United Nations CCPR/C/125/D/3041/2017

International Covenant on Civil and Political Rights

Distr.: General
6 June 2019

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 3041/2017*, **, ***

Communication submitted by:	B.D.K. (represented by counsel, Mylène Barrière)
Alleged victims:	The author and her two elder children
State party:	Canada
Date of communication:	7 November 2017
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 8 November 2017 (not issued in document form)
Date of adoption of Views:	19 March 2019
Subject matter:	Deportation of an adult and two minor children to Angola
Procedural issues:	Exhaustion of domestic remedies; manifestly ill-founded claims; re-evaluation of facts and evidence
Substantive issues:	Torture; cruel, inhuman or degrading treatment or punishment; family rights; separation of children from parents; children rights; arbitrary arrest; detention
Articles of the Covenant:	6, 7, 9, 17, 23 and 24
Articles of the Optional Protocol:	2 and 5 (2) (b)

1.1 The author submits the communication acting in her name and in the name of her two children, citizens of the Democratic Republic of the Congo, where they were born in

* Adopted by the Committee during its 125th session (4–29 March 2019).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi. In accordance with article 108 of the Rules of Procedure of the Committee, Marcia V.J. Kran, member of the Committee, did not participate in the examination of the communication.

*** An individual opinion by Committee member José Manuel Santos Pais (dissenting) is annexed to the present Views.

2004 and 2005. The author submits that her deportation together with her two children to Angola would amount to a violation of their rights under articles 6 (1), 7, 9, 13, 17 (1), 23 (1) and 24 (1) of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 19 August 1976. The author is represented by counsel, Mylène Barrière, of the Montreal City Mission.

1.2 On 8 November 2017, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, requested the State party not to deport the author and her children while it was examining the communication. On 4 March 2018, the State party requested that the interim measures be lifted because the deportation of the author to Angola would not result in irreparable harm, the author having failed to present even a prima facie case or to substantiate the claim that her deportation to Angola would result in irreparable harm. The Committee rejected the request on 17 October 2018. The State party has postponed the removal of the author and her children, who currently reside in Canada.

The facts as submitted by the author

2.1 The author and her children are part of a larger family that also comprises the author's husband and father of the children, L.M., two younger siblings and the author's mother.

2.2 From 1998 to 2001, L.M. was working as a cook for the head of the National Intelligence Agency in the Democratic Republic of the Congo. To be selected for that position, he changed his name for J.M. to appear to belong to the same ethnicity as that of his employer (Ngwaka).

2.3 On 16 January 2001, the President of the Democratic Republic of the Congo, Laurent Désiré Kabila, was killed and a purge of those allegedly responsible began in the country. On 17 February 2001, the author's husband was questioned by the police at his place of work together with all his co-workers, because his employer was among the suspects. During the interrogations, he was accused by the police of being complicit in the murder; he escaped the house through the back door and immediately fled to Angola.

2.4 The author subsequently took shelter at a friend's house. After she was informed that the police had broken into their former house, she sought shelter at her parents' house, which was in a different district of Kinshasa.

2.5 On 10 March 2001, after the police came looking for the author at her parents' house on two occasions, she left the Democratic Republic of the Congo for Angola with her mother and her brother. Her father and other siblings joined them soon after.

2.6 In Angola, the author's husband met other persons originally from the Democratic Republic of the Congo but with Angolan nationality. In order that the authors could obtain Angolan identity documents, the said persons testified that they all were part of the same family. The family was, however, subjected to discrimination by neighbours because they were nationals of the Democratic Republic of the Congo, and by others, who were envious of the author's husband's position in a petrol company.

2.7 In 2008, owing to the hardships they endured in Angola as citizens of the Democratic Republic of the Congo, the author and her husband decided to return to the Democratic Republic of the Congo. The couple thought that they would no longer risk persecution seven years after the events. The author's husband was, however, arrested and faced imminent execution. L.M. was then helped to escape from detention by the officer in charge of his detention, a childhood friend of his brother's. The officer went to the author's house, asked her to provide L.M. with an Angolan passport, and then placed L.M. in a plane to Angola, where the author joined him.

2.8 On 9 January 2009, after discovering that the Angolan secret police were seeking to extradite the author's husband to the Democratic Republic of the Congo, the family escaped to the United States of America with authentic Angolan passports that they had obtained through misrepresentation.

2.9 On 5 March 2009, the author and her two children in whose name she submits the communication sought to enter Canada from the United States using false names and claiming that the author's husband and father of her two children was dead. They were returned to the United States pursuant to the terms of the Canada-United States Safe Third Country Agreement.

2.10 On 9 January 2010, the family requested refugee status in the United States. Their request was rejected in June 2012, and an appeal denied in December 2015. On 29 February 2016, the author's husband's application for an extension of his work permit (employment authorization) was denied by the United States authorities.

2.11 After 2014, the author's parents and siblings, who still lived in Angola, were tracked down and subjected to harassment, mostly by telephone, presumably by the Angolan police with the help of the police force of the Democratic Republic of the Congo. In May 2015, officers of the Angolan secret police broke into their residence and questioned them about the author's husband, using death threats. The author's younger brother was fatally shot and her mother was shot in the leg, which was later amputated. While her mother was in hospital, the family lost track of the author's father and other siblings; the family is still unaware of their whereabouts today. In August 2015, the author's mother joined them in the United States.

2.12 On 10 November 2015, a warrant was issued against the author and her husband by the National Intelligence Agency (Agence nationale de renseignements) of the Democratic Republic of the Congo.

2.13 On 4 June 2016, the author and her family crossed the border irregularly from the United States into Canada. They were arrested by the Royal Canadian Mounted Police. The author and her two elder children (in whose name she submits the communication) were found ineligible to claim asylum on the basis of the Immigration and Refugee Protection Act because their prior claim had been found to be inadmissible (when they attempted to enter Canada on 5 March 2009). Their claims were redirected to the pre-removal risk assessment process. However, L.M., his two younger children and his mother-in-law saw their asylum claim deferred to the Immigration Refugee Board.

2.14 On 23 February 2017, the author's application for pre-removal risk assessment was rejected for lack of credibility regarding her identity and because the family had been able to live in Angola for a number of years without incident. On 11 May, the author requested leave to apply for judicial review by the Federal Court of the rejection of her application for pre-removal risk assessment. On 12 May, the author applied for a deferral of their removal on the basis that the separation of the family would cause them hardship, stress and anxiety. On 17 May, the deferral application was denied on the grounds that the psychological report presented by the author included various contradictions and that the family had voluntarily separated in the past and would reunite once the author's husband's claim for protection was determined. The author applied to the Federal Court for a judicial stay of the removal; her application was however refused on 26 May. On 13 July, the Federal Court denied the leave to apply for judicial review regarding the negative pre-removal risk assessment decision.

2.15 On 23 May 2017, after a massive prison breakout at the Makala detention facility in Kinshasa that month, another warrant of arrest was issued against L.M., alias J.M., by the National Intelligence Agency.

The complaint

3.1 The author submits that her deportation together with her children to Angola would amount to violations of articles 6 (1), 7, 9, 13, 17 (1), 23 (1) and 24 (1) of the Covenant.

3.2 The author claims that, if returned to Angola, they risk being sent to the Democratic Republic of the Congo, where they would be persecuted by security forces, as reflected by the persecution that she and her husband had previously endured. This would amount to a violation of articles 6 (1), 7 and 9. They substantiate that risk by highlighting that their Angolan passports were obtained through misrepresentation, and that they do not actually hold Angolan nationality.

3.3 The author claims that, by applying the Canada-United States Safe Third Country Agreement, she and her children have been denied the opportunity to apply for refugee status in Canada, and they have not been given an oral hearing. They have only been able to have a pre-removal risk assessment, which does not have all due procedural guarantees. The author claims that this amounts to a violation of article 13 of the Covenant.

3.4 The author claims that she and her children have strong family ties, and that the deportation of part of the family interferes with their family rights. She also claims that the two children on whose behalf she presents the communication have been going to school in Canada since they entered the country and have integrated into Canadian society; their removal would consequently have a major impact on them and would not be in their best interests. For these reasons, the author claims that her deportation with her two elder children would amount to a violation of articles 17 (1), 23 (1) and 24 (1) of the Covenant.

State party's observations on admissibility and merits

4.1 By note verbale of 4 May 2018, the State party provided its observations on the admissibility and merits of the communication. It submits that the communication is inadmissible owing to lack of exhaustion of domestic remedies and lack of substantiation, and because the communication constitutes, in essence, an appeal against a decision made by the domestic authorities.

4.2 The State party notes that the author has presented no new evidence that she is personally at risk. Rather, her communication is largely based on complaints about the decisions rendered by the domestic bodies that have considered her case. The substance of the author's communication is an appeal against the domestic decisions finding her not to be at risk of persecution if returned to Angola. In this regard, Canada recalls the Committee's consistent jurisprudence that it is not for the Committee to review the decisions of domestic authorities on the evaluation of facts and evidence in a case unless the evaluation is manifestly arbitrary or amounts to a denial of justice. Claims involving the re-evaluation of facts and evidence should be declared inadmissible under article 2 of the Optional Protocol.[1] The State party considers that the author has not demonstrated that the evaluation of her case by domestic authorities has been manifestly arbitrary or amounts to a denial of justice.

4.3 The State party further submits that the author has not sufficiently substantiated her allegations of violation of articles 6 (1), 7 and 9 because she is completely devoid of credibility, and she has not established even such basic elements as her identity or that she is a citizen of the Democratic Republic of the Congo. Originally, the communication affirmed that the author travelled with false Angolan travel documents, while her passport was authentic. The author also made contradictory declarations regarding her nationality, and the documentation provided contains various inconsistencies; for instance, the birth certificate provided during the author's first entry to Canada had her married name. Domestic authorities also found that the author lacked common knowledge about the Democratic Republic of the Congo, such as what a "post-nom"[2] was, concluding she was not a citizen of the Democratic Republic of the Congo. The author has repeatedly used fraudulent documents and false identities. She has repeatedly and knowingly provided false information. She has claimed that her husband is deceased, has given various dates of birth, and has used at least four names (K.D., D.K.M., N.B.M. and B.N.M.K.). The State party adds that the communication to the Committee is based on false statements, and appends documents in support – such as the psychological report appended to her communication –

[1] See *Contreras v. Canada* (CCPR/C/119/D/2613/2015), para. 8.7; *A.B. v. Canada* (CCPR/C/117/D/2387/2014), para. 8.3; *Tarlue v. Canada* (CCPR/C/95/D/1551/2007), para. 7.4; *Surinder Kaur v. Canada* (CCPR/C/94/D/1455/2006), para. 7.3; *Tadman and Prentice v. Canada* (CCPR/C/93/D/1481/2006), para.7.3; *Pham v. Canada* (CCPR/C/93/D/1534/2006), para. 7.4; *Kibale v. Canada* (CCPR/C/93/D/1562/2007), para. 6.4; and *P.K. v. Canada* (CCPR/C/89/D/1234/2003), para. 7.3.

[2] The use of a "post-nom" – the name of one or more ancestors – was a legal requirement in the Democratic Republic of the Congo: see Isidore Ndaywel è Nziem, "De l'authenticité à la libération : se prénommer et République démocratique du Congo", *Politique africaine*, No. 72, December 1998, p. 103.

which feature many errors and misstatements. With regard to the evidence relating to the author's persecution after the assassination of the President of the Democratic Republic of the Congo, the officer in charge of the pre-removal risk assessment noted that most people accused of conspiracy were military officers, and there is no evidence that someone with the personal profile of the author's husband would be personally at risk. The State party recognizes that, in some situations, refugee claimants must resort to the use of false identities and false documents to flee their country of persecution. Once in a safe country and when seeking its protection, however, refugee claimants are expected to be truthful. The only authentic identity document that the author has presented to the State party's authorities is a valid Angolan passport, with the result that she faces deportation to Angola, not to the Democratic Republic of the Congo. Her other identity documents are by her own admission fraudulent or either have been tampered with or otherwise of dubious authenticity. In the circumstances, the State party is justified in relying on her one authentic identity document – an Angolan passport – and in considering her a citizen of Angola.

4.4 The author has provided no evidence that would support a finding that she would face human rights violations in Angola. The excerpts from several human rights reports concerning Angola that she attached to her complaint are general, and nothing in them relates to her personal situation. The general human rights situation in Angola, while in some respects problematic, does not indicate that someone with the author's personal profile would be personally at risk if returned there. Furthermore, the author has presented no evidence that, if deported to Angola, she would face onward removal to the Democratic Republic of the Congo. The State party therefore considers the author's allegations with respect to articles 6 (1), 7 and 9 inadmissible for lack of substantiation.

4.5 The State party submits that the author's allegations under article 13 of the Covenant regarding the application of the Canada-United States Safe Third Country Agreement are inadmissible for non-exhaustion of domestic remedies. Claimants who return to Canada between border posts in order to evade the application of the Agreement, after having been found ineligible under it, are ineligible under section 101 (1) (c) of the Immigration and Refugee Protection Act. In that situation, they are not returned to the United States, but are subjected to a pre-removal risk assessment to determine whether they are in need of protection, the procedure followed when the author and her two eldest children entered Canada in 2016. At the time of her refugee claim in 2009, when she first entered Canada, the author could have challenged her ineligibility and prospective return to the United States by way of an application for leave to apply for judicial review to the Federal Court, coupled with a motion for a judicial stay of removal. Contrary to the author's assertions that no remedies were available to her, a refugee claimant in her situation does in fact have effective access to the Federal Court. The author did not challenge the decision to return her to the United States.

4.6 The author's allegations under article 13 are also deemed inadmissible for lack of substantiation. The author's complaint in this regard seems to be centred on the fact that she was not granted an oral hearing in the course of the pre-removal risk assessment process. Canada submits that the author was interviewed by Canadian immigration authorities a number of times prior to her application for pre-removal risk assessment, and in the course of those interviews was questioned specifically about her citizenship, identity and the authenticity of her documents. The officer in charge of the assessment based her finding that the author was a citizen of Angola on the author's own statements and the author's authentic Angolan passport. In the circumstances, there was no reason for the officer who was considering her application to interview the author again on exactly the same issues. Moreover, the author was able to apply for leave to apply for judicial review of the decision on her pre-removal risk assessment, as well as for a judicial stay of removal. The author was allowed to stay in Canada for the purpose of having her application assessed. Since it has been determined that the author is not at risk in Angola, the country of which she is a citizen and to which she is to be removed, and because she is subject to a lawful removal order, she is not "lawfully in the territory" of Canada.

4.7 Alternatively, the State party submits that the proceedings challenged satisfy the guarantees contained in article 13. As demonstrated by the domestic proceedings described above, the author had her claim for asylum considered and rejected, and her appeal

dismissed in the United States. In Canada, she had access to a pre-removal risk assessment procedure. She was represented by counsel, and had every opportunity to participate by way of extensive written submissions. She had access to judicial review of the negative decision regarding her pre-removal risk assessment. She was able to make an application for deferral of her removal, and for judicial review of that negative decision. She had access to a judicial stay of removal. The facts do not disclose any violation of article 13 of the Covenant.

4.8 The State party further submits that claims under articles 17 (1), 23 (1) and 24 (1) of the Covenant should be found inadmissible for lack of substantiation. The author alleges that her prospective deportation, with her two eldest children, while her husband, two youngest children and mother remain in Canada for the determination of their claims for refugee status, would constitute a violation of their right to family life and of the children's right to protection as minors. The State party notes that, when the author and the two eldest children entered Canada in 2009, the author claimed that her husband was deceased. When she presented the authorities with the children's birth certificates, a person named A.L. was listed as their father. Despite these inconsistencies, the State party is prepared to grant the author the benefit of the doubt for the purpose of these submissions, and consider that the author, her husband and children constitute a family.

4.9 The State party claims that it was the decisions and actions of the author and her husband that resulted in their claims for protection in Canada being determined at different times and in different processes. The fact that the family may be temporarily separated if the authors are deported to Angola does not in itself render the removal unlawful, arbitrary, unreasonable or disproportionate. If the author's husband's claim for protection is granted, he will be able to apply for permanent residence in Canada, and he will be able to include the author and the two eldest children on his application. If the author's husband's claim for protection is denied, he will be able to join the author in Angola, a country where they have citizenship and where they have, by their own admission, lived for a number of years. The State party emphasizes that, at the time of the author's intended removal, originally scheduled for May 2017, the family had been in Canada for less than a year. The family are not long-term residents and do not have a long-settled family life in Canada. The author's two elder children were not born in Canada and cannot be considered to be so integrated into their school and Canadian society as to warrant overriding a lawful deportation order. Moreover, the hardship resulting from the separation of the family and the children's best interests were considered in the context of the deferral application; the Canada Border Services Agency officer deciding the application noted that the evidence in the psychological report was based exclusively on the statements of the author and her husband, and featured many contradictions. The officer noted that the family had voluntarily separated in the past, and that the adults had entered Canada illegally, knowingly putting their children in an unstable and stressful situation. As a result, the officer concluded there were insufficient grounds to defer removal. The Federal Court declined to judicially review the decision. On this matter also, the State party considers that the author has not demonstrated that the evaluation of her case by domestic authorities has been manifestly arbitrary or amounts to a denial of justice, and concludes that her claims under articles 17 (1), 23 (1) and 24 (1) of the Covenant should be found inadmissible.

4.10 The State party therefore requests the Committee to find the communication inadmissible as insufficiently substantiated, and to declare the author's claims inadmissible. Should any of the author's claims be deemed admissible by the Committee, the State party submits that the facts do not disclose a violation of the Covenant for the same reasons.

Author's comments on the State party's observations

5.1 The author submits that, since the submission of her communication, she has found out she is pregnant and that the expected date of birth of her child is 9 September 2018. Furthermore, the mental health of her daughter has seriously deteriorated owing to the threat of deportation and family separation. According to the medical report that the author attached, her daughter has recurring suicidal thoughts and would be at high risk of committing suicide if deported. The author submits that appropriate mental health care and

treatment in Angola and in the Democratic Republic of the Congo remain very limited, and are insufficient to meet the specific needs of her daughter.

5.2 The author also submits additional evidence with regard to the risk they would face upon deportation and to her identity. Firstly, another arrest warrant was issued by the National Intelligence Agency in May 2017 against the author and her husband, L.M., after a massive prison breakout at the Makala detention facility, which led to the reissuance of old arrest warrants. Secondly, the author, her husband and her mother have been able to obtain passports and marriage and family certificates from the Embassy of the Democratic Republic of the Congo in Ottawa.[3] The authors submit that the State party's observations do not address the alleged risk upon return of the alleged victims, but limits itself to arguing about the lack of credibility of the author. This assumption only strengthens the essence of the present communication: the essential elements of the author's asylum claim were never given fair consideration.

5.3 On the matter of her credibility, the author fully rejects the State party's assertion that she had at some point recognized having Angolan citizenship, and submits that she had only indicated that she had an Angolan passport (irregularly obtained). The author further clarifies that she had always been truthful to the Canadian authorities about the different identities that had been used, and the reasons for their use: one false identity was used to obtain the Angolan passport; the other was used when the author's husband was working for the head of the National Intelligence Agency, for cultural reasons. The author concludes that she was at all times truthful to the State party authorities and that, if the domestic authorities had examined her application properly, all their doubts would have been clarified regarding the credibility of her statements. The author notes the State party's claim that, because they do not consider the author to be a national of the Democratic Republic of the Congo, she would face no persecution in Angola. The author has alleged, however, that she has been subjected to persecution not only in the Democratic Republic of the Congo but also in Angola, where the author's family members have been tracked down and questioned, resulting in the death of her brother, her mother's leg amputation and the disappearance of her father and of other siblings. The author, her husband and her mother have consistently maintained this in all their exchanges with the authorities of the State party.

5.4 The author submits that the Angolan passports, obtained through misrepresentation, expire in August 2018, and that thereafter they would be undocumented migrants in Angola. According to different reports, asylum seekers and refugees do not receive any protection from the Government in Angola, and are often victims of harassment and intimidation by police officers. The author also recalls that she had already suffered discrimination in Angola as a citizen of the Democratic Republic of the Congo. In addition, arbitrary arrest and detention in Angola are a particular concern for Congolese migrants, and would be of even greater concern for the author, who is a wanted person in the Democratic Republic of the Congo. The author also points out that the judicial system and the security forces in Angola are deeply affected by corruption and inefficiencies, and that extrajudicial killings are a serious human rights concern.

5.5 The author recalls that she fears being extradited or deported to the Democratic Republic of the Congo by the Angolan authorities. A report by the Government of Angola showed that at least 170 citizens from the Democratic Republic of the Congo had been repatriated in April 2018.[4] She notes the worsening human rights situation in the Democratic Republic of the Congo, characterized by high rates of arbitrary arrest and detention and where family members are often arrested in the place of a suspect, putting her at risk of being arrested in the place of her husband. Security forces in the Democratic Republic of the Congo have reportedly perpetrated acts of torture and ill-treatment, while

[3] Although the passports were issued in August 2016, the author does not explain why they were not submitted with the original complaint. The author attaches a written statement by their lawyer before the domestic courts declaring that she did not submit such evidence during the pre-removal risk assessment procedure because she was expecting to have an oral hearing and bring them then. She does not explain why she did not include the passports in the appeal to the pre-removal risk assessment decision.

[4] See https://reliefweb.int/report/angola/sme-repatriates-170-drc-citizens-illegal-stay.

conditions in detention in the Democratic Republic of the Congo are life-threatening and amount to inhuman and degrading treatment. The author notes that Canada has acknowledged the gravity and prevalence of human rights violations in the Democratic Republic of the Congo, and has even imposed a moratorium on removals to the Democratic Republic of the Congo, which still remains in place.

5.6 The author submits that she did not have a fair opportunity of being heard because she was only heard by officers of the Canada Border Services Agency during the port-of-entry interviews, where claimants are not advised by counsel and are often misinformed. The records of these interviews are not exhaustive, as pointed out by a report by the Canadian Council for Refugees.[5] The author highlights the fact that she was not eligible for the quasi-judicial refugee determination system in application with the Canada-United States Safe Third Country Agreement and could only use the pre-removal risk assessment programme, which does not offer equivalent procedural safeguards in the refugee determination process. The pre-removal risk assessment programme is a purely administrative procedure; applications are processed by immigration officers (public servants employed by Immigration, Refugees and Citizenship Canada), not by independent persons. The general principal is that a pre-removal risk assessment application is a written procedure, and hearings are held only exceptionally, at the discretion of the officer processing the application. According to section 169 of the Immigration and Refugee Protection Act, oral hearings are aimed at clarifying an applicant's testimony when there are doubts about his or her credibility or the conclusive value of evidence given. None of the author's repeated requests for an oral hearing was accepted, and she was never heard during the processing of her pre-removal risk assessment application. She further submits that the officer processing her application did not examine her claims regarding the personal risks she would face if she were deported. The Federal Court, in its order of 26 May 2017, admits that an oral hearing should have been held and that the author is a citizen of the Democratic Republic of the Congo, although it illogically concluded that she would not be exposed to any irreparable harm in Angola because she was able to live there for many years. Furthermore, the author was arrested on 6 November 2017, and was informed the following day that she and her children would be deported on 8 November 2017. Such expeditious enforcement of their removal order did not allow the author to explain the reasons against her deportation in order to have her case reviewed. The unfairness that characterized the pre-removal risk assessment process and the enforcement of the removal order in the author's case amount to a violation of article 13 of the Covenant, in conjunction with article 7.

5.7 Regarding the author's submissions under articles 17 (1), 23 (1) and 24 (1), the State party submits that the family can be separated only because of the parents' own decision, because the author previously tried to enter Canada with her children and filed a refugee request asserting that her husband had died. The author clarifies that she declared as much because she believed it was in the best interests of her children. The family's original plan was to seek asylum in Canada (owing to perceived closer linguistic and cultural ties with Canada than with the United States), but the author's husband feared that crossing the border illegally was too dangerous. The author then decided to try to cross the border by foot with her children and, to be consistent with her husband's identity known at the National Intelligence Agency and following incorrect advice that she received in the United States, she obtained identity documents using that family name. In her administrative stay request, the author submitted that her deportation together with her two older children would cause irreparable harm, as the family would be separated. The Canada Border Services Agency officer however rejected the stay request because the psychological report was not reliable owing to its many contradictions. The author explains that such contradictions were due to misunderstandings by the Canada Border Services Agency officer. Furthermore, the officer submitted that the psychologist's report was mainly based on the author's statements; this is not however accurate, given that the psychologist provides a list of the methodology employed in her examination. In the event of deportation,

[5] Canadian Council for Refugees and Sojourn House, *Welcome to Canada: The Experience of Refugee Claimants at Port-of-Entry Interviews*, November 2010 (available from http://ccrweb.ca/files/poereport.pdf), pp. 2–3.

the separation of the family could last several years, since the author's husband's asylum application and consequent permanent residence application could take up to 32 months to be processed. Consequently, the deportation of the author with her older children would amount to a violation of their rights under articles 17 (1), 23 (1) and 24 (1) of the Covenant.

5.8 The author notes that she was detained with her children in preparation for their deportation, and was later released when the Committee issued interim measures requesting the State party to suspend the deportation while the communication was under examination. She submits that such detention of minor children, even if for a short duration, is disproportionate and arbitrary, and constitutes a violation of their rights under articles 17 (1), 23 (1), 24 (1) and 9 (1) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[6] The Committee notes the author's submission that the detention of her minor children with her, in preparation for their deportation, is disproportionate and arbitrary, and constitutes a violation of their rights under articles 17 (1), 23 (1), 24 (1) and 9 (1) of the Covenant. The Committee notes that the author did not bring that claim before the Committee at the time of her initial communication, but referred to it only in her comments on the State party's observations, and that the State party has not had the opportunity to comment on these allegations. Furthermore, the Committee notes that the author has not attempted to use any domestic remedy to challenge her children's detention, and has not argued that there were no effective remedies available. Accordingly, it considers that these claims are inadmissible, in accordance with article 5 (2) (b) of the Optional Protocol.

6.4 The Committee also notes that, according to the State party, the author's claims under article 13 should be deemed inadmissible because when she first entered Canadian territory, she could have challenged her ineligibility and prospective return to the United States by means of an application for leave to apply for judicial review to the Federal Court, coupled with a motion for a judicial stay. The Committee notes that the author not only makes claims with regard to the application of the Canada-United States Safe Third Country Agreement, but also about the procedural guarantees of the pre-removal risk assessment and about the lack of an oral hearing in her case. The Committee notes that the remedy proposed by the State party is aimed at challenging the application of the Canada-United States Safe Third Country Agreement exclusively, but does not cover all aspects of the author's claims under article 13. The Committee notes that the State party has not challenged the exhaustion of domestic remedies of the author for any of the other claims under the communication. Accordingly, it considers that article 5 (2) (b) of the Optional Protocol does not preclude the examination of the remaining claims made in the present communication.

6.5 The Committee notes the author's claim that, if she were to be returned to Angola, her rights under article 9 of the Covenant would be violated as she would be persecuted there and extradited to Democratic Republic of the Congo where she would be detained in life-threatening circumstances. The Committee also notes the State party's challenge to the

[6] See *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4 and *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5.

admissibility of the communication on the grounds that the author has failed to sufficiently substantiate her claims under article 9. The Committee recalls that article 2 of the Covenant requires that States parties respect and ensure the rights recognized in the Covenant for all persons in their territory and all persons under their jurisdiction. This entails, inter alia, an obligation 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, in the country to which removal is to be effected, or in any country to which the person may subsequently be removed. In that connection, the Committee notes that the author did not provide sufficient information regarding her claim under article 9 of the Covenant that would allow the Committee to conclude that her allegations regarding deprivation of liberty would amount to irreparable harm such as that contemplated in articles 6 and 7. Accordingly, the Committee considers that the author has failed to substantiate, for the purposes of admissibility, her allegations that her removal to Angola by the State party would violate article 9, and declares that part of the communication inadmissible under article 2 of the Optional Protocol.[7]

6.6 Concerning the author's claim under article 13, the Committee notes the State party's argument that the author's claims are insufficiently substantiated since the author was interviewed a number of times prior to her pre-removal risk assessment application. The Committee observes that the author's assessment was examined and that the officer responsible found that there was no risk for the author upon removal, and therefore no need to proceed to an oral hearing. It also notes that that decision was reviewed by the Federal Court, which rejected the author's request for leave to apply for judicial review on 1 August 2017. In view thereof, the Committee considers that the author has failed to sufficiently substantiate for purposes of admissibility that the above-mentioned proceedings amounted to a denial of justice in her case, in violation of article 13 of the Covenant. The Committee therefore concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee also notes the State party's argument that the other author's claims are inadmissible under article 2 of the Optional Protocol due to insufficient substantiation. With regard to the author's allegations under articles 6 (1) and 7 of the Covenant, the Committee observes that the author has explained that she feared returning to Angola because she feared persecution there and being extradited to the Democratic Republic of the Congo, where she and her husband would be once again persecuted by security forces, as in the past. With regard to articles 17 (1), 23 and 24 (1) of the Covenant, the Committee observes that the author has explained that the deportation of part of the family is interference in their family life since all members of the family have very strong ties. The Committee considers that, for the purposes of admissibility, the author has sufficiently substantiated her allegations.[8] The Committee therefore declares the communication admissible insofar as it raises issues under articles 6 (1), 7, 17 (1), 23 and 24 (1), and proceeds to consideration of the merits.

Consideration of the merits

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

7.2 The Committee notes the author's claim that her expulsion to Angola would put her at risk of being persecuted and extradited to the Democratic Republic of the Congo, where she could be subjected to ill-treatment. She further claims that the State party has not reasonably assessed the risk inherent in her removal.

7.3 The Committee recalls paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it

[7] See *S.Z. v. Denmark* (CCPR/C/117/D/2443/2014), para. 8.4 and *S. v. Denmark* (CCPR/C/122/D/2642/2015), para. 7.5.

[8] See *Biao Lin v. Australia* (CCPR/C/107/D/1957/2010), para. 8.6.

referred 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 personal[9] 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.[10] 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.[11]

7.4 The Committee notes the author's statements regarding the arrest warrants against her in the Democratic Republic of the Congo, and the persecution that she and her family endured in Angola. The Committee observes, however, that the author's pre-removal risk assessment filed and arguments thereby submitted were thoroughly examined by the State party's authorities in the context of the consideration of her application for a pre-removal risk assessment, and subsequent application for leave to apply for judicial review. The Committee notes that, according to the documentation provided by the parties, the Canada Border Services Agency heard the author on various occasions and had identity documents provided by the author examined by experts to establish their authenticity. All the authorities identified contradictory and implausible elements in the author's statements. In particular, the Committee notes the State party's argument that the author has failed to substantiate or convincingly explain why the author and her husband are being persecuted in the Democratic Republic of the Congo even though their profiles do not correspond with those persecuted following the murder of the former President of the Democratic Republic of the Congo (see para. 4.3), and that the State party questions whether the authors are actually citizens of the Democratic Republic of the Congo. The Committee also notes that the author has not convincingly demonstrated that she was persecuted in the Democratic Republic of the Congo, that her brother was killed in Angola because she was persecuted and that her mother's leg had to be amputated for the same reasons, as she claims. Following the analysis of the case file, the Federal Court, on its decision of 26 May 2017, came to the conclusion that the author was not at risk of irreparable harm if she were deported to Angola, a country where she had lived for years.

7.5 The Committee notes that, although the author contests the assessment and findings of the Canadian authorities as to the risk of harm she faces in Angola and the risk of extradition to the Democratic Republic of the Congo, she has not presented any evidence to sufficiently substantiate her allegations under articles 6 and 7 of the Covenant. The Committee considers that the information at its disposal demonstrates that the State party took into account all the elements provided by the author when evaluating the risk that she faced, and she has not identified any irregularity in the decision-making process. The Committee also considers that, while the author disagrees with the factual conclusions of the authorities in the State party, she has not shown that they were arbitrary or manifestly erroneous, or that they amounted to a denial of justice. Consequently, the Committee considers that the evidence and circumstances mentioned by the author do not demonstrate that she would be at real and personal risk of being subjected to treatment contrary to articles 6 and 7 of the Covenant. In view thereof, the Committee is not able to conclude that the information before it shows that the author's rights under articles 6 (1) and 7 of the Covenant would be violated if she were removed to Angola.

7.6 With respect to the claim of violation of articles 17 (1), 23 (1) and 24 (1) of the Covenant, the Committee notes the author's claims that her deportation with her two elder children constitutes interference in their right to family life since all members of the family have very strong ties, and that their separation would not be in the best interests of her children. The Committee notes the State party's argument that it was the author's decision to enter Canada without her husband that results now in their claims being considered

[9] See *K. v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.3, *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.2 and *X. v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

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

[11] See, for example, *K. v. Denmark*, para. 7.4.

through different procedures and their subsequent deportation before the claims of the other family members have been determined. The Committee recalls its case law, according to which there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.[12]

7.7 In the present case, the Committee considers that to issue a deportation order against the author and her two eldest children but not her other minor children and her husband, father of the children, constitutes interference with the family,[13] within the meaning of article 17 of the Covenant. The Committee has to determine whether such interference in the author's and her children's family life is arbitrary or unlawful pursuant to article 17 (1) of the Covenant, and thus whether insufficient protection has been afforded to her family and to her children by the State in accordance with articles 23 (1) and 24 (1).

7.8 The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[14] The Committee also recalls that, in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference in family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.[15]

8. In the present case, the Committee observes that the author's removal pursued a legitimate objective, which is the enforcement of the State party's immigration law; the State party explained that the reason for removing the author was the denial of her pre-removal risk assessment. The Committee notes the State party's argument that it has thoroughly examined the author's claims regarding the hardship that the separation of the family could cause in the context of the author's deferral application, and that the Canada Border Services Agency officer highlighted that the separation would be only temporarily, until the author's husband claim for protection is decided upon. The State party submits that, after this decision, they will be able to reunite either in Canada or in Angola, where the authors have lived for years. In the particular circumstances, the Committee considers that the author's personal family situation has been thoroughly assessed by the competent authorities and that it has found that the degree of hardship the family and its members would encounter is proportionate to the legitimate aim pursued. The Committee therefore considers that the interference in the author's family life that has occurred is not arbitrary within the meaning of article 17 of the Covenant. Similarly, the Committee finds that the degree of hardship that may be caused by the execution of the deportation order is proportionate to the legitimate objective of enforcing the State party's immigration law and is not arbitrary within the meaning of article 17 of the Covenant. The Committee concludes that the facts before it do not reveal a violation of articles 17 (1), 23 (1) and 24 (1) of the Covenant.[16]

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not permit it to conclude that the author's expulsion to Angola would, if implemented, violate the author's rights under articles 6 (1), 7, 17 and 23 and 24 (1) of the Covenant or those of her children.

[12] See, for example *Dauphin v. Canada* (CCPR/C/96/D/1792/2008), para. 8.1, *Winata v. Australia* (CCPR/C/72/D/930/2000), para. 7.1; *Madafferi v. Australia* (CCPR/C/81/D/1011/2001), para. 9.7 and *Byahuranga v. Denmark* (CCPR/C/82/D/1222/2003), para. 11.5.

[13] See *Madafferi v. Australia*, para. 9.8.

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

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

[16] See *M.G.C. v. Australia* (CCPR/C/113/D/1875/2009), para. 11.19.

Annex

Individual opinion of José Manuel Santos Pais (partly dissenting)

1. I regret not being able to share the Committee's conclusion that the author's expulsion to Angola would not, if implemented, violate the author's rights or those of her children under articles 17 and 23 and 24 (1) of the Covenant.

2. The author and her two elder children are part of a larger family composed of themselves, the author's husband and father of the children, L.M., two younger siblings and the author's mother (para. 2.1), who was shot in the leg while in Angola, which was later amputated (paras. 2.11, 5.3), who joined her daughter in the United States of America.

3. The author and her two elder children, after crossing the Canadian border in 2016, were found ineligible to claim asylum on the basis of the Immigration and Refugee Protection Act. Their claims were redirected to the pre-removal risk assessment process (para. 2.13) and subsequently rejected. The author applied for a deferral of their removal, which was denied on the grounds that the family had voluntarily separated in the past and would reunite once the author's husband's claim for protection was determined (para. 2.14).

4. In the meantime, L.M., his two younger children and his mother-in-law saw their asylum claim deferred to the Immigration Refugee Board. This process is still pending.

5. The author claims that she has strong family ties, that deportation of part of the family would interfere with her family rights, and that the two children on whose behalf she presents the communication have been going to school in Canada since they entered the country (in 2016, so for three years now) and have integrated into Canadian society. The removal of the children would consequently have a major impact on them and would not be in their best interests (para. 3.4).

6. The State party acknowledges that the author, her husband and all their children constitute a family (para 4.8). The State party also considers it was the decisions and actions of the author and her husband that resulted in their claims for protection in Canada being determined at different times and in different processes (para 4.9). However, the State party recognizes that these different processes concern the same family and so their outcome will have a significant impact on any of its members. In fact, while the children are not accountable for their parents' procedural actions, they are now particularly vulnerable, as the deportation order may entail disruption of the family itself.

7. The State party considers that, while the family may be temporarily separated if the authors are deported to Angola, this does not in itself render the removal unlawful, arbitrary, unreasonable or disproportionate. If the author's husband's claim for protection is granted, he will be able to apply for permanent residence in Canada and will be able to include the author and the two eldest children on his application (para. 4.9). However, how sure can we be the separation is only temporary? The father's pending process may take up to 32 months (para. 5.7). On the other hand, if the separation is to be only temporary, why not stay the decision of removal, pending the outcome of the husband's claim for protection?

8. The State party also states that the hardship resulting from the separation of the family and the children's best interests were considered in the context of the deferral application (para 4.9), but does not explain how this conclusion was reached. Which children's best interests were considered: those of the elder children, who are to be removed to Angola with their mother, or those of the younger ones, who are staying in Canada with their father and maternal grandmother? Furthermore, no mention is made of the child to whom the author was expecting to give birth, in September 2018 (para. 5.1). Is this child to be removed to Angola as well, at such a young age? As to the clinical situation of the author's daughter, allegedly experiencing a serious deterioration in her mental health due to the threat of deportation and family separation, with recurring suicidal thoughts, it does not seem this was also taken into account by the State party.

9. I concur with the Committee (para. 7.7) that the deportation order against the author and her two eldest children, but not her other minor children and her husband, constitutes interference in the family, within the meaning of article 17 of the Covenant. However, unlike the Committee, I consider that this interference, while lawful, is arbitrary, in the sense that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality (para. 7.8).

10. In the present case, I do not think the interference in family life is appropriate, reasonable, necessary or objectively justified in the light, on the one hand, of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members will encounter as a consequence of such removal. I am even less convinced that it is proportionate to the legitimate aim pursued. In fact, since the State party itself recognizes the pending process relating to the author's husband may allow a future application for permanent residence in Canada on behalf of the author and her elder children, why not wait for its outcome? Family unity would thus be guaranteed in the meantime and the best interests of all the children duly respected.

11. Accordingly, I consider the deportation order, if implemented, while the process of the author's husband is still pending, not proportionate and therefore arbitrary, violating the author's and her elder children's rights under articles 17 (1), 23 (1) and 24 (1) of the Covenant.