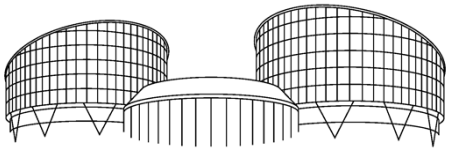

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ASADY AND OTHERS v. SLOVAKIA

(Application no. 24917/15)

JUDGMENT

Art 4 P4 • Prohibition of collective expulsion of aliens • Removal to Ukraine of Afghan nationals not seeking asylum in Slovakia, after examination of their individual situation • Applicants not asserting any risk of being subjected to treatment incompatible with the Convention

STRASBOURG

24 March 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Asady and Others v. Slovakia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President,*
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Lorraine Schembri Orland, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 10 December 2019 and 25 February 2020,

Delivers the following judgment, which was adopted on that last date:

PROCEDURE

1. The case originated in an application (no. 24917/15) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by nineteen Afghan nationals on 17 May 2015. A list of the applicants is set out in the appendix.

2. The applicants were represented by Ms Z. Števulová, a lawyer from the Slovak branch of the Human Rights League, an international non-governmental organisation (NGO). The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

3. The applicants alleged that their expulsion to Ukraine had been collective in nature and that they had not had an effective remedy in respect of it. In particular, they alleged that the State authorities had not carried out an individual assessment and examination of their cases and had denied them access to the asylum procedure.

4. On 26 September 2016 the complaints concerning Article 4 of Protocol No. 4, taken alone and in conjunction with Article 13 of the Convention, were communicated to the Government, and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Events of 17 November 2014

5. On 17 November 2014 at 1.30 a.m. the Slovak Border and Foreigners Police ("the police") apprehended, near the Ukrainian border, the nineteen applicants, together with other Afghan nationals. The applicants were found hidden in a truck whose driver fled after the police patrol had followed the vehicle which had not reacted to warning signs; none of them were carrying identity documents.

6. According to the Government, thirty-two persons, including the applicants, were subsequently taken to the border police station in Petrovce ("the police station") for the purposes of an identity check. Ten police officers were assigned to record their statements and document their cases; other officers were involved in undertaking certain actions around the site where the applicants had been apprehended and in providing transfers to the police station. A Persian-language translator was present from 9 a.m. for twenty-four hours and assisted the police in their dealings with the applicants. As to the other thirteen persons (the persons other than the nineteen applicants) brought to the police station, one of them was taken for a medical examination; the remaining twelve (five men, five women and two children) – who had asked for asylum – were transferred to a reception centre for asylum seekers on 18 November 2014 at 2 a.m. The Government provided a copy of the note on that transfer, which contained the names of the persons concerned.

7. The Government submitted, in respect of the applicants, the following documents, dated 17 November 2014, most of which were signed by the applicants and the interpreter:

- official notes, according to which the applicants had been brought to the police station for the purposes of establishing their identity;
- transcripts of oral explanations provided by the applicants concerning their irregular border-crossing; according to those transcripts, all the applicants had answered in the negative when asked by the police whether they had suffered persecution in their country of origin and whether they wished to seek asylum in Slovakia, stating that they had left Afghanistan for economic reasons and wanted to go to Germany;
- documents whereby the applicants had been informed of the commencement of the proceedings on their administrative expulsion and of their right to legal aid;
- transcripts of the interviews conducted with the applicants in their capacity as parties to the expulsion proceedings, whereby they had declared

that they had not suffered any kind of persecution in Afghanistan nor been sentenced to death there;

- documents whereby each applicant had been informed of the possibility to comment on the contents of his respective case file and to adduce evidence, neither of which possibilities the applicants had used;

- police decisions, rendered individually in respect of each applicant but with the same wording, on the applicants' administrative expulsion to Ukraine on the basis of sections 77 § 1 and 82 § 1 (a) of the Aliens Act (Law no. 404/2011 Coll., as amended), including a three-year ban on re-entering Slovak territory under Article 82 § 3 (b); pursuant to Article 83 § 2 (a) of the Aliens Act, the applicants had not been given any time-limit in respect of their voluntary departure, and the suspensive effect of any possible appeal had been excluded on the grounds of urgent public interest, pursuant to section 55(2) of the Administrative Proceedings Act (Law no. 71/1967 Coll., as amended); according to the instruction at the end of each decision regarding available remedies, an appeal against a decision could be lodged within fifteen days of the respective applicant being notified of that decision, and any subsequent decision was reviewable by a court; according to the note on the last page of that instruction, the decisions in question had been handed over to the applicants, as affirmed by the applicants' and the interpreter's signatures;

- documents whereby the applicants had been informed that their personal data would be registered in the information systems of the Slovak Ministry of Interior, in the EURODAC system, and in the Schengen information system;

- documents whereby the applicants had been informed of the possibility for them to ask the International Organization for Migration to be voluntarily returned to their home country;

- requests for the readmission of the applicants to Ukraine, issued by the police in a simplified procedure; documents certifying that the applicants had been returned to the Ukrainian authorities at 10.30 p.m. on 17 November 2014; and official notes on the execution of the expulsion decisions.

8. According to the above documents, all the interviews lasted exactly ten minutes and were conducted by two police officers in the presence of the interpreter. The times of some interviews, as given in the documents, overlapped – for example, between 9.20 a.m. and 9.30 a.m. two police officers and the same interpreter were recorded as being present at three different interviews. The questions were standardised, and most of the applicants' recorded answers were identical; the only difference was in the respective amounts of money the applicants were recorded as having in their possession.

9. Before the Court, the applicants submitted that the police had not properly identified all of them, that only a few of them had been

interviewed, and that they had been made to sign documents of unknown content in the Slovak language, having been told that those documents related to their asylum requests and that they would be transferred to a reception centre for asylum seekers. They also maintained that they had been given no information regarding the asylum procedure in Slovakia; they had nevertheless approached police officers with requests for asylum and for legal assistance, but the police had ignored them – even though they had transferred the remaining twelve persons to an establishment for asylum seekers. Moreover, the interpreter was present for a few hours only, as affirmed by the transcripts of the interviews, according to which all those interviews had taken place between 9.10 a.m. and 12.30 p.m.

10. It appears from the expulsion decisions of 17 November 2014 that the police took into account the economic situation of the applicants and the absence of any family ties in Slovakia, and that they examined the existence of any obstacles to the administrative expulsion, within the meaning of section 81 of the Aliens Act and with regard to Articles 3 and 8 of the Convention. In that the police also based their standpoint on the statements made by the applicants, who had not alleged any interference with their private and family life in Ukraine or any risk of torture, inhuman or degrading treatment or punishment if they were returned there. The police furthermore emphasised that the applicants were not at risk of any forced return to their country of origin (which had been confirmed at a bilateral meeting at the Slovak/Ukraine border of persons with the relevant authority), and that Ukraine had ratified the Convention.

11. On the basis of the above decisions on their administrative expulsion, the applicants were expelled to Ukraine on the same day (17 November 2014) at 10.30 p.m. They maintained that they had not been given copies of the decisions while they had still been on Slovak territory and that they had obtained copies only later by authorising their current legal representative to inspect their respective case files.

B. Developments after the applicants' expulsion to Ukraine

12. In Ukraine, the applicants were placed in the temporary detention centre in the town of Chop.

13. The file contains a copy of an email string between employees of an NGO in Ukraine who from 18 November 2014 onwards were allowed to talk to the applicants and lawyers from the Slovak branch of the Human Rights League, which resulted in the lodging of the appeals detailed. It appears from the email string that the applicants had been stating, since 18 November 2014, that they had asked for asylum in Slovakia and did not understand why they had been removed from Slovakia (unlike the other twelve migrants who had been arrested with the applicants); they also

expressed the view that the interpreter had provided an inaccurate translation.

14. On 25 November 2014, the first four applicants (Zabi Asady, Farid Ahmad Ahmadi, Ali Ahmadi, Sher Badov Shinwari) instructed a lawyer and lodged an appeal against the administrative expulsion decisions against them, alleging a violation of their procedural rights and a violation of Article 13 of the Convention taken in conjunction with Article 3 and Article 4 of Protocol No. 4. They maintained that only one person from their group had been questioned by the police and that the others had merely been handed documents in Slovak for them to sign, having been told that they would be taken to a reception centre for asylum seekers; thus, the obstacles to their expulsion and the risk of their indirect refoulement to Afghanistan where they feared prosecution had not been examined. Furthermore, their requests for asylum had been ignored by the Slovak police, they had not had access to any legal aid, and they had been expelled without having been first served with the relevant decision and without having had an effective remedy at their disposal. In their view, the situation complained of had thus amounted to collective expulsion, which was prohibited by Article 4 of Protocol No. 4.

15. On 10 and 25 December 2014, the applicants were transferred to another detention centre (in the municipality of Zhuravychi).

16. On 7 January 2015, the Slovak border police directorate dismissed their appeals and confirmed the impugned decisions of 17 November 2014. Referring to the contents of the file, the border police directorate pointed out that interpretation into Persian had been provided throughout the entire proceedings on expulsion; moreover, the applicants had been duly informed of their rights, had signed the relevant documents and had expressly stated that they did not want to ask for asylum. Furthermore, individual decisions had been delivered in respect of all the applicants and there had been no obstacles to their expulsion to Ukraine.

C. The applicants' whereabouts and their contacts with their legal representative

17. According to their legal representative, some applicants returned to Afghanistan, where they live under unstable conditions due to the deteriorating security situation in the country, which does not always allow them access to means of communication. Others are asylum seekers in Europe, with only occasional access to the Internet or telephone. In the light of those specific circumstances, their legal representative has created a Facebook group with a view to staying in contact with the applicants.

18. In observations dated 10 May 2017, the applicants' legal representative provided the Court with the following information concerning the whereabouts of the applicants and her contacts with them:

- Mr Zabi Asady currently resides in Sweden and maintains indirect contact with the applicants' legal representative via another applicant, Mr Sher Badov Shinwari. The legal representative provided the Court with a link to his Facebook account. He is also a member of a Facebook group dedicated to the instant case.
- Mr Farid Ahmad Ahmadi currently resides in Vienna, Austria. The legal representative provided a link to his Facebook account.
- Mr Ali Ahmadi's place of residence is currently unknown.
- Mr Sher Badov Shinwari currently resides in Austria as an asylum seeker and maintains direct contact with the legal representative via Facebook. He provided a statement regarding his just satisfaction claim.
- Mr Abdul Hamid Nasri currently resides in Denmark as an asylum seeker and maintains contact with the legal representative via Facebook. He provided a statement regarding the just satisfaction claim.
- Mr Mohammad Azam currently resides in Kabul, Afghanistan and maintains direct contact with the legal representative via Facebook. He provided a statement regarding the just satisfaction claim.
- Mr Samiuddin Faizy currently resides in France as an asylum seeker and maintains contact with the legal representative via Facebook. He provided a statement regarding the just satisfaction claim.
- Mr Mohammad Shakib currently resides in Odessa, Ukraine and maintains contact with the legal representative via Facebook. He provided a statement regarding the just satisfaction claim.
- Mr Nasir Ahangarzada's place of residence is currently unknown.
- Mr Zabiullah Zazai currently resides in Mazar-e Sharif, Afghanistan, and maintains direct contact with the legal representative via Facebook. He provided a statement regarding the just satisfaction claim.
- Mr Ali Ahmad Ali Zada's place of residence is currently unknown.
- Mr Abobaker Jamil currently resides in Afghanistan and maintains direct contact with the legal representative via Facebook. He provided a statement regarding the just satisfaction claim.
- Mr Salman Faqiri and his brother Mr Sohrab Faqiri are no longer interested in pursuing the proceedings and wish to strike their applications out of the Court's list of cases.
- Mr Mohamad Farid Ekhlas's place of residence is currently unknown.
- Mr Edris Yusufi's place of residence is currently unknown.
- Mr Bezhan Rahimi currently resides in Germany. The legal representative provided a link to his Facebook account.
- Mr Miramza Sidiqi currently resides in Berlin, Germany. His legal representative provided a link to his Facebook account.
- Mr Rahim Rahimi currently resides in Zurich, Switzerland. He maintains indirect contact with the legal representative via a Facebook group dedicated to the instant case; the legal representative provided a link to his Facebook account.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Police Corps Act 1993 (Law no. 171/1993 Coll., as amended)

19. Section 17(1) authorises the police to seek explanations, where required, from anyone who can contribute to the clarification of facts that are of importance in uncovering a misdemeanour or administrative offence and the perpetrator thereof, or facts of importance in tracking down missing or wanted persons or items.

20. Under sections 18(3) and (4), the police can take a person to a police station for the purposes of verifying his or her identity if that person is unable to credibly prove his or her name and surname, date of birth and place of residence.

B. Asylum Act (Law no. 480/2002 Coll., as amended)

21. Under section 3(1), asylum proceedings are launched by means of a declaration by the individual concerned to the relevant police department that he or she is applying for asylum or subsidiary protection on the territory of the Slovak Republic. Section 3(2)(b) provides that if a foreigner requests asylum after entering the territory of the Slovak Republic, the authority authorised to receive the asylum request is the police office established within the asylum facility. Under section 3(8), if a foreigner applies for asylum at a police office that does not have authority to receive an asylum request, that police office is obliged to inform the applicant of the relevant police office and provide him or her with a travel document valid for twenty-four hours; alternatively, it may decide that he or she should be detained.

C. Aliens Act (Law no. 404/2011 Coll., as amended)

22. Under section 77 § 2, the collective expulsion of foreigners on the basis of one single decision is inadmissible.

23. Section 81 enumerates the obstacles to administrative expulsion. Under section 81(1), it is not possible to expel an alien to a country where his life would be at risk on the grounds of race, nationality, religion, or association with a social group or political conviction, or where he would be at risk of torture or of cruel, inhuman or degrading treatment or punishment. It is also not possible to expel an alien to a country that has imposed on him the death penalty or where he can be expected to receive such a sentence in pending criminal proceedings.

Under section 81(2), an alien cannot be expelled to a country where his liberty would be at risk on the grounds of race, nationality, religion, or association with a social group or political conviction; this does not apply if,

by his behaviour, the alien puts national security at risk or if he has been convicted of a criminal offence and represents a danger to Slovakia.

Under section 81(4), an alien cannot be expelled to a country where he would be at risk of a forced return to [his or her country of origin], as described in section 81(1) and (2).

24. Section 82(1)(a) provides that the border police can authorise the administrative expulsion of a third-country national if he or she has irregularly crossed the external border, or if he or she intentionally avoids or refuses to undergo border control checks when crossing the external border.

25. Under section 83(1) and (2), a third-country national in respect of whom an administrative expulsion decision has been rendered is obliged to leave the territory within the period allowed for voluntary departure set out in the expulsion decision (which should fall between seven and thirty days of that decision gaining force). If it is deemed likely that the person in question might escape or otherwise obstruct or hinder the exercise of the administrative expulsion – and in particular if the person's identity cannot be verified, or if the third-country national threatens the State's security, public order, public health or the rights and freedoms of others – the police need not stipulate any deadline in respect of voluntary departure.

D. Administrative Proceedings Act (Law no. 71/1967 Coll., as amended)

26. An appeal can be lodged against an administrative expulsion decision within fifteen days of the person concerned being notified thereof (sections 53 and 54(2)).

27. Under section 55(2), an appeal lodged against an administrative decision before the expiry of the relevant time-limit has suspensive effect, unless provided otherwise. The administrative authority may exclude the suspensive effect only if the urgent public interest so requires, or if there is a risk that by suspending the enforcement of a decision a party to the proceedings or a third person might suffer irreparable damage.

III. RELEVANT INTERNATIONAL DOCUMENTS

28. The relevant international documents are listed in *Sharifi and Others v. Italy and Greece* (no. 16643/09, §§ 51-82, 21 October 2014) and in *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, §§ 41-67).

29. In a 124-page report published in December 2010 entitled *"*Buffeted in the Borderland. The Treatment of Asylum Seekers and Migrants in Ukraine*",* the NGO Human Rights Watch described the findings of its research into the experience of migrants and asylum seekers who had been returned to Ukraine from Hungary and Slovakia. The report states that "according to the bilateral agreements, migrants caught entering Poland,

Slovakia and Hungary without permission can be summarily returned if caught within 48 hours of a crossing. The launching of an appeal in Slovakia and Hungary does not suspend the return and returnees do not have access to minimal information on arrest and return. In practice, Human Rights Watch found that migrants were often tricked into believing they would not be returned, were asked to sign papers they did not understand, and were not always given an opportunity to contact a lawyer, NGOs or UNHCR." Specifically with regard to Slovakia, Human Rights Watch stated that "the most common complaint heard from migrants who had been returned from Slovakia was that their asylum claims were ignored and that they were treated in summary fashion [and] quickly sent back within hours of apprehension in Slovakia, with little opportunity to make any claim to remain.

THE LAW

I. PRELIMINARY ISSUES RAISED BY THE GOVERNMENT

A. The applicants' whereabouts and loss of contact with their legal representative

1. Parties' arguments

30. The Government maintained that from the very beginning the applicants' legal representative had been able to communicate with them only through staff of the NGO in Ukraine, and that the Slovak branch of the Human Rights League had exerted extreme pressure on the applicants in order to secure their consent for it to lodge the application with the Court. While it was true that the applicants had authorised a lawyer from that NGO to represent them before the Court, they had not contacted her thereafter to inform her of their whereabouts or to provide her with a means of contacting them, which indicated that they had lost interest in the case. In additional observations, the Government maintained that the applicants' representative was not able to contact them in a standard manner, that the elements produced by the applicants' representative were of no probative value and that messages sent within their Facebook group could not be accepted in the proceedings before the Court; moreover, the whereabouts of applicants nos. 3, 9, 11, 15 and 16 still remained unknown (see paragraph 18 above).

31. In such circumstances, given that the fact that the relevant authorisation forms have been correctly completed does not in itself justify pursuing the examination of the case (see *Ramzy v. the Netherlands*, no. 25424/05, § 64, 20 July 2010), the Government considered that the

application should be struck out of the Court's list of cases, in accordance with Article 37 § 1 of the Convention.

32. In reply, the applicants' representative submitted information regarding the applicants' current whereabouts (including, in respect of some of them, copies of their identity documents and links to their respective Facebook accounts) and their claims for just satisfaction (see paragraph 18 above). She noted that she was in contact with most of them via Facebook, within a dedicated group that she had created. She also pointed to the applicants' vulnerable situation, their limited access to means of communication and – in some cases – their poor command of English, which may have resulted in delays to their replies to her messages or in a need to rely on others to facilitate communication.

33. Furthermore, the applicants' representative informed the Court that the thirteenth and fourteenth applicants, Mr Salman Faqiri and his brother, Mr Sohrab Faqiri, were no longer interested in pursuing the proceedings and wished their applications to be struck out of the Court's list of cases.

2. The Court's assessment

34. The Court considers it necessary first to examine the criteria set forth in Article 37 of the Convention, which reads as follows:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.
>
> 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course."

35. On the one hand, the Court reiterates that an applicant's representative must not only supply a power of attorney or written authority (Rule 45 § 3 of the Rules of Court) but that it is also important that contact between the applicant and his or her representative be maintained throughout the proceedings. Such contact is essential both in order to learn more about the applicant's particular circumstances and to confirm the applicant's continuing interest in pursuing the examination of his or her application (see *V.M. and Others v. Belgium* ([GC], no. 60125/11, § 35, 17 November 2016, with further references; *N.D. and N.T. v. Spain* [GC], cited above, § 72).

36. On the other hand, in cases concerning a context similar to that of the instant, the Court has held that it cannot ignore the generally precarious

conditions of asylum seekers and other events that may temporarily prevent communication between a legal representative and applicants (see *Sharifi and Others v. Italy and Greece* (no. 16643/09, § 131, 21 October 2014). Thus, the Court has accepted contact between a legal representative and applicants that took place via third persons if such contact was regular and substantiated by relevant documents (ibid., § 130). However, the Court has struck out applications for lack of contact between the applicants and their legal representative where information about the applicants' whereabouts or the circumstances of the contact appeared insufficient, contradictory or unsubstantiated (ibid., §§ 129, 133). By way of example, the Court has considered proof of contact to be unsubstantiated when applicants or their legal representative have failed to provide any document proving their legal status, or when they have provided only a link to the Facebook account of the applicant without any further explanation (ibid., § 129).

37. Turning to the facts of the present case, the Court observes that the applicants' legal representative has never met the applicants in person and that contact between the applicants and their representative was initially facilitated by lawyers visiting the detention centre in Ukraine at which they were being held. The latter secured the applicants' signatures on the authorisation forms and forwarded them to the legal representative in Slovakia, who then lodged the application with the Court. The Court notes that the authenticity of those authorisation forms has not been challenged by the Government and that nothing in the file raises any concerns about their validity.

38. While it is true that the applicants' representative thus has power to represent them throughout the entire proceedings before the Court, the Court must nevertheless examine whether the subsequent contacts between the applicants and their representatives justify pursuing the examination of the case. In exercising such an examination, the Court does not lose sight of the complicated situation both of those applicants who seek asylum in Europe and those applicants who have returned to Afghanistan. It is therefore ready to accept that they may not be able to communicate with their legal representative regularly and via traditional means (ibid., *mutatis mutandis,* § 131,).

39. In this context, the Court observes, firstly, that the thirteenth and fourteenth applicants expressly stated that they no longer wished to pursue the proceedings. In so far as it concerns these two applicants, the application is to be struck out of the list of cases, pursuant to Article 37 § 1 (a) of the Convention.

40. The Court notes, secondly, that applicants nos. 3, 9, 11, 15 and 16, whose whereabouts are unknown, have not attempted to contact their legal representative or the Court, and neither have they demonstrated in any way their interest in continuing the case.

With regard to applicants nos. 1, 2, 17, 18 and 19, the legal representative provided the Court only with the name of their country of residence and a link to their respective Facebook accounts; with regard to applicants nos. 1 and 19, the representative explained that they were members of the above-mentioned dedicated Facebook group and that they had been in indirect contact with her via third persons (see paragraph 18 above). The Court observes, however, that the sole fact that a Facebook account exists under the applicant's name or a similar name does not necessarily prove that there has been any real contact between the applicant and his or her representative through the means provided by that account, especially if no extract of any such conversation has been submitted. In the Court's view, such information is insufficient to establish that the above applicants did indeed maintain contact with their legal representative (ibid., §§ 129 and 133) and to conclude that the latter could meaningfully continue the proceedings before the Court in respect of those applicants.

Having regard to the foregoing and in accordance with Article 37 § 1 (c) of the Convention, the Court considers that it is no longer justified to continue the examination of the application as regards applicants nos. 1, 2, 3, 9, 11, 15, 16, 17, 18 and 19. It points out that the complaints initially lodged by those applicants are identical to those submitted by the remaining applicants, in respect of which it will express its opinion below. Given the circumstances, the Court sees no grounds relating to respect for human rights secured by the Convention and its Protocols that, under Article 37 § 1 *in fine*, would require the continuation of the examination of the applications of the above-mentioned ten applicants.

41. Lastly, with regard to applicants nos. 4, 5, 6, 7, 8, 10 and 12, the legal representative informed the Court of their respective current places of residence and their residency status; most of them also provided copies of their personal documents. It furthermore appears from the extracts from the Facebook messages exchanged between them and their representative submitted by the legal representative that they have specified just satisfaction claims; applicant no. 10 also provided his bank account details. The Court accepts that such information is sufficient to establish that the above applicants have maintained contact with their legal representative and that they have an interest in pursuing the case before the Court. The Court therefore rejects the Government's objection as to those seven applicants.

42. In conclusion, the Court decides to strike the case out of the list in so far as it concerns applicants nos. 1, 2, 3, 9, 11, 13, 14, 15, 16, 17, 18 and 19, and to pursue the examination of the remainder of the application.

B. Exhaustion of domestic remedies

43. The Government pointed out that only the first four applicants had lodged appeals against the decisions on administrative expulsion. None of

the other applicants had used this remedy, despite having been detained in the same centre at the time that applicants nos. 1-4 had signed the authorisation forms for the purpose of the appeal proceedings, and despite having authorised Ms Z. Števulová to represent them before the Court.

44. The applicants replied that, as can be seen from her email communication with the lawyers in Ukraine, their Slovak legal representative was prepared to lodge appeals on behalf of all of them. However, the Ukrainian lawyers were able to meet only four of them in the Chop detention centre before the expiration of the fifteen-day time-limit set for lodging an appeal (the deadline being 2 December 2014), and they had not themselves been in a position to contact a Slovak lawyer. They had all been able to meet a lawyer only in the detention centre in Zhuravychi between 12 December 2014 and 5 January 2015, when it was no longer possible to lodge an appeal; thus, they could then sign only the authorisation forms for the proceedings before the Court. In any event, the applicants contested the effectiveness and accessibility of the impugned remedy since, firstly, they had received neither a copy of the decision in question nor a translation thereof and, secondly, any *ex post* remedy would have had no practical effect on their expulsion, and nor would it have offered them a possibility to re-enter the country.

45. The Court notes that the applicants nos. 5, 6, 7, 8, 10 and 12 did not lodge an appeal against the decisions on their expulsion. However, having regard to the contents of the police directorate's decisions of 7 January 2015 dismissing the appeals of the applicants nos. 1 to 4, there is nothing to suggest that, had the former applicants also filed an appeal, the decisions in their cases would have been any different from those in the cases of the latter applicants. In these circumstances, and taking into account the difficulties faced by the applicants to access a lawyer after their removal to Ukraine, the Court is of the view that those applicants were not required to exhaust the remedy referred to by the Government. The Government's preliminary objection must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

46. The applicants 4, 5, 6, 7, 8, 10 and 12 submitted that they had been victims of a collective expulsion.

They relied on Article 4 of Protocol No. 4 to the Convention, which reads as follows:

> "Collective expulsion of aliens is prohibited."

A. Admissibility

47. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

48. The applicants complained that their expulsion to Ukraine had been collective in nature and, in particular, that the State authorities had not carried out an individual assessment and examination of their cases, since all the expulsion decisions had had the same wording. They had had no access to information, proper interpretation, legal aid or the assistance of UNHCR. In addition, they claimed that either their asylum claims had been ignored or the interpreter had not translated them, and that they had thus been denied access to the asylum procedure.

49. The applicants were of the view that they had been dealt with as a group, not as individuals, and that the transcripts of their interviews indeed showed that they had not been interviewed separately since the official times of the respective interviews had overlapped in several cases, even though only one interpreter had been present. Moreover, the fact that the interpreter had been there for only a few hours meant that it had not been possible to properly examine each individual case. Furthermore, the applicants pointed out that they must have been interviewed under extreme time constraints, since within ten minutes they were supposed to have been briefed about the procedure and their rights and then interviewed – all allowing extra time for interpretation. In their view, the police had been in a position to invest more time and effort into examining each individual case – specifically, the police officers should have asked open questions (that is to say questions not requiring simple "yes" or "no" answers) about the reasons for the applicants leaving their home country and the factors preventing their return, and they should have made more effort to encourage the applicants to enlarge upon their answers.

50. As to the Government's argument concerning possible errors in noting the starting and ending times of the interviews and the length of their duration, the applicants asserted that they should be given the benefit of the doubt because they were in a vulnerable position and unable to collect evidence regarding the exact course of events. It was indeed the police who had been in control of the recording of their interviews and the documentation thereof, and it had been the police's obligation to make

precise recordings of those interviews; therefore, the transcriptions of those interviews should be relied on.

51. Thus the applicants claimed that they had not been allowed to actively participate in the procedure and had not been offered an individual and effective opportunity to put forward individualised details and arguments against their expulsion, as required by the Court's case-law (see *Sultani v. France*, no. 45223/05, § 81, ECHR 2007-IV (extracts), and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §§ 177 and 184, ECHR 2012).

52. Concerning the Government's argument regarding the police's "longstanding experience" of interviewing illegal migrants, the applicants considered that this was a further indication of collective treatment. The statements of the police only confirmed the tendency to generalise as regards the behaviour of migrants apprehended at the Slovak-Ukrainian border, regardless of their individual circumstances. The applicants also emphasised in that regard that they had been complaining about their collective expulsion ever since their first meeting with the Ukrainian lawyers.

53. Lastly, the applicants argued that the cases (referred to by the Government) of *Sultani* (cited above) and *M.A. v. Cyprus* (no. 41872/10, ECHR 2013 (extracts) – see paragraph 56 below) substantially differed from the present case. In *M.A,* the asylum claims of all the applicants had been dealt with on an individual basis over a period of more than five years and their appeals had been individually examined. By contrast, in the present case the applicants had been physically expelled from Slovak territory within twenty-four hours of their arrival, their asylum applications had been ignored and their arguments against expulsion had not been addressed. The fact that twelve other persons had been channelled into the asylum procedure did not prove, in the applicants' view, that their cases had been examined individually or that they had not been denied access to the asylum procedure.

(b) The Government

54. The Government referred to the transcripts of the interviews and submitted that the applicants had been interviewed separately and with the help of an interpreter, which was attested to by their signatures on those transcripts. The applicants had each been individually familiarised with their respective case files and the reasons for their expulsion and the ban on their re-entering Slovakia, and each of them had been handed a copy of the expulsion decision, their receipt of which they had confirmed by signing it in the presence of the interpreter. In that regard, the Government submitted a fee invoice from the interpreter, according to which he had been present at the police station from 9 a.m. on 17 November 2014 until 9 a.m. on 18 November 2014.

55. The Government conceded that written errors could have occurred in the "course of recording the interviews" because those interviews had been conducted during the night and early morning hours. As to the identical wording of the transcripts, they submitted that in the longstanding experience of the police, irregular migrants – especially those arriving in Slovakia in an organised fashion with the help of smugglers – tended during interviews to cite identical facts and motives in respect of their irregular border-crossing, and they sometimes changed their statements when meeting a non-governmental organisation after readmission to Ukraine. In the present case, the identical wording of the applicants' statements would have been a consequence of them having travelled as a group; it did not constitute proof of a collective approach on the part of the police, but was rather the reason for the similar wording of the expulsion decisions. Indeed, the fact that the transcripts differed in respect of the amounts of money cited as being possessed by the applicants showed that the police had treated them individually.

56. According to the Government, the applicants had been duly instructed regarding the possibility to request legal aid and had had the opportunity to claim asylum during their stay at the police station. They pointed out that twelve Afghan members from the group who had requested asylum had been transported to a refugee camp, rather than being returned to Ukraine. That proved that the applicants had not been prevented from accessing the asylum procedure (see, *mutatis mutandis*, *M. A. v. Cyprus*, cited above, §§ 252-255). Lastly, the Government emphasised that, after being asked clear and comprehensible questions by the police officers, none of the applicants had mentioned having been subjected to any form of persecution in their home country, so there had been no need to put further questions to them. Neither had the appeals lodged by four of the applicants contained any allegation of persecution.

2. The Court's assessment

(a) Principles established in the Court's case-law

57. The Court points to its case-law concerning Article 4 of Protocol No. 4, as set out, with regard to migrants and asylum-seekers, in the judgments in *Hirsi Jamaa and Others*, *Sharifi and Others*, and *Khlaifia and Others* (all cited above). According to that case-law, an expulsion is deemed to be "collective" for the purposes of Article 4 of Protocol No. 4 if it compels aliens, as a group, to leave a country, "except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group" (see *Khlaifia and Others*, cited above, §§ 237 et seq.; *Georgia v. Russia (I)*, cited above, § 167; *Andric v. Sweden* (dec.), no. 45917/99, 23 February 1999; *Davydov v. Estonia* (dec.), no. 16387/03, 31 May 2005; *Sultani v. France*,

no. 45223/05, § 81, ECHR 2007-IV (extracts); and *Ghulami v. France* (dec.), no. 45302/05, 7 April 2009). The fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion, if each person concerned has been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis (see *Khlaifia and Others*, cited above, § 239; see also *M.A. v. Cyprus*, no. 41872/10, §§ 246 and 254, ECHR 2013 (extracts); *Sultani*, cited above, § 81; *Hirsi Jamaa and Others*, cited above, § 184; and *Georgia v. Russia (I)*, cited above, § 167). However, Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances, as the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State (see *Khlaifia and Others*, cited above, § 248; *N.D. and N.T. v. Spain*, cited above, §§ 193 and 199).

58. Article 4 of Protocol No. 4 is aimed at maintaining the possibility, for each of the aliens concerned, to assert a risk of treatment which is incompatible with the Convention – and in particular with Article 3 – in the event of his or her return and, for the authorities, to avoid exposing anyone who may have an arguable claim to that effect to such a risk (see *N.D. and N.T. v. Spain*, cited above, § 198). The purpose of Article 4 of Protocol No. 4 is thus to prevent States from removing a number of aliens without examining their personal circumstances and therefore without enabling those aliens to put forward their arguments against the measure taken by the relevant authority in question (see *Hirsi Jamaa and Others*, cited above, § 177, and *Sharifi and Others*, cited above, § 210). In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of the case and to verify whether the removal decisions took into consideration the specific situation of the individuals concerned (see *Hirsi Jamaa and Others*, cited above, § 183; *N.D. and N.T. v. Spain*, cited above, § 197).

59. It should be stressed at the outset that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Paposhvili*, cited above, § 172; *Hirsi Jamaa and Others*, cited above, § 113; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI; and *N. v. the United Kingdom* [GC], no. 26565/05, § 30, ECHR 2008). The Court also reiterates the right of States to establish their own immigration policies, potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union (see *Georgia v. Russia (I)*, cited above, § 177;

Sharifi and Others, cited above, § 224; and *Khlaifia and Others*, cited above, § 241). Furthermore, the Court has previously emphasised the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East (see *M.S.S. v. Belgium and Greece*, cited above, § 223; *Hirsi Jamaa and Others*, cited above, §§ 122 and 176; and *Khlaifia and Others*, cited above, § 241). Nevertheless, the Court has also stressed that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto (see *Hirsi Jamaa and Others*, cited above, § 179; *N.D. and N.T. v. Spain*, cited above, § 170).

(b) Application of those principles in the present case

60. In the present case, it is not disputed that the applicants were expelled after they had irregularly entered Slovak territory and that they were returned to Ukraine; this clearly amounts to an "expulsion" within the meaning of Article 4 of Protocol No. 4 as interpreted by the Court (see, most recently, *N.D. and N.T. v. Spain*, cited above, §§ 166-191). The Court is thus called to ascertain whether the applicants' expulsion was "collective" in nature.

61. The Court observes that the applicants have not disputed the fact that, after being brought to the police station for the purposes of their identification, they underwent interviews, following which a separate administrative decision was made in respect of each of them. It is true, as the applicants pointed out, that the expulsion decisions were drafted in almost identical terms. However, according to the case-law cited in paragraph 57, this fact cannot in itself be decisive. In the Court's view, the relatively simple and standardised nature of the expulsion orders can be explained by the fact that the transcripts of the applicants' interviews do not contain any statement regarding any possible ill-treatment in the event of their readmission to Ukraine or regarding the existence of any other legal obstacles to their expulsion. It is therefore not unreasonable for those orders to have been justified merely by the fact that the applicants were third-country nationals who had committed an administrative offence by unlawfully crossing the Slovak border, and by the absence of any of the situations provided in section 81 of the Aliens Act (see paragraph 10 above).

62. The Court notes that, although the applicants had crossed the Slovak border in an unauthorised manner, they were intercepted in the territory of Slovakia and the State provided them access to means of legal entry through the appropriate border procedure (see, conversely, *N.D. and N.T. v. Spain*, cited above). It thus remains to be established whether the applicants were

afforded, prior to the adoption of the impugned expulsion orders, an effective possibility of submitting arguments against their removal and whether there were sufficient guarantees demonstrating that their personal circumstances had been genuinely and individually taken into account.

63. In this regard, the Court observes that the parties are not in agreement as to the conditions of the interviews conducted in the present case; they also disagree as to whether the applicants actually declared their intention to request asylum. The Government submitted that genuine individualised interviews had been carried out in the presence of an interpreter; the contents of those interviews had then been recorded in the transcripts thereof, which had been signed by the applicants. The applicants alleged, by contrast, that they had not been interviewed separately, that the interviews had been carried out under extreme time pressure and that several of those interviews had overlapped, and that they had been made to sign documents whose contents had been unknown to them.

64. The Court notes that the file contains transcripts of oral explanations provided by the applicants concerning their irregular border-crossing, as well as transcripts of individual interviews conducted with them in their capacity as parties to the expulsion proceedings; those documents were signed by the applicants and the interpreter (see paragraph 7 above). According to these transcripts, all the interviews were carried out on 17 November 2014 between 9.10 and 12.30, lasted exactly ten minutes and were conducted by two police officers in the presence of the interpreter (see paragraph 8 above). It is true that the official times of some interviews overlapped, which the Government explained by the fact that there could have been some errors in the recording of those interviews owing to the fact that the interviews had taken place in the night and early morning hours. Even if, in the Court's view, such an explanation does not appear entirely plausible, given that the interviews took place between 9.10 and 12.30, it is not in itself sufficient to justify the applicants' view that the interviews were not conducted on an individual basis. Moreover, the Court has already held that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances (see paragraph 57 *in fine* above).

65. Indeed, what matters is whether the applicants had a genuine and effective opportunity to submit arguments against their expulsion (see, among other authorities, *Sultani*, cited above, § 81, and *Hirsi Jamaa and Others*, cited above, § 184).

66. In this connection, the Court is ready to accept the fact that the applicants were asked standardised questions, in so far as those questions were aimed at establishing the factors that had led the applicants to leave their country of origin and the circumstances of their entry onto Slovak territory. While the applicants' answers were very similar, it may be presumed that the details of their journey might have been similar as well, since they had been travelling as a group; the recordings also differ in the

amount of money that the applicants declared as being in their possession, which rather points to an individualised approach. Moreover, the fact that the interviews were rather short may be a consequence of the applicants not stating anything that would require a more thorough examination.

67. Furthermore, the applicants have not put forward any arguments to refute their statements, as recorded in the transcripts of their interviews. According to those statements, they had not suffered any persecution in their country of origin, and nor had the death penalty been imposed on them there; rather, they had left Afghanistan for economic reasons and wished to go on to Germany and thus did not wish to seek asylum in Slovakia (see paragraph 7 above). They have thus not asserted any risk of being subjected to a treatment which is incompatible with the Convention (see paragraph 58 above). It is to be noted that the existence of any possible obstacles (under Articles 3 and 8 of the Convention) to the administrative expulsion of the applicants was nevertheless subject to examination by the police authority, and that regard was paid to the fact that the applicants did not risk any forced return to their country (see paragraph 10 above).

68. Moreover, the Court does not have any proof that the transcripts of the applicants' interviews did not correspond to the applicants' actual statements, or that those statements were wrongly translated (as alleged by the applicants), nor does it have any reason to believe that the applicants' requests for asylum were ignored by the police. It is to be noted, on the other hand, that no personal reasons supporting the applicants' requests for asylum were mentioned either in their conversations with the Ukrainian lawyer (see paragraph 13 above) or in their appeals against the expulsion orders (see paragraph 14 above).

69. It is significant that – as stated and documented by the Government (see paragraph 6 *in fine* above) and not disputed by the applicants – twelve migrants arrested together with the applicants expressed their wish to apply for asylum, thus halting their return and resulting in their transfer to a reception centre for asylum seekers. There is thus no reason to assume that the Slovak authorities, which heeded the wishes of those other migrants to seek asylum, would have remained unreceptive to similar requests on the part of the applicants

70. Lastly, it is not disputed by the applicants that the interpreter was present at the police station at least during the time of their interviews – that is to say between 9.10 and 12.30. Neither does the Court have reason to doubt that, as affirmed by the relevant documents signed by the applicants and the interpreter, the applicants were informed of their right to legal aid and of the possibility to comment on the case file and to adduce evidence; none of them chose to avail themselves of that right and possibility (see paragraph 7 above).

71. In view of the above, the Court does not find that the applicants were deprived of the possibility to draw the attention of the national authorities to

any circumstance that might affect their status and entitle them to remain in Slovakia, or that their removal to Ukraine was carried out without any form of examination of their individual situation.

In conclusion, there has been no violation of Article 4 of Protocol No. 4 to the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 4 OF PROTOCOL No. 4

72. The applicants complained that they had had no effective remedy through which to prevent their expulsion – which they deemed "collective" – to Ukraine since the decisions on their expulsion had excluded the otherwise automatic suspensive effect of the appeal; thus their removal to Ukraine had been immediately enforced. They relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

73. The Government contested the applicants' argument and considered that there existed no arguable claim under Article 13.

74. The Court reiterates that Article 13 guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights in whatever form they may happen to be secured under domestic law. However, that Article cannot reasonably be interpreted as requiring such a remedy in respect of any supposed grievance under the Convention that a person may have, no matter how unmeritorious; the grievance must be an arguable one in terms of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131). As a rule, the fact that a complaint has been declared admissible is a strong indication that it can be regarded as arguable for the purposes of Article 13, even if the Court ultimately finds no breach of the substantive provision in issue (see, for example, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 137, ECHR 2003-VIII). However, determining whether a claim is arguable does not depend so much on the case's procedural posture as on the particular facts and the nature of the legal issues raised.

75. In the present case the Court, having regard to the particular circumstances and the available evidence, was not persuaded that the applicants' expulsion was "collective" within the meaning of Article 4 of Protocol No. 4 or that the applicants were effectively prevented from applying for asylum. The position here is therefore akin to that in cases such as *Halford v. the United Kingdom* (25 June 1997, § 70, *Reports* 1997-III),

Russian Conservative Party of Entrepreneurs and Others v. Russia (nos. 55066/00 and 55638/00, § 90, ECHR 2007-I), and *Ivan Atanasov v. Bulgaria* (no. 12853/03, § 101, 2 December 2010), in which the Court, having regard to the particular circumstances, departed from its usual approach and found that complaints that had been declared admissible were nonetheless not arguable in terms of Article 13.

76. Bearing in mind its case-law stemming from similar cases (see *Khlaifia and Others*, cited above, §§ 279 and 281), the Court also observes that the applicants did not raise any separate complaints under Articles 2 and 3, and nor did they substantiate their fear of being persecuted in Afghanistan.

77. Accordingly, however the applicants' grievance is construed, the applicants have no arguable claim for the purposes of Article 13 of the Convention.

78. It follows that this part of the application is manifestly ill-founded, and must be rejected, in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Decides*, by a majority, to strike the application out of its list in so far as it concerns Mr Zabi Asady, Mr Farid Ahmad Ahmadi, Mr Ali Ahmadi, Mr Nasir Ahangarzada, Mr Ali Ahmad Ali Zada, Mr Salman Faqiri, Mr Sohrab Faqiri, Mr Mohamad Farid Ekhlas, Mr Edris Yusufi, Mr Bezhan Rahimi, Mr Miramza Sidiqi and Mr Rahim Rahimi;

2. *Decides,* unanimously, not to strike the application out of its list in so far as it concerns the other applicants;

3. *Declares*, unanimously, the complaint under Article 4 of Protocol No. 4 admissible;

4. *Declares*, by a majority, the remainder of the application inadmissible;

5. *Holds*, by four votes to three, that there has been no violation of Article 4 of Protocol No. 4.

Done in English, and notified in writing on 24 March 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Paul Lemmens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Lemmens, Keller and Schembri Orland are annexed to this judgment.

P.L.
J.S.P.

DISSENTING OPINION OF JUDGE KELLER

1. I respectfully disagree with my colleagues as to whether the claims of applicants nos. 1, 2, 17, 18 and 19 should be struck out. With particular regard to the Grand Chamber's most recent analysis of Article 37 of the Convention, I am satisfied that the communication between these five applicants and their legal representative was sufficient throughout these proceedings for the Court to continue examining their claims (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 72, 13 February 2020).

2. In *N.D. and N.T.*, the two applicants maintained contact with their legal representatives by telephone and WhatsApp while "moving around" in Mali and Spain, respectively (ibid., § 69). The Grand Chamber accepted that this contact was sufficient to satisfy the criteria set forth in Article 37 (ibid., § 74). This approach to Article 37 is appropriate in cases involving individuals seeking international protection, whose generally precarious conditions cannot be ignored by the Court (see *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 131, 21 October 2014).

3. Turning to the facts of the present case, I note that, as in *N.D. and N.T.*, applicants nos. 1, 2, 17, 18 and 19 have maintained contact with their legal representative even as they live and move around within a number of States. It is true that this contact took place on Facebook, rather than by telephone or WhatsApp. But this distinction is immaterial. Facebook, which currently owns WhatsApp, is popular as a medium for communication among young people such as applicants nos. 1, 2, 17, 18 and 19. Insofar as social media platforms such as Facebook enable users to access and exchange content easily from anywhere in the world, they should not be underestimated as a means of communication between legal representatives and clients, particularly in difficult circumstances such as those in which applicants nos. 1, 2, 17, 18 and 19 find themselves.

4. Moreover, I note that applicants nos. 2 and 19 are both members of a Facebook group created by their legal representative (see paragraph 18 of the judgment). This implies that they were invited to the Facebook group by their lawyer or requested to join the group, which points to active contact between them and their legal representative.

5. The applicants' choice to communicate with their legal representative by way of social media should not be held against them. Since contact between applicants nos. 1, 2, 17, 18 and 19 and their legal representative was maintained throughout these proceedings, the Court should have examined their claims.

JOINT DISSENTING OPINION OF JUDGES LEMMENS, KELLER AND SCHEMBRI ORLAND

Introduction

1. We respectfully disagree with the majority as regards Article 4 of Protocol No. 4. Our view of this aspect of the case also prevents us from supporting their approach to the complaint under Article 13 of the Convention.

2. The majority do not dispute that the applicants were the victims of an "expulsion" within the meaning of Article 4 of Protocol No. 4 (see paragraph 60 of the judgment). It is therefore only necessary to determine whether the expulsion was "collective" in order to decide whether there has been a violation of this provision.

3. An expulsion is "collective" if it compels aliens, as a group, to leave a State, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 193, 13 February 2020).

4. It can scarcely be doubted that the applicants constitute a "group". The Court has consistently held that the number of persons affected by an expulsion is irrelevant under Article 4 of Protocol No. 4 (ibid., § 203).

5. There are consequently only two critical questions before the Court.

6. First, did the applicants each receive a reasonable and objective examination of their respective cases? The majority answer in the affirmative. For the reasons that follow, we respectfully disagree.

7. Second, if the applicants' individual cases were not reasonably and objectively examined, should this be attributed to their own conduct, a circumstance that could play a role, given the recent Grand Chamber judgment in *N.D. and N.T.*? We would answer this question, which the majority find unnecessary to address, in the negative. In our view, the judgment in *N.D. and N.T.* must be confined to its proper context in order to avoid depriving the right secured by Article 4 of Protocol No. 4 of its very essence.

The first question

8. The manner in which the applicants' cases were examined by the Slovakian police is contested by the parties (see paragraph 63 of the judgment). Of particular salience in this regard is the allegation by the applicants that they were not interviewed individually.

9. As the majority note at paragraph 64 of the judgment, the respondent Government's records state that a number of the applicants' interviews

overlapped. Although the respondent Government have attempted to dismiss this as a mere clerical error, we agree with the majority that this explanation is implausible, particularly in the absence of supporting evidence.

10. The overlap of interviews makes it especially troubling that there was only a single interpreter present (see paragraph 70 of the judgment). That the respondent Government have submitted evidence that the interpreter remained at the police station for longer than the applicants suggested, as is recorded at paragraph 54 of the judgment, does nothing to dispel this concern.

11. On these two grounds, we find that the applicants were not interviewed individually.

12. Although "Article 4 of Protocol No. 4 does not guarantee the right to an individual interview" (see *N.D. and N.T. v. Spain*, cited above, § 199), such interviews are warranted when individuals may be able to indicate a legal or factual ground which, under international or national law, precludes their removal (see, by converse implication, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 253, 15 December 2016). This was so in the present case. As paragraph 18 of the judgment explains, a number of the applicants were acknowledged as asylum seekers in other member States of the Council of Europe after their expulsion from the Slovak Republic. Furthermore, Ukraine appears to have accepted that one of them, Mr Shakib, cannot be removed: according to the applicants' observations, he came to reside in Odessa after being granted international protection.

13. In any event, we are constrained to observe that a ten-minute individual interview hardly provides sufficient time to explain an investigative process, identify a person and probe whether he or she was persecuted and requires international protection.

14. Because "the procedure followed does not enable [us] to eliminate all doubt that the expulsion might have been collective", we are not convinced that the examination of the applicants' respective cases was reasonable (see *Čonka v. Belgium*, no. 51564/99, § 61, ECHR 2002-I). In these circumstances, it is unnecessary to consider whether the reasonableness or objectivity of the examination might be impugned on other grounds. However, in making our assessment, we have not closed our eyes to the evidence of difficulties faced by migrants at the Slovak Republic's borders. This evidence includes the Human Rights Watch report cited at paragraph 29 of the judgment, as well as the critical assessment of the situation that has been expressed within the United Nations system, particularly by the Committee against Torture and the High Commissioner for Refugees, during the second cycle of the Universal Periodic Review ("UPR") (see the Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1 and paragraph 5 of

the annex to Council Resolution 16/21, §§ 63-72, 11 November 2013, A/HRC/WG.6/18/SVK/2). The second cycle of the UPR took place in 2014, the year in which the applicants were expelled.

The second question

15. Having found that the applicants were indeed subjected to a collective expulsion, we are obliged to address whether this was attributable to their own conduct, in which case Article 4 of Protocol No. 4 would not have been violated (see *N.D. and N.T. v. Spain*, cited above, § 200).

16. The Grand Chamber has identified two situations in which the collective nature of an expulsion might be attributed to an applicant's conduct. The first is characterised by a "lack of active cooperation with the available procedure for conducting an individual examination" (ibid., § 200). The second concerns "the conduct of persons who cross a land border in an unauthorised manner" (ibid., § 201).

17. On the one hand, it has not been suggested that the applicants failed to cooperate with the authorities of the respondent State. On the other hand, the applicants did cross the border between Ukraine and the Slovak Republic in an unauthorised manner (see paragraph 62 of the judgment). However, for three reasons, it is clear that the present case is not an example of the second situation identified by the Grand Chamber in *N.D. and N.T.*

18. First, the Grand Chamber referred to persons who "deliberately take advantage of their large numbers and use force" (see *N.D. and N.T. v. Spain*, cited above, § 201). More than 600 individuals were involved in the events with which the judgment in *N.D. and N.T.* was concerned (ibid., § 24). Only thirty-two migrants played a part in the events at the heart of the present case (see paragraph 6 of the judgment). There is nothing to suggest that any of them used force.

19. Second, the Grand Chamber deprecated the creation of a "clearly disruptive situation which is difficult to control and endangers public safety" (see *N.D. and N.T. v. Spain*, cited above, § 201). The applicants in the present case caused no such disruption or endangerment of public safety.

20. Third, the Grand Chamber held that the Court should consider whether a respondent State had provided genuine and effective access to means of legal entry, in particular border procedures, and, *if so*, whether an applicant had cogent reasons not to make use of them which were based on "objective facts for which the respondent State was responsible" (ibid.). In the present case, we are of the opinion that the applicants' reasons for entering the Slovak Republic in an unauthorised manner are irrelevant because the respondent State has not provided sufficient access to means of legal entry.

21. In coming to this conclusion, we stress that the applicants in *N.D. and N.T.* had more opportunity to seek admission to Spain than the

applicants in the present case. In particular, the applicants N.D. and N.T. could have sought international protection at Spain's diplomatic missions and consulates abroad (ibid., § 212). We do not need to decide whether it would have been obligatory or even permissible, as a matter of public international law, for the Slovak Republic to grant the applicants international protection in these circumstances (see *Asylum (Colombia/Peru), Judgment, ICJ Reports* 1950, pp. 274-75). It is sufficient to note that, as a matter of fact, this does not appear to have been a possibility.

22. We also emphasise that it is unclear whether the applicants could have effectively applied for admission to the Slovak Republic at its border with Ukraine (contrast *N.D. and N.T. v. Spain*, cited above, §§ 213-17). The evidence to which we refer at paragraph 14 strongly suggests otherwise.

23. For the foregoing reasons, we hold that the Grand Chamber's judgment in *N.D. and N.T.* does not forestall a finding that Article 4 of Protocol No. 4 was violated in the present case.

24. This position should not be taken as defiance of the Grand Chamber. On the contrary, it merely reflects the limited circumstances in which that judgment is applicable. The Grand Chamber itself recognised this when it stated that its reasoning was "without prejudice to the application of Articles 2 and 3" of the Convention (see *N.D. and N.T.*, cited above, § 201).

25. It is vital that the limited scope of the Grand Chamber's judgment in *N.D. and N.T.* be respected. An overly broad interpretation of the judgment would damage the "broad consensus within the international community" concerning compliance with "the Convention guarantees, and in particular ... the obligation of *non-refoulement*" (see *N.D. and N.T.*, cited above, § 232).

The Article 13 complaint

26. It will be evident why we also part ways with the majority with respect to the applicants' Article 13 complaint.

27.. The majority regard the complaint as not arguable because they are not persuaded that the applicants' expulsion was "collective" in terms of Article 4 of Protocol No. 4 (see paragraphs 75 and 77 of the judgment).

28. As we take a contrary position on Article 4 of Protocol No. 4, we are bound to respectfully dissent from this approach too.

Conclusion

29. Collective expulsion gravely harms the lives of migrants and is prohibited by Article 4 of Protocol No. 4. We regret that the majority's judgment may be read as condoning such conduct and dissent accordingly.

APPENDIX

List of applicants

1. Zabi ASADY, born in 1995
2. Farid Ahmad AHMADI, born in 1995
3. Ali AHMADI, born in 1995
4. Sher Badov SHINWARI, born in 1995
5. Abdul Hamid NASRI, born in 1991
6. Mohammad AZAM, born in 1984
7. Samiuddin FAIZY, born in 1980
8. Mohammad SHAKIB, born in 1989
9. Nasir AHANGARZADA, born in 1988
10. Zabiullah ZAZAI, born in 1995
11. Ali Ahmad ALI ZADA, born in 1983
12. Abobaker JAMIL, born in 1992
13. Salman FAQIRI , born in 1988
14. Sohrab FAQIRI, born in 1999
15. Mohamad Farid EKHLAS, born in 1989
16. Edris YUSUFI, born in 1995
17. Bezhan RAHIMI, born in 1993
18. Miramza SIDIQI, born in 1987
19. Rahim RAHIMI, born in 1995