



OBSERVATOIRE SUR LE CONTENTIEUX EUROPEEN DES DROITS DE L'HOMME N. 4/2015

2. *A.S. v. SWITZERLAND*: THE STRASBOURG COURT'S MISSED OPPORTUNITY TO EXPLAIN DIFFERENT DEGREES OF VULNERABILITY IN ASYLUM CASES

In the judgment of last 30 June 2015 in *A.S. v. Switzerland*, the European Court of Human Rights, deliberating in private on 2 June 2015, offers an occasion to reflect on the issue of vulnerability in asylum cases.

The ruling under discussion represents another episode of the ongoing saga concerning the Dublin System to determine the State responsible for asylum applications and builds upon the previous case law relating to Article 3 considerations when expelling seriously ill persons, on the one hand, and when deporting asylum seekers to another country, pursuant to [Dublin II Regulation 343/2003](#) (now replaced by [Dublin III Regulation 604/2013](#)), on the other hand.

Both lines of reasoning will be taken into account in the following analysis.

1. *The factual background of the case*

The case of *A.S. v. Switzerland* concerned the impending removal from Switzerland to Italy of a Syrian asylum seeker of Kurdish origin, born in 1988 and currently residing in Switzerland, where he lodged an asylum application in 2013.

Based on the fact that his fingerprints had previously been registered in Greece and Italy through the [EURODAC database](#), his request was rejected. Although Greece would have been the first competent State to receive the applicant, the Italian authorities accepted the Swiss authorities' request to transfer the applicant to Italy, pursuant to the Dublin Regulation, as 'it could not be excluded that on leaving Greece the applicant had left the "Dublin area" before entering Italy.' Furthermore, a removal to Greece would have been unlikely owing to the 'systemic failures' in the Greek asylum system, as formerly described in [M.S.S. v. Belgium and Greece](#).

Nonetheless, the applicant appealed against the decision of the Swiss authorities, arguing that he had been diagnosed with severe post-traumatic stress disorder due to the persecution and torture suffered in Syria, and that he was being treated for this disorder in Switzerland, where he was also being treated for back problems. Additionally, the applicant argued that his two older sisters lived in Switzerland and their presence could be supportive and provide "emotional stability in his life", as evidenced by a medical report produced by

the applicant before the Court. By and large, in 2013 the appeal was dismissed on the basis of the Dublin Regulation.

Having the Federal Administrative Court dismissed his appeal, in June 2013 the applicant filed a complaint before the European Court of Human Rights, arguing that he would be subjected to treatment in violation of Article 3 ECHR due to the systemic deficiencies in the Italian reception system, as he would not be provided with treatment for his post-traumatic stress disorder. Furthermore, he argued that a transfer to Italy would be in violation of Article 8 ECHR, having found emotional stability in Switzerland, spending the whole time with his two sisters' families.

2. *The Court's reasoning*

In addressing the Applicant's complaints, the Court's Second Section referred to previous key pronouncements, namely *D v. United Kingdom* and *N v. United Kingdom*, as to Article 3 considerations when expelling seriously ill persons, and *Tarakbel v. Switzerland*, as to the reception conditions of asylum seekers, specifically in Italy.

After considering the applicant's circumstances, the Court decided, unanimously, that the applicant's removal to Italy would not be in violation of Article 3 and Article 8 ECHR, respectively, since his condition was not critical and he could receive psychological and medical treatment in Italy, on the one hand, and Switzerland could retain its margin of appreciation in immigration matters, on the other hand.

a) *The issues under Article 3 ECHR*

With reference to Article 3 ECHR, the Court firstly made reference to its well-established case law, stating that the expulsion of an asylum seeker may engage the responsibility of a State, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or degrading treatment in the receiving country.

In particular, the Court echoed its ruling in *M.S.S. v. Belgium and Greece*, confirming the special vulnerability of asylum seekers as a 'group in need of special protection', and recalled *Tarakbel v. Switzerland*, as regards the minimum level of severity for the alleged ill-treatment to fall within the scope of Article 3 ECHR. On that occasion, the Court had indeed raised serious doubts about the Italian reception system for asylum seekers with possible lack of adequate facilities or accommodation whatsoever, but the Court had also found that this *per se* could not justify rejecting all transfers of asylum seekers to Italy.

In the case under discussion, the Court went on to focus on the applicant's illness to develop its reasoning on vulnerability under Article 3 ECHR. From this point of view, the Court thus relying on the previous case law, and especially in *N v. United Kingdom*, found that the fact that the applicant's circumstances, including life expectancy, would be reduced, once removed, is not sufficient to give rise to a breach of Article 3 ECHR. As emphasised in *D v. United Kingdom*, only in 'very exceptional circumstances', stemming from three standard cumulative criteria, including an advanced stage of terminal disease, no adequate medical treatment and no certainty by any relative, the applicant should not be removed. Based on the circumstances, the Court concluded that the case at issue did not disclose exceptional circumstances comparable to those in another case in which the Court had found that the deportation of the applicant, who was in the final stages of AIDS and had no prospect of medical care or family support in his country of origin, would violate

the Convention. Therefore, the Court concluded that the removal to Italy would not give rise to a breach of Article 3 ECHR.

b) *Concerns under Article 8 ECHR*

As to the relevance of Article 8 ECHR on the right to private and family life, in an attempt to balance between respecting the applicant's rights and State interest in controlling immigration, the Court found that applicant's short presence in Switzerland, before lodging his submission, had only been accepted by the Swiss authorities for the purpose of examining his status as an asylum seeker. Therefore, it could not be argued that the tolerance of his presence by the Swiss authorities had enabled him to establish and develop strong family ties there. In a consistent case law, the Court had, moreover, already established that, unless the applicants could demonstrate additional elements of dependence, the relations between adult siblings do not constitute family life under Article 8 (*F.N. v. the United Kingdom*). This was not considered to be the case in this particular instance, which, according to the Court, should be kept distinct from cases concerning 'settled migrants,' a notion that the Court has used to indicate persons who have already been enjoying a right of residence in the host country and not aliens seeking admission, whether or not as asylum seekers.

Additionally, the Court submitted the case to the test of fair balance between the applicant's rights, on the one hand, and the State public order interests, on the other hand. From this point of view, the Court reiterated that States have margin of appreciation, stemming from the well acknowledged assumption that 'as a matter of well-established international law..., a State has the right to control the entry of non-nationals into its territory...' (*Thym, 2008*).

Accordingly, the Court concluded, that the family life enjoyed by the applicant while his asylum claim was being processed was precarious and thus there would be no violation of Article 8 to remove the applicant to Italy.

3. *Considerations on a Court's controversial approach to asylum seekers' vulnerability*

The judgment under discussion seems to raise a few concerns on the approach followed by the Court to address a case that, at least at first instance, could appear a classical episode of the ongoing saga concerning the Dublin System to determine the State responsible for asylum applications.

It comes just as natural, in fact, to read the instant case in conjunction with the recent judgment in *Tarakbel v. Switzerland* and the Court's findings in *M.S.S. v. Belgium and Greece*. Nonetheless, the Court's reasoning seems to depart from the wake of its asylum case law, especially as regards the unsolved notion of vulnerability (*Peroni/Timmer, 2013*).

In contrast to *Tarakbel v. Switzerland*, which perfectly matched the definition of asylum seekers as a "particularly underprivileged and vulnerable population group in need of special protection" provided in *M.S.S. v. Belgium and Greece*, in the case under discussion it seems that the Court decided to consider the vulnerability of the applicant only on the ground of his health status.

Although reiterating the serious doubts about the Italian reception system for asylum seekers, the Court shifted its attention on the availability of medical treatment in order to answer the question whether the applicant could have been removed from Switzerland.

Admittedly, as formerly emphasised in *A.M.E. v. The Netherlands*, the Court stressed that as ‘an able young man with no dependents,’ the applicant’s situation ‘cannot compare to the special vulnerability as a family with children’, which in *Tarakbel 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.

Nonetheless, it seems that some other elements might have been better considered by the Court to corroborate its reasoning. First, by putting the case at issue in relation with *Tarakbel v. Switzerland*, to which the Court expressly referred as regards the description of the legal framework and organization of the reception system for asylum seekers in Italy, the level of vulnerability in order to engage State responsibility for a breach of Article 3 ECHR could have better been considered not only on the basis of the applicant’s health status. From this perspective, the Court relied on the established case law which considers a removal as contrary to the ECHR only in very strict exceptional circumstances. Instead, the fact that the applicant was an asylum seeker, belonging to a ‘particularly underprivileged and vulnerable population group in need of special protection’ could be taken into better account by the Court in light of those doubts on the documented miserable reception conditions of asylum seekers and refugees in Italy (*Bethke/Bender, 2011*). Even though a medical treatment for the applicant’s disease is available in the latter State, the Court could have shown greater care to make sure that such a condition would not expose the applicant to the risk of an ill-treatment that could worsen his health status. In *Tarakbel v. Switzerland*, reference was made, in fact, to the 2013 UNHCR Recommendations on important aspects of refugee protection in Italy (*UNHCR, 2013*). In such document, it was expressly recommended that ‘measures are also needed to ensure services provided to asylum-seekers and refugees are tailored to their distinct needs, offering the former the assistance they need pending a decision on their status, whilst providing refugees with the support they require to facilitate their integration in Italian society.’ Based on these recommendations one may reasonably doubt whether the applicant can receive timely medical assistance during the usual lengthy procedure to determine the refugee status in Italy.

Second, it is worth reflecting on the fact that the applicant’s personal situation is likely to be worsened upon removal to Italy by the lack of the ‘emotional stability’ provided in Switzerland by his two sisters’ families, which could help overcome the multiple traumas he suffered. To this end, it must be stressed, that the medical report produced before the Court by the applicant considered the involvement of the sisters in the applicant’s treatment is ‘an absolute necessity.’

From this perspective, concerns can be even raised also as to the strict interpretation provided by the Court on the notion of family members, further explained in the appended Concurring Opinion of three judges. In their view, there was family life between the applicant and his sisters, but as the siblings had had to live in different countries for a number of years, these ties could not be considered so strong that the applicant’s separation from his sisters would cause a suffering.

In this regard, the recent judgment of 29 January 2013 in *S.H.H. v. United Kingdom*, can be recalled, as one of the reasons, why the Court found the applicant could be returned to Afghanistan, was that he had two sisters there who could take care of him, without any submitted evidence of their willingness to do so.

From a different perspective, the Court could have paid greater sensitiveness in addressing the issue of family ties in the case under discussion. Admittedly, it appears that most of the time, when a violation of Article 8 is found, there was also a close relationship

with the parents, which is not the case in *A.S. v. Switzerland*. Nonetheless, the Strasbourg judges could have relied, for instance, on the *Scozzari and Giunta v. Italy* case law or more recently in *Maslov v. Austria*, in which the Court confirmed that ‘in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted “family life.” Indeed, the relationship between the applicant and his two sisters can be regarded as ‘family life’, provided that there was a special relationship and an emotional stability proved by the fact that the applicant ‘was virtually spending the whole time’ with his sisters’ families, as ‘he was in great emotional need’, and ‘could not be left alone.’ The fact that for many years the applicant and his sisters had lived separated in different countries cannot exclude that, once reunited, and due the fragile health status of the applicant, the latter could develop an emotional dependence on his sisters.

As a result of the highlighted criticism, far from considering wrong the reasoning of the Court, one may conclude that the further elements could have been better assessed by the Court in an attempt to establish the balance between the competing interests at stake, namely the personal interest of the applicant and the public order interests of the Swiss government. The Court has, in fact, missed a precious opportunity to settle the issue of vulnerability in asylum cases. Considering the request for protection at the core of the judgment, the Court could have shown more sensitiveness about the applicant’s reasons not to be removed to Italy. This could have been an important authoritative sign in a context such as the actual one in Europe in which various proposals to amend the Dublin rules are put forward to face the increasing migratory crisis.

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