United Nations CRC/C/94/D/145/2021

Convention on the Rights of the Child

Distr.: General
16 October 2023

Original: English

Committee on the Rights of the Child

Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 145/2021*, **

Communication submitted by:	O.M. (represented by counsel, Line Bøgsted, Danish Refugee Council)
Alleged victims:	C.C.O.U., C.C.A.M. and A.C.C.
State party:	Denmark
Date of communication:	25 May 2021 (initial submission)
Date of adoption of Views:	19 September 2023
Subject matter:	Separation of children from their father due to his deportation to Nigeria
Procedural issues:	Failure to exhaust domestic remedies; non-substantiation of claims
Substantive issues:	Best interests of the child; family separation
Articles of the Convention:	3, 7, 9 and 10
Articles of the Optional Protocol:	7 (e) and (f)

1.1 The author of the communication is O.M, a national of Nigeria born on 11 November 1984. He submits the communication on behalf of his "stepson", C.C.O.U., a national of Nigeria born on 23 February 2012, and his two children, C.C.A.M. and A.C.C., nationals of Nigeria born in Denmark on 23 August 2018 and 15 April 2020, respectively. The author is subject to an expulsion order to Nigeria. He claims that his deportation to Nigeria would be in violation of the rights of C.C.O.U., C.C.A.M. and A.C.C. under articles 3, 7, 9 and 10 of the Convention. The author is represented by counsel. The Optional Protocol entered into force for the State party on 7 January 2016.

1.2 On 2 June 2021, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to refrain from returning the author to Nigeria while the case was under consideration by the Committee. On 29 June 2021, the Immigration Appeals Board confirmed that the deadline of the author's return had been suspended until further notice, in accordance with the Committee's request.

* Adopted by the Committee at its ninety-fourth session (4–22 September 2023).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Aïssatou Alassane Sidikou, Thuwayba al Barwani, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chophel, Rosaria Correa, Bragi Gudbrandsson, Philip Jaffé, Faith Marshall-Harris, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

Facts as submitted by the author

2.1 On 4 April 2015, the author entered Denmark and applied for asylum. On 14 June 2016, the asylum procedure was terminated because the author was reported missing from the asylum centre that he was assigned to. On 19 August 2016, the author was sentenced by the City Court of Copenhagen to three months imprisonment for possession of drugs, along with an expulsion order from Denmark with a six-year re-entry ban. On 17 June 2017, the Immigration Service ordered that the author remain in the deportation centre at Kærshovedgård and report daily to the police.

2.2 During the course of 2017, the author started a relationship with a national of Nigeria, C.C.A., who, since 6 April 2016, has had a residence permit in Denmark due to medical reasons given that she suffers from chronic leukaemia. According to a medical examination,[1] given her medical condition, C.C.A. requires highly specialized treatment and medical advice, including regular checks. If her ongoing treatment were interrupted, she would not be able to live more than four years. C.C.A. has a son, C.C.O.U. (who also has a residence permit in Denmark), from a previous relationship. The former partner of C.C.A. and biological father of C.C.O.U. does not reside in Denmark.

2.3 On 20 July 2017, the author was reported missing from the deportation centre. On 23 August 2018, C.C.A.M., the first child of the author and C.C.A., was born. C.C.A.M. obtained a residence permit in Denmark. On 26 November 2018, the author was again reported missing from the deportation centre. On 21 March 2019, the author was convicted by the City Court of Herning to 60 days' imprisonment and another expulsion order and six-year re-entry ban were issued due to lack of respect for the order to remain at the deportation centre and report to the police.

2.4 On 27 May 2019, the Western High Court confirmed the expulsion orders and six-year re-entry bans that had previously been issued by the City Court of Copenhagen, on 19 August 2016, and by the City Court of Herning, on 21 March 2019. The Western High Court did, however, note that the author had a family life in Denmark. During proceedings, the author explained that the main reason that he did not stay at the deportation centre was the fact that the medical condition of C.C.A. required frequent treatment at the hospital, especially during her pregnancy. The author explained that he took care of his "stepson", C.C.O.U., during those medical visits and he argued that he had informed the deportation centre of his whereabouts. The Court, however, did not deem the expulsion to be disproportionate, and stated that it would not be impossible nor an insurmountable difficulty to continue family life in another country, even if C.C.A. suffered from leukaemia. The Court also noted that the author could remain in contact with his family through Skype, Facetime and other digital means, and specified that periodic short visits could be organized with his child and partner, but outside Denmark.

2.5 On 3 May 2019, the Immigration Service rejected the author's asylum application. That decision was confirmed by the Refugee Appeals Board on 11 October 2019. On 16 April 2019, the author filed an application for a residence permit based on exceptional circumstances, stating that he had a family life in Denmark with his child, "stepson" and girlfriend, which would not be able to be maintained if he were to be expelled with a re-entry ban of six years. On 5 December 2019, the Immigration Service refused that request for a residence permit and stated that it was impossible to apply for family reunification in Denmark, as the author did not have a legal permit to stay in the country and had previously received an expulsion order. On 13 December 2019, a complaint was filed with the Immigration Appeals Board, requesting suspension of the expulsion decision, which was denied on 8 January 2020. Another request for suspension was again refused on 13 February 2020.

2.6 The author notes that he has been detained since 1 February 2019 and had served his sentence of three months by 1 April 2019. However, he remains in custody in line with section 35 of the Aliens Act for the purpose of securing his presence to ensure his return to Nigeria. A representative from the Embassy of Nigeria in Stockholm agreed, on 27 February 2020, to issue travel documents for the author, but at the time of the presentation of the

[1] The author attaches a copy of the medical examination to his submission.

communication, 15 months after the initial confirmation by the Embassy, no documents had been issued and the author remained in detention.

2.7 On 15 April 2020, A.C.C., the second child of the author and C.A.A., was born. The child has a residence permit for Denmark. On 19 June 2020, the author applied to have his expulsion order repealed, due to a fundamental change of circumstances, invoking the birth of a second child. The District Court of Helsingor rejected the request on 18 December 2020. That decision was confirmed by the Eastern High Court on 12 January 2021, which stated that the fact that the author had one more child with his girlfriend could not be considered as new essential information. The author notes that neither in that decision nor in the other judicial decisions was there any consideration of the effect that an expulsion order and re-entry ban would have on the children, and the only reference that is made is to the use of video calls as a measure to maintain family life.

Complaint

3.1 The author claims that the rights of C.C.O.U., C.C.A.M. and A.C.C. enshrined in articles 3, 7, 9 and 10 of the Convention would be violated if he were deported to Nigeria and argues that the separation of the children from him would be contrary to their best interests. The author contends that his deportation to Nigeria would have a serious impact on the children's well-being, especially given that their mother is facing a life-threatening illness.

3.2 The author claims that the Western High Court, the Eastern High Court, the Immigration Service and the Immigration Appeals Board failed to assess the best interests of the children as a primary consideration in deciding to uphold the decision to return him to Nigeria, to deny family reunification and to refuse the request for suspension of the expulsion order. The author notes that in none of those decisions is there a reference to the best interests of the children. He adds that the Eastern High Court did not appropriately examine the various factors related to the best interests of the child and did not weigh the best interests against the gravity of the crime committed and the public interest in the case.

3.3 The author contends that if he were deported, C.C.O.U, C.C.A.M. and A.C.C. would be deprived of their right to be cared for by both parents, in accordance with article 7 (1) of the Convention. The author adds that the different judicial and administrative procedures have not only failed to assess the best interests of the children, but also to assess whether the deportation may in fact lead to a permanent separation of the family, contrary to article 9 of the Convention. The author argues that the children cannot follow their father to Nigeria, as their mother is undergoing medical treatment in Denmark and cannot travel for long periods at a time. Moreover, the children will have to attend school and travelling internationally is expensive for a single mother and the children are too young to travel alone. The author states that he cannot visit his children in Denmark due to the travel ban and argues that that combination of factors would lead to a de facto separation of the family. The author explains that the biological father of C.C.O.U is not in Denmark and there are no other caregivers present in the country in addition to C.A.A. The author argues that it is difficult for a single mother with an illness that requires frequent hospitalization to take care of three small children alone. Therefore, if he were to be deported to Nigeria, there would be no one to take care of the children if the mother's situation worsened or if she passed away. That would mean that the children would have to move to Nigeria to live with a father with whom they would not have been able to build a proper relationship. The author notes that C.C.O.U. has not been in Nigeria since he was two years old, and C.C.A.M. and A.C.C. have never been to Nigeria.

3.4 The author claims that, if he were to be deported, his youngest child, A.C.C., would not be able to establish a relationship with him through video calls or other digital means, even though this was suggested by the Western High Court. The author argues that that implies that the family life of A.C.C. with his father would be effectively ruptured. The author adds that his "stepson", C.C.O.U., and his oldest child, C.C.A.M., would not be able to relate to him in a manner that makes it possible for him to become a real caregiver if the mother died or if her illness worsened to the point that she could not take care of her children anymore.

State party's observations on admissibility and the merits

4.1 On 2 February 2022, the State party submitted its observations on admissibility and the merits, contending that the communication should be considered inadmissible and submitting that if the communication were found to be admissible, the author's deportation to Nigeria would not entail a violation of his children's rights under articles 3, 7, 9 and 10 of the Convention.

4.2 Regarding the facts, the State party refers to the judgment of the Western High Court of 27 May 2019, in which additional arguments were provided by the author, including the fact that his absence from the deportation centre was due to the illness of C.C.A. and the care for her son due to the leukaemia she is suffering from, and the fact that he also had a biological child. According to the information received, the Court determined that the conditions for expulsion had been met. The Court assessed whether the expulsion would entail an interference with the author's right to respect for private and family life under article 8 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The Court considered that, based on the underlying circumstances, the couple could not have had a justified expectation to continue to exercise their right to family life in Denmark with their child born in August 2018. The Court decided that the expulsion, together with a six-year re-entry ban, was not disproportionate, as continuing their family life in another country could not be presumed to be impossible or to entail insurmountable difficulties even though C.C.A. received essential treatment for chronic myeloid leukaemia in Denmark. The Court observed that the author would be able to maintain contact with his family by using social media platforms and being together with the child and his mother for short periods of time in countries other than Denmark.

4.3 The State party refers to the order of the District Court of Helsingor of 18 December 2020, which responded to a request claiming that material changes in the circumstances of the author had occurred. The State party refers to the author's arguments presented during those proceedings, including the fact that he would be unable to exercise his right to family life through social media platforms, and that he could not be expected to establish a family life through the proposed media, in particular as such a family life included a newborn. The author alleged in those proceedings that exercising the right to family life during short periods in countries other than Denmark was unrealistic, as his expulsion would apply in all Schengen and European Economic Area countries. He added that the right to family life could not be exercised in Nigeria, as C.C.A. required medical treatment that was unavailable there. The State party confirms that, in those proceedings, the author presented additional information and arguments, including that the matters before the Court had regard to article 3 of the Convention. The Court recognized certain personal circumstances presented by the author, including the fact that he had had a relationship with C.C.A. for five years, with whom he had had two children and that he spent time with the children every day before his imprisonment. The Court considered that the Immigration Service had found that the expulsion of the author would not be contrary to the international obligations of Denmark, that the fact that he had fathered a child living in Denmark after the expulsion order was issued could not lead to a different outcome and that the fact that he spent time with his children every day until his imprisonment could not justify the revocation of the expulsion order. The Court further acknowledged the author's statements that he was very close to the son of C.C.A., C.C.O.U., who visited him in prison and sent him drawings, that he took care of the three children whenever he was out of detention and that he missed them when he was absent. The District Court of Helsingor upheld the decision of the Western High Court, referring to the fact that the couple could not have had a justified expectation that they would be able to continue to exercise their right to family life in Denmark, and found that an expulsion order combined with a re-entry ban for six years was not disproportionate. On 21 December 2020, the author filed an appeal against that decision, which was denied by the Eastern High Court on 12 January 2021.

4.4 On 8 January 2020, the Immigration Appeals Board rejected the appeal that the author had presented against the decision of the Immigration Service of 5 December 2019, finding that there were no special circumstances that would allow for an appeal or a postponement of the expulsion deadline. On 11 October 2021, the Immigration Appeals Board again upheld

the decision of the Immigration Service of 5 December 2019. The Immigration Appeals Board noted the author's arguments regarding the medical condition of C.C.A. and the fact that she would most likely die within a number of years without the necessary treatment, the difficulties in maintaining family life, including through video calls or short visits if the author were to be deported, and the argument that it was unfair to expect that the relationship between the author and his children would remain stable and close if he were to leave Denmark, and that that would de facto dissolve the family. The Immigration Appeals Board found that the international obligations of Denmark did not dictate that the author's application should be allowed and referred to the fact that article 8 (2) of the European Convention on Human Rights stated that no public authority was allowed to intervene in the exercise of the right to family life, unless it happened in accordance with the law and was necessary in a democratic society with respect to national security, public safety or the country's economic well-being, to prevent disorder or crime, to protect health or morals, or to protect the rights and freedoms of others. The Immigration Appeals Board noted that article 8 of the European Convention on Human Rights did not entail a general and unconditional right to family reunification as families did not have an unconditional right to choose the country in which they wanted to exercise their family life. The Immigration Appeals Board referred to the case law of the European Court of Human Rights[2] and stated that, when weighing proportionality, elements such as a State party's right to control immigration might be taken into consideration, including whether the applicant had previously committed offences under immigration law, considerations of national security and considerations of public order. The Immigration Appeals Board added that, by rejecting an appeal, the author was not precluded from obtaining family reunification in accordance with section 9c of the Aliens Act. Furthermore, the Immigration Appeals Board found that there were no other issues to preclude the author from making an application for family reunification through the Danish representation in his country of origin or in a country in which he had been legally resident for the previous three months. The Immigration Appeals Board added that the fact that C.C.A. was receiving vital treatment for chronic myeloid leukaemia in Denmark, that she had a 9-year-old child who was not in contact with his father and that the author was close to that child could not lead to a different assessment. The Immigration Appeals Board noted that the fact that C.C.A. would most likely die within a limited number of years and that the author would then be the single parent for the children of his union with C.C.A. and of her previous union could not lead to another outcome. The Immigration Appeals Board repeated that the couple did not have a legitimate expectation to be able to live their family life in Denmark and upheld the decision of the Immigration Service of 5 December 2019.

4.5 The State party refers to the Aliens Act of 26 September 2021 as amended by Act No. 2055 of 16 November 2021, which states in section 9c thereof that residence can be granted to an alien upon application due to exceptional reasons, including regard for family unity, and specifies in the same section that an application for residence can only be submitted in Denmark if the alien is lawfully resident in the country. The State party adds that the Aliens Act determines, in section 22 thereof, that aliens can be expelled for violations of the Act on Controlled Substances if they are sentenced to imprisonment or another criminal sanction involving or allowing deprivation of liberty. Additionally, the Aliens Act specifies, in section 26 (2) thereof, that an alien cannot be expelled if such an act were contrary to the international obligations of Denmark. In the case at hand, the State party argues that an assessment was made on the principle of proportionality, in accordance with article 8 of the European Convention on Human Rights. It states that the case law[3] of the European Court of Human Rights has specified a number of criteria that have to be taken into account, including: the nature and seriousness of the offence committed; the person's family situation; whether there are children from the marriage and, if so, their ages; the best interests and well-being of the children; and the strength of social, cultural and family ties with the host country and with the country of destination. The State party notes that, on 19 August 2016, when the City Court of Copenhagen delivered its judgment, the author had not founded a family life in

[2] European Court of Human Rights, *Konstantinov v. the Netherlands*, Application No. 16351/03, Judgment, 26 April 2007.

[3] European Court of Human Rights, *Maslov v. Austria*, Application No. 1638/03, Judgment, 23 June 2008, para. 70.

Denmark, for which reason the sole issue was whether an order expelling him from Denmark should be considered a violation of his right to private life under article 8 (1) of the European Convention on Human Rights. The State party provides information about procedural issues, explaining that defendants in criminal cases in Denmark generally have a right to a hearing before two different instances. It notes that the most recent judgment expelling the author from Denmark and banning him from re-entry for six years was tried by several different instances at the request of the author and several different instances also found that there had been no changes in his circumstances that would justify the revocation of the expulsion order. The State party adds that the Immigration Appeals Board is an independent, collegiate, quasi-judicial executive agency that decides on appeals in cases under immigration law and certain police decisions. It notes that the decisions of the Immigration Appeals Board are not final and can be appealed before the courts pursuant to section 63 of the Constitution of Denmark.

4.6 On the admissibility of the communication, the State party contends that domestic remedies have not been exhausted, as the decision of the Immigration Appeals Board of 11 October 2021, which upheld the decision of the Immigration Service of 5 December 2019 by denying the author's request for a residence permit (see para. 4.5 above), has not been appealed to the courts, which is a possibility according to section 63 of the Constitution. The State party thus requests the Committee to declare the communication inadmissible pursuant to article 7 (e) of the Optional Protocol on a communications procedure. The State party adds that the claims presented by the author regarding the rights of C.C.O.U., C.C.A.M. and A.C.C. have never been argued before the national courts and submits that the author has failed to establish a prima facie case for the purpose of admissibility of the communication, as required by article 7 (f) of the Optional Protocol.

4.7 Regarding the merits of the case, the State party refers to the jurisprudence of the Committee in the case of U.A.I. v. Spain [4] and to a judgment of the European Court of Human Rights,[5] and contends that the authors' cases were thoroughly considered by the courts and that the authors failed to identify any irregularities in the proceedings before the courts or the decision-making process before the Immigration Appeals Board. The State party argues that there is no basis for setting aside the assessment made by the national courts and authorities of the facts and evidence in the case and the possibility of maintaining a family life after the expulsion of the author. The State party observes that the author has not provided any essential new information to the Committee that has not already been considered by the authorities. It claims that the author's communication merely reflects the fact that he disagrees with the outcome of the assessment of the specific circumstances of the present case.

4.8 Regarding the author's claims of a violation of article 3 of the Convention, the State party notes that a child's parents have the main responsibility for protecting the best interests of their child. Referring to article 9 of the Convention, the State party notes that that implies that it should ensure that children are not separated from their parents against their will, except in situations that are deemed incompatible with the best interests of the child. The State party adds that that article also includes an obligation for the Government to respect the right of children to maintain contact with both parents and to recreate this contact if the separation is due to any action initiated by a State party. The State party recognizes that article 7 of the Convention entails the right of children to be taken care of by their parents as far as possible, and adds that article 10 obliges States parties to ensure that children can maintain contact with their parents and that family reunification cases should be dealt with in a positive, humane and expeditious manner.

4.9 The State party notes that the author's application for family reunification was rejected in Denmark, but argues that the Danish authorities have not decided whether the author could get a residence permit in Denmark if a full application were submitted from his country of origin or a country in which he had been legally resident for the previous three months. The State party adds that the fixed maximum time limit in a case involving family reunification was seven months at the time of the decision. The State party reiterates that the author was

[4] *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2.

[5] European Court of Human Rights, *X v. Sweden*, Application No. 36417/16, Judgment, 9 January 2018, para. 47.

convicted on 19 August 2016 and recalls that the expulsion order and re-entry ban were issued before he had established his family life in Denmark. The State party refers to the case law of the European Court of Human Rights[6] and argues that a person who is facing deportation cannot rely on subsequently establishing family life to create grounds to stay in the country from which he is facing deportation. The State party submits that the Western High Court, in its decision of 27 May 2019, carefully considered whether the interference in the author's right to family and private life would be disproportionate in the light of article 8 of the European Convention on Human Rights. The State party contends that the courts have carefully considered the right of the victims to family life when assessing the case of their father/"stepfather" and, in this regard, the opportunities for them to maintain contact and know him and thus have taken into account their best interests. The State party claims that the Immigration Appeals Board, in its decision of 11 October 2021, has thoroughly evaluated whether the denial of the submission for family reunification was in accordance with the international obligations of Denmark, including those emanating from the Convention, and recalls the arguments established by the Immigration Appeals Board. The Government adds that the provisions of the Convention focus on the needs of children, including a consideration of the best interests of the child in article 3. It claims that the Convention thus contains provisions that, without regulating the right to family life as is the case of article 8 of the European Convention on Human Rights, under the circumstances can be significant for the right to family reunification. The State party thus contends that the judgments of the courts concerning the expulsion of the author and the rejection by the immigration authorities of his request to submit an application for family reunification do not constitute a violation of articles 3, 7, 9 and 10 of the Convention.

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

5.1 On 20 May 2022, the author submitted comments on the State party's observations. Regarding the State party's arguments claiming that the communication should be declared inadmissible as the decision of the Immigration Appeals board of 11 October 2021 has not been appealed to the courts, the author replies that, according to international jurisprudence,[7] the requirement to exhaust domestic remedies does not render a communication inadmissible if the specific remedy in a case does not have any prospect of offering effective redress. The author adds that the Immigration Appeals Board clearly stated, in its decision of 11 October 2021, that the author's application for family reunification could not be processed since he was subject to a re-entry ban. He claims that the issue at hand is the question of whether his expulsion and re-entry ban have been properly assessed by the courts with due respect for the best interests of the child, and whether the Immigration Appeals Board should have made its own assessment of the best interests of the child regardless of the judgments of the courts. The author notes that the Immigration Appeals Board based its decision on judgments of the city courts and high courts. The author submits that, according to international case law,[8] the State party must provide evidence that the remedy available in the author's case offers a reasonable prospect of success. He argues that the State party has failed to provide any evidence that there is a reasonable prospect of success for the judicial review it refers to.

5.2 The author refers to the State party's argument that the claims regarding the rights of the children have not been heard before the national courts and notes that the proceedings before the courts concerned the right to family life of the author with his children. He repeats that the argument in this case is precisely that the courts have not taken the children's best interests, including their right to family life, into account, although they should have done so according to the obligations enshrined in the Convention. The author states that the main

[6] European Court of Human Rights, *Onur v. the United Kingdom*, Application No. 27319/07, Judgment, 17 February 2009, para. 50.

[7] *Toala et al. v. New Zealand* (CCPR/C/70/D/675/1995), para. 6.4; *Chongwe v. Zambia* (CCPR/C/70/D/821/1998), para. 4.3; *Bousroual v. Algeria* (CCPR/C/86/D/992/2001), para. 8.3; European Court of Human Rights, *L.L. v. France*, Application No. 7508/02, Judgment, 10 October 2006, para. 23; and European Court of Human Rights, *Gnahoré v. France*, Application No. 40031/98, Judgment, 19 September 2000, paras. 46–48.

[8] European Commission of Human Rights, *Spencer v. the United Kingdom*, Applications No. 28851/95 and No. 28852/95, Decision on Admissibility, 16 January 1998.

argument before the courts has been the separation of the victims from their father, and argues that the State party cannot claim that the courts did not have an obligation to consider the children's right to family life and their best interests. The author concludes that no more effective domestic remedies are available in the present case.

5.3 Regarding the merits of the case, the author reiterates his claim that, in all the different proceedings, there has been no mention of the effect that the author's expulsion order and re-entry ban would have on the children. The author notes that the only reference that was made was the use of video calls to maintain family life. Referring to the State party's reference to the case of *U.A.I. v. Spain*, the author notes that the case is not comparable to the present case, as in that communication, the courts did consider the best interests of the child. The author underlines that a re-entry ban for six years was issued against him, which would lead to effective separation from the children. He claims that six years of separation are not proportionate in relation to the best interests of the child, especially given the terminal illness of the children's mother. He repeats that the main issue in the proceedings before the Danish courts was the right to family life of the author, which is not the same as proceedings based on the best interests of C.C.O.U., C.C.A.M. and A.C.C. The author notes that, in all the different proceedings, no assessment has been made of the children's future attachment to their father/"stepfather" nor of the risk that their mother's leukaemia might worsen or lead to death, and the impact that this would have if their father were not in Denmark because of the re-entry ban. The author adds that none of the children has been heard in any of the court cases and no criteria to assess the best interests of the child have been described in any of the judgments with a specific emphasis on the rights of the children. The author requests the Committee to declare the case admissible as the expulsion order and re-entry ban that were imposed on him are not in the best interests of the children and he argues that such an assessment has not been thoroughly made by national authorities.

State party's additional observations

6. On 18 November 2022, the State party submitted additional observations. It notes that the author has claimed that C.C.A. is terminally ill with leukaemia and argues that the Immigration Appeals Board, in its decision of 11 October 2021, made a decision in the case, taking into account that the illness was being well treated. The State party notes that the fact that C.C.A. is terminally ill is to be considered as new information and adds that the author has not submitted any evidence to substantiate this fact. The State party claims that it therefore cannot duly assess that matter nor consider it a statement of fact, and notes that the author could bring this information to the attention of the authorities, for example by submitting a new application for family reunification based on new essential information.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the claim is admissible under the Optional Protocol.

7.2 The Committee takes note of the State party's claim that domestic remedies have not been exhausted because: (a) the decision of the Immigration Appeals Board of 11 October 2021, which upheld the decision of the Immigration Service of 5 December 2019 by denying the author's application for a residence permit, has not been appealed to the courts, which is a possibility according to section 63 of the Constitution of Denmark; and (b) the author has never raised his claims regarding alleged violations of the rights of C.C.O.U, C.C.A.M. and A.C.C. before the national courts.

7.3 Regarding the first issue, the Committee takes note of the author's argument that an appeal before the courts does not have any prospect of offering effective redress because the issue at hand is the question of whether his expulsion and re-entry ban have been properly assessed by the courts with due respect for the best interests of the child. The Committee observes that the author raised the issue of his family life in the context of criminal and asylum proceedings, as well as in his request for a residence permit before administrative

instances, and that all his complaints were rejected.[9] In that context, the State party has not explained how a possible additional appeal before the courts based on the arguments that were previously rejected could be effective in these particular circumstances.[10]

7.4 With regard to the State party's contention that the author has never raised the arguments related to the violations of the rights of C.C.O.U, C.C.A.M. and A.C.C. before the national courts, the Committee notes that the author consistently raised violations of his right to family life, which is intimately linked to the children's right not to be separated from their father, and that he referred to article 3 of the Convention in the proceedings of 18 December 2020 before the District Court of Helsingor.[11] The Committee also notes that, in the assessment of the author's deportation, the impact that the separation would inevitably have on the children should have been a central issue. The Committee thus considers that the requirements of article 7 (e) of the Optional Protocol have been met.

7.5 The Committee takes note of the State party's argument that the author has failed to sufficiently substantiate his claims. However, the Committee takes note of the author's allegations that the best interests of the children were not taken into account in the different proceedings that resulted in the confirmation of the author's deportation, which would have a serious impact on the children's well-being, especially given the fact that their mother is facing a life-threatening illness.[12] The Committee therefore considers that the author's claims based on articles 3, 7, 9 and 10 of the Convention have been sufficiently substantiated for the purposes of admissibility.

7.6 Accordingly, the Committee will proceed to consider the merits of the author's claim, with regard to articles 3, 7, 9 and 10 of the Convention.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

8.2 The Committee takes note of the author's argument that the expulsion order and six-year re-entry ban imposed on him would violate the rights of C.C.A.M. and A.C.C. to be cared for by him as their father and not to be separated from him, in violation of articles 7 and 9 of the Convention, respectively.

8.3 The Committee notes that, while the author is not the biological father of C.C.O.U., C.C.O.U. has been taken care of by the author, together with his mother, since the age of 2, including after the birth of his half-siblings, C.C.A.M. and A.C.C. Therefore, the Committee considers that the author is a "parent" of C.C.O.U. for the purposes of the latter's right not to be separated from the author.

8.4 The Committee notes that, although the children's contact with the author has been subjected to significant restrictions during the author's deprivation of liberty, they have maintained a close relationship with him nonetheless.[13] The Committee also notes the author's uncontested argument that C.C.O.U, C.C.A.M. and A.C.C. cannot follow him to Nigeria, a country with which they have no or a very limited relationship, as their mother is undergoing essential medical treatment in Denmark and is unable to travel. Against that background and considering the six-year re-entry ban imposed on the author, his return to Nigeria would inevitably lead to a de facto and prolonged separation from C.C.O.U, C.C.A.M. and A.C.C. The Committee must therefore consider whether such a separation is justified in the light of the State party's obligations under the Convention and whether the children's best interests were a primary consideration in the proceedings leading to the author's expulsion order.

8.5 The Committee recalls that, pursuant to article 9 (1) of the Convention, States parties should ensure that children are not separated from their parents against their will, except

[9] *C.R. v. Paraguay* (CRC/C/83/D/30/2017), para. 7.3.
[10] *Y.A.M. v. Denmark* (CRC/C/86/D/83/2019), para. 7.2.
[11] Para. 4.3 above.
[12] Paras. 3.2–3.4 above.
[13] Paras. 2.4 and 4.3 above.

when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary in the best interests of the children. The Committee also recalls its general comment No. 14 (2013), according to which the right of children to have their best interests taken into account as a primary consideration is a substantive right, a fundamental interpretative legal principle and a rule of procedure.[14] Therefore, the legal duty to assess the best interests of the child applies to all decisions and actions that directly or indirectly affect the child, even if they are not the direct target of the measure; the Committee specified that, in situations in which decisions would have a major impact on children, a greater level of protection and detailed procedures to consider their best interests was appropriate.[15] In that regard, the Committee considers it indispensable to carry out the assessment and determination of children's best interests in the context of a potential separation of a child from their parents.[16] Specifically, the best interests of children should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning, inter alia, the detention or expulsion of parents associated with their own migration status.[17] Additionally, the Committee has stressed the need to conduct systematically best-interests assessments and determination procedures as part of, or to inform, migration-related and other decisions that affect migrant children, which involve evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children.[18] The Committee has further specified that States parties have an obligation to assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status and that these procedures should be put in place in any decision that would separate children from their family.[19] Lastly, the Committee recalls that, as a general rule, it is for national authorities to examine the facts and evidence and to interpret domestic law unless such an examination or interpretation is clearly arbitrary or amounts to a denial of justice. It is therefore not for the Committee to interpret domestic law or to assess the facts of the case and the evidence in place of the national authorities but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the children were a primary consideration in that assessment.[20]

8.6 In the present case, the Committee takes note of the State party's contention that the national courts have carefully considered the children's right to family life when assessing the author's case and, in this regard, considered the opportunities for the children to maintain contact with him, including through videoconferencing. The Committee notes, however, that the State party's authorities failed to consider the impact of the separation on the children and how such contact could be ensured in the particular circumstances of the case, including the children's young age, their mother's inability to travel to a third country and the six-year re-entry ban imposed on the author. In these circumstances, any significant contact of C.C.O.U., C.C.A.M. and A.C.C. with the author would seem highly difficult. Neither did those authorities consider the particular impact that the separation from the father would have on the children given their mother's chronic health condition. The State party's argument regarding contact through social media platforms does not ensure that the children can maintain adequate and meaningful personal relations and direct contact with the author.

8.7 While acknowledging the State party's legitimate interest in enforcing its criminal and migration laws and decisions, the Committee considers that this interest needs to be balanced against the children's right not to be separated from their parents. In this balancing, particular weight should be given to the necessity and proportionality of the return order, as well as the

[14] General comment No. 14 (2013), para. 6.

[15] Ibid., paras. 19 and 20.

[16] Ibid., paras. 58 and 59.

[17] Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017), para. 30.

[18] Ibid., para. 31.

[19] Ibid., para. 32 (e).

[20] See, inter alia, the Committee's decisions of inadmissibility in *U.A.I. v. Spain*, para. 4.2; *Navarro Presentación and Medina Pascual v. Spain* (CRC/C/81/D/19/2017), para. 6.4; and *A.R.G. v. Spain* (CRC/C/85/D/92/2019), para. 4.2.

particular impact that the separation would have on the children, taking into account their views. In the present case, given the potentially significant impact of the decisions regarding the author's deportation to Nigeria, including a six-year re-entry ban, on the children considering their young age and their mother's illness and the inevitable separation that such deportation would entail, a detailed assessment of the best interests of the children would have been paramount. The Committee considers that the State party's failure to assess the specific impact of the decisions on the children and to enable continued contact with their father in practice violated their rights under articles 3 and 9 (1) of the Convention.

8.8 The Committee, acting under article 10 (5) of the Optional Protocol on a communications procedure, is of the view that the facts before it disclose a violation of the rights of C.C.O.U., C.C.A.M. and A.C.C. enshrined in articles 3 and 9 of the Convention.

8.9 In the light of the above finding of a violation of articles 3 and 9 of the Convention, the Committee does not consider it necessary to separately examine whether the same facts would amount to a violation of the children's rights under articles 7 and 10 of the Convention.

9. The State party is under an obligation to refrain from returning the author to Nigeria and to ensure a reassessment of his claim, making the best interests of C.C.O.U, C.C.A.M. and A.C.C. a primary consideration. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In that regard, the State party is requested, in particular, to ensure that asylum or other proceedings directly or indirectly affecting children ensure an assessment of the best interests of the child as a primary consideration. Decisions involving the separation of children from one of their parents or caregivers should, in particular, ensure a careful consideration of the impact of the separation on the children in the light of their specific circumstances, and consider all possible alternatives to such a separation.

10. In accordance with article 11 of the Optional Protocol, the Committee wishes to receive from the State party, as soon as possible and within 180 days, information about the measures it has taken to give effect to the Committee's Views. The State party is requested to include information about any such measures in its reports to the Committee under article 44 of the Convention. The State party is also requested to publish the present Views and to disseminate them widely.