



# International Covenant on Civil and Political Rights

Distr.: General  
3 June 2019

Original: English

## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2923/2016\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Shafaq Baharuddin (represented by Barcza-Szabó Zita Borbála, Hungarian Helsinki Committee)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Hungary
<i>Date of communication:</i>	22 December 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 23 December 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	15 March 2019
<i>Subject matter:</i>	Author's deportation from Hungary to Bulgaria
<i>Procedural issue:</i>	Lack of sufficient substantiation
<i>Substantive issue:</i>	Risk of torture or other cruel, inhuman or degrading treatment
<i>Articles of the Covenant:</i>	7 and 2 (3) (a)
<i>Article of the Optional Protocol:</i>	5 (2) (a) and (b)

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

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\* An individual opinion by Committee member Yadh Ben Achour (dissenting) is annexed to the present Views.



1.1 The author of the communication is Shafaq Baharuddin, a national of Afghanistan born on 30 July 1989. The author sought asylum in Hungary. On 27 July 2016, the Hungarian office of immigration and nationality ruled that, under the Dublin III Regulation,<sup>1</sup> Bulgaria was responsible for processing the author's asylum application, in accordance with the principle of first country of asylum. On 17 October 2016, the Metropolitan Administrative and Labour Court confirmed the decision, which has become final. The author has been at risk of imminent deportation since then.<sup>2</sup> The author claims that his deportation to Bulgaria would constitute a violation by Hungary of his rights under articles 7 and 2 (3) (a) of the Covenant. The author is represented by counsel.

1.2 On 23 December 2016, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from deporting the author to Bulgaria while his case is under consideration by the Committee.

1.3 On 26 April 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided, in accordance with rule 97, paragraph 3, of its rules of procedure, to examine the admissibility of the communication together with its merits.<sup>3</sup>

#### **The facts as submitted by the author**

2.1 The author is an Afghan Sunnite Muslim from Kapisa, Afghanistan, where he worked as a police officer in Kapisa Tagow Police Station.<sup>4</sup> The Taliban wanted him to join them or spy for them. After the author refused to join the Taliban, he and his family received letters containing death threats from one of the Taliban leaders. Subsequently, the Taliban carried out a suicide bombing at the police station where the author worked. The author was not at the police station at the time but several of his colleagues died. Fearing repeated attacks against him, the author fled Afghanistan in February 2016.

2.2 On 20 April 2016, the author entered Bulgaria illegally on foot with a group of around 20 persons. He was apprehended by the Bulgarian police who severely beat him with truncheons. His valuables and passport were seized by the police. He was taken to a police station where the police took his fingerprints. He did not apply for asylum at this point.

2.3 Subsequently, the author was taken to the Elhovo allocation centre, where he was kept for a week. The author claims that the camp seemed to be a prison since he and other asylum seekers were placed together with convicted prisoners. He was also subjected to severe ill-treatment. The beds were not, for example, equipped with mattresses. He claims that the police treated him with excessive force and brutality, kicking him and shouting at him. The guards usually consumed alcohol. During the week, the author was only able to shower once. Medical services were not available at all.

2.4 After one week at the centre, the author was transferred to the Voenna Rampa refugee camp. The conditions were extremely dire, the toilets did not work properly, the food was poor and there were serious sanitation problems. The author suffers from asthma but did not receive the medication prescribed to him by the doctor at the camp. The author claims that he witnessed brutal beatings and ill-treatment of asylum seekers being returned from other European Union member States.<sup>5</sup>

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<sup>1</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

<sup>2</sup> The date of deportation has not been specified.

<sup>3</sup> The State party submitted separate observations on the admissibility of the communication on 27 February 2017.

<sup>4</sup> The author claimed to be a Tajik national and a Sunnite Muslim by religion, according to the State party's observations.

<sup>5</sup> No further information has been provided.

2.5 Because of the dire conditions, the author left the refugee camp on 19 May 2016 and crossed the border to Serbia. On 26 May 2016, he entered Hungary and applied for asylum on 28 May 2016. The author was heard by the office of immigration and nationality on the same date, stating that he had entered the European Union through Bulgaria. Accordingly, the office of immigration and nationality requested Bulgaria to accept its responsibility under the Dublin III Regulation (art. 18 (1) (b)). The author only had one short interview before the decision was delivered, during which he was not asked any question in relation to Bulgaria and was not given any opportunity to react to the potential applicability of the Dublin III Regulation to his case. The author challenged the decision but did not have legal assistance in doing so. On 17 October 2016, the Metropolitan Labour and Administrative Court confirmed the decision of the office of immigration and nationality.

2.6 The author has family in Budapest: two aunts with refugee status; an uncle and his wife under subsidiary protection; and 15 cousins. Three of his cousins have already been granted Hungarian citizenship. He is currently staying with family in Budapest. After receiving the decision of 17 October 2016 of the Metropolitan Court, the author sought treatment at the Cordelia Foundation for the Rehabilitation of Torture Victims in Budapest. On 11 November 2016, a psychiatrist at the Foundation issued a medical opinion regarding the author's health status.<sup>6</sup> According to the medical certificate, the author suffers from post-traumatic stress disorder and panic disorder, with fear and anxiety attacks. It also indicates that the author has no psychotic symptoms, although he suffers from flashbacks. According to the certificate, the author needs regular medical and psychotherapeutic treatment. It confirms that the author's sense of security is strengthened by staying with his relatives in Hungary. The author is currently receiving regular therapy from the Foundation. According to his psychiatrist, the author needs continuous therapy and stable support from his family.

2.7 Since there is no further legal remedy against the decisions of the Metropolitan Court in asylum judicial review procedures (Act LXXX of 2007 on Asylum (as amended, 2016), sect. 53 (5)), the author claims to have exhausted all domestic remedies. The author has not submitted the same matter for examination under another procedure of international investigation or settlement.

### The complaint

3.1 The author claims that his removal to Bulgaria would amount to a violation of his rights under article 7 of the Covenant, as he would face a real risk of irreparable harm due to inhuman and degrading treatment there. The author recalls the Committee's general comments No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment (para. 9) and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (para. 12), in which the Committee declares that States parties should not deport individuals to third countries 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.<sup>7</sup>

3.2 The author claims that if returned to Bulgaria, he would in all likelihood be detained since Bulgaria routinely detains asylum seekers, sometimes in combination with deliberate deprivation of food and liquids.<sup>8</sup> Therefore, he fears that he will face an irreparable harm due to a risk of inhuman and degrading treatment.<sup>9</sup> He refers to the decision of the

<sup>6</sup> The certificate has been submitted together with the initial communication.

<sup>7</sup> See also *Kindler v. Canada* (CCPR/C/48/D/470/1991), para. 6.2; and *X. v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

<sup>8</sup> See Asylum Information Database, *Country Report: Bulgaria*, 2017 update. See also PRO ASYL, "Humiliated, ill-treated and without protection: refugees and asylum-seekers in Bulgaria" (Frankfurt, Germany, December 2015).

<sup>9</sup> See European Court for Human Rights, *Budina v. Russia*, application No. 45603/05, decision of 18 June 2009, in which the Court considered that inaction on the part of the State party in the face of severe conditions may amount to inhuman or degrading treatment under article 3 of Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). See also Asylum Information Database, *Country Report: Bulgaria*, 2017 update; Council of Europe, "Report to the Bulgarian Government on the visit to Bulgaria carried out by the European

European Court of Human Rights in *M.S.S. v. Belgium and Greece*,<sup>10</sup> though admitting that it is not identical to his situation, in which the European Court supported a finding that inappropriate reception conditions as well as serious shortcomings in asylum procedure amount to inhuman or degrading treatment. The author submits that unacceptable sanitary conditions, ill-treatment and humiliation have been addressed in the reports of the PRO ASYL<sup>11</sup> association and the Bulgarian Helsinki Committee. He claims that as an asylum seeker returned to Bulgaria under the Dublin III Regulation, he would likely face a situation in which his asylum procedure in Bulgaria has already been terminated, since in some cases negative decisions have been taken in absentia.<sup>12</sup>

3.3 Given those circumstances, he fears being transferred to one of the detention facilities, such as the Busmantsi or Lyubimets detention centres. Even if he were not detained, Dublin returnees are likely to be deprived of their right to accommodation, as only those with visible vulnerabilities (e.g., families with children) are provided with reception. He also claims that he would have no access to mental health care, which would result in a serious deterioration of his current condition. Referring to extensive background information on Bulgaria, the author further submits that there is no access to mental health services and no identification procedure for vulnerable asylum seekers, and that the Bulgarian authorities treat asylum seekers with excessive force and brutality.

3.4 In addition, the author claims a violation of article 2 (3) (a), read in conjunction with article 7, of the Covenant, on the grounds that the decision to return him to Bulgaria by the office of immigration and nationality and the judicial review thereof by the Metropolitan Court did not represent an effective remedy. He claims that he was heard only once, at the asylum interview, whereas he was not questioned about his relevant individual circumstances in relation to a potential transfer to Bulgaria during the proceedings before the office of immigration and nationality and the Metropolitan Court. He argues that the arguments given by the Hungarian authorities were purely focused on the Dublin III Regulation and did not examine how the Bulgarian asylum system functions in practice, whether he would have access to a fair and efficient asylum procedure in Bulgaria and whether he would have access to psychological assistance. He argues that the authorities did not carry out a meaningful assessment of his claims and that he was consequently deprived of the opportunity to exercise his right to an effective remedy.

#### **State party's observations on admissibility**

4.1 On 27 February 2017, the State party submitted its observations on the admissibility of the communication, arguing that it is inadmissible due to non-substantiation of the author's claims.

4.2 The State party asserts that the author did not refer to the alleged violation of his rights during the asylum procedure but has only invoked them in the communication. It questions the genuineness of his allegations and argues that even if these were true, the author did not allow the State party's authorities to consider the claims during the domestic proceedings. It therefore holds that the failure of the author cannot be attributed to the State party.

4.3 The State party notes that the author was interviewed on 28 May 2016 with the assistance of a Dari interpreter. The author's photograph and fingerprints were taken. He was informed about his procedural rights and obligations, and the information contained in the information sheet on the asylum procedure was explained to him. The author

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Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 29 October 2010, Strasbourg, 15 March 2012", pp. 24–30, and "Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Bulgaria from 9 to 11 February 2015"; and European Council on Refugees and Exiles and European Legal Network on Asylum, "Research note: reception conditions, detention and procedural safeguards for asylum seekers and content of international protection status in Bulgaria", February 2016 (in which the detention conditions in Bulgaria are assessed to be inhumane or degrading treatment).

<sup>10</sup> Application No. 30696/09, judgment of 21 January 2011.

<sup>11</sup> PRO ASYL, "Humiliated, ill-treated and without protection".

<sup>12</sup> The author, however, has not applied for asylum in Bulgaria.

understood and took note of the information. Prior to the personal interview, the applicant claimed to be physically and mentally fit for the interview. During the interview, he also claimed to be healthy. Regarding the circumstances of his arrival in Hungary, the author stated that he had travelled with his brother from Afghanistan to the Islamic Republic of Iran legally and had continued to Turkey, where they had spent two months. They had then travelled to Bulgaria with the help of smugglers, where they had spent one month (one week in a closed facility and three weeks in an open reception facility). However, their asylum procedure could not be conducted on the merits as they had absconded to Serbia, where they had spent five or six days, following which they had travelled onwards to Hungary by bus. The author stated that their original destination had been Hungary, as their aunt had been living there for 15 years. The author claimed that his profession as a police officer had been the reason for his escape from Afghanistan, as the Taliban had threatened him in order to make him join their forces. The State party claims that the minutes of the interview were read back to the author at the end of the interview and that he did not wish to amend or make any additions to the minutes, which he therefore approved.<sup>13</sup>

4.4 Having taken the author's fingerprints, the Immigration and Asylum Office<sup>14</sup> established that the Eurodac system already contained the author's fingerprints from Bulgaria, taken at the Voenna Rampa refugee camp on 20 April 2016. The Office also established that the Dublin procedure should be initiated, and the author's asylum procedure was suspended on 28 May 2016 until the Dublin procedure was completed. The Office assigned the author to Vámoszabadi Reception Centre as a place of residence; however, the author never arrived there. On 30 May 2016, the author filed a request with the Office to allow him to remain at his aunt's private residence. Consequently, the Office designated the aunt's home as the author's residence.

4.5 On 27 July 2016, the Office established that Bulgaria was the State responsible for examining the author's application for international protection. The author was notified of that decision on 14 September 2016. He filed for appeal on the same date and stated that around 70 of his family members, who had escaped from Afghanistan in the 1980s, were currently living in Hungary. He explained that his family members could help him in the asylum procedure and in his integration process. According to the State party, at that stage of the proceedings he did not mention any other facts or circumstances that he has referred to in his complaint submitted to the Committee.

4.6 The State party emphasizes that the author was given information about the asylum procedure, both in writing and orally, including the implications of the Dublin procedure, and the author understood and took note of it. The author claimed to be physically and mentally fit before and during the interview, and he did not mention his asthma or issues concerning his mental condition during the interview. Each page of the interview minutes has been signed by the author. The authorities informed the author about the application of the Dublin III Regulation and another personal interview took place, pursuant to article 5 of that Regulation. Since the author did not indicate any medical problems, the asylum authority could not consider these facts.

4.7 The author appealed against the Immigration and Asylum Office's decision that Bulgaria was the responsible State for examining his application for international protection, based on article 49 of Act LXXX of 2007 on Asylum (as amended, 2016), which is in compliance with article 27 of the Dublin III Regulation. His right to remedy was indeed secured, and the author exercised his right when he appealed the Office's decision. In his appeal, the author did not object to the lawfulness of the procedure, nor did he complain about any shortcomings in the Bulgarian asylum system or state that Bulgaria was not a safe country in his case. The author's appeal was merely based on the fact that around 70 of his family members live in Hungary, many of whom received Hungarian citizenship. He particularly referred to his aunt living in Hungary for 15 years. In the view of the State party, the author's aunt does not qualify as a family member under article 2 (g) of the Dublin III Regulation, thus this circumstance is irrelevant in the asylum procedure. The

<sup>13</sup> The minutes are not enclosed with the State party's observations.

<sup>14</sup> While the author refers to the office of immigration and nationality, the State party uses the name Immigration and Asylum Office.

author in his appeal did not name any other relatives who would qualify as family members under the Dublin III Regulation, and he did not raise any other objections against the continuation of the procedure to be conducted by the Bulgarian authorities. The State party notes that the author did not complain about any mental health condition or health problems in the appeals phase of the proceedings either. It also notes that the psychiatric diagnosis of post-traumatic stress disorder was only issued by the Cordelia Foundation on 11 November 2016, after the Metropolitan Court had delivered its legally binding decision on 17 October 2016.<sup>15</sup>

4.8 The State party reiterates that the author did not refer to any condition, such as an “improper mental state” or medical problems, calling for him to be considered as a vulnerable person. To the contrary, the author seemed to be an adult, single and healthy man who had served as a police officer in his country of origin and had fled his country because he did not want to join the Taliban forces. The Hungarian authorities had no reason to call those circumstances into question. In addition, the State party notes that the author’s sibling, who also submitted a request for asylum, did not mention any circumstances that would give rise to the suspicion that the author might belong to a vulnerable group.<sup>16</sup> Circumstances that would substantiate the alleged violation of the author’s rights were only put forward in the complaint submitted to the Committee. The State party thus questions the genuineness of those allegations and claims that it cannot be made responsible for the author’s failure to inform the authorities about the circumstances he referred to in his complaint, be these allegations true or false.

4.9 Furthermore, the State party emphasizes that the reports cited by the author in his complaint were written two to three years ago and do not reflect the current conditions in Bulgaria. In particular, those reports did not take into consideration the development assistance and aid funded by the European Union in recent years. It also claims that there is no European Union decision according to which, contrary to Greece, Bulgaria cannot be considered as a safe country. The State party finally reiterates that the author did not put forward any arguments in his appeal claiming that Bulgaria is not a safe country in his case that would have caused the Hungarian authorities to reach a different outcome in their decision. It argues that the violations claimed by the author are not well founded and that the complaint is therefore inadmissible.

#### **Author’s comments on the State party’s observations on admissibility**

5.1 On 3 April 2017, the author submitted his comments on the State party’s observations, claiming that the State party had failed to rely on relevant legal reasoning in its observations on admissibility. The author asserts that the Immigration and Asylum Office and the Metropolitan Court did not fulfil their duty to undertake a future-oriented risk assessment regarding the author’s deportation to Bulgaria, as they failed to carry out the necessary fact-finding and assessment of relevant country information in light of the author’s individual circumstances.

5.2 The author notes that the State party has referred to the fact that he did not make any declaration before the State party’s authorities regarding his poor health condition and the previous ill-treatment he had suffered in Bulgaria. The author claims that the Office had an obligation to ascertain the relevant facts of his case,<sup>17</sup> especially those relevant within the

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<sup>15</sup> The Court explained in its reasoning that the Office acted lawfully when it examined the available documents and the author’s oral statements.

<sup>16</sup> In the case of the author’s sibling, it was also established that Bulgaria would be the State adjudicating his asylum request.

<sup>17</sup> The author refers to article 50 (1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services, which states that “the authority shall ascertain the relevant facts of the case in the decision-making process. If the information available is insufficient, the authority shall initiate an evidence procedure”, and to section 196 of the Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees issued by the Office of the United Nations High Commissioner for Refugees, which directs: “Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed,

application of the Dublin III Regulation. He adds that this obligation entails taking steps to proactively identify vulnerable asylum seekers, which the State party's authorities failed to do. The author argues that without fulfilling these obligations, the State party cannot legitimately rely on his failure to present every possible argument available, especially considering that he did not have legal representation.

5.3 The author notes that he only had one short interview with the authorities of the State party during his asylum application and that he was not asked any questions regarding Bulgaria or the Dublin procedure. He claims that he was never properly informed about the Dublin procedure, despite the State party's clear obligation to do so under article 4 of that Regulation. Consequently, he could not have known what sort of information, and in relation to which country, he was to put forward arguments during the proceedings.

5.4 Regarding his health condition, the author claims that he could not have provided the State party with a diagnosis of post-traumatic stress disorder, as an asylum seeker suffering from the symptoms of that disorder would not be able to give full account of his mental health condition.

5.5 Based on the above, the author maintains his claim that the authorities of the State party failed to fulfil their obligation to provide effective guarantees to protect him against arbitrary removal to Bulgaria resulting in a potential violation of article 7 and article 2 (3) (a), read in conjunction with article 7, of the Covenant.

5.6 The author further claims that the proceedings regarding his asylum application were marred by significant procedural errors. He submits that the judicial review by the Metropolitan Court was not compatible with the preamble and article 27 of the Dublin III Regulation, according to which an applicant has the right to an effective remedy that should cover both the examination of the application of the Dublin III Regulation and the legal and factual situation in the member State concerned. He claims that he was not presented with the chance to be heard on either the potential applicability of the Dublin III Regulation or on the potential consequences of his return to Bulgaria, entailing the risk of torture or other inhuman or degrading treatment under article 7. He also claims that this failure has not been remedied by the domestic court, and that he was denied a personal hearing. He further claims that the Metropolitan Court failed to assess the publicly available information on the Bulgarian asylum system and reception conditions. In addition, he notes that he was not represented by a lawyer during the proceedings and claims that he had not received any information on the nature and substance of the process and was therefore not in a position to submit the necessary arguments. He thus claims that the judicial review did not contain a meaningful assessment of his claim.

#### **State party's observations on admissibility and the merits**

6.1 On 28 August 2017, the State party submitted its supplementary observations on admissibility and the merits, reiterating that the author's claims had not been substantiated.

6.2 As regards the author's statements that the Immigration and Asylum Office should have examined whether the author's return to Bulgaria qualified as torture or inhuman or degrading treatment, the State party maintains its position that the procedure conducted by the Office was in line with the relevant legal provisions, in particular the requirements of the Dublin III Regulation. It notes that it would be unreasonable to expect the asylum authority and the relevant courts to conduct fact-finding missions in the receiving country in each case. This does not, however, prevent either the asylum authority or the courts from examining the individual circumstances, as was done in the author's case, since the authorities compared his individual circumstances to the general information relevant to the case, including with regard to the Bulgarian asylum system.

6.3 The State party claims that during the author's asylum interview on 28 May 2016, he did not refer to any mistreatment suffered during his stay in Bulgaria, as concerning his health condition, he claimed to be healthy. It also rectifies its earlier submission to clarify

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in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."

that the author was interviewed only once, but observes that this does not affect any of the arguments in its previous observations. The State party draws attention to the relevant guidelines of the European Asylum Support Office, according to which applicants must be given the opportunity to answer any questions concerning their flight and other circumstances during the asylum interview. In line with that, the author was asked open-ended and disguised questions, including questions regarding his health condition. Nevertheless, the author never invoked any of his claims alleged in the communication. The State party emphasizes that the author did not mention his allegedly poor health condition (asthma and post-traumatic stress disorder) in spite of the direct questions posed to him on this issue; the failure to detect such conditions cannot therefore be attributed to the asylum authority. Instead, such answers confirm that the author was attempting to prevent the authority from implementing its decision on his transfer.

6.4 In light of the above, the State party objects to the author's submission that the asylum authority could have identified his vulnerability. It also claims that when the conditions for the Dublin procedure are met, the Immigration and Asylum Office is obliged to act accordingly. The asylum authority would have infringed the law, had it ignored its obligations as established by the European Union.

6.5 Concerning the author's claim that he was never properly informed about the Dublin procedure, the State party draws attention to the complaint, in which the author indicates that he was in possession of an information document on the Hungarian asylum procedure. The two statements are contradictory. The author also had the right to ask further questions concerning the written and oral information with which he was provided. Regarding follow-up questions, the author, after being informed, was asked to sign the information sheet, attesting that he had received a copy of the information sheet, that he had taken note of its contents and that he did not wish to comment on it. The fact that the author did not wish to ask further questions or make any comments cannot be regarded as the Office's failure. The author's reasoning and conclusions cannot be regarded as well founded.

6.6 In his appeal, the author had the opportunity to state the reasons for which Bulgaria should not be regarded as a safe country in his case. The author's claim that the review procedure of the Metropolitan Court decision is ineffective should be considered as ill-founded. During the procedure, the court examines all the relevant documents as its disposal and, if needed, conducts an individual assessment on whether the Dublin transfer would violate any international, European Union or internal legal provisions.

6.7 The State party emphasizes that once a European Union member State's responsibility for examining the application for international protection is determined and the individual circumstances of the case do not require the asylum authority to act differently, the authority has no further obligations to conduct an individualized assessment and must ensure the enforcement of the decision on transfer. Should a request for review not contain any new circumstances (based on which the case would necessitate a different outcome), the competent court upholds the decision of the asylum authority. Since this is what happened in the present case, the decision of the Metropolitan Court must be regarded as reasonable and well founded.

6.8 In addition, the State party affirms that there is no European Union decision according to which Bulgaria could not be considered as a safe country. Therefore, transfers to Bulgaria are regularly implemented by member States under the Dublin III Regulation. It also recalls that the author did not put forward any arguments, either during the personal interview and the asylum procedure or during the review procedure, claiming that Bulgaria was not a safe country in his case, which would have been essential for the Hungarian authorities to reach a different outcome in their decision.

6.9 Since the circumstances that would substantiate the alleged violation of the author's rights were mentioned only in the communication submitted to the Committee, the State party questions the genuineness of those allegations. It concludes that Hungary cannot be made responsible for the author's failure to inform the authorities about the circumstances he referred to in his complaint, be these allegations true or false. In light of the above, the State party is of the view that the alleged violations of the Covenant are not well founded, and the complaint should therefore be declared inadmissible.



### **Author's comments on the State party's observations on admissibility and the merits**

7.1 On 27 November 2017, the author submitted his comments regarding the State party's observations on admissibility and the merits of the communication.

7.2 As to the State party's contention that the author never referred to the alleged violation of his rights during the asylum procedure, and only invoked them in the communication, the author reiterates that he has only had one short interview so far, during which he was not asked any question in relation to Bulgaria or any relevant question regarding the Dublin procedure. Moreover, the fact that the Immigration and Asylum Office did not meet its obligation to properly inform the author about the Dublin procedure (art. 4) and carry out an interview in relation to it (art. 5), amounted to a violation of the Dublin III Regulation.

7.3 On the merits, the author submits that the State party failed to provide any new legal reasoning, as it has only reiterated its arguments put forward in its previous observations, namely that the author failed to express his observations regarding Bulgaria and that he did not reveal his mental health problem either before the Immigration and Asylum Office or the Metropolitan Administrative and Labour Court. He argues that the State party only generally referred to the Dublin III Regulation. Without supplying evidence that it complied with the relevant legal provisions, the State party's argument cannot be considered as capable of rebutting the author's arguments. The author also objects that he did not refer to "fact-finding missions" but to "fact-finding" as an obligation of the Office based on section 50 (1) of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.<sup>18</sup>

7.4 As for the State party's assertions concerning the individualized examination of the case, there is no indication in the files that the relevant authorities conducted any examination regarding the available information on the Bulgarian asylum system. There is no reference to such an examination either in the decision or in the case files.

7.5 Concerning the lack of statements by the author about his poor mental health condition and experience in Bulgaria, the author reiterates that no questions were put to him concerning Bulgaria, contrary to the Dublin III Regulation. There was no appropriate identification of the author's vulnerability (his health condition) either, as required by section 3 (1) and (2) of Government Decree No. 301/2007. The Immigration and Asylum Office has therefore violated its obligation to properly assess the asylum seeker's individual circumstances.

7.6 In addition, persons suffering from post-traumatic stress disorder are, by definition, not suited to give a detailed account of their mental disease without any psychological help. A lack of trust in the officer conducting the interview may make it impossible for a traumatized asylum seeker to reveal his or her psychological difficulties, provided that he or she is able to identify them in the first place. There are several signs from which post-traumatic stress disorder symptoms can be assessed (such as frequent headaches, flashbacks, sleeping disorders, etc.); nonetheless, the authority failed to ask the relevant questions from the author and did not conduct any other procedure aiming to identify his potential vulnerability. The author, referring to a recent report on the topic, submits that the protection needs of asylum seekers are not systematically assessed.<sup>19</sup> Had the Immigration and Asylum Office carried out the vulnerability identification procedure, it would have been able to assess the psychological needs of the author. If the possibility of conducting a Dublin procedure is identified, the Office should conduct an early identification of persons with special needs and inform the applicant about the Dublin procedure in detail, while taking into account the individual vulnerability of the applicant. Specific and targeted questions about countries where a transfer could potentially take place – in the present case, Bulgaria – should also be asked. Subsequently, the Office should take all the information

<sup>18</sup> According to that provision, "the authority shall ascertain the relevant facts of the case in the decision-making process".

<sup>19</sup> See Gruša Matevžič, *Unidentified and Unattended: the response of Eastern EU Member States to the Special Needs of Torture Survivor and Traumatized Asylum Seekers* (Budapest, Hungarian Helsinki Committee, May 2017).

gathered into account when examining whether a decision on transfer to Bulgaria could indeed be issued. Consequently, the Office failed to act according to its legal obligations, resulting in the infringement of European Union law as well as the Covenant and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

7.7 The author further objects to the misleading observations by the State party. The State party refers to the information note given to the author during the asylum procedure without mentioning that the information was provided exclusively in relation to the general questions of the Hungarian asylum procedure, while it did not inform the author about the Dublin procedure in detail or about a potential transfer to Bulgaria. The right to be heard is enshrined in the Dublin III Regulation (art. 5); therefore the authorities cannot simply assume that the applicant had read and understood the information leaflet given to him. According to article 5, the aim of the personal hearing is to facilitate the process of determining the responsible member State, and to allow a proper understanding of the information supplied.

7.8 During the review procedure carried out by the Metropolitan Court, the author had no legal assistance. Consequently, he could not have known what to submit to the court or what he should have highlighted. He submits that the judicial review procedure is a non-litigious procedure (without oral hearing), which must be completed within eight days (Act LXXX of 2007 on Asylum (as amended, 2016), sect. 49 (8)). The review procedure raises serious questions, given that the request for a judicial review must be submitted through an asylum authority, which forwards it to the Metropolitan Court with its comments on the case. With such a short deadline in place, the court will be more inclined to adopt the legalistic arguments presented by the Office rather than examine the case in depth. The present case clearly demonstrates how the current system of judicial review of Dublin decisions fails to uphold the principle of the equality of arms. It may therefore be concluded that the right to an effective remedy, as required by article 2 (3) (a) of the Covenant, was seriously violated.

7.9 Although there is indeed no European Union decision according to which Bulgaria could not be considered as a safe country, several member States do halt returns to Bulgaria.<sup>20</sup> The author also refers to the letter dated 6 July 2017 on “Measures of improvement of the Bulgarian asylum system”, sent by the Directorate-General of Home Affairs to the Bulgarian authorities, especially in relation to the issue of the identification of vulnerable asylum seekers, given the low recognition rate and the systematic detention of Afghan asylum seekers.

7.10 The author lastly submits that he is still suffering from post-traumatic stress disorder and depressive symptoms. The most recent psychiatric opinion, issued on 8 November 2017, indicates that “as a result of the extended uncertainty and feelings of incompetence, his psychotic symptoms remained, which results in the maintained need of regular psychotherapy and medication”.<sup>21</sup> Finally, the author claims that, since the Hungarian authorities have failed to secure effective guarantees to protect him against arbitrary removal to Bulgaria, taking into account that its authorities have not yet taken the responsibility to examine the author’s asylum claim under the Dublin III Regulation, his rights guaranteed by article 7 and article 2 (3) (a), read in conjunction with article 7, of the Covenant have been violated, and the author is still in danger of being exposed to inhuman or degrading treatment.

#### **Author’s additional comments**

8.1 On 13 June 2018, the author submitted additional comments.

8.2 He draws attention to the recent medical documentation on the deteriorating state of his mental and physical health owing to his impending deportation to Bulgaria despite the risk of inhuman and degrading treatment there. According to a medical certificate of 10

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<sup>20</sup> The author provides a list of Dublin transfers that have been prevented, referring to relevant case law from Belgium and Germany.

<sup>21</sup> Psychiatric opinion issued by the Cordelia Foundation on 8 November 2017, supplied by the author.

April 2018, the author is in need of continuous psychological and medical treatment, the frequency of which has had to be increased. The opinion points to the reported lack of appetite, loss of weight, somatic headaches, sleep deprivation and diminished concentration, while concluding that symptoms of depression are clearly detectable. Besides the mental health concerns, the author has been treated for a continuous pain in his shoulder, stemming from the psychological disorder with which he has been diagnosed. The author submits that he drew the attention of the Office of Immigration and Asylum to the medical certificate delivered on 11 November 2016 (see para. 2.6 above) on 5 April 2018 and to the certificate issued on 10 April 2018 on 13 April 2018.

8.3 The author also draws the Committee's attention to the recent publicly available reports on the Bulgarian reception conditions as regards asylum seekers having serious mental health disorders. The reports indicate that there is inadequate hygiene and sanitation and that there are interruptions in the provision of medical and interpretation services at refugee facilities; that there is no accommodation for persons with limited mobility or for asylum seekers with visual, mental or psychosocial disabilities;<sup>22</sup> that there are no guidelines or practice regarding the accommodation of the specific needs of vulnerable groups; and that there is a lack of special treatment or infrastructure to handle torture victims and persons suffering from psychosocial disabilities.<sup>23</sup> Other reports emphasize that for asylum seekers access to health treatment in Bulgaria is seriously restricted, despite being entitled to the same scope of medical treatment as nationals, due to the lack of medical personnel in reception centres. While in Bulgaria the highest standard of health for asylum seekers is guaranteed by law, there is a lack of access to mental health care in practice.<sup>24</sup>

8.4 The author maintains that the Hungarian authorities have failed to fulfil their obligation to furnish effective guarantees to protect the author against arbitrary removal to Bulgaria, resulting in the violation of article 7 and article 2 (3) (a), read in conjunction with article 7, of the Covenant.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

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

9.3 The Committee notes that the State party has not expressly objected to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol, although it held that the author had failed to raise the alleged violation of his rights during the domestic asylum procedure, contesting the application of the Dublin III Regulation (para. 4.2), and had invoked them only in the communication. It also observes that the author appealed against the negative decision of the Immigration and Asylum Office on his asylum application to the Metropolitan Administrative and Labour Court, which dismissed the appeal on 17 October 2016. Since the decisions of the Metropolitan Court cannot be appealed, no further remedies are available to the author. Accordingly, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

9.4 The Committee notes the State party's challenge to the admissibility of the communication on the grounds that the author's claims under article 7 and article 2 (3) (a), read in conjunction with article 7, of the Covenant are manifestly ill-founded. The Committee, however, considers that the author has raised numerous risk factors and

<sup>22</sup> See United States of America, Department of State, "Country Report on Human Rights Practices 2017: Bulgaria", 20 April 2018. Available at [www.ecoi.net/en/document/1430270.html](http://www.ecoi.net/en/document/1430270.html).

<sup>23</sup> See Asylum Information Database, *Country Report: Bulgaria*, 2017 update.

<sup>24</sup> Gruša Matevžič, *Unidentified and Unattended*, p. 39.

potential errors during the domestic asylum and court proceedings that, cumulatively, sufficiently substantiated his claims for the purposes of admissibility. The Committee further considers that the inadmissibility argument adduced by the State party is intimately linked to the merits and should thus be considered at that stage.

9.5 The Committee declares the communication admissible insofar as it appears to raise issues under article 7 and article 2 (3) (a), read in conjunction with article 7, of the Covenant and proceeds to its consideration of the merits.

*Consideration of the merits*

10.1 The Committee has considered the communication in light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The Committee notes the author's claim that his deportation to Bulgaria, based on the Dublin III Regulation principle of "first country of asylum", would expose him to a real risk of irreparable harm as he would likely be detained and held in conditions amounting to inhuman and degrading treatment there, in violation of article 7 of the Covenant. The author bases his arguments on, inter alia, the actual treatment he received when in Bulgaria; his particular vulnerability due to suffering from post-traumatic stress disorder; the general reception conditions in facilities for asylum seekers in Bulgaria, including the lack of access to mental health care; and the treatment of asylum seekers with excessive force and humiliation, as described in various background reports. The Committee also notes the author's claim that, even if he were not detained, the Dublin returnees are likely to be deprived of their right to accommodation as only those with visible vulnerabilities are provided with reception. The Committee further notes the author's claims that the asylum and judicial procedures suffered from procedural errors, such as the absence of a personalized assessment of the application of the Dublin III Regulation in his circumstances, and that he was consequently deprived of the right to an effective remedy, in violation of article 2 (3) (a), read in conjunction with article 7, of the Covenant. The Committee notes the State party's argument that the author's claims should be considered manifestly ill-founded.

10.3 The Committee recalls its general comment No. 31, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant (para. 12). The Committee has also indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.<sup>25</sup> Furthermore, the Committee recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such risk exists,<sup>26</sup> unless it is found that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>27</sup>

10.4 Concerning article 7, the Committee notes the author's claims that he would likely be detained and held in conditions amounting to inhuman and degrading treatment, as described in the background reports and also in the jurisprudence of the European Court of Human Rights concerning the routine detention of asylum seekers, inappropriate reception conditions, including lack of food, liquids and sanitation, and serious shortcomings in asylum procedure. The Committee also notes the author's claims that even if he were not detained, he fears facing a lack of accommodation, a lack of access to mental health care, which would result in a serious deterioration of his current condition, the absence of identification procedure for vulnerable asylum seekers and the use of excessive force and brutality by the Bulgarian authorities. The Committee observes as undisputed that the author entered Bulgaria illegally, was apprehended and severely beaten by the Bulgarian

<sup>25</sup> See communications *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2; *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.6; and *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

<sup>26</sup> See communication *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

<sup>27</sup> See communications *Y.A.A. and F.H.M. v. Denmark* (CCPR/C/119/D/2681/2015), para. 7.3; and *Rezaifar v. Denmark* (CCPR/C/119/D/2512/2014), para. 9.3.

police. The Committee further observes that the author was exposed to kicking and shouting by the police at the Elhovo centre, as well as to poor material conditions and the absence of medical services. One week later, he was transferred to the Voenna Rampa refugee camp, where he witnessed brutal beatings and the ill-treatment of asylum seekers returned from other European Union member States, and where he was exposed to dire material conditions. Furthermore, the Committee notes the author's claim that he suffers from asthma but did not receive the medication prescribed to him by the doctor at the camp, and that he left the refugee camp on 19 May 2016, without the asylum procedure being concluded on the merits. The Committee also observes that the author also relied on reports on the general situation of asylum seekers in Bulgaria. Nonetheless, the Committee notes the State party's submission that the author did not refer to the alleged violations of his rights during the asylum procedure, but has only invoked them in the communication, without allowing the State party's authorities to consider the claims during the domestic proceedings. The Committee observes that the State party has questioned the genuineness of the author's allegations, arguing that the failure of the author cannot be attributed to the State party.

10.5 As regards article 2 (3) (a) of the Covenant, the Committee notes the author's claim that the asylum and judicial review procedures did not represent an effective remedy as he was heard only once, at the asylum interview, whereas he was not questioned about his specific circumstances in relation to a potential transfer to Bulgaria during the proceedings before the Immigration and Asylum Office and the Metropolitan Administrative and Labour Court. The Committee in particular notes the author's claim that the Hungarian authorities exclusively focused on the Dublin III Regulation, without assessing how the Bulgarian asylum system functions in practice, that is, whether he would have access to a fair and efficient asylum procedure in Bulgaria and whether he would have access to psychological assistance.

10.6 The Committee further notes the State party's submissions that the author was properly informed about his rights and obligations during the asylum procedure; that he signed the interview minutes without any amendments; that he did not mention any circumstances during the asylum and judicial procedures that he has referred to in his communication to the Committee; that he claimed to be physically and mentally fit before and during the asylum interview; and that his right to remedy was effectively secured as he appealed the negative asylum decision to the Metropolitan Court. The Committee also notes the State party's claim that in his appeal the author did not object to the lawfulness of the procedure, the grounds of which instead concerned intended family reunification, and that he did not complain about any shortcomings in the Bulgarian asylum system or state that Bulgaria was not a safe country in his case.

10.7 The Committee observes that the material before it, as well as general information in the public domain on the situation of asylum seekers in Bulgaria, indicate that there may be a lack of available places in the reception facilities for asylum seekers and that they are often in poor sanitary condition and without adequate medical personnel and assistance. However, the Committee notes that the author was not homeless before his departure from Bulgaria as he stayed in a refugee camp, and did not live in destitution. The Committee also observes that, according to his own statement, the author had access, though limited, to medical treatment during his stay in Bulgaria. Likewise, the author has not provided any information that would explain why he would not be able to seek asylum in Bulgaria. The Committee further observes that the author was informed about the application of the Dublin procedure by the Immigration and Asylum Office in his case, that he was heard once in the presence of an interpreter and that the interview was held in a fair and objective manner, which he attested by a signature. The Committee notes that the author's appeal of the negative asylum decision failed for not meeting the burden of allegation and proof, and that his explanation for that failure was not persuasive. In the circumstances, the Committee observes that the author has not substantiated his claim that he would face a real and personal risk of inhuman or degrading treatment if returned to Bulgaria.<sup>28</sup> The Committee considers that the mere fact that the author may be possibly confronted with difficulties

<sup>28</sup> See, e.g., communication *B.M.I. and N.A.K. v. Denmark* (CCPR/C/118/D/2569/2015), para. 8.6.

upon his return to Bulgaria does not in itself mean that he would be in a special situation of vulnerability and in a situation significantly different to many other Dublin returnees, notwithstanding the necessary treatment of his post-traumatic stress disorder.

10.8 The Committee also considers that, in the present case, the author's claims mainly reflect his disagreement with the decision of the State party's authorities to return him to Bulgaria as his country of first asylum, and that he failed to explain why that decision is manifestly unreasonable or arbitrary or amounting to a denial of justice.<sup>29</sup> Accordingly, the Committee cannot conclude that the removal of the author to Bulgaria by the State party would constitute a violation of article 7 or that the author's rights under article 2 (3) (a), read in conjunction with article 7, of the Covenant have been violated in arriving at the negative asylum decision.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's removal to Bulgaria would not be a violation by the State party of article 7 of the Covenant. The Committee is, however, confident that the State party will duly inform the Bulgarian authorities of the author's removal, in order for the author to be taken charge of in a manner adapted to his medical and other needs, as required.

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<sup>29</sup> See, e.g., *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.4.

## Annex

[Original: *French*]

### **Individual opinion (dissenting) of Committee member Yadh Ben Achour**

1. The Committee notes in paragraph 9.4 of the present Views that the State party challenges the admissibility of the communication on the grounds that the author's claims under article 7 and article 2 (3) (a), read in conjunction with article 7, of the Covenant, are manifestly ill-founded. Having rejected this argument, the Committee then proceeds to examine the merits of the case.

2. In fact, this is not really the argument made by the State party. The latter makes a different argument, a procedural argument based on article 5 (2) (b) of the Optional Protocol, according to which the Committee shall not consider any communication from an individual without first having ascertained that the individual has exhausted all available domestic remedies. The scope of article 5 is twofold:

(a) First, it means that, generally speaking, the case must have been submitted to the domestic courts before it can be examined by the Committee. While the reference to "all remedies" is undoubtedly problematic, there is no need to go into this here because it is outside the scope of the present analysis;

(b) Article 5 (2) (b) also means, however, that each individual complaint raised before the Committee must have been submitted beforehand to the domestic courts that hear applications for judicial remedy.

3. In the present case, the State party has placed particular emphasis on the argument that the author did not present the claims he raises before the Committee, on points of fact or of law, before either the Hungarian judicial or administrative authorities. To begin with, the author did not describe any particular conditions or circumstances of his experience in Bulgaria that might have revealed a situation of particular vulnerability to the Hungarian authorities. The State party asserts that, during the author's asylum interview on 28 May 2016, he did not refer to any ill-treatment suffered during his stay in Bulgaria. Secondly, the author did not put forward the arguments relating to his state of health even though the Hungarian authorities asked specific questions about this. The State party notes that the author did not complain about any mental or other kind of health problems in the appeals phase of the proceedings either, and that the psychiatric diagnosis of post-traumatic stress disorder was only issued by the Cordelia Foundation on 11 November 2016, that is, after the Metropolitan Court had delivered its legally binding decision on 17 October 2016. And lastly, from a legal standpoint, the author did not put forward any arguments concerning the State party's possible violation of article 7 of the Covenant or of article 2 (3) (a), read in conjunction with article 7, if he were to be returned to Bulgaria. The State party asserts that the author never referred to the alleged violation of his rights during the asylum procedure but only invoked them in the present communication. As the author has not refuted these claims by the State party, the requirements of article 5 (2) (b) of the Optional Protocol have not been satisfied.

4. Consequently, and as argued by the State party, the communication submitted to the Committee in this case should have been declared inadmissible.