



## International Covenant on Civil and Political Rights

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### 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 Ms. 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 issues:</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)

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

\*\* The following members of the Committee participated in the examination of the present 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, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

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

1.1 The author of the communication dated 22 December 2016, is Mr. Shafaq Baharuddin, an Afghan citizen, 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 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) of the International Covenant on Civil and Political Rights (the Covenant). The author is represented by the Hungarian Helsinki Committee (Ms. Barcza-Szabó Zita Borbála).

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 presented by the author**

2.1 The author is an Afghan Sunnite Muslim from Kapisa, Afghanistan, where he was working 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 life threatening letters from one of the Taliban leaders. After this, 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. The author fled Afghanistan in February 2016 in fear of repeated attacks against him.

2.2 On 20 April 2016, he illegally entered Bulgaria on foot with a group of around 20 persons. He was apprehended by the Bulgarian police and severely beaten by truncheons. His valuable belongings and passport were seized by the police. He was taken to a police station where the Police registered his fingerprints. He did not apply for asylum at that 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.

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<sup>1</sup> Regulation No. 604/2013/EU of the European Parliament and of the Council on 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).

<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.

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 EU Member States.<sup>5</sup>

2.5 Because of the dire conditions at the refugee camp, the author left the 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 (OIN) on the same date, stating that he entered the EU through Bulgaria. Accordingly, the OIN requested Bulgaria to accept its responsibility under the Dublin III Regulation (art. 18 (1) (b)). The author only had one short interview before the above 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 in his case. The author challenged the decision but did not have legal assistance in doing so.

2.6 The author has family in Budapest, two aunts having refugee status, an uncle and his wife both having subsidiary protection, and 15 cousins. Three of his cousins were already granted Hungarian citizenship. He is currently staying with family in Budapest. Having received the Metropolitan Labour and Administrative Court's decision of 17 October 2016, 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 (PTSD) and panic disorder, with attacks of fear and anxiety. 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 On 17 October 2016, the Metropolitan Labour and Administrative Court confirmed the OIN decision. Since there is no further legal remedy against the decisions of the Metropolitan Court in asylum judicial review procedures (section 53(5) of the Asylum Act), the author claims to have exhausted all domestic remedies. The author did not submit 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 invokes the Committee's general comments Nos. 20 and 31<sup>7</sup> to recall 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.

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

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

<sup>7</sup> See the General Comment No. 20 (1992), para. 9, and the General Comment No. 31 (2004), para. 12. See also communications *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.

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 to face an irreparable harm due to a risk of inhuman and degrading treatment<sup>9</sup> He refers to the decision of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*, 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.<sup>10</sup> The author submits that unacceptable sanitary conditions, ill-treatment and humiliation have been addressed in the reports of ProAsyl<sup>11</sup> and the Bulgarian Helsinki Committee. He claims that as an asylum-seeker, who is returned to Bulgaria under the Dublin Regulation, he is likely to have had his asylum procedure in Bulgaria terminated since in some cases, negative decisions have been taken in absentia.<sup>12</sup>

3.3 In those circumstances, he fears to be transferred to one of the detention facilities, such as Busmantsi or Lyubimets. 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 (e.g. families with children) are provided with reception. He 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 The author also claims a violation of article 2 (3) (a), read in conjunction with article 7, of the Covenant, on the ground that the decision to return him to Bulgaria by the OIN 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 OIN and the Metropolitan Court. He argues

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<sup>8</sup> See AIDA: Dublin, Bulgaria (<http://www.asylumineurope.org/reports/country/bulgaria>), update from February 2018. See also ProAsyl: Humiliated, ill-treated and without protection; Refugees and asylum-seekers in Bulgaria.

<sup>9</sup> See European Court for Human Rights, *Budina v. Russian Federation* (application no. 45603/05), decision of 18 June 2009, in which the Court considered that inaction on part of the State party in the face of severe conditions may amount to inhuman or degrading treatment under article 3 of European Convention on Human Rights (ECHR). See also AIDA: Dublin, Bulgaria (<http://www.asylumineurope.org/reports/country/bulgaria>), update from February 2018; CPT, 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, Strasbourg, 15 March 2012, pages 24-30; and Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Bulgaria, from 9 to 11 February 2015 (<http://bit.ly/1GHj8EN>). See also the assessment of detention conditions in Bulgaria as inhumane or degrading treatment in ECRE-ELENA: Research Note: Reception conditions, detention and procedural safeguards for asylum seekers and content of international protection status in Bulgaria (<http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Research%20Note%20-%20Reception%20conditions%20C%20detention%20and%20procedural%20safeguards%20for%20asylum%20seekers%20and%20content%20of%20international%20protection%20status%20in%20Bulgaria.pdf>).

<sup>10</sup> See European Court of Human Rights, *M.S.S. v. Belgium and Greece* (application no. 30696/09), decision of 21 January 2011.

<sup>11</sup> ProAsyl: Humiliated, ill-treated and without protection; Refugees and asylum-seekers in Bulgaria: <https://www.proasyl.de/en/material/humiliated-ill-treated-and-without-protection-refugees-and-asylum-seekers-in-bulgaria-2/>.

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

that the arguments given by the Hungarian authorities were purely focused on the Dublin 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 present complaint. 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 photo and fingerprints were recorded and he was informed about his procedural rights and obligations, and was explained the information provided in the information sheet on the asylum procedure. The author understood and took note of the above-mentioned. 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 to Hungary, the author stated that he had travelled with his brother from Afghanistan to Iran legally and continued to Turkey, where they had spent two months. They travelled to Bulgaria with the help of smugglers, where they 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 absconded to Serbia, where they spent 5-6 days, following which they travelled onwards to Hungary by bus. The author stated that their original destination was Hungary, as their aunt has been living there for fifteen years. The author claimed that his profession as a police officer was the reason for his escape from Afghanistan, as the Taliban threatened him in order to make him join their forces. The State party claims that the minutes of the interview was 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 author's fingerprints from Bulgaria, taken at Voenna Rampa centre on 20 April 2016. The Office established that the Dublin procedure shall be initiated and the author's asylum procedure was suspended on 28 May 2016 until the completion of the Dublin procedure. The Office appointed the Vámoszabadi Reception center as the author's place of residence; however, the author did not arrive there. On 30 May 2016, he filed a request with the Office to allow him to remain at his aunt's private residence. Consequently, the Office appointed the indicated private residence as the author's residence.

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

<sup>14</sup> While the author has referred to the Office for Immigration and Nationality, the present document will use the name of Immigration and Asylum Office, as per observations by the State party.

4.5 On 27 July 2016, the Office established that Bulgaria was the responsible state for examining the author's application for international protection. The author was notified about this decision on 14 September 2016. He filed for appeal on the same date and stated that around seventy of his family members, who escaped from Afghanistan in the eighties, are currently living in Hungary. He explained that his family members can help him in the asylum procedure and in his integration process. According to the State party, he did not mention any other facts or circumstances at that stage of the proceedings 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 his improper 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 Regulation and another personal interview took place, pursuant to article 5 of the Dublin 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 Office's decision that Bulgaria was the responsible state for examining his application for international protection, based on article 49 of the Law LXXX of 2007 on Asylum, which is in compliance with article 27 of the Dublin Regulation. His right to remedy was indeed secured, and the author exercised his right when he appealed the said decision. In his appeal, the author did not object to the lawfulness of the procedure, and he did not complain about any shortcomings in the Bulgarian asylum system nor did he state that Bulgaria was not a safe country in his case. The author's appeal was merely based on the fact that around seventy of his family members live in Hungary, many of whom received Hungarian citizenship. He particularly referred to his aunt living in Hungary for fifteen years. In view of the State party, the author's aunt does not qualify as a family member under article 2 (g) of the Dublin Regulation, thus this circumstance is irrelevant in the asylum procedure. The author in his appeal did not indicate any other relatives by names who would qualify as family members under the Dublin 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 further 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 opinion diagnosing PTSD issued by Cordelia Foundation was issued only on 11 November 2016 when the legally binding decision had already been delivered by the Metropolitan Court on 17 October 2016.<sup>15</sup>

4.8 The State party reiterates that the author did not make references to any condition, such as 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 served as a police officer in his country of origin, and escaped his country because he did not want to join the Taliban forces. The Hungarian authorities had no reason to call into question these circumstances. The State party also notes that the author's sibling who also submitted a request for asylum did not mention any circumstances which would give rise to the suspicion that the author may belong to a vulnerable group.<sup>16</sup> The circumstances that would substantiate the alleged violation of the author's rights were only

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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 author sibling's case, it was also established that Bulgaria shall be the state adjudicating his asylum request.

made 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 The State party further emphasizes that the reports cited by the author in his complaint were written two to three years ago, for which reason they do not reflect the current conditions in Bulgaria, as they did not take into consideration the development assistance and aid funded by the EU in the previous years. It also claims that there is no EU 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 which would have been essential for 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**

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

5.2 The author notes that the State party has referred to the fact that he had not made 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 application of the Dublin III Regulation. He adds that this obligation entails to take 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 the fact that he did not have legal representation.

5.3 The author notes that he only had one short interview with the State party authorities 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 the said 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.

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<sup>17</sup> The author refers to article 51 (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 UNHCR 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, December 2011, 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, 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.*"

5.4 Regarding his health condition, the author claims that he could not have provided the State party with a diagnosis of PTSD, as an asylum seeker suffering from the symptoms of PTSD 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 State party's authorities 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, read alone and in conjunction with article 2 (3) 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 Regulation, according to which an applicant shall have the right to an effective remedy that should cover both the examination of the application of the Dublin Regulation and of the legal and factual situation in the Member State concerned. He claims that he was not presented with the chance to be heard neither on the potential applicability of the Dublin Regulation in his case, nor on the potential consequences of his return to Bulgaria, entailing the risk under article 7. In addition, he 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 Court failed to assess the publicly available information on the Bulgarian asylum system and reception conditions. He also 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 the 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 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 have not been substantiated.

6.2 As regards the author's statements that the Office should have examined whether the author's return to Bulgaria qualifies as torture, and inhumane or degrading treatment, the State party maintains its position that the procedure conducted by the Office is 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 neither the asylum authority nor the courts to examine the individual circumstances, as it happened in the author's case, since the authorities compared available individual circumstances to the general information relevant to the case, including on 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 rectified its earlier submission to the effect that the author was interviewed only once which does not have an effect on any of the arguments in the previous observations. The State party drew attention to the relevant guidelines of the European Asylum Support Office, according to which applicants shall 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 had never invoked any of his claims alleged in the present complaint. It emphasizes that the author did not mention his allegedly bad health condition (asthma, PTSD) in spite of the direct questions on this issue; such failure cannot be attributed to the asylum authority. Instead, it confirms that the author attempts 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 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 had never been properly informed about the Dublin procedure, the State party draws attention to the same point of the complaint that the author was in possession of an information document on the Hungarian asylum procedure. The aforementioned statements by the author are contradictory. The author also had the right to ask further questions concerning the information he was provided orally and in writing. In case of a follow-up question, the author – after being informed – by signing the information sheet attests that he/she received a copy of the information sheet and that he/she took note of its content and does 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 Regarding the author's concerns on the review procedure of the transfer decision, 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 competent 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 individual assessment on whether the Dublin transfer would violate any of the international, EU or internal legal provisions.

6.7 The State party emphasizes that once a 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, but it shall 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 Court shall be regarded reasonable and well-founded.

6.8 In addition, the State party affirms that there is no EU decision, according to which Bulgaria could not be considered as a safe country. Therefore, transfers to Bulgaria are being regularly implemented by Member States under the Dublin III Regulation. It also recalls that the author did not put forward any arguments, neither during the personal interview and the asylum procedure, nor the review procedure, claiming that Bulgaria is 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 made only in the complaint 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 said articles of the Covenant are not well-founded, and the complaint should therefore be declared inadmissible.

#### **Author's comments on the State party's observations**

7.1 On 27 November 2017, the author submitted his comments regarding the admissibility and merits of the communication.

7.2 As to the State party's contention that the author had never referred to the alleged violation of his rights during the asylum procedure, but only invoked them in the present complaint, the author reiterated that he had only 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 Office did not meet its obligation to properly inform the author about the Dublin procedure (article 4) and carry out an interview in relation to it (article 5), amounted to the violation of the Dublin Regulation.

7.3 On the merits, the author submits that the State party failed to provide any new legal reasoning as it only reiterated its arguments put forward in the previous observations, namely that the author failed to express his observations regarding Bulgaria and that he did not reveal his mental health problem neither before the Office nor the Court. He argues that the State party only generally referred to the Dublin Regulation. Without giving evidence for complying with the relevant legal provisions, the argument cannot be considered as capable of 'rebutting the author's arguments'. The author also objected 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 individualized examination of the case, there was no indication in the files that the relevant authorities had conducted any examination regarding the available information on the Bulgarian asylum system. There was no reference to that, neither in the decision nor in the files of the case.

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 forward to the author as regards Bulgaria, contrary to the Dublin Regulation. There was no appropriate identification of the author's vulnerability (his health condition) either, as required by Section 3 (1) and (2) of the Government Decree no. 301/2007. The Office has therefore violated its obligation to properly assess the asylum seeker's individual circumstances.

7.6 In addition, a person suffering from PTSD is, by definition, not suited to give a detailed account on his mental disease without any psychological help. Not having trust towards the officer conducting the interview may make it impossible for a traumatised 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 PTSD 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 refers to the background documents to submit that the protection needs of the asylum-seekers are not systematically assessed.<sup>19</sup> Had the Office carried out the vulnerability identification procedure, it would have been able to assess the psychological need 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 details, while taking into account the individual vulnerability of the applicant. Specific and targeted questions about countries where a transfer could potentially take place, i.e. Bulgaria, should also be asked. Subsequently, the Office should take all this into account when examining whether a decision on transfer to Bulgaria could indeed be issued.

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<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> Gruša Matevžič: Unidentified and Unattended, The response of Eastern EU Member States to the Special Needs of Torture Survivor and Traumatized Asylum Seekers, May 2017.

Consequently, the Office failed to act according to its legal obligations, resulting in the infringement of the EU law as well as the Covenant and the European Convention.

7.7 The author further objects to the misleading observations by the State party which refers only to the information note given to the author during the asylum procedure but does not take into consideration the fact that information was provided exclusively in relation to the general questions of the Hungarian asylum procedure and it did not inform the author about the Dublin procedure in details or about a potential transfer to Bulgaria. The right to be heard is enshrined in the Dublin Regulation (article 5), therefore the authorities cannot simply assume that the applicant had read and understood the given information leaflet. According to article 5, the aim of the personal hearing is to facilitate the process of determining the Member State responsible, and to allow the proper understanding of the information supplied.

7.8 During the review procedure carried out by the 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 (section 49 (8) of the Asylum Act). The review procedure raises serious questions, given that the request for a judicial review must be handed through an asylum authority, which forwards it to the 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 effective remedy, as required by article 2 (3) (a) of the Covenant was seriously violated.

7.9 Although there is indeed no EU 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 of the Directorate-General Home Affairs dated 6 July 2017 sent to the Bulgarian authorities with the subject “Measures of improvement of the Bulgarian asylum system”, especially in relation to the identification of vulnerable asylum-seekers, given the low recognition rate and the systematic detention of Afghan asylum-seekers.<sup>21</sup>

7.10 The author lastly submits that he is still suffering from PTSD and depressive symptoms. The latest 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>22</sup> Finally, the author claims that, since the Hungarian authorities 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 Regulation, his rights guaranteed by article 7, and article 2 (3) (a) in compliance with article 7 of the Covenant were violated, and the author is still in danger to be exposed to inhuman or degrading treatment.

#### **Author’s additional comments**

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

<sup>20</sup> Annex 1 of the additional comments (List of preventions of Dublin Transfers) refers to the relevant case law from Germany and Belgium.

<sup>21</sup> Annex 2 of the additional comments (Letter of the Directorate-General Home Affairs dated 6 July 2017).

<sup>22</sup> Psychiatric opinion of Cordelia Foundation issued on 8 November 2017.

8.2 He drew attention to the recent medical documentation on the deteriorating state of his mental and physical health since the Immigration and Asylum Office intends to carry out his deportation to Bulgaria despite the risk of inhuman and degrading treatment there. According to the medical certificate of 10 April 2018, the author is in need of continuous psychological and medical treatment, frequency of which 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.<sup>23</sup> Besides the mental health problems, the author has been treated for a continuous pain in this shoulder which stems from the psychological disorder the author was diagnosed with.<sup>24</sup> The author submits that he drew the above mentioned medical certificates to the attention of the Office on 5 and 13 April 2018.

8.3 The author drew the Committee's attention to the recent publicly available reports on the Bulgarian reception conditions as regards asylum seekers having serious mental disorders. The reports indicate inadequate hygiene and sanitation and interruptions in the provision of medical and interpretation services at refugee facilities; the absence of accommodation for persons with limited mobility in the centres, as well as for asylum seekers with visual, mental or psychological disabilities;<sup>25</sup> and absence of guidelines or practice to accommodate the specific needs of vulnerable groups and lack of availability of special conditions for treatment of torture victims and persons suffering mental health problems.<sup>26</sup> Further reports emphasize that access of asylum seekers 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 being employed in reception centres. Bulgaria is an example of a country with a discrepancy between the highest standard of health for asylum seekers guaranteed by law and the lack of access to mental health care in practice.<sup>27</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), in conjunction with article 7 of the Covenant.

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<sup>23</sup> Annex 1 to the additional comments.

<sup>24</sup> Annex 2 to the additional comments.

<sup>25</sup> United States Department of State: Country Report on Human Rights Practice 2017 – Bulgaria, 20 April 2018, at: <https://www.ecoi.net/en/document/1430270.html>.

<sup>26</sup> Refugee and Migrant Legal Programme; Bulgarian Helsinki Committee; ECRE – European Council on Refugees and Exiles, published by ECRE – European Council on Refugees and Exiles: Country Report: Bulgaria, February 2018, at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_bg\\_2017update.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_bg_2017update.pdf).

<sup>27</sup> Hungarian Helsinki Committee, Unidentified and Unattended: The Response of Eastern EU Member States to the Special Needs of Torture Survivor and Traumatized Asylum Seekers, May 2017, at: <http://www.refworld.org/docid/59b155744.html>. The report for example indicates: “*In six reception centres, there is 12 medical staff, which is clearly not enough since in 2016, 14’800 asylum seekers applied for asylum in Bulgaria. The State Agency for Refugees (SAR) has only one psychologist based in Sofia who also performs other duties (currently, the psychologist is an administrative director of one of the SAR’s directorates). Two NGOs (ACET and Center “Nadya”) provided mental health services, but their services are based on project funding and since 2017, ACET no longer operates. Therefore, during certain periods of time or at certain locations, there are sometimes no mental health services available or they are available for only a limited number of clients. Besides, there is no possibility, neither for asylum seekers, nor for Bulgarian citizens, to access state psychologists since psychological examinations and therapy are not covered by the National Health Insurance Fund.*”

## 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 to the Covenant.

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 and invoked them only in the present communication, contesting the application of the Dublin Regulation (para. 4.2). It also observes that the author appealed against the negative decision of the Immigration and Asylum Office on his asylum application to the Metropolitan 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 alone, and in conjunction with article 2 (3) (a) of the Covenant, are manifestly ill-founded. The Committee, however, considers that the author has raised numerous risk factors and potential errors during the domestic asylum and court proceedings, which, 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 alone, and in conjunction with article 2 (3) (a) of the Covenant, and proceeds to its consideration of the merits.

### *Consideration of the merits*

10.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under 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 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 PTSD; 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 Regulation in his circumstances, and that he was consequently deprived of the right to an effective remedy, in violation of article 2 (3) (a), in conjunction

with article 7, of the Covenant. The Committee also 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,<sup>28</sup> 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. 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>29</sup> The Committee further 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>30</sup> unless it is found that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>31</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 the European Court jurisprudence on 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 to face a lack of accommodation, no access to mental health care which would result in a serious deterioration of his current condition, 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 police. The Committee further observes that the author was exposed to kicking and shouting by the police at Elhovo centre, as well as to poor material conditions and absence of medical services. One week later, he was transferred to the Voenna Rampa refugee camp, where he witnessed brutal beatings and ill-treatment of asylum seekers returned from other EU Members States and was exposed to dire material conditions. The Committee also 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 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 present complaint, 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), 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

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<sup>28</sup> See the Committee's General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

<sup>29</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>30</sup> See communication *Lin v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

<sup>31</sup> See communications *Y.A.A. and F.H.M. v. Denmark* (CCPR/C/119/D/2681/2015), para. 7.3; and No. *Rezaifar v. Denmark* (CCPR/C/119/D/2512/2014), para. 8.3.

the Office and the Metropolitan Court. The Committee in particular notes the author's claim that the Hungarian authorities exclusively focused on the Dublin Regulation, without assessing how the Bulgarian asylum system functions in practice, i.e. whether he would have access to 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 as 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 he did not complain about any shortcomings in the Bulgarian asylum system nor did he 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 conditions and without adequate medical personnel and assistance. The Committee, however, 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 further 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. In addition, the Committee observes that the author was informed about the application of the Dublin procedure by the 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 further notes that the author appealed the negative asylum decision, without meeting the burden of allegation and proof, while not persuasively explaining the failure thereof. 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>32</sup> The Committee considers that the mere fact that the author may be possibly confronted with difficulties 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 PTSD.

10.8 The Committee further 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>33</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), 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 to the Covenant, is of the view that the author's removal to Bulgaria would not violate his rights under

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<sup>32</sup> See e.g. communication *B.M.I. and N.A.K. v. Denmark* (CCPR/C/118/D/2569/2015), para. 8.6.

<sup>33</sup> See e.g. *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.4.

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.



## Annex 1:

### Opinion individuelle (dissidente) de M. Yadh Ben Achour

1. Dans cette affaire le Comité, a relevé dans le paragraphe 9.4 des constatations que « l'État partie conteste la recevabilité de la communication au motif que les griefs que l'auteur tire de l'article 7 du Pacte, lu seul et conjointement avec le paragraphe 3 a) de l'article 2, ne sont manifestement pas fondés. » (« manifestly ill-founded »). Ayant rejeté cet argument, le comité est alors passé à l'examen du fond de l'affaire.

2. En réalité, cet argument n'est pas vraiment celui de l'Etat partie. Ce dernier développe un argumentaire différent, de caractère procédural, tiré de l'article 5 (2) (b), du Protocol facultatif. Cet article se lit ainsi : « Le Comité n'examinera aucune communication d'un particulier sans s'être assuré que: ...b) Le particulier a épuisé tous les recours internes disponibles». L'article 5 a une double portée :

a) Il signifie tout d'abord que, globalement, le cas doit être soumis aux tribunaux internes avant de pouvoir être examiné par le comité. L'expression « tous les recours » est certes problématique, mais nous ne la discuterons pas ici, parce qu'elle déborde le cadre de notre analyse de la présente affaire.

b) Mais l'article (5) 2 ( b) signifie, par ailleurs, que chaque grief particulier soulevé devant le comité doit avoir été préalablement soumis aux tribunaux internes saisis par voie de recours juridictionnels.

3. Or, dans la présente affaire, l'État a particulièrement insisté sur l'argument d'après lequel l'auteur n'a développé ni devant les autorités administratives, ni devant les autorités judiciaires hongroises, aussi bien sur le plan des faits que sur le plan du droit, les griefs qu'il développe devant le comité. Tout d'abord, l'auteur n'a pas développé les conditions et circonstances particulières de son expérience bulgare qui aurait pu révéler aux autorités hongroises une situation de particulière vulnérabilité. L'Etat partie indique que l'auteur « lors de l'entretien qu'il a eu le 28 mai 2016 dans le cadre de la procédure d'asile, n'a pas dit avoir subi de mauvais traitements durant son séjour en Bulgarie ». Ensuite, l'auteur n'a pas développé les arguments relatifs à son état de santé, alors même que des questions précises lui ont été posées à ce propos par les autorités hongroises. L'État partie relève que l'auteur ne s'est pas plaint de problème de santé, mentale ou autre, au stade de l'appel, et que le certificat psychiatrique diagnostiquant un état de stress post-traumatique émis par la Fondation Cordelia ne date que du 11 novembre 2016, c'est-à-dire qu'il est postérieur à l'adoption par le tribunal métropolitain, le 17 octobre 2016, de la décision juridiquement contraignante. Enfin, sur le plan des arguments de droit, l'auteur n'a pas développé les arguments relatifs à l'éventuelle violation par l'État partie de l'article 7, lu seul ou conjointement avec l'article 2 paragraphe 3 du pacte, au cas où il serait renvoyé en Bulgarie. L'État partie dit que l'auteur n'a pas évoqué, dans le cadre de la procédure d'asile, la violation de ses droits qu'il invoque dans la présente communication. L'auteur n'ayant pas réfuté ces prétentions de l'Etat partie, il en ressort que l'article 5 (2) (b) du protocole facultatif n'a pas été respecté.

4. Par voie de conséquence, comme le soutient l'État partie, la communication présentée devant le comité dans cette affaire aurait dû être déclarée irrecevable.