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Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 94/2019*, **, ***

Communication submitted by:	S.F. (not represented by counsel)
Alleged victims:	W.W. and S.W.
State party:	Ireland
Date of communication:	16 August 2019 (initial submission)
Date of adoption of decision:	12 September 2022
Subject matter:	Return to Canada of the author's daughters under the Convention on the Civil Aspects of International Child Abduction
Procedural issues:	Failure to exhaust domestic remedies; insufficient substantiation of claims; abuse of right of submission; case already submitted to another procedure of international settlement; disclosure of information
Articles of the Convention:	3, 9, 12, 16 and 27
Articles of the Optional Protocol:	4 (2), 6, 7 (d) and (e)

1.1 The author of the communication is S.F., a national of Canada and Ireland born on 23 July 1985. She submits the communication on behalf of her two daughters, W.W. and S.W., both nationals of Canada, born on 29 May 2015 and 15 September 2017, respectively. The author claims that her daughters' rights under articles 3, 9, 12, 16 and 27 of the Convention have been violated. The Optional Protocol entered into force for the State party on 24 December 2014. The author is not represented by counsel.

1.2 On 20 August 2019, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, requested the State party to adopt interim measures to suspend the return of W.W. and S.W to Canada pending the consideration of the case by the Committee. On 23 August 2019, the author informed the

* Adopted by the Committee at its ninety-first session (29 August–23 September 2022).

** The following members of the Committee participated in the examination of the communication: Suzanne Aho, Aïssatou Alassane Moulaye, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Gehad Madi, Faith Marshall-Harris, Benyam Dawit Mezmur, Clarence Nelson, Otani Mikiko, Luis Ernesto Pedernera Reyna, José Ángel Rodríguez Reyes, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

*** A joint opinion by Committee members Hynd Ayoubi Idrissi, José Ángel Rodríguez Reyes and Luis Ernesto Pedernera Reyna (dissenting) is annexed to the present decision.

Committee that the children had been taken by the authorities and could be returned to Canada despite the interim measures. On 2 September 2019, the author informed the Committee that she could not locate the children. On 4 September 2019, the State party informed the Committee that it had carefully and in good faith considered the Committee's request for interim measures. However, the State party was not in a position to comply with the request in this particular case as it was in conflict with court proceedings under the Convention on the Civil Aspects of International Child Abduction. On 17 May 2021, the Committee rejected the State party's request for the admissibility of the communication to be considered separately from the merits.

Facts as submitted by the author

2.1 In 2009, the author moved from Ireland to British Colombia, Canada, where she met and married the father of her two daughters, a Canadian national. On 23 November 2018, the couple had an irreparable marital conflict. Although the author had no other family in Canada, her husband refused to move out of the family house. He became increasingly psychologically abusive and controlling. The author had no income and her husband refused to provide any financial support for the children. During the divorce and custody proceedings, she was self-employed. She soon became unwell and was unable to continue working. She was still breastfeeding her younger daughter. The author claims to have a long history of depression, anxiety, panic attacks and suicidal ideation. Prior to her marital breakup, the author managed her mental health with medication.

2.2 In December 2018, the author's family paid for her and her children to travel to Ireland. On 31 December 2018, they returned to Canada as scheduled. The author tried to obtain a protection order against her husband. She states that, as free legal aid was available only for limited hours in British Colombia, she was unable to receive any legal assistance. When her husband learned of her application for a protection order, he obtained an order from the Supreme Court of British Columbia preventing her from removing the children from the jurisdiction without his express consent or a further court order. During that time, the situation at home deteriorated. The author's older daughter started having nightmares owing to her parents' conflict. On 21 February 2019, the author attempted to obtain a protection order but failed again, because she had submitted her request to the wrong court. She was not represented.

2.3 On 22 February 2019, when the author tried to take the children on a trip locally, her husband assaulted her in front of the children, suspecting that she was leaving for good. He was arrested and placed on bail with a "no contact" order in relation to her and the children. She was subsequently advised by the police that he would probably not be charged owing to the absence of witnesses and would be permitted to return to the family house. With no legal aid available, she could not seek legal advice. She was still shaken by the assault, had no cash left and feared for her mental health. On 25 February 2019, despite the court order obtained by her husband, the author and her children left Canada for Ireland in order to seek refuge with and the support of her family, provide the children with an emotionally stable environment and be free from her allegedly abusive husband. Upon her arrival in Ireland, she sought medical assistance and was prescribed medication.

2.4 On 4 March 2019, her husband initiated proceedings before the Supreme Court of British Columbia, which granted him sole custody of the two children and further directed their immediate return to British Columbia, the place of their habitual residence before their wrongful removal.

Proceedings in Ireland under the Convention on the Civil Aspects of International Child Abduction

2.5 On 15 March 2019, the author's husband initiated proceedings under the Convention on the Civil Aspects of International Child Abduction before the Irish High Court and was provided with legal aid. The author argued that the children's return to Canada would give rise to a grave risk, leading to an intolerable situation for them, within the meaning of article 13 (b) of that Convention. In that regard, she noted, inter alia, that their father was not available to care for the children on a daily basis and had been unsuccessful in his attempts to abstain from alcohol and drug use. She also noted that she had no income and had not been

provided sufficient financial support, that she had no legal counsel and would not be able to afford a private counsel in Canada, that the children would be exposed to a grave risk of psychological and physical harm and that, if returned to Canada, the author would have nowhere to live, have no money, face criminal charges and be ineligible for welfare support. On 24 May 2019, the Court ruled that there had been a wrongful removal of the two children by the author and found that she had not established a grave risk to the children should they be returned to Canada. The Court also noted that she had received legal assistance in Canada, but had exhausted the allotment of 45 hours.

2.6 The author's appeal to the Irish Court of Appeal was dismissed on 30 July 2019. The Court observed that the Convention on the Civil Aspects of International Child Abduction was concerned only with the international situation of children and did not require any assessment of the long-term best interests and welfare of the children. It noted that the children's father had been granted sole custody of the children, that the children had been habitual residents of Canada prior to their removal and that the removal had been in breach of the orders by the Supreme Court of British Columbia. The Court dismissed the author's contention that the children's father had been not exercising his custody rights at the time of the children's removal, pointing out that he was an active participant in litigation concerning the children before the Canadian court, which amounted per se to the exercise of custody rights. The Court also found that her contention that the absence of satisfactory civil legal aid in Canada would violate her right under the fundamental principles of the Constitution was not supported by any authority. Moreover, the threshold for establishing a grave risk for the children was high and should not be equated with general considerations of the paramount welfare of the child. Finally, regarding the author's reference to articles 7 (1) and 9 (1) of the Convention on the Rights of the Child, the Court held that those articles operated equally in favour of the children's father and that the pending domestic proceedings in Canada would determine relevant matters. Articles 10 (2), 11 and 18 (1) of the Convention were consistent with the provisions of the Convention on the Civil Aspects of International Child Abduction in seeking to protect and vindicate the rights of a child to have a relationship with both parents and to have decisions pertaining to their welfare determined in the most appropriate forum. The Court ordered the children's return to Canada to take place on 21 August 2019.

2.7 On an unspecified date, the Court of Appeal denied a stay of the order to appeal to the Supreme Court. On 2 August 2019, the author's request for legal aid was denied. The author submits that the time frame between the refusal of legal aid and the date on which the children were to be returned (21 August 2019) was not a reasonable and fair amount of time for her to appeal further, in particular in her "incapacitated state of ill health" and as she was not represented by counsel. In addition, she was informed by the Supreme Court office that applications to them could take months to be assessed and that the Courts were closed during the summer period. Even if leave to appeal was granted, her mental health condition would have rendered her unable to prepare and submit an appeal to the Supreme Court. The author adds that a precedent decision by the Supreme Court related to a property case seemed to have been used by the Court of Appeal to preclude her new medical evidence, which was a key part of her case.[1]

2.8 On 23 August 2019, the High Court issued a decision directing the author to comply with the previous court ordering the return of the children to Canada. On 24 August 2019, the children were returned to Canada, accompanied by their father.

Complaint

3.1 The author claims that the State party violated her daughters' rights under articles 3, 9, 12, 16 and 27 of the Convention owing to their return to Canada.[2] She alleges that the return placed her at risk of a dangerous deterioration in her mental health and that this could have a grave impact on the children.

[1] No further information was provided.

[2] The author alleged a violation of article 12 of the Convention, without explicitly naming the article, at a later stage of the procedure.

3.2 The author also claims that the best interests of the children were not assessed by the High Court or the Court of Appeal and that there was no detailed examination of the children's current circumstances. The courts did not investigate or obtain any professional opinion about the situation of the children. She notes that the court's decision was made with full acceptance that the children's father provided no financial support for them. The decision did not address the fact that his job would take him away from home for long periods of time or how the children would be taken care of during those periods.

3.3 The author also asserts that the Irish courts failed to duly assess her mental illness. No investigation or professional opinion was obtained by the courts in relation to her mental health, and no further medical evidence was admitted, following the false conclusion by the Court of Appeal that it was new.

State party's observations on admissibility

4.1 In its observations dated 25 October 2019, the State party argued that the communication should be declared inadmissible under article 7 (c), (d), (e) and (f) of the Optional Protocol.

4.2 The State party submits that the communication is inadmissible under article 7 (c) of the Optional Protocol because the author seeks only a re-evaluation of the facts on which the judgments of the High Court and the Court of Appeal were based. Furthermore, the author essentially complains of an alleged violation of her rights that is not encompassed by the Convention.

4.3 The State party also submits that the communication is inadmissible under article 7 (d) of the Optional Protocol as, on 6 August 2019, the author had applied for interim measures to the European Court of Human Rights; the application was refused on 16 August 2019 on the basis of the Court's assessment that the author had not demonstrated that the children would be at risk of irreparable harm if returned to Canada. The decision by the Court is sufficiently specific to show the basis of its consideration of the application for interim measures.

4.4 The State party further submits that the communication is inadmissible under article 7 (e) of the Optional Protocol as the author did not apply to the Supreme Court seeking leave to appeal. If leave had been granted by the Supreme Court, it would have been possible for the author to apply to that Court for a stay on the return order in respect of her children, which in all likelihood would have been granted on the basis of the practice of the Supreme Court in such cases. While noting the author's argument that one of the reasons that she did not apply was because she thought that a precedent of that Court did not favour her, the State party maintains that there was sufficient time for her to apply for leave to appeal to the Supreme Court before the date on which the children were scheduled to return to Canada and that the Supreme Court would have rendered a decision prior to the return date.

4.5 The State party submits that the communication is inadmissible under article 7 (f) of the Optional Protocol as the author's claims are manifestly ill-founded and/or not sufficiently substantiated. The author has failed to make specific allegations. The author makes several complaints relating to her ill health but an analysis of the judgments from the High Court and the Court of Appeal (the Superior Courts) makes clear that the Superior Courts considered the question under this specific heading in detail and evaluated the evidence she exhibited in her affidavits and the effect of a return to Canada on her and how that might impinge on the children in the context of article 13 (b) of the Convention on the Civil Aspects of International Child Abduction. The author fails to demonstrate that allegations regarding the Court's consideration of submissions in relation to her ill health give rise to specific and identifiable breaches of the children's rights under the Convention.

4.6 According to the State party, the author's claim that the decisions of the Superior Courts did not make a reasonably competent assessment of the family set-up and the best interests of the children is not supported by the text of the judgments, from which it is clear that both courts evaluated the case in the context of, inter alia, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the judgments of the European Court of Human Rights in *Neulinger and*

Shuruk v. Switzerland[3] and *X. v. Latvia*[4] and the Convention on the Rights of the Child and conducted an appropriate and nuanced balancing exercise following full hearings.

4.7 Regarding the author's claim that factual errors were made by the Superior Courts, the State party sustains that this claim lacks detail and seems to be based on the premise that the author disagrees with the findings of fact that were made against her. These findings were made by both courts following full hearings and were not arbitrary or groundless.

4.8 The State party also sustains that the author's claim that she made it clear at the outset that she would not return to Canada with the children and that returning the children to the care of their father violated their rights under the Convention on the Rights of the Child is not supported in the judgments of the Superior Courts. The High Court judgment makes clear that this issue was not argued in the High Court but that there was an evaluation of the appropriateness of the father taking the children back to Canada. There was a further particular review of the specific question of the author not returning with the children in the Court of Appeal decision under the heading "Intention of the appellant not to return".

4.9 The author's claim that the denial by the Court of Appeal of a stay pending appeal to the Supreme Court infringed the children's rights under the Convention does not bear scrutiny when there was adequate time and a procedure available to the author to apply to the Supreme Court for leave to appeal, which would have opened the door to an application for a stay in that Court.

4.10 The State party submits that the author's claim regarding her alleged inability to financially engage legal support in Canada was considered in the judgments of the Superior Courts. The High Court's decision is comprehensive in its analysis of this complaint and it considered it in the context of both article 13 (b) and article 20 of the Convention on the Civil Aspects of International Child Abduction. The author's complaint that the children's rights were violated under the Convention on the Rights of the Child because she was not granted legal aid for the appeal to the Court of Appeal was not made before the Superior Courts and it is not accepted that such a violation occurred.

4.11 The State party concludes that the author has not demonstrated that the State party's alleged actions or inactions have impaired the rights of her children as set forth in the Convention. Nor has the author shown that the State party's courts' assessment of the facts and evidence presented by the author were arbitrary or otherwise amounted to a denial of justice.

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

5.1 On 17 December 2019, the author provided her comments on the State party's observations on admissibility. The author submits that the State party's refusal to comply with the interim request not to return her children to Canada put them and her in a very vulnerable situation. The State's courts conducted an emergency hearing; she was given less than 24 hours' notice about it and her children were ordered to be left at a separate location. At this hearing, the court instructed her that the United Nations "had no power in their court" and refused her pleas, while not represented by counsel, to: (a) delay the return until a response of some kind was provided by the State party; (b) delay the return by a matter of days so that she could possibly obtain some legal assistance; or, failing all the above (c) delay the return order by a week so that she could make plans to travel with the children. The court ordered the immediate handover of the children to their father without granting permission for them to even say goodbye to her or explain to them what was happening. The court declined to make a contact order covering the period during which she and the children would be separated.

5.2 As a result, the children and the author were subjected to psychological and emotional suffering and lifelong harm. No consideration was given to the protection of the attachment that young children have to their primary caregiver. A sudden forced breach of this bond has long been known to cause significant trauma to young children; the State party would have

[3] Application No. 41615/07, Judgment, 8 January 2009.
[4] Application No. 27853/09, Judgment, 26 November 2013.

been aware of that had it appointed an independent expert to protect the interests of the children.

5.3 At the hearing during which the court ordered the immediate return of the children, the State party also provided the children's father's counsel with copies of the submissions by the author to the Committee. The author considers that this sharing of information was at best inappropriate and at worst illegal, and has formed the basis for further legal attacks on her by his legal team in Canada. The author considers that, in doing this, the State party violated article 4 of the Optional Protocol. The author sustains that, had she been afforded legal aid in Ireland, even if the return order was still made, she would probably have been advised not to disclose her medical history in the way that she did, so that it would not be used against her after her return to Canada.

5.4 The author explains that her fears were realized, as she and her children were again in a very difficult situation, without legal aid, and without any family support.

5.5 The Irish courts had accepted an undertaking from the children's father that, immediately upon the author's return to Canada, he would vacate the family home and hand over the children to her. She had argued before the Irish courts that he could not be trusted to comply with any of the undertakings he had given. Her argument was dismissed on the grounds that, under the Convention on the Civil Aspects of International Child Abduction, there was a well-established history of requesting and accepting undertakings and that there was no reason to think that the Canadian courts would not assist if there was any failure to honour them.

5.6 The author explains that the children's father frustrated all her attempts to contact the children between 23 August 2019 and the date of her return to Canada. On 3 September 2019, when she arrived at the family home, she found it empty. He had left, taking the children with him, and leaving no information whatsoever as to their whereabouts.

5.7 On 6 September 2019, the author appeared before the Supreme Court. Her legal counsel, funded through "emergency frantic borrowing from family", argued that the children's father had already violated the undertakings given in the Irish courts. Although she was allowed to stay in the family home, the judge ordered an immediate equal parenting time arrangement. When the children were returned to her care on 9 September 2019, her 4-year-old daughter showed signs of serious emotional trauma. She began to lick the author, put her fingers in her mouth and try to breastfeed. She also began wetting the bed each night and continues to show these signs.

5.8 She clarifies that her complaint was not examined by another procedure of international investigation. She did apply to European Court of Human Rights, but for an interim order only, requesting a hold on the return of the children pending a full application to that Court. When her application for an interim measure was reviewed and denied, she was invited to submit an application to the European Court of Human Rights, which she did not do.

5.9 The author also explains that, upon receiving the judgment from the Court of Appeal that the children were to be returned immediately, she pleaded with the Court for a stay of the order to appeal to the Supreme Court. She was denied a stay. She sought guidance from the office of the Supreme Court on how to apply for leave to appeal to the Supreme Court. She was informed that permission for leave to appeal took a minimum of six weeks to be assessed owing to a large backlog of cases. She applied for legal aid again and was refused. It is for this reason that she maintains that she has exhausted all domestic remedies available to her as a lay person under an impossible deadline. She contends that a lay person suffering ill health and without legal representation cannot be expected to have the technical and emotional resources to apply for leave to appeal to the Supreme Court.

5.10 Concerning the State party's argument that her case lacks detail, the author explains that she submitted her application to the Committee for an interim measure in extreme haste with the purpose of getting enough information to the Committee in order to obtain an interim measure. Her understanding was that she would then be required to submit further evidence to the Committee. She argues that her children were not given fair voice within the Irish courts through denial of legal aid to their mother and unfair procedural rules.

Author's additional comments

6.1 In her comments dated 29 August 2020, 19 March 2021 and 9 June 2021, the author notes that her children's father has pursued her in court for the expenses incurred in relation to the proceedings under the Convention on the Civil Aspects of International Child Abduction (the equivalent of 20,000 United States dollars representing costs incurred for travelling to Ireland and returning the children to Canada and the equivalent of 5,000 United States dollars for a fine for not upholding the sworn undertakings made before the Irish courts).

6.2 The author also notes that, on 9 June 2021, she was arrested by the police in Canada in relation to the proceedings under the Convention on the Civil Aspects of International Child Abduction. She was charged with the offences of abduction by a parent or guardian and disobeying a court order. The author claims that her arrest and the pursuance of charges are in violation of the orders of the Irish High Court, thereby supporting her arguments before the State party's courts and in relation to the State party's refusal and inability to protect the best interests of the children.

State party's observations on the merits

7.1 In its observations on the merits dated 17 November 2021, the State party submits that the author has failed to substantiate the violation of the rights of the children under the Convention.

7.2 Regarding the author's claims under article 9 of the Convention, the State party argues that the rights protected under this article extend to the relationship of children with both parents, not just the mother. The State party sustains that it did not separate the children from the author; it was the author who separated the children from their father through their unlawful removal, illicit transfer and non-return to Canada. The State party submits that the judgment of its courts was to return the children, and the author was free to return to Canada with them.

7.3 The State party also notes that the author invokes a violation of articles 16 and 27 of the Convention without sufficiently substantiating her claims. It refers to the careful decisions of the Irish High Court and Court of Appeal, which demonstrate the absence of arbitrariness.

7.4 The State party argues that the author's claims under article 3 of the Convention seem to imply that the application of the Convention on the Civil Aspects of International Child Abduction per se, or as applied by the Irish courts, breached this article. According to the State party, the application of the Convention on the Civil Aspects of International Child Abduction is, in principle, fully compatible with the application of the Convention on the Rights of the Child, including article 3 thereof. In the particular circumstances of the author's case, it cannot be concluded that the manner in which the Convention on the Civil Aspects of International Child Abduction was applied by the Irish courts failed to comply with article 3 of the Convention on the Rights of the Child.

7.5 The State party explains that proceedings under the Convention on the Civil Aspects of International Child Abduction before the Irish Superior Courts are conducted between the children's parents and in private, in the best interests of the children. The State party does not have access to the affidavits and exhibits filed by the litigants and relies only on the details contained in the judgments. It highlights that the father of the children is not a party to the communication to the Committee and, therefore, the information before the Committee presents only a partial section of the factual situation.

7.6 Contrary to the author's arguments, the State party argues that the High Court had due regard to her mental health and conducted a thorough analysis of the impact on the children in case of a return to Canada. It refers to the High Court judgment in which medical notes from the author on her appointments with a general practitioner and the medications she was taking are referenced. The High Court considered that the evidence submitted by the author was not sufficiently compelling to engage her defence under the Convention on the Civil Aspects of International Child Abduction. It was for the author to submit convincing evidence that her mental health was so delicate that it would be intolerable for the children to return to Canada, which she did not.

7.7 The State party notes that, while it has not seen the documents, it appears that the author then tried to submit as new evidence before the Court of Appeal historic medical records and notes from her general practitioner that, while post-dating the High Court decision, contained reference to her prior mental health issues. The Court of Appeal was entitled to hold that that evidence could have been adduced in the High Court. The Court of Appeal noted the author's claim that she had insufficient time to obtain an independent psychiatric evaluation of herself and that she considered that the hearing and events leading up to it had been stressful and rushed, and that crucial medical evidence had not been correlated, resulting in the threshold for grave risk under article 13 of the Convention on the Civil Aspects of International Child Abduction not being considered to have been met by the evidence in the view of the trial judge. The Court of Appeal considered arguments regarding the author's mental health in several other places. The Court referred in paragraph 20 of the judgment to the argument advanced by the author relating to the "likely severe emotional strain the Family Court proceedings would place on the [appellant] in the absence of legal aid and facing extreme inequality of arms arising from the respondent's access to privately funded legal representation".

7.8 The State party observes that the author appears to have filed at least two affidavits in the proceedings before the High Court, one of which is described in paragraph 30 of the judgment as containing a "substantial volume of exhibits". Neither affidavit seems to have indicated explicitly that she would not return to Canada because of her mental health issues. No argument appears to have been advanced in the High Court to that effect. Whether the author had sought to raise her disinclination to return with the children in the event of a return order from the outset or not is irrelevant given the fact that it was raised in the Court of Appeal. If she was making an argument in the High Court that her mental health issues were such that they would impinge on the children in an intolerable way in the event of a return order (and clearly she was making such an argument), it is noteworthy that she did not emphasize in her affidavits that she personally could not tolerate to return to Canada with the children because of those same mental health issues. It seems that the author changed the emphasis of her defence between the two court hearings and sought to enhance her defence on the basis of her mental health issues by contending that she could not face returning to Canada because of those issues. A close reading of the Court of Appeal judgment indicates that this was the view of that Court.

7.9 The State party highlights the view expressed by the Court of Appeal that the author was endeavouring to mould her situation around the facts in a previous case, *M.L. v. J.C.*, before that Court. Unlike the facts in that case, however, the author had not undergone a mental health episode necessitating hospitalization and in-patient care just prior to the wrongful removal. The author had a history of medication for certain mental health issues of long standing, but that alone simply does not meet the threshold of seriousness that would adequately ground a defence of grave risk to the children under article 13 of the Convention on the Civil Aspects of International Child Abduction.

7.10 The State party sustains that the potential failure of the author to return with the children was considered by the High Court and adjudged not to impinge upon the children unduly. In the Court of Appeal's decision, the issue of the non-return of the mother was explicitly dealt with in the context of her mental health argument. In addition, the State party considers that the author has not shown to the Committee the exact nature of her mental health problems. In any event, the author has not shown to the Committee that the evidence that was not admitted was unavailable to her when she put her case to the High Court.

7.11 Regarding the author's claim that the State party did not make a reasonably competent assessment of the family set-up and the best interests of the children, the State party argues that the decisions of the Irish courts and the assessments of the best interests of the children were made within the framework of the Convention on the Civil Aspects of International Child Abduction. The essence of the summary return procedure envisaged under that Convention could not be sustained if a detailed welfare assessment of the longer-term best interests of the type normally undertaken in the State of the children's habitual residence was undertaken in all cases of child abduction. Detailed assessments as to the long-term best interests take considerable time and require access, in many instances, to medical, educational and other records, as well as witnesses – all of which are in the home State.

7.12 The State party submits that its courts' assessment of the children's family set-up was detailed, sensitive, careful, measured, comprehensive and certainly "reasonably competent". Paragraphs 75–77 of the High Court judgment read as follows in relation to the possibility that the children would be in the care of their father upon their return: "On the issue of the applicant's unfitness to care for the children, I am also satisfied that the evidence placed before the Court does not establish a grave risk of the children being placed in an intolerable situation on return as a result of the impugned unfitness of the applicant.[…] Moreover, in my view, these are all issues which can and should be resolved in the courts of Canada. The Court is conscious that the [European Court of Human Rights] case law requires the Court to bear in mind the best interests of the child."

7.13 The State party denies that the fact that legal aid was not provided in respect of the author's appeal engages article 3 of the Convention; if it does, article 3 is not breached as a result. Any legal aid system in any country must apply its resources efficiently. The author was granted legal aid for her High Court defence of the proceedings under the Convention on the Civil Aspects of International Child Abduction but was refused legal aid for an appeal to the Appeal Court. The Committee can observe that the Legal Aid Board undertook an exercise to assess whether there was a likelihood of success in relation to the litigation continuing to an appeal. It is submitted that it is entirely reasonable that such a system would be in place, not merely because it allows for a fair allocation of legal aid resources among the many claims on it from citizens and taxpayers but also as such a system ensures that appellate courts are not subject to unnecessary or unmeritorious appeals.

7.14 The State party argues that the Court of Appeal considered the author's allegation related to the lack of legal aid in Canada in the context of a grave risk defence under article 13 and article 20 of the Convention on the Civil Aspects of International Child Abduction. Paragraph 86 of the judgment of the Court of Appeal reads as follows: "[t]he totality of the reports from human rights bodies […] cited by the appellant in support of her claims […] do not meet the threshold as established by the jurisprudence […]. [H]aving duly considered the said material referenced and alluded to throughout the appellant's written legal submission, and whilst it is appropriate to have due regard to the contents of such material insofar as relevant, I am satisfied in its totality the material falls far short of establishing a valid defence, either pursuant to Art. 13(b) or Art. 20 of the Hague Convention." As is clear from the judgment of the Court of Appeal, a mere allegation that legal aid may not be available is insufficient to prevent return under the Convention on the Civil Aspects of International Child Abduction. A respondent must demonstrate, on the balance of probabilities, that the courts in the other State would be incapable of vindicating the rights of the child because of the lack of legal aid.

7.15 As to the views of the children, the State party observes that the author did not apply for any separate representation for her children and advanced her arguments entirely on the basis that their rights were entirely aligned with her interests. It also observes that the father of the children appears to have taken the view that separate legal representation for these young children was unnecessary. In the application of the Convention on the Civil Aspects of International Child Abduction in Ireland, the courts usually ascertain the views of children who are 6 years old and above. Where children are younger, views are ascertained where a specific issue is brought to the attention of the court such that ascertaining the views of that younger child would be appropriate. It has not been asserted by the author in the present case that the children could form their own views.

7.16 Regarding the author's medical history, the State party explains that it is standard practice at the conclusion of proceedings under the Convention on the Civil Aspects of International Child Abduction before the Irish courts that the papers are released to the courts of the requesting State and to the lawyers for the parties in that State. Such information regarding the author's mental health history as was put by her before the Irish courts was therefore made available to the parties for the purposes of any future litigation in Canada and for no other purpose.

7.17 As to the author's argument related to the issue of an alleged failure of the children's father to abide by undertakings given by him to the Irish Court, the State party observes that it is unclear how the author contends that this issue gives rise to any alleged breach of the Convention.

Third-party intervention

8.1 On 1 December 2021, the Aire Centre Ireland submitted a third-party intervention. It recalls that speed is at the heart of the Convention on the Civil Aspects of International Child Abduction procedure, in order to avoid any adverse effects on the children from being re-uprooted. In proceedings under that Convention, the best interests assessment and determination must be tailored to the specifics of article 13 of the Convention. It does not require the conduct of a full best interests assessment and determination, such as is set out in detail in the Committee's general comment No. 14 (2014), as a full assessment and determination remains the responsibility of the national courts in the jurisdiction from which the child was abducted.[5]

8.2 The third party also notes that children who are subject to proceedings under the Convention on the Civil Aspects of International Child Abduction that directly concern them are very often not even joined as party to those proceedings, much less represented. Parents who are seeking, or challenging, a return may not be the right people to assess, determine or present the children's best interests or put forward the children's views or perspective, which may not coincide with their own. A person who is independent of the parents will therefore be required for this task.[6]

8.3 The third party re-emphasizes that it is the risk of physical or psychological harm to the child or an intolerable situation for the child that are determinative under article 13 (b) of the Convention on the Civil Aspects of International Child Abduction and not the risk of harm to or an intolerable situation for the abducting parent. When the abducting parent asserts that the effect of the return on his or her own personal situation will have a serious indirect adverse effect on the child, it is even more important that a person is appointed who is independent of the parent challenging the return and making those assertions. The judge is then able to assess the children's best interests and their views or perspective based on independent information and not just through the prism of the abducting parent's concerns about his or her own well-being. In *A and B v. Croatia*[7] the European Court of Human Rights requested independent legal representation for the child, in order for her interests, wishes and feelings to be represented separately from her mother's. It is stated in the *1980 Child Abduction Convention: Guide to Best Practice* that an abducting parent's precarious financial circumstances are not a ground for granting a non-return order; case law from various jurisdictions is referenced.[8]

Author's comments on the State party's observations on the merits and on the third-party intervention

9.1 On 28 February 2022, the author submitted her comments on the State party's observations on the merits. She submits that she is still going through divorce proceedings from the children's father and is also dealing with the Canadian courts with regard to the charge of criminal abduction that she faces despite undertakings given to the Irish courts.

9.2 With regard to the third-party intervention, the author agrees that the "children's interests" are paramount. At no point did the Irish courts even consider appointing a person

[5] See European Court of Human Rights, *Neulinger and Shuruk v. Switzerland* and *X v. Latvia*.

[6] In the Netherlands, standing practice is now that a "guardian ad litem" is appointed in all cases under the Convention on the Civil Aspects of International Child Abduction involving children from the age of 3. This guardian ad litem – typically a (child) psychologist and/or registered mediator – represents the child during the ensuing procedure (first instance and appeal) by expressing the voice of the child and assessing his or her maturity and the measure in which the child seems to feel free to express himself or herself. The same practice is used in Germany, where a "*Verfahrensbeistand*" (guardian ad litem) is regularly appointed in proceedings under the Convention. (Hague Conference on Private International Law, *1980 Child Abduction Convention: Guide to Best Practice*, part VI, article 13 (1) (b) (The Hague, 2020), p. 57.)

[7] Application No. 7144/15, Judgment, 20 June 2019 (not a case under the Convention on the Civil Aspects of International Child Abduction).

[8] Hague Conference on Private International Law, *1980 Child Abduction Convention: Guide to Best Practice*, part VI, article 13 (1) (b), para. 60. See also the Hague Conference on Private International Law Case Law Database, available at www.incadat.com.

to defend the children's best interests: they were simply seen as possessions to be returned to their country of origin, by a rapid and simple interpretation of the Convention on the Civil Aspects of International Child Abduction. She claims that her older daughter was of an age at which she could have been heard by a competent child psychologist.

State party's comments on the third-party intervention

10. On 28 February 2022, the State party submitted its comments on the third party, only to observe that the intention of the third party was to provide relevant information as to the interpretation and jurisprudence of the Convention on the Civil Aspects of International Child Abduction and not to seek to advocate for any specific outcome.

Issues and proceedings before the Committee

Consideration of admissibility

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

11.2 The Committee notes the State party's claim that the same matter has been examined by another procedure of international investigation or settlement and that the communication should therefore be declared inadmissible under article 7 (d) of the Optional Protocol. The Committee observes that, prior to submitting her communication to the Committee, on 6 August 2019, the author had submitted a request for interim measures to the European Court of Human Rights concerning the same matter, which was rejected on 16 August 2019. The Committee notes the author's uncontested argument that she only applied to the European Court of Human Rights for interim measures and that she did not submit a full application to the Court. The Committee therefore considers that the Court did not examine the same matter within the meaning of article 7 (d) of the Optional Protocol, and it is not precluded from examining the present communication on the basis of that provision.[9]

11.3 The Committee also notes the State party's argument that the communication is inadmissible under article 7 (e) of the Optional Protocol for failure to exhaust domestic remedies, as the author did not apply to the Supreme Court seeking leave to appeal. The Committee further notes that the author's appeal of the High Court decision ordering the return of the children to Canada was dismissed on 30 July 2019 and that the Court of Appeal also denied a stay of the order to appeal to the Supreme Court. The Committee notes the author's explanation that she did not apply for leave to appeal to the Supreme Court as she was not represented by counsel and had no reasonable possibility to appeal in the light of her mental health situation and the limited time between the notification of the rejection of legal aid on 2 August 2019 and 21 August 2019, which was the date ordered by the Court of Appeal for the return of the children to Canada. However, the Committee considers that the 19-day time frame to file an appeal to the Supreme Court is not in itself a sufficient reason to lift the exhaustion requirement and that there is no information in the file that would suggest that the author's mental health condition was of such a nature as to justify not filing such an appeal. The Committee also considers that the author has failed to substantiate, in the particular circumstances of her case, that her financial situation and lack of access to legal aid was an impediment to filing an appeal to the Supreme Court. In this regard, the Committee is of the view that ordinarily financial considerations, without adequate justification, do not absolve authors from exhausting domestic remedies.[10] In this regard, the Committee observes that, during the same period, the author was able to submit a request for interim measures to the European Court of Human Rights and the present complaint to the Committee.

11.4 The Committee recalls that authors must make use of all judicial or administrative avenues that may offer them a reasonable prospect of redress. The Committee considers that domestic remedies need not be exhausted if, objectively, they have no prospect of success,

[9] *A.B. v. Finland* (CRC/C/86/D/51/2018), para. 11.2; and *E.J. and M.J. v. Finland* (CRC/C/81/D/6/2016), para. 9.2.

[10] *Kadirić and Kadirić v. Bosnia and Herzegovina* (CCPR/C/115/D/2048/2011), para. 8.3.

for example in cases in which, under applicable domestic law, the claim would inevitably be dismissed or if established jurisprudence of the highest domestic tribunals would preclude a positive result. Nevertheless, the Committee recalls that mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.[11]

11.5 In the present case, the Committee notes the State party's argument, unrefuted by the author, that, had the Supreme Court granted leave to appeal, it would have then been possible for the author to apply for a stay on the return order, which in all likelihood would have been granted considering the practice of the Supreme Court in such cases.

11.6 The Committee also notes the author's explanation that she did not apply for leave to appeal to the Supreme Court as she had been informed by the Supreme Court office that such requests usually took weeks to be assessed. However, the Committee further notes the State party's assertion that the Supreme Court would have rendered a decision prior to the return date. In the absence of any further justification from the author as to why she did not attempt to pursue this remedy, the Committee considers that the author has failed to exhaust all domestic remedies that were reasonably effective and available to her to challenge the alleged violation of her daughters' rights under the Convention.

12. The Committee finds the communication inadmissible under article 7 (e) of the Optional Protocol, for failure to exhaust domestic remedies.

13. The Committee therefore decides:

(a) That the communication is inadmissible under article 7 (e) of the Optional Protocol;

(b) That the present decision shall be transmitted to the author of the communication and, for information, to the State party.

[11] *D.C. v. Germany* (CRC/C/83/D/60/2018), para. 6.5; and *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), para. 10.17.

Annex

[Original: French]

Joint opinion of Hynd Ayoubi Idrissi, Luis Ernesto Pedernera Reyna and José Ángel Rodríguez Reyes (dissenting)

1. This opinion addresses issues pertaining to:

(a) The refusal of the interim measures sought, pursuant to article 6 of the Optional Protocol, by the working group on communications, which, acting on behalf of the Committee, requested the State party to suspend the return of W.W. and S.W. to Canada while the communication was under review;

(b) The inadmissibility of the communication, under article 7 (e) of the Optional Protocol, for failure to exhaust domestic remedies.

2. Regarding the denial of interim measures, the State party informed the Committee, on 4 September 2019, that it had carefully and in good faith considered the Committee's request for interim measures, but that it was not in a position to comply with the request as that would create a conflict with court proceedings under the Convention on the Civil Aspects of International Child Abduction.

3. In this regard, it should be recalled that requests for interim measures reflect a concern to prevent irreparable harm from occurring. A State party cannot evade its obligations under article 6 (1) of the Optional Protocol by invoking a possible conflict with its domestic law or with an international treaty.

4. In this case, the non-granting of the Committee's request for interim measures to suspend the return of W.W. and S.W. to Canada pending the consideration of the communication, like the separation of the children from their mother at very short notice without her being allowed contact with them prior to their return to their father, are likely to have resulted in some degree of harm. According to the author, when the children were returned to her care on 9 September 2019, her 4-year-old daughter showed signs of serious emotional trauma. She began to lick the author, put her fingers in her mouth and try to breastfeed. She also began wetting the bed each night and continued to show these signs.

5. Therefore, we consider that there has been a violation of article 6 (1) of the Optional Protocol by the State party.

6. With regard to the finding, under article 7 (e) of the Optional Protocol, of inadmissibility for failure to exhaust domestic remedies, it must be emphasized that exhaustion of domestic remedies presupposes that effective remedies are available. The effectiveness of a remedy means not only that it exists, but also that it is accessible, which gives rise to positive obligations for States parties.

7. In evaluating the effectiveness of a remedy, consideration must be given to the personal circumstances of the author and the positive obligation incumbent on the State party by virtue of the universally recognized guarantees regarding access to representation and to legal aid, if needed.

8. In its judgment of 9 October 1979 in *Airey v. Ireland*, the European Court of Human Rights held that the absence of an express provision on legal aid in civil matters did not prevent article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) from imposing a positive obligation on

the State to ensure genuine access to the courts through an effective means such as free legal aid.[1]

9. This positive obligation to ensure the right to an effective remedy, including through the provision of legal aid, has been laid down by the treaty bodies, including in general recommendation No. 33 (2015) of the Committee on the Elimination of Discrimination against Women on women's access to justice, in which States parties are called upon to ensure the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law, which is a crucial element in guaranteeing that justice systems are economically accessible to all women, and, to that end, to institutionalize systems of legal aid and public defence that are accessible, sustainable and responsive to the needs of women, ensure that such services are provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes, and ensure the unhindered access of legal aid and public defence providers to all relevant documentation and other information, including witness statements.[2]

10. In this case, the author explains that she did not apply for leave to appeal to the Supreme Court as she was informed that such requests usually take a minimum of six weeks to be assessed and that she would not receive legal aid. Thus, the author did not have access to an effective remedy and article 7 (e) of the Optional Protocol did not constitute an obstacle to the admissibility of the communication.

[1] See European Court of Human Rights, *Airey v. Ireland*, application No. 6289/73, judgment of 9 October 1979.

[2] Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice, paras. 36 and 37 (a).