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4. ANOTHER EPISODE IN THE STRASBOURG SAGA ON THE DUBLIN SYSTEM TO DETERMINE THE STATE RESPONSIBLE FOR ASYLUM APPLICATIONS

The recent judgment in *A.M.E. v. The Netherlands*, issued by the European Court of Human Rights last 13 January 2015 and notified in writing on 5 February 2015, offers another occasion to assess through a human rights perspective the working of the Dublin system for determining which State is responsible for deciding an asylum seeker's application for international protection.

Based on Dublin II Regulation 343/2003 (now replaced by Dublin III Regulation 604/2013) such system has represented the core of a thriving case law of the Strasbourg Court, including the case under discussion. The analysis will be therefore enhanced by discussing the findings in other two key-cases to which the Strasbourg made explicit reference in *A.M.E. v. The Netherlands*, namely the recent *Tarakhel v. Switzerland* and *M.S.S. v. Belgium and Greece*.

1. The facts and context of the case

The case under discussion concerned a Somali national, born in 1994, who fled his home country in 2008 after his parental home was allegedly attacked by Al-Shabab, an al-Qaeda-linked terrorist group, fighting for the creation of a fundamentalist Islamic state in Somalia. Following the so called East African Route of migration, in 2009 he entered the EU at the Italian border, where he had his fingerprints taken, was registered and placed in a reception facility. He stated that he was born in 1985 and, after applying for international protection, he obtained a 3-year subsidiary protection permit under Article 15(c) of the EU Qualification Directive 2004/83/EC (now replaced by Directive 2011/95/EU). Such status is a complementary protection granted to a person who cannot qualify as a refugee *stricto sensu*.

Nevertheless, the applicant of his own volition left the reception facility in Italy and in October 2009 applied for asylum in The Netherlands, declaring that he was born in 1994. At the exam of the applicant's fingerprints through the EURODAC asylum database, it was found that he had been registered in Italy already and, pursuant to the Dublin Regulation, a transfer decision was issued by the Dutch authorities.

The applicant appealed the decision and in 2010 filed a submission before the Strasbourg Court. He complained that a removal to Italy would have been in breach not only of Article 3 ECHR, but also of Article 5, 6 and 13 ECHR, fearing a removal from Italy to Somalia, because his subsidiary protection permit was of a limited 3 year duration, and a lack of judicial guarantees and effective remedies, on account that Italy would not properly assess a new asylum application.

2. The Court's reasoning

In addressing the Applicant's complaints, especially as to the alleged infringement of Article 3 ECHR, which constitutes the core of the judgment, the Court's Third Section referred to two other key pronouncements, namely *Tarakhel v. Switzerland* and *M.S.S. v. Belgium and Greece*.

In particular, the Court relied on *Tarakhel v. Switzerland* as regards the minimum level of severity for the alleged ill-treatment to fall within the scope of Article 3 ECHR, and echoed *M.S.S. v. Belgium and Greece* as to the need to determine whether the situation in which the applicant is likely to find himself, if removed to Italy, is incompatible with Article 3 ECHR.

a) the minimum level of severity for ill-treatment

With reference to the first element, the Court reiterated that the assessment of the minimum level of severity for ill-treatment is relative, as it depends on factors such as the duration of the treatment, its physical or mental effects, and, in some instances, the sex, age, health of the victim. In this regard, the Court had to take into account the fact that the applicant deliberately told the Italian authorities that he was an adult, when in fact he was a minor, in order not to be separated from the group of other migrants with whom he had arrived. In this regard, the Court also observed that the applicant had deliberately sought to mislead the authorities, that, acting in good faith, granted a subsidiary protection status with a permit valid for 3 years.

b) the compatibility of the actual situation with Article 3 ECHR

Concerning the removal to a situation in Italy where the applicant could claim a breach of Article 3 ECHR, it must be stressed that the applicant left the Italian reception centre of his own volition and he was not forced to leave, as he argued. Furthermore, reiterating the analysis done in *Tarakhel v. Switzerland*, the Court underscored that the situation in Italy cannot be compared to the situation in Greece at the time of *M.S.S. v. Belgium and Greece*, where the Court found "systemic failures" in the Greek asylum system, and banned all removals to that country. The Court, in fact, found no basis on which it can be assumed that conditions in the Italian reception facilities disclose a concrete risk of treatment contrary to Article 3 ECHR. Therefore, the Court declared the complaint manifestly ill-founded and therefore inadmissible.

3. Comments on an ongoing saga

The short judgment under discussion is to be read in conjunction with the Court's findings in *Tarakhel v. Switzerland* and *M.S.S. v. Belgium and Greece*, drawing the similarities and differences of these three cases. From this perspective some considerations may be discussed.

First, it has to be mentioned that the Court's rationale rests on the settled principle that the Dublin System's presumption that all participating states respect their human rights obligations under the ECHR may be rebutted. The criteria to such rebuttal are two: it could stem from a) "structural deficiencies" of the asylum procedure, as held in *M.S.S. v. Belgium and Greece*, or b) "substantial grounds for believing" that the applicant, personally, would face a "real risk" of ill-treatment contrary to Article 3, as posited in *Tarakhel v. Switzerland*.

Second, provided that the structure and overall situation of the reception arrangements in Italy are not comparable to that of Greece as described in *M.S.S. v. Belgium and Greece*, the question is thus whether there are "substantial grounds for believing" that the applicant would face a "real risk" of treatment contrary to Article 3 ECHR. From this point of view, the case at issue appears as a corollary of the reasoning elaborated in *Tarakhel v. Switzerland*. especially as regards the issue of the applicant's "vulnerability". In *A.M.E. v. The Netherlands*, in fact, the Court stressed literally that «the applicant is an able young man with no dependents», a circumstance which cannot compare to the applicant's special vulnerability as a family with children, that in *Tarakhel v. Switzerland* led the Court to conclude that a removal without prior assurances of adequate treatment to the children's age would violate Article 3.

Therefore, the Court seemed to touch upon the controversial issue of "vulnerability" without seizing the opportunity to answer, as argued before, the urgent questions on the relation between different degrees of vulnerability, and even different degrees of particular vulnerability.

The issue is still in the pipeline, especially following the Partly Dissenting Opinion of judges Casadevall, Berro-Lefèvre and Jäderblom who in *Tarakhel v. Switzerland* criticized the Court's approach to reverse the recent case law in which the Court held that there was no reason to believe that an asylum seeker and her two young children would not have received adequate support had they been sent back to Italy (*Mohammed Hussein and Others v. the Netherlands and Italy*, 2 April 2013). One may therefore expect that such opportunity is postponed to another episode of the Strasbourg's saga on the Dublin system.

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