



International Covenant on Civil and Political Rights

Distr.: Restricted*
21 May 2010
English
Original: French

Human Rights Committee

Ninety-eighth session

8–26 March 2010

Views

Communication No. 1465/2006

<i>Submitted by:</i>	Ms. Diene Kaba (represented by counsel, Ms. Johanne Doyon, later Ms. Valérie Jolicoeur)
<i>Alleged victims:</i>	Ms. Diene Kaba and Fatoumata Kaba, her minor daughter
<i>State party:</i>	Canada
<i>Date of communication:</i>	7 April 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 May 2006 (not issued in document form) CCPR/C/92/D/1465/2006 – decision on admissibility of 1 April 2008
<i>Date of adoption of Views:</i>	25 March 2010
<i>Subject matter:</i>	Removal of the author and her daughter to Guinea
<i>Substantive issues:</i>	Risk of the author's daughter being subjected to excision if removed to Guinea
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate allegations
<i>Articles of the Covenant:</i>	7; 9, paragraph 1; 13; 14; 18, paragraph 1; 24, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b).

* Made public by decision of the Human Rights Committee.

On 25 March 2010, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 1465/2006.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Ninety-eighth session)

concerning

Communication No. 1465/2006*

<i>Submitted by:</i>	Ms. Diene Kaba (represented by counsel, Ms. Johanne Doyon and Ms. Valérie Jolicoeur)
<i>Alleged victims:</i>	Ms. Diene Kaba and Fatoumata Kaba, her minor daughter
<i>State party:</i>	Canada
<i>Date of communication:</i>	7 April 2006 (initial submission)
<i>Decision on admissibility:</i>	1 April 2008

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2010,

Having concluded its consideration of communication No. 1465/2006 submitted to the Human Rights Committee by Ms. Diene Kaba under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms. Diene Kaba, born on 27 March 1976 in Monrovia, Liberia, a national of Guinea, who has submitted the communication on her behalf and on that of her daughter, Fatoumata Kaba, born on 2 December 1994 in Guinea. She states that her removal to Guinea with her daughter would violate their rights under articles 7; 9, paragraph 1; 13; 14; 18, paragraph 1; and 24, paragraph 1, of the Covenant.

* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text of the individual opinions of Committee members Mr. Abdelfattah Amor and Mr. Krister Thelin are appended to the present document.

They are represented by counsel, Ms. Johanne Doyon and later Ms. Valérie Jolicoeur. The Optional Protocol entered into force for the State party on 19 May 1976.

1.2 On 27 July 2007, the Committee, pursuant to rule 92 of its rules of procedure, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to remove the author and her daughter to Guinea while the communication was under consideration by the Committee.

The facts as submitted by the author

2.1 On 20 February 2001, when Fatoumata was 6 years old, Mr. Karou Kaba, the author's husband, sent for two *exciseuses* (excision practitioners) without her knowledge to abduct Fatoumata after school in order to excise her.¹ When the author came to pick up her daughter, she was informed that two old ladies had come to take Fatoumata away, and she hurried home. She was able to prevent the excision just as her husband returned and, when he saw her, he beat her. Fatoumata sustained a scalp wound in the commotion. Mother and daughter managed to escape, and left Guinea on 25 May 2001. They went to Canada and claimed refugee status on grounds of membership of a particular social group as single women and victims of domestic violence, and in view of the serious risk of Fatoumata's excision.

2.2 On 17 September 2002, the Immigration and Refugee Board of Canada (IRB) refused to grant refugee status to the author and her daughter on grounds of lack of credibility. On or around 3 March 2003, the author applied for an exemption to the permanent resident visa requirement on the basis of humanitarian and compassionate considerations (H&C), and on or around 22 November 2005, she applied for a pre-removal risk assessment (PRRA). The evidence submitted in support of these applications includes several documents confirming the risk of excision in Guinea, a medical certificate attesting to the fact that Fatoumata had not been excised and abundant evidence of the practice of excision in Guinea. A letter from the author's uncle, Mr. Kabine, confirmed that her husband was still angry and threatened to harm her if he saw her again. The author's uncle also confirmed that Mr. Kaba had beaten her in the past. The author also submitted a letter from her husband in which he threatened her and insisted that Fatoumata should become a "true Muslim", i.e., undergo excision. The author's husband accused her of behaving like a white person and threatened to kill her if she did not return his daughter to him.

2.3 Alongside her problems with her husband, the author has expressed fear of persecution in relation to subsequent events experienced by her family in Guinea. These include the arrest of several members of the Kaba family following a failed coup against the President in January 2005. Since then, the family has been under heightened surveillance and subjected to unannounced raids on their homes, and five family members have been arrested. Another uncle was abducted one night in April 2005 and is currently detained; the conditions in which he is being held are unknown. According to testimony, when a family member was being questioned in April 2005, the authorities accused the author and one of her brothers, who is also currently outside the country, of financing a coup to overthrow the President of Guinea. All of this is new evidence that was not considered during the application for refugee status in 2002.

2.4 The PRRA and H&C applications were rejected on 16 December 2005 and the date of removal was set. The author filed an application for leave and judicial review of the PRRA and H&C decisions with the Federal Court. She also filed an appeal for a stay of removal with the Federal Court, which was denied on 27 February 2006.

¹ The Committee considers that the term "excision" refers to a form of female genital mutilation.

2.5 On 19 May 2006, counsel stated that the author had obtained a divorce on 12 January 2006 following proceedings instituted in July 2005.² She was represented at the hearing by her brother, Al Hassane Kaba, who had been authorized to consent to the divorce and ask for sole custody of Fatoumata. The divorce decree contains no reference to custody of the child; according to counsel, section 359 of the Civil Code of Guinea applies in this instance: custody of a child aged over 7 years is automatically granted to the father.³ The author's brother states that Mr. Kaba has obtained a court ruling ordering him and his mother to do everything possible to bring Fatoumata back to her father, on pain of severe penalties. In his affidavit, the author's brother further warns that Mr. Kaba is still determined to have Fatoumata undergo excision and has announced his intention to give her in marriage to his nephew. On her return to Guinea, Fatoumata would thus face certain excision and a forced marriage by her father, who would have complete parental authority over her. No protection would thus be provided by the State of Guinea to the authors. The author has also submitted testimony from her uncle, Mr. Bangaly Kaba, dated 13 March 2006, reiterating the serious threats faced by the author and her daughter.

The complaint

3.1 The author asserts that articles 7; 9, paragraph 1; 13; 14; 18, paragraph 1; and 24, paragraph 1, of the Covenant have been violated by Canada. However, she does not link each of these articles with specific allegations.

3.2 Several substantial errors are claimed to have been committed in the decisions rendered, concerning in particular (a) the risk of excision and failure to assess the best interests of the child; (b) disregard of the evidence and failure to assess the author's fear in regard to her particular situation as a single woman and a victim of spousal abuse; (c) violation of the principles of natural justice, the right to a hearing, adverse finding of credibility and arbitrary rejection of new evidence; and (d) failure to consider a new aspect of the fear of return, i.e., fear as a member of the Kaba family.

3.3 Firstly, concerning the failure to assess Fatoumata's best interests, the main problem is said to have occurred during the PRRA and H&C procedures. The file contained medical evidence showing that Fatoumata had not undergone excision and letters and sworn statements by the author confirming the risks of excision in Guinea. The documentary evidence provided showed that around 99 per cent of girls in Guinea are affected by excision.⁴ Although Guinea has enacted legislation addressing the issue, it is not applied in practice and hence protection by the State is non-existent. The PRRA officer admitted that the existence of excision in Guinea is not at issue in the present case. The Federal Court decision refers neither to the issue of excision nor to that of the best interests of the child – yet the stay of removal was based on these considerations. This error points to violation of the articles of the Covenant and places Fatoumata's physical integrity, mental health, security, development and education at risk. Fatoumata's removal also runs counter to the Convention on the Rights of the Child.⁵ It is in Fatoumata's best interests not to return to an unhealthy environment in which her polygamous father would continue to assault and

² A copy of the decision of the Court of Appeal of Conakry was submitted. The decision states that Mr. and Ms. Kaba "divorced by mutual consent on 12 January 2006".

³ Counsel also refers to the report presented by Guinea to the Committee on the Rights of the Child (CRC/C/3/Add.48, para. 77).

⁴ Counsel refers to a 2005 report by the United Nations Children's Fund (UNICEF) (entitled *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*) which does not indicate any change in the prevalence rate over the last decade.

⁵ Counsel also refers to Canadian case law, the Youth Protection Act and the Immigration and Refugee Protection Act.

attack her mother as in the past. In this case, however, the PRRA officer and the Federal Court failed to display the necessary attentiveness and sensitivity to the child's interests in remaining in Canada, where she is integrated and safe from excision. Counsel also refers to several decisions by Canadian bodies in which applications for refugee status were accepted solely on the basis of the risk of excision in Guinea, which is equivalent to persecution, and in which women were recognized as a particular social group.

3.4 Secondly, the PRRA and H&C decisions neglected to consider the author's particularly vulnerable situation as a female victim of spousal abuse and a single woman. It is the combined effect of being a female victim of spousal abuse, the absence of protection by the State of Guinea and the lack of family support in Guinea because of her refusal to allow her daughter to be excised that has led to her well-founded fear of persecution. The author refused to bow to tradition and took a stand against her husband and in-laws concerning Fatoumata's excision. The IRB decision did not challenge the fact that she was a victim of spousal abuse. In fact, the court had questioned the validity of a medical certificate referring to Fatoumata,⁶ but did not explicitly challenge the medical certificates or photographs of the author confirming her injuries and medical examinations carried out after her beating by her husband.

3.5 Moreover, neither the PRRA officer nor the Federal Court considered the application from the standpoint of women as a particular social group. It is alleged that both the PRRA officer and the IRB member who denied the refugee status application erred at law when they concluded that the author needed to prove that she and her daughter were personally targeted, disregarding the well-founded nature of their fear in view of the risks faced by members of a particular social group, i.e. women.

3.6 Thirdly, concerning violation of the principles of natural justice, the H&C and PRRA decisions cannot be held valid given that these principles have been infringed. During the PRRA and H&C procedures, the officer cast doubt on the author's credibility and rejected the new evidence, questioning her behaviour in delaying, as he saw it, her departure from Guinea with her daughter. Yet the new documents were crucial in that they corroborated several of the allegations: the author's husband's demand that her daughter undergo excision and confirmation that the author faced serious and even fatal reprisals if he saw her again; and her uncle's confirmation that her husband had threatened and beaten her and was determined to have his daughter excised. The author was given no opportunity to be heard, and the officer did not attribute any evidentiary value to key evidence, to the detriment of the right to a hearing. Furthermore, the officer questioned the credibility of the author's entire account without interviewing her so as to clear up alleged contradictions or inconsistencies. Moreover, the Federal Court decision makes no mention of the new evidence. The authors therefore allege that the PRRA and H&C decisions are fundamentally flawed insofar as no interview or hearing was conducted to resolve issues of fact and credibility.⁷

3.7 Fourthly, concerning the arbitrary rejection of new evidence and failure to consider a new aspect of the fear of return, another crucial error was committed in the PRRA and H&C decisions. The letter from the author's sister provided new evidence of risk, i.e., fear

⁶ See paragraph 4.5. Counsel refers to the correction made by the physician Bernard Moulonda on 25 January 2006, which is said to dispel any doubt in this regard. Counsel points out that this evidence was available to the Federal Court, but was not taken into consideration in its decision to deny the authors' application for a stay of removal.

⁷ Counsel refers to article 7 of the Canadian Charter of Rights and Freedoms, section 167 of the Immigration and Refugee Protection Regulations and section 113 (b) of the Immigration and Refugee Protection Act.

of persecution as a member of the Kaba family and as a person accused by the authorities of having financed a coup against the President. This evidence was not available at the time of the IRB hearing, and the PRRA officer rejected it. Counsel reiterates that it is not fair that the officer should reject that evidence of risk without even giving the author an opportunity to argue her case in an interview.

3.8 Enforcement of the order to remove the author and her daughter to Guinea would cause them irreparable harm, adversely affecting the security, health, physical integrity and life of the author, who faces reprisals by her husband, without any possibility of protection by the State in Guinea. Enforcement of the removal order would endanger Fatoumata's security, health, development, physical and mental integrity, life and best interests.

State party's observations

4.1 On 24 January 2007, the State party submitted that the communication is inadmissible on grounds of both failure to exhaust domestic remedies and lack of sufficient substantiation of the author's allegations.

4.2 The State party submits that the communication is inadmissible for failure to exhaust domestic remedies. The "new" evidence should have been submitted under a new PRRA application by the author,⁸ a remedy which is still available to her. The author could also apply to the Federal Court for a stay of the enforcement of the removal order pending the result of the PRRA.

4.3 Concerning the minimum justification for the communication, the author's allegations are manifestly not credible, given the numerous contradictions and implausibilities surrounding key aspects of her testimony. The evidence submitted fails to corroborate her allegations and is not credible. The complaint reveals no substantial grounds for believing that the author and her daughter risk being subjected to any treatment prohibited by article 7 of the Covenant on their return to Guinea. The allegations of violation of the other articles of the Covenant are inadmissible *ratione materiae* or are not sufficiently substantiated for the purposes of admissibility.

4.4 Alternatively, and for the same reasons, the communication should be rejected on its merits, according to the State party. The author's allegations have already been carefully examined by the Canadian authorities under the refugee determination procedure, the PRRA and H&C applications and the application for the stay of a removal order before the Federal Court. The allegations and evidence submitted under these procedures are essentially the same as those currently before the Committee. Having examined those allegations and the evidence and having heard the author's oral submissions, the Canadian authorities concluded that she lacked credibility and that she and her daughter did not risk persecution or unlawful treatment on their return to Guinea. In particular, the Canadian authorities concluded that there was no credible evidence giving reason to conclude that Fatoumata faced a personal risk of forced excision in Guinea.

4.5 The State party refers to the main inconsistencies and contradictions noted by the Canadian authorities. Firstly, it notes the absence of credible evidence of the alleged attempt at forced excision on 20 February 2001. The IRB observed that the medical certificate dated 20 February 2001 completely contradicts the author's account, as it states that Fatoumata received her injuries three weeks before the alleged attempt at forced excision.⁹ When she was confronted with this major contradiction during the IRB hearing,

⁸ The State party refers to communication No. 1302/2004, *Dawood Khan v. Canada*, decision on inadmissibility of 25 July 2006, para. 5.5.

⁹ The medical certificate reads in part as follows: "I, the undersigned, certify that I examined today

the author did not offer any reply or explanation. Nor did she attempt to explain this contradiction in her PRRA application in November 2005. She now claims before the Committee that the physician had been mistaken in stating that Fatoumata had suffered her injuries three weeks before the medical examination. She submits as evidence a further medical certificate dated 25 January 2006 and signed by the same Gabonese doctor. It reads in part as follows: "In fact it was an injury sustained on the same day, i.e., 20 February 2001, the date of the medical examination, and not three weeks earlier. The mistake in the date was due to confusion with another young girl I had seen in my practice some time before, with the same cranial injury." The State party submits that this new evidence is not credible and that the doctor's explanation is implausible. Firstly, it is not merely a matter of the wrong date, as the diagnosis of 20 February 2001 reports a condition in remission and does not describe clearly a patient who has just been injured.¹⁰ Secondly, it is unlikely that the author of the medical certificate would remember his mistake and the reason for it nearly five years later. The correction fails to explain why the author's prescription is dated 11 February 2001, whereas she claims she received her injuries at the same time as her daughter, i.e., on 20 February 2001.

4.6 The State party further points out that the author went to France without her daughter on 22 February 2001. She was in possession of a passport and a Schengen visa valid until 10 March 2001. Instead of escaping immediately with her daughter, the author made a one-week trip to France without her from 22 February to 1 March 2001, the date of her return to Gabon. It was not until three months later that she left Gabon with her daughter. In her refugee status application the author stated that the purpose of her trip to France was to obtain a visa for Canada. In fact, however, her Canadian visa was obtained in Libreville, Gabon, and there is no indication of any application for a Canadian visa in Paris in February 2001. When the IRB questioned her on the subject, the author argued that the trip to France was an opportunity to seek refuge there, without claiming to have availed herself of this option. She also testified that she did not want to leave France to return to Gabon, but that her daughter was still in Gabon. Notwithstanding the conclusions of the IRB, the author did not attempt to explain her trip to France in her PRRA application, or in her H&C application, or in her communication to the Committee. As for the delay between her return from France and the date on which she left Gabon with her daughter, 25 May 2001, the author said this was due to lack of money and her husband's temporary absence. Yet the trip to France suggests that her financial resources did not play a major role in that delay. Furthermore, by her own admission, the author was not a *pagne* (cotton wrap) vendor as stated in her refugee status application, but a receptionist at the Embassy of Guinea in Libreville, Gabon, during the period in question. When she applied for a visa to Canada in 2001, the author included a letter from the Embassy and her diplomatic identity card, which confirmed her employment there.

4.7 The Canadian authorities examined all the evidence and found that it did not corroborate her allegations. As to the medical certificate confirming that Fatoumata had not undergone excision, the PRRA officer did not consider it sufficient to prove the existence of the alleged risks. The PRRA officer also examined the three letters from the author's sister, uncle and husband and observed that the first letter made no mention of the risks of excision or of the alleged harassment of the author by her husband. The PRRA officer noted that the author had made no mention of political persecution or of her family's political activities in Guinea in her PRRA and H&C applications. The officer did not

Fatoumata Kaba, a child aged 6 years, who sustained a cranial injury during a fall, with loss of consciousness and scalp injuries three weeks ago."

¹⁰ The medical certificate reads in part as follows: "She has now recovered consciousness but the scalp still shows after-effects calling for specialist dermatological treatment of persistent alopecia ..."

consider the other two letters very convincing either. The uncle's letter provided little new information, and Mr. Kaba's letter did not provide a satisfactory explanation of the considerable implausibilities in her allegations. Moreover, the State party argues that the letter comes from Guinea, whereas Mr. Kaba and the author have lived in Gabon since 1992.

4.8 Concerning the new evidence submitted to the Committee on 19 May 2006, the State party maintains that the affidavit from Mr. Al Hassane A. Kaba is not credible for two main reasons. First, the source is not credible since the author of the affidavit is not who he claims to be. The author gave the names of her brothers and sisters in the H&C application and in the personal information form she submitted to support the asylum application. Neither the name nor the date of birth of Mr. Al Hassane A. Kaba appears on this list. Second, the contents of the affidavit are not credible. Sole custody was allegedly granted to Mr. Kaba on 12 January 2006, in other words on the same day the divorce decree was issued. It is unlikely that the Conakry court would have granted Mr. Kaba sole custody without mentioning it in the divorce decree, or in another written judgement of which the author would probably have received a copy. In the absence of credible evidence supporting her allegations, the State party maintains that the author did not establish that the father had been granted custody of Fatoumata. The State party also argues that she did not notify her divorce to the Canadian authorities, or to the Committee in her initial submission, and that she did not explain why she had not done so earlier.

4.9 Mr. Bangaly Kaba's letter does not come from a reliable and independent source and does not explain the major implausibilities and contradictions. Furthermore, it is dated 13 March 2006 but did not appear in the initial submission. Neither the affidavit nor the letter mentions the Kaba family's alleged political persecution in Guinea. The State party maintains that this "new" evidence should not be taken into consideration by the Committee, since it was never submitted to the Canadian authorities.

4.10 The incidence of excision has declined in recent years in Guinea, following various governmental and non-governmental initiatives to raise public awareness of the risks of excision and to retrain women who perform it.¹¹ The State party also maintains that whatever the incidence of excision in Guinea, it could not be concluded that Fatoumata risks being forced by her father to undergo excision upon her return to Guinea. In fact, the report of the United Nations Children's Fund (UNICEF) and the Demographic Health Survey¹² confirm that it is women, and more particularly mothers, who decide to have girls excised. Despite the fact that more than 7,000 Guinean women took part in the Survey, no case of excision carried out against the will of the mother or at the request of the father was reported. The same applies to the UNICEF report. Nor is there any mention of reprisals or threats such as those alleged in this case against mothers who refuse to subject their daughters to excision. According to the UNICEF report, shame, stigmatization and loss of social status are the consequences of refusing to follow this tradition. Thus, reportedly, mothers are sometimes subject to family pressure to have their daughters excised, but are not forced to do it by their husbands. The State party therefore maintains that the author would not be obliged to have her daughter excised, just as her mother did not have her excised. The author stated in her personal information form that she was "spared excision during my childhood, thanks to my mother, who opposed it". There is no evidence that Fatoumata might be forced to undergo excision despite her mother's opposition to this practice. The State party also argues that excision is prohibited in Guinea and perpetrators

¹¹ The State party refers to the report of the Special Rapporteur on violence against women of 27 February 2003, E/CN.4/2003/75/Add.1, para. 300. It also refers to a United States Department of State report published in 2006.

¹² Demographic and Health Survey, Guinea 2005, prepared by the National Statistics Office.

are liable to severe punishment, under Act No. L/2000/010/AN adopted on 10 July 2000.¹³ The author did not establish that she would be unable to obtain State protection if Mr. Kaba sought to have Fatoumata excised.

4.11 As far as the alleged violation of article 13 of the Covenant is concerned, the State party maintains that article 13 is not applicable in the present case because the author is not in Canada legally. In addition, there was no violation of article 13 since she presented oral testimony before the IRB, an independent and impartial administrative tribunal, in keeping with the law and the right to a fair hearing. The PRRA and H&C officer is not obliged to grant her a second hearing. The author had the chance to explain all the contradictions in her statement during the IRB hearing, and under article 13 of the Covenant there is no requirement that she be granted a second chance to explain the contradictions. Given that the PRRA officer took account of the contradictions noted by the IRB, and that the author failed to provide a satisfactory explanation of them, there is clearly no need for a further hearing.

4.12 Concerning the alleged violation of article 14, the latter does not apply to the determination of immigration status or the protection that may be granted by a State.¹⁴

4.13 With regard to article 7 of the Covenant, the State party maintains that the author has not sufficiently substantiated her allegations for the purposes of admissibility. The allegations are patently unfounded on account of the implausibilities and contradictions noted above. The allegations are not credible and show that the authors do not risk being subjected to treatment prohibited by the Covenant on their return to Guinea. The State party also maintains that the communication is inadmissible insofar as the allegations based on article 9, paragraph 1 and article 18, paragraph 1, of the Covenant are concerned, since those allegations have not been substantiated by any evidence. As to the allegation made with regard to article 24, paragraph 1, of the Covenant, it does not add to the allegations made under article 7 of the Covenant.

4.14 The State party emphasizes that the allegations have been examined by independent and impartial national bodies in keeping with the law and the right to a fair hearing. In the absence of proof of any clear error, abuse of procedure, bad faith, clear bias or serious procedural irregularities, the Committee should not substitute its findings of fact for those of the Canadian authorities. It is for the courts of States parties to review facts, the evidence and above all the issue of credibility in particular cases. The author has not shown that there was any irregularity in the decisions of the Canadian authorities that would justify action by the Committee with regard to their findings on the facts and credibility. In such circumstances, the Committee has repeatedly stated that it is not for the Committee to question the evaluation of facts and evidence by national authorities.

Author's comments

5.1 On 26 July 2007, the author asserted that she had exhausted all effective remedies. She had already applied for a PRRA and had subsequently filed an application for leave and judicial review of the PRRA decision with the Federal Court, which had refused the application on 25 September 2006. Consequently, the PRRA remedy is no longer available. Moreover, the administrative stay granted is no longer applicable, given the adverse decision of the Federal Court.¹⁵ It is further argued that subsequent PRRA applications do

¹³ The State party refers to the report submitted by Guinea to the Committee on the Elimination of Discrimination against Women (CEDAW/C/GIN/4-6 of 7 September 2005), pp. 52 and 60.

¹⁴ The State party refers to the jurisprudence of the European Court of Human Rights in relation to article 6 of the European Convention on Human Rights.

¹⁵ Counsel refers to a decision of the Committee against Torture stating that "this procedure would not

not have the effect of staying the removal order.¹⁶ Thus, the subsequent PRRA application can on no account be considered an effective remedy, since removal of the authors remains enforceable while the application is being assessed. Furthermore, the PRRA officer may take into consideration only “new” evidence meeting the requirements of section 113 of the Immigration and Refugee Protection Act,¹⁷ which, in this case, would mean new evidence not relating to excision or to the earlier problems. Accordingly, the risks already invoked by the author would not be re-evaluated in the light of the new evidence. This remedy, which does not allow for a full and fair analysis of the facts of the case and the evidence of the risks faced, cannot be considered effective.

5.2 In addition, contrary to the State party’s arguments, the author cannot apply to the Federal Court for a stay of enforcement of the removal order, pending the result of the PRRA, on the grounds of the risks faced. The Court may only intervene on certain grounds,¹⁸ and the author has already filed an application for a stay of removal with the Federal Court, which was denied on 27 February 2006.

5.3 As to the risk of excision faced by Fatoumata, the incidence of excision in Guinea has declined very little, as demonstrated by the Demographic Health Survey, Guinea 2005, prepared by the National Statistics Office: the proportion of women excised fell from 99 per cent in 1999 to 96 per cent in 2005. Moreover, according to the report, there is little hope of a drop in the rate in the future. Lastly, again according to the report, the incidence of excision among women of the Malinke ethnic group, to which the authors belong, is 97 per cent. According to the 2005 report by UNICEF,¹⁹ the incidence of excision among women aged 15–49 is 96 per cent. The 2001 report by the United States Department of State cites a rate of 99 per cent. Consequently, and given Mr. Kaba’s very serious threats in

afford the complainant an effective remedy” (communication No. 133/1999, *Falcon Ríos v. Canada*, Views adopted on 23 November 2004, para. 7.5).

¹⁶ See section 165 of the Immigration and Refugee Protection Regulations: “Subsequent application.

165. A person whose application for protection was rejected and who has remained in Canada since being given notification under section 160 may make another application. [...] It is understood that the application does not result in a stay of the removal order.”

¹⁷ “Consideration of an application for protection shall be as follows:

(a) An applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.”

¹⁸ Section 18.1 of the Federal Courts Act states that:

“(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. [...]

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal:

(a) Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) Failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) Erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) Based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) Acted, or failed to act, by reason of fraud or perjured evidence; or

(f) Acted in any other way that was contrary to law.”

¹⁹ UNICEF, *At a Glance: Guinea – Statistics*, 2005.

that regard, the risk of excision faced by Fatoumata is very real. Furthermore, the author would not be in a position to prevent her daughter's excision and protect her in the event that they returned to Guinea. The report by the United States Department of State²⁰ indicates that excision is often practised without parental consent, when girls are visiting relatives. Lastly, the documentation refers to the lack of protection by the State in Guinea, notwithstanding the fact that excision is illegal.

5.4 A recent case similar to the author's, involving a mother whose two-and-a-half-year-old daughter risked being excised in the event of her return to Guinea, has just been accepted on humanitarian and compassionate grounds (H&C). The Government of Canada, in approving the H&C application, recognized the real risks that excision entails and the need to refrain from removing a little girl who could be exposed to those risks.

5.5 With regard to the State party's other arguments, the author's allegations have not been given meaningful and thorough consideration. Concerning the IRB decision, the risks invoked were not properly analysed. The IRB did not consider the allegations of risk from the correct standpoint, since it failed to evaluate the author's application for refugee status on the basis of her social group, i.e., a single woman and victim of domestic violence who is opposing her daughter's excision and thereby challenging Guinean social customs. The IRB demanded evidence of personal risk, whereas Canadian case law clearly states that membership of a particular social group is sufficient for an application for refugee status to be approved. Moreover, the IRB made its finding that the author lacked credibility on the basis of minor elements, which constitutes a substantial error of law: the author's claim was subjected to a microscopic and painstaking analysis, contrary to judicial precedent.

5.6 In addition, not only are the PRRA and the H&C application not effective remedies,²¹ the decisions in question are based on identical errors to those committed by the IRB. The author's allegations of risk were not properly analysed, owing in particular to the disregard and arbitrary rejection of the new evidence and to the failure to allow the author to give oral testimony. Lastly, the risks of return should be evaluated in the light of the facts and evidence currently available, particularly the new evidence.

5.7 Regarding the minor discrepancies, the new medical certificate addresses the contradictions raised by the IRB. The document demonstrates that it was the attending physician, not the author, who was responsible for these contradictions. It cannot be argued, on the basis of the errors committed by the physician, that return poses no risks. On the contrary, the new evidence proves that Fatoumata has not undergone excision; that the father is determined to have his daughter excised; that excision is a common practice; and that there is a lack of protection by the State. The author consulted her attending physician on several occasions in the past. Her ex-husband regularly assaulted her, and she sought treatment from her doctor on 11 February 2001 for injuries inflicted by her husband. The prescription dated 11 February 2001 does not therefore contradict the author's allegation that she went to her doctor, yet again, on 20 February 2001; rather, it demonstrates the repeated violence to which she was subjected.

5.8 Concerning her trip to France without her daughter, the author has submitted an affidavit stating the reasons for the trip, filed with the immigration authorities on 15 November 2006. She explains that, in Guinea, excision is normally practised on girls aged over 6 or 7 years and that, when she learned of her husband's intentions, she opposed them. Her fears were increased by the attempted excision in February 2001. The author also

²⁰ United States Department of State, *Guinea: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, 2001.

²¹ Communication No. 133/1999, *Falcon Ríos v. Canada*, Decision adopted on 23 November 2004 by the Committee against Torture.

explains that, during her absence, her cousin was to take care of her daughter and ensure that the father did not have her excised. The author mentions that a friend had advised her to travel to France to facilitate her subsequent trip to Canada but, owing to difficulties with her travel documents, her daughter was unable to accompany the author to France as originally intended. The author further explains that her friend was to ensure that her daughter obtained the necessary documents so that she could join her as soon as possible. When the author learned that her daughter would be unable to join her, she immediately decided to return. She explains the reason for the delay between the issuance of the Canadian visa and her departure for Canada: she had to gather together the money needed for the journey and wait until her husband left the area on business before she could escape. Thus, it cannot be argued, on the basis of the trip to France, that return to Guinea poses no risk.

5.9 As to the trip to Guinea, this element is not relevant to the current evaluation of the risks of return for the authors. It was the author's friend who helped her complete her personal information form and who misstated a date, thus creating confusion at the IRB hearing. Lastly, regarding the financial resources for the trip to France, she received financial assistance from friends, which enabled her to travel at that time.

5.10 Regarding the political persecution of her family, the author explains that the persecution only began in April 2005 with the arrest of her uncle. She was informed of the arrest a few months before receiving the PRRA decision in December 2005. She had thus not succeeded, prior to the PRRA decision, in obtaining all the information and documentation necessary to substantiate these allegations, and accordingly she had not yet informed the immigration authorities of the persecution.

5.11 All of the evidence, taken together and properly evaluated, corroborates the allegations of risk. The affidavit by Mr. Al Hassane A. Kaba is credible: he describes himself as the author's brother but is in fact her cousin, that is, the son of her father's older brother. It is customary for Guineans to refer to their male cousins as brothers. The author did not include her cousin in the list of family members abroad because the list covered only brothers and sisters having the same father and/or the same mother. Concerning the lack of specific provisions on custody in the divorce decree, custody of minor children aged over 7 years is automatically granted to the father. Consequently, it is not unlikely that the decree would be silent on the matter. As to the author's alleged delay in informing the authorities of her divorce, she was waiting to receive official divorce papers before doing so. Lastly, the fact that some documents do not corroborate the risks invoked by the author can on no account be regarded as contradicting the author's allegations, which moreover are corroborated by other documents.

5.12 Regarding article 13 of the Covenant, it cannot be claimed that the author's status precludes her from submitting the reasons against her expulsion. Furthermore, every person has the right to a hearing by a competent, independent and impartial tribunal. The errors committed, and the evidence presented, confirm the risk of cruel, inhuman or degrading treatment or punishment. The right to protection set out in articles 7 and 9 of the Covenant is applicable. Concerning article 18 of the Covenant, the right to freedom of thought, conscience and religion cannot but include the right to refuse to subject one's minor daughter to any degrading and dangerous religious practice such as excision. Lastly, the right of the child to such measures of protection as are required by her status as a minor, provided for in article 24 of the Covenant, is applicable in this case.

Decision of the Committee on admissibility

6.1 On 1 April 2008, at its ninety-second session, the Committee considered the admissibility of the communication.

6.2 With regard to the complaint of a violation of articles 9 and 18 of the Covenant, the Committee considered that they were not sufficiently substantiated, and concluded that they were inadmissible under article 2 of the Optional Protocol.

6.3 With respect to the author's contention that she was not afforded an effective remedy to contest her and her daughter's expulsion, the Committee observed that the author did not substantiate how the Canadian authorities' decisions failed thoroughly and fairly to consider their claim that they would be at risk of violation of article 7 if returned to Guinea. In these circumstances, the Committee did not need to determine whether the proceedings relating to the authors' expulsion fell within the scope of application of article 13 (as a decision upon which an alien lawfully present is expelled) or article 14 (as a decision relating to civic rights and duties). This part of the communication was accordingly inadmissible under article 2 of the Optional Protocol.²²

6.4 The Committee recalled that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.²³ The Committee therefore needed to decide whether there were substantial grounds for believing that, as a necessary and foreseeable consequence of the removal of the author and her daughter to Guinea, there was a real risk that they would be subjected to treatment prohibited by article 7 of the Covenant.²⁴ In the present case, the Committee noted that the author's allegations had already been carefully examined by the Canadian authorities in connection with the application for refugee status, the PRRA and H&C applications and the application for the stay of a removal order before the Federal Court. Having examined those allegations and the evidence and having heard the author's oral submissions, the Canadian authorities had concluded that she lacked credibility and was not at risk of being persecuted or subjected to unlawful treatment on her return to Guinea. The Committee considered that Ms. Kaba had not shown sufficiently why these decisions were contrary to the standard set out above. Nor had she adduced sufficient evidence in support of a claim that she would be exposed to a real and imminent risk of violation of article 7 of the Covenant if she was returned to Guinea. The Committee therefore considered that the author's claim was inadmissible under article 2 of the Optional Protocol as insufficiently substantiated for the purposes of admissibility.

6.5 As far as Fatoumata and the alleged violation of articles 7 and 24 of the Covenant are concerned, the Committee observed that the "new" documents submitted by counsel to the Committee on 19 May 2006, including the divorce decree and Guinean legislation which is said to give custody of children automatically to the father, had not been provided to the Canadian authorities. The Committee noted the State party's argument that domestic remedies had not been exhausted and that it was not too late to submit a further application for a pre-removal risk assessment and an application for a stay of the expulsion order on the basis of the "new" documents. However, the Committee noted that the State party had rejected this evidence on the grounds that it was not credible. Without embarking on a detailed examination of counsel's arguments on the effectiveness of the pre-removal risk assessment, the Committee, in the light of the State party's position, considered that a further application for a pre-removal risk assessment would not constitute an effective remedy for Fatoumata under article 5, paragraph 2 (b), of the Optional Protocol. The

²² See communications No. 1315/2004, *Daljit Singh v. Canada*, inadmissibility decision adopted on 30 March 2006, para. 6.2, and No. 1302/2004, *Dawood Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.3.

²³ General comment No. 31 (80) of 29 March 2004, para. 12.

²⁴ See communications No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997, paras. 8.1 and 8.2, and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.9.

Committee also noted that the evidence in the file indicated that up to 90 per cent of girls undergo excision in Guinea and finds that the claims presented on Fatoumata's behalf, under articles 7 and 24 of the Covenant, read together were sufficiently substantiated for the purposes of admissibility.

6.6 The Committee therefore decided that the communication was admissible insofar as it raised issues under article 7 and article 24, paragraph 1, of the Covenant in respect of Fatoumata Kaba. The Committee requested the State party to provide its views on the information relating to current Guinean legislation and practice relating to the custody of children after divorce, and the incidence of excision in Guinea.

Additional observations of the State party regarding the admissibility and merits of the communication

7.1 On 13 January 2009, the State party submitted additional observations on admissibility and merits and requested the Committee to reconsider its admissibility decision and to declare the communication inadmissible as a whole on grounds of abuse of process or, if an abuse of process were not acknowledged by the Committee, to declare it inadmissible on grounds of failing to substantiate the claim. If the Committee decided nevertheless to uphold the admissibility of the communication concerning Ms. Fatoumata Kaba, the State party would request the claims under articles 7 and 24, paragraph 1, of the Covenant to be rejected as unsubstantiated.

7.2 The State party engaged a lawyer practising in Guinea to collect the information requested by the Committee in its admissibility decision of 1 April 2008. As far as child custody in cases of divorce is concerned, the lawyer confirmed that article 359 of the Civil Code of Guinea is still in force, as the bill amending the article is pending adoption. Under article 359, children are entrusted to the care of their father once they reach the age of 7, unless a special agreement between the parents specifies otherwise. However, the State party notes that, according to the inquiry carried out by the lawyer, the divorce decree submitted by the author is forged. The senior registrar of the Court of First Instance in Kaloum/Conakry, which allegedly rendered the decree in question, confirmed that, as there was no record of the divorce in the register, the decree was not authentic. Furthermore, the decree could not have been granted on 12 January 2006 bearing the number 26, as the court had rendered only 9 civil judgements on that date. The registrar also provided a copy of the seal of the registrar of the court, confirming that the seal affixed to the copy of the decree submitted by the author was not authentic. The State party maintains that this new evidence shows beyond a reasonable doubt that the author's allegations are not credible and thereby undermine the credibility of the letters of Mr. Al Hassane A. Kaba, the author's so-called brother, and the letter of Mr. Bangaly Kaba, her so-called uncle, which both mentioned the divorce. In view of this blatant falsification of evidence, the State party requests the Committee to declare the communication inadmissible as a whole on grounds of abuse of process, in accordance with article 96 (c) of its rules of procedure.

7.3 The State party further considers that the evidence pertaining to the alleged divorce settlement giving custody of Fatoumata Kaba to her father should be rejected and declared inadmissible on grounds of failure to substantiate the claim. The allegation that the custody of the child would be granted to the father is based exclusively on article 359 of the Civil Code of Guinea, which would have been enforced following the alleged divorce. There is no evidence or allegation that the child's father could have any authority over the child without a divorce decree or against the mother's wishes. The State party recalls that the child's father does not appear to live in Guinea, since, according to the author, she and her husband had lived in Gabon since 1992 and her husband was still there in 2001 when the author and her daughter left the country for Canada. The only evidence linking Mr. Kaba to Guinea since 2001 is a letter that he allegedly wrote to the author in December 2002

threatening to kill her. Given that the decree was forged, the State party doubts that this letter is authentic. The author has not shown in any case that she had contacted the Guinean authorities or requested protection for herself and her daughter. The State party therefore doubts the couple's intention to divorce and the supposed ill will of the author's husband.

7.4 Concerning the incidence of excision in Guinea, the State party has relied on expert reports that show the prevalence of excision in Guinea among girls between 10 and 14 years old to be below 89.3 per cent. The State party maintains, however, that this figure is not a reliable measure of the risk of excision that Fatoumata Kaba personally faces, since it is women, particularly mothers, who decide on their daughters' excision. No cases of excision carried out against the mother's wishes have been reported. The State party adds that the author has not undergone excision, as her mother had made a stand against it, and that, likewise, the author could stand in the way of her daughter's excision on their return to Guinea. According to a survey carried out in 2005, only 15.2 per cent of Guinean mothers who had not undergone excision had at least one daughter who had been excised. The author's daughter was already beyond the age when girls run the highest risk of excision.²⁵ Statistics confirm that the daughters of women who have not undergone excision are much less exposed to the risk of excision. Based on these statistics, the State party concludes, given that it is the mother who has the power to decide on matters involving excision, that the author's allegations are not sufficiently substantiated for the purposes of admissibility and excision is not a necessary and foreseeable consequence of Fatoumata Kaba's expulsion to Guinea.

7.5 If the Committee decided nevertheless to uphold the admissibility of the communication from the viewpoint of Fatoumata Kaba, the State party would ask it to reject the allegation on the merits.

Author's comments on the State party's observations

8.1 On 19 May 2009, the author, represented by a new counsel, reiterated the arguments previously advanced and added that the general literature on excision shows that several members of the family have a say in whether excision is performed and that it is extremely rare for the decision to be perceived as concerning only the parents given that excision affects the social status of the excised person and her family. These reports also state that excision is sometimes performed without the consent of the child and/or her mother.²⁶ In this case, as the threat of excision came not only from the father but also from the father's family, the threat did not hinge solely on the divorce decree or the father's wishes.

8.2 The author refers to the Civil Code of Guinea, which stipulates that the father has authority over the child until the age of majority, including the right to inflict corporal punishment, even in the event of divorce. Given that Fatoumata Kaba's father has never been stripped of parental authority, his ties with his daughter still exist. The author adds that the Guinean authorities do not intervene in family disputes. Despite the fact that excision is illegal in Guinea, no excision practitioner was prosecuted in 2008 for performing an excision. The author could not, therefore, turn to the State for protection in the event of a dispute with her husband over the issue. Furthermore, Mr. Kaba lives in Guinea, as the divorce decree attests. In support of this claim, the author provides a letter from relatives testifying that they have encountered Mr. Kaba in Guinea. On the basis of certain

²⁵ According to the third demographic and health survey of Guinea (EDSG-III) of 2005, only 27 per cent of girls aged between 10 and 14 and only 3 per cent of girls over the age of 14 have undergone excision.

²⁶ *Female genital mutilation of women in West Africa*, Landinfo, Country of Origin Information Centre, 12 January 2009.

governmental reports and reports from NGOs, she insists that the risk of excision concerns minors between the ages of 4 and 17 and that excision may also be performed on adult women.

8.3 The author also reiterates in her comments the risks that she faces if she is expelled to Guinea.

8.4 Lastly, as far as the authenticity of the divorce decree is concerned, the author engaged a Guinean lawyer to clarify the State party's allegation that the decree is a forgery and, if necessary, to institute new divorce proceedings. She insists nevertheless that she was not present during the proceedings and that she was represented by family members who confirm that they participated in them. Her lawyer contacted a bailiff in Conakry, who informed the lawyer that the registrar who allegedly signed the divorce decree did not recognize the signature or the seal, whereas another registrar did recognize his signature, which attests to the corruption among registrars in this case. The lawyer provided evidence of the use of several different seals by the registrar's office in Conakry, including the seal affixed to the divorce decree. The author thus concludes that the allegations of the State party challenging her credibility or blaming her for errors, fraud or breaches are unfounded. Lastly, the author informs the Committee that new divorce proceedings have been instituted resulting in her being awarded custody of Fatoumata Kaba in a judgement rendered on 15 April 2009.

8.5 The author sent a copy of the new divorce decree in a letter dated 8 June 2009 and noted that even though she had obtained custody of the child, the child still had a justifiable fear of undergoing excision, since her father maintained authority over her. The author maintains that Mr. Kaba is only using the divorce granted in her favour as a scheme to obtain the child's repatriation. She adds that there is no doubt as to Mr. Kaba's residence in Guinea, as evidenced by the record of the new divorce decree.

Review of admissibility

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the State party's request for reconsideration of the admissibility decision and to declare the communication inadmissible as a whole on the ground of abuse of process, as the request was based on new evidence that questioned the credibility of the author's statements and the communication as a whole. Although the Committee wishes to give the State party's allegations their full weight, it considers, nevertheless, that the risk mentioned by the author on behalf of her daughter Fatoumata Kaba is sufficiently serious for the Committee to take it up in connection with the merits of the case, on the ground of reasonable doubt.

9.3 The Committee therefore proceeds with the consideration of the merits of the communication in view of the issues raised on the basis of articles 7 and 24, paragraph 1, of the Covenant concerning Fatoumata Kaba, the author's daughter.

Consideration of the merits

10.1 As to the author's claim that expelling her daughter Fatoumata Kaba would entail a risk of her being subjected to excision by her father and/or members of the 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.²⁷ In this connection, there is no question that subjecting a woman to genital mutilation amounts to treatment prohibited under article 7 of the Covenant. Nor is there any question that women in Guinea traditionally have been subjected to genital mutilation and to a certain extent are still subjected to it. At issue is whether the author's daughter runs a real and personal risk of being subjected to such treatment if she returns to Guinea.

10.2 The Committee notes that in Guinea female genital mutilation is prohibited by law. However, this legal prohibition is not complied with. The following points should be noted: (a) genital mutilation is a common and widespread practice in the country, particularly among women of the Malinke ethnic group; (b) those who practise female genital mutilation do so with impunity; (c) in the case of Fatoumata Kaba, her mother appears to be the only person opposed to this practice being carried out, unlike the family of Fatoumata's father, given the context of a strictly patriarchal society; (d) the documentation presented by the author, which has not been disputed by the State party, reveals a high incidence of female genital mutilation in Guinea; (e) the girl is only 15 years old at the time the Committee is making its decision. Although the risk of excision decreases with age, the Committee is of the view that the context and particular circumstances of the case at hand demonstrate a real risk of Fatoumata Kaba being subjected to genital mutilation if she was returned to Guinea.

10.3 Consequently, in accordance with article 5, paragraph 4, of the Optional Protocol, the Committee is of the view that Fatoumata Kaba's deportation to Guinea would constitute a violation of article 7 and article 24, paragraph 1, of the Covenant, read in conjunction.

10.4 In accordance with article 2, paragraph 3 (a), of the Covenant, the State must refrain from removing Fatoumata Kaba to a country where she runs a real risk of being excised.

10.5 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 or not 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 or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also invited to publish the present Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

²⁷ See communication No. 1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4; communication No. 1429/2005, *Blanca Lilia Londoño Soto et al. v. Australia*, inadmissibility decision of 1 April 2008, para. 6.3.

Appendix

Dissenting opinion by Mr. Abdelfattah Amor

1. In the present case, the Committee did not agree to grant the State party's request to reconsider its previous admissibility decision and to declare the communication inadmissible as a whole on grounds of abuse of process. In its decision on the merits, it found a violation of article 7 and article 24, paragraph 1, read in conjunction. I respectfully disagree with both the rejection of the request to reconsider the admissibility and the decision on the merits.

2. Regarding the reconsideration of admissibility, I believe that the Committee should have used greater caution with regard to the credibility of the information provided by the author and the degree to which that information was substantiated. Even though a legitimate doubt justifying the addition of the issue of admissibility to the consideration of the merits could be invoked, and even though the daughter cannot be held accountable for her mother's claims, what is at issue in terms of the admissibility is the credibility of the information provided by the author and its effects on the proceedings before the Committee.

3. The author initially claimed to have obtained a divorce by mutual consent on 12 January 2006 by Decree No. 26, as the result of proceedings that were begun in July 2005 and throughout which she had been represented by her brother. She stated that the decree contained no reference to custody of the child and that section 359 of the Civil Code of Guinea therefore applied, by which custody of a child aged over 7 years was automatically granted to the father.

4. Considering it unlikely that the custody of the child would not have been mentioned in the divorce decree, the State party is of the view that the author has not established that custody of the child was granted to the father.

5. Following the admissibility decision adopted on 1 April 2008, the State party engaged a Guinean lawyer in Conakry to verify the information presented. The lawyer then determined that the decree submitted by the author was a forgery. The State party has shown ample proof of this (see paragraph 7.2) and the author does not deny it, although she refuses to take responsibility for what, in her opinion, attests to the "corruption among registrars" (see paragraph 8.4).

6. On 15 April 2009, the author obtained another — this time authentic — divorce decree that granted her custody of the child. The author maintains, however, that the divorce granted in her favour was only a scheme used by her ex-husband to secure the child's repatriation.

7. What is certain is that the divorce decree of 12 January 2006, initially submitted by the author, is a forgery. The State party's investigation revealed that the seal of the registrar affixed to the decree was not authentic and that the court of Kaloum/Conakry had rendered only nine judgements on 12 January 2006 (the date on which the divorce decree was supposedly rendered) and that therefore the decree in question could not have borne the number 26.

8. The most important consideration is that the author was unable to prove that she or the persons acting on her behalf or representing her were not aware of the fraud from which she had intended to benefit by concluding that she had been denied custody of her daughter and, given that the custody issue was not mentioned in the decree and in accordance with section 359 of the Civil Code of Guinea, that custody had been granted to her daughter's

father. It is obvious that the author intended deliberately to mislead the Committee, because a person cannot claim to be divorced while knowing that he/she is not.

9. This conclusion is also corroborated by the discrepancies, contradictions and imprecise information provided by the author, which the State party had pointed out to the Committee from the beginning (see paragraphs 4.3 to 4.14). For example, there is the doctor who “corrects” a medical certificate five years after having written a different one in which the facts were untenable, while also juggling the dates (see especially paragraph 4.5 and the author’s reaction in that respect in paragraph 5.7). The pagne (cotton wrap) vendor turns out to be a receptionist at the Embassy of Guinea in Gabon (see paragraph 4.6). The brother is no longer a brother but a cousin (see paragraph 4.8). The Canadian entrance visa that was applied for in Paris is obtained in Libreville, Gabon and “there is no indication of any application for a Canadian visa in Paris in February 2001” (see also paragraph 4.6). Letters of testimony from family members suddenly appear just at the right moment. And even when the court grants custody of the child to the author, she finds a way to argue that it is merely a scheme concocted by the father.

10. It seems obvious to me that the author made use of practices that are incompatible with the functions entrusted to the Committee, both before the Committee pronounced its admissibility decision on 8 April 2008 and after Canada asked the Committee to reconsider the admissibility. I am convinced that she abused the process offered by the Optional Protocol. The State party invoked this abuse of process, covered by article 3 of the Optional Protocol and by rule 96 (c) of the rules of procedure of the Committee, to request that the Committee reconsider its admissibility decision and to declare the communication inadmissible as a whole.

11. In light of the new elements adduced by the State party, and especially the use of a forged decree, the Committee would not have been contradicting itself if, on the basis of the additional data provided, it had rejected the communication as a whole on the ground of abuse of process. Instead, it considered that “the risk mentioned by the author on behalf of her daughter ... is sufficiently serious for the Committee to take it up in connection with the merits of the case, on the ground of reasonable doubt”. I believe that the seriousness of the risk does not justify granting recourse to a process that the author has deliberately tainted.

12. As for reasonable doubt, it is true that it is impossible to consider the issue using completely objective criteria and that it is bound to involve a degree of subjectivity, but in any event information that is deliberately incomplete cannot be the object of reasonable doubt. In other words, the Committee is faced with here reasonable doubt of error. I believe that the Committee should have asserted its own credibility by specifying that it cannot allow itself to be manipulated by illegal procedures for any reason. I therefore regret the Committee’s attitude and do not find its admissibility decision relevant on the basis of either the legal assessment or the evaluation of the facts, even though I have always condemned female genital mutilation and will continue to do so, as it constitutes a violation of the Covenant and of human rights. The legitimacy of a cause cannot help but be damaged when it is defended by illegitimate means. In other words, the end cannot justify all the means for any of the parties concerned. That path will result in even greater difficulties for the Committee when it comes to implementation of its Views.

13. With regard to the merits, several observations are worth making.

14. In response to the request that it reconsider the admissibility, the Committee noted that the request was based “on new evidence that questioned the credibility of the author’s statements and the communication as a whole. Although the Committee wishes to give the State party’s allegations their full weight, it considers, nevertheless, that the risk mentioned by the author on behalf of her daughter Fatoumata Kaba is sufficiently serious for the

Committee to take it up in connection with the merits of the case, on the ground of reasonable doubt”.

15. In its consideration of the merits, the Committee completely lost sight of the issue of credibility, ignoring article 5, paragraph 1, of the Optional Protocol, which requires the Committee to consider “all written information made available to it by the individual and by the State Party concerned”. Why did it refuse to answer a question raised by the State party, which the Committee itself had already answered during the consideration of the merits?

16. Is the assessment of the degree of the risk reason enough to ignore the issue of credibility, when such assessment depends precisely on credibility itself? Have feelings of compassion and generosity stifled the fundamental issue of knowing whether the State party is legally required by the Covenant, despite the procedures and guarantees invoked and despite the lack of credibility of the information provided by the author, to refrain from removing the author and/or her daughter from the State party?

17. I believe that international law must have the last word, because it allows States, while offering guarantees, to enact legislation regulating the entry and stay of foreigners in their territory. The choices the Committee has made regarding this communication are unfathomable. This is truly surprising, given the Committee’s usual meticulousness and its care not to let compassion and legally questionable considerations interfere with its work.

18. In this case, one has the impression that everything was handled as if the issue under consideration were the process of female genital mutilation in general rather than an individual complaint. While points (a), (b) and (d) of paragraph 10.2 might appear to be stages in an argument, they creep into the individual complaint, using it as more of a pretext. It is to the Committee’s credit that it is vigilant regarding female genital mutilation in general, and it is able to question States about the issue during the consideration of their reports.

19. It is, however, still important for the Committee to limit itself to the case at hand, using the context to clarify the situation rather than as a general justification. The essential question is whether, taking into consideration all the information provided, the particular circumstances of the case could constitute a real and personal risk for the author’s daughter, who is 15 years old and whose mother is not excised, thanks to her own mother who opposed excision, recalling once again that a mother’s opposition to excision is a determining factor in most cases.

20. According to the State party, “no cases of excision carried out against the mother’s wishes have been reported”. In point (c) of paragraph 10.2, the Committee says only that “in the case of Fatoumata Kaba, her mother appears to be the only person opposed to this practice being carried out, unlike the family of Fatoumata’s father, given the context of a strictly patriarchal society”. Legal certainty has thus given way to human supposition. Furthermore, to say that only the mother is opposed to the situation is not corroborated by the case file, which includes several indications of the solidarity of the mother’s family.

21. It also seems curious that Fatoumata’s mother’s fear of the father’s family “in the context of a strictly patriarchal society” did not stop her from leaving for France, without her daughter, from 22 February to 1 March 2001, two days after the attempt to excise Fatoumata (see paragraph 4.6). A cousin was entrusted with the daughter’s care and with ensuring “that the father did not have her excised” (see paragraph 5.8). The least that can be said in this regard is that the mother’s fear was exaggerated to the Committee, which should have been more circumspect, especially since more than three months passed before the mother left Guinea with her daughter. I believe that the Committee accepted this exaggeration without bothering to analyse the information provided by the author. In sum, while there may be a risk, it is unsafe to define that risk as real or personal.

22. In its analysis of the case, the Committee gives the impression that it is better able than the State to assess the risk, as if the Committee had more information than the State or as if the State had assessed the risk in an arbitrary or ill-founded manner. I believe that the information in the case file makes it clear that the relevant State authorities gave due consideration to the issue of risk, invoking procedural and substantive safeguards, and it is unseemly to doubt that or to consider that it is for the Committee to replace inefficient State authorities in order to establish the facts and evidence.

23. It has consistently been held that it is within the jurisdiction of the States parties to examine the facts and evidence, unless it can be established that the assessment of the evidence was arbitrary or amounted to a manifest error or denial of justice, which is clearly not the case. The State party was right to recall that “in the absence of proof of any clear error, abuse of procedure, bad faith, clear bias or serious procedural irregularities, the Committee should not substitute its findings of fact for those of the Canadian authorities. It is for the courts of States parties to review facts, the evidence and above all the issue of credibility in particular cases. The author has not shown that there was any irregularity in the decisions of the Canadian authorities that would justify action by the Committee with regard to their findings on the facts and credibility” (paragraph 4.14).

24. The Committee has concluded that the removal of the author’s daughter “to Guinea would constitute a violation of article 7 and article 24, paragraph 1, of the Covenant, read in conjunction”. This conclusion implies two things. The first and most obvious is that the case concerns only the daughter, not her mother. There can be no ambiguity in that regard. The complaint was only declared admissible with regard to the daughter, and the merits concern only the daughter’s condition.

25. It follows from this that the daughter might stay in Canada while the mother could be removed. This is a curious solution that the Committee cannot make use of, given the (strongly criticized) position that it adopted in communication No. 930/2000, *Hendrick Winata and Ms. Li So Lan v. Australia*. The second inference is that Canada could remove the daughter to a country other than Guinea where there is no real risk of excision. What the author requested, however, was to stay with her daughter in Canada. This means that the procedures before the Canadian authorities could only be tainted by irregularities if the issue at stake was the removal to Guinea, which is not at all obvious.

26. What the author requested from the Canadian authorities was, firstly, refugee status and, secondly, the issuance of a permanent residence visa on humanitarian grounds. It would have been more thorough to make the obvious distinctions and to specify that the evaluation made by Canada justified the refusal of both refugee status and the issuance of a permanent residence visa and could only raise questions if Canada wished to remove the author’s daughter to Guinea.

(Signed) Mr. Abdelfattah Amor

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee’s annual report to the General Assembly.]

Dissenting opinion by Mr. Krister Thelin

A majority of the Committee has found a violation in this case. I respectfully disagree. The Committee's reasoning and conclusion should, in my view, read as follows:

“10.1 As to the author's claim that expelling her daughter Fatoumata Kaba would entail a risk of her being subjected to excision by her father and/or members of the 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.¹ Nor is there any question that women in Guinea have traditionally been subjected to genital mutilation and to a certain extent are still subjected to it. The point at issue is whether the author's daughter runs a real and personal risk of being subjected to such treatment if she returns to Guinea.

10.2 On the basis of the information submitted by the author throughout the proceedings — even leaving aside the issue of her credibility, raised in some respects by her assertions — read together with other material in the case file, the Committee is unable to conclude that the author has refuted the State party's claim that her removal and that of her daughter would not entail a real risk of a violation of the author's rights under articles 7 and 24, paragraph 1, read in conjunction.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by Canada of the articles of the Covenant referred to by the author.”

(Signed) Mr. Krister Thelin

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

¹ See communication No. 1302/2004, *Dawood Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4; communication No. 1429/2005, *Blanca Lilia Londoño Soto et al. v. Australia*, inadmissibility decision of 1 April 2008, para. 6.3.