



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. 3300/2019*, **

<i>Communication submitted by:</i>	A.E. (represented by counsel, Malin Dahl)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sweden
<i>Date of communication:</i>	14 January 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and 94 of the Committee's rules of procedure, transmitted to the State party on 28 January 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	13 March 2020
<i>Subject matter:</i>	Deportation from Sweden to Nigeria (non-refoulement)
<i>Procedural issues:</i>	Inadmissibility – incompatibility with the Covenant; level of substantiation of claims
<i>Substantive issues:</i>	Risk of torture and other cruel, inhuman or degrading treatment or punishment
<i>Article of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	3 and 5 (2) (b)

1.1 The author of the communication is A.E., a national of Nigeria born on 11 August 1985. His applications for asylum have been denied in the State party and he is facing imminent deportation to Nigeria.¹ The author claims that there is a risk his rights under article 7 of the Covenant would be violated by the State party if he were deported to his country of origin. The Optional Protocol entered into force for Sweden on 23 March 1976. The author is represented by counsel, Malin Dahl.

1.2 The communication was registered on 28 January 2019, with provisional interim measures, in response to which the Swedish Migration Agency decided to stay the

* Adopted by the Committee at its 128th session (2–27 March 2020).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, Yuval Shany, H el ene Tigroudja, Andreas Zimmermann and Gentian Zyberi.

¹ The date of deportation has not been set, but the author is being held in immigration detention, according to counsel, and can be deported at any time.



enforcement of the author's expulsion order until further notice. On 26 July 2019, the State party submitted a request to lift interim measures, which the Committee rejected on 31 October 2019.

The facts as presented by the author

2.1 The author identifies as homosexual. On 10 February 2015, he applied for asylum, alleging a risk of persecution by Boko Haram, without claiming any risk relating to his sexual orientation. His initial application for asylum was rejected by the Swedish Migration Agency on 28 January 2016. The appeal of the negative decision was rejected by the Migration Court on 12 May 2016. On 13 July 2016, the Migration Court of Appeal refused leave to appeal and the decision to expel the author became final and non-appealable.² On 28 July 2016, the author submitted a second application for asylum based on his sexual orientation. The author stated that because he had grown up in a society where homosexuality was criminalized and strictly taboo, he had experienced almost insurmountable difficulties in talking about the real reason why he had had to leave Nigeria and why he could not return there. He also claimed that revealing his sexual orientation under the circumstances was associated with shame and guilt. The Migration Agency granted the author's request for re-examination of his asylum application on 18 October 2016.

2.2 During the re-examination of the case, the author had three interviews with different case officers, providing information about his background, sexual orientation, previous relationships and his life in Sweden. He did not know at that time whether the Nigerian authorities had information about his sexual orientation. On 12 October 2017, the Migration Agency rejected the author's second application for asylum, considering that the author had not provided information about his situation and sexual orientation in a self-reflecting and coherent manner. The Migration Agency found the author's statements about his sexual orientation not to be credible because they were vague, undetailed and implausible. Upon appeal, the decision was upheld by the Migration Court on 30 January 2018 and by the Migration Court of Appeal on 7 March 2018.

2.3 After the final decision from the Migration Court of Appeal, the author received new information regarding the difficulties he would allegedly face in Nigeria due to his assumed sexual orientation. He therefore submitted a second application for re-examination of his asylum case in 2018.³ The application was rejected by the Migration Agency on 18 December 2018. The author asserted that he had participated in an interview with *Östersunds-Posten*, a Swedish newspaper, on 11 May 2018 about his asylum case, which would mean that he would risk being identified as homosexual in Nigeria, as the article had contained a close-up photograph of his face and several other photographs in which he was identifiable. The article was also available online and remained on the newspaper's website, although accessible to subscribers only. It was therefore easy for anyone, including Nigerian citizens or authorities, to access the information. In addition, he learned at the end of December 2018 that a friend had seen his name and face in a newspaper article published in the *Nigerian Observer*, stating that he was wanted by the police for homosexual activity and could face 10 to 14 years of imprisonment if convicted. His name and photograph was included in the physical copy of the newspaper article, dated 15 August 2014,⁴ about which he had received information only recently and had therefore been unable to submit it earlier.

2.4 Despite the submission of new evidence, the Swedish authorities have not properly examined either the Swedish or the Nigerian newspaper articles. On 10 January 2019, a ruling by the Migration Court confirmed the decision by the Migration Agency not to re-examine the case, stating that the newspaper articles could not change the assessment of the application, while mentioning that the author had never proven nor plausibly demonstrated his identity, and thus could not connect the Swedish newspaper articles to his person. This means that the consequences of the publications have not been considered on the merits, but cannot be brought up again.

² The decisions were not attached to the initial communication.

³ No date was indicated.

⁴ The newspaper article was attached to the communication.

2.5 As to his identity, the author admits that he fled Nigeria and entered Sweden with a falsified passport that did not state his real name but had his photograph attached. He has never submitted any documents proving his identity, including his name and date of birth. However, the article in the *Nigerian Observer* contains both his name, A.E., and his photograph, which, although not of the best quality, still enables his identity to be verified. While this combined information cannot prove nor plausibly demonstrate his identity, the presence of his name as stated to the authorities since his arrival in Sweden, along with a rather large photograph of his face, means that the article is about him and his sexual orientation.

2.6 The author further claims that it is likely that Nigerian authorities would easily identify him from the newspaper article, which contained information originating from them. He argues that in the light of the article, the authorities in Sweden should have reopened his case and granted him an interview with the Migration Agency. He reiterates that no domestic authority has examined the consequences of the publication of the newspaper article even though the publication of the information in the article would expose him to a risk of further persecution if he were to be returned to Nigeria.

2.7 The author argues that he has exhausted all available domestic remedies in the State party, and that the subject matter of the communication is not being and has not been examined under another procedure of international investigation or settlement.

The complaint

3. The author submits that his forced return to Nigeria would expose him to a real risk of treatment contrary to article 7 of the Covenant due to his sexual orientation. He claims that he fears persecution from individuals who want to impose sharia law and punish or otherwise hurt him; that there is a risk that any individual would report him to the authorities, which would lead to his arrest and imprisonment; and that he also runs a risk of being identified as a homosexual by the police or other State authorities, and of “being punished accordingly”.

Additional submission by the author

4.1 On 27 March 2019, the author submitted further information on the alleged risk he would be exposed to if returned to Nigeria, in response to a request from the Committee.

4.2 The author arrived in Sweden on 10 February 2015, and applied for asylum with a false passport under the name Isaac Junior Jumbo. The passport had been bought in Nigeria and smuggled out of the country. The passport was confiscated by the Swedish police and registered as “reported stolen or lost”. Having admitted to using a false document, the author was charged with the crime of use of a false document by the Malmö District Court and sentenced on 24 January 2017. He received a suspended sentence and a fine of SKr 2,000.⁵ However, when he was being held in custody, the Swedish border police filed an application with the Nigerian embassy for the issuance of an emergency travelling certificate, stating that the author’s name was Isaac Junior Jumbo and providing the photograph taken when he first applied for asylum in Sweden. The embassy issued the certificate, valid from 30 January 2019 to 8 February 2019, on unclear grounds, as it does not appear that a background check was made, nor has the application ever been signed or seen by the author. It is not clear how the embassy verified any information or why the certificate was issued. However, the fact remains that the passport of an Isaac Junior Jumbo was reported stolen at the time of the author’s arrival in Sweden and determined by the District Court not to be the author’s. The issue of the author’s identity under the additional alias of Isaac Junior Jumbo is somewhat relevant with respect to the weight of his name being featured in media articles online and otherwise, but does not determine the author’s need for protection from irreparable harm should he be returned to Nigeria.

4.3 The author notes that the Migration Agency, the Migration Court and the Migration Court of Appeal found that he had not made plausible his claims that he was homosexual and a member of a group that was subject to persecution in Nigeria. His case was not re-

⁵ The Court had determined that A.E. had bought a passport in another person’s name.

opened by the Migration Agency despite his submission on 7 January 2019 of a newspaper article published in the *Nigerian Observer*, which supported his claims. He was referred to as A.E. (in full) in the article, which also contains a close-up photograph of his face. He argues that should this not be considered as adding to his credibility as a genuine member of the lesbian, gay, bisexual and transgender community, it must be considered as an ascribed sexual orientation, which carries the same risks as a genuine sexual orientation. As his face has been connected to homosexual activity, it is of lesser importance under what name he would be returned to Nigeria. He argues that the authorities in Sweden should have re-opened his case pursuant to the Aliens Act in order to assess the risk he would face because of the publication, shortly before his application was submitted, of the article in Nigeria. He claims that if he had been able to submit the article earlier, in the context of his asylum application based on sexual orientation, it would have likely had a positive impact on the assessment of his credibility and it would have shed a different light on the matter of ascribed sexuality and the risks he faces if returned to Nigeria. The author adds that there is substantial media coverage on him in Swedish newspapers,⁶ which mention his sexual orientation and the fact that homosexuality is illegal in Nigeria. A Google search result for A.E. brings up several newspaper articles clearly identifying him as gay; these are available worldwide through translations, even though they were originally written in Swedish. A large number of close-up photographs of the author's face are also readily accessible. This confirms how easy it would be to identify the author as an openly homosexual man, a status that, if brought to the attention of Nigerian authorities and society, would render him vulnerable to persecution and sanctions.

4.4 As regards official practices in Nigeria, the author notes that the above-mentioned article in the *Nigerian Observer* states that he is wanted for sodomy and homosexual acts and that he could be sentenced to imprisonment of 10 to 14 years. He claims that this gives an accurate portrayal of the situation lesbian, gay, bisexual and transgender persons face in Nigeria. He notes that Nigeria implemented the Same Sex Marriage (Prohibition) Act in 2013, which, according to Human Rights Watch, has made a bad situation even worse for the lesbian, gay, bisexual and transgender community in Nigeria. The Act has led to an increase in acts of extortion and violence against members of that community, and imposed restrictions on non-governmental organizations providing essential services to lesbian, gay, bisexual and transgender persons in Nigeria.⁷ He further notes that the Finnish Immigration Service has stated that:

Arbitrary arrests of homosexuals and people perceived as being homosexual have increased since the enactment of the Same Sex Marriage Prohibition Bill.

The bill has given Nigeria's corrupt police, who are infamous for taking advantage of the country's citizens, more legitimate powers. Compiling a comprehensive list of the people arrested as a result of the new law is impossible. The Nigerian press usually reports on arrests of members of sexual minorities and sometimes also on public trials. The outcomes of these trials, however, are not reported.⁸

The Finnish Immigration Service has also noted that "under sharia law, which is observed in northern Nigeria, sodomy, i.e. sex against the order of nature, is punishable by flogging, imprisonment or death by stoning".⁹ Moreover, the conditions in prison are harsh and the chances of fair trial are low.

4.5 The author claims that he would be at risk of imprisonment if returned to Nigeria, reiterating that a prison sentence of 10 to 14 years is provided for under criminal law. He would also be at risk of harm and persecution by individuals, including members of local communities that operate under sharia law, against which the State would be unable or unwilling to provide protection. He claims that he could be identified as homosexual through several means. Firstly, he maintains that he is genuinely a homosexual man and

⁶ A newspaper article was attached to the communication.

⁷ See Human Rights Watch, "Nigeria: harsh law's severe impact on LGBT community", October 2016, and Human Rights Watch, *Tell Me Where I Can Be Safe: The Impact of Nigeria's Same Sex (Prohibition) Act* (October 2016).

⁸ Finnish Immigration Service, "Status of sexual and gender minorities in Nigeria" (9 June 2015), p. 12.

⁹ *Ibid.*, p. 9.

will continue to live openly as such. Secondly, he can be identified through the article that appeared in the *Nigerian Observer*, which was published both online and in printed form on 15 August 2014. Thirdly, several articles about him in Swedish can be found online, and have gained such exposure that the risks posed by the Nigerian authorities or individuals must be considered high.

4.6 The author argues that given the fact that the Same Sex Marriage (Prohibition) Act is imposed at the national level, there are no reasonable internal flight alternatives for him. It is possible and common for authorities to arrest someone based merely on an assumption of their sexual orientation. The author was featured in a newspaper as wanted because he is suspected of sodomy, which under all circumstances must be considered to constitute grounds for Nigerian officials or civilians to assume that he is homosexual. Given the severity of the punishments, all the documents and statements should be reviewed on the merits, which the Swedish authorities failed to do when rejecting the author's request for re-examination without an interview with the Migration Agency.

State party's observations on admissibility and the merits

5.1 On 26 July 2019, the State party submitted its observations on admissibility and the merits of the communication, and a request to lift the interim measures, as the alleged grounds for international protection had not been sufficiently substantiated and the enforcement of the expulsion order would not cause an irreparable harm to the author. Having noted that the expulsion order would become statute-barred on 13 July 2020, the State party requested that the Committee consider the communication in good time before that date.

5.2 In its observations, the State party indicates that the author's case was assessed under the 2005 Aliens Act, in effect since 31 March 2006, and subsequently also under the Act on temporarily restricting the possibility to obtain residence permits in Sweden, in effect since 20 July 2016.

5.3 As to the facts, the State party submits that the author applied for asylum in Sweden on 10 February 2015. The Swedish Migration Agency rejected his application and decided on 28 January 2016 to expel him to Nigeria. The decision was appealed to the Migration Court, which rejected the appeal on 12 May 2016. On 13 July 2016, the Migration Court of Appeal refused leave to appeal and the decision to expel the author became final and non-appealable. On 28 July 2016, the author submitted an application to the Migration Agency for a residence permit pursuant to chapter 12, section 18, of the Aliens Act, or a new examination of the issue of a residence permit pursuant to chapter 12, section 19, of the Aliens Act. On 18 October 2016, the Migration Agency decided not to grant the author a residence permit; however, it granted the author a new examination for a residence permit, since his newly cited grounds for protection could constitute an impediment to the enforcement of his expulsion order.

5.4 On 12 October 2017, the Migration Agency again decided to reject the author's application for a residence permit in two separate decisions. Only one of the decisions was subject to appeal, and the author appealed this decision to the Migration Court, which on 30 January 2018 rejected the appeal. The Migration Court of Appeal decided on 7 March 2018 not to grant the author leave to appeal, and the decision to reject the application became final and non-appealable. On 14 December 2018, the author submitted a new application for a residence permit or a new examination of the issue of a residence permit, citing impediments to the enforcement of the expulsion order. The Migration Agency decided on 18 December 2018 not to grant the complainant a residence permit or a new examination. The decision was appealed to the Migration Court, which rejected the appeal on 10 January 2019.

5.5 The State party argues that the author failed to substantiate the allegations of a risk of irreparable harm, if removed, and that the communication is inadmissible pursuant to article 3 of the Optional Protocol as manifestly unfounded. It concedes, however, that he has exhausted all available domestic remedies, and that the same matter is not being and

has not been examined under another procedure of international investigation or settlement.¹⁰

5.6 In addition, the State party recalls the Committee's jurisprudence on article 7 of the Covenant as regards the substantiation of a real and personal risk of irreparable harm as a necessary and foreseeable consequence of the forced return, and the background reports on the situation in Nigeria.¹¹ While not underestimating the concerns that may legitimately be expressed regarding the human rights situation in Nigeria, the State party holds that the general situation does not in itself suffice to establish that the author's expulsion would be contrary to article 7 of the Covenant.¹² It also notes that the author has not contested this conclusion by the Swedish migration authorities in his communication to the Committee. The assessment before the Committee must thus focus on the foreseeable consequences of the complainant's expulsion to Nigeria in the light of his personal circumstances, just like the Swedish migration authorities' assessments in the present case. Accordingly, the author must show that he would personally face a real risk of being subjected to treatment in violation of article 7 of the Covenant upon his return to Nigeria.

5.7 In the view of the State party, the assessment by the Swedish migration authorities was significantly broader than the matter before the Committee, as the domestic asylum proceedings concerned not only the risk of treatment that would be contrary to article 7 of the Covenant, but also other grounds for asylum and a residence permit, such as a risk of corporal punishment or the death penalty. The Migration Agency held an introductory interview with the author in connection with his asylum application on 10 February 2015. On 25 March 2015, an extensive asylum investigative interview that lasted for almost two hours took place. After the author's initially claimed grounds for asylum, namely, alleged risks of persecution by Boko Haram, had been investigated and examined by all domestic migration authorities and the decision to expel him had become final and non-appealable, he was granted a new examination of the issue of a residence permit after invoking new grounds for asylum, this time, his sexual orientation. The Agency subsequently held a new asylum investigative interview with the author on 8 December 2016, lasting for three hours and focusing primarily on his need for protection owing to his alleged sexual orientation. On 23 February and 11 April 2017, the Agency held two supplementary investigative interviews with the author, lasting for more than six hours and still focusing on his alleged sexual orientation. The minutes from all the investigative interviews were, during this process, communicated to the author's public counsel. Furthermore, upon appeal, the Migration Court held an oral hearing with the author in camera on 11 January 2018. The interviews, the investigative interviews and the hearing were all conducted in the presence of a public counsel and with the aid of interpreters whom the author confirmed that he understood well. Through his public counsel, the author was invited to scrutinize and submit written observations on the minutes from the interviews, and to make written submissions and appeals. He therefore had ample opportunities to explain the relevant facts and circumstances in support of his claim and to argue his case, orally as well as in writing, before the Migration Agency and the Migration Court. The State party submits that against this background, it must be considered that the domestic authorities had sufficient information, together with the facts and documentation in the case, to ensure that they had a solid basis for making a well-informed, transparent and reasonable risk assessment concerning the author's need for protection in Sweden. It argues that there is no reason to conclude that the national rulings were inadequate or that the outcome of the domestic proceedings was in any way arbitrary or amounted to a manifest error or denial of justice.¹³

¹⁰ Sweden has entered a reservation expanding the scope of application of article 5 (2) (a) of the Optional Protocol to the Covenant to subject matters that have already been examined under another procedure of international investigation or settlement.

¹¹ See, for example, *Lucas Ramón Mendos, State-Sponsored Homophobia: Global Legislation Overview Update 2019* (Geneva, International Lesbian, Gay, Bisexual, Trans and Intersex Association, March 2019), and European Asylum Support Office, *Country of Origin Information Report – Nigeria: Targeting of Individuals* (2018).

¹² See, for example, the Committee's general comment No. 36 (2018) on the right to life, para. 30.

¹³ See, for example, *A.H.S. v. Denmark* (CCPR/C/119/D/2473/2014), para. 7.5.

Accordingly, the State party holds that considerable weight must be attached to the opinions of the Swedish migration authorities.

5.8 The State party notes that throughout the examinations of the author's case before the domestic authorities, he was found not to have plausibly demonstrated his identity. He was initially apprehended with a passport issued in a name that was different from the name he later gave and which he uses before the Committee. However, his photograph was attached to the passport and the passport has been assessed as genuine, even though it contained a partly falsified residence permit. The identity stated in the passport was later confirmed by the Nigerian embassy in Sweden. No other documents have been submitted in support of the author's alleged identity. The State party therefore argues that the author has not plausibly demonstrated his cited identity.

5.9 The State party mentions that during the domestic migration proceedings, the author cited grounds for protection that were different than those that were later presented before the migration authorities and that now form the basis of his communication before the Committee. The author originally stated, before the domestic authorities, that a forced return to Nigeria would put him at risk of being killed by Boko Haram. He stated, *inter alia*, that one day in July 2014, Boko Haram had attacked a marketplace in his home town and killed both of his parents. He had escaped the attack since he had been at home when it happened. In August 2014, Boko Haram had come back to his home town to search for him. However, he had managed to escape to a friend's house and had stayed hidden there until January 2015, when he left the country. The State party notes that the domestic authorities considered the author's initial asylum account to be contradictory and vague and held that he had not plausibly demonstrated that there was a risk in Nigeria that he would face persecution from Boko Haram.

5.10 On 28 July 2016, shortly after his expulsion order became final and non-appealable, the author applied for a residence permit or a new examination of the issue of a residence permit, citing impediments to the enforcement of the expulsion order. In his second asylum application, he claimed that he was homosexual and explained that the reason for not having invoked that circumstance at an earlier stage during the asylum proceedings was that he had been afraid to tell anyone about his sexual orientation. In its decision to grant the complainant a new examination of the request for a residence permit, the Migration Agency noted that it occasionally happened that an applicant invoked sexual orientation or transgender identity or expression as grounds for protection at a late stage in the process, sometimes even at the enforcement stage. The fact that new asylum grounds are cited at a late stage can sometimes lead to the applicant's credibility being questioned. However, when it comes to sexual orientation or gender identity, it must be taken into account that it can be perceived as shameful, even in liberal societies, and therefore difficult to talk about. In addition, several asylum seekers come from cultures where, *inter alia*, homosexuality is strictly taboo and criminalized, in some cases even punishable by death. If the applicant can provide an explanation as to why these grounds were not invoked earlier, the account should thus not be considered less credible solely because they are cited late in the process. The State party argues that the Migration Agency made extensive efforts during three more investigative interviews, lasting more than nine hours in total, in the presence of his public counsel, to give the author the opportunity to present his grounds for asylum and describe how his alleged sexual orientation and gender identity had affected him in Nigeria and to describe what he would risk if he were to return there. During this process, the author also made written submissions on three occasions through his public counsel. The author's case was further assessed by an expert on lesbian, gay, bisexual, transgender and intersex issues who participated in making the final decision. During the investigative interviews, the author claimed that he had discovered his homosexuality at the age of 13. He allegedly revealed his sexual orientation to a man in Nigeria who brought him to church to pray for salvation. The author further claimed that he had been involved in three long-term relationships with men in Nigeria. One day, the author allegedly had been caught together with another man in the bathroom of a nightclub. The author escaped, but the other man was killed. The author also claimed that his parents were killed after the incident, when a group of people searched for him at his house. He later left Nigeria and travelled to Sweden.

5.11 The Migration Agency, however, considered the author's account to be strikingly vague, and noted that the author had not been able to provide any in-depth reflections regarding his sexual orientation or to speak about terms such as homosexuality even though he was 32 years old and claimed to have been thinking about his sexuality since he was a teenager. It further noted that the author had first mentioned that he was homosexual two weeks after his expulsion order had become final and non-appealable, even though he claimed to have had three long-term relationships with men in Nigeria while knowing that homosexuality was prohibited there. The Migration Agency considered that his account lacked credibility to such an extent that it could not serve as the basis of a subsequent assessment of his need for protection in Sweden. Upon appeal, the Migration Court held an oral hearing, once again giving the author the opportunity to orally present his cited grounds for protection and to explain any misunderstandings. During the hearing, the author claimed that he had realized he was homosexual when he was 9 years old. The Court noted, *inter alia*, that the new circumstance contradicted the earlier claim that the author had realized he was homosexual at 13 years of age. The Court upheld the decision of the Migration Agency, noting that, during the hearing before the Court, the author had changed his asylum account in more ways than one. The Court considered that the author's claims for protection had escalated, had become inconsistent and could not be deemed credible. The author had therefore not plausibly demonstrated that he would be threatened in Nigeria because of his alleged sexual orientation. The decision to reject the application became final and non-appealable on 7 March 2018.

5.12 On 14 December 2018, the author once again applied for a residence permit or a new examination for a residence permit, citing impediments to the enforcement of his expulsion order. He claimed that his sexual orientation was publicly known because an article had been published in a local newspaper in Sweden. He further claimed that there was reason to believe that the Nigerian authorities monitored Nigerian citizens' activities over the Internet. In its decision of 18 December 2018, the Migration Agency noted, *inter alia*, that the author had not plausibly demonstrated his identity. He had, furthermore, provided the authorities with a passport stating a name that was different from the one he had used in his application. However, the passport did bear his photograph. Those circumstances alone gave reason to exercise caution when considering the author's claim about the possibility that the Nigerian authorities could connect him to the article. The Migration Agency held that it was hardly reasonable to believe that an article in a local Swedish paper had been read by or passed on to the Nigerian authorities. Moreover, the author had not substantiated his claim that the article had garnered attention through social media. Against this background, the Migration Agency did not consider the cited circumstances to constitute a lasting impediment to the enforcement of the expulsion order. The decision was appealed to the Migration Court, which rejected the appeal on 10 January 2019 as no reason to deviate from the Migration Agency's decision had been found. What had emerged regarding the cited newspaper article in the *Nigerian Observer* did not change that assessment.

5.13 The State party states that while homosexuality is criminalized in Nigeria, the situation is not such that everyone from Nigeria who claims to belong to the lesbian, gay, bisexual, transgender and intersex community is deemed to be in need of international protection. It follows from the Aliens Act that persecution due to sexual orientation can constitute a ground for protection, as reaffirmed by a Migration Agency legal position paper concerning the method for a forward-looking risk assessment of a need for protection due to sexual orientation, transgender identity or expression. The task of the Migration Agency is not to determine an applicant's sexual orientation but to assess if an asylum seeker has plausibly demonstrated that he or she belongs to such a group. The Office of the United Nations High Commissioner for Refugees has confirmed that sexual orientation is a fundamental aspect of human identity and that ascertaining an applicant's lesbian, gay, bisexual, transgender and intersex background is essentially an issue of credibility, which needs to be undertaken in an individualized and sensitive way.¹⁴ The State party also refers

¹⁴ Office of the United Nations High Commissioner for Refugees, "Guidelines on international protection No. 9: claims to refugee status based on sexual orientation and/or gender identity within

to the decision by the European Court of Human Rights in *M.K.N. v. Sweden*, in which the Court considered that the applicant's claim concerning the cited homosexual relationship was not credible.¹⁵

5.14 The State party argues that what is stated in the article published in the *Nigerian Observer*, submitted by the author, differs from the oral account provided by him before the domestic authorities. For instance, the author claimed before the migration authorities that he had been caught with another man in a nightclub. However, in the article it is stated that the people involved in the incident were apprehended in a hotel. It is further stated in the article that two men were dragged outside the hotel and beaten mercilessly before one man escaped. Later, the escaped man's parents were killed in their store in a marketplace. Before the domestic authorities, the author did not claim to have been beaten, and he further claimed that his parents had been killed in his house. The State party argues that these inconsistencies raise serious doubts regarding the article's connection to the author. The State party also pointed out that the paper version of the article submitted by the author is different from the one available on the newspaper's website. It further notes that the online edition of the article does not contain a photograph of the alleged suspect. The State party argues that this raises questions about the legitimacy of the photograph attached to the paper version of the article. It also notes that contrary to what the author claims, the photograph does not clearly depict him.¹⁶ It also reiterates its argument that the author has not plausibly demonstrated his alleged identity and that he would therefore not be connected to the article by the Nigerian authorities.

5.15 The author has submitted to the Committee a newspaper article from a local Swedish newspaper (*Arbetarbladet*), which has not previously been cited before the domestic authorities. The newspaper article appears to be based on the author's account without any prior evaluation of his credibility. The same can be said of the article in the other article from a local Swedish newspaper (*Östersund-Posten*) submitted by the complainant, which has been presented to the domestic authorities. These articles can consequently be attributed only low probative value. The State party agreed with the domestic authorities' assessment that the articles were not sufficient to cause the authorities to assume that the articles would constitute a lasting impediment to the enforcement of the expulsion order. Moreover, the migration authorities noted in their decisions and judgements that the complainant had been unable to answer, to any appreciable extent, general questions about his sexual orientation and how it had affected his life. The fact that the complainant waited to present his alleged homosexuality until the decision to expel him had become final and non-appealable is another shortcoming in the credibility of the author's claims. The author's explanation for the delay, that he did not dare to tell anyone, is contradicted by his claim that he revealed his sexual orientation to several people in Nigeria, although he knew about the general opinion of homosexuality there and that it was prohibited. The State party does not consider the author's explanation for not having cited his sexual orientation at an earlier stage to be reasonable or acceptable. In the State party's view, this casts serious doubts regarding the general credibility and the veracity of the author's claims.

5.16 The author has failed to demonstrate that the domestic migration authorities did not take into account relevant facts or risk factors in their assessments and has not shown that the authorities' assessments were arbitrary or amounted to a manifest error or a denial of justice.¹⁷ Consequently, the claims presented to the migration authorities and to the Committee are insufficient to conclude that the author's expulsion to Nigeria would constitute a violation of the State party's obligations under article 7 of the Covenant.

the context of article 1 A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (October 2012), para. 62.

¹⁵ Application No. 72413/10, Judgment, 27 June 2013, para. 43.

¹⁶ The photograph is blurry and of poor quality.

¹⁷ See, for example, *X v. Norway* (CCPR/C/115/D/2474/2014), para. 7.5, and *X v. Denmark* (CCPR/C/113/D/2515/2014), para. 4.3.

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

6.1 On 21 October 2019, the author submitted comments, requesting that the interim measures remain in place and adding that should he be returned, he should be expelled under his real and cited name, and not under the alias registered by the Swedish authorities. The author acknowledges that the assessment of his asylum interviews has not been clearly arbitrary or amounted to a denial of justice. He notes that after having been granted a retrial, he had three interviews with the Migration Agency. All three were held in English, which is not his mother tongue (Hausa). Although he requested an English interpreter and has not expressed any complaints regarding the translation, he argues that in the assessment of the information he provided, especially when it comes to details, it should be taken into account that he did not express himself in his first language. He also had travelled a long distance for the interviews and was exhausted.

6.2 The author notes that the primary reason for conducting three separate interviews on the re-examination of his case was the poor quality of the first two interviews, as the case officer posed ill-informed and offensive questions regarding the author's information on his gender identity being fluid or transgender. He argues that his alleged inability to explain his actions and background can be attributed primarily to the case officer's lack of understanding of transgender identities during the first two interviews and the author's lack of education, limited vocabulary, and previous life in a society that heavily restricted his living conditions and thoughts. The author maintains that it is incorrect to claim that he had three full-length interviews, adding that his perceived credibility and reliability were influenced by the repetition and confusion as a result of feeling misunderstood and maltreated. The author also questions the influence of having an expert on lesbian, gay, bisexual, transgender and intersex issues involved.

6.3 The author acknowledges that he has not been able to present documents to plausibly demonstrate his cited identity, but claims that the State party does not have grounds to argue that his true identity is that of the man whose passport he used to escape Nigeria. He argues that the State party's assertion that his identity has been confirmed by the Nigerian embassy in Sweden is false. The Nigerian embassy was presented with an application for an emergency travel document, which was submitted by the Swedish police without the author's participation. The Nigerian embassy could not have confirmed his identity with no passport to examine, without having personally met him and without any other investigation presented. It appears as though the Nigerian embassy received the application with the attached photograph of the author and approved it without questioning the contents. The author admits that the information initially provided was incorrect, which is regretful; however, he had fled Nigeria due to persecution after being exposed as homosexual. Having lived a secretive and dangerous life for 20 years in Nigeria has had obvious effects on his expression, which explains why he did not disclose his homosexuality earlier, although he had been living in Sweden for almost a year when the Migration Agency rejected his second application for asylum.

6.4 As concerns the newspaper article in Nigeria, cited in December 2018, the author reasserts that his name is stated both in the physical version of the newspaper as well as online. While he agrees that the content of the physical article differs from the oral account he provided, cross-referencing his name from the online publication to the cited Swedish articles, which feature a full-page photograph of his face, as well as his name and nationality, may lead to a conclusion that the author can easily and strongly be tied to the online article and identified as homosexual. The physical copy of the article in question has not been examined by the Migration Agency or other authorities. The claim that it has been tampered with is therefore unfounded.

6.5 The author claims that the domestic authorities failed to take into account all relevant facts and risk factors in their assessment. The refusal to consider the articles in the *Nigerian Observer* and in the Swedish newspapers in the context of a retrial or as new circumstances amounts to a denial of justice.

State party's additional observations

7.1 On 2 December 2019, the State party submitted that the author's comments of 21 October 2019 did not include any new substantive information. It maintains its initial observations on the facts, admissibility and the merits of the communication. If there were aspects of the author's submissions that the authorities have not addressed, this should not be interpreted as acceptance of those assertions. Nonetheless, the State party presents some additional clarifications.

7.2 It notes that the author acknowledges that the domestic asylum interviews were not held in a clearly arbitrary way and did not constitute a denial of justice. He admitted that the third asylum investigative interview, which lasted for four hours, was conducted in a respectful manner. He nevertheless contends that the assessment of his case was unfair. Given these statements, the State party holds that the author is clearly trying to use the Committee as an appeals court to have his credibility reassessed. This is, however, not the role of the Committee.

7.3 The author argues that all asylum interviews were held in English, even though his mother tongue is Hausa. The State party notes that the author, in his application for asylum, stated that his mother tongue was English. During the initial asylum interview on 25 March 2015, he declared that his parents spoke English with him and that people who came to the marketplace in Nigeria also spoke English. It is also noted that the Migration Agency repeatedly asked the author, during the asylum investigative interviews, whether he understood what was being said; he confirmed that he did. Moreover, after the author was granted a new examination, the Migration Agency asked twice whether he could speak Hausa. On both occasions, the author maintained that he could not speak Hausa. In that light, the State party questions the entirely new assertion by the author regarding his mother tongues and holds that this appears to be an escalation of the cited circumstances before the Committee.

7.4 In addition to the three asylum interviews conducted by the Migration Agency, the Migration Court held an oral hearing in which the author had the opportunity to account for his newly cited grounds for protection. The State party hence emphasizes that the domestic migration authorities have thoroughly examined the author's case and all the circumstances cited throughout the investigative interviews. However, the authorities did not consider the author's claim of belonging to the lesbian, gay, bisexual, transgender and intersex community to be credible. The State party argues that when an author's grounds for protection have been thoroughly assessed by the State party's authorities, which have found that the author was not credible, the Committee cannot conclude a violation of article 7 if the author has not identified any irregularities in the decision-making process or any risk factor that the authorities failed to take into account.¹⁸ In this regard, the State party reiterates that the author concedes that the examination of his case was not clearly arbitrary or amounted to a denial of justice.

7.5 As regards the author's claims that the application for an emergency travel document was written and submitted by the Swedish police without his participation, the State party notes that, while the "emergency travelling certificate" from the Nigerian embassy is not signed by the author, it declares that he stated to the embassy that he was Nigerian, born on 11 August 1985 in Lagos State. The document also states that the embassy had no reason to doubt the author's statement. Accordingly, the document does not confirm the author's claim.

7.6 On 12 February 2015, the Swedish border police conducted an examination of the passport submitted by the author, with the help of optic technology, and made comparisons with other original identity documents from Nigeria. The police concluded that the passport, which contained the author's photograph, was authentic but noted that the residence permit attached to the passport was partly falsified. This assessment was subsequently communicated to the author.

¹⁸ See, for example, *X and X v. Denmark* (CCPR/C/112/D/2186/2012), para 7.5.

7.7 Regarding the cited article from the *Nigerian Observer*, the State party maintains its position that the inconsistencies between the author's oral account and the information provided in the article raises serious doubts regarding its connection to the author. In this context, the Government also considers it necessary to underline the generally frequent occurrence of fraudulent documents issued in Nigeria. This is evident from, inter alia, reports issued by the Home Office of the United Kingdom of Great Britain and Northern Ireland and by the Immigration and Refugee Board of Canada.¹⁹ In the report of the Home Office (p. 34), the following information can be found: "Benin City is a centre of the engraving industry, and practically any falsified document can be procured there, from birth certificates to diplomas." In addition to the above-mentioned inconsistencies, there are thus further reasons to question the authenticity of the submitted article.

7.8 The State party also reiterates that the author has not plausibly demonstrated his claimed identity. Accordingly, the article cannot be connected to him personally. Moreover, his claim that the Nigerian authorities monitor their citizens on the Internet and will cross-reference his face and cited name to articles published by local Swedish newspapers is merely speculative, as it is not based on specific facts. In any event, the author's emergency travel document from the Nigerian embassy is issued in a name that is different than the one appearing in the articles.

7.9 The State party maintains that there is no reason to conclude that the domestic rulings were inadequate or that the outcome of the domestic proceedings was in any way arbitrary or amounted to a denial of justice, observing that the author's account and the facts relied on by him in the communication are insufficient to conclude that the alleged risk of ill-treatment upon his return to Nigeria meets the requirements of being foreseeable, real and personal. Consequently, an enforcement of the expulsion order would not, under the present circumstances, constitute a violation of the State party's obligations under article 7 of the Covenant.

7.10 Lastly, considering that the decision to expel the author will become statute-barred on 13 July 2020, and that no further correspondence should be necessary, the State party respectfully reiterates its request that the Committee consider the admissibility and merits of the present communication in good time before July 2020, at the latest at its 128th session in March 2020.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 The Committee further 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.²⁰ The Committee takes note of the author's submission that he has exhausted all available domestic remedies, as the last negative decision not to

¹⁹ United Kingdom of Great Britain and Northern Ireland, Home Office, "Country information and guidance – Nigeria: background information, including actors of protection and internal relocation", version 2.0 (August 2016), available at www.ecoi.net/en/file/local/1262712/1226_1471849541_cig-nigeria-background-v2-0-august-2016.pdf; and Canada, Immigration and Refugee Board, "Nigeria: prevalence of fraudulent documents, including whether genuine documents can be obtained using false information; instances of visa application fraud; document verification practices at the Canadian visa office in Lagos (2016–August 2018)" (28 August 2018), available at <https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=457580>.

²⁰ See, for example, *Timmer v. Netherlands* (CCPR/C/111/D/2097/2011), para. 6.3.

grant the author a residence permit or a new examination was appealed to the Migration Court, which rejected the appeal on 10 January 2019. The Committee also notes that the State party does not contest the fact that all available domestic remedies have been exhausted in the present case. Accordingly, the Committee considers that in the present case, the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee, however, observes the State party's objection to the admissibility of the communication due to a manifest lack of substantiation, pursuant to article 3 of the Optional Protocol, as the author's assertions of a risk of violation of article 7 of the Covenant, if he were to be removed to Nigeria, failed to attain the basic level of substantiation required for the purpose of admissibility. The Committee considers the author's claims of a risk of persecution, criminal conviction and an eventual risk to his life, on account of his assumed homosexuality, as sufficiently specific and evidenced in regard to risk factors, sources of persecution and sanctions, and potential errors in the assessment of evidence, including the Swedish and Nigerian newspaper articles, during the domestic asylum proceedings, and therefore adequately substantiated for the purpose of admissibility. The Committee further considers that the inadmissibility argument adduced by the State party is intimately linked to the merits and should thus be considered at that stage. Accordingly, the Committee considers as admissible the author's claims under article 7 and proceeds to their examination on the merits.

Consideration of the merits

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

9.2 The Committee notes that the author claims that the State party would violate its obligations under article 7 of the Covenant by forcibly removing him to Nigeria. In this context, the Committee notes that the author submitted two applications for asylum in Sweden, on 10 February 2015 and on 28 July 2016. He first alleged that he faced a risk of being persecuted and killed by Boko Haram. He subsequently changed his account to an alleged risk of persecution or sanction for his assumed homosexuality, which is criminalized in Nigeria – the reason why he did not admit his sexual orientation initially.

9.3 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personal²¹ and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.²² Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin. The Committee further recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such a risk exists,²³ unless it is found that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.²⁴

9.4 The Committee notes the State party's argument that following the rejection of the author's initial asylum application on 28 January 2016, the Migration Agency decided on 18 October 2016 to re-examine his asylum application; that he had three interviews with different case officers whom he informed about his background and sexual orientation, admitting that he did not know at that time whether Nigerian authorities had information

²¹ *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2; *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.6; and *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

²² *X v. Denmark*, para. 9.2 and *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

²³ *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), para. 11.4; and *Lin v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

²⁴ *Y.A.A. and F.H.M. v. Denmark* (CCPR/C/119/D/2681/2015) para. 7.3; and *Rezaifar v. Denmark* (CCPR/C/119/D/2512/2014), para. 9.3.

about his sexual orientation; and that the Migration Agency rejected the author's second asylum application on 12 October 2017, considering the author's statements about his sexual orientation not to be credible as being vague, undetailed and implausible. The second negative decision was upheld by the Migration Court on 30 January 2018, and the Migration Court of Appeal on 7 March 2018. The author submitted a second application for re-examination of his asylum case after he received new information regarding his status in Nigeria; that application was rejected by the Migration Agency on 18 December 2018, and the negative decision was upheld by the Migration Court on 10 January 2019, which stated that the Swedish and Nigerian newspaper articles could not change the assessment, while mentioning that the author had never proven nor made plausible his identity, and hence could not connect the articles to his person to demonstrate a personal and real risk of irreparable harm due to his sexual orientation. The Committee further notes the State party's argument that the author fled Nigeria and entered Sweden with a falsified passport, which contained a name that was different than his claimed one but which had his photograph attached, and that the Nigerian embassy confirmed the author's identity as documented in the passport, which contained a visa page that had been falsified, as determined by the expertise of the Swedish police.

9.5 The Committee notes that the State party has further argued that the Swedish migration authorities have considered two different accounts of alleged risks by the author and re-examined his asylum application twice, having perceived the evolving arguments, including the submission of the newspaper article from the *Nigerian Observer* only on 7 January 2019, although dated 15 August 2014, as an escalation of claims rather than new circumstances that would merit re-assessment. The Committee further notes the State party's argument that the author admitted that the assessment of his asylum interviews had not been arbitrary or amounted to a manifest error or denial of justice, and that the evolving statements by the author, such as about the killing of his parents first by Boko Haram and then by a mob in retaliation for his disclosed sexual orientation, have lacked consistency, which together with the disputed identity, has weakened the author's general credibility.

9.6 The Committee notes the author's submission that his claims were not properly assessed by State party's authorities, as he had participated in an interview with *Östersunds-Posten*, a Swedish newspaper, on 11 May 2018, available online to subscribers, against which he could be identified as homosexual by the Nigerian authorities or individuals since the article contained a close-up photograph of his face and several photographs in which he could be identified. The author has claimed that he could therefore face 10 to 14 years of imprisonment, if convicted. The author further submits that he learned at the end of December 2018 that a friend had seen a newspaper article published in the *Nigerian Observer*, dated 15 August 2014, containing both his name (A.E.) and his photograph and stating that he is wanted by the police for homosexual activity, and that a physical copy of the newspaper article could not be submitted earlier. The author has claimed that despite the submission of new evidence, the Swedish asylum authorities have not properly examined on the merits either the Swedish or the Nigerian newspaper articles, and that the Migration Court, on 10 January 2019, had confirmed the decision by the Migration Agency of 18 December 2018 not to re-examine the case, which amounted to a denial of justice. The Committee notes the author's argument that he should have been granted a new interview with the Migration Agency, as the new material gives reason to look more closely at his ascribed sexual orientation, which would expose him to a risk of further persecution if returned to Nigeria.

9.7 The Committee observes in this regard the State party's assertion that the Migration Agency and the Migration Court have repeatedly exercised both an individualized and an overall assessment of the specific circumstances of the author's case, taking into account the background information on the situation of lesbian, gay, bisexual, transgender and intersex persons in Nigeria, and found that the author was not facing a personal and real risk that would justify asylum in Sweden, mainly since he did not establish as probable that he was homosexual or convincingly demonstrate his identity and that he would attract the risks under the name cited in the Swedish or the Nigerian newspaper articles. The Committee observes that the newspaper articles were duly assessed by the asylum authorities, which could not establish without a doubt that the photograph in the paper copy of the *Nigerian Observer* article was that of the author, thus posing a legitimate concern

about the genuineness of the article. In addition, it was not established whether the article in the Swedish newspaper related to the author, and since its online access was limited to paying members, the asylum authorities did not consider that homosexual orientation would be ascribed to the author in his country of origin. The Committee also observes that the migration authorities' decisions of 18 December 2018 and 10 January 2019 took into account that A.E. did not speak about his sexual orientation until after his expulsion order had entered into legal force. It has affected the credibility of his information negatively, especially in view of the fact that at that time he had been in Sweden for 1.5 years and had had several meetings with the Migration Agency where he had had the opportunity to talk about it. At an overall assessment, the Migration Court found that A.E.'s story had escalated and contained such deficiencies and ambiguities that it did not appear credible. National authorities were of the view that since he was not able to establish as probable that he was homosexual and that if returned to Nigeria he risked persecution due to his sexual orientation, he could not be granted a residence permit or subsidiary protection. The Committee recalls its jurisprudence that an author carries the burden of proof to support the allegations of a personal and real risk of irreparable harm, including the obligation to submit evidence sufficiently in advance of the decisions of the national authorities, unless the information could not have been presented before. The Committee observes that the author's alleged irregularity in the decision-making process has been characterized by the State party's authorities as an escalation of his claims. In the circumstances of the present case, the Committee considers that the author's claims mainly reflect his disagreement with the factual conclusions drawn by the State party's authorities, and do not demonstrate that these conclusions are arbitrary or manifestly unreasonable or that the proceedings in question amounted to a procedural error or denial of justice.²⁵

9.8 In the light of the above, the Committee concludes that the information before it does not demonstrate that the author would face a real and personal risk of treatment contrary to article 7 of the Covenant in the event of his removal to Nigeria.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the removal of the author to Nigeria would not violate his rights under article 7 of the Covenant.

²⁵ See, for example, communications *I.K. v. Denmark* (CCPR/C/125/D/2373/2014), para. 9.7, and *M.P. et al. v. Denmark* (CCPR/C/121/D/2643/2015), para. 8.7.