



International Covenant on Civil and Political Rights

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ADVANCE UNEDITED VERSION

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol concerning Communication No. 2965/2017**

<i>Communication submitted by:</i>	M.R. and L.J. (represented by counsel, Lennar Binder)
<i>Alleged victims:</i>	The authors and their children, M.R., T.R., T.L.R. and H.R.
<i>State party:</i>	Austria
<i>Date of communication:</i>	27 February 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and 94 of the Committee's rules of procedure, transmitted to the State party on 1 March 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	24 March 2022
<i>Subject matter:</i>	Deportation to Bulgaria
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Torture; cruel, inhuman or degrading treatment or punishment; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3) and 7
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The authors of the communication are Mr. M.R. and Ms. L.J., nationals of Iraq born in 1984 and 1983, respectively. They are submitting the communication on their own behalf and on behalf of their minor children, M.R., T.R., T.L.R. and H.R., born in 2005, 2006, 2009 and 2010, respectively. They claim that by deporting them to Bulgaria the State party would violate their and their children's rights under article 7, read alone and in conjunction with article 2 (3) 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 1 March 2017, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, requested the

* Adopted by the Committee at its 134th session (28 February – 25 March 2022).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

State party not to deport the authors to Bulgaria while their case was under consideration by the Committee.¹

The facts as presented by the authors

2.1 The authors fled from Iraq at an unspecified date in 2016 as they feared persecution in that country and they entered Bulgaria in May 2016. They claim that, upon entry in Bulgaria, they and their children were beaten with sticks by members of the Bulgarian police in order to force them into cooperating with the police and provide their fingerprints. They also claim that the accommodation in Bulgaria was unsuitable for small children.

2.2 Having departed Bulgaria the authors applied for asylum in Austria. The application was denied by the Federal Administrative Court on 1 February 2017 under the Dublin III Regulation. The authors note that, under domestic law, an appeal of a decision by the Federal Administrative Court does not have automatic suspensive effect, but has to be granted by the Supreme Administrative Court or the Constitutional Court. They note that at the time of the submission of their complaint, their application for legal aid necessary to bring their case before the Supreme Administrative Court or the Constitutional Court was pending but argued that as their deportation was imminent no effective remedy was available.

The complaint

3.1 The authors claim that their deportation to Bulgaria would expose them to a real risk of treatment contrary to article 7 of the Covenant as the poor reception conditions in Bulgaria would amount to inhuman and degrading treatment. The authors refer to a country report published on the Asylum Information Database (AIDA) according to which it is noted that UNHCR has continued to raise concerns with respect to inadequate reception conditions in Bulgaria, the lack of systematic identification of vulnerable asylum seekers and of a system to respond to their needs, the quality of decisions on asylum applications and procedures and the absence of an integration program for those who have been granted protection status.² The authors argue that the conditions in the reception centres and detention facilities in Bulgaria amount to ill-treatment. They refer to reports by the European Committee for the Prevention of Torture³ and the Council of Europe Commissioner for Human Rights⁴ in which concerns were raised about poor hygienic conditions, overcrowding, poor nutrition, no provision of education for children, substandard material conditions as well as a lack of medical care, interpreters and information on the asylum procedure in the reception centres and detention facilities in Bulgaria. It was further noted that complaints of abusive and violent treatment by guards had been recorded. The authors further argue that there are no instruments in place in Bulgaria to identify vulnerable asylum-seekers, and even if a person would be identified as a vulnerable person, the reception system does not provide for special care or other measures of protection.

3.2 The authors further claim that asylum-seekers are regularly detained in Bulgaria and that there are systematic deficiencies in the asylum system. They refer to a country report according to which an asylum-seeker who is returned to Bulgaria under the Dublin III Regulation is likely to have their Bulgarian procedure terminated or a negative decision may have been served in absentia, which means that upon return transferred persons would be detained in one of the detention facilities in Bulgaria. Even if a person is not detained, in cases of Dublin transfers they are likely to have forfeited their right to accommodation.⁵

¹ The authors were transferred to Bulgaria on 28 February 2017.

² AIDA, Dublin, Bulgaria, 12 January 2016.

³ Council of Europe: Committee for the Prevention of Torture, 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 (CPT) from 18 to 29 October 2010, 15 March 2012, pp. 24-30.

⁴ Report by Niels Muiznieks, Council of Europe Commissioner for Human Rights, report on visit to Bulgaria 9-11 February 2015.

⁵ AIDA, Dublin, Bulgaria, 12 January 2017.

State party's observations on admissibility and the merits

4.1 On 28 April 2017, the State party submitted its observations on the admissibility of the communication. It submits that the communication should be found inadmissible for failure to exhaust domestic remedies and lack of sufficient substantiation of the authors' claims. The State party notes that the authors submitted their complaint and request for interim measures before the Committee on 27 February 2017. On 28 February 2017 they were transferred to Bulgaria. On the 1 March 2017, the Committee's request to not transfer the authors to Bulgaria was transmitted to the State party. The State party notes that, despite immediate action by its authorities, it was impossible for the State party to comply with the request for interim measures.

4.2 The State party informs that the authors applied for asylum in the State party on 20 August 2016. A EURODAC query showed that they had already lodged an application for asylum in Bulgaria on 27 July 2016. On 22 August 2016, the Federal Aliens and Asylum Office filed a request to transfer the authors to Bulgaria pursuant to the Dublin III Regulation, which Bulgaria accepted on 31 August 2016.

4.3 On 28 December 2016, the Federal Aliens and Asylum Office rejected the authors' application for asylum and it held that Bulgaria was responsible for examining their application under the Dublin III Regulation and it ordered their transfer to Bulgaria. On 12 January 2017, the authors appealed the decision to the Federal Administrative Court. The authors argued that the conditions for asylum-seekers in Bulgaria did not meet EU standards and that reception conditions regarding food, accommodation and treatment would be miserable. The Federal Court dismissed the appeal on 1 February 2017 as unfounded. The Court noted that an asylum-seeker is required to submit sufficiently concrete reasons as to why a transfer to another EU Member State would lead to a lack of protection against persecution, and in particular of a violation of article 3 of the European Convention on Human Rights. It noted that the authors had submitted that food and care would be insufficient in Bulgaria and that there would exist further risks, for example of child abductions. The Court found their statements to be imprecise and vague and it held that they had not substantiated a real risk of a violation of their rights enshrined in article 3 of the European Convention on Human Rights in case of a transfer to Bulgaria. The Court noted that following improvements regarding the registration of asylum-seekers in Bulgaria, the processing of asylum applications and the conditions in reception centres, UNHCR had concluded that a general suspension of transfers to Bulgaria was no longer justified, but that there might be reasons for abstaining from a transfer in the case of certain vulnerable persons. The Court further noted that no decision on the merits of the authors' asylum application in Bulgaria had been taken and that should the proceedings have been terminated following the authors' departure from Bulgaria, they would be able to submit an application for their case to be re-opened. It further noted that asylum applicants in Bulgaria were entitled to accommodation and care during the entire asylum proceedings and that a number of NGOs support applicants, who can turn to these organisations in case of problems. The Court further found that the authors had not asserted in sufficiently concrete terms systematic deficiencies in the asylum proceedings and reception conditions in Bulgaria nor any inhuman treatment suffered by them in Bulgaria within the meaning of article 3 of the European Convention. It found that their general allegation that a transfer to Bulgaria would violate their rights under article 3 of the Convention was far too vague and unsubstantiated to indicate a real risk of a fundamental rights violation. It further noted that the authors did not suffer from any serious health impairments, and that in any case, health care was guaranteed in Bulgaria. It also noted that no other risk elements had been submitted by the authors in their application for asylum in Austria.

4.4 The State party further submits that the communication is inadmissible because the authors did not exhaust available domestic remedies. It notes that, after having filed the communication with the Committee, the authors filed requests for legal aid before the Supreme Administrative Court and the Constitutional Court on 10 March 2017. Legal aid was granted by the Constitutional Court on 14 March 2017 and by the Supreme Administrative Court on 4 April 2017. The State party notes that at the time of the submission of its observations these appeals were still pending. It notes that a complaint against a ruling rejecting an application for international protection shall have suspensive effect only if

expressly granted by the Federal Administrative Court. Under Section 17 of the Federal Office for Migration and Asylum Procedural Act such a complaint shall be granted suspensive effect if the transfer of the asylum-seeker would entail a real risk of a violation of articles 2, 3 or 8 of the European Convention on Human Rights or Protocols no. 6 or no. 13 thereto, or if it would entail a serious threat to the person's life or integrity as a civilian due to arbitrary violence in situations of an international or national conflict. Pursuant to article 133 of the Federal Constitutional Law an appeal against decisions of the Federal Administrative Court can be filed within six weeks with the Supreme Administrative Court. Additionally, article 144 of the Federal Constitutional Law provides for the possibility to file a complaint with the Constitutional Court, challenging a decision by the Federal Administrative Court on the ground that it violates a fundamental right under the Constitution. Legal aid is available for both proceedings and a request for suspensive effect can be combined with complaints submitted before both instances. If a transfer decision is overturned on appeal after the applicant has been transferred, the Member State which carried out the transfer shall pursuant to article 29 (3) of the Dublin III Regulation promptly accept the person from the Member State to which they have been transferred. The State party submits that as the authors submitted the complaint before the Committee before filing appeals before the Supreme Administrative Court and the Constitutional Court, they have failed to exhaust available and effective remedies, especially taking into account that appeals before the Supreme Administrative Court and the Constitutional Court can be combined with requests for suspensive effect in order to prevent a possible transfer.

4.5 The State party further submits that in the present case the authors' claims have been thoroughly examined by the Federal Aliens and Asylum Office and the Federal Administrative Court. Both examined in detail the general situation faced by asylum-seekers in Bulgaria as well as the personal situation of the authors and found that their transfer to Bulgaria would not entail a real risk of a violation of their human rights. It further notes that the authors' account of events were contradictory during the examination of their applications. Initially, the authors did not mention any negative aspects of their stay in Bulgaria. Only in a subsequent interview, on 17 November 2016, did the husband assert that he had been ill-treated by Bulgarian police officers, forced to give fingerprints and that one of the children had been hit by a police officer. His wife on the other hand did not mention any of these alleged incidents when she was questioned on the same date, merely stating that she did not want to return to Bulgaria. The authors also provided contradicting statements as to their accommodation in Bulgaria with the husband stating that they had not been provided with any accommodation, while the wife stated that they had been accommodated in a camp. The State party further notes that the country reports referred to by the authors in their complaint are not up to date, and does not reflect the current situation in Bulgaria and it argues that in its decisions the State party authorities took into account country reports on the situation for asylum-seekers in Bulgaria by NGOs, the UNHCR, as well as reports by the Austrian liaison officer of the Federal Ministry of Interior.

4.6 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. 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 Member States 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.

4.7 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.⁶ However, it argues that 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.

4.8 On 31 August 2017, the State party submitted its observations on the merits of the communication. It provides further information on the domestic proceedings and notes that after the Supreme Administrative Court and the Constitutional Court granted legal aid to the authors, they filed complaints before both instances, which at the time of the submission of the observations were pending. It informs that suspensive effect was granted by the Supreme Administrative Court on 14 June 2017. The State party further notes that in their initial complaint, the authors had asserted that their request for legal aid to bring complaints before the Supreme Administrative Court and the Constitutional Court were pending at the time of the submission of their complaint before the Committee. The State party refutes this fact and notes that their requests for legal aid were filed on 10 March 2017. It reiterates its argument that the authors have therefore failed to exhaust domestic remedies.

4.9 As to the merits of the communication, the State party notes that the authors have not explained how their right to an effective remedy has been violated. It refers to its observations on the admissibility of the complaint and argues that its legal system offers multiple effective remedies against asylum decisions and removal orders. It further notes that as to the authors' claims under article 7, the authors refer to poor living conditions for asylum-seekers in Bulgaria and it argues that such a blanket statement does not constitute sufficient grounds for finding a violation under the Covenant. It refers to its submission on the admissibility of the complaint and reiterates its argument that the authors' claims have been thoroughly examined by the Federal Aliens and Asylum Office and the Federal Administrative Court.

Authors' comments on the State party's observations

5.1 On 14 May 2018, the authors submitted their comments on the State party's observations. They maintain that the communication is admissible.

5.2 The authors reiterate their argument that an appeal to the Supreme Administrative Court and the Constitutional Court are not effective remedies as they do not have automatic suspensive effect. They claim that the possibility to submit an application for suspensive effect before these entities does not make these remedies effective as "in practice, the granting of a suspensive effect, which is at the discretion of the authority, does not take place".

5.3 The authors note that, as to the domestic proceedings, the Supreme Administrative Court annulled the decision of the Federal Administrative Court on 30 August 2017. The authors and their children were however not returned to Austria and have moved to Turkey.

5.4 The authors refer to their initial complaint and reiterate their argument that their rights under article 7, read alone and in conjunction with article 2 (3) of the Covenant, have been violated.

Further submission by the State party

6. On 22 June 2018, the State party submitted further observations on the communication. It confirms that on 30 August 2017, the Supreme Administrative Court overturned the decision of the Federal Administrative Court of 1 February 2017 finding the conclusion "not comprehensible" ("nicht nachvollziehbar") and it referred the case back to the Federal Court, where proceedings, at the time of the submission, remained pending. In view of the decision of the Supreme Administrative Court, the Constitutional Court terminated the proceedings filed by the authors on 11 October 2017. The State party reiterates its argument, that given these findings by the domestic authorities the authors' claim have been subject to a careful and thorough examination by the domestic authorities.

⁶ *R.A.A. and Z.M. v. Denmark* (CCPR/C/118/D/2608/2015).

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 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.

7.3 The Committee notes the State party's submission that the communication is inadmissible for failure to exhaust available domestic remedies as the authors submitted the complaint before the Committee before filing appeals before the Supreme Administrative Court and the Constitutional Court, especially taking into account that appeals before both instances can be combined with requests for orders for suspensive effect. The Committee further notes the State party's argument that it was only after having filed their complaint before the Committee that the authors, on 10 March 2017, filed requests for legal aid before the Supreme Administrative Court and the Constitutional Court. The Committee also notes the authors' argument that appeals to the Supreme Administrative Court and the Constitutional Court would not constitute effective remedies as they do not have automatic suspensive effect.

7.4 The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no prospect of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.⁷

7.5 The Committee recalls its jurisprudence in *B.A. et. al. v. Austria*⁸ in which the Committee found that it was not precluded from examining that communication under article 5 (2) (b) of the Optional Protocol in a situation where the authors of that communication filed their complaint before the Committee 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 thus recalls that in cases where a remedy is said to be available to the victim but 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.⁹ In the present case, the Committee notes the State party's information that pursuant to article 133 of the Federal Constitutional Law an appeal against decisions of the Federal Administrative Court can be filed within six weeks with the Supreme Administrative Court. It further notes that the authors' appeal of the decision of the Federal Aliens and Asylum Office, rejecting their application for asylum, was upheld by the Federal Court by decision of 1 February 2017, and that the authors were transferred to Bulgaria on 28 February 2017, i.e. before the deadline for filing an appeal before the Supreme Administrative Court had expired. The Committee further notes that legal aid was granted to the authors by the Constitutional Court on 14 March 2017 and by the Supreme Administrative Court on 4 April 2017, that suspensive effect was granted by the Supreme Administrative Court on 14 June 2017 and that on 30 August 2017, the Supreme Administrative Court overturned the decision of the Federal Administrative Court and referred the case back to the Federal Court for re-examination. The Committee however notes that all of these proceedings took place after the authors had already been transferred to Bulgaria. The Committee therefore considers that it is not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

⁷ See, inter alia, *V.S v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3, *García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; and *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.

⁸ CCPR/C/127/D/2956/2017, paras. 10.3-10.4.

⁹ Ibid.

7.6 The Committee further takes note of the State party's argument that the communication is inadmissible due to insufficient substantiation. It notes the State party's argument that the authors' claims have been thoroughly examined by the Federal Aliens and Asylum Office and the Federal Administrative Court, which examined in detail the general situation faced by asylum-seekers in Bulgaria as well as the personal situation of the authors and found that their transfer to Bulgaria would not entail a real risk of a violation of their human rights. The Committee further notes the State party's argument that the migration authorities found the authors' account of events to be contradictory, imprecise and vague regarding the alleged ill-treatment they had been subjected to in Bulgaria and the access to accommodation available to them in Bulgaria. 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.

7.7 The Committee notes that the authors' claim that, upon entry in Bulgaria, they and their children were beaten with sticks by members of the Bulgarian police in order to force them into cooperating with the police and provide their fingerprints and their claim that the accommodation in Bulgaria is unsuitable for small children. The Committee notes that the authors also refer to a number of reports detailing the state of asylum procedures and reception conditions in Bulgaria.

7.8 Regarding the authors' claim that they were ill-treated by Bulgarian authorities, the Committee notes that the authors have not provided any information to substantiate it, and notes further that during the domestic proceedings the authors provided contradictory accounts as to the alleged incident. The Committee further notes the authors' argument that accommodation facilities in Bulgaria would be unsuitable for small children. However, the authors have not provided any information as to their accommodation or stay in Bulgaria upon arrival in that country, and the Committee notes the State party's information that the authors provided contradictory information to the State party migration authorities regarding the accommodation they received in Bulgaria. The Committee considers that the authors' allegations regarding the examination of their claims reflect their disagreement with the factual conclusions drawn by the State party authorities. The Committee notes, however, that the domestic authorities considered all the claims raised by the authors and it finds that the authors have not demonstrated that the assessment by and conclusions of the domestic authorities were clearly arbitrary or amounted to a manifest error or denial of justice. In the light of the submissions on all of the authors' circumstances in Bulgaria, and noting that UNHCR had lifted its recommendation not to remove asylum seekers to Bulgaria, the Committee therefore considers that the authors' claims under article 7, read alone and in conjunction with article 2 (3) 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.

8. The Committee therefore decides:

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