



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2956/2017*, **, ***

<i>Communication submitted by:</i>	B.A. et al. (represented by counsel, Susanna Paulweber)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Austria
<i>Date of communication:</i>	8 February 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 14 February 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	8 November 2019
<i>Subject matters:</i>	Cruel, inhuman or degrading treatment or punishment; deportation to Bulgaria
<i>Procedural issues:</i>	Level of substantiation of claims; non-exhaustion of domestic remedies; interim measures
<i>Substantive issue:</i>	Cruel, inhuman or degrading treatment or punishment
<i>Articles of the Covenant:</i>	7 and 2 (3) (a), read in conjunction with article 7
<i>Articles of the Optional Protocol:</i>	1 and 2

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Schuichi Furuya, Christoph Heyns, Bamariam Koita, 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 Gentian Zyberi (dissenting) is annexed to the present decision.



1.1 The authors of the communication are B.A., born in 1976, and N.T., born in 1980, and their five minor children: R.L. and R.L., twins born in 2004, M.L., born in 2010, R.L., born in 2014, and D.L., born in 2015. They claim that the State party has violated their rights under article 7 of the Covenant. The Optional Protocol entered into force for the State party on 10 March 1988. The authors are represented by counsel.

1.2 On 14 February 2017, pursuant to rule 94 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 authors to Bulgaria while their case was under consideration by the Committee. On 15 March 2017, the Special Rapporteur reiterated the request. On 14 April 2017, it transpired that the State party had removed the authors to Bulgaria on 16 March 2017. The authors presently reside in Iraq.

Factual background¹

2.1 In their initial communication, the authors claimed that they were Syrians of Kurdish ethnicity who had never obtained Syrian nationality. They fled to Austria from the Syrian Arab Republic and claim to have a well-founded fear of persecution.² In their additional submission dated 31 August 2018, the authors note having travelled from Iraq.³

2.2 In July 2016, the authors arrived in Bulgaria. They were arrested and brought to a detention centre.⁴ The authors state that the Bulgarian police threatened them with weapons. They stayed in the detention centre for 14 days and were released only after they had applied for asylum.⁵ The authors claim that they did not receive adequate nutrition or health care during their detention and that the two youngest children, aged 1 and 2, were fed bread soaked in water instead of milk. After they had applied for asylum, the authors were transferred to a camp where they had to sleep on the floor and still did not receive enough food. The father was forced to clean the floor.

2.3 The authors left Bulgaria on an unspecified date. According to the State party, Eurodac information indicates that they applied for asylum in Hungary on 7 September 2016. The authors left Hungary on an unspecified date in 2016 for Austria, where they applied for asylum on 24 September 2016.

2.4 The authors claim that the children were malnourished upon their arrival in Austria. They submit that the mother was in a bad state of health. She was suffering from post-traumatic stress disorder ever since the authors had left their country of origin. She also suffered from depression. She was neither diagnosed nor treated in Bulgaria. A clinical report from Innsbruck University Hospital dated 18 January 2017 indicates that she urgently required psychotraumatological treatment and that deportation would be irresponsible from a medical perspective.

2.5 On 13 January 2017, the Federal Office for Immigration and Asylum rejected the authors' asylum applications, noting that under Regulation 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 (Dublin Regulation) Bulgaria was in charge of examining the merits of the claim. It also decided to remove the authors to Bulgaria.

¹ Prepared on the basis of the incomplete initial communication submitted by the authors, their further submission and the submissions of the State party.

² The authors do not provide further information in that regard.

³ According to the State party, the authors have used at least three different identities in Europe. The State party says it has been unable to ascertain the authors' identities and nationalities.

⁴ The authors apparently interchangeably refer to the place of detention as a "camp" and a "prison".

⁵ According to the State party, a Eurodac query shows that the authors applied for asylum in Bulgaria on 7 July 2016.

2.6 On 25 January 2017, the authors lodged an appeal before the Federal Administrative Court, which did not grant suspensive effect to their application. It dismissed the appeal as unfounded on 8 March 2017. The father appealed against that decision.⁶

2.7 On 10 February 2017, the Federal Office for Immigration and Asylum requested from the chief physician of the Department on Medical and Health Issues of the Federal Ministry of the Interior an opinion on whether the authors were able to travel, given the father's bladder neck stenosis, the mother's gynaecological problems and the thalassaemia of one of the children.⁷ On 13 February 2017, the chief physician concluded that the thalassaemia required no further examination and that, from a medical perspective, the authors' removal could be executed. The State party claims that it immediately transferred the health data to the Bulgarian authorities.

2.8 On 16 March 2017, the State party removed the authors to Bulgaria.

2.9 The authors filed petitions on 20 March 2017 in respect of the closing of their asylum procedures in Bulgaria and requested assistance for their voluntary return to Iraq.

2.10 On 26 April 2017, the authors lodged an appeal before the Austrian Constitutional Court. On 2 May 2017, the Constitutional Court decided to grant suspensive effect to the appeal. On 4 May 2017, the authors requested the Federal Ministry of the Interior to instruct the Embassy of Austria in Bulgaria to permit their re-entry into Austria. The authors requested the Constitutional Court to grant an interim measure to the same effect on 30 June 2017.

2.11 Following the authors' request of 20 March 2017, the Bulgarian authorities discontinued their asylum procedures. The authors appealed against that decision.⁸

2.12 On 21 September 2017, the Austrian Constitutional Court rejected the authors' appeal. The authors submit that they had not been readmitted into Austria before the rendering of the judgment.

2.13 On 20 February 2018, the Austrian Supreme Administrative Court rejected the father's appeal.

2.14 According to the authors, they were transferred from Bulgaria to Iraq approximately on 20 November 2017. They currently reside near the city of Zakho.

The complaint

3.1 In their initial submission, the authors claim that their deportation to Bulgaria would put them at risk of treatment contrary to article 7 of the Covenant. They refer to a report dated 2 January 2014, in which the Office of the United Nations High Commissioner for Refugees (UNHCR) advocated halting the transfer of asylum seekers to Bulgaria because of a real risk of inhuman or degrading treatment emanating from systemic deficiencies in reception conditions and asylum procedures.⁹ They add that, while UNHCR lifted its call to suspend removals to Bulgaria on 15 April 2014 due to significant improvements in

⁶ In its submissions on the admissibility of the communication, the State party states that an inadmissibility finding by the Supreme Administrative Court was communicated to the authors on 15 March 2017. This appears to contradict the State party's observation, in its submissions on the merits of the communication, of 14 August 2017 that the authors had not appealed to the Supreme Administrative Court. It also appears to contradict the authors' submission of 24 October 2017, in which they claim that as a "last domestic legal remedy the applicants can lodge an appeal to the High Administrative Court which will be done within the statutory limit". The State party has provided a copy of the Supreme Administrative Court's decision dated 20 February 2018 but no copy of any decision dated 15 March 2017.

⁷ The authors do not specify which child was suffering from thalassaemia. In their additional submission of 31 August 2018, the authors contend that four of the five children were suffering from thalassaemia.

⁸ In its submission on the merits of 14 August 2017, the State party notes that the Administrative Court of Sofia had rejected the appeals of the mother and the children; the father's appeal was still pending. Neither party has since provided information on the outcome of the father's appeal.

⁹ UNHCR, "Bulgaria as a country of asylum: UNHCR observations on the current situation of asylum in Bulgaria", 2 January 2014. Available from www.refworld.org/pdfid/52c598354.pdf.

reception conditions, it continued to raise concerns with respect to reception conditions and the identification of vulnerable asylum seekers, among other things.¹⁰ The authors refer to reports confirming poor reception conditions in Bulgaria, including in terms of poor hygiene, abuse, overcrowding, malnutrition and a lack of education, medical care and information on asylum procedures.¹¹

3.2 As for the mother's need for medical support, the authors refer to reports stating that health care for asylum seekers is insufficient in Bulgaria. Health insurance often only exists on paper and there is no treatment for asylum seekers in need of psychosocial support. The authors claim that, because the Bulgarian police has already mistreated them and the mother and children did not receive medical treatment, there is a substantial reason to believe that, should they be returned to Bulgaria, they would be detained and would not receive adequate medical treatment.

3.3 At the time of the submission of their complaint to the Committee, the authors' appeal against the decision of 13 January 2017 lodged before the Austrian Federal Administrative Court was still pending.¹² The Court had not granted suspensive effect to the proceedings before it. The authors therefore submitted that they were at risk of being removed to Bulgaria and lacked an effective remedy against the removal decision in the sense of article 2 (3) (a) of the Covenant.¹³

State party's observations on admissibility

4.1 On 14 April 2017, the State party submitted its observations on admissibility. The State party notes that the Dublin Regulation sets out which State member of the European Union is responsible for examining the merits of an asylum application, adding that normally that State is the one whose territory the asylum seeker has first entered from a third country. However, a member State may decide to examine an asylum application even if not required to do so under the Dublin Regulation, including when transferring the applicant would violate the non-refoulement principle. In the event of an outcome positive to the authors following their removal under the Dublin Regulation, the same Regulation obliges the sending member State to take back the authors.

¹⁰ UNHCR, "Bulgaria as a country of asylum: UNHCR observations on the current situation of asylum in Bulgaria", April 2014. Available from www.refworld.org/docid/534cd85b4.html.

¹¹ European Council on Refugees and Exiles, "Dublin: Bulgaria", Asylum Information Database (available from <http://asylumineurope.org/reports/country/bulgaria/asylum-procedure/procedures/dublin>); European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 18 to 29 October 2010"; report by Nils Muižnieks, the Council of Europe Commissioner for Human Rights, following his visit to Bulgaria from 9 to 11 February 2015; ProAsyl, "Humiliated, ill-treated and without protection: refugees and asylum seekers in Bulgaria" (2015); Bulgarian Helsinki Committee, *Human Rights in Bulgaria in 2015: Annual Report of the Bulgarian Helsinki Committee* (April 2016); European Council on Refugees and Exiles, "Country report Bulgaria", Asylum Information Database (available from www.asylumineurope.org/reports/country/bulgaria); Amnesty International, "Report 2015/16: Bulgaria", 24 February 2016 (available from www.refworld.org/docid/56d05b6ee.html); and Human Rights Watch, "Bulgaria: pushbacks, abuse at borders", 20 January 2016 (available from www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders).

¹² The initial submission includes no information on the reasons for the appeal or the grounds invoked in it. In its submissions on admissibility of 14 April 2014, the State party does summarily provide such information. In addition to circumstances invoked in the initial communication before the Committee, the authors "would have been pushed around by police officers as a result of which one of the children had a broken leg. One child probably suffered from cancer." No further information was provided by the State party or the authors on those two points. The State party's submissions of 14 February 2014 only state that, according to the letter of the head physician of the Department for Child and Youth Health at Innsbruck University Hospital, the thalassaemia of one of the children was "not a disease but (merely) a thalassaemia minor with a Mentzer index of <13, so that there was no need for a further examination and a blood sample".

¹³ The authors also refer to *M.S.S v. Belgium and Greece*, in which, in their contention, the European Court of Human Rights found that inappropriate reception conditions and serious shortcomings in asylum procedures can amount to inhuman and degrading treatment.

4.2 Moreover, the State party notes that the Austrian Federal Office for Immigration and Asylum Procedure Act stipulates that an appeal against a decision rejecting an asylum application and providing for a measure to terminate the applicant's stay only has suspensive effect if expressly granted by the Federal Administrative Court. Such an effect may only be granted if it is to be assumed that removal would entail a real risk of a violation of articles 2, 3 or 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or of Protocols No. 6 and No. 13 to that Convention or that it would entail a serious threat to the person's life or integrity as a civil person due to arbitrary violence in situations of an international or national conflict. Appeals against the decisions of the Federal Administrative Court can be filed with the Supreme Administrative Court. There is also the possibility of appealing to the Constitutional Court on the grounds of an alleged violation of constitutionally guaranteed rights. Appeals before the Supreme Administrative Court and the Constitutional Court may be supplemented by a request for suspensive effect to prevent removal.

4.3 The State party also refers to Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, which intends to ensure that applicants have a dignified standard of living that is comparable in all States members of the European Union (Reception Conditions Directive). The Reception Conditions Directive aims to ensure full respect for human dignity, having particular regard for persons with special needs and the best interest of the child. It contains minimum standards for all States members of the European Union regarding freedom of movement, access to necessary medical treatment, the labour market and education, adequate and humane accommodation, sufficient food and examination and consideration of special needs.

4.4 The State party further submits that the communication is inadmissible because the authors did not exhaust the available domestic remedies. The authors filed the communication while the decision of the Federal Administrative Court was still pending. The State party recalls that the decisions of the Court can be challenged both before the Supreme Administrative Court and before the Constitutional Court, and that authors can request for such procedures to be accorded suspensive effect. The State party claims that these remedies are effective also after a Dublin Regulation transfer has been carried out because the Regulation obliges member States to take an applicant back immediately in case the proceedings lead to an outcome favourable to the applicant. The State party argues that removal under the Dublin Regulation therefore does not cause irreparable harm. The State party mentions that, according to the jurisprudence of the European Court of Human Rights, international borders are not in and of themselves an obstacle to the exhaustion of domestic remedies.

4.5 The State party submits that the communication is inadmissible also because it is insufficiently substantiated.

4.6 In that regard, the State party argues that the Federal Office for Immigration and Asylum and the Federal Administrative Court examined the authors' asylum claim carefully and comprehensively. Both considered in detail the general situation faced by asylum seekers in Bulgaria and held that the authors' health conditions did not preclude their transfer to Bulgaria. In light of the authors' submissions, their personal circumstances, including their health conditions, and the situation in Bulgaria at the time, the Federal Office for Immigration and Asylum and the Federal Administrative Court concluded that the authors' removal to Bulgaria did not carry a risk that their human rights would be violated.

4.7 The State party observes that, in its dismissal of the appeal dated 8 March 2017, the Federal Administrative Court concluded that the authors had not substantiated their claim of human rights violations upon return to Bulgaria. The Court acknowledged that criticism of the Bulgarian asylum and reception system had increased at the beginning of 2014 but also noted that UNHCR had since lifted its call for a general suspension of Dublin Regulation transfers to Bulgaria. The Court observed that asylum and reception conditions in Bulgaria needed to be improved and that the authors, as a family with several small children, were vulnerable, but that they had access to asylum proceedings and sufficient care. Furthermore, the Bulgarian authorities still had to decide on the authors' asylum

applications. The Court also noted that Bulgarian security forces ensure the maintenance of public peace, order and security, and that the authors would have the security of returning in cooperation with the public authorities. The Court also noted that the authors had submitted asylum applications in three different States members of the European Union within three months but had not awaited the outcome of the proceedings in either Bulgaria or Hungary. Moreover, the Court found that the imposition of restrictions on the freedom of asylum seekers in Bulgaria could not in and of itself constitute a human rights violation.

4.8 Furthermore, the State party notes that Bulgaria has undertaken to comply with the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the Reception Conditions Directive and other regional and international human rights instruments. The State party argues that there is currently no UNHCR recommendation not to carry out transfers to Bulgaria under the Dublin Regulation. Moreover, a special support plan for Bulgaria was developed by the European Asylum Support Office in December 2014.

4.9 The State party observes that it is unaware of any decision by the European Court of Human Rights to the effect that asylum seekers are treated inadequately in Bulgaria. The State party refers to a case brought against Austria before the Court concerning a Dublin Regulation transfer to Bulgaria. In a case similar to the present one, the applicants were a family with a minor daughter and elderly and sick people. Austria obtained assurances from Bulgaria that the domestic authorities would accommodate the authors in accordance with their family needs and provide them with adequate care. The Court struck the case off its list.

4.10 The State party refers to the Committee's views in *R.A.A. and Z.M. v. Denmark*, in which the Committee concluded that the execution of a Dublin Regulation transfer to Bulgaria of a couple with a small child would amount to a violation of article 7 of the Covenant.¹⁴ However, the present case differs significantly from *R.A.A. and Z.M. v. Denmark* in that the latter was filed in 2014, when conditions in the Bulgarian asylum and reception system were much worse than presently, the authors R.A.A. and Z.M. were recognized refugees and particularly vulnerable because they had a baby and the husband suffered from a heart disease requiring urgent medical treatment and Denmark had not examined whether there was a real risk of ill-treatment.

4.11 The State party notes that its authorities take every interim measure request by an international court or treaty body as an opportunity to re-examine the case in question. The authorities undertake medical examinations to determine the ability of applicants to undergo detention and to fly, they continue to monitor health conditions during detention and they take into account the findings of medical specialists, experts and therapists prior to the scheduled flight in order to guarantee continuous medical treatment.

4.12 The State party also notes that the authors used at least three different identities in Europe and were unable to substantiate their names, dates of birth and nationalities.

4.13 On 20 April 2017, the State party provided a copy of the decision by the Federal Administrative Court dated 8 March 2017.

State party's observations on the merits

5.1 On 14 August 2017, the State party provided its observations on the merits. It recalls that the Austrian authorities were unable to establish the authors' identities and nationalities due to their contradictory statements. The Federal Office for Immigration and Asylum and the Federal Administrative Court rejected the authors' asylum applications because under the Dublin Regulation Bulgaria was responsible for examining their claim. Furthermore, the State party maintains that, should they be removed, the authors would not be exposed to a real risk of a violation of article 3 of the European Convention on Human Rights or article 4 of the Charter of Fundamental Rights of the European Union, which, in the State party's submission, are almost identical to article 7 of the Covenant.

¹⁴ *R.A.A. and Z.M. v. Denmark* (CCPR/C/118/D/2608/2015).

5.2 The State party refers to article 3 (2) of the Dublin Regulation, which provides that a State member of the European Union becomes responsible for the examination of an asylum claim where it is impossible to transfer an applicant to the member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for authors in that member State, resulting in a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter of Fundamental Rights of the European Union. The State party recalls that a member State may decide to examine an asylum application, even if not required to by the Dublin Regulation, including on the basis of the non-refoulement obligation. Furthermore, the jurisprudence of the Constitutional Court and the Supreme Administrative Court obliges the Austrian authorities to consider articles 3 and 8 of the European Convention on Human Rights in decisions on the removal of asylum seekers under the Dublin Regulation.

5.3 The State party observes that the Bulgarian authorities discontinued the authors' asylum proceedings upon their own request and that the appeals of the mother and the children against that decision were also rejected. The State party argues that it is unclear whether the authors still resided in Bulgaria and whether they wished to pursue their communication, and that the communication should be rejected if the authors had returned to their country of origin.

5.4 Concerning the authors' claim of a violation of article 7 of the Covenant, the State party recalls the Committee's general comment No. 20 (1992) on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, paragraph 20 of which provides that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. The State party further recalls that the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant provides that the article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails 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, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The State party also submits that "a real risk" entails that the risk must be the necessary and foreseeable consequence of the removal.¹⁵

5.5 The State party argues that the Austrian Federal Office for Immigration and Asylum and the Federal Administrative Court carefully and thoroughly examined the authors' personal circumstances, including their health, the alleged ill-treatment by the Bulgarian police, including the use of dogs,¹⁶ and the best interest of the children. They also conducted an in-depth examination of the general situation of asylum seekers in Bulgaria. Both the Office and the Court took into consideration reports of non-governmental organizations, UNHCR statements and reports of the Austrian liaison officer of the Federal Ministry of the Interior on the treatment of asylum seekers and the needs of returnees under the Dublin Regulation. Neither the Office nor the Court determined that there was a real risk of torture or cruel, inhuman or degrading treatment. The Austrian authorities provided reasons as to why they could not accept the authors' claims regarding threats by Bulgarian security forces¹⁷ and made sure that they were able to travel without medical supervision. Moreover, acting in compliance with the Dublin Regulation, the Austrian authorities shared the authors' health data with Bulgaria.

¹⁵ *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.6.

¹⁶ The initial communication does not claim that the Bulgarian authorities used police dogs. No other information has been provided on this by either of the parties.

¹⁷ The State party does not clearly state whether it means that the Austrian authorities found the authors' account of threats by Bulgarian security forces not credible or whether they disagreed with the claim that the authors ran the risk of suffering again from such threats upon return. The State party also does not explain what its reasons were for not accepting the authors' claim.

5.6 The State party reiterates that UNHCR no longer recommends not to carry out any Dublin Regulation transfers to Bulgaria and that a special support plan for Bulgaria has been developed by the European Asylum Support Office. Furthermore, the European Court of Human Rights has so far not issued decisions giving rise to concerns that asylum seekers are treated or cared for inadequately in Bulgaria. The Court's conclusion in *M.S.S. v. Belgium and Greece* that a State member of the European Union should not remove individuals to a member State where deficiencies in the asylum procedure and reception conditions would result in a real risk of inhuman and degrading treatment does not apply in the present case, as systemic deficiencies in procedures and conditions do not exist in Bulgaria and there are no individual grounds for reaching such a conclusion.

5.7 The State party refers to the reception conditions of the authors following their return to Bulgaria as described in the report of 31 March 2017 by the Bulgarian State Agency for Refugees with the Council of Ministers. The Agency reports that the Bulgarian authorities accommodated the authors in the refugee centre of Vrazhdebna-Sofia and that they received care in line with the Reception Conditions Directive. The authors were given a warm meal three times per day and had access to the Bulgarian health-care system, including psychological treatment. The report also notes that some of the authors had already made use of medical care. It adds that, while at the refugee centre of Vrazhdebna-Sofia, the father fell down in the bathroom and "probably" broke his leg. He was immediately transferred to the Pirogov Emergency Hospital in Sofia, where he refused further treatment, explaining that he wished to return to Iraq and continue his treatment there. The State party provides a copy of a declaration attributed to the father, dated 30 March 2017, stating that he had refused further treatment of his knee in the Pirogov Emergency Hospital because he did not know who would pay for it, that his only problem was his knee and that the living conditions and the atmosphere in the refugee centre were "good and pleasant".¹⁸

5.8 As for the authors' claim under article 2 (3) (a) of the Covenant, the State party submits that the authors have not explained how their rights under that article have been violated. The State party specifies that its domestic legal framework requires the execution of a removal order to be delayed until the statutory time limit for filing an appeal has passed. If the conditions for granting suspensive effect to the appeal are met and if such effect is not granted within one week, the asylum seeker can request the Supreme Administrative Court to fix an adequate time limit for taking such a decision. The Constitutional Court concurs that the appellate courts may decide on a case-by-case basis whether to grant suspensive effect to the appeal as long as the removal is suspended until the decision has been made.

5.9 The State party underscores that, in Austria, independent judicial authorities decide on requests for suspensive effect within very short time limits upon careful scrutiny of the documents submitted to them by applicants. Austrian law requires decision-making authorities to examine whether the execution of a removal order would violate the non-refoulement principle.

5.10 The State party observes that appellants to a decision of the Federal Administrative Court can appeal to the Supreme Administrative Court and the Constitutional Court and that the authors therefore had effective legal remedies against the refusal of their asylum applications. The authors did appeal to the Constitutional Court but not to the Supreme Administrative Court.¹⁹

Authors' comments on the State party's observations

6.1 In their comments of 24 October 2017, the authors note that in June 2017 the Austrian Constitutional Court had annulled a decision by the Federal Administrative Court on the transfer of a mother with two minor children to Bulgaria because the Federal Administrative Court had not acknowledged that the housing situation in Bulgaria had deteriorated to the point of being unsatisfactory. The judgment notes that the UNHCR

¹⁸ The father's declaration, which was provided in German only, reads: "die Lebensbedingungen und die Atmosphäre im Zentrum sind gut und angenehm. Das einzige Problem ist, dass ich mein Bein gebrochen habe".

¹⁹ See footnote 6 above.

observation of April 2014 on improvements in Bulgarian asylum procedures had been followed by a deterioration of accommodation conditions in 2015.

6.2 The authors argue that, in their case, the Federal Administrative Court had come to essentially identical findings. They maintain that, following its judgment of June 2017, the Constitutional Court acted inconsistently by finding, three months later, that the authors' appeal lacked sufficient prospect of success. In their case before the Constitutional Court, the authors had referred to a UNHCR report of 29 November 2016 citing the deterioration in the reception conditions in Bulgaria. The authors state their intention of filing an appeal before the Supreme Administrative Court.²⁰

6.3 Following their removal to Bulgaria, the father fell down the stairs and had to undergo surgery. He suffered from a postoperative inflammation and needed another operation but it was unclear who was responsible for the costs of the treatment. The mother too needed a medical examination after she had tripped and fallen but, more than a week after the incident, she had still not received treatment due to a lack of interpreters.

6.4 The authors note that after returning to Bulgaria they lived in collective accommodation near Sofia. They submit that they lived in a very remote location, that the father was unable to accompany the children to school because he depended on crutches and that the children were consequently not attending school. The mother was unable to look after the children because of her depression. The family was living in a single room that could not be locked. They initially received a monthly support payment from the State of €14 per person, but those payments ceased. The authors further submit that they were not informed sufficiently of the current state of asylum procedures in Bulgaria due to a lack of interpreters.

6.5 The authors refer to reports on the situation of asylum procedures and reception conditions in Bulgaria.²¹ They observe that several States members of the European Union stopped carrying out Dublin Regulation transfers to Bulgaria between January and November 2016. The reports confirm serious malfunctions in the Bulgarian asylum system, including long detention, overcrowded facilities, poor quality of sanitary and living conditions, as well as a lack of support besides accommodation, nutrition and basic medical services, including the cancellation of monthly financial allowances from 1 February 2015.

6.6 The authors note that in December 2016 the Committee concluded in *R.A.A. and Z.M. v. Denmark* that the removal of a Syrian family to Bulgaria would amount to a violation of article 7 of the Covenant. The authors also submit that Austria and Hungary removed vulnerable Syrian-Kurdish and Afghan authors to Bulgaria in 2017 despite interim measure requests by the Committee. The authors refer to decisions by courts in Austria, Belgium, France, Germany, Italy and the Netherlands, from 2016 and 2017, finding that the transfer of individuals to Bulgaria under the Dublin Regulation would entail a risk of inhuman or degrading treatment and observing the existence of systematic deficiencies in the Bulgarian asylum system.

State party's additional observations

7. On 29 May 2018, the State party added that in its decision of 21 September 2017 the Constitutional Court had concluded that the Federal Administrative Court had not interpreted Austrian law in a manner contrary to human rights law nor committed any gross procedural errors constituting a violation of human rights law. The State party observes that the Supreme Administrative Court had, on 20 February 2018, rejected the father's appeal

²⁰ Ibid.

²¹ Iliana Savova, "Country report: Bulgaria – 2017 update", Asylum Information Database (available from www.asylumineurope.org/reports/country/bulgaria); UNHCR, the United Nations Children's Fund and the International Organization for Migration, "Refugee and migrant children in Europe: accompanied, unaccompanied and separated", June 2017 (available from www.unicef.org/eca/sites/unicef.org.eca/files/eca-dataproduct-Infographic_Children_and_UASC_2017_11July.pdf); and Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, "New threats to the rule of law in Council of Europe member States: selected examples", 25 September 2017.

on the grounds that he had failed to refute the presumption that he could be safely transferred to another State member of the European Union. The State party reiterates that several independent Austrian courts had thoroughly and carefully examined the authors' claims but could not determine a real risk of a human rights violation. The State party repeats that the communication should be found inadmissible for non-exhaustion of domestic remedies and for insufficient substantiation.

Authors' additional submission

8.1 In their additional comments of 31 August 2018, the authors contest the State party's argument that they had not exhausted domestic remedies. They submit that, while the State party refers to the possibility of appeal before the Constitutional Court and the Supreme Administrative Court, the only remedy available to them at the time of the submission of the present communication was the pending appeal before the Federal Administrative Court. As that appeal had not been granted suspensive effect, the authors were under constant threat of deportation without any further assessment of whether their removal could result in a violation of article 7 of the Covenant. The authors were indeed removed to Bulgaria on 16 March 2017. At the time of the submission they therefore had no remedy available that could have prevented their removal to Bulgaria. The authors recall that the Committee found the communication relative to the case *Simalae Toala et al. v. New Zealand* admissible because it was not apparent to the Committee that any remedies that might still be available to the authors would be effective to prevent their deportation.²² The authors underscore that the Committee has made clear on numerous occasions, including in country reports, that effective remedies against expulsion must have suspensive effect,²³ and that the Committee against Torture²⁴ and the European Court of Human Rights²⁵ have expressed similar views.

8.2 The authors submit that, with the decision of 20 February 2018 by the Supreme Administrative Court, the authors have now exhausted the available domestic remedies. The authors argue that, in another case of a family with minor children, the Supreme Administrative Court concluded that the appellate court in question had failed to assess the real risk of inhuman or degrading treatment that the appellants would face as a vulnerable family upon their removal to Bulgaria. The authors claim that there is no discernible reason why the Supreme Administrative Court ruled differently in their case only months later.

8.3 The authors state that, after the father suffered a severe knee fracture and initially did not receive treatment in Bulgaria, he is still, while now in Iraq, in pain and having difficulties walking. He has been diagnosed with an early stage of bladder cancer. A doctor in Iraq has informed him that the percentage of successful treatment is low and the costs are high. The mother is still suffering from severe depression due to her experiences during their journey from Iraq to Turkey, Bulgaria, Hungary and Austria. She has had a miscarriage, which she attributes to depression, hunger and psychological effects. She is receiving psychological treatment in Iraq. Four of the five children, including the youngest child, suffer from thalassaemia. The youngest daughter misses her classmates and friends in Austria and is isolating herself from the community in which they live in Iraq. The three children of school age do not have access to education because they missed the enrolment deadline but will be able to enrol next year. The authors claim that their current situation shows their ordeal since the State party removed them to Bulgaria and its detrimental effect on all of the authors' physical and psychological health.

8.4 As for their financial situation, the authors state that they currently rely on the help of relatives and friends. There are no jobs that would suit the father's current physical condition. The authors are not receiving any government support.

²² *Simalae Toala et al. v. New Zealand* (CCPR/C/70/D/675/1995), para. 6.4.

²³ See, for example, the Committee's concluding observations on Lithuania (CCPR/CO/80/LTU, para. 7) and Uzbekistan (CCPR/CO/83/UZB, para. 12).

²⁴ Committee against Torture, *Arkauz Arana v. France* (CAT/C/23/D/63/1997).

²⁵ European Court of Human Rights, *Sultani v. France* (application No. 45223/05), judgment of 20 September 2007.

8.5 The authors recall that in *X v. Denmark*, the Committee considered that States parties should give sufficient weight to the real and personal risk that individuals might face following their removal.²⁶ The authors also recall *Y.A.A. and F.H.M. v. Denmark*, in which the Committee observed that the experiences of the removed person in the first country of asylum under the Dublin Regulation may underscore special risks that they are likely to face and may thus render their return to the first country of asylum a particularly traumatic experience.²⁷ The authors note that, in *Hashi v. Denmark*, the Committee considered that it had been incumbent upon the State party to undertake an individualized assessment of the risk that the authors would face in Italy, rather than rely on general assumptions and reports.²⁸ The author, in that case, had claimed difficulties in accessing sufficient food and medical care in Italy, to have been undernourished, to have fainted often and to almost have had a miscarriage.²⁹

8.6 The authors submit that their case is similar to that of the authors in *Y.A.A. and F.H.M. v. Denmark* and *Hashi v. Denmark* in that they too experienced inhuman treatment in the country of first asylum and serious harm after their removal from Austria. They claim to have been extremely vulnerable and maintain that the State party did not examine their claim that they would face unbearable living conditions in Bulgaria.

Issues and proceedings before the Committee

State party's failure to respect the Committee's request for interim measures pursuant to rule 94 of its rules of procedure

9.1 The Committee notes that the adoption of interim measures pursuant to rule 94 of its rules of procedure, in accordance with article 1 of the Optional Protocol, is vital to the role entrusted to the Committee under that article. Failure to respect the interim measure requested by the Committee with a view to preventing irreparable harm undermines the protection of the rights enshrined in the Covenant.

9.2 As indicated in paragraph 19 of the Committee's general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol, failure to implement interim measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol. The Committee is therefore of the view that, by failing to respect the request for interim measures transmitted to the State party on 14 February 2017 and reiterated on 15 March 2017, the State party failed in its obligations under article 1 of the Optional Protocol.

Consideration of admissibility

10.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

10.2 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 procedure of international investigation or settlement.

10.3 The Committee notes the State party's argument that the authors did not exhaust domestic remedies, as they filed the present communication while their appeal against the rejection of their asylum applications was still pending before the Federal Administrative Court, after which the authors could have appealed to both the Supreme Administrative Court and the Constitutional Court. The Committee further notes the State party's argument that such remedies must be considered effective because, while an appeal against a first-instance rejection of an asylum application does not automatically suspend removal under the Dublin Regulation, the State party would have been under the obligation to immediately take back the authors in case of an outcome favourable to them.

²⁶ *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

²⁷ *Y.A.A. and F.H.M.* (CCPR/C/119/D/2681/2015), para. 7.7.

²⁸ *Hashi v. Denmark* (CCPR/C/120/D/2470/2014), para. 9.10.

²⁹ *Ibid.*

10.4 Nonetheless, the Committee considers that, in cases where a remedy said to be available to the victim cannot shield that person from an event that the victim is seeking to prevent and that is alleged to result in irreparable harm, such a remedy is by definition ineffective. In the present case, the authors lodged on 25 January 2017 an appeal before the Federal Administrative Court, which did not grant suspensive effect to their application and later dismissed the appeal as unfounded on 8 March 2017. The father appealed against the decision of the Federal Administrative Court but the Supreme Administrative Court rejected that appeal on 20 February 2018. The authors were in the meantime removed to Bulgaria on 16 March 2017. On 26 April 2017, the authors lodged an appeal before the Constitutional Court, which granted suspensive effect to the appeal. However, the authors were not readmitted into Austria pending the decision of the Constitutional Court, which was delivered only on 21 September 2017, finally rejecting the authors' appeal. The Committee is thus not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

10.5 The Committee further takes note of the State party's argument that the communication is inadmissible due to insufficient substantiation. The Committee notes, with regard to the authors' claim under article 7 of the Covenant, that the State party submits that the Austrian authorities examined the authors' asylum applications carefully and comprehensively, including their submissions, personal circumstances, health conditions and the situation in Bulgaria at the time, and concluded that their removal did not carry a risk that their human rights would be violated. The Committee also notes the State party's arguments that Bulgaria has undertaken to comply with the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the Reception Conditions Directive and other regional and international human rights instruments. The Committee further notes the State party's contention that UNHCR has lifted its recommendation not to carry out transfers to Bulgaria under the Dublin Regulation.

10.6 The Committee notes that the authors argue that, during their first stay in Bulgaria, the police threatened them with weapons, they received inadequate nutrition, the mother did not obtain treatment for her post-traumatic stress disorder and depression, they were forced to apply for asylum and they were made to sleep on the floor, which the father was forced to clean. The Committee notes that the authors also refer to a number of reports detailing the state of asylum procedures and reception conditions in Bulgaria.

10.7 As for the authors' claim that the Bulgarian authorities threatened them with weapons, the Committee notes that the authors have not provided more information to substantiate how that contributes to their claim that their removal to Bulgaria would amount to a violation of article 7 of the Covenant. The Committee further notes that, while the authors contend that the mother and the children did not receive medical treatment in Bulgaria, they do not describe whether they took any steps to obtain access to such care. As for the authors' submissions concerning their second stay in Bulgaria and their current plight in Iraq, the Committee will, in principle, not consider events following a removal where it is alleged that the removal constituted a violation of the Covenant at that point in time, unless those events shed light on the situation prevailing at the relevant time. In the light of the submissions on all of the authors' circumstances in Bulgaria, and noting that while reception conditions in Bulgaria at the time of the authors' removal were subject to concerns, UNHCR had lifted its recommendation not to remove asylum seekers to Bulgaria, the Committee considers that the authors' claims under article 7 of the Covenant are insufficiently substantiated for the purposes of admissibility. Accordingly, the Committee concludes that the communication is inadmissible under article 2 of the Optional Protocol.

11. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and the authors of the communication.

Annex

Individual opinion of Committee member Gentian Zyberi (dissenting)

General remarks

1. I cannot agree with the Committee's finding of inadmissibility in the present case. The reason for this is based on the threefold failure of the Austrian authorities in processing the case, namely: first, the failure to adequately take into account the health of the mother; second, the failure to adequately consider the best interests of the five minor children; and third, the failure to comply with the interim measures indicated by the Committee on 14 February 2017, reiterated on 15 March 2017, and the 2 May 2017 decision of the Constitutional Court granting suspensive effect to the authors' appeal (para. 2.10). My assessment is based on what was known to the Austrian authorities at the time the authors were in Austrian territory, before being removed to Bulgaria. The treatment they received once removed from Austria confirms their claims under article 7 of the Covenant.

2. The authors have raised several claims related to article 7, including about the lack of access to adequate health care for the mother and the father, due to a lack of clarity as to who would have to cover the expenses for treating the father's leg (para. 6.3), as well as the lack of psychotraumatological treatment for the mother (paras. 2.4 and 3.2). The children were unable to attend school (para. 6.4), as their parents could not accompany them due to their health conditions. The family of seven was living in a single room that could not be locked (para. 6.4). Finally, they also have pointed out that the limited financial support they received from the Bulgarian authorities had ceased (para. 6.4).

3. The lamentable conditions for asylum seekers in Bulgaria are reflected in many documents and reports, which are referred to by the complainants. In that regard, it must be noted that the Dublin Regulation allows a State to take charge of a case and that, while having lifted its recommendation not to carry out transfers to Bulgaria under the Dublin Regulation, the Office of the United Nations High Commissioner for Refugees (UNHCR) had urged particular vigilance with respect to the transfer of asylum seekers with specific needs and vulnerabilities.¹ The general situation of this family and their special vulnerability should have prompted the Austrian authorities to handle the case themselves, instead of removing the authors to Bulgaria.

Health of the mother

4. From the information on record, it does not appear that the Austrian authorities have conducted an adequate assessment of the authors' situation. In a clinical report from the Innsbruck University Hospital dated 18 January 2017 it is mentioned that the mother urgently required psychotraumatological treatment and that deportation would be irresponsible from a medical perspective (para. 2.4). Despite that clinical report, on 10 February 2017 the Federal Office for Immigration and Asylum requested from the chief physician of the Department on Medical and Health Issues of the Federal Ministry of the Interior an opinion on whether the authors were able to travel. On 13 February 2017, the chief physician concluded that, from a medical perspective, the authors' removal could be executed (para. 2.7). About a month later, on 16 March 2017, the State party removed the authors to Bulgaria. The clinical report from the Innsbruck University Hospital, which had deemed such deportation irresponsible from a medical perspective, seems to not have been given any consideration.

¹ UNHCR, "Bulgaria as a country of asylum: UNHCR observations on the current situation of asylum in Bulgaria", April 2014, especially p. 17. Available from www.refworld.org/docid/534cd85b4.html.

Best interests of the children

5. The authors' family includes five minor children: twins aged 13, one 10-year-old, one 2-year-old and one 1-year-old. The authors claim that they did not receive adequate nutrition or health care during their detention in Bulgaria and that the two youngest children, aged 1 and 2, were fed bread soaked in water instead of milk (para. 2.2). Four of the five children were suffering from thalassaemia (para. 2.7 and footnote 8). The Austrian authorities refer to Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, which, in its article 23, pays specific attention to and protection for minors. That article provides that States members of the European Union shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development. Given the four children's health conditions, in other words the fact that they were suffering from thalassaemia, the inadequate living conditions in the Bulgarian reception centre (a family of seven living in one unlocked room) and the lack of access to schooling and leisure activities, the Austrian authorities failed to adequately take into account the best interests of the five minor children.

Failure to follow the interim measures and the suspensive effect of the Constitutional Court judgment

6. The Austrian authorities did not comply with the interim measures indicated by the Committee on 14 February 2017, reiterated on 15 March 2017, and the 2 May 2017 decision of the Constitutional Court granting suspensive effect to the authors' appeal (para. 2.10).

Concluding remarks

7. Although the Austrian authorities try to distinguish this case from *R.A.A. and Z.M. v. Denmark* (para. 4.10), it is difficult to see how the untreated severe condition of the mother, who suffered from post-traumatic stress disorder, and ensuring the best interests of the five minor children make this a different case. For the reasons explained above, in my opinion the removal of the authors to Bulgaria amounted to a violation of article 7 of the Covenant.
