in Nigeria, where the vast majority of young Nigerian women have not been, and will not be, subjected to female genital mutilation. The sources cited also indicate that the prevalence of female genital mutilation is declining. That information further justifies the conclusion that the author is unlikely to be pressured by people in the wider community to undergo female genital mutilation, which is regarded as a family matter. That is consistent with the statements that the author made during various interviews, indicating that, except during her pregnancy, she and her mother were not pressured to undergo circumcision.

6.5 The State party maintains that the author has a social network of people who can help her to build a new life. She is an adult woman who lived, studied and worked in various places in Nigeria until the age of 30. She is able to earn an income. Moreover, she has family in Nigeria, including her mother and five siblings, who can help her.

#### **Author's comments on the State party's additional observations**

7.1 On 19 February 2019, the author submitted further comments. She reiterates that the State party should not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm being done to that child. She submits that female genital mutilation may have various immediate and/or long-term health consequences.

7.2 The author insists that, even if E's father does not have official custody of E, it is still possible that he would decide that she must be circumcised. To support her claims, the author refers to a report from the European Asylum Support Office from June 2017, according to which fathers generally make the decision with regard to the circumcision of their daughters, even if the children's mothers oppose.

7.3 The author submits that reports indicate that the State party lacks the ability and willingness to protect women and girls, in particular those of lower socioeconomic status, against violence and female circumcision<sup>26</sup> and that, in 12 states in Nigeria, female genital mutilation is still considered legal.<sup>27</sup> Her situation as a single mother is further complicated, given her lack of education and inability to find a job.

7.4 The author submits that the well-being of her child should not be dependent on the mother's ability to withstand the pressure from E's father's family to subject E to female genital mutilation. It is a positive duty of the State party to prevent the child from being subjected to such harmful practices. The author submits that the State party must take care of the best interests of the child when assessing the alleged risk faced by her daughter of being subjected to female genital mutilation if she is returned to Nigeria.

---

<sup>24</sup> The author refers to the following documents: Bright E. Oniha, "Dissolution of marriage and custody of children under customary law in Nigeria"; and Efe Etomi and Elvis Asia, "Family law in Nigeria: overview", Thompson Reuters Practical Law.

<sup>25</sup> Bright E. Oniha, "Dissolution of marriage", pp. 19–20.

<sup>26</sup> Bertelsmann Foundation, "BTI 2018 Country Report — Nigeria". Available from [https://www.ecoi.net/en/file/local/1427393/488302\\_en.pdf](https://www.ecoi.net/en/file/local/1427393/488302_en.pdf).

<sup>27</sup> United States Department of State, "Country report on human rights practices, 2017: Nigeria", 20 April 2018.



## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being, and has not been, examined under another procedure of international investigation or settlement.

8.3 The Committee observes that the State party has not objected to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol. Accordingly, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee notes that the State party argues that article 1 of the Covenant cannot be raised by the author. The article relates to the right to self-determination conferred upon peoples.<sup>28</sup> The Committee also notes that the State party argues that article 2, being of a general nature and containing general obligations for States, cannot be invoked separately, but only in conjunction with other articles. The Committee further notes that the State party argues that the author's claims under articles 9 (1) and 24 (1) are not substantiated, because the author failed to demonstrate how a return to Nigeria would entail a violation of the right to liberty or of the right to protection of the child.

8.5 The Committee notes that the author agrees with the State party that the communication is inadmissible under articles 1 and 9 of the Covenant. The Committee also notes, however, that the author argues that she has sufficiently substantiated her claims under article 7, read alone and in conjunction with article 24, of the Covenant.

8.6 The Committee observes that the State party does not challenge the admissibility of the communication under article 7 of the Covenant.

8.7 The Committee also observes that, in the absence of further information, the author has failed to sufficiently substantiate her claim under article 2 (3), read in conjunction with article 7, of the Covenant and therefore finds that part of the communication inadmissible. The Committee notes that the author raises claims under article 7, read alone and in conjunction with article 24, of the Covenant, and the Committee is of the view that the author has sufficiently substantiated those claims for the purposes of admissibility.

8.8 In the light of the above, the Committee declares the communication admissible insofar as the author raises issues under article 7, read alone and in conjunction with article 24, of the Covenant, and it proceeds to the consideration of the merits.

### **Consideration of the merits**

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

9.2 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it referred to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there were substantial grounds for believing that there was a real risk of an irreparable harm, such as those contemplated by articles 6 and 7 of the Covenant, being done to that person.<sup>29</sup> The Committee has also indicated that the risk must be personal, with a high threshold for establishing substantial grounds for the existence of a real risk of irreparable harm.<sup>30</sup> All relevant facts and circumstances must be considered, including the

<sup>28</sup> See *Kitok v. Sweden*.

<sup>29</sup> General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

<sup>30</sup> *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2; *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.6; and *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

general human rights situation in the author's country of origin. The Committee recalls that, in its jurisprudence, it has found that significant weight should be given to the assessment conducted by the State party and that it is generally for the organs of States parties to examine the facts and evidence of a case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.<sup>31</sup>

9.3 As to the author's claim that expelling E would entail a risk of her being subjected to excision by her father and/or members of his family, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement.<sup>32</sup> In that connection, there is no question that subjecting a woman or girl to genital mutilation amounts to treatment prohibited under article 7 of the Covenant, nor is there any question that women in Nigeria traditionally have been subjected to female genital mutilation and, to a certain extent, are still subjected to it. At issue is whether the assessment made by the State party's authorities was clearly arbitrary or amounted to a manifest error or denial of justice. The Committee observes that the arguments submitted in that regard are articulated on the following aspects: (a) the credibility of the alleged marriage; (b) the risk posed to the author and her daughter of being subjected to female genital mutilation; (c) the general situation in Nigeria, where it is still a recurrent practice; and (d) the possibility of a flight alternative or alternative place of residence, bearing in mind the psychological condition of the author.

9.4 With regard to the credibility of the alleged marriage, the Committee takes note of the author's claim that the Regional Court of Utrecht found that previous courts had incorrectly determined the lack of credibility of her marriage. The Committee observes that, while acknowledging that the Immigration and Naturalization Service of the Netherlands gave insufficient reasons for not finding the alleged marriage credible, the State party, however, argues that the district court agreed with the Service's alternative argument that, even if the statements should be deemed credible, the author and her daughter could go and reside elsewhere in Nigeria. The Committee observes that a complete assessment of the author's statements during the asylum process could have had a significant impact on a determination of the capacity of the author's spouse to claim custody over the author's daughter and subjecting her to female genital mutilation. It takes note of the author's assertion that the State party failed in its procedural obligation to duly assess the risk to which E and herself would be exposed, dismissing her claims on the basis of a negative credibility finding, without considering the fact that the district court had ruled that the Service had given insufficient reasons for not finding the alleged marriage credible and that a more thorough assessment by the authorities could determine whether there was a real and personal risk that E would be excised upon returning to Nigeria.

9.5 Regarding the risk that the author and her daughter would be subjected to female genital mutilation, the Committee takes note of the author's claims, based on several reports that, although E's father does not have official custody over the child, he can decide that she must be circumcised, even if her mother opposes, and that the protection of E should not depend on the author's ability to withstand the pressure from her husband's family to subject the author's daughter to female genital mutilation. The Committee takes note of the State party's argument that customary courts in Nigeria, including in Edo State, consider the best interests and welfare of the child as the prime guiding principle in their approach to child custody cases and that, in Nigeria, the trend is that the courts consider that daughters are better protected when they remain in the custody of their mothers, in cases where the marriage is dissolved. The personal situation of the author must also be taken into consideration.

9.6 With regard to a flight alternative or alternative place of residence, the Committee takes note of the author's arguments that female genital mutilation is common in the entire southern part of Nigeria, and there is not any part of Nigeria where she would be safe from that risk, that, as a single mother, she is not able to survive on her own, that she suffers from

<sup>31</sup> *X v. Denmark*, para. 9.2; and *X v. Sweden*, para. 5.18.

<sup>32</sup> *Khan v. Canada* (CCPR/C/87/D/1302/2004), para. 5.4; and *A et al v. Australia* (CCPR/C/92/D/1429/2005), para. 6.3.

severe psychiatric conditions and that she cannot rely on a social network to protect her or E against female genital mutilation. The Committee also takes note of the State party's arguments that there is no universal practice of female genital mutilation in Nigeria, where the vast majority of young Nigerian women have not been subjected to female genital mutilation, but recognizes that, despite State prohibition of female genital mutilation, the practice continues throughout the country with perpetrators rarely being prosecuted. The Committee further takes note of the State party's argument that, except during her pregnancy, the author and her mother were not pressured to undergo female genital mutilation.

9.7 The Committee takes note of the author's argument that, owing to the fairly high incidence of female genital mutilation in Nigeria and that E was only two years old at the time of submission of the communication, E would face a real risk of being subjected to female genital mutilation if she were to be expelled to Nigeria, which would constitute a violation of article 7, read in conjunction with article 24, of the Covenant, and that, even though circumcision is prohibited in Nigeria, the practice continues throughout the country, including in Edo State, and the perpetrators are not prosecuted. The Committee also takes note of the State party's argument that the prevailing trends of female genital mutilation in Nigeria do not demonstrate that women and girls are generally excised upon their return to the country and that the author does not substantiate the claim that the assessment made by the authorities in that regard was clearly arbitrary or amounted to a manifest error or denial of justice. The Committee observes that both parties agree that subjecting a child or an adult to female genital mutilation amounts to treatment proscribed by article 7 of the Covenant. The Committee also observes that both parties agree on the fact that, despite State prohibition, women and children in Nigeria continue to be exposed to female genital mutilation. The Committee further observes that the State party has recognized that female genital mutilation is more prevalent in the south, where Edo State is situated, and that the female genital mutilation rate for the whole country in 2015 was 27 per cent, which is indicative that it is still practised to a significant degree. The Committee notes that that element is an important factor in determining whether or not E is at risk of being circumcised upon her return to Nigeria.

9.8 The Committee recalls that, under article 24 of the Covenant, children shall enjoy the necessary protection as required by their status as minors, on the part of their family, society and the State. The Committee also recalls that, even though the measures to be adopted are not specified in the Covenant, it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction. The protection measures should also prevent children from being subjected to acts of violence and cruel and inhuman treatment.<sup>33</sup> The Committee therefore finds that the State party has not properly assessed the author's claims regarding the risk that E would face upon her return to Nigeria.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's and E's removal to Nigeria, if implemented in the absence of a procedure which would guarantee a proper assessment of the real and personal risk that they might face if deported, would violate their rights under article 7, read alone and in conjunction with article 24, of the Covenant.

11. In accordance with article 2 (1) of the Covenant, which establishes that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to proceed to a review of the author's case, taking into account the State party's obligations under the Covenant and the Committee's present Views. The State party is also requested to refrain from expelling the author and her daughter to Nigeria while their requests for asylum are under reconsideration.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case

<sup>33</sup> General comment No. 17 (1989) on the rights of the child, para. 7.

a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official language of the State party.

## Annex

### Joint opinion of Committee members Furuya Shuichi, Marcia V.J. Kran and Gentian Zyberi (dissenting)

1. We are unable to concur with the Views of the majority of the Committee that the removal of the author and her daughter, E, to Nigeria, if implemented, would violate their rights under article 7, read alone and in conjunction with article 24, of the Covenant.

2. We fully agree with the majority findings that subjecting a child or an adult to female genital mutilation amounts to treatment proscribed by article 7 of the Covenant and that women and children in Nigeria continue to be exposed to female genital mutilation. At issue in the present case, however, is whether the author has demonstrated that the assessment by the State party of her situation was clearly arbitrary or amounted to a manifest error or denial of justice.

3. According to the jurisprudence of the Committee, it is generally for the organs of a State party to examine the facts and evidence of the case in question to determine, through an individualized assessment,<sup>1</sup> whether a real risk of irreparable harm would result should a person be removed from the State party's territory,<sup>2</sup> unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>3</sup> That risk must be personal, and there is a high threshold for providing substantial grounds to establish its existence.<sup>4</sup> Furthermore, considerable weight should be given to the assessment conducted by the State party, and it is for the author of a communication to establish that the assessment by the State party was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>5</sup>

4. In paragraph 9.3 of the decision, the majority set out the four aspects considered before deciding whether the assessment was clearly arbitrary or amounted to a manifest error or denial of justice: (a) the credibility of the alleged marriage; (b) the risk posed to the author and E of being subjected to female genital mutilation; (c) the general situation in Nigeria, where it is still a recurrent practice; and (d) the possibility of a flight alternative, i.e. an alternative place of residence to which the author and her daughter could reasonably flee where, in the context of the present case, they would not face a real risk of irreparable harm. The majority, in paragraphs 9.4 to 9.7, merely explain the arguments of both sides, without assessing those arguments based on the jurisprudence of the Committee, and suddenly conclude that the State party has not properly assessed the author's claims regarding the risk that E would face upon her return to Nigeria (para. 9.8). Without persuasive reasons or a sound legal rationale to conclude that the assessment conducted by the State party was clearly arbitrary or amounted to a manifest error or denial of justice, the majority of the Committee appears to reach a finding without resolving the central legal issue it identified in paragraph 9.3.

5. We are of the view that the crucial element to be taken into account in deciding the arbitrariness or manifest error or denial of justice of the assessment is whether the State party conducted an individualized assessment of the situation particular to the author and E, as

<sup>1</sup> *A.G. et al v. Angola* (CCPR/C/129/D/3106/2018-3122/2018), paras. 7.5–7.6.

<sup>2</sup> General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12; *Kaba and Kaba v. Canada* (CCPR/C/98/D/1465/2006), paras. 7.4 and 10.1; *Hamida v. Canada* (CCPR/C/98/D/1544/2007), para. 8.7; and *K v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.4.

<sup>3</sup> *K v. Denmark*, para. 7.4; *Q.A. v. Sweden* (CCPR/C/127/D/3070/2017), para. 9.3; and *A.E. v. Sweden* (CCPR/C/128/D/3300/2019), para. 9.3.

<sup>4</sup> *A.G. et al v. Angola*, para. 7.4; *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 7.4; *Q.A. v. Sweden*, para. 9.3; *X v. Norway* (CCPR/C/115/D/2474/2014), para. 7.3; *A.S.M. et al v. Denmark* (CCPR/C/117/D/2378/2014), para. 8.3; and *Y.A.A. and F.H.M. v. Denmark* (CCPR/C/119/D/2681/2015), para. 7.3.

<sup>5</sup> *A.S.M. et al v. Denmark*, para. 8.3.



opposed to relying on reports of the general situation in Nigeria.<sup>6</sup> In that respect, the author presented only a description of the general situation in Nigeria concerning female genital mutilation (paras. 3.4, 5.3 and 7.3 of the decision), the capacity of fathers to force circumcision on their daughters (paras. 5.6 and 7.2) and difficulties facing single mothers in Nigeria (paras. 5.8 and 7.3).

6. The State party conducted an individualized assessment of the personal risks that the author might face on her return to Nigeria. The State party's assessment procedure ensured that its assessment could be individualized. In paragraph 4.5 of the decision, the State party submits that the author was interviewed several times during the asylum application procedure on behalf of herself and E, and was specifically questioned on the facts and circumstances of her departure from Nigeria and on the reasons why she believed that she and/or her daughter could expect treatment contrary to article 7 of the Covenant if she were to return to Nigeria, and that those measures were conducted through the Dutch asylum procedure, with due consideration given to article 7 of the Covenant. The assessment included such findings as: (a) the author was unlikely to be pressured by people in the wider community to undergo female genital mutilation, which was regarded as a family matter, which was consistent with the statements that the author had made during the various interviews, indicating that, except during her pregnancy, she and her mother had not been pressured to undergo circumcision (para. 6.4); (b) it was questionable whether the father would even be aware of the author's return and/or of the existence of his daughter, given that E was born in the Netherlands and the author had declared that she was no longer in contact with E's father, whose name was also not listed on E's birth certificate (para. 4.13); (c) the author went to secondary school and worked as a trainee hairdresser, and hairdressing was a trade that could be pursued anywhere and from which she could earn money (para. 4.12); and (d) the author was an adult woman who had lived, studied and worked in various places in Nigeria until the age of 30; she was able to earn an income, and moreover, she had family in Nigeria, including her mother and five siblings, who could help her (para. 6.5). While the author argues that the Immigration and Naturalization Service of the Netherlands failed to give sufficient reasons for not finding her marriage credible, the author has not demonstrated that that failure: (a) precludes the State's risk assessment from being individualized; or (b) renders the State's assessment clearly arbitrary or amounts to a manifest error or denial of justice.

7. The author was able to appeal the decision of the Immigration and Naturalization Service, and during the appeal, the court considered factors personal to the author, which concerned the availability of flight alternatives, namely, that the author could reside elsewhere, even if her marriage were found credible (para. 2.3 of the decision). The court therefore conducted an assessment on the author's flight alternative, which was sufficiently individualized for us to find that the author has failed to demonstrate that it was clearly arbitrary or amounted to a manifest error or denial of justice.

8. The author has not rebutted the substance of the State party's assessment. To do so, the author must establish, to a high threshold, grounds for believing that she or E would face a real and personal risk of female genital mutilation as a result of their deportation to Nigeria.<sup>7</sup> The author has not sufficiently substantiated her claims, according to the legal threshold established by the Committee. She has made a general assertion about the patriarchal nature of Nigerian society and asserted that E would be at risk of female genital mutilation under the authority of E's father and his relatives, following her deportation to Nigeria.<sup>8</sup> The author has not shown that it would be impossible for her and E to relocate to another location in Nigeria to avoid the risk of female genital mutilation.

9. The author relied on the case of *Kaba and Kaba v. Canada*, in which the Committee found that the author, who had fled from Guinea to Canada, had established that a real risk of female genital mutilation would result from her return to Guinea. The present case differs in at least three respects. First, in the present case, the author's daughter has never met her father, whereas in *Kaba and Kaba v. Canada*, Fatoumata Kaba had grown up in her father's

---

<sup>6</sup> *Y.A.A. and F.H.M. v. Denmark*, para. 7.9.

<sup>7</sup> *E.U.R. v. Denmark* (CCPR/C/117/D/2469/2014), para. 9.3.

<sup>8</sup> General comment No. 31 (2004), para. 12.

household.<sup>9</sup> Second, in *Kaba and Kaba v. Canada*, the author and her daughter faced deportation to Guinea, where her daughter faced certain excision by her father, who would have complete parental authority over her, given that the Civil Code of Guinea stipulated that custody of a child over 7 years of age was automatically granted to the father.<sup>10</sup> In the present case, the State party argued that there was no reason to believe that Nigerian courts would automatically grant custody to the father without the acquiescence of the author, and the author has not provided information in rebuttal (para. 6.3 of the decision). Third, in *Kaba and Kaba v. Canada*, the evidence indicated that as many as 90 per cent of girls underwent excision in Guinea, whereas in the present case, the prevalence of female genital mutilation is far lower. Specifically, the State party asserts that there is little evidence that women and girls face pressure to undergo female genital mutilation from general society and the incidence of female genital mutilation is declining (paras. 6.2 and 6.4). Furthermore, the author did not dispute the State party's statement that the prevalence of female genital mutilation is declining and low relative to what it was in Guinea at the time of the Committee's consideration of *Kaba and Kaba v. Canada*. That distinguishing factor is significant because it shows that, in the present case, unlike in *Kaba and Kaba v. Canada*, there is no reason to infer a real and personal risk of female genital mutilation to the author or E based on an overwhelmingly frequent practice of female genital mutilation in the country.

10. Without underestimating the concerns with respect to the practice of female genital mutilation in Nigeria, the author has failed to demonstrate that the assessment by the authorities of the State party was clearly arbitrary or amounted to a manifest error or denial of justice. Accordingly, we conclude that the removal of the author and her daughter to Nigeria, if implemented, would not constitute a violation of article 7, read alone and in conjunction with article 24, of the Covenant.

---

<sup>9</sup> *Kaba and Kaba v. Canada*, para. 2.1.

<sup>10</sup> *Ibid.*, para. 2.5.