



# 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. 3017/2017\*, \*\*

<i>Communication submitted by:</i>	A.B. and B.D. (represented by Mikita Matyushchenkov and Margaux Delomez, effective from 16 July 2018)
<i>Alleged victims:</i>	A.B., P.D. and their two children
<i>State party:</i>	Poland
<i>Date of communication:</i>	24 August 2017 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 31 August 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	21 July 2022
<i>Subject matter:</i>	Torture; inhuman and degrading treatment; alien's right to enter territory to claim asylum; right to an effective remedy
<i>Procedural issue</i>	Exhaustion of domestic remedies, <i>ratione personae</i>
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment or punishment; right to claim asylum; non-refoulement; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 7 and 13
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1.1 The authors of the communication are A.B. ("first author"), born on 21 October 1979, and P.D. ("second author"), born on 7 May 1988, who bring the communication on their own behalf and on behalf of their two children, both minors, born in 2011 and 2012. All family members are citizens of the Russian Federation. The authors fled the Russian Federation and arrived in Belarus in January 2017, with the intention of applying for asylum in Poland at the border between Belarus and Poland, in Terespol. The authors made more than 20 attempts, in the period from January to August 2017, to request asylum at the border. On each of those

\* Adopted by the Committee at its 135th session (27 June–27 July 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, Kobayuh Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



occasions, however, their claim for asylum was not recognized as such by Border Guards with the result that the claim was not passed on to the competent authorities for consideration. As a result of their not having valid travel documents and not being acknowledged as having claimed asylum, the authors were issued decisions by which they were denied entry into Poland and were immediately expelled and sent back to Belarus.<sup>1</sup>

1.2 The authors submitted a communication to the Committee on 24 August 2017, in which they claimed a violation by the State party of their rights under articles 7 and 13 of the Covenant read alone and in conjunction with article 2 of the Covenant. The authors requested that the Committee grant interim measures of protection by requesting the State party to (a) accept their applications for international protection and register them as asylum-seekers; and (b) refrain from removing them from its territory until the Committee had decided their complaint. On 25 August 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the authors' request for interim measures and made the above-mentioned requests to the State party.

1.3 On 25 October 2017, the State party requested that the Committee examine the admissibility of the communication separately from the merits and declare it inadmissible and that interim measures be lifted as the authors were no longer in the territory of the State party. The Committee granted the request to lift interim measures, as the authors were no longer subject to deportation by the State party, but pursuant to rule 93 (1) of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

#### **Facts as presented by the authors**

2.1 The authors are of Chechen origin. The first author's brother secured a job with a security firm in Chechnya in 2010. He disappeared a few months later and has not been heard from since. In the first half of 2013, men, some in camouflaged uniforms, arrived at the first author's house in Grozny. They asked him about his cousin, whom they said was suspected of involvement with a terrorist organization. The first author told them he did not know where his cousin was. The men took him to a private house where he was held for several days and beaten and tortured.

2.2 After this incident, the first author decided to flee the Russian Federation. He travelled to Poland where he applied for asylum. Immediately thereafter he left for Denmark where he also applied for asylum. After five months in Denmark, he was sent back to Poland. A month later, he returned to the Russian Federation and lived in a village near the city of Kaluga. He did not, however, return to Chechnya.

2.3 On 7 and 14 December 2016, the second author, who was living in the city of Shali in Chechnya, received summonses from the police ordering the first author to report to the police station. Later in December 2016, the authors visited the first author's mother in Chechnya. An hour after they arrived at his mother's house, men in camouflage broke into the house. They asked where the first author's brother was. They beat the first author in front of his family and raped the second author, after which, they kidnapped the first author and held him for three days during which he was tortured through use of electric shocks and beatings. He was taken by car from where he had been held and thrown out of the car near the village of Valerik in Chechnya. On 24 December 2016, the first author was taken to a hospital in Grozny where he was treated for serious injuries including concussion and post-traumatic cerebral arachnoiditis with severe intercranial hypertension, amnesia, multiple abrasions to his face and bruising of the soft tissue of his upper extremities.<sup>2</sup> He was discharged from the hospital on 4 January 2017.

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<sup>1</sup> The authors reside in Germany.

<sup>2</sup> He provides the stamped hospital admission form, which also confirms that he reported contemporaneously that men had come to his house and kidnapped him.

2.4 On 14 January 2017, another summons was received by the second author, by which the first author was obliged to appear at the police station in Shali for questioning as a suspect.<sup>3</sup>

2.5 On 16 January 2017, the authors left the Russian Federation and travelled to Belarus. They arrived at Terespol at the border between Belarus and Poland. While they told the Polish Border Guards that they wanted to apply for asylum and showed the guards their medical records and the police summonses as evidence of their fear of persecution, their request was not acknowledged. The guards simply stamped their passports with a denial-of-entry stamp indicating that their entry into Poland had been rejected, as they did not hold valid visas.

2.6 The authors tried again to apply for asylum on 18, 19, 20, 21, 23, 24, 26, 28, 29 and 30 January and 1, 2, 3, 6, 13, 15 and 16 February 2017. A Belarusian human rights defender prepared a written motion for asylum in Polish on their behalf. On 17 March 2017, the authors submitted the motion to the Border Guards at Terespol. Again, their claim was rejected in the same manner as before.<sup>4</sup> The authors made several further attempts to apply for asylum, on 20 and 25 April, 25 May and 24 August 2017.

2.7 On 27 August 2017 a representative of the Helsinki Foundation for Human Rights sent a letter in Polish on behalf of the authors to the Head of the Polish Border Guard reiterating the Committee's decision and informing the authorities that the authors would come to the border on 29 August 2017 to request asylum. The authors went to the checkpoint at the Border in Terespol on 29 August 2017 with a written motion in Polish requesting asylum and including supporting documents and the Committee's letter requesting interim measures. The Border Guard did not accept the asylum claim and once again the authors received a denial-of-entry stamp and were sent back to Belarus. In response to a request by the Helsinki Foundation for an explanation, the Border Guard affirmed that the authors had not claimed asylum.

2.8 The authors made a total of over 20 requests for asylum at the Polish border, all of which were rejected. The authors' claim that the refusal of the Border Guards at Terespol to acknowledge their requests was in keeping with the State party's policy of routinely denying foreigners, particularly of Chechen origin, the right to apply for asylum at the border.<sup>5</sup>

2.9 The authors claim that, as Russian nationals can stay in Belarus for only 90 days without official registration, which, at the time of submission of their complaint to the Committee had expired, they feared deportation to the Russian Federation at any time. At that time, the second author was pregnant and suffering from chronic bronchial asthma. During her stay in Belarus, she lacked the financial means to access medical care.

### **Complaint**

3.1 The authors claim that their rights under article 13 of the Covenant have been violated by the State party, as their asylum claims were not acknowledged as such, as a result of which they were not afforded the right to remain on the territory while those claims were assessed.

3.2 As they were neither shown nor read the contents of interview records taken by Border Guards, the authors therefore, argue that they were denied the opportunity to affirm or correct any mistakes or omissions therein. Moreover, although the Border Guard was not the competent authority for assessing their asylum claims, when they were found not to have a right to remain on the territory, they had no way to challenge the basis for the denial of their rights. Furthermore, they claim that appeals against decisions of the Border Guard are not effective in any case, as the process is unduly prolonged, the filing of an appeal does not have

<sup>3</sup> Summonses provided.

<sup>4</sup> The authors claim that on the same date, a group of 14 lawyers from the Warsaw Bar Association came to the border crossing to provide the group of asylum-seekers with legal assistance. They represented 51 persons in total, who had provided them with power of attorney. All except one lawyer were denied access to their clients and the 51 asylum-seekers were returned to Belarus. According to the Border Guards, the asylum-seekers had not applied for asylum, while in fact they had.

<sup>5</sup> They note that five communications have recently been transmitted to the State party by the European Court of Human Rights, in which the issue of denial of access of foreigners to the procedure of application for international protection was raised.

a suspensive effect on the decision to expel and the appeal can be submitted only in the Polish language; appeals therefore offer no remedy to persons subject to immediate expulsion after a denial-of-entry decision is issued. As a consequence, the authors claim that the State party violated their right to an effective remedy for the violation of their rights under article 13 of the Covenant, in conjunction with article 2.

3.3 The authors claim that the failure to accept their repeated written and oral requests for asylum was a violation of the State party's obligation to ensure that individuals are not subject to refoulement to any country in which they face treatment contrary to the provisions of article 7 of the Covenant. By returning them to Belarus, without any assessment of their claims, the State party has repeatedly exposed them to the risk of refoulement to the Russian Federation, where they face torture or inhuman or degrading treatment. They claim that they could not apply for international protection in Belarus as the protection mechanism is entirely ineffective for Russian nationals, as evidenced by the fact that no Russian national has been granted refugee or subsidiary protection status in Belarus.<sup>6</sup>

3.4 The authors claim that their rights under article 7 of the Covenant were violated through the inhuman and degrading treatment to which they were subjected at the border at Terespol for they were forced to repeatedly present themselves at the border to submit their request for international protection and, being refused each time, were expelled and returned to the Belarusian side. Added to this were the difficult conditions to which they were subjected while remaining in Belarus, where they were unable to afford medical care for the second author, and the mental anguish she endured through having suffered a sexual assault at the hands of Russian forces, as well as the authors' fear that agents of those forces were present in the area surrounding the border and their fear of removal to the Russian Federation at any time.

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

4.1 On 25 October 2017, the State party submitted its observations on admissibility, requesting that the admissibility be considered separately from the merits and that the Committee's request for interim measures be lifted.

4.2 The State party claims that, in accordance with articles 1 and 2 of the Optional Protocol, the communication is inadmissible as the authors lack victim status. The State party notes that the authors had not made requests for international protection to the Border Guards, as, during their interviews, they referred only to economic reasons for entering Poland, which meant that they were not asylum-seekers and were therefore subjected to applicable border control proceedings as economic migrants, as a result of which the decisions under which they were denied entry into Poland were correctly issued, as they did not have valid travel documents. The State party thus alleges that there was no violation of the applicants' rights under the Covenant and, as they had not claimed asylum, they had no right under the Covenant to enter or remain on its territory and consequently the applicants cannot be considered victims before the Committee.

4.3 The State party claims that, had they wished to challenge the decisions issued against them, they had the option to file an appeal with the office of the Head of the Border Guard or the Administrative Court, in which they challenged the decisions by which they were refused entry into Poland. As they did not file any appeal, the authors therefore failed to exhaust available domestic remedies prior to making the complaint to the Committee.

4.4 The State party therefore surmises that on all 24 occasions (a) the authors did not fulfil the conditions required to enter Poland; (b) the Border Guard issued administrative decisions by which they were refused entry into Poland in accordance with its obligations under European Union and domestic legislation; and (c) the authors did not pursue domestic remedies to address their claims of violation.

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<sup>6</sup> See <https://www.omct.org/en/resources/news/nasta-loika-working-on-the-future-of-belarus-helps-me-face-the-present>.

### **Authors' comments on the State party's observations on admissibility**

5.1 On 16 July 2018, the authors provided their comments on the State party's observations. They reiterated that, on each of the more than 20 occasions, they did make claims for international protection but the claims were ignored. Further, as after each claim they were immediately issued a denial-of-entry decision, following which they were promptly removed from the territory, there was no remedy by which they could effectively challenge the Border Guards' decision.

5.2 In response to the State party's request to have the admissibility considered separately from the merits, the authors request that, as their communication raises complex issues under the Covenant, which necessitate consideration on the merits, the Committee reject the State party's request and consider admissibility together with the merits.

5.3 On 14 September 2018, the authors submitted additional information to the Committee explaining that, after their claims had been registered and they were admitted into the State party's territory to pursue their asylum application, they left the State party and travelled to Germany, where they made fresh asylum applications. The authors note that the German authorities had issued a "take charge request"<sup>7</sup> to the State party in accordance with the Dublin III Regulation.<sup>8</sup> The authors have since informed the Committee that they currently reside in Germany awaiting the outcome of their asylum claim, for which Germany has taken responsibility.

### **State party observations on the merits**

6.1 On 17 July 2019, the State party submitted its observations on the merits of the authors' communication. Upholding its position that the communication is inadmissible under articles 1 and 2 of the Optional Protocol, the State party submits that, if found admissible, it did not violate the authors rights under articles 7 and 13 of the Covenant read alone or in conjunction with article 2.

6.2 The State party submits that each time the authors arrived at the Terespol border crossing, they underwent the first-line border control procedure where any travel documents and visas required to cross the border are verified. Since the authors were not in possession of valid entry visas for Poland, they were directed to second-line border control, which aims, inter alia, at establishing detailed reasons for entry. The reports of the Border Guard officers clearly show that on no occasion during any of the more than 20 attempts in question did the authors express a wish to seek international protection in the State party. The State party asserts that the reasons given by the authors were either economic or personal.<sup>9</sup> Each decision was reached based on an interview with the first and second authors in Russian and after an individualized assessment of all of the circumstances presented. On each occasion, the authors were notified, in Russian, on the same day of the decision to refuse them entry and were provided with information about their rights of appeal. The authors did not appeal against any of the decisions concerning refusal of entry into the State party.

6.3 On 9 November 2017, after the Committee registered the complaint and granted the request for interim measures, the authors once again submitted an asylum request at the Polish border. Their claim was accepted and registered, allowing them entry to Poland. On 10 January 2018, however, the asylum proceedings were discontinued, in accordance with domestic law, as the authors had left the centre for migrants for longer than seven days, without justification. The State party informed the Committee that the authors' third child was born in Germany on 25 December 2017. On 5 January 2018, German authorities initiated

<sup>7</sup> See article 21 of the Dublin III Regulation.

<sup>8</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

<sup>9</sup> The State party provided a summary of the reasons on each occasion but did not provide the relevant reports or excerpts. The State party claims that, after each second-line border control interview, the Border Guard officers prepared an official report, which included detailed information concerning the reasons for entry given by the authors.

proceedings under the Dublin III Regulation and the family were returned to Poland on 2 April 2019, at which time proceedings were reinitiated. The authors were placed in a supervised centre for migrants in Biata Podlaska.<sup>10</sup>

6.4 On 8 April 2019, the authors' asylum claims were rejected, obliging them to return to their country of origin. On the same day, the authors, with legal assistance, submitted their third application for international protection in the territory of Poland. On 9 May 2019, the second author and the authors' children were released from the supervised centre for migrants and placed in a regular centre for migrants.<sup>11</sup> The first author remained initially in supervised accommodation<sup>12</sup> but was later released<sup>13</sup> and reunited with the rest of the family on the condition that he report to the authorities on a monthly basis.<sup>14</sup> The first author failed to comply with this requirement.

6.5 The authors were interviewed on 25 April and 24 May 2019 regarding their protection claims. They reported having been persecuted in their country of origin because some of their relatives allegedly belonged to illegal armed groups in Chechnya.

6.6 The second author and the authors' children left the centre for migrants and on 8 June 2019 were consequently struck off the residents' list. On 18 June 2019, German authorities contacted the Office for Foreigners to inform Polish authorities that the authors had initiated asylum proceedings in Germany and requested the State party to take charge of processing their claims under the Dublin III Regulation.

6.7 On 26 June 2019, the State party discontinued asylum proceedings in the authors' cases on the grounds that the authors had breached the conditions imposed on them.<sup>15</sup> In the light of these factual circumstances, the State party requests that the authors be recognized as economic migrants.

6.8 With regard to relevant domestic law, the State party underlines that it is bound by regulations of the European Union, in particular the Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) as well as domestic law.<sup>16</sup> Under the Schengen Borders Code, if third-country nationals do not fulfil entry criteria,<sup>17</sup> a detailed and reasoned decision is issued. While such foreigners have the right to appeal, lodging such an appeal does not have suspensive effect on a decision to refuse entry.<sup>18</sup>

6.9 Domestic law holds that a foreigner who intends to cross the border into the territory of the State party must be in possession of a valid travel document, under articles 23-36 of the Act on Foreigners.<sup>19,20</sup> Moreover, the proceedings conducted by border authorities can be limited to questioning individuals and verifying any travel documents held by foreigners. If the reasons provided by a foreigner to explain the failure to meet the required conditions do not raise any other issues, a decision may be taken at that time.<sup>21</sup> While the decision to refuse entry may be appealed to the Commander in Chief of the Border Guard, such an appeal does not have suspensive effect and the decision on refusal is immediately enforceable. The decision on appeal may be contested before administrative courts.<sup>22</sup>

<sup>10</sup> By virtue of the Zgorzelec District Court ruling of 3 April 2019.

<sup>11</sup> The Jelenia Gora Regional Court overturned the Zgorzelec District Court ruling of 3 April 2019.

<sup>12</sup> The ruling of 3 April 2019 was upheld with respect to A.B.

<sup>13</sup> On 9 May 2019, the Head of the Biata Podlaska Border Guard Unit decided to lift his detention of the first author.

<sup>14</sup> The condition that the first author report to the Border Guard Unit on the first Thursday of each month was imposed as an alternative to isolation measures.

<sup>15</sup> By a Regional Court ruling of 9 May 2019.

<sup>16</sup> See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification).

<sup>17</sup> As established in article 6 of the Schengen Borders Code.

<sup>18</sup> See article 14 of the Schengen Borders Code.

<sup>19</sup> Of 12 December 2013.

<sup>20</sup> The conditions of refusal of entry are listed in article 28 of the Act on Foreigners.

<sup>21</sup> See article 34 of the Act on Foreigners.

<sup>22</sup> In accordance with the Law on Proceedings before Administrative Courts 2002.

6.10 As regards the authors' allegations about being subjected to a collective expulsion of foreigners, in breach of article 13 of the Covenant, the State party reiterates that measures applied in respect of the authors were issued individually after consideration of their individual situation.

6.11 With regard to the circumstances of the present case, the State party notes that the jurisprudence of the Committee on removals to Belarus or the Russian Federation appears to relate to extradition or deportation procedures, whereas the present case concerns crossing of the border in order to enter the territory of the State party, to which the provisions of article 13 of the Covenant do not seem applicable.

6.12 The State party submits that each foreigner arriving at the Terespol border crossing is given the opportunity to present his or her individual case for assessment by authorities, based upon which basis individual decisions are issued. This individualized approach is supported by significant numbers of admissions.<sup>23</sup> The State party therefore claims that the border procedures comply with the provisions of the Covenant.

6.13 As regards the alleged violation of article 7 of the Covenant, the State party submits that the authors did not show substantial grounds for believing that they faced a real risk of treatment in contravention of article 3 of the European Court of Human Rights (equivalent to article 7 of the Covenant).<sup>24</sup> The State party recalls that it is, in principle, for the author to adduce evidence showing substantial grounds for believing that he would be exposed to a real risk of being subjected to such treatment.<sup>25</sup> The mere possibility of ill-treatment in the receiving country does not in itself give rise to a breach.<sup>26</sup>

6.14 The State party submits that, during border control interviews, the authors did not indicate that they feared being subjected to any treatment in contravention of article 7 of the Covenant while staying in Belarus. The State party asserts that in fact they stayed in Belarus for several months and rented a flat with financial support from non-governmental organizations.

6.15 Regarding whether the treatment of the authors by the Polish Border Guard could amount to degrading or inhuman treatment in breach of article 7 of the Covenant, the State party submits that the authors' treatment was in accordance with binding procedures of border control and did not amount to inhuman or degrading treatment. The State party argues that the prevailing conditions at the border checkpoints are appropriate for meeting the needs of both adults and minors, including for potable water, sanitary facilities and medical assistance.<sup>27</sup> The State party therefore affirms that making several attempts to cross the border cannot be regarded as subjecting the authors to a violation of article 7 of the Covenant.

6.16 As regards the alleged lack of an effective remedy under article 2 of the Covenant regarding their complaints under articles 7 and 13, the State party emphasizes that proceedings relating to the expulsion of foreigners, governed by article 13 of the Covenant, do not protect the right of appeal to judicial courts.<sup>28</sup> The State party asserts that there are no legal grounds for allowing persons with unclear legal status, such as the authors at the time, to stay on the State party's territory. In conclusion, the State party submits that the authors had access to an effective domestic remedy to the degree required by article 13 of the Covenant.

<sup>23</sup> The fact that each person's situation in Terespol is examined individually is confirmed by statistics which show that 8,313 foreigners were admitted at the border checkpoint in Terespol in 2016; and during the first six months of 2017, 1,212 requests were transferred.

<sup>24</sup> See *Bajsultanov v. Austria*, Application No. 54131/10, Judgment, 12 June 2012; and *Saadi v. Italy*, Application No. 37201/06, Judgment, 28 February 2008, para. 125.

<sup>25</sup> *Saadi v. Italy*, para. 129.

<sup>26</sup> *Ibid.*, para. 131.

<sup>27</sup> Conditions include access to potable water, toilets and medical aid, with at least a paramedic always available on each shift. Moreover, there is a physician's office at the Terespol checkpoint.

<sup>28</sup> *K.H. v. Denmark* (CCPR/C/89/D/2423/2014), para. 7.5, citing *Omo-Amenaghawon v. Denmark* (CCPR/C/114/D/2288/2013), para. 6.4; and the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 17 and 62.

6.17 The State party therefore reiterates its request that the Committee find the authors' communication inadmissible and that the claims therein be rejected accordingly. Should the Committee find the communication to be admissible, the State party reaffirms its position that there was no violation of article 7 or article 13 either alone or in conjunction with article 2 of the Covenant in respect of the authors.

#### **Authors' comments on the State party's observations on the merits**

7.1 The authors refute the State party's claims that they presented merely personal or economic claims before the authorities at the Terespol crossing. The authors note that the State party has not, to the present day, provided them with the interview notes taken at any of the interviews conducted. They also note that the Supreme Administrative Court of Poland has held, in factually similar cases, that there are not sufficient administrative protocols in place to ensure that international procedural guarantees are upheld at the border.<sup>29</sup>

7.2 The authors note that pushbacks by Polish authorities at the Terespol checkpoint have been characterized as systemic in the findings of various treaty bodies,<sup>30</sup> as well as in the findings of other bodies, including the European Court of Human Rights<sup>31</sup> and several non-

<sup>29</sup> On 20 September 2018, the Supreme Administrative Court ruled in two cases concerning the refusal of entry to Poland of two foreigners who alleged that during border control procedures they had asked for international protection but that their requests were ignored by the Border Guard officers. The refusals of entry were based solely on official reports prepared by the Border Guard officers, in which it was stated that the purpose of entry in both cases was of an economic nature. The Supreme Administrative Court agreed with the applicants, finding that the procedure was unlawful, as there was no administrative protocol in place to ensure the course of proceedings. The Court held that in asylum cases, a sufficiently detailed documentation of the interview between a foreigner and a Border Guard officer, allowing for at least its approximate recreation (that is to say, the questions and answers exchanged in the course of the interview), is of key importance for the possible recognition of the foreigner as a person seeking international protection, thus enabling a judicial and institutional review of a possible decision on refusal of entry at the border. However, although the Supreme Administrative Court annulled the unlawful decisions on refusal of entry, the judgment is neither applicable to reopening the cases of those persons nor instructive should they again try to cross the border, even after a judgment in their favour. The Ministry of the Interior and the Administration refused to introduce amendments to national law to ensure its compliance with the judgments of the Supreme Administrative Court. See Supreme Administrative Court, Case II OSK 890/18, 20 September 2018, available at <http://orzeczenia.nsa.gov.pl/doc/E42DFAC290> (accessed on 25 September 2019); and Supreme Administrative Court, Case II OSK 345/18, 20 September 2018, available at <http://orzeczenia.nsa.gov.pl/doc/6422D006AE> (accessed on 25 September 2019).

<sup>30</sup> The Committee against Torture expressed its concern that "persons in need of international protection are not always given access to the territory of Poland, in particular at the Terespol border crossing with Belarus ... even in the case of vulnerable persons" ("Concluding observations on the seventh periodic report of Poland" (CAT/C/POL/CO/7, para. 25 (a)), 29 August 2019. The Committee on the Elimination of Racial Discrimination expressed its concern about "[r]eports that asylum seekers [had] been denied entry to [Poland's] territory or denied access to asylum procedures" (CERD/C/POL/CO/22-24), 29 August 2019.

<sup>31</sup> See *D.A. and others v. Poland*, Application No. 51246/17, 8 July 2021; *M.K. and others v. Poland*, Application No. 40503/17; and *M.A. and others v. Lithuania*, Application No. 59793/17, 11 December 2018.



governmental organizations,<sup>32</sup> and in a report of the State party's Ombudsman for Children 2016–2018.<sup>33</sup>

7.3 The authors submit that, in the circumstances of their case, the central question is not whether they faced a real risk of ill-treatment in the Russian Federation but whether the Polish authorities carried out an adequate assessment of their claims that they would be at such a risk as a result of expelling them to Belarus. No such assessment was carried out on any of the more than 20 occasions in question. The authors accordingly submit that the State party violated their rights under article 7 of the Committee on three accounts: (a) that they were expelled to Belarus without an adequate assessment of their risk of ill-treatment as a result of the expulsion to Belarus, either in Belarus itself or in the Russian Federation, in the likely event of chain refoulement; (b) that by expelling them to Belarus, the State party was exposing them to living conditions of destitution in that country; and (c) that the treatment they were subjected to by the Border Guard officers in respect of their refusing to acknowledge or register their asylum claims qualifies in and of itself as cruel, inhuman or degrading.

7.4 The authors submit that the only remedy available to them against decisions on refusal of entry is an appeal to the Chief of the Border Guard, which is not effective in terms of article 5 (2) (b) of the Optional Protocol. First, it does not have automatic suspensive effect on the immediate removal from the State party, therefore rendering a later decision allowing the appeal moot for the purposes of providing protection from refoulement.<sup>34</sup> Second, the Chief of the Border Guard is not an independent entity for the purpose of considering appeals against the decisions of the Border Guard.<sup>35</sup> Therefore, an appeal against the decision on refusal of entry submitted to the Chief of the Border Guard does not constitute an effective remedy within the context of the meaning of article 5 (2) (b) of the Optional Protocol. The authors are consequently not required to have exhausted this remedy prior to submitting a communication under the Covenant.

7.5 The mechanism enabling an alien to challenge decisions on refusal of entry issued by the Border Guard consists of lodging a complaint with the Chief of the Border Guard. If such a complaint is unsuccessful, the alien has the right to file an appeal with the Regional Administrative Court. If the Regional Administrative Court does not allow the appeal, it is possible to lodge a cassation appeal with the Supreme Administrative Court of the Republic

<sup>32</sup> Human Constanta, “Invisible refugees on Belarus-Poland border”, 16 September 2016, available at <https://humanconstanta.by/en/invisible-refugees-2016/> (accessed on 25 September 2019); Association for Legal Intervention, “At the border”, available at <http://interwenciaprawna.pl/en/at-the-border-report> (accessed on 25 September 2019); Helsinki Foundation for Human Rights, “Road to nowhere” (October 2016), available at <http://www.hthr.pl/en/road-to-nowhere-report-from-brest-terespol-border-crossing/> (accessed on 25 September 2019); Human Rights Watch, “Poland: asylum seekers blocked at border”, 1 March 2017, available at <https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border> (accessed on 25 September 2019); Amnesty International, “Poland: rule of law and human rights concerns in Poland: update” (May 2017), available at <https://www.amnesty.org/g/LdQcwments/eur37.1622712017/en> (accessed on 25 September 2019); and Human Rights Watch, Amnesty International and Helsinki Foundation for Human Rights, “Poland: EU should tackle unsafe returns to Belarus – Poland blocks asylum seekers at border in defiance of European Court rulings” (5 July 2017), available at <http://www.hfhr.pl/wp-content/uploads/2017/07/EU-Should-Tackle-Unsafe>Returns-to-Belarus.pdf> (accessed on 25 September 2019).

<sup>33</sup> Observations made by the Ombudsman for Children, e.g. during border control at the Terespol-Brest border checkpoint, indicate that many families have received repeated decisions on refusal of entry at the border of Poland for many weeks or months, despite the fact that during each attempt they declared the intention to seek international protection in Poland. See “Information of the Ombudsman for Children prepared in relation to the list of issues prior to reporting (LOIPR) for Poland being drafted by the Committee on the Rights of the Child on the implementation of the Convention on the Rights of the Child” (29 June 2018), pp. 44-46, available at [http://brpd.gov.pl/sites/default/files/raport\\_rpd\\_onz.pdf](http://brpd.gov.pl/sites/default/files/raport_rpd_onz.pdf) (accessed on 25 September 2019).

<sup>34</sup> *M.A. and others v. Lithuania*, Application No. 59793/17, 11 December 2018.

<sup>35</sup> The Border Guard is subordinate to, and supervised by, the Minister of Internal Affairs according to art. 29, sect. 4, of the Act of 4 September 1997 on departments of government administration (*Journal of Laws of 2007*, No. 65, item 437, as amended); and art. 3, sect. 1, of the Border Guard Act of 12 October 1990 (*Journal of Laws of 1990*, No. 78, item 462, as amended).

of Poland; however, if the Voivodship Administrative Court does accept the foreigner's appeal, the Border Guard may lodge a cassation appeal with the Supreme Administrative Court, which would delay the adoption of the final judgment for a total of from two to three years without suspending the decision to remove them.<sup>36</sup> As to compensation for the harm they suffered as a result of their treatment by the Border Guard officers, the authors note that, in theory, pecuniary damages can be pursued through administrative review proceedings. However, as this would necessitate establishing that each of the more than 20 expulsion decisions had been issued unlawfully without the benefit of having access to the interview records or legal counsel, this option would be unavailable and, in any case, ineffective with regard to providing an effective remedy.

7.6 Moreover, the authors did not have a safe place in which to await the outcome of any appeal proceedings or access assistance. The authors could not wait in Belarus, as Russian nationals can remain in that country without registration for only 90 days per year. From 4 April 2017, the authors had already been living in Belarus under the permanent threat of imminent apprehension and deportation to the Russian Federation. In such circumstances, they could not await the outcome of an appeal. In the light of these factors, the authors assert that this is not an effective remedy.

7.7 In relation to the State party's argument that article 13 of the Covenant does not apply in the present case, as it concerns not a removal procedure but the procedure of crossing the Polish border, the authors note that the Human Rights Committee has clearly stated that article 13 "is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise".<sup>37</sup> The authors submit that on each occasion, they had been lawfully present in Terespol within the meaning of article 13.

7.8 According to article 28.2.2 of the Act on Foreigners, a decision on refusal of entry cannot be issued with regard to foreigners requesting international protection.<sup>38</sup> At the European Union level, the legality of the stay on the territory of a member State of a foreigner who expresses a wish to apply for international protection is regulated, inter alia, by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive) and the Schengen Borders Code (see arts. 19-21).

7.9 The authors assert that the Asylum Procedures Directive applies to all international protection applications lodged within the territory of the European Union, including at the borders.<sup>39</sup> The application may therefore take different forms, including the form of an oral application at the State party's border checkpoint or an application transmitted in writing by a foreigner's representative to any national authorities. Moreover, under the *Practical*

<sup>36</sup> In cases II OSK 890/18 and II OSK 345/18, referenced in footnote 29 above, the foreigners were denied entry into Poland in February 2017 and the Supreme Administrative Court issued the final judgment on 20 September 2018, that is to say, the whole appeal process took about 19 months. If the authors had wished to obtain compensation for the treatment inflicted on them by the Border Guard officers, they would therefore have used the prolonged procedure.

<sup>37</sup> See General comment No. 15 (1986) on the position of aliens Under the Covenant, adopted by the Human Rights Committee at the twenty-seventh session on 11 April 1986.

<sup>38</sup> According to article 55 of the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland, when the foreigner lodges on a particular form an application for international protection, a temporary identification document is issued to that foreigner. This document confirms the legality of the foreigner's stay in Poland. National law does not provide directly that foreigners who do not have a document entitling them to enter Poland and declare at the border their wish to apply for international protection have the right to enter Poland and stay there legally.

<sup>39</sup> The Asylum Procedures Directive distinguishes three consecutive stages of the application procedure: making an application for international protection, lodging an application and registration of the application. While application for international protection should be "lodged" in person and at a designated place, the Directive does not provide any specific form for "making application for international protection".

*Handbook for Border Guards (Schengen Handbook)*,<sup>40</sup> foreigners do not have to express their wish to apply for international protection in any particular form nor do they need to use the word “asylum”. It is sufficient that they express, in any way, the fear of returning to their country of origin because of the risk of serious harm. The decisive element in every case should be the expression of concern about what may happen to the applicant upon returning home. Once the foreigner makes an application, he or she is considered an asylum applicant and, from that moment on, he or she benefits from the rights enshrined in the European Union law.<sup>41</sup> From that moment the foreigner should therefore be allowed to remain within the territory of the given member State until his or her case is reviewed. Moreover, the Return Directive explicitly stipulates that such a foreigner should not be regarded as staying illegally on the territory of that member State unless and until a negative decision on the substantive application, or a decision ending his or her right of stay as an asylum-seeker, has entered into force.<sup>42</sup> The Schengen Borders Code provides for exceptions to entry conditions in the event that a foreigner fails to fulfil all entry conditions.<sup>43, 44</sup>

7.10 In the present case, the authors reaffirm that they made applications for international protection according to the terms of the Asylum Procedures Directive on all 24 occasions. Consequently, under Polish and European Union law, they should have been granted lawful entry into Poland. Consequently, procedural guarantees enshrined in article 13 of the Covenant were therefore applicable to all instances of their removal.

7.11 The authors submit that on each appearance in Terespol the Border Guard officers ignored their asylum requests, with the result that they did not pass on those requests to the competent authority for assessment. The authors’ rights under article 13 of the Covenant were therefore violated on all of those occasions.

7.12 The authors quote public statements made by Mariusz Blaszczak<sup>45</sup> that the Government wishes to protect Polish citizens from the “inflow of Muslim refugees” and that it will not be pressured by those who want to bring the migration crisis into Polish territory from the Belarusian border.<sup>46</sup> According to the head of the Polish ruling party, Poland has a “moral right” to reject incoming refugees.<sup>47</sup>

7.13 In conclusion, the authors assert that all decisions to remove the authors from Poland were arbitrary and formed part of what amounted to a collective expulsion resulting in violations of articles 7 and 13 of the Covenant, read alone and in conjunction with article 2 (3).

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

8.1 Before considering any claim 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.

<sup>40</sup> See <https://data.consilium.europa.eu/doc/document/ST-10213-2018-INIT/en/pdf>.

<sup>41</sup> Asylum Procedures Directive (sect. 20), recital 27 and art. 2 (c).

<sup>42</sup> Return Directive (sect. 19), recital 9.

<sup>43</sup> Article 6 (l) of the Schengen Borders Code.

<sup>44</sup> As an exception, an entry may be authorized on humanitarian grounds, due to national interest or because of international obligations (Schengen Borders Code (sect. 21), art. 6 (5) (c)).

<sup>45</sup> Minister of the Interior and Administration at the time all the requests were made by the authors.

<sup>46</sup> Referring to the monitoring visits conducted by non-governmental organizations and the Office of the United Nations High Commissioner for Human Rights. See “Fleeing Chechen refugees stranded on Polish-Belarus border”, *Moscow Times*, 31 August 2016, available at <https://www.themoscowtimes.com/2016/08/31/chechens-running-from-kady-rov-stuck-on-polish-border-a55165> (accessed on 25 September 2019).

<sup>47</sup> Reuters, “Poland did not invite refugees, has right to say ‘no’: Kaczynski”, 2 July 2017, available at <https://www.reuters.com/article/us-poland-migrants-idUSKBN19M3H8> (accessed on 25 September 2019).

8.2 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.

8.3 The Committee takes note of the State party's assertion that the authors failed to exhaust available domestic remedies, as required under article 5 (2) (b) of the Optional Protocol, to challenge expulsion decisions. The Committee notes the authors' assertion that none of the proposed avenues of administrative review were either accessible or effective, as they would not prevent or remedy the harm they were facing,<sup>48</sup> that is to say, removal from the State party's territory. The Committee also notes that the State party does not explain how such remedies could have been effective in addressing or remedying the authors' claims in the event they had been successful, particularly since, as acknowledged by the State party, none had suspensive effect. Therefore, the Committee finds that such remedies do not fall within the meaning of effective remedies, which must be exhausted prior to submitting a complaint under the Covenant. Accordingly, the Committee considers that it is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol from examining the present communication.

8.4 The Committee notes the State party's claim that the communication should be found inadmissible on the grounds that the authors do not have victim status. It also notes the State party's assertion that article 7 of the Covenant does not apply to the authors since they did not make any claim for international protection at the border and therefore article 13 does not apply to the authors' case, as there was no indication that they were asylum-seekers or that their legal status was in doubt. The Committee further notes the authors' assertions that they did claim asylum each time they reached the border and that each time their claims were not acknowledged. They therefore claim that the State party's refusal to allow them entry into its territory as asylum-seekers was in contravention of their rights under articles 7 and 13 of the Covenant, read alone and in conjunction with article 2 (3). The Committee finds that the authors have sufficiently substantiated their claims that they presented information to authorities at the Terespol border checkpoint which implicated the State party's obligations under articles 7 and 13 and that in this regard, they have victim status under article 2 of the Optional Protocol. The Committee therefore finds that it is not precluded from an examination on the merits.

#### *Consideration of the merits*

9.1 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.

9.2 The Committee notes the authors' assertions that they arrived at the border of the State party with Belarus to claim asylum in January 2017 owing to their fear of persecution in the Russian Federation. They therefore feared an imminent, serious and personal threat if they returned to the Russian Federation. Upon being interviewed at the border, they informed Border Guards of their request for asylum, producing supporting documents, and state that those claims were never acknowledged or recorded by interviewers and that they were not given any chance to verify the content of those records. On the basis that the claims made under article 7 of the Covenant were not recognized as such and as they had no valid travel documents, they were issued decisions denying them entry into the State party and ordering their removal, pursuant to which they were immediately removed to Belarus. The authors argue that they attempted to claim asylum at the border on more than 20 further occasions, each time with the same outcome. They assert that, as their asylum claims were not registered, they were not passed on to the Office of Foreigners for substantive assessment in violation of article 7. They claim that as a result, they were refused status as asylum-seekers and were therefore denied the right to enter and remain on State party territory or to do so in order to have their legal status determined in contravention of article 13. They state that their immediate removal blocked their access to effective remedies for those violations, as provided for under article 2 (3) of the Covenant, as they could not mount a legal challenge to

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<sup>48</sup> Authors quote European Court of Human Rights, *Sikorski v. Poland*, Application No. 17599/05, Judgment, 22 October 2009.

halt their removal and had no way to access legal assistance from abroad. They argue that the treatment to which they were subjected at the border and in Belarus further exposed them to inhuman and degrading treatment in violation of article 7.

9.3 The Committee notes the State party's argument that the authors had not at any material time made claims before Board Guard officers for international protection under article 7 of the Covenant. It therefore claims that they did not meet the definition of asylum-seekers or foreigners whose legal status was in doubt. It therefore asserts that the authors had no right to enter or remain on the State party's territory, as provided for by article 13. As they had no visas allowing them to enter the State party, they were removed to the Belarussian side of the border. The State party claims that despite not having raised issues triggering obligations under articles 7 and 13 of the Covenant, they nonetheless had the opportunity to effectively challenge those decisions through domestic judicial and administrative processes. The State party notes, however, that, not having raised any issues under article 7, such remedies were not required and did not have suspensive effect. It therefore reiterates that there was no breach of article 7 or article 13 and therefore no right to remedies under article 2 was triggered with respect to either of those articles.

9.4 The Committee recalls its jurisprudence on the obligations of State parties towards aliens<sup>49</sup> in which it confirms that States parties must respect and ensure the rights laid down in the Covenant to anyone within their power or effective control, even if not situated within the physical territory of the State Party. The enjoyment of rights under the Covenant must be made available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, who may find themselves in the territory or subject to the jurisdiction of the State party.<sup>50</sup> The Committee recalls that, while rights under article 13 protect only aliens lawfully on State party territory, in certain circumstances, an alien may enjoy protection under the Covenant, even in relation to entry or residence, when, for example, considerations of non-discrimination or the prohibition of inhumane or degrading treatment arise, as in the present case. Furthermore, it recalls that, if the legality of an alien's entry or stay is in dispute, aliens are entitled to submit reasons against their expulsion before the competent authority and must be given full facilities for pursuing a remedy against expulsion so that this right will, in all the circumstances of the case, be an effective one. The Committee refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it states that the right to an effective remedy may in certain circumstances require States parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair, at the earliest possible opportunity any harm that may have been caused by such violations.<sup>51</sup>

9.5 Moreover, the Committee recalls its jurisprudence<sup>52</sup> in which it is indicated that States parties have an obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, including both physical pain and mental anguish, such as is contemplated under article 7 of the Covenant, either in the country to which removal is to be affected or in any country to which the person may subsequently be removed. The Committee finds that the authors have substantiated that they raised issues before State party border authorities that implicated their rights under article 7 of the Covenant and notes that the State party did not provide the interview records to substantiate its argument that the authors had not made any claims for international protection. It therefore concludes that the refusal of State party authorities to recognize the authors' requests for asylum and the authorities' consequently denying them the opportunity to have the merits of their claims assessed in good faith amounts to a failure by the State party to discharge its obligations under article 7 of the Covenant. It finds that in denying the authors the opportunity to have their protection claims duly considered and denying them the right or opportunity to challenge those denials, including the failures to provide access to legal assistance, to produce the interview notes

<sup>49</sup> In its general comment No. 15 (1986) on the position of aliens under the Covenant, the Human Rights Committee invokes article 2, paragraph 1, of the Covenant, stating that "each State party must ensure the rights in the Covenant 'to all individuals within its territory and subject to its jurisdiction'".

<sup>50</sup> General comment No. 15 (1986), para. 1.

<sup>51</sup> General comment no. 31 (2004), para. 19.

<sup>52</sup> *Ibid.*, para. 12.

either at the time of the expulsion decision or thereafter and to offer a remedy with suspensive effect on their expulsion orders, the State party also failed to afford the authors the procedural safeguards necessary to avoid arbitrariness and provide effective redress in violation of article 2 (3), read in conjunction with article 7 of the Covenant.

9.6 The Committee notes that, as set down in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the procedural guarantees under article 13 of the Covenant incorporate notions of due process and that, insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals, as enshrined in article 14, paragraph 1, of the Covenant, and the principles of impartiality, fairness and equality of arms, implicit in this guarantee, are applicable.<sup>53</sup> The Committee recalls its jurisprudence under its general comment No. 15 (1986) on the position of aliens under the Covenant, in which it is affirmed that, if the legality of an alien's entry or stay is in dispute, any decision on this point, leading to his expulsion or deportation, ought to be taken in accordance with article 13. In the circumstances of the present case, the Committee finds that the decision of the State party authorities to deny the authors their status as asylum-seekers or individuals whose legal status was in doubt was taken arbitrarily, without acknowledging or assessing their requests for international protection. It therefore finds that the State party violated the authors' rights under article 13 of the Covenant.

9.7 The Committee also finds that, in issuing expulsion orders with immediate effect and having those orders carried out without providing the authors with the means or opportunity to effectively challenge the arbitrary denial of their asylum-seeker status, the State party failed to afford to the authors their right to access an effective remedy for the alleged violation of article 13 of the Covenant. The Committee therefore finds that the State party also violated the rights of the authors under article 2 (3), read in conjunction with article 13 of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is therefore of the view that the facts before it disclose a violation by the State party of articles 7 and 13 read alone and in conjunction with article 2 (3) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. The Committee is of the view that in the present case its Views on the merits of the claims constitute sufficient remedy for the violations found. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future. In this connection, in accordance with its obligation under article 2 (2) of the Covenant, the State party should carry out a comprehensive review of all relevant policies, procedures and legislation in order to identify and effectively remedy any gaps in the implementation of the State party's obligations under the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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<sup>53</sup> *Ahani v. Canada* (CCPR/C/80/D/1051/2002), para. 10.9. See also *Everett v. Spain* (CCPR/C/81/D/961/2000), para. 6.4 (extradition); and *Taghi Khadje v. Netherlands* (CCPR/C/88/D/1438/2005), para. 6.3.