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Committee on Economic, Social and Cultural Rights

Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 176/2020*, **, ***

Communication submitted by:	Sergei Ziablitsev (not represented by counsel)
Alleged victim:	The author
State party:	France
Date of communication:	6 January 2020 (initial submission)
Date of adoption of decision:	2 March 2022
Subject matter:	Eviction from social housing
Procedural issues:	Exhaustion of domestic remedies; abuse of rights
Substantive issue:	Right to adequate housing
Article of the Covenant:	11 (1)
Article of the Optional Protocol:	3 (1) and (2) (f)

1.1 The author of the communication is Sergei Ziablitsev, a national of the Russian Federation born on 17 August 1985. He claims to be a victim of a violation by the State party of his rights under article 11 (1) of the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol entered into force for the State party on 18 June 2015. The author is not represented by counsel.

1.2 On 14 January 2020, the Committee, acting through its working group on communications, registered the communication but decided to deny the author's request for interim measures, as provided for under article 5 of the Optional Protocol, as it had not received sufficient specific information to substantiate the risk of irreparable damage to the author.[1] On 29 July, 2 October and 26 October 2020 and 22 January 2021, the Committee,

* Adopted by the Committee at its seventy-first session (14 February–4 March 2022).

** The following members of the Committee participated in the examination of the communication: Mohamed Ezzeldin Abdel-Moneim, Nadir Adilov, Mohammed Amarti, Asraf Ally Caunhye, Laura-Maria Crăciunean-Tatu, Peters Sunday Omologbe Emuze, Karla Vanessa Lemus de Vásquez, Mikel Mancisidor de la Fuente, Seree Nonthasoot, Lydia Ravenberg, Preeti Saran, Shen Yongxiang, Heisoo Shin, Rodrigo Uprimny and Michael Windfuhr. Pursuant to rule 23 of the rules of procedure under the Optional Protocol, Committee members Aslan Abashidze and Ludovic Hennebel did not take part in the examination of the communication.

*** An individual opinion by Committee member Rodrigo Uprimny (concurring) is annexed to the present decision.

[1] The author requested interim measures whereby the State party would restore his material reception conditions and resume payment of the asylum seeker's allowance.

acting through its working group on communications, denied new requests from the author for interim measures.

1.3 In the present decision, the Committee will first summarize the information and the arguments submitted by the parties, without taking a position; it will then consider the admissibility and merits of the communication; and, lastly, set out its conclusions.

A. Summary of the information and arguments submitted by the parties

Facts as submitted by the author[2]

2.1 After working as a surgeon in Moscow for 10 years, on 20 March 2018, the author left the Russian Federation with his wife and their two children, born on 22 June 2015 and 28 January 2017, because he was wanted by the Russian authorities as a result of his human rights activities.[3] On 11 April 2018, the family applied for asylum in France[4] and were granted asylum seeker certificates. On this basis, the French Office for Immigration and Integration granted them accommodation (a hotel room) and an allowance. However, by a decision of 18 April 2019, the Office terminated all of the author's allowances following a report from the shelter of the author's violent behaviour towards his wife, which had required police intervention. On 19 April 2019, the author was forced to leave the accommodation. The author's wife was relocated with the children, subsequently returned with the children to the Russian Federation without informing the author, and filed for divorce there.

2.2 On 25 April 2019, the author was offered accommodation at the Abbé Pierre emergency shelter. However, after his arrival there, he was served with 14 written warnings for failure to respect the facility's rules of operation, such as failure to respect the equipment made available, indecent dress and failure to respect the privacy of others. On a regular basis, he filmed, recorded or took pictures of the staff during their work, in disregard of their right to privacy, and even though they made it clear that they did not want such things to be recorded. On 17 July 2020, the author aggressively interrupted a facility staff member who was reminding another user of the operating rules. The author started filming the scene and was asked to stop. When he refused, he was requested to leave the facility, which he also refused to do. The municipal police had to be called, and they proceeded to evict him in view of his behaviour, which was entirely incompatible with life at the facility. On 21 July 2020, the author filed a complaint with the Nice Administrative Court, requesting that the French Office for Immigration and Integration should provide him with the material reception conditions of an asylum seeker and that the emergency shelter should immediately provide him with a place. By letter dated 23 July 2020, the Municipal Social Welfare Centre (Centre communal d'action sociale) confirmed to the author that he was to be excluded for a period of six months. By an order of 22 July 2020, the Nice Administrative Court ruled that the author had not established that he was homeless or in a situation of social distress, or that he had been subjected to inhuman treatment. The author challenged this order before the Council of State, but his appeal is pending.

2.3 On 19 September 2019, the author claimed the allowance that had been unpaid since 18 April 2019 and requested that he should be given the accommodation usually granted to asylum seekers. On 23 September 2019, the Nice Administrative Court found that the author had not been given the opportunity to submit prior written observations before the material reception conditions were withdrawn by the decision of 18 April 2019, and that the decision was therefore unlawful. In addition, noting that the French Office for Immigration and

[2] The facts have been reconstructed on the basis of the initial submission and the information subsequently provided by the parties in their observations and comments on the merits of the communication.

[3] The author specifies that he was a member of the "Public Oversight of Public Order" movement.

[4] On 30 September 2019, the French Office for the Protection of Refugees and Stateless Persons rejected the author's application for asylum, as he had not demonstrated that he would be personally exposed to persecution in his country. The author filed an appeal with the National Court of Asylum, which was rejected on 20 April 2021. He was then placed in detention for deportation to the Russian Federation. His repeated requests for interim measures to prevent his deportation have been rejected by the Human Rights Committee and the Committee against Torture.

Integration had not responded to the author's request to restore his material reception conditions, the Court gave the Office one week to decide on the author's request to restore his material entitlements. The author challenged this decision, claiming that the Court should have stopped the inhuman treatment to which he was subjected, and he further complained that he was not allowed to record the hearing. However, on 29 October 2019, the Council of State rejected his complaint, considering that the Court's decision did not impair the author's right to asylum. It noted, inter alia, that the author was born in 1985, that he had no health problems, that he now lived alone, that he had been violent towards his wife, that he was not completely deprived of accommodation and that he was not in a vulnerable situation.

2.4 By a letter dated 30 September 2019, the local director of the French Office for Immigration and Integration notified the author, in execution of the 23 September 2019 order, of his intention to withdraw his material entitlements – to lodging and allowance – due to the author's violent behaviour. On 1 October 2019, the author asked the Nice Administrative Court to order the Office to reinstate his material entitlements. On 3 October 2019, the Court denied his request on the grounds that he had been housed in an emergency shelter for a few days, but also because he had brought four cell phones and a tablet to the hearing with the intention of recording it, demonstrating that he had the financial means to afford five expensive electronic devices.

2.5 By a decision of 16 October 2019, the French Office for Immigration and Integration withdrew the author's material entitlements owing to his violent behaviour, as reported by the manager of the shelter and by the law enforcement services that had been called to the site. On 17 October 2019 the author applied to the Nice Administrative Court, requesting it to annul the Office's decision of 18 April 2019. This case is still pending.

2.6 On 6 November 2019, the author filed a petition with the Nice Administrative Court for urgent relief from administrative penalties, seeking, inter alia, a finding that the actions implemented by the French Office for Immigration and Integration on 18 April 2019 were unlawful and calling for the annulment of the Office's decision of 16 October 2019, arguing that he could not be accused of violent behaviour in the absence of any administrative or criminal proceedings against him.[5] On 7 November 2019, the Court denied his request. It took note of statements by the hotel administrator that he had seen bruises on the hands of the author's wife and that following an argument between the couple, the author had forced his wife and children out of the room, kicking them and leaving them on the street, and had taken the room key, whereupon the administrator had called the police. On 26 November 2019 the Council of State rejected the author's appeal.

2.7 On 11 November 2019, the author filed a complaint calling for expedited action with the Nice Administrative Court because he had to pay for accommodation at an emergency shelter while he had a legal and unconditional right to free accommodation, as he was in a situation of distress. On 13 November 2019, the Court rejected his request, considering that the author, as a 34-year-old man with no family dependents, had not shown any medical or personal elements in support of his contention that he was in a particularly vulnerable situation. In addition, the Court expressed doubts about the author's claims of deprivation, given that he had appeared before the judges in possession of several expensive devices with the intention of recording the hearing. Recalling that the Social Welfare and Family Code did not stipulate that care must be free of charge, the Court concluded that, in view of the means available to the administration for the emergency accommodation of persons in distress and the number of persons in a particularly vulnerable situation awaiting emergency accommodation, the lack of care for the author did not constitute a serious and manifestly unlawful infringement of a fundamental freedom, namely the right to emergency accommodation. On 4 December 2019 the Council of State rejected the author's appeal.

2.8 On 18 November 2019, the author requested, in expedited proceedings, that the Nice Administrative Court should order the French Office for Immigration and Integration to restore his material reception conditions and compensate him for moral damage. By an order

[5] The author said that he had only started screaming when he learned that his wife had left him, which was why the hotel administrator had called the police. He also provided a copy of his wife's petition for divorce, which reportedly referred only to personal incompatibility.

of 22 April 2020, the Court dismissed his application, in the absence of a decision showing that the Office had ruled on an application previously submitted to it by the author. On 8 May 2020, the author filed an appeal against this order. It is still pending.

2.9 On 23 November 2019, the author filed a new petition for expedited proceedings before the Nice Administrative Court alleging inter alia that he had had no resources for seven months[6] but still had to pay €2.50 a day to access emergency accommodation. The author alleged that, as a result, he was at risk of being left without any accommodation. On 27 November 2019, the Court denied his request, as he had not demonstrated that he was in a particularly vulnerable situation.

2.10 On 2 January 2020, the author filed a request for interim measures with the European Court of Human Rights, asking it to order the State party to provide him with accommodation for asylum seekers within 48 hours and to pay him the asylum seeker's allowance. On 3 January 2020, the Court, under a single judge, rejected his request for interim measures and declared his application inadmissible because it did not meet the admissibility requirements of articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

2.11 On 13 January 2020, the author brought a case before the Nice Administrative Court requesting it to order the French Office for Immigration and Integration to pay him €3,000 for his entitlements as an asylum seeker and to order the Office to conclude a contract with a hotel to accommodate him with another asylum seeker in shared accommodation. By order of 23 January 2020, the Nice Administrative Court rejected his request, noting that the author had not submitted any prior request to the Office for payment of the amounts he considered he was owed for the asylum seeker's allowance. In addition, the Court considered that the author's request was abusive, given his behaviour pattern of compulsively and unreasonably bringing legal action with the use of inappropriate terms, and it imposed a fine of €1,500 on him.

2.12 On 12 August 2020, the author was placed in a psychiatric hospital on the basis of four medical certificates, as he was considered a danger to others. He claims that his human rights activities were the reason for this placement and states that in the hospital he was tortured, mistreated and prevented from filing complaints with the national authorities and the European Court of Human Rights. On 17 August 2020 and 21 September 2020, the author initiated court proceedings for unlawful detention and placement in a psychiatric hospital. On 1 September 2020, the Court of Appeal of Aix-en-Provence ordered his deprivation of liberty. On 11 September 2020, the author received an order from the prefect dated 10 September 2020 and based on a medical certificate dated 9 September 2020, extending his involuntary hospitalization on the basis of his psychiatric disorder. On 23 September 2020, the hospital informed him that he would be allowed to leave if he had a place to stay. The author's representatives tried to find him a room, but the rental agency informed them that the contract had to be concluded with the author, who would have to provide a residence permit, which he did not have. The author was invited to take part in a hearing on his asylum application on 5 October 2020, but the hospital and the authorities refused to respond to his requests to be released from the hospital and to be provided with a trip to Paris in order to participate in the hearing. On 6 October 2020, the author challenged his placement in a psychiatric hospital before the urgent applications judge. By an order of 7 October 2020, the Nice Administrative Court rejected his request, as the author's appeal for an end to the measure of involuntary psychiatric hospitalization at the request of a third party, which had been applied to him since 12 August 2020, fell under the jurisdiction of the liberties and detention judge of the ordinary court.

2.13 On 21 October 2020, the Defender of Rights informed the author that, following an exchange with the French Office for Immigration and Integration concerning the author's case, the Office had indicated that it was for the author to approach the local directorate of the Office to request the restoration of his material reception conditions, in accordance with

[6] The author also mentioned that he was taking university courses. According to his statements to the Committee, he completed an internship as a surgeon between June and September 2019 at the Santa Maria polyclinic and the Belvedere clinic, both located in Nice.

the *Haqbin* ruling issued by the Court of Justice of the European Union.[7] On 24 October 2020, the author brought a case before the urgent applications judge requesting the judge to order the Office to restore his reception conditions. This request was rejected by an order of 20 November 2020 of the Nice Administrative Court. Consequently, on 30 November 2020, the author filed a new application with the local director of the Office to restore his material reception conditions and reinstate the benefits he had received prior to the decision of 18 April 2019, requesting that urgent measures should be taken so that he could receive accommodation and an allowance. In the absence of a response from the Office, on 9 December 2020 the author again filed an application for interim relief with the Nice Administrative Court, requesting that the Office should be ordered to restore the entitlements that he had enjoyed prior to the decision of 18 April 2019. On 14 December 2020, the Court denied his application, as it was substantially identical to the application submitted on 24 October 2020.

2.14 On 10 December 2020, the author challenged the inaction of the local director of the French Office for Immigration and Integration with the general directorate of the Office, citing the *Haqbin* judgment and the ruling handed down in the case of *N.H. and Others v. France* by the European Court of Human Rights on 2 July 2020.[8] Subsequently, on 22 and 23 December 2020, the author complained to the Paris Administrative Court about the inaction of the Office's general directorate following his exchange with the Defender of Rights, and he requested emergency measures. On 24 December 2020, the Court declined jurisdiction, as the contested decisions had been made by the regional directorate of the Office in Nice. On 25 December 2020, the author moved to recuse the previous judge and reiterated his request before the Paris Administrative Court, which again rejected it on 26 December 2020. On 26 December 2020, the author filed a third motion before the Paris Administrative Court, in which he moved to recuse the two previous judges and requested interim measures. On 29 December 2020, this motion was again denied, for lack of jurisdiction. The author appealed on 31 December 2020. Subsequently, on 9 January 2021, he filed a case with the Nice Administrative Court against the Office and complained of a denial of justice by the French courts.

2.15 According to the author, at the end of December 2020, an employee of the Nice branch of the association JRS France personally paid for a place in a hotel for him until 11 March 2021 and then bought him a tent so that he would not have to sleep in the open. However, this person asked the author not to inform the authorities of the assistance and did not provide him with any personal information. The author says he lives in a tent, deprived of entitlements. His phone and Internet access are paid for by a third party.

Complaint

3.1 The author invokes article 11 of the Covenant, complaining of a lack of respect for his right to an adequate standard of living, including adequate food, clothing and housing. He complains that he has to pay €2.50 a night for accommodation and disputes all the decisions taken by the national courts. He further claims that he has been discriminated against because of his status as a vulnerable person and recalls that all asylum seekers should be protected.

3.2 The author claims that he sleeps in the woods.[9] He also claims that, although there are rooms available in hotels for refugees, the authorities do not want to accommodate him there. Lastly, he alleges that he has been subjected to torture and inhuman treatment by the French courts, which have conspired to act against his interests and do not adopt timely decisions and urgent measures, forcing him to beg to survive, which indicates a lack of impartiality. In conclusion, in the absence of accommodation and an allowance, the author claims to have suffered irreparable harm since the decision handed down on 18 April 2019.

[7] Court of Justice of the European Union, *Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, case No. C-233/18, Judgment, 12 November 2019.

[8] European Court of Human Rights, *N.H. and Others v. France*, nos. 28820/13, 75547/13 and 13114/15, Judgment, 2 July 2020.

[9] When addressing the authorities, the author nonetheless provides the address of Forum réfugiés in Nice (an institution responsible for the initial reception of asylum seekers).

State party's observations on admissibility and the merits

4.1 In its observations dated 16 March and 22 September 2020, the State party first argues that the communication does not meet the admissibility criteria set out in the Optional Protocol, since the author brought the matter before the Committee without waiting for the decision of the administrative judge on the application he lodged with the Nice Administrative Court for judicial review of the administrative decision of 18 April 2019; there has thus been a failure to exhaust domestic remedies. The State party argues that the application for urgent relief from administrative penalties and the application for judicial review of a decision do not have the same purpose. It notes that the author did not bring an application for judicial review of a decision, also known as an appeal against an ultra vires act, before the administrative judge in respect of the decision of 16 October 2019 by which the French Office for Immigration and Integration had notified him of the withdrawal of the material reception conditions; instead, he merely brought applications for urgent relief from administrative penalties.

4.2 The State party specifies that, when there is an emergency situation and a public entity infringes a fundamental freedom in a serious and manifestly unlawful manner, the urgent relief from administrative penalties provided under article L5212–2 of the Code of Administrative Justice allows the urgent applications judge to order any measures necessary to safeguard the fundamental freedom. Generally speaking, the urgent applications judge acts in a provisional capacity. The order makes it possible to hand down protective, reversible measures. They can thus be modified by a trial court if the case is subsequently brought before it. Moreover, the order does not constitute res judicata, notwithstanding the fact that, like any judicial decision, it is enforceable. Thus, a judge who hears an appeal for urgent relief from administrative penalties does not have the power to overturn an administrative decision.

4.3 Overturning an unlawful administrative decision falls under the competence of the administrative judge hearing an appeal against an ultra vires act or an application for judicial review. In such a case, the judge does not act in a provisional capacity but decides on the merits of the case, and the decision, once final, constitutes res judicata. Therefore, only an application for judicial review would have been able to offer the author an appropriate remedy for the violation invoked by him.[10]

4.4 The State party then addresses the manifestly ill-founded and insufficiently substantiated nature of the communication. It considers that, for a communication to be admissible, authors must not have deliberately and knowingly committed acts or omissions that would exclude them from entitlement to existing benefits; in other words, they must not be solely responsible for the fact that they have no adequate housing.[11] The author is in the situation he is challenging before the Committee solely as a result of his own conduct. This case is covered by article L744–8 (No. 1) of the Code on the Entry and Stay of Aliens and the Right to Asylum. Furthermore, the author contests the emergency accommodation solution explicitly proposed to him by the public authorities at €2.50 per night. The State party notes that neither the Covenant nor the Committee's general comments call for housing to be free of charge, and that the amount, €2.50, demonstrates that such housing has been largely subsidized by national solidarity and by the authorities. Moreover, the author was evicted from the emergency shelter because of his refusal to abide by the rules. By not accepting the proposed solution, the author deprived himself of the reception conditions that were offered to him.

4.5 In addition, the State party produces a certificate from the local director of the French Office for Immigration and Integration dated 12 August 2020, in which he states, inter alia, that the author was verbally abusive at the reception areas of the prefecture and the Office, which required the intervention of security services, and that he systematically filmed his appointments or visits to the authorities without permission from the institutions concerned

[10] In this regard, the State party produced three decisions dated 11 and 12 February 2020, in which the Paris, Grenoble and Melun Administrative Courts, hearing appeals for judicial review, overturned decisions of the French Office for Immigration and Integration refusing material reception conditions for other asylum seekers.

[11] *S.S.R. v. Spain* (E/C.12/66/D/51/2018), para. 4.7.

or the persons present. The State party therefore considers that the author is solely responsible for the removal of the material reception conditions, owing to his violent behaviour.

4.6 The State party points out that the author has not provided any evidence or specific facts relating to his present situation, either in his initial submission or in his additional observations.

4.7 The State party then states that it considers the communication to be an abuse of the right to submit a communication within the meaning of article 3 (2) (f) of the Optional Protocol. In the author's numerous posts and photographs on social media, he presents himself as a surgeon at the Pasteur Hospital in Nice, spends winter vacations in Courchevel, dines in restaurants in Monaco and visits several cities and historical sites on the French Riviera. Clearly, the author is neither homeless nor in social distress, contrary to his allegations before the domestic courts and the Committee.

4.8 In the alternative, the State party requests the Committee to find the absence of any violation of article 11 of the Covenant. While the Committee has been able to rule on evictions related to the expiry of a lease, unauthorized occupation or lease termination, it apparently has not heard a case similar to the author's.

4.9 In this case, it has been shown that the author demonstrated violent behaviour that led the French Office for Immigration and Integration, in application of French law, to terminate his entitlement to the provisions for the reception of asylum seekers, for just cause. The author had at his disposal ample remedies to contest the withdrawal of his material reception conditions before the administrative judge: urgent relief from administrative penalties, application for a stay of action and application for judicial review. In the context of the author's various petitions for urgent relief from administrative penalties, the administrative judge conducted a rigorous examination of the author's personal situation and potential vulnerability. The author's removal from his accommodation for asylum seekers thus did not constitute a violation of article 11 of the Covenant.

Author's comments on the State party's observations

5.1 In his comments dated 7 July 2020 and 2 February 2021, the author emphasizes that he has exhausted all domestic remedies. He points out that the Abbé Pierre emergency shelter is not housing; it provides a bed for the night from 11 p.m. to 7 a.m. and access to showers, subject to a payment of €2.50 per night. Moreover, the author has never been able to obtain free clothing and shoes, as the association proposed that he should pay €5 to have access to clothing for his height, which is 190 cm.

5.2 The author points out that the associations give food aid once a week in the form of canned goods, cereals and noodles. On the one hand, space is required to store such goods, but the rules of the Abbé Pierre emergency shelter prohibit bringing food onto the premises. On the other hand, such food must be prepared, and there are no facilities to do so. Consequently, the failure to provide him with housing means that he is not provided with food assistance.

5.3 With regard to the State party's argument on the non-exhaustion of domestic remedies, the author states that on 6 November 2019 he asked the urgent applications judge to annul the 16 October 2019 decision of the French Office for Immigration and Integration, but that by an order of 7 November 2019, the urgent applications judge rejected the request, without specifying that he lacked the jurisdiction to do so. Consequently, the author states that he has exhausted all remedies, since all judges refer to this order as a "preliminary" ruling. In addition, the author argues that the annulment procedure must be accompanied by a procedure to suspend the decision challenged in the interim measures procedure, as the victim must not be subjected to inhuman treatment for a year or two while the proceedings, which the author deems to be slow, are ongoing. The author therefore considers that because the urgent applications judges refused to adopt provisional measures, he has exhausted the remedies recognized by international law as effective, i.e., those having suspensive effect.

5.4 Furthermore, the author argues that, contrary to the State party's claim, he did not abuse his right to submit a communication, as the photographs posted on social media do not prove that the author had housing and income, but only the fact that a person can place on

social media any photo, from any date, with any freely chosen location.[12] The author also claims that the State party continues to disseminate defamatory statements against him, alleging that he violated the rules of the shelter and perpetrated domestic violence, even though no competent authority has verified this information from the French Office for Immigration and Integration on his behaviour.

B. Committee's consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 10 (2) of its rules of procedure under the Optional Protocol, whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, first of all, that the State party considers that the communication constitutes an abuse of the right to submit a communication, since it is clear from the author's activity on social media that he is neither homeless nor in social distress, contrary to what he alleges before the domestic courts and the Committee. The author explains that he maintains a different identity on social media. The Committee considers that, in view of the facts and circumstances set out in the communication, it cannot assess from a single photograph with any degree of certainty the income or living conditions of the person depicted in it without further supporting evidence. Accordingly, in the absence of further evidence, the Committee does not consider that the author's failure to inform the Committee of his social media activities constitutes an abuse of the right to submit a communication under article 3 (2) (f) of the Optional Protocol.

6.3 The Committee recalls that article 3 (1) of the Optional Protocol precludes it from considering a communication unless it has ascertained that all available domestic remedies have been exhausted. Article 6 (1) of the Optional Protocol further provides that the communication must be brought confidentially to the attention of the State party unless the Committee considers the communication inadmissible.

6.4 The Committee is of the view that its legal doctrine in respect of the implementation of articles 3 (1) and 6 (1) of the Optional Protocol must be in line with both the language of the Optional Protocol and the established practice adopted in this regard by international human rights adjudicating bodies,[13] in accordance with the generally recognized principles of international law.

6.5 In accordance with articles 3 (1) and 6 (1) of the Optional Protocol, the authors of a communication are required to provide information on the exhausted remedies to enable the Committee to make a prima facie assessment of whether this admissibility requirement has been met, or to demonstrate that such remedies are unavailable, ineffective or unreasonably prolonged. Failing that, the communication may be declared inadmissible by the Committee in accordance with article 6 (1) of the Optional Protocol and thus cannot be registered and transmitted to the State party.

6.6 If, at the time of submission of a communication, the Committee is unable to determine conclusively whether all available remedies have been exhausted, it may register and transmit the communication to the State party. It will then be for the State party to challenge the admissibility of the communication on the basis of the grounds specified in article 3 of the Optional Protocol. A State party raising an objection to admissibility on the grounds of non-exhaustion of domestic remedies must moreover prove that the author of the communication has not exhausted available and effective remedies capable of redressing the alleged violation. The Committee will proceed with the verification of admissibility after considering the State party's observations and any comments the author may make in response to the State party's objection.

[12] The author claims that some of these photos were taken between 2016 and 2018 and that what he posts on social media does not correspond to his actual situation.

[13] *Gómez-Limón Pardo v. Spain* (E/C.12/67/D/52/2018), para. 6.2; *El Goumari et al. v. Spain* (E/C.12/69/D/85/2018), para. 6.3; and *M.B.B. et al. v. Spain* (E/C.12/68/D/79/2018), para. 8.1.

6.7 The State party is deemed to have waived its objection to the admissibility of the communication if it does not communicate to the Committee, within a reasonable time, the grounds on which it objects to admissibility, and if it does not specify the domestic remedies available that have not been exhausted by the authors.

6.8 In the present case, the State party expressly requested that the communication should be deemed inadmissible on the grounds that the author had not used the remedy of annulment of the decision of 16 October 2019 by which the French Office for Immigration and Integration had notified him of the withdrawal of the material reception conditions, and that he had merely lodged appeals for urgent relief from administrative penalties, which could not result in the annulment of an administrative decision. In addition, the State party submits that the annulment proceedings filed by the author against the administrative decision of 18 April 2019 are still pending.

6.9 The Committee notes that, by a decision of 18 April 2019, the French Office for Immigration and Integration terminated the author's material reception conditions and ordered him to vacate the housing that he occupied. After the administrative court found a procedural flaw, the Office issued a new decision on 16 October 2019, which, however, maintained the provisions of its previous decision. The Committee notes that the author used several proceedings for urgent relief from administrative penalties to challenge the withdrawal of his entitlements as an asylum seeker. However, the State party notes that the procedure that could effectively have led to the annulment of the Office's decision was the judicial review procedure, not the urgent relief from administrative penalties procedure. In this regard, the State party submits that, although the author filed an application for judicial review against the administrative decision of 18 April 2019, he neither waited for the completion of the procedure nor filed an application for judicial review against the administrative decision of 16 October 2019. In support of its comments on the effectiveness of the judicial review procedure, the State party gives as examples three applications for judicial review from other asylum seekers which resulted in annulments of the same kind of decisions issued by the Office. In response, the author replies that he did request the annulment of the decision of 16 October 2019, but in the context of an urgent relief from administrative penalties procedure, and not through the judicial review procedure. The author does not comment on the decisions given as examples by the State party.

6.10 The Committee considers that the author does not convincingly explain why he challenged the original decision of the French Office for Immigration and Integration with an application for judicial review, but not the one issued after the courts had found procedural flaws in the adoption of that decision, which, however, should ultimately be considered the administrative decision taken in his regard in compliance with the legal provisions. The Committee then notes the author's silence with regard to the examples provided by the State party to demonstrate the effectiveness of appeals for judicial review to set aside decisions by the Office concerning the withdrawal of the material reception conditions of asylum seekers. In addition, the Committee notes that the annulment proceedings filed by the author against the Office's decision of 18 April 2019 are still pending. The Committee also notes that, although the author did request the annulment of the administrative decision of 16 October 2019, he did not do so in the context of a petition for judicial review, but in the context of a procedure for expedited action. Lastly, the Committee notes the State party's explanations on the difference between an application for urgent relief from administrative penalties, which allows for the issuance of protective, reversible measures without the force of res judicata, and an application for judicial review, which allows the administrative judge to rule on the merits, and with the force of res judicata, on a request for the annulment of an unlawful administrative decision.

6.11 Consequently, the Committee considers that the application for judicial review, which was available to the author, constitutes an effective remedy to seek the annulment of an administrative decision of the French Office for Immigration and Integration. Given the breadth of the proceedings initiated by the author with the same goal of annulling the Office's decision and the fact that he did indeed file an application for judicial review against the 18 April 2019 decision, there is nothing in the case file to indicate that the author had no access to such a remedy against the 16 October 2019 decision, or that an appeal for judicial review against an administrative decision of the Office was not an effective remedy in the

circumstances of this case. In the absence of information indicating that the remedy of judicial review was unavailable to the author or would have been ineffective, the Committee considers that, according to the information in the case file, the author did not exhaust all available domestic remedies. Consequently, the Committee finds the communication inadmissible under article 3 (1) of the Optional Protocol.

C. Conclusion

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 (1) of the Optional Protocol;

(b) That the present decision shall be transmitted to the author of the communication and to the State party for information.

Annex

[Original: Spanish]

Individual opinion of Committee member Rodrigo Uprimny (concurring)

1. I concur with the Committee's decision to declare the present communication inadmissible for failure to exhaust domestic remedies, and also with the doctrine it reflects on the distribution of procedural burdens among States, petitioners and the Committee itself in respect of this admissibility requirement. I also believe that members of judicial or quasi-judicial bodies such as the Committee should strive to achieve consensus (meaning agreement, albeit with different levels of enthusiasm) on our decisions and their legal underpinnings in order to enhance the strength and coherence of our collegial bodies' collective doctrine. We must therefore limit, as much as possible, the use of dissenting or concurring opinions. Notwithstanding the foregoing, I am compelled to submit this concurring opinion because, despite my request to this effect, the Committee preferred not to explicitly acknowledge that the present decision has corrected the ambiguities of its previous doctrine on the matter; and I do not see this as a minor issue. I shall thus clarify, firstly, what this ambiguity was and how it was corrected and, secondly, why it was important for the Committee to explicitly acknowledge that it was making this rectification to its jurisprudence.

The Committee's doctrinal ambiguity and its correction

2. Articles 3 (1) and 6 (1) of the Optional Protocol suggest that it is incumbent upon the Committee to verify ex officio whether or not domestic remedies have been exhausted: these articles state that the Committee must have ascertained that all available domestic remedies have been exhausted before it can consider a communication and transmit it to the respondent State. However, a strictly literal interpretation that imposes this ex officio burden on the Committee is unreasonable because, on the one hand, it is States that clearly know which remedies must be exhausted, and, on the other, the non-exhaustion of domestic remedies has been understood as a defence in favour of the State, in application of the principle that international human rights protection systems are subsidiary in nature, which means that States may waive this defence. Owing to these two factors, international human rights bodies have rightly understood that it is incumbent upon the respondent State to request a finding of inadmissibility for failure to exhaust domestic remedies, while clearly indicating which remedies were not exhausted; if the State does not do so, it is understood to have waived this defence or objection.

3. This tension between the wording of articles 3 (1) and 6 (1), on the one hand, and the purpose of this admissibility requirement in international legal practice, on the other, has led the Committee to take diverging approaches to the matter. In some cases it has understood the failure to exhaust domestic remedies as an objection that must be expressly invoked by the State,[1] while in other cases it has taken the view that even though the State had not invoked the failure to exhaust such remedies, it was incumbent upon the Committee to verify ex officio whether or not there clearly existed domestic remedies that the petitioners should have exhausted.[2]

4. The present decision not only corrects that ambiguity, but also resolves the normative tension, as it harmonizes the text of articles 3 (1) and 6 (1) with accepted practice in international law on the nature and purpose of the exhaustion of domestic remedies as an admissibility requirement. The Committee does so appropriately in paragraphs 6.3 to 6.7 of

[1] See, for example, *I.D.G. v. Spain* (E/C.12/55/D/2/2014) and *M.B.B. et al. v. Spain* (E/C.12/68/D/79/2018).

[2] See, for example, *El Goumari et al. v. Spain* (E/C.12/69/D/85/2018) and *Gómez-Limón Pardo v. Spain* (E/C.12/67/D/52/2018).

the present decision, with which I fully concur, by differentiating between two stages of the procedure: registration and admissibility.

Transparency and consistency in legal argumentation

5. The present decision reflects a sound doctrine on procedural burdens in respect of the exhaustion of domestic remedies, but unfortunately the Committee did not acknowledge that it was making a rectification to its jurisprudence.

6. This omission is not a minor point, as I noted in our internal discussions in the Committee, because, as some of the foremost theoreticians have pointed out,[3] consistency and transparency are minimum requirements for ensuring the correctness of judicial or quasi-judicial bodies' legal argumentation.

7. A judicial or quasi-judicial body should strive to be consistent and respect its precedents for at least three reasons: (a) out of respect for equality, since similar cases should be decided in the same manner; (b) in the interest of legal certainty, since the decisions of judicial and quasi-judicial bodies must be reasonably foreseeable; and (c) for the purpose of self-monitoring, since respect for precedent imposes a minimum level of rationality and universality by obliging us to decide each specific case in a way that we would be willing to accept in a different but analogous case.

8. As the duty of consistency and respect for precedent are not absolute values, judicial or quasi-judicial bodies may diverge in their jurisprudence when they have compelling reasons to do so. But this must be done transparently, not surreptitiously. We must clearly indicate what the rectification of jurisprudence consists of and what justifies it, since the duty to maintain consistency and follow precedent imposes a basic argumentative burden: any change or rectification of jurisprudence must be explicitly acknowledged and justified. Unfortunately, the Committee did not meet this argumentative burden in the present decision, and it was this omission that prompted the present concurring opinion.

[3] See the concurring views on this point expressed by authors from very different legal and philosophical traditions, such as H. Wechsler, "Toward Neutral Principles of Constitutional Law", *Harvard Law Review*, No. 73 (1959); N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Oxford University Press, 1994); R. Alexy, *Teoría de la argumentación jurídica* (Madrid, Centro de Estudios Constitucionales, 1989); L. Prieto Sanchís, "Notas sobre la interpretación constitucional", *Revista del Centro de Estudios Constitucionales*, No. 9 (1991); M. Atienza, *Curso de Argumentación Jurídica* (Madrid, Trotta, 2013); and C. Perelman, *Logique juridique. Nouvelle rhétorique* (Paris, Dalloz, 1978).