UNITED NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/89/D/1052/2002
3 May 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12 - 30 March 2007

VIEWS

Communication No. 1052/2002

Submitted by:	Ms. Natalya Tcholatch (not represented by counsel)
Alleged victims:	The author and her daughter, Julia Tcholatch
State party:	Canada
Date of communication:	3 February 1998 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 26 February 2002 (not issued in document form)
Date of adoption of Views:	20 March 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Denial of access of mother to her child

Substantive issues: arbitrary interference with family, protection of the family, protection of the child as a minor, fair trial, undue delay

Procedural issues: failure to substantiate claim.

Articles of the Covenant: 14, paragraph 1, 17, 23 and 24

Article of the Optional Protocol: 2

On 20 March 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1052/2002.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-ninth session

concerning

Communication No. 1052/2002**

Submitted by:	Ms. Natalya Tcholatch (not represented)
Alleged victims:	The author and her daughter, Julia Tcholatch
State party:	Canada
Date of communication:	3 February 1998 (initial submission)

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

Meeting on 20 March 2007

Having concluded its consideration of communication No. 1052/2002, submitted to the Human Rights Committee by Ms. Natalya Tcholatch under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication is Natalya Tcholatch, a Canadian citizen of Ukrainian origin, born on 28 July 1960. She also submits the communication on behalf of her daughter, Julia Tcholatch, born in Canada on 20 February 1993, who was removed from her care on 2 August 1997 and later adopted. Although the author did not initially make any specific claims under the Covenant, she later claimed that they were the victims of violations by Canada[1] of articles 1, 2, 3, 5 (2), 7, 9 (1, 3 and 5), 10 (1 and 2 *a*), 13, 14 (1, 2, 3 *d* and *e*, and 4), 16, 17, 18 (4), 23, 24, 25 (*c*) and 26, of the

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley.

[1] The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

International Covenant on Civil and Political Rights (the Covenant). She is not represented by counsel.

The facts as submitted by the author

2.1 The author was born in the Ukraine and obtained a qualification in the medical field there. She migrated to Canada in 1989 and became a Canadian citizen in 1994. After the birth of her daughter on 20 February 1993, she raised her child as a single parent, while pursuing University studies in order to obtain a professional Canadian qualification. The child's biological father did not have any contact with her.

2.2 During the night of 1 to 2 August 1997, the author called the police to report a sexual abuse of her four-year old daughter. The author also slapped her daughter, to prevent her from visiting the neighbours, resulting in a red mark on her face[2]. According to the author, this only happened once, in a special circumstance where she was concerned for her daughter's well-being. According to a police report, the author stopped a motorist to "give away" her daughter and said that she no longer wanted her daughter and that Canada could take care of her. However this has been consistently denied by the author, according to whom the child was standing on the sidewalk waiting for the author who was talking to the police, and according to whom she never abandoned her daughter. The police took her child to the Police Station and placed her in the care of the Children's Aid Society of Metropolitan Toronto which in turn entrusted her to a foster home. Despite the author's report that her daughter had been sexually assaulted, no investigation was allegedly made and the child was not examined by a doctor.

2.3 A few days later (5 August), the author was arrested and charged with assault (for what she believed to be an exercise of parental authority) of her daughter[3]. In an affidavit of 6 August, the author explained the circumstances of the incident and stated that she believed that she was capable of caring for her daughter, and that she would be pleased to have the Children's Aid Society attend her home to follow her parenting style. However, on 7 August, the Scarborough Provincial Court placed the child in temporary (three months) care of the Catholic Children's Aid Society of Toronto (CCAS), with supervised access. According to the author, this order did not provide the authority to place her child permanently in a foster home, nor to release her child for adoption. She claims that until the child protection trial and the judgment of 26 June 2000[4], no custody order was issued in favour of the CCAS and it was not established that the child needed protection, as would have been required by national legislation, i.e. the Rules of Civil Practice, the Family Court Rules and the Family and Services Act, for the further apprehension of her daughter from 1997 to 2000. Although the girl initially disclosed that her mother had hit her, she repeatedly expressed the wish to return home and reacted negatively when separated from her mother at the end of visits. All visits were strictly supervised and the mother and daughter were allowed no privacy.

[2] According to the police, the girl had bruises on her face and arms.
[3] The author confessed the assault and was convicted of assault on 24 April 1998 and received a conditional sentence of 90 days imprisonment.
[4] The author refers to the trial which led to the 26 June 2000 judgement of Justice B.E. Payne of the Ontario Court of Justice, on the application of the Children's Aid Society of Toronto for an order for crown wardship without access of the child.

2.4 On 1 December 1997[5], on her daughter's request, the author took her home. As a result, she was convicted of child abduction and sentenced to one month imprisonment. In prison, she was severely beaten by an inmate and thereafter placed in segregation without medical attention for 10 days. On 24 December 1997, she was released on bail, with the condition that before she could have any access to her daughter, she undergo an assessment as approved by the CCAS, and that any access to her daughter be under the immediate and direct supervision of the CCAS. Telephone contact between mother and daughter was terminated following an angry exchange between the author and the foster mother.

2.5 In March 1998, the author was assessed, on the CCAS' request, by Dr. K., an attending psychiatrist at the Clarke Institute of Psychiatry, for a total of 4 hours. The Committee has not been provided with a copy of the 14-page report that he produced. However, it transpires from the judgement of 26 June 2000[6] that the doctor, who based his assessment on two interviews and second hand information from other psychiatrists, found the author to suffer from a delusional disorder and erotomanic, persecutory, and somatic delusions. According to the judge, the doctor also observed that because her mental illness was proceeding untreated, her ability to care for her daughter was in question.

2.6 On 29 September 1998, Dr. K. replied to a letter from the author's counsel, and clarified a number of issues, among which was the fact that he was not able to detect the author's erotomanic delusions in his time spent with her, but rather that the notes from the University of Toronto Health Services Clinic suggested that her treatment there flowed from her erotomanic delusional material. He also indicated in his conclusions that if she did experience erotomanic delusions, they did not appear to have had an impact on her ability to care for her daughter[7].

2.7 On 12 May 1998, the author was assessed by Dr. G. from the Toronto Hospital. In describing the author, he indicated that "there do not appear to be any manic or overt psychotic symptoms", that "there was no formal thought disorder" and that "her thought content revealed mostly ideas of persecution which appeared to be overvalued, but not of delusional proportions". He considered that "it is likely that this patient suffers from a paranoid personality disorder, although it is difficult to say at this point as a result of only one interview", but concluded that she did not need medication.

2.8 On 2 July 1998, a Dr. G., the author's family physician since May 1995, indicated in a letter that he did not feel that he knew the patient well and that she was difficult to describe, but that she did not appear to suffer from any major psychiatric illness and had not been on any medications.

2.9 In a letter of 6 July 1998, Dr. T., Consultant Paediatrician who had seen the child in consultation intermittently since August 1993, indicated that he had no reason or evidence to suggest that the author was an unfit mother.

[5] According to the author, the temporary order of 7 August 1997, granting temporary care to the CCAS with supervised access, had expired at this time, and was neither varied nor extended by another order.
[6] See below.
[7] This information was also made available to the judge.

2.10 As a result of Dr. K.'s report which outlined a medical condition, and despite other specialists' acknowledgment that she was in good health and did not need medication, the CCAS refused to reinstate access. In June 1998, the initial application of the CCAS for an order of 3 months wardship was amended to seek an order of crown wardship with no access, to allow the child to be adopted. In July, August and November 1998, the author's motions to reinstate access were denied by no-access orders.

2.11 In an adoptability assessment of 28 September 1998, an Adoption Social Worker of the CCAS considered that "since her admission into care, Julia's social skills have greatly improved". However, she found that "Julia appears to have a significant attachment to her mother" and "she has stated that she wants to live with her". "Julia, in a discussion with this worker indicated that she wanted to be with her mother, although she still has some ambivalence about her." She stated that she loved her mother although she had been beaten by her. "Despite this, she was not able to consider the possibility of living with another family at this time." The social worker concluded that it would be helpful to have the child psychologically assessed and specifically explore the attachment issues before making a decision about her adoptability.

2.12 On 12 December 1998, Dr. P., the child's psychologist, wrote a report on the possible effect that crown wardship without access might have on the child. The psychologist indicated that the child, who at that time had not seen her mother for one year, was at risk of developing attachment disorder. She further stated that:

> "Julia misses her mother, says she wants to see her, she is confused by her mother's absence. (…) Julia is a child in limbo. (…) The impression I got from both conversations with Julia's foster mother and from Julia's presentation is that she is clinging to the memory of her mother, that she is confused, and does not know what she should and can feel about her mother. She is at risk of depression. (…) Julia needs to come to some resolution in relation to her mother. (…) It could be helpful for Julia to have contact with her mother so that such a resolution can be achieved. (…) The recommendation is therefore that supervised visits with [the author] are reinstated. That Julia is given a chance to know her mother. (…) Should it be considered that the visits are detrimental to Julia, they should be stopped and the reasons for the termination explained to her."

2.13 In order to regain the care and control of her child or visiting rights, the author turned to various lawyers and eventually proceeded in person to pursue numerous motions and appeals to the courts during the years 1997 to 2000. In the result on 11 January 1999, on the CCAS' request, the Ontario Court of Justice, relying on Dr. K.'s report, found the author to be under a "mental disability" and ordered that she not be allowed to pursue any further court proceedings in person. In the circumstances the Public Guardian and Trustee Office (PGT) was assigned as the author's litigation guardian[8]. She claims that the PGT did not act on her behalf and tried to mislead her. The Court also ordered that the trial scheduled for February 1999 be postponed, as the PGT was not ready to proceed to trial.

[8] In an affidavit of 17 May 2000, a lawyer from the PGT indicated that the author had "demonstrated that she was capable of instructing and keeping legal counsel" in support of a motion for the PGT to be removed as legal representative for the author.

2.14 In June 1999, as a result of an order issued on 17 May 1999, access to her child was reinstated by consent on certain terms and conditions, among which:

> "1. [The author] shall have supervised access to the child in the sole and absolute discretion of the CCAS.
>
> 2. Access shall be once every three weeks for a period of not more than 90 minutes.
>
> 4. [The author] shall remain in the visitation room at the CCAS office with the child at all times during the visits, fully supervised by CCAS employees. There will be a CCAS employee in the room at all times as well as a CCAS employee behind an observation mirror.
>
> 10. [The author] shall not question Julia regarding where she lives, her telephone number or where she attends school.
>
> 13. In the event [the author] fails to abide by any of these terms and conditions the access visits shall be terminated immediately and the CCAS shall have the right to determine if future visits shall take place."

2.15 Access was removed again by the CCAS in August 1999 although the visits had gone well and the author fully complied with all access conditions at each visit. On the author's motion to reinstate access, the access order was varied on 21 December 1999, in the best interests of the child. In December 1999, the child started living with new foster parents, who expressed the wish to adopt her.

2.16 On 8 December 1999, the author filed an application for judicial review of the entire child protection process in the Superior Court of Justice. The CCAS initiated a counter-application under Section 140 of the Courts of Justice Act, banning the author from continuing any proceedings she had commenced in any court, and preventing her from initiating any subsequent proceedings. On 8 March 2000, the Superior Court of Justice prohibited her from instituting further proceedings in any court, and ordered that all proceedings previously instituted in any court be discontinued. The Court's reasoning was that the author had initiated numerous motions, appeals and applications, sabotaging the timetable of the trial regarding the protection of the child, and thereby seriously compromising the child's welfare.

2.17 On 26 June 2000, in the main trial on the child protection case, the Ontario Court of Justice made an order for crown wardship without access for the purpose of adoption. The Court considered that "the evidence in this matter is overwhelming to permit the Court to find that the child is in need of protection and that there is overwhelming evidence to demonstrate that this child's best interests can only be served by an order for crown wardship without access." The Court further "firmly believed" that the author was a "seriously ill person", and that if the child were to be left in her care, she would suffer not only physical harm but irreparable emotional damage. The Court based this finding on Dr. K.'s 1998 medical report, Dr. G.'s indication that "it is likely that this patient suffers from a paranoid personality disorder" and another doctor's statement of 12 May 1998 that "While I have no direct confirmatory evidence of her suffering from a delusional disorder, I would feel that the material presented by Dr. K. and presumably to the Courts, would likely have stood up and

would continue to do so". None of these specialists came to Court to testify.

2.18 The child was not heard during the trial. However, it transpires from the judgement that through her lawyer, "the position was taken on behalf of the child that she wished to remain with her present foster parents although she still indicated a wish to visit with her mother". During the trial, the child's psychologist stated that Julia was strongly attached to her mother, that she needed contact with her, and that she would suffer if deprivation of all access continued.

2.19 With regard to the author's condition and her conduct, the Court further noted that:

> "It is difficult to determine where [the author's] illness ends and her malicious behaviour begins as they are intertwined. The apprehension of this child took place in the early hours of the morning on August 2nd, 1997 and from then until this matter proceeded to trial in May and June of 2000, there were endless legal proceedings related to this apprehension which delayed the hearing of the initial problem and [the author], with the assistance of seven or eight lawyers, ran off in all directions attacking everyone with motions and appeals from decisions until finally this year an order was made in the Superior Court, directing that [the author] was a vexatious litigant and she was not permitted to institute any new legal proceedings without prior leave of the Court."

Finally, it considered that continued access would only perpetuate the state of limbo the child found herself in, and that there were no special circumstances demonstrated which would justify the continuation of access in these circumstances. On 10 October 2000, the author's attempted appeal of 26 July 2000 was dismissed, on procedural grounds.

2.20 In November 2000, the author asked the CCAS for the release of information related to Julia's placement for adoption. The CCAS replied that "the Society has no obligation to advise you as to whether your daughter has been placed for adoption".

2.21 It transpires from an affidavit of 22 June 2001 sworn by the child's foster mother, that the author attempted to be in contact with her daughter on several occasions. She called their home in February, August and October 2000 and went to her school twice, in May and June 2001. According to the foster mother, the girl had run away from the author and sought the assistance of a teacher. Julia told her foster mother that the author had approached her, but that "she knew not to speak to her", and that she "continued to be afraid of her mother". An "Acknowledgement of Adoption Placement" of 9 August 2001 signed by the foster parents indicates their intention to adopt the child.

2.22 The author made further motions and appeals which were all rejected on procedural grounds. Finally, on 13 September 2001, the Supreme Court of Canada dismissed an application for leave to appeal and a motion for stay of adoption filed by the author. Her applications to the Ontario Human Rights Commission, the Ministry of Community and Social Services, and to "many other authorities" were fruitless.

The complaint

3.1 While the author did not initially invoke violations of specific provisions of the Covenant, she subsequently, in comments on the State party's observations, invoked violations of articles 1; 2; 3; 5,

paragraph 2; 7; 9, paragraphs 1, 3 and 5; 10, paragraphs 1 and 2(a); 13; 14, paragraphs 1, 2, 3 (d) and (e) and 4; 16; 17; 18, paragraph 4; 23; 24; 25(c); and 26 of the Covenant. The Committee, upon analysis of the complaint, considers that it raises the following issues under the Covenant.

3.2 The author claims, on her own behalf, violations of article 14, in relation to her convictions and imprisonment for the assault and abduction of her daughter, and of article 9 and article 10, in relation to her treatment while serving her sentence.

3.3 The author claims, on her daughter's and her own behalf, that her daughter was "abducted" and requests that she be returned to her custody or granted access. She claims that her family was "illegally destroyed" as her daughter was apprehended and kept by the CCAS without a legitimate custody order. Her access to her daughter was unlawfully and arbitrarily terminated by the CCAS without any explanations and in spite of a court order guaranteeing access. Her daughter stayed in the temporary care of the CCAS well beyond the maximum statutory one-year limit[9]. No efforts to return the child to the author, or seek a less restrictive solution, were made in the course of the proceedings. These claims raise issues under article 17, article 23 and article 24.

3.4 The author denounces on her daughter's and her own behalf the delays in considering their case, in particular a delay of almost three years between the commencement of the child protection proceedings in August 1997 and the trial in June 2000, thus raising issues under article 14, paragraph 1.

3.5 The author claims that the hearing of the child protection case was unfair. She claims that during the trial which resulted in the judgment of 26 June 2000, the court did not call the main witnesses nor acknowledge the numerous contradictions in the witnesses' statements. Further, the psychiatric assessment on which the Court based its finding was carried out two years before the trial and included hearsay information which was not evaluated in court. The judge based his decision on a single outdated report, prepared by the psychiatrist on the CCAS' request, and paid for by the CCAS. This psychiatrist did not testify during the proceedings. These claims also raise issues under article 14, paragraph 1, of the Covenant.

3.6 The author contends on her daughter's behalf that the court decisions in the case were not taken in the child's best interest, and that the unfair and prolonged nature of the proceedings caused her mental suffering, thus raising issues under Article 7.

3.7 The author does not further substantiate her claims under articles 1, 2, 3, 5, 13, 16, 18, 25 and 26 of the Covenant.

State party's submission on the admissibility and merits of the communication

4.1 On 15 May 2002, the State party commented on the admissibility and merits of the communication. It notes that in her communication, the author describes her experiences with

[9] Child and Family Services Act, Section 70.(1) (…) "the court shall not make an order for society wardship under this Part that results in a child being a society ward for a period exceeding,

(a) 12 months, if the child is less than 6 years of age on the day the court makes an order for society wardship".

various legal and social institutions of the State party, and contends that the communication should be declared inadmissible for non-substantiation, as the author's allegations are formulated in an imprecise manner, without specifying which provisions of the Covenant allegedly were violated. The State party argues that in the light of this deficiency, it cannot provide a response to the author's complaint.

4.2 The State party refers to the Committee's decision in the case of *J.J.C. v. Canada*[10] where the Committee concluded that the author's complaint was not sufficiently substantiated due to the "sweeping nature" of the allegations made against the Canadian Court system, and found the communication inadmissible. It submits that the present communication suffers from the same inadequacies as those in that particular communication, and that it should likewise be found inadmissible.

4.3 The State party argues that the author's allegations reveal no specific violations of any Covenant provisions, and that the communication is without merits.

4.4 The State party reserved the right to make submissions with respect to the admissibility and merits of the communication if further information was received.

Author's comments

5.1 On 21 September 2003, the author commented on the State party's submissions, arguing that her sole intention is to gain the possibility to see her only child. All her efforts and court applications were aimed at reinstating contact with her daughter, who was separated from her against their will.

5.2 In reply to the State party's contention that her communication reveals no specific violations of Covenant provisions, the author lists the provisions she considers to have been violated by the State party (see paragraph 1. above). She reiterates her claim that her daughter was illegally removed from her custody, as the interim supervision order of 7 August 1997 expired after three months. When she decided to take her daughter home after the expiry of that order, she was immediately arrested and imprisoned for two months without trial. She contends that the subsequent terminations of access to her daughter were arbitrarily decided by the CCAS, despite a court order granting her access[11].

5.3 The author reiterates that her daughter wanted to have contact with her, which was ignored by the judge, and refers to the adoptability assessment and the psychologist's recommendation that the author should have access to her child.

5.4 Finally the author claims that her daughter suffered severe anxiety and depression symptoms, as a result of her separation from her. Unnecessarily severe measures towards the family caused an irreversible psychological trauma to the child, and put her at risk of developmental disorders. For the author, this constituted cruel and unusual punishment of her child.

[10] Communication No. 367/1989, *J.J.C. v. Canada,* inadmissibility decision of 5 November 1991.
[11] The author refers to the order of 7 August 1997 giving her access and the termination of access on 1 December 1997 further to the abduction, as well as the order of 17 May 1999 reinstating access and the CCAS' unilateral decision to terminate access in August 1999.

5.5 On the issue of standing of the author to represent her daughter, the author has confirmed that she wishes to bring the complaint also on behalf of her daughter. On 19 August 2006, she informed the Committee that her daughter has been adopted, and that she has no more contact with her. As a result of the incidents of 2001 in which she attempted to enter into contact with her, she was taken to court by her daughter's foster/adoptive parents and arrested. She also indicates that she has not been provided any information as to the date of adoption.

5.6 On 31 October 2006, the author indicated that her attempts to contact her daughter were prevented by the present caregivers, and that she has not been able to obtain an authorisation from her daughter to act on her behalf in the proceedings before the Committee. Consequently she took the matter to court, in which the proceedings are still pending. On 22 February 2007, she confirmed that a court hearing initially scheduled for December 2006 had been postponed to 9 March 2007.

Absence of further comments from the State party

6. On 10 December 2003, the author's comments were transmitted to the State party, which did not provide any further comments.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol. It notes that the State party has not contested the admissibility of the communication on grounds of non-exhaustion of domestic remedies, and that the author's application for leave to appeal to the Supreme Court was denied on 13 September 2001. It thus considers that the author has exhausted domestic remedies.

7.3 The Committee has noted the State party's contention that the communication should be declared inadmissible for non-substantiation because the author's allegations were formulated in an imprecise and sweeping manner, without referring to the Covenant. It observes, however, that in response to State party's comments, the author, who is unrepresented, made an effort to organise her claims and referred to different articles of the Covenant, although in a broad manner. The State party has not commented on these claims, although it has been given the opportunity to do so. The Committee concludes that the author's claims are not inadmissible on this ground.

7.4 With respect to the author's standing to represent her daughter in relation to her claims under article 7, article 14, article 17, article 23 and article 24, the Committee notes that the author's daughter is now fourteen years old and has been adopted. It further notes that the author has not provided an authorisation from her daughter to act on her behalf. It recalls, however, that a non-

custodial parent has sufficient standing to represent his or her children before the Committee[12]. The bond existing between a mother and her child and the allegations in the case should be considered sufficient to justify representation of the author's daughter by her mother. In addition, the Committee also notes that the author has repeatedly but unsuccessfully sought to obtain authorization from her daughter to act on her behalf (see paragraph 5.6 above). In the circumstances, the Committee is not precluded from examining the claims made on behalf of the child by her mother.

7.5 The Committee understands the author's claims under article 9, article 10 and article 14, paragraph 2, as relating to her convictions for assault of her daughter and for child abduction, and the imprisonment related thereto. It notes that she has not provided any evidence supporting these claims, nor any description of facts sufficiently substantiated for purposes of admissibility, and accordingly finds them inadmissible under article 2 of the Optional Protocol.

7.6 The Committee considers that the author's claim that her daughter was a victim of mental suffering in violation of article 7 is not sufficiently substantiated for purposes of admissibility, and finds this claim inadmissible under article 2 of the Optional Protocol.

7.7 The Committee considers that the remaining claims raise issues under the Covenant and are sufficiently substantiated, for purposes of admissibility, and declares the communication admissible with respect to the claims under article 14, paragraph 1; article 17; article 23; and article 24 of the Covenant.

Consideration of the merits

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

8.2 As to the alleged violation of article 17, the Committee recalls that the term "family" must be understood broadly, and that it refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and a child[13]. Where there are biological ties, there is a strong presumption that a "family" exists and only in exceptional circumstances will such relationship not be protected by article 17. The Committee notes that the author and her daughter lived together until the child was four years old and she was placed in institutional custody and that the author was in contact with the child until August 1999. In these circumstances, the Committee cannot but find that at the time when the authorities intervened, the author and her daughter formed a family within the meaning of article 17 of the Covenant.

8.3 In respect of the author's claim that she unlawfully lost custody of and access to her child and that her family was destroyed, the Committee observes that the removal of a child from the care of his or her parent(s) constitutes interference in the parents' and the child's family. The issue thus

[12] See Communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 6.1.

[13] See Communication No.201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, paragraph 10.3, and Communication No.417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, paragraph 10.2.

arises whether or not such interference was arbitrary or unlawful and contrary to article 17. The Committee considers that in cases of child custody and access, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the effective right of a parent and a child to maintain personal relations and regular contact with each other, and on the other hand, in the light of the best interests of the child[14].

8.4 The Committee notes that the authorities' initial removal of her daughter from the author's care, on 2 August 1997, confirmed by a judicial order of 7 August placing her under the care of the CCAS, was based on their belief, later confirmed by the author's conviction, that she had assaulted her child. The Committee notes that although the order was temporary (three months), it only granted the author access to her daughter under extremely harsh circumstances. It considers that the initial three-month placement of the author's daughter in the care of the CCAS was disproportionate.

8.5 In relation to the author's claims regarding the period commencing after the expiry of the three-month period covered by the interim order of 7 August 1997 up to the trial in May 2000, the Committee notes that the CCAS kept the child in its care. According to the order of 7 August 1997, the author was to have access to her daughter, although under very strict conditions. Following the author's "abduction" of her daughter on1 December 1997 and her conviction in April 1998, the author was denied access. She did not regain access until June 1999, also under very harsh conditions, as a result of an order of 17 May 1999 reinstating access. For instance, the author and her daughter were allowed to meet only in the CCAS' premises, every third week for 90 minutes. The visits were fully supervised by CCAS employees. The author was not allowed to telephone her daughter. The CCAS again terminated access on its own initiative, while the order for access of 17 May 1999 was still in force. In the conditions for access appended to that order, it was stated that the author should have supervised access to the child *in the sole and absolute discretion of the CCAS*. The access issue was not assessed by a judge until 21 December 1999 when the judge decided not to reinstate the author's access to her daughter. Since then, the author's access has not been reinstated.

8.6 The Committee observes that the child repeatedly expressed the wish to go home, that she cried at the end of visits and that her psychologist recommended that access be reinstated. It considers that the conditions of access, which also excluded telephone contact, were very severe vis-à-vis a four-year old child and her mother. The fact that the author and the foster mother had an argument on the phone is not sufficient to justify the definitive termination of that contact between the author and her daughter. The Committee finds that the CCAS' exercise of its power unilaterally to terminate access in December 1997 and August 1999, without a judge having reassessed the situation or the author having been given the opportunity to present a defence constituted arbitrary interference with the author and her daughter's family, in violation of article 17 of the Covenant.

8.7 With respect to the alleged violation of article 23, the Committee recalls its jurisprudence that the national courts are generally competent to evaluate the circumstances of individual cases. However, the law should establish certain criteria so as to enable the courts to apply the full provisions of article 23 of the Covenant. "It seems essential, except in exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact

[14] See Communication No.946/2000, *L.P. v. Czech Republic*, Views adopted on 25 July 2002, para.7.3.

between the child and parents." [15] In the absence of such special circumstances, the Committee recalls that it cannot be deemed to be in the best interest of a child to eliminate altogether a parent's access to him or her[16].

8.8 In the present case, the judge, during the child protection trial of 2000, considered that "there were no special circumstances demonstrated which would justify the continuation of access in these circumstances", instead of examining the issue whether there were exceptional circumstances justifying terminating access, thereby reversing the perspective under which such issues should be considered. Given the need to ensure family bonds, it is essential that any proceedings which have an impact on the family unit deal with the question of whether the family bonds should be broken, keeping in mind the best interests of the child and of the parents. The Committee does not consider that the slapping incident, the author's lack of cooperation with the CCAS and the contested fact of her mental disability constituted exceptional circumstances which would justify total severance of contact between the author and her child. It finds that the process by which the State party's legal system reached a conclusion to completely deny the author access to her daughter, without considering a less intrusive and less restrictive option, amounted to a failure to protect the family unit, in violation of article 23 of the Covenant. In addition, these facts result in a violation of article 24 with respect to the author's daughter, who was entitled to additional protection as a minor.

8.9 With respect to the claim of undue delay under article 14, paragraph 1, the Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay[17], and that the very nature of custody proceedings or proceedings concerning access of a divorced parent to his or her children requires that the issues complained of be adjudicated expeditiously[18]. The Committee considers that this jurisprudence also applies to child protection proceedings, which relate to the removal of parental authority and access of a parent to his or her child. In examining this issue, the Committee must take into consideration the age of the child in question and the consequences that delayed proceedings may have on the child's well-being and the outcome of the court case.

8.10 In the present case, the child was four years old at the time of apprehension in August 1997, and seven years old at the time of the child protection trial in June 2000. As a consequence of the delayed proceedings, the child's psychologist warned that she was at risk of depression and of developing attachment disorder[19] and that she found herself in a "state of limbo"[20], as she did not know where she belonged. Moreover, the judge partly based his finding on the fact that the child had

[15] Communication No.201/1985, *Hendriks v. The Netherlands*, Views adopted on 27 July 1988, paragraph 10.4.
[16] Communication No.514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, paragraph 8.10.
[17] See Communication No.203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, paragraph 11.3; and Communication No.263/1987, *González del Río v. Peru*, Views adopted on 28 October 1992, paragraph 5.2.
[18] In a different context, see Communication No.514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, paragraph 8.4; and Communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, paragraph 6.2.
[19] P. psychological report of 12 December 1998.
[20] P. psychological report of 12 December 1998, 25 October 1999 and testimony at trial.

formed very strong bonds with her foster parents, who wanted to adopt her, and that she wished to remain with them. The Committee notes that the child initially wanted to return to her mother's care, and that her wish only changed over time.

8.11 It further transpires from the file that the author changed lawyers various times and filed numerous court motions, which delayed the proceedings. She was also found to be a vexatious litigant who, by her numerous motions and appeals, was sabotaging the timetable of the trial. However, these were all motions aimed at reinstating access of the author to her child. The Committee considers that bringing a motion for access should not have as a necessary consequence the delaying of the main trial. In addition, the delay cannot be attributable only to the author. The Committee for example notes that it was on the CCAS' request that the PGT was appointed as the author's representative and that a consequence of this appointment was the postponement of the trial. The Committee finds that in view of the young age of the child, the delay of nearly three years between the placement of the child in CCAS' care and the trial on the child protection application, which cannot solely be imputed to the author, was undue and in violation of the author's and her daughter's rights to an expeditious trial, as guaranteed by article 14, paragraph 1.

8.12 As to the claims of unfair hearing under article 14, paragraph 1, the Committee observes that the judge based his finding on what he believed to be the "serious illness of the mother". This conclusion was based on the two-year old assessment of Dr. K. that the author suffered "from a delusional disorder" and "erotomanic, persecutory and somatic delusions", and other psychiatric reports. It transpires from the judgement that the judge selectively and incorrectly used these reports. In particular, he appears to have misinterpreted Dr. K.'s assessment (see paragraphs 2.5 and 2.6 above) that if she did experience erotomanic delusions, they did not appear to have had an impact on her ability to care for her daughter. Further, the judge omitted Dr. G.'s opinion that there was no formal thought disorder, and that her ideas of persecution were not of delusional proportions. The judge did not hear Dr. K., who had been summoned to court by the author but failed to appear, nor did he solicit the testimony any of the other doctors who had assessed the author.

8.13 It transpires from the file that the judge decided the question of removal on one single incident of assault and contested facts, which took place three years earlier. In addition, there is no indication that the judge considered hearing the child, or that the child was involved at any point in the proceedings. While her wishes were expressed by her lawyer at trial, indicating that "she wished to remain with her present foster parents although she still indicated a wish to visit with her mother", the judge found that "continued access would only keep this state of limbo which Dr. P. believes is very damaging for the child and there should be closure and the child should be permitted to get on with the new opportunity which she has for a decent life." The Committee notes however that the child's psychologist considered that the child was in a state of limbo because she was "confused by her mother's absence". Further, the judge pointed out that "it is significant to note that the child that we are dealing with now is not the same one that was apprehended in that these proceedings have taken nearly three years and we are now dealing with a seven year old child who has now expressed the desire not to return home". While the Committee has taken note that the judge did examine the child's wishes and ordered crown wardship without access in the best interests of the child, the Committee cannot share the Court's assessment that the termination of all contact between mother and child could serve the child's best interest in this case. In view of the above, the Committee considers that the author and her daughter did not have a fair hearing in the child protection trial, in

violation of article 14, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it disclose a violation of article 14, paragraph 1; article 17 read alone and in conjunction with article 2; article 23; and article 24 of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her daughter with an effective remedy, including regular access of the author to her daughter and appropriate compensation for the author. In addition, the State party should take steps to prevent further occurrences of such violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee’s views.

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