



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2957/2017*, **

<i>Communication submitted by:</i>	M.B. (represented by counsel, Myriam Roy L'Ecuyer)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	13 February 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 15 February 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	13 March 2020
<i>Subject matter:</i>	Deportation to Guinea
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment or punishment; effective remedy
<i>Articles of the Covenant:</i>	2, 6 and 7
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1.1 The author of the communication is M.B., a national of Guinea born in 1982. The author presents himself as being bisexual.¹ He claims that his deportation to Guinea would amount to a violation by the State party of his rights under articles 2, 6, 7, 23, 24 and 27 of the Covenant. Canada acceded to the Optional Protocol on 19 May 1976. The author is represented by counsel.

1.2 On 15 February 2017, pursuant to rule 92 of its rules of procedure (now rule 94), the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the author's request in relation to interim measures and asked the State party not to deport him to Guinea pending the Committee's consideration of the communication.

* 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, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi. In accordance with article 108 of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.

¹ It is unclear whether the author is bisexual or homosexual. His various submissions have not served to clarify this point.



1.3 On 13 September 2017, the State party requested the Committee's agreement for the interim measures granted in respect of the author to be lifted. On 20 February 2018, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided to agree to the State party's request for the interim measures to be lifted. However, at the time of consideration of the present matter, the author remained in Canada. He had informed the Committee that a new application for humanitarian and compassionate consideration was pending before the Canadian authorities.²

The facts as submitted by the author

2.1 The author, whose father is an imam and a member of the Islamic League of Guinea, states that he was raised in the Islamic tradition. He asserts that, in the event of his return to Guinea, he would be at risk of persecution owing to his sexual orientation. The author indicates that, despite his bisexuality and his relationship with another man, his family forced him to marry a woman. In 2012, his wife discovered his relationship with a man and disclosed everything to members of his family. Rumours about his sexual orientation spread within the community, the members of which subjected him to derision and persecution. He was beaten and threatened with death. His store was set on fire.

2.2 The author arrived in Canada in July 2012 and filed an application for asylum with the Canadian authorities.³ On 14 April 2014, the Refugee Protection Division of the Immigration and Refugee Board of Canada rejected that application because it considered that the author's testimony was not credible. It found it implausible that the author and his lover had been able to meet each week for years without attracting the attention of his family and his wife's family. Furthermore, the State party authorities considered that the author had not satisfactorily explained the letter signed by his lover to prove his bisexuality. In the letter, the author's alleged lover stated that the author was part of a homosexual group and that people had been informed that a homosexual person was present in his home. In addition, the author had not satisfactorily explained the allegations that he had been beaten and threatened with death because of his sexual orientation.

2.3 Following a workplace accident, the author had the first toe of his right foot amputated on 20 June 2013; this caused various health problems, including chronic pain. The author indicates that he is on strong medication and needs help to move around and carry out his daily household tasks.

2.4 The author lodged an appeal with the Federal Court against the decision of the Refugee Protection Division dated 14 April 2014. His appeal was rejected on 12 September 2014. He filed an initial application for humanitarian and compassionate consideration in August 2014; this was rejected in April 2016. The author also submitted an application for a pre-removal risk assessment, which was rejected on 5 April 2016. In the rejection decision, the immigration officer found that the author had not filed documentation sufficient to substantiate his account of the facts. There was no evidence that the author had been subjected to persecution because of his homosexuality, such as evidence from his lover confirming that they had had a relationship or evidence proving that he had attempted to seek remedy from his country's authorities in respect of the attack and the death threats against him. As for the author's claims regarding his health problems, the immigration officer found that the author could not request protection from Canada simply because better health care was unavailable to him in his country of origin. The immigration officer also noted that the author had not presented any evidence to prove that he might be subjected to torture or that his life might be at risk if he were returned to Guinea. The author lodged appeals with the Federal Court against the decision rejecting his application for a pre-removal risk assessment and the decision rejecting his application for humanitarian and compassionate consideration, but the Federal Court rejected both appeals in August 2016. The author also filed a second application for humanitarian and compassionate consideration, on 16 October 2016; that application is still pending.

2.5 The author claims to have exhausted all domestic remedies.

² Information provided by the author on 14 January 2020.

³ The author has not indicated the exact date of his asylum application.

The complaint

3.1 The author claims that, by returning him to Guinea, the State party would be violating his rights under articles 6 and 7 of the Covenant, given that Guinea is known for its lack of respect for the rights of sexual minorities, who are at risk of extrajudicial executions, torture and imprisonment. He submits that same-sex relations are illegal and criminalized in Guinea. The author considers that, because he was previously subjected to violence in his country owing to his sexual orientation, he faces a greater risk of such violence.

3.2 The author also claims a violation of article 2 of the Covenant on the grounds that the State party did not conduct an in-depth assessment of the risk he would face if returned to Guinea. He maintains in this regard that new evidence submitted was never assessed by an appropriate administrative decision maker and that this evidence was presented in his second application for humanitarian and compassionate consideration, which is still pending.

3.3 The author also states that he fears persecution from his family and community. He notes that same-sex relations are taboo in Guinea and that lesbian, gay, bisexual and transgender persons are subjected to harassment, persecution and criminal prosecution.⁴

3.4 Lastly, the author points out that, as his health condition requires intensive and regular monitoring, his return to Guinea, which would also entail a long flight,⁵ would put an end to the medical treatment that he is receiving in Canada; that would have serious consequences for his health.⁶ The author furthermore considers that cessation of the treatment he receives in Canada would constitute torture and cruel and unusual treatment, especially in the light of his psychological state, and would place him at risk of suicide.

3.5 The author does not explain why he considers that his return to Guinea would constitute a violation by the State party of articles 23, 24 and 27 of the Covenant.

State party's observations on admissibility and the merits

4.1 On 13 September 2017, the State party submitted its observations on the admissibility and merits of the communication. On the same date, it requested the Committee's agreement for the interim measures granted in respect of the author to be lifted, considering that the communication should be found inadmissible on the following grounds. The State party submits that the Committee is not a "fourth instance tribunal" and that the claims related to the author's health are not sufficiently substantiated and are incompatible *ratione materiae* with the Covenant. The State party submits arguments refuting the assertions relating to the author's bisexuality and contesting his claim under article 2 of the Covenant.

4.2 The State party emphasizes that the author's claims essentially amount to an attempt to convince the Committee to review and overturn the decisions of the Canadian authorities. In this regard, it recalls that the Committee is not a "fourth instance tribunal".⁷ The State party also submits that the author, in arguing that the decisions of the Canadian authorities violated procedural fairness principles, that he was a victim of clearly arbitrary proceedings and that those proceedings resulted in a denial of justice, is attempting to convince the Committee to evaluate facts, evidence and the credibility of claims made by individuals in proceedings before national authorities.⁸ The State party asserts that all competent national decision makers, including the Refugee Protection Division and the officer responsible for his application for humanitarian and compassionate consideration, called into question the evidence submitted by the author to support his claims. It recalls that the Refugee Protection Division emphasized on numerous occasions that the author lacked credibility, that under Canadian law there is no obligation to take account of documentary evidence supporting

⁴ Under the Guinean Criminal Code, homosexuality is punishable by 6 months' to 3 years' imprisonment and a fine of 100,000 to 1,000,000 Guinean francs.

⁵ See the letter from Dr. Isabelle Lecours dated 13 December 2016.

⁶ See the medical certificate from Dr. Lamarana Sow dated 24 January 2017.

⁷ See, for example, *Tarlue v. Canada* (CCPR/C/95/D/1551/2007), para. 7.4; *Kaur v. Canada* (CCPR/C/94/D/1455/2006), para. 7.3; and *Tadman and Prentice v. Canada* (CCPR/C/93/D/1481/2006), para. 7.3.

⁸ See, for example, *Hamida v. Canada* (CCPR/C/98/D/1544/2007), paras. 8.4 to 8.6; *Tarlue v. Canada*, para. 7.4; *Kaur v. Canada*, para. 7.3; and *Tadman and Prentice v. Canada*, para. 7.3.

allegations deemed not to be credible⁹ and that, moreover, the Federal Court dismissed the author's application for leave and judicial review of the decision taken by the Refugee Protection Division.

4.3 The State party submits that the author's claims based on articles 6 and 7 of the Covenant, regarding his state of health, are incompatible *ratione materiae* with the Covenant, which does not cover the right to health.¹⁰ The State party asserts that a person's deportation to a country that is unable to offer health-care services of a quality equivalent to those available in Canada does not give rise to an obligation of non-refoulement under articles 6 and 7 of the Covenant, except in "very exceptional circumstances", which the author has not been able to establish in the present case. The State party asserts that the author's deportation to his country of origin does not constitute torture or cruel, inhuman or degrading treatment within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, even if his situation worsens.¹¹ The State party emphasizes that the officer responsible for the application for humanitarian and compassionate consideration took into account the findings of the Refugee Protection Division that the application lacked credibility, and it points out that the author had not submitted credible evidence capable of overturning the Division's findings. It adds that the application for leave and judicial review of the Division's decision was rejected by the Federal Court. The State party emphasizes that the findings of the officer responsible for the application for a pre-removal risk assessment were based on a thorough examination of the facts and the evidence presented by the author, while recalling that, as provided in subparagraph 97 (1) (b) (iv) of the Immigration and Refugee Protection Act, the inability of the author's country of origin to provide adequate medical care does not constitute a ground for granting him protected person status. The State party stresses that the assessment carried out by the officer responsible for the application for humanitarian and compassionate consideration showed that the author was recovering and that he would be able to continue his treatment in Guinea. The evidence presented by the author was examined by the Canada Border Services Agency, which also rejected it, on 6 February 2017.

4.4. Even if the author's claims regarding his health were to fall within the scope of articles 6 and 7 of the Covenant, the State party requests that the Committee find them inadmissible, since they are not sufficiently substantiated. First, the author has not been able to demonstrate that treatment for his condition is unavailable in Guinea. The asylum authorities found the evidence submitted to support that argument to be not credible. Second, the author has failed to credibly demonstrate that, as he alleges, he would be unable to travel by plane if deported to Guinea. Third, his alleged depression can be treated in Guinea.

4.5 With regard to the author's bisexuality, the State party maintains that the claims made by the author have not been sufficiently substantiated. It also calls into question the credibility of all the documentation submitted by the author to substantiate those claims. The State party claims that the bailiff's certified report,¹² prepared in October 2016 based on a telephone conversation, containing the same testimony as was given previously¹³ and placed on file in the communication, does not seem to have been submitted to the Canadian authorities. Its late submission damages its credibility. The State party adds that the letters received from the organizations AGIR and Arc-en-ciel d'Afrique, dated 3 February 2017 and 30 January 2017, respectively, do not provide any new information on the basis of which the decisions of the Canadian authorities are likely to be overturned. The State party emphasizes that the

⁹ Federal Court of Canada, *Mercado v. Canada (Citizenship and Immigration)*, 2010 FC 289, decision of 12 March 2010, para. 32; Federal Court of Canada, *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 471, decision of 23 April 2003, para. 26; and Federal Court of Canada, *Hamid v. Canada (Minister of Employment and Immigration)*, [1995] FCJ No. 1293, paras. 19–20.

¹⁰ *Linder v. Finland* (CCPR/C/85/D/1420/2005), para. 4.3; and *Cabal and Pasini Bertran v. Australia* (CCPR/C/78/D/1020/2001), para. 7.7.

¹¹ *B.S.S. v. Canada* (CAT/C/32/D/183/2001), para. 10.2; and *G.R.B. v. Sweden* (CAT/C/20/D/83/1997), para. 6.7.

¹² Certified report of bailiff Mohammed Konate, dated 7 October 2016.

¹³ Set of documents included by the author in his submission.

author presents himself sometimes as bisexual and sometimes as homosexual¹⁴ and that the information submitted regarding his lover is not credible.

4.6 The State party also indicates that, in assessing the risks in the country of origin, there is no need to examine the human rights situation in Guinea, given that the author's claims were neither credible nor corroborated by objective evidence.¹⁵ It adds that the risk allegedly faced by the author relates to his family and not to the State and that the author could seek refuge somewhere else rather than staying with his parents after his return to Guinea. Although the State party recognizes that homosexuality is a punishable offence under the Guinean Criminal Code, it stresses that the author did not prove that sexual minorities systematically suffered abuse in Guinea. Moreover, the State party argues that, based on reports of non-governmental organizations, it appears that homosexual persons are not systematically prosecuted in Guinea.¹⁶

4.7 The State party also submits that the allegations of a violation of article 2 are incompatible with the provisions of the Covenant for the same reasons as the allegations of a violation of article 6. The State party argues that, in the absence of a violation of article 6 of the Covenant, the allegations that article 2 has been violated must be found inadmissible, since article 2 may be invoked only in relation to the violation of another article of the Covenant that confers a right on the author.¹⁷

4.8 The State party claims that the author has not exhausted all available domestic remedies, given that his application for humanitarian and compassionate consideration is still being processed by the Canadian authorities. It further emphasizes that the author did not submit the bailiff's report dated 7 October 2016 to the Canadian authorities during his pursuit of domestic remedies and recalls that the Committee has reiterated on several occasions that the author of a communication must have brought a substantive complaint in the domestic courts in respect of any allegation subsequently brought before the Committee.¹⁸ The State party therefore requests the Committee to find the author's communication inadmissible on the grounds of non-exhaustion of domestic remedies, in accordance with article 5 (2) (b) of the Optional Protocol and rule 96 (f) of the Committee's rules of procedure (now rule 99 (f)).

4.9. Alternatively, should the Committee declare the communication admissible, the State party requests the Committee to find it to be without merit for the reasons set out above.

Authors' comments on the State party's observations

5.1 On 25 November 2017, the author submitted his comments on the State party's observations. He asks the Committee to reject the State party's arguments on the grounds that they lack legal basis and constitute a poor factual assessment of the evidence in the file. The author challenges the State's claim that his allegations are incompatible *ratione materiae* with the provisions of the Covenant. The author stands by the allegations and arguments set out in his communication and submits that articles 6 and 7 of the Covenant impose an obligation not to deport a person to a State where there is a risk that his right to life and his right to be protected against torture and cruel, inhuman or degrading treatment will be violated.

5.2 While he recognizes that the greater effectiveness of the Canadian health-care system does not constitute a ground, under articles 6 and 7 of the Covenant, for Canada to accept foreign nationals on its territory, the author nonetheless argues that by imposing on States parties the obligation not to deport an individual to a country where he or she risks death or faces cruel, inhuman or degrading treatment, the Covenant requires them to take note of

¹⁴ The State party submits an affidavit by the author testifying that he has never been attracted to women. See the set of documents included by the author in his submission submitted in support of the application for stay of deportation, filed with the Federal Court of Canada, Exhibit A: "My personal history".

¹⁵ *V.N.I.M v. Canada*, (CAT/C/29/D/119/1998), paras. 8.4 and 8.5.

¹⁶ Carroll, A., *State Sponsored Homophobia 2016 – A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva; ILGA, May 2016), p. 69.

¹⁷ *M. de Vos v. Netherlands* (CCPR/C/84/D/1192/2003), para. 6.3; *Rogerson v. Australia* (CCPR/C/74/D/802/1998), para. 7.9; and *P.K. v. Canada* (CCPR/C/89/D/1234/2003), para. 7.6.

¹⁸ *Deperraz and Delieutraz v. France* (CCPR/C/83/D/1118/2002), para. 6.4.

factual situations that could lead individuals to claim that they face such a risk. The author also asserts that he is vulnerable as a result of the State party's violation of articles 6 and 7 of the Covenant and that it would be inhuman to deport him to a State where the available health care is more limited. He maintains that his health situation requires particular attention, that the deterioration of his condition poses a threat to his life and that, as a result, failure to take these factors into account would indirectly amount to depriving him of his right to life.

5.3 The author considers that he has submitted all necessary evidence in support of his claims regarding both the deterioration of his health, including his inability to endure a long flight, and his sexual orientation.¹⁹ The author submits that the method used by the Canadian authorities is not relevant in the present case and that the State party should verify whether all persons of the same sexual orientation as him would be at risk. He also considers that the State party should determine whether he faces a direct risk owing to his sexual orientation.

Additional comments from the author

6. On 28 December 2018, the author submitted some additional comments. In these comments he referred to a list of additional documents supporting his claims, in particular with regard to his health situation, his involvement in the activities of non-profit organizations working with homosexual persons and the dangers he might face if returned to Guinea.²⁰ On 7 March 2019, the author again asked the Committee to request interim measures.²¹

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 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

7.3. 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.²² The Committee notes the author's claim that he has exhausted all available domestic remedies, given that the Federal Court of Canada rejected his applications for review. The Committee nonetheless notes the State party's argument that the author has filed an application for humanitarian and compassionate consideration that is still pending before the national authorities and that consequently he has not exhausted all domestic remedies. The Committee notes that the author, in his submissions, has not contested the State party's assertion that not all remedies have been exhausted. However, it considers that the author is not shielded from deportation to Guinea by virtue of having applied for humanitarian and compassionate consideration. The Committee is therefore of the view that such an application cannot be regarded as an effective remedy in the circumstances of the present case.²³ Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

¹⁹ The author has not provided any information to address the contradictions identified by the State party with regard to whether he is homosexual or bisexual.

²⁰ The 21 documents are addressed to the Committee and were not submitted to the State party authorities during their consideration of his asylum case at the domestic level. They mostly date from 2018.

²¹ The interim measures previously granted to the author were lifted on 20 February 2018. The author's counsel did not learn of this measure until 5 March 2019.

²² See, for example, *Timmer v. Netherlands* (CCPR/C/111/D/2097/2011), para. 6.3.

²³ *Choudhary v. Canada* (CCPR/C/109/D/1898/2009), para. 8.3; *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4; *W.K. v. Canada* (CCPR/C/122/D/2292/2013), para. 9.3;

7.4 The Committee notes the author's claim that his rights under articles 6 and 7 of the Covenant would be violated if he were returned to Guinea, given that Guinea is known for its lack of respect for the rights of sexual minorities, who are at risk of extrajudicial executions, torture and criminal convictions. The Committee notes the author's assertion that, because of his past experiences as a victim of homophobic aggression, he faces certain risk in his country of origin. It also notes the State party's argument that the author has not substantiated his claims regarding his sexual orientation and that the asylum authorities unanimously called into question his bisexuality or homosexuality. The Committee notes that the State party authorities assessed the risks that the author would face in connection with his alleged homosexuality in the event of his return to his country of origin, and it observes that there is nothing to suggest that its assessment is arbitrary.

7.5 The Committee notes the author's claims, on the one hand that his physical and mental health conditions require particular attention by the State party, and on the other hand, that his return to Guinea would amount to torture and cruel treatment. The Committee also notes the State party's observation that the decisions taken by the officer responsible for the application for humanitarian and compassionate consideration, the officer responsible for the application for a pre-removal risk assessment and the Canada Border Services Agency were based on rigorous analysis and that all those bodies concluded that the author could continue with his treatment in Guinea. The Committee notes the State party's assertion that the claims related to the author's health are incompatible *ratione materiae* with articles 6 and 7 of the Covenant. However, it recalls that its jurisprudence favours a broad interpretation of the right to life, according to which the protection of this right requires that States parties adopt positive measures. In particular, as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life. The Committee emphasizes that, in the present case, the author has not explained in what way the State party failed to provide the care necessary for him to enjoy his right to life. The Committee also notes that, in the present case, the medical reports submitted by the author and the other health-related information are not sufficient to demonstrate exceptional circumstances related to his condition such that articles 6 and 7 of the Covenant would be violated in the event of his return to Guinea.

7.6 The Committee recalls paragraph 12 of its general comment No. 31 (2004), 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 also indicates in the general comment that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin. The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.

7.7 Regarding the author's claims under article 2 of the Covenant, the Committee recalls that the provisions of article 2 lay down general obligations for States parties that cannot, by themselves and standing alone, give rise to a claim in a communication under the Optional Protocol. The Committee thus considers that the author's claims to this effect cannot be sustained and that, accordingly, they are inadmissible under article 2 of the Optional Protocol. The Committee further notes that, while the author disagrees with the factual conclusions of the State party authorities, the information before the Committee does not show that those conclusions are manifestly unreasonable. The Committee considers that the author has not adequately demonstrated that the assessment of his asylum case by the Canadian authorities was clearly arbitrary or amounted to a manifest error or a denial of justice. Accordingly, the Committee considers that the author's claims under articles 2, 6 and 7 of the Covenant are

Shakeel v. Canada (CCPR/C/108/D/1881/2009), para. 7.4; and *X. v. Canada* (CCPR/C/115/D/2366/2014), para. 8.3.

insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.
