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**Human Rights Committee**

Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 3041/2017[[1]](#footnote-1)\*,[[2]](#footnote-2)\*\*,[[3]](#footnote-3)\*\*\*

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

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

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

The facts as submitted by the author

2.1 The author and her children are part of a larger family composed by themselves, the author’s husband and father of the children, L.M., two younger siblings and the author’s mother.

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

2.3 On 16 January 2001, the President of the DRC, Laurent Désiré Kabila, was killed and a purge looking for the culprits started in the country. On 17 February 2001, the author’s husband was questioned by the police at his place of work together with all his co-workers, because his employer was among the suspects. During the interrogations, he was accused by the police of being complicit in the murder and he escaped the house using the back door. He immediately fled to Angola.

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

2.5 On 10 March 2001, after the police went looking for the author at her parents’ house during her absence on two occasions, she left the DRC for Angola with her mother and her brother. Her father and other siblings joined them soon after.

2.6 In Angola, the author’s husband met other persons originally from DRC but with Angolan nationality. They helped the author’s husband in testifying that they all were part of the same family so that the authors could obtain Angolan identity documents. However, the family was discriminated against by neighbours because they had DRC nationality and because others were jealous of the author’s husband position in a petrol company.

2.7 In 2008, due to the hardships they were experiencing in Angola as citizens from the DRC, the author and her husband returned to the DRC. The couple thought that they would no longer face persecution 7 years after the events. However, the author’s husband was arrested and faced imminent execution. L.M. was then helped escape from detention by the officer in charge of his detention, who turned out to be his brother’s childhood friend. The officer went to the author’s house, asked her to provide L.M. Angolan passport, and then placed L.M. in a plane to Angola, where the author joined him.

2.8 On 9 January 2009, after finding out that Angola secret police was seeking to extradite the author’s husband to the DRC, the family escaped to the USA with authentic Angolan passports that they had obtained through misrepresentation.

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

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

2.11 From 2014 onwards, the author’s parents and siblings, who still lived in Angola, were tracked down and harassed, mostly by phone, presumably by the Angolan police with the help of the DRC police. In May 2015, officers of the Angolan secret police broke into their residence and questioned them about the author’s husband, using death threats. The author’s young brother was fatally shot and her mother was shot in a leg, later amputated. While her mother was in the hospital, the family lost track of the author’s father and other siblings and is unaware of their whereabouts still today. In August 2015, the author’s mother joined them in the USA.

2.12 On 10 November 2015, a warrant was issued against the author and her husband by the Intelligence Agency (Agence Nationale de Renseignements) of the DRC.

2.13 On 4 June 2016, the author and her family crossed the Canadian border irregularly from the USA. They were arrested by the Royal Canadian Mounted Police. The author and her two elder children (in whose name she submits the communication) were found ineligible to claim asylum based on the Immigration and Refugee Protection Act (IRPA) because their prior claim was determined inadmissible (when they attempted to enter Canada on 5 March 2009). Their claims were redirected to the Pre-Removal Risk Assessment (PRRA) process. However, L.M., his two younger children and his mother-in-law saw their asylum claim deferred to the Immigration Refugee Board (IRB).

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

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

The complaint

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

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

3.3 The author claims that, by applying the Canada-US Safe Third Country Agreement (STCA), she and her children have been denied the opportunity to apply for refugee status in Canada, and they have not been heard in an oral hearing. They have only been able to access a PRRA, which does not have all due procedural guarantees. The author claims that this amounts to a violation of article 13 of the Covenant.

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

State party’s observations on admissibility and merits

4.1 By Note verbale of 4 May 2018, the State party provided its observations on the admissibility and merits of the communication. It submits that the communication is inadmissible for lack of exhaustion of domestic remedies, for lack of substantiation, and because the communication constitutes, in essence, an appeal of the domestic authorities’ decision.

4.2 The State party notes that the author has presented no new evidence that she is personally at risk. Rather, her communication is based in large part on complaints about the decisions rendered by the domestic bodies that have considered her case. The substance of the author’s communication is an appeal of the domestic decisions finding her not to be at risk of persecution if returned to Angola. In this regard, Canada recalls the Committee’s consistent jurisprudence that it is not for the Committee to review the decisions of domestic authorities on the evaluation of facts and evidence in a case, unless the evaluation is manifestly arbitrary or amounts to a denial of justice. Claims involving the re-evaluation of facts and evidence should be declared inadmissible under article 2 of the Optional Protocol.[[4]](#footnote-4) The State party considers that the author has not demonstrated that the evaluation of her case by domestic authorities has been manifestly arbitrary or amounts to a denial of justice.

4.3 The State party further submits that the author has not sufficiently substantiated her allegations regarding her claims of violation of articles 6 (1), 7 and 9 because she is completely devoid of credibility, and she has not established even such basic elements as her identity or that she is a citizen of the DRC. Originally, the communication affirmed that the author travelled with false Angolan travel documents, whilst her passport was authentic. The author’s declarations were also contradictory regarding her nationality and the documentation provided contains various inconsistencies. For instance, the birth certificate provided during the author’s first entry to Canada had her married name. Domestic authorities also found that the author lacked common knowledge about the DRC, such as knowing what a “post-nom”[[5]](#footnote-5) is, concluding she is not a citizen of the DRC. The author has repeatedly used fraudulent documents and false identities. She has repeatedly knowingly provided false information. She has claimed that her husband is deceased, has used various dates of birth, and has used at least four names: K.D., D.K.M., N.B.M., and B.N.M.K. The State party adds that the communication to this Committee is based on false statements, and appends documents in support – such as the psychological report appended to her communication -, which are full of errors and misstatements. With regard to the evidence related to the author’s persecution after the assassination of the DRC president, the PRRA Officer noted that the majority of the persons accused of conspiracy were military officers, and there is no evidence that someone with the personal profile of the author’s husband would be personally at risk. The State party recognizes that, in some situations, refugee claimants must resort to the use of false identities and false documents to flee their country of persecution. However, once in a safe country and when seeking its protection, refugee claimants are expected to be truthful. The only authentic identity document that the author has presented to the State party’s authorities is a valid Angolan passport, with the result that she faces deportation to Angola, not to the DRC. Her other identity documents are by her own admission fraudulent, or have either been tampered with or are otherwise of dubious authenticity. In the circumstances, the State party is justified in relying on her one authentic identity document – an Angolan passport – and in considering her a citizen of Angola.

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

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

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

4.7 In the further alternative, the State party submits that the proceedings challenged satisfy the guarantees contained in article 13. As demonstrated by the domestic proceedings described above, the author had her claim for asylum considered and rejected, and her appeal dismissed in the United States. In Canada, she had access to a PRRA procedure. She was represented by counsel, and had a full opportunity to participate by way of extensive written submissions. She had access to judicial review of the negative PRRA decision. She was able to make an application for deferral of her removal, and for judicial review of that negative decision. She had access to a judicial stay of removal. The facts do not disclose any violation of article 13 of the Covenant.

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

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

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

Author’s comments on the State party’s observations

5.1 The authors submit that, since the submission of their communication, the adult author has found out she is pregnant and that the expected date of birth is 9 September 2018. Furthermore, her daughter has experienced a serious deterioration of her mental health due to the threat of deportation and family separation. According to the medical report that the author attaches, her daughter has recurring suicidal thoughts and would be at high risk of committing suicide if deported. The author submits that appropriate mental health care and treatment in Angola and in the DRC remain very limited and are insufficient and inadequate to meet the specific needs of her daughter.

5.2 The author also submits additional evidence on the risk they would face upon deportation and on her identity. Firstly, a newer warrant of arrest was issued by the National Intelligence Agency in May 2017 against the author and her husband, L.M., owing to a massive prison break at the Makala detention facility, which lead to the reissuance of old warrants of arrest. Secondly, the author, her husband and her mother have been able to obtain their passports from the DRC, marriage certificate and family certificate through the DRC Embassy based in Ottawa.[[6]](#footnote-6) The authors submit that the State party’s observations do not address the alleged risk upon return of the alleged victims, but limits itself to arguing on the lack of credibility of the author. This assumption only strengthens the essence of the present communication: the author was never given a fair consideration of the essential elements of her asylum claim.

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

5.4 The author submits that their Angolan passports, obtained through misrepresentation, expire in August 2018, and from then on they would be undocumented migrants in Angola. According to different reports, asylum seekers and refugees do not receive any adequate protection from the government in Angola and are often victims of harassment and intimidation by police officers. She further reminds that the author had already suffered discrimination in Angola as a citizen of the DRC. In addition, arbitrary arrest and detention in Angola is a particular concern for Congolese migrants, and would even be of higher concern for the author, who is a wanted person in the DRC. The author also notes that the judicial system and security forces in Angola have high levels of corruption and inefficiencies and that extrajudicial killings are a serious human rights concern.

5.5 The author reminds that she fears being extradited or deported to the DRC by Angolan authorities. A report from the Government of Angola indicates that at least 170 citizens from the DRC were repatriated in April 2018[[7]](#footnote-7). She notes the worsening human rights situation in the DRC, with high rates of arbitrary arrest and detention and where family members are often arrested in the place of a suspect, putting her at risk of being arrested in the place of her husband. Security forces in the DRC have been reported to perpetrate acts of torture and ill-treatment and conditions in detention in the DRC are also life-threatening and amount to inhuman and degrading treatment. The author notes that Canada has acknowledged the gravity and prevalence of human rights violations in the DRC and has imposed a moratorium of removals to the DRC, which remains in place today.

5.6 The author submits that she did not have a fair opportunity of being heard because she was only heard by the CBSA officers during the port-of-entry interviews, where claimants are not advised by counsel and are often misinformed. The records of these interviews are not exhaustive, as pointed out by a report by the Canadian Council for Refugees.[[8]](#footnote-8) The author highlights that she was not eligible to the quasi-judicial refugee determination system in application of the STCA and could only use the PRRA program, which is far from offering equivalent procedural safeguards to the refugee determination process. The PRRA program is a purely administrative procedure. PRRA applications are decided by immigration officers (public servants employed by Immigration, Refugees and Citizenship Canada or IRCC), instead of independent Board members. The general principal is that a PRRA application is a written procedure, and hearings are held only exceptionally at the discretion of the officer responsible of the application. In accordance with section 169 of the Immigration and Refugee Protection Act, oral hearings are particularly aimed at clarifying the applicant’s testimony when there are doubts about his or her credibility or the conclusive value of the evidence. Despite repeatedly requesting an oral hearing, the author’s requests were not accepted and she was never heard during the PRRA application. She further submits that the PRRA officer’s analysis did not examine her claims regarding the personal risk she would face if she were deported. The Federal Court, in its order of 26 May 2017, admits that an oral hearing should have taken place and that the author is a citizen of the DRC, although it illogically concludes that she would not be exposed to any irreparable harm in Angola because she was able to live there for many years. Additionally, the author was arrested on 6 November 2017 and was informed the following day that she would be deported on 8 November 2017 together with her children. Such an expedited enforcement of their removal order did not allow her to explain the reasons against her deportation and have her case reviewed. The unfairness that characterised the PRRA process and the enforcement of the removal order in the author’s case amount to a violation of article 13 of the Covenant, in conjunction with article 7.

5.7 Regarding the author’s submissions under articles 17 (1), 23 (1) and 24 (1), the State party submits that the family might be separated only because of the parents’ own decisions, this is, because the author previously tried to enter Canada with her children and filed a refugee request asserting that her husband had died. The author clarifies that she did this in what she believed was the best interest of her children. Seeking asylum in Canada was the original plan of the family (because of closer linguistic and cultural ties with Canada than with the USA) but the author’s husband feared that crossing the border illegally might be too dangerous. The author then decided to try to cross the border by foot with her children and, to be consistent with her husbands’ identity known at the ANR and following bad advice that she received in the USA, she obtained identity documents using that family name. In her administrative stay request, the author submitted that her deportation together with her two older children would cause an irreparable harm as it would separate the family. However, the CBSA officer rejected the stay request based on her view that the psychological report is not reliable because it is full of discrepancies. The author explains that such contradictions are owed to misunderstandings by the CBSA officer. Furthermore, the CBSA officer submits that the psychologist’s report is mainly based on the author’s statements, but this is not accurate, as the psychologist provides a list of the methodology employed in her examination. In case of deportation, the separation of the family could last several years since the author’s husband’s asylum application and consequent permanent residence application could take up to 32 months. Consequently, her deportation with her older children would amount to a violation of their rights under articles 17 (1), 23 (1) and 24 (1) of the Covenant.

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

Issues and proceedings before the Committee

Consideration of admissibility

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

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

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

6.4 The Committee also notes that, according to the State party, the author’s claims under article 13 should be deemed inadmissible because when she first entered the Canadian territory, she could have challenged her ineligibility and prospective return to the United States by way of an application for leave to apply for judicial review to the Federal Court, coupled with a motion for a judicial stay. The Committee notes that the author does not only raise claims with regard to the application of the 3rd safe country agreement, but also about the procedural guarantees of the PRRA and about the lack of an oral hearing in her case. The Committee notes that the remedy proposed by the State party is aimed at challenging the application of the 3rd safe country agreement exclusively, but does not cover all aspects of the author’s claims under article 13. The Committee notes that the State party has not challenged the exhaustion of domestic remedies of the author for any of the other claims under the communication. Accordingly, it considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the remaining claims under the present communication.

6.5 The Committee notes the author’s claim that if she were to be returned to Angola, her rights under article 9 of the Covenant would be violated, as she would be persecuted there and extradited to DRC where she would be detained in life threatening circumstances. The Committee also notes the State party’s challenge to the admissibility of the communication on the grounds that the author has failed to sufficiently substantiate her claims under article 9. The Committee recalls that article 2 of the Covenant requires that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their jurisdiction. This entails, inter alia, an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, in the country to which removal is to be effected, or in any country to which the person may subsequently be removed. In that connection, the Committee notes that the author did not provide sufficient information regarding her claim under article 9 of the Covenant that would enable the Committee to conclude that her allegations regarding deprivation of liberty would amount to irreparable harm such as that contemplated in articles 6 and 7. Accordingly, the Committee considers that the author has failed to substantiate, for the purposes of admissibility, her allegations that her removal to Angola by the State party would violate article 9 and it declares that part of the communication inadmissible under article 2 of the Optional Protocol[[10]](#footnote-10).

6.6 Concerning the author’s claim under article 13, the Committee notes the State party’s argument that the author’s claims are insufficiently substantiated since the author was interviewed a number of times prior to her PRRA application. The Committee observes that the author’s PRRA was examined and that the PRRA officer found that there was no risk for the author upon removal without resorting to an oral hearing. It also notes that this decision was reviewed by the Federal Court and that the Federal Court rejected the author’s request for leave to apply for judicial review on 1 August 2017. In view thereof, the Committee considers that the author has failed to sufficiently substantiate for purposes of admissibility that the above-mentioned proceedings amounted to a denial of justice in her case, in violation of article 13 of the Covenant. The Committee therefore concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee further notes the State party’s argument that the other author’s claims are inadmissible under article 2 of the Optional Protocol due to insufficient substantiation. With regard to the author’s allegations under articles 6 (1) and 7 of the Covenant, the Committee observes that the author has explained that she feared returning to Angola because she feared persecution there and she feared being extradited to the DRC where she and her husband would be persecuted by security forces because of the previous persecution suffered by them. With regards to articles 17 (1), 23 and 24 (1) of the Covenant, the Committee observes that the author has explained that the deportation of part of the family is an interference with their family life since all members of the family have very strong ties. The Committee considers that, for the purposes of admissibility, the author has sufficiently substantiated her allegations.[[11]](#footnote-11) The Committee therefore declares the communication admissible insofar as it raises issues under articles 6 (1), 7, 17 (1), 23 and 24 (1) and proceeds to consideration of the merits.

Consideration of the merits

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

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

7.3 The Committee recalls paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personal[[12]](#footnote-12) and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author’s country of origin.[[13]](#footnote-13) The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.[[14]](#footnote-14)

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

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

7.6 With respect to the claim of violation of articles 17 (1), 23 (1) and 24 (1) of the Covenant, the Committee notes the author’s claims that her deportation with her two elder children constitutes an interference with their right to family life since all members of the family have very strong ties, and that their separation would not be in the best interest of her children. The Committee notes the State party’s argument that it was the author’s decision to enter Canada without her husband that results now in their claims being considered through different procedures and their subsequent deportation before the other family members’ claims have been determined. The Committee recalls its case law, according to which there may be cases in which a State party’s refusal to allow one member of a family to remain in its territory would involve interference in that person’s family life. However, the mere fact that certain members of the family are entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.[[15]](#footnote-15)

7.7 In the present case, the Committee considers that to issue a deportation order against the author and her two eldest children but not her other minor children and her husband, father of the children, constitutes interference with the family,[[16]](#footnote-16) within the meaning of article 17 of the Covenant. The Committee has to determine whether such interference with the author’s and her children’s family life is arbitrary or unlawful pursuant to article 17 (1) of the Covenant, and thus whether insufficient protection has been afforded to her family and to her children by the State in accordance with articles 23 (1) and 24 (1).

7.8 The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[[17]](#footnote-17) The Committee also recalls that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State party’s reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members would encounter as a consequence of such removal.[[18]](#footnote-18)

8 In the present case, the Committee observes that the author’s removal pursued a legitimate objective, which is the enforcement of the State party’s immigration law; the State party explained that the reason for removing the author was the denial of her PRRA. The Committee notes the State party’s argument that they have thoroughly examined the author’s claims regarding the hardship that the separation of the family could cause in the context of her deferral application, and that the CBSA officer highlighted that the separation would be only temporarily, until the author’s husband claim for protection is decided upon. The State party submits that, after this decision, they will be able to reunite either in Canada or in Angola, where the authors have lived for years. In the particular circumstances, the Committee considers that the author’s personal family situation has been thoroughly assessed by the competent authorities and that they have found that the degree of hardship the family and its members would encounter is proportionate to the legitimate aim pursued. The Committee therefore considers that the interference with the author’s family life that has occurred is not arbitrary within the meaning of article 17 of the Covenant. Similarly, the Committee finds that the degree of hardship that may be caused by the execution of the deportation order is proportionate to the legitimate objective of enforcing the State party’s immigration law and is not arbitrary within the meaning of article 17 of the Covenant. The Committee concludes that the facts before it do not reveal a violation of articles 17 (1), 23 (1) and 24 (1) of the Covenant.[[19]](#footnote-19)

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

Annex 1:

Individual Opinion of Mr. José Santos Pais (dissenting)

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

2. The author and her two elder children are part of a larger family composed by themselves, the author’s husband and father of the children, L.M., two younger siblings and the author’s mother (para 2.1), shot in a leg, while in Angola, later amputated (paras 2.10, 5.3), who joined her daughter in the USA.

3. The author and her two elder children, after crossing the Canadian border in 2016, were found ineligible to claim asylum based on the Immigration and Refugee Protection Act (IRPA). Their claims were redirected to the Pre-Removal Risk Assessment (PRRA) process (para 2.12) and subsequently rejected. The author applied for a deferral of their removal, which was denied on the grounds that the family had voluntarily separated in the past and would reunite once the author’s husband’s claim for protection was determined (para 2.13).

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

5. The author claims they have strong family ties, deportation of part of the family interferes with their family rights and the two children on whose behalf she presents the communication have been going to school in Canada since they entered the country (in 2016, so for 3 years now) and are integrated in Canadian society. The removal of the children would consequently have a major impact on them and would not be in their best interest (para 3.4).

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

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

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

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

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

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

1. \* Adopted by the Committee during its 125th session (4 – 29 March 2019) [↑](#footnote-ref-1)
2. \*\* The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi, Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi. In accordance with article 108 of the Rules of Procedure of the Committee, Marcia Kran, member of the Committee, did not participate to the examination of the communication. [↑](#footnote-ref-2)
3. \*\*\* Individual opinion (dissenting) by Committee member José Manuel Santos Pais is annexed to the present Views. [↑](#footnote-ref-3)
4. See Contraras v. Canada, Communication No. 2613/2015 (2017), at para. 8.7; A.B. v. Canada, Communication No. 2387/2014 (2016), at para. 8.3; Tarlue v. Canada, Communication No. 1551/2007 (2009), at para. 7.4; Kaur v. Canada, Communication No. 1455/2006 (2008), at para. 7.3; Tadman and Prentice v. Canada, Communication No. 1481/2006 (2008), at para.7.3; Pham v. Canada, Communication No. 1534/2006 (2008), at para. 7.4; Kibale v. Canada, Communication No. 1562/2007 (2008), at para. 6.4; P.K. v. Canada, Communication 1234/2003 (2007), at para. 7.3. [↑](#footnote-ref-4)
5. The use of a “post-nom” – the name of one or more ancestors - was a requirement of the DRC law: see Politique africaine [Paris]. December 1998. No. 72. Isidore Ndaywel è Nziem. "De l'authenticité à la libération : se prénommer et République démocratique du Congo.", at p. 103, available at: <http://www.politique-africaine.com/numeros/pdf/072098.pdf>. [↑](#footnote-ref-5)
6. These passports were issued in August 2016 but the authors do not explain why they were not submitted with the original complaint. The authors attach a written statement by their lawyer before the domestic Courts declaring that she did not submit such evidence during the PRRA procedure because she was expecting to have an oral hearing and bring them then. She does not explain why she did not include the passports in the appeal to the PRRA decision. [↑](#footnote-ref-6)
7. Report from Government of Angola, SME repatriates 170 DRC citizens for illegal stay, Reliefweb, 4 June 2018, https://reliefweb.int/report/angola/sme-repatriates-170-drc-citizens-illegal-stay. [↑](#footnote-ref-7)
8. Canadian Council for Refugees and Sojourn House, Welcome to Canada : The Experience of Refugee.

   Claimants at Port-of-Entry Interviews, November 2010, available at: <http://ccrweb.ca/files/poereport.pdf>, pp. 2-3. [↑](#footnote-ref-8)
9. See Warsame v. Canada, para. 7.4, and P.L. v. Germany (CCPR/C/79/D/1003/2001), para. 6.5. [↑](#footnote-ref-9)
10. See S.Z. v. Denmark (CCPR/C/117/D/2443/2014), para 8.4, and S v. Denmark (CCPR/C/122/D/2642/2015), para7.5. [↑](#footnote-ref-10)
11. See Biao Lin v. Australia (CCPR/C/107/D/1957/2010), para. 8.6. [↑](#footnote-ref-11)
12. See K. v. Denmark (CCPR/C/114/D/2393/2014), para. 7.3; P.T. v. Denmark (CCPR/C/113/D/2272/2013), para. 7.2; and X. v. Denmark (CCPR/C/110/D/2007/2010), para. 9.2. [↑](#footnote-ref-12)
13. See X. v. Denmark, para. 9.2; and X. v. Sweden (CCPR/C/103/D/1833/2008), para. 5.18. [↑](#footnote-ref-13)
14. See, for example, K. v. Denmark, para. 7.4. [↑](#footnote-ref-14)
15. See, for example, communications No. 1792/2008, Dauphin v. Canada, Views adopted on 28 July 2009, para. 8.1; Winata v. Australia, para. 7.1; Madafferi v. Australia, para. 9.7; and No. 1222/2003, Byahuranga v. Denmark, Views adopted on 1 November 2004, para. 11.5. [↑](#footnote-ref-15)
16. See Madafferi v. Australia, para. 9.8. [↑](#footnote-ref-16)
17. See the Committee’s general comment No. 35 (2014) on liberty and security of person, para. 12. [↑](#footnote-ref-17)
18. See Madafferi v. Australia, para. 9.8. [↑](#footnote-ref-18)
19. See M.G.C. v. Australia (CCPR/C/113/D/1875/2009) para. 11.19. [↑](#footnote-ref-19)