



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2081/2011***

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| <i>Communication submitted by:</i> | D.T. (represented by Committee to Aid Refugees, Montreal) |
| <i>Alleged victims:</i> | D.T. and her son, A.A. |
| <i>State party:</i> | Canada |
| <i>Date of communication:</i> | 4 August 2011 (initial submission) |
| <i>Document references:</i> | Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 10 August 2011 (not issued in document form) |
| <i>Date of adoption of Views:</i> | 15 July 2016 |
| <i>Subject matter:</i> | Deportation to Nigeria |
| <i>Procedural issues:</i> | Insufficient substantiation of claims; exhaustion of domestic remedies |
| <i>Substantive issues:</i> | Right to privacy; protection of the family; protection of the child |
| <i>Articles of the Covenant:</i> | 17, 23 (1) and 24 (1) |
| <i>Articles of the Optional Protocol:</i> | 2 and 5 (2) (b) |

1.1 The author of the communication is D.T., a national of Nigeria, born in 1980. She submits the communication on her own behalf and on behalf of her son, A.A., a Canadian national born in 2004, therefore a minor. She claims that they are victims of a violation by Canada of their rights under articles 17, 23 (1) and 24 (1) of the Covenant. The Optional

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.



Protocol entered into force for Canada on 19 August 1976. The author is represented by the Committee to Aid Refugees, Montreal.

1.2 On 10 August 2011, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the author's request for interim measures to suspend her and her son's deportation to Nigeria. On 12 August 2011, the Special Rapporteur maintained his decision not to grant interim measures.

The facts as submitted by the author

2.1 The author submits that she was born in Lagos State, Nigeria, and raised by a single mother. She has no other siblings. The author met O.A. on an unspecified date, they began a relationship and in November 2002, O.A. proposed marriage to the author and asked her to accompany him to see his family. Problems began when O.A.'s parents discovered that the author was a Christian. O.A. hailed from a Muslim family. His parents were against the relationship. He still insisted that he was going to marry the author. The fact that O.A. was the first son and the breadwinner of his family further compounded the problem.

2.2 On 6 June 2003, the author married O.A. The author, as a Protestant Christian, was harassed by her husband's family. In December 2003, O.A. died in a car accident. His family then increased its persecution of the author, who was pregnant at the time, threatening to kill the baby in order to cleanse the "abomination" of the couple's marriage. During a 40-day mourning period, the author was forced to drink the water used to bathe O.A.'s corpse, and to sleep in the same room with the corpse for three days. The author then escaped to Lagos where she stayed with a friend from December 2003 to May 2004, when she left for Canada, with the assistance of an agent.

2.3 The author arrived in Canada on 23 May 2004, where she gave birth to her son, A.A., on 4 June 2004. A.A. is therefore a Canadian national by birth. On 16 October 2005, the author married a Congolese national in Quebec. However, they separated soon afterwards, on an unspecified date. The author started to work in Canada in 2005, and also volunteered at an organization that helps children cope with cancer and at her community church.

2.4 The author's son, A.A., suffers from several health conditions. He has a heart murmur¹ and a congenital malformation of the meniscus. He underwent surgery on his right knee in October 2009. A report from his paediatric orthopaedic surgeon indicated that the problem could also affect his left knee, as it is often bilateral. A.A. may need arthroscopic surgery once or several times during growth, and specialized paediatric orthopaedic care.

2.5 A.A. also suffers from attention deficit hyperactivity disorder (ADHD) with both hyperactivity and inattentiveness, for which he has been prescribed daily medication. His school has designed a special intervention plan for him, involving special education professionals. The multidisciplinary approach of the plan, involving a doctor who has diagnosed his symptoms and prescribed appropriate medication, and several educational professionals, is based on the recommendation of the Quebec College of Physicians and the Quebec Order of Psychologists. They suggest combining several modes of intervention, including behavioural, social and family therapy and psychotherapy. Regular monitoring and revision of the plan are also required.

2.6 The author's claim for asylum was heard by the Refugee Protection Division on 17 January 2005. The Division noted that the author's identity and credibility were the decisive issues in her claim. In particular, after careful consideration of the testimony and the evidence presented, the Division concluded that the author had not sufficiently established her identity and that her allegations were not credible or substantiated.

¹ Diagnosed by a cardiologist as benign.

2.7 The Division noted that the author had failed to produce any identity documents such as a birth certificate, school documents or a genuine Nigerian passport. It concluded that her failure to produce any such documents cast doubt on her identity. Furthermore, the baptism certificate produced by the author, which bore no picture, was found to have been issued by a church that did not exist. The Division also found that the author's testimony was not credible. That conclusion was corroborated by omissions and inconsistencies between her testimony at the hearing and the allegations contained in her personal information form, notably with respect to the date on which she was taken to her husband's village to perform the ritual following his death, her alleged participation in the ritual and her allegations regarding her escape to Lagos in December 2003, as well as the reasons for which she alleged that she had not escaped as soon as she had learned of her husband's death. The Division concluded that D.T. was not a credible witness and that she had not presented sufficient evidence to establish that she was a Convention refugee or that she was a person in need of protection.

2.8 On 25 August 2005, the author submitted a first application for permanent residence on humanitarian and compassionate grounds. On 30 May 2007, that application was denied as the evidence did not show that her departure would cause excessive difficulty for her, or any other person in Canada, to the point where she would suffer unusual and undeserved or disproportionate hardship if required to return to Nigeria in order to apply for permanent residence in Canada. The officer concluded that the risks for her son could not be evaluated since the author had not established her identity or nationality and at the time the application was decided, there was no identifiable risk for him.

2.9 The author filed a second humanitarian and compassionate application on 10 October 2007, in which she presented the same allegations of risk of serious harm in Nigeria as in her previous humanitarian and compassionate application and refugee claim. She also claimed that her son would suffer disproportionate hardship if she was required to return to Nigeria in order to apply for permanent residence in Canada. The application was refused on 28 July 2010, based, *inter alia*, on the finding that the author's evidence did not support the claim that, in the future, her son would need treatment for his right knee, which had been successfully operated on. Although there was speculation about the need for an operation on his left knee, there was no indication that such an operation was likely to be necessary. As for his heart condition, according to a doctor's letter dated 20 November 2008, the heart murmur was benign. The evidence did not disclose that the author had made any specific efforts to determine the medical and educational services that were available in Nigeria and did not support the allegation that her son would not have access in Nigeria to health or education services for his alleged ADHD.

2.10 The author applied for leave to apply for judicial review of the second humanitarian and compassionate decision on 13 October 2010, which was granted on 3 March 2011.

2.11 The Federal Court of Canada dismissed the author's application for judicial review of the second decision on 30 June 2011. The Court noted that, although the best interests of the child are an important factor that requires serious consideration in a humanitarian and compassionate application, they do not constitute a decisive factor. In that case, the Court was of the view that the officer in charge of the application had considered and analysed the best interests of the child and the evidence provided in that respect, and that his decision was reasonable. The specific care and educational services required had not been shown to be unavailable in Nigeria. The evidence adduced with regard to A.A.'s ongoing treatment and future treatment needs was not satisfactory in the opinion of the officer, as it was unclear and speculative. The officer stated that the child had been born in Canada and could remain in the country.

2.12 The author applied for a pre-removal risk assessment on 21 November 2008. The risk assessment officer concluded, by a decision dated 28 July 2010, that the author did not

face a personal or individualized risk to life or a risk of persecution, torture or cruel or unusual treatment or punishment if returned to Nigeria. A risk assessment interview was conducted with the author on 27 April 2010. The officer found that the author lacked credibility. The documentary evidence she submitted on the mistreatment of widows in Nigeria was not considered to be relevant since she had failed to establish that she was a widow or that she had gone through any of the rituals that are customary for widows in Nigeria. The author also submitted reports relating to the mistreatment of women in Nigeria, political violence and human rights abuse, but it was determined that she had not provided sufficient evidence of how those forms of violence would affect her personally in her particular circumstances.

2.13 Following the dismissal of her application for judicial review of the second humanitarian and compassionate decision by the Federal Court of Canada on 30 June 2011, the author was ordered to leave Canada on 14 August 2011 pursuant to a removal order. Her departure was later rescheduled to 19 August 2011.

2.14 The author left Canada on 19 August 2011 and took her 7-year-old son with her.

The complaint

3.1 The author claims that she and her son are victims of a violation by Canada of articles 17 and 23 (1) of the Covenant and that her son is also the victim of a violation of article 24 (1). She claims that she and her son face a risk of irreparable harm should they be deported to Nigeria, based on the factors indicated below.

3.2 The author's son suffers from a mental health disorder, ADHD. That, combined with the dire state of both the education system, even for students who suffer from no disorders, and the health-care system in Nigeria, means that his educational prospects and mental health would be severely compromised if his mother were to be deported from Canada and he were obliged to accompany her to Nigeria. The author highlights the inadequacy of the school² and the health-care systems in Nigeria,³ as well as the absence of laws designed to protect children's rights. Given the state of the health-care system in Nigeria, the author's son, who suffers from a physical and an intellectual impairment, could not reasonably be expected to receive anything like the individualized attention and access to special education professionals from which he currently benefits in Canada. Nor would he have access to a doctor who could monitor his ADHD and or to appropriate medication, given that even essential medication for childhood diseases is unavailable to nearly half of Nigerian children. The author thus submits that her son's removal would prejudice his physical health and constitute a violation of his rights under article 24 (1) of the Covenant.

3.3 The author contends that the decision maker on the humanitarian and compassionate application never properly identified where her son's best interests actually lay — whether in staying in Canada or going to Nigeria. Instead, the officer considered whether A.A. would “suffer a disproportionate hardship”, which the author can only understand as meaning whether he “would not suffer too much”. She refers to the Committee's jurisprudence⁴ in which it held that the principle that in all decisions affecting a child, the child's best interests should be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on

² According to the United Nations Children's Fund (UNICEF), some 40 per cent of children in Nigeria are not enrolled in primary school and some 65 per cent do not attend secondary school.

³ According to the World Health Organization (WHO), this includes low immunization rates, low population coverage, unequal access of the population to adequate health services, essential medicines, clean water and sanitation (see “WHO country cooperation strategy at a glance: Nigeria” (2009)).

⁴ See communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.7.

the part of his or her family, society and the State. Therefore, the author claims that the immigration officer failed to respect the requirements of article 24 of the Covenant. The author also refers to the Convention on the Rights of the Child, particularly articles 23, 24, 28 and 29.

3.4 The option of the author's son staying in Canada, which he has the right to do as a Canadian citizen, in order to avail himself of the proper special education and health-care services he requires, would result in a family separation between himself and his mother, who is his sole caregiver. That would clearly be prejudicial to A.A.'s best interests as it would be harmful to his physical health, cognitive and academic functioning and social and emotional well-being. Therefore, his separation from his mother would violate his rights under articles 17 (1), 23 (1) and 24 (1) of the Covenant. It would also violate the author's rights under articles 17 (1) and 23 (1) of the Covenant.

3.5 The author acknowledges that she has not exhausted domestic remedies with respect to her account of persecution at the hands of her former in-laws, but she relies, for the purposes of her communication before the Committee, on the consequence of her and her son's removal to Nigeria, in the light of articles 17, 23 and 24 of the Covenant.

3.6 The author contends that the allegations were brought in the context of her humanitarian and compassionate application, which was rejected on 28 June 2010, and appealed before the Federal Court.

State party's observations on admissibility and the merits

4.1 On 20 February 2012, the State party submitted its observations on admissibility and the merits of the communication. The State party submits that the author has failed to exhaust domestic remedies; that some of her allegations are incompatible with the provisions of the Covenant; and that she has failed to substantiate her allegations. The State party contends that the communication is devoid of merit, as the author has failed to demonstrate a prima facie violation of the Covenant.

4.2 The State party submits that the author's communication is inadmissible on three grounds: failure to exhaust domestic remedies, as the author failed to initiate an application for leave and for judicial review of the Refugee Protection Division and the pre-removal risk assessment decisions; incompatibility with the provisions of the Covenant under article 3 of the Optional Protocol; and non-substantiation of the author's allegations regarding articles 17, 23 (1) and 24 (1) pursuant to article 2 of the Optional Protocol.

Non-exhaustion of domestic remedies

4.3 The author failed to seek judicial review of the 20 April 2005 decision of the Refugee Protection Division on her refugee protection claim and of the pre-removal risk assessment decision. Judicial review of such a decision was available, with leave, before the Federal Court. No explanation has been provided for her failure to do so.

4.4 The author also failed to initiate an application for leave and for judicial review of the pre-removal risk assessment decision. The State party notes that the author acknowledges in the communication that she did not exercise all domestic remedies available to her in that regard, although she provides no explanation for her failure to do so. The State party also notes that the Refugee Protection Division and pre-removal risk assessment decisions, although focused on the risk of return to Nigeria, which is not one of the issues the author has brought before the Committee, are nonetheless important to the present communication, as they address the author's lack of credibility and the problematic inconsistencies in her explanations.

Incompatibility with the provisions of the Covenant

4.5 The Government of Canada submits that the communication is inadmissible on the grounds of incompatibility with the provisions of the Covenant, specifically in relation to general allegations regarding the Convention on the Rights of the Child, pursuant to article 3 of the Optional Protocol.

Non-substantiation of allegations

4.6 The State party submits that the author has not sufficiently substantiated, for the purposes of admissibility, any of her allegations with respect to articles 17, 23 (1) and 24 (1) of the Covenant, even on a prima facie basis.

4.7 In the alternative, should any aspect of the present communication be declared admissible, the State party submits that the communication should be dismissed on the merits as it does not disclose any violation of articles 17, 23 (1) or 24 (1) of the Covenant.

No interference with the family

4.8 The State party recalls the author's allegation that her removal to Nigeria would interfere with her family, in violation of articles 17 and 23 (1) of the Covenant, by preventing her from maintaining links with the only family member she has, her son, should he ultimately remain in Canada. She also alleges that their separation would cause her son serious prejudice and violate his rights under articles 17, 23 (1) and 24 (1) of the Covenant.

4.9 The State party, while acknowledging that the relationship between a mother and her son can constitute "family life" within the meaning of those articles, submits that it has not interfered with the right of the author or her son to the protection of their family pursuant to those articles. The State party has taken no steps to separate the members of the family. It did not prevent the author's son from accompanying his mother to Nigeria, where the family could continue to live together. Indeed, the decision as to whether the author's son would accompany her to Nigeria or remain in Canada was purely the author's decision, not the result of the actions of Canada, and therefore does not amount to "interference".

4.10 As the author has indeed decided to take her son with her to Nigeria, no family separation has occurred. There is no evidence that they would be unable to live in Nigeria as a family, and the domestic decision makers found that there were no personal risks of persecution or death for them in Nigeria. Furthermore, the author has not disclosed that she had any other family besides her son in Canada.

4.11 In the alternative, if the Committee were to consider that the removal of the author, who chose to take her son with her, constituted interference in the life of the family, the State party submits that the author's removal was justified, being lawful and reasonable.

4.12 The State party refers to the Committee's jurisprudence and to its general comments No. 15 (1986) on the position of aliens under the Covenant, No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, and No. 19 (1990) on protection of the family, the right to marriage and equality of the spouses. It notes that only in "extraordinary circumstances" will a State party be required to "demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness" for the purposes of articles 17 and 23 of the Covenant.⁵ Such extraordinary circumstances cannot be said to arise by virtue only of the fact that the

⁵ See communication No. 893/1999, *Sahid v. New Zealand*, Views adopted on 28 March 2003, para. 8.2.

person facing removal, such as the author, may have children born in the State that is seeking to remove him or her. It does not follow from one family member's entitlement to remain in Canada that other family members, nationals of another State, are also so entitled.⁶

4.13 The application of the Immigration and Refugee Protection Act in the author's circumstances was neither unlawful nor arbitrary. Rather, the decision makers at each level took into account all relevant considerations and afforded the author all of the procedural and substantive guarantees available. The decision to remove the author was lawful as it was reached in accordance with the provisions of the Act and its regulations. Canadian immigration laws, regulations and policies are compatible with the requirements of articles 17 and 23 (1) of the Covenant. In particular, section 25 (1) of the Act allows for an exemption from any criteria or obligation made under the Act or its regulations, based on humanitarian and compassionate grounds, including with regard to the obligation of a foreign national to apply for permanent residence in Canada overseas. Such considerations include the existence of family in Canada and the potential harm that would result if a member of the family were removed from Canada.

4.14 In the case of the author, humanitarian and compassionate grounds, which included family considerations both in Canada and Nigeria, were carefully taken into account during the proceedings before the immigration authorities, in particular in the context of the author's second humanitarian and compassionate application and judicial review application of the humanitarian and compassionate officer's decision.

4.15 The author came to Canada fully aware that she might be required to leave if her asylum claim was rejected. She arrived without family, but pregnant. Accordingly, the author cannot claim to ever have had any expectation of maintaining a family life in Canada. It will be recalled that the author entered Canada in 2004 as a refugee claimant.

4.16 The State party asks the Committee to consider the implications of the author alleging to Canada that she should not be removed because she faced a risk of persecution and death if she were returned to Nigeria, while not choosing to rely on those allegations of risk in her communication.

4.17 In 2005, the author's refugee protection claim was denied because she failed to prove her identity and was found not to be a credible witness. Her ability to stay in Canada was prolonged only by the remedies afforded to her under Canadian law. At no time did the author obtain any legal status in Canada that could have led her to expect that she could remain in Canada. On the contrary, the author was from the outset the subject of removal orders. These considerations, together with the relatively short time spent by the author in Canada, further support the conclusion that her removal would not constitute arbitrary or unlawful interference with her or her son's family or home life.

4.18 Therefore, the State party requests that the Committee conclude that the author's allegations under articles 17 and 23 (1) of the Covenant are wholly without merit.

Measures of protection for minor children

4.19 With respect to the author's argument under article 24 (1) of the Covenant that her removal, and the fact that her son was obliged to accompany her to Nigeria, has denied him such measures of protection as are required by his status as a minor, the State party submits, first, that the author's son was not removed by Canada. A.A. left Canada as a result of his mother's decision to take him with her when she departed for Nigeria. Canada recognizes

⁶ See communications No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.3; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7; and *Sahid v. New Zealand*, para. 8.2.

that the author and her son are a family unit, and never sought to separate or destroy that unit. In the present case, the author was always free to take her son with her to Nigeria, where they could both live together, which she ultimately did. Doing so did not affect her son's Canadian citizenship. If, however, the author had elected for her son to remain in Canada, that would have been a parental decision that was not required by the State. Consequently, the State party considers the author's allegations to be unsubstantiated.

4.20 In the alternative, to the extent that the author alleges that Canada would violate or has violated article 24 (1) of the Covenant because, as she alleges, her son would have poorer educational and health-care prospects in Nigeria, Canada submits that these allegations have not been sufficiently established. The State party submits that its obligations under article 24 (1) do not extend to potential or hypothetical violations of article 24 (1) by another State.

4.21 In the further alternative, and referring to paragraph 3 of general comment 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the State party submits that article 24 (1) does not have extraterritorial reach. This provision does not prohibit a State from removing a child to another State that does not have the same level of education or health care or that may not fully adhere to its obligations under that article.

4.22 The Immigration and Refugee Protection Act expressly requires, in the context of applications for permanent residence on humanitarian and compassionate grounds, that decisions be made taking into account the best interests of a child who is directly affected. This general approach is in place to implement the obligations of Canada under article 24 (1). However, although the domestic decision maker ought to consider this principle as an important factor and give it substantial weight, that is not to say that the best interests of the child are the only or the decisive consideration or that there will not be other reasons for denying a humanitarian and compassionate application even when the child's interests are given due consideration.

4.23 In the author's specific case, the humanitarian and compassionate officer considered carefully the best interests of her son, including allegations and evidence relating to A.A.'s health and education. The officer determined that the author had failed to establish that A.A. suffers from a serious medical condition. In that regard, the Officer noted that A.A.'s heart condition had been assessed by a physician to be benign, that his right knee had already been successfully operated on and that the need for an operation to the left knee had not been established as being probable, but was merely speculative. The Officer also determined that the author had not shown that the required medication for the treatment of ADHD was prohibitively expensive or unavailable in Nigeria. The Officer also considered the degree of the author's establishment and integration in Canada and the impact on her son of her departure to Nigeria, should he remain in Canada. However, the Officer concluded the information pertaining to her establishment in Canada, "while positive, does not show that the applicant's departure from Canada would cause a disproportionate hardship for her or anyone else". All of those conclusions were confirmed by the Federal Court of Canada on judicial review as being reasonable.

4.24 With respect to A.A.'s ADHD, the State party submits that the author has not established that her son's condition is serious. In addition, the fact that a proportion of the Nigerian population may not be receiving the best health care and education services available in other parts of the world does not in and of itself demonstrate that her son's rights in particular under article 24 (1) would be violated. The author did not establish that she had even attempted to seek such services for her son in Nigeria. Furthermore, the

evidence available shows that children with learning disabilities have access to special needs education in Nigeria.⁷

4.25 The State party recalls that the Committee is not an appellate body competent to re-evaluate findings of fact or to review the application of domestic legislation, unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice.⁸ The material submitted by the author does not support a finding that the Canadian decisions, including the humanitarian and compassionate decisions, suffered from any such defects.

4.26 The State party recalls that the author's credibility was consistently called into question by all of the Canadian authorities, submits that it is not within the scope of review by the Committee to re-evaluate findings of credibility made by competent domestic tribunals, and stresses that the author's lack of credibility colours the entirety of the present communication, including her allegations regarding articles 17, 23 and 24 (1) of the Covenant.

Author's comments on the State party's observations

5.1 On 23 April 2012, the author submitted her comments on the State's party's observations. The author challenges the State party's allegation that, by failing to apply for judicial review of the decisions of the Refugee Protection Division and the pre-removal risk assessment, she has not exhausted domestic remedies. The author reiterates that the grounds raised both before the Division and in the risk assessment application are not being invoked in the present complaint before the Committee. The State party does not contest that the author exhausted the domestic remedies available regarding the only decision that dealt with the substance of the present complaint, namely the second humanitarian and compassionate application, dated 10 October 2007. The author subsequently applied for judicial review of that decision.

5.2 In the alternative, should the Committee decide that the author was, in fact, under an obligation to exhaust domestic remedies regarding her Refugee Protection Division and pre-removal risk assessment decisions, the author submits that the aspects of the present complaint pertaining to the alleged violation of her son's rights should still be found admissible. The author's son was not a party to either the Division decision or the risk assessment decision.

5.3 The author notes that she is not relying on provisions of the Convention on the Rights of the Child directly, but only for assistance in interpreting article 24 of the Covenant.

5.4 The author rejects the State party's contention that there has been no interference with her right to family life.⁹ She claims that she was placed in the untenable situation of having to choose between interference with family life by family separation, if she chose to leave her son behind in Canada with no one to care for him, and violations of her son's right to protection, if he accompanied her to Nigeria. Faced with that nearly impossible choice, the author chose to take her son with her to Nigeria. The author therefore contends

⁷ The State party cites a number of schools in Lagos that are reportedly sympathetic towards children with special needs.

⁸ See communications No. 215/1986, *G.A. van Meurs v. Netherlands*, Views adopted on 13 July 1990, para. 7.1; No. 485/1991, *V.B. v. Trinidad and Tobago*, Views adopted on 26 July 1993, para. 5.2; No. 949/2000, *Keshavjee v. Canada*, Views adopted on 9 November 2000, para. 4.3; No. 934/2000, *G. v. Canada*, Views adopted on 8 August 2000, paras. 4.2 and 4.3; and No. 761/1997, *Singh v. Canada*, Views adopted on 14 August 1997, para. 4.2.

⁹ The author refers to *Madafferi v. Australia*, para. 9.8.

that the interference has entailed a violation of her and her son's rights under articles 17 and 23 (1) of the Covenant.

5.5 Concerning article 24 (1), the author submits that States parties are responsible for violations of rights when such violations are reasonably foreseeable consequences of the State party's actions. In *Kaba v. Canada*,¹⁰ for example, the Committee held that Canada would be responsible for the violation of the child's rights under both articles 7 and 24 (1) of the Covenant if it returned the author of that communication to Guinea.

5.6 The author reiterates that the decision resulting from her humanitarian and compassionate application failed to take into account the best interests of her child. In that decision, the test applied, that of "disproportionate hardship" (that is, whether the child would not suffer too much) if obliged to follow his mother to Nigeria, was the wrong one. The test that should have been applied was whether it was in, or against, the child's best interests to go to Nigeria. The author therefore submits that the officer's approach was at odds with the State party's obligation under article 24 (1) of the Covenant to treat a child's best interests as a "primary consideration" in all decisions affecting a child. If a decision maker fails to even consider where a child's best interests lie, the best interests cannot possibly be a primary consideration in his or her decision. Such a decision is the epitome of arbitrariness in that it fails to identify and consider a factor that is supposed to be a primary consideration.

5.7 With regard to the State party's assertion that the author has not established that her son would be deprived of special education services or medication for his ADHD, the author notes that the schools listed by the State party are all private schools. This is consistent with the author's contention that the woefully inadequate public school system in Nigeria cannot possibly provide the special education services that her son requires. The author made inquiries regarding all eight institutions listed by the State party, not all of which are in fact schools. Seven of them replied. All are clearly private institutions, given their high fees.

5.8 The author submits that since her return to Nigeria, she has not been able to earn even the average Nigerian income, despite actively seeking employment and having work experience in the Canadian aerospace industry. She has been subsisting on assistance from friends. Her total monthly expenses, for herself and her son, come to 20,000 naira (US\$ 131) a month.

5.9 The author indicates that her son's ADHD medication, Strattera, is not available in Nigeria either through the public health system or privately. A pharmacist she consulted has not been able to find anything similar in Nigeria. As a consequence, her son's symptoms have worsened.

5.10 The author's son now attends a public school, which is unable to provide him with any specialized services. This, along with the fact that he is being deprived of his ADHD medication, is combining to make it impossible for him to function properly in the classroom.¹¹

5.11 The author's son is also suffering pain in his left knee, and his right knee, on which he had surgery in Canada, is also giving him problems again, possibly owing to the fact that he is not walking properly as a result of the pain he is experiencing in his left knee. The author has taken him to two clinics but was told that they cannot do anything for him without magnetic resonance imaging of both his knees, which will cost a minimum of 20,000 naira, approximately her total monthly budget.

¹⁰ See communication No. 1465/2006, Views adopted on 25 March 2010.

¹¹ The author attaches a report from the school describing her son's difficulties in the classroom, such as his inability to sit still and stay focused, to read, to write and to assimilate learning.

5.12 The author recalls that, although the humanitarian and compassionate officer dismissed the need for medical care for her son's left knee as "speculative", she had provided evidence in her application that the congenital malformation from which her son suffers, and for which he had surgery on his right knee, often affects both knees, and that his left knee was already causing him pain at the time of the humanitarian and compassionate application.

5.13 According to the author, the present situation, in which the author's son is being deprived of specialized education services, ADHD medication and medical care for his knee problem, was entirely foreseeable at the time of the humanitarian and compassionate decision. The author had provided evidence in her application of the dire state of the Nigerian public school and health-care systems, of the fact that that even essential medications are often unavailable, that private services are expensive and that women in Nigeria suffer serious discrimination in the workplace such that she would be highly unlikely to be able to afford to pay for services privately.

5.14 Although the State party contends that the author "has not established that her son's condition is serious", the author submits that the lack of attention to at least two medical conditions, his ADHD and his knee problem, and the consequent deprivation of education, owing to the combination of untreated ADHD and lack of access to special education services, are indeed having a serious impact on the author's son's life and future prospects.

5.15 The author thus reiterates that the State party has violated her and her son's rights under articles 17 (1), 23 (1) and 24 (1) of the Covenant. She requests that the State party immediately provide them with an effective remedy in the form of a temporary residence permit under section 24 (1) of the Immigration and Refugee Protection Act, allowing her to return to Canada and reside there with her son, and grant her permanent residence on humanitarian and compassionate grounds in an expeditious manner following her return to Canada.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

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

6.3 The Committee notes that the State party has objected to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol. The State party submitted, in particular, that the author had failed to seek judicial review of the 20 April 2005 decision of the Refugee Protection Division on her refugee protection claim, and of the pre-removal risk assessment decision of 28 July 2010.

6.4 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.¹² The Committee observes, in the present case, that the author specifically excluded from her communication before the Committee allegations

¹² See communications No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; and No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5.

pertaining to the risk of persecution in Nigeria, which were the object of the Refugee Protection Division and pre-removal risk assessment decisions, which she acknowledges she has not appealed. Instead, the author's claims before the Committee relate to the right to family life and the best interests of her son, to the extent that he is affected by his mother's forcible return to Nigeria.

6.5 The Committee notes that the author submitted two humanitarian and compassionate applications, on 25 August 2005 and 10 October 2007, in which she claimed that her son would suffer disproportionate hardship if she were removed to Nigeria, or if she took him with her to Nigeria. The Committee observes that the author applied for leave to apply for judicial review of the second humanitarian and compassionate decision, which was granted on 3 March 2011. However, the Federal Court dismissed the application for judicial review on 30 June 2011, and determined that the humanitarian and compassionate decision was reasonable.

6.6 In such circumstances, the Committee considers that it is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.7 The Committee takes note of the State party's argument that the author has not sufficiently substantiated, for the purposes of admissibility, any of her allegations under articles 17, 23 and 24 of the Covenant. The Committee, however, considers that for the purposes of admissibility, the author has sufficiently substantiated and documented such claims, which present cross-cutting and overlapping issues, and should be examined together at the merits stage.¹³ The Committee therefore finds this part of the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

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

7.2 The Committee notes the author's allegation that, given the state of education and health care in Nigeria, her son's physical and mental health would be severely compromised, in violation of his rights under article 24 of the Covenant, should he leave with her for Nigeria. The author has argued that if her son, a Canadian citizen, were to remain in Canada, he would be separated from his mother, his sole caregiver, such that his rights under articles 17, 23 (1) and 24 (1) of the Covenant would be violated.

7.3 Additionally, the author alleges that her own rights under articles 17 and 23 (1) would be infringed if she were removed to Nigeria.

7.4 With respect to the claim of violation of articles 17 and 23 (1), the Committee notes the State party's argument that the decision about whether the author's son would accompany her to Nigeria or remain in Canada, occasioning in the latter case a physical separation, would be purely an issue for the family and would not be compelled by the State's actions. The Committee recalls its case law, according to which there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain in the territory of a State party does not

¹³ See communications No. 1875/2009, *M.C.G. v. Australia*, Views adopted on 26 March 2015, para. 10.8; and *Winata v. Australia*, para. 6.4.

necessarily mean that requiring other members of the family to leave involves such interference.¹⁴

7.5 In the present case, the Committee considers that to issue a deportation order against the single mother of a 7-year-old child who is a citizen of the State party constitutes interference with the family,¹⁵ within the meaning of article 17 of the Covenant. The Committee has to determine whether such interference with the author's family life is arbitrary or unlawful pursuant to article 17 (1) of the Covenant, and thus whether insufficient protection has been afforded to her family by the State in accordance with article 23 (1).

7.6 The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law,¹⁶ as well as elements of reasonableness, necessity and proportionality.¹⁷ The Committee also recalls that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.¹⁸

7.7 In the present case, the Committee observes that the author's removal pursued a legitimate objective, which is the enforcement of its immigration law. In addition, the State party explained that the reason for removing the author was the denial of her refugee protection claim, and that the latter had no legal status that could have led her to expect that she could remain in Canada, and that she was therefore obliged to apply for permanent residence from outside the country.

7.8 The Committee notes that the author's son, A.A., was born in Canada in 2004, and left the country for Nigeria with his mother at the age of seven. A.A. suffers from several health conditions, including a heart murmur and a congenital malformation of the meniscus, for which he underwent surgery in Canada. Medical reports from his paediatric orthopaedic surgeon indicated that this problem could also affect his left knee, as it is often bilateral, and that the condition could result in the need for one or several arthroscopic surgeries in the future. The Committee observes that the author's son suffers from ADHD, for which he has been prescribed daily medication, and for which a multidisciplinary intervention plan was developed in his school in Canada, involving special education professionals.

7.9 The Committee takes note of the State party's argument that the child's heart condition was benign, and that the need to operate on his left knee in the future was speculative. The State party also considered that the author had not made specific efforts to seek out adequate medical and education services that might be available to her child in Nigeria.

7.10 The Committee recalls the principle that in all decisions affecting a child, the child's best interests shall be a primary consideration. The Committee considers that the State party failed to give primary consideration to the best interests of the author's child in the present case, and that, as a result, its interference with the author's family life and the ensuing

¹⁴ See, for example, communications No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009, para. 8.1; *Winata v. Australia*, para. 7.1; *Madafferi v. Australia*, para. 9.7; and No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.5.

¹⁵ See *Madafferi v. Australia*, para. 9.8

¹⁶ See, inter alia, communication No. 2009/2010, *Ilyasov v. Kazakhstan*, Views adopted on 23 July 2014, para. 7.4.

¹⁷ See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 12.

¹⁸ See *Madafferi v. Australia*, para. 9.8.

insufficient protection afforded to her family generated excessive hardship to the author and her son. The issuance of a removal order against the author faced the author with the choice of leaving her 7-year-old behind in Canada, or exposing him to a lack of the medical and educational support on which he was dependent. No information has been provided to the Committee to indicate that the child had any alternative adult support network in Canada. It was thus foreseeable that the author would take her son back to Nigeria with her, with the consequence that he would be deprived of the socio-educational support he needed. Given the young age and special needs of the author's son, both alternatives confronting the family — the son remaining alone in Canada or returning with the author to Nigeria — could not have been deemed to be in his best interests. Still, the State party has not adequately explained why its legitimate objective in upholding its immigration policy, including in requiring the author to apply for a permanent resident status from outside Canada, should have outweighed the best interests of the author's child, nor how such an objective could justify the degree of hardship that confronted the family as a result of the decision to remove the author. In the light of all the circumstances of the present case, the Committee considers that the removal order issued against the author constituted disproportionate interference with the family life of both the author and her son, which cannot be justified in the light of the reasons invoked by the State party to remove the author to Nigeria.

7.11 The Committee concludes that the author's removal resulted in arbitrary interference with the right to family life, in breach of article 17 (1), read alone and in conjunction with article 23 (1) of the Covenant, in respect to the author and her son.

7.12 Concerning the claim under article 24, the Committee reiterates that the principle of the best interests of the child forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24 (1) of the Covenant.¹⁹ In the light of its conclusions under articles 17 and 23 (1), the Committee considers that the removal order against the author has violated article 24 owing to a failure to provide A.A. with the necessary measures owed to him as a child by the State party.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's deportation to Nigeria violated her rights under article 17 read alone and in conjunction with article 23 (1) of the Covenant, in respect to the author and her son, and additionally, article 24 (1), in relation to A.A.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with an effective re-evaluation of her claims, based on an assessment of the best interests of her child, including his health and educational needs, and to provide her with adequate compensation. The State party is also under an obligation to avoid similar violations in the future.

10. 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 when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its

¹⁹ See *Bakhtiyari v. Australia*, para. 9.7.

Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.
