ECtHR - Tarakhel v. Switzerland, Application no. 29217/12

Country of Applicant:
Afghanistan

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Tarakhel v. Switzerland (Application no. 29217/12), 4 November 2014

Court Name:
European Court of Human Rights; Grand Chamber

Keywords:
Dublin Transfer [1]
Best interest of the child [2]
Child Specific Considerations [3]
Individual assessment [4]
Family unity (right to) [5]
Personal circumstances of applicant [6]
Inhuman or degrading treatment or punishment [7]
Material reception conditions [8]
Responsibility for examining application [9]
Reception conditions [10]
Return [11]
Vulnerable person [12]

Relevant Legislative Provisions:
International Law
International Law > 1951 Refugee Convention [13]
European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01
European Union Law > EN - Treaty on European Union [14] > Article 2
European Union Law > EN - Treaty on European Union [14] > Article 6
Council of Europe Instruments > EN - Convention for the Protection of Human Rights and Fundamental Freedoms [15] > Article 3 [16]
European Union Law > EN - Treaty on European Union [14] > Article 67
European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01 > Article 78
European Union Law > EN - Dublin II Regulation, Council Regulation (EC) No 343/2003 of 18 February 2003 [17]

European Union Law > EN - Charter of Fundamental Rights of the European Union [18] > Article 4 [19]
Council of Europe Instruments > EN - Convention for the Protection of Human Rights and Fundamental Freedoms [15] > Article 8 [20]
European Union Law > EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004 [21]
Council of Europe Instruments > EN - Convention for the Protection of Human Rights and Fundamental Freedoms [15] > Article 13 [22]
European Union Law > EN - Reception Conditions Directive, Directive 2003/9/EC of 27 January 2003 [23]
European Union Law > EN - Charter of Fundamental Rights of the European Union [18] > Article 18 [24]
European Union Law > EN - Charter of Fundamental Rights of the European Union [18] > Article 19 [25]

Headnote:
This case examined the compatibility of the Dublin II Regulation with the European Convention on Human Rights regarding transfers to Italy under the Dublin II Regulation.

The Court found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if the Swiss authorities were to send an Afghan couple and their six children back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

Facts:
The applicants, Golajan Tarakhel, his wife and their six minor children are Afghan nationals who live in Lausanne (Switzerland).

The couple lived in Pakistan, Iran and Turkey, from where they arrived to Italy. In Italy the applicants were immediately subjected to the EURODAC identification procedure after supplying a false identity. The same day they were placed in a reception facility and later transferred to the Reception Centre for Asylum Seekers (?CARA?) in Bari, once their true identity had been established.

Later the applicants left the CARA in Bari without permission and travelled to Austria, where they were again registered in the EURODAC system. They lodged an application for asylum which was rejected. On 1 August 2011 Austria submitted a request to take charge of the applicants to the Italian authorities, which on 17 August 2011 formally accepted the request.

The applicants later travelled to Switzerland and on 3 November 2011 lodged an asylum application.

On 15 November 2011 Mr Tarakhel and his wife were interviewed by the Federal Migration Office (?the FMO?), which requested the Italian authorities to take charge of the applicants. The Italian authorities tacitly accepted the request.

On 24 January 2012 the FMO decided not to examine the applicants? asylum application on the grounds that, in accordance with the European Union?s Dublin Regulation, by which Switzerland was bound under the terms of an association agreement with the European Union, Italy was the

State responsible for examining the application. The FMO therefore issued an order for the applicants? removal to Italy. On 2 February 2012 the applicants appealed against the removal to the Federal Administrative Court, which dismissed the appeal in a judgment of 9 February 2012.

The applicants requested the FMO to have the proceedings reopened and to grant them asylum in Switzerland. The Federal Administrative Court rejected an appeal on the ground that the applicants had not submitted any new arguments.

The applicants applied to the European Court of Human Rights and requested an interim measure suspending the enforcement of their deportation to Italy, which was granted on 18 May 2012.

Decision & Reasoning:
The Court considered it appropriate to examine the complaint concerning the applicants? reception conditions in Italy solely from the standpoint of Article 3.

It declared the complaint under Arts 3 and 13 inadmissible; stressing examples where the Swiss authorities had exercised the sovereignty clause and where the courts had prevented returns to Italy including in a case of a family with young children [131].

General principles and their application to the present case

The Court notes that Article 3(2) of the Dublin Regulation provides that each Member State may examine an application for asylum lodged with it by a third-country national under the so-called ?sovereignty? clause. In such a case the State concerned becomes the Member State responsible for examining the asylum application for the purposes of the Regulation and takes on the obligations associated with that responsibility (M.S.S., § 339). By virtue of the association agreement, this mechanism applies also to Switzerland.

The Court concludes from this that the Swiss authorities could, under the Dublin Regulation, refrain from transferring the applicants to Italy if they considered that the receiving country was not fulfilling its obligations under the Convention.

The Court reiterated the M.S.S judgment, where it attached considerable importance to the applicant?s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It noted the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.

Moreover in M.S.S. (§§ 252 and 253), having to determine whether a situation of extreme material poverty could raise an issue under Article 3, the Court reiterated that it had not excluded ?the possibility that the responsibility of the State [might] be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity? (Budina v. Russia (dec.), no. 45603/05).

With more specific reference to minors, the Court has established that it is important to bear in mind that the child?s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, and Popov v. France, nos. 39472/07 and 39474/07). Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child

encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (Popov, § 91).

The Court chooses to follow an approach similar to that which it adopted in the *M.S.S.* judgment in the present case.

It highlights that a presumption that a State participating in the ?Dublin? system will respect the fundamental rights laid down by the Convention is not irrebuttable. (103)

Moreover, in the case of ?Dublin? returns, the presumption that a Contracting State which is also the ?receiving? country will comply with Article 3 of the Convention can therefore validly be rebutted where ?substantial grounds have been shown for believing? that the person whose return is being ordered faces a ?real risk? of being subjected to treatment contrary to that provision in the receiving country.

The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person?s removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established. (104)

Concerning the overall situation of the reception arrangements for asylum seekers in Italy, the Court had previously observed that the Recommendations of the Office of the United Nations High Commissioner for Refugees (?UNHCR?) and the report of the Commissioner for Human Rights of the Council of Europe, both published in 2012, referred to a number of failings.

With regard to living conditions in the available facilities, the Court noted that in its Recommendations for 2013 UNHCR had described a number of problems. However, UNHCR had not reported situations of widespread violence or insalubrious conditions, and had stressed the efforts undertaken by the Italian authorities to improve reception conditions for asylum seekers. The Human Rights Commissioner, in his 2012 report, had noted the existence of some problems with regard to legal aid, care and psychological assistance in the emergency reception centres, the time taken to identify vulnerable persons and the preservation of family unity during transfers.

The Court ruled that while the structure and overall situation of the reception arrangements in Italy cannot therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information received by the Court nevertheless raise serious doubts as to the current capacities of the system. Accordingly, in the Court?s view, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded. (115)

The applicants? individual situation

The Court reiterates that to fall within the scope of Article 3 the ill?treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

This requirement of ?special protection? of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their

parents (*Popov*, § 91). Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not ?create ... for them a situation of stress and anxiety, with particularly traumatic consequences? (*Popov*, § 102).

Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention. (119)

In the present case in view of the current situation as regards the reception system in Italy, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together. (120)

The Court notes that, according to the Italian Government, families with children are regarded as a particularly vulnerable category and are normally taken charge of within the SPRAR network. This system apparently guarantees them accommodation, food, health care, Italian classes, referral to social services, legal advice, vocational training, apprenticeships and help in finding their own accommodation. However, in their written and oral observations the Italian Government did not provide any further details on the specific conditions in which the authorities would take charge of the applicants.

The Court found that in the absence of detailed and reliable information concerning the specific facility in Bologna, where the applicants were to be supposedly accommodated in, the physical reception conditions and the preservation of the family unit, the Court considers that the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. (121)

It follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention. (122).

Outcome:
The Courtfound the complaints of a violation of Article 3 of the Convention admissible and the remainder of the application inadmissible.

It held by fourteen votes to three, that there would be a violation of Article 3 of the Convention if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together;

The Court held that the finding of the Article 3 violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

The Court held that Switzerland was to pay the applicants 7,000 euros (EUR) in respect of costs and expenses.

Subsequent Proceedings :

In June 2015, the CoE Committee of Ministers adopted a final resolution (CM/Res DH(2015)96) [26] wherein it found that adequate execution measures had been adopted. Notably, the Court was satisfied with the suspension of the enforcement of returns to Italy of asylum-seeking families with minor children (including the return of the applicants). In addition, the CM favourably welcomed the subsequent practice of seeking detailed information and individual guarantees from Italy on the reception facility and the issue of whether the family would be kept together before envisaging any removal to this country.

Observations/Comments:
Observations and interventions

Observations in the case were submitted by the Italian, Dutch, Swedish, Norwegian and United Kingdom Governments (79-82) and by the organisation Defence for Children, the Centre for Advice on Individual Rights in Europe (?the AIRE Centre?), the European Council on Refugees and Exiles (?ECRE?) and Amnesty International, which had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

The organisation Defence for Children shared the applicants? view that the capacity to accommodate asylum seekers in Italy was clearly insufficient, arguing that this had particularly serious consequences for children, some of whom were forced to live in squats and other insalubrious accommodation.

The joint intervention by the AIRE Centre, ECRE and AIreferred to the concept of the ?child?s best interests? and submitted that children should only be transferred to other Member States of the European Union if this was in their best interests.The interveners also highlighted that Member State authorities must conduct a thorough and individualised examination of the person?s situation and must take account of all relevant evidence before transferring anyone under Dublin Regulation. They then went on to reiterate that the demonstration of operational or systemic failures in the receiving state is not necessary for a finding of a breach by the removing state. They argued that it may be sufficient, triggering a duty of enquiry and not merely rebutting, but reversing the presumption that member states will comply with their international obligations (as was the case in M.S.S at [359]).

Joint partly dissenting opinion by judges Casadevall, Berro-Lefevre and Jaderblom

The three judges are in disagreement with the majority of the judges of the Grand Chamber in their conclusion that Switzerland would be in breach of Article 3 if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

They maintained that it was clearly foreseeable by the Swiss authorities that the applicants? standard of accommodation in Italy might be poor. However, they would not constitute inhuman or degrading treatment in terms of their type, degree or intensity. The fact that they would also affect children, who are particularly vulnerable, did not lead the three judges to any other conclusion.

However, such conditions if extended over a lengthy period, may eventually give rise to a violation of Article 3. Were that the case it would be too far-reaching to hold the Swiss authorities responsible for failure to include that possibility in their risk assessment. Instead Italy, as a party to the Convention, would be answerable for an alleged violation of Article 3, and it would still remain open to the applicants to lodge an appeal with the Italian authorities.

Case Law Cited:

ECtHR - Nizamov and Others v. Russia, Applications nos. 22636/13, 24034/13, 24334/13, 24328/13

ECtHR - Kudla v Poland [GC], Application No. 30210/96

ECtHR - Salah Sheekh v The Netherlands (Application no. 1948/04) - resource [27]

UK - High Court, 18 November 2011, Medhanye, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 3012 (Admin) [28]

UK - High Court, 11 August 2011, Elayathamby, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 2182 (Admin) [29]

UK - R v Home Secretary ex p. Adan (CA) [1999] 3 WLR 1274; [1999] EWCA Civ 1948

CJEU - C-411/10 and C-493/10 N.S. v Secretary of State for the Home Department and ME (UP)

ECtHR - Müslim v Turkey (Application no. 53566/99)

ECtHR - Mubilanzila Mayeka and Kaniki Mitunga v Belgium, Application No. 13178/03 [30]

ECtHR - Jabari v Turkey, 11 July 2000, (Application no. 40035/98)

ECtHR - Chapman v The United Kingdom (Application no. 27238/95)

ECtHR - M. and Others v. Bulgaria, Application No. 41416/08

ECtHR - Hirsi Jamaa and Others v Italy [GC], Application No. 27765/09 [31]

ECtHR - Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airways) v. Ireland [GC], Application No. 45036/98

ECtHR - Michaud v. France, Application no. 12323/11

ECtHR - Guerra and Others v. Italy, 116/1996/735/932

ECtHR - Popov v France, Application Nos. 39472/07 and 39474/07 [32]

ECtHR - Budina v. Russia, Application No. 45603/05

ECtHR - Samsam Mohammed Hussein and Others v the Netherlands and Italy, Application No. 27725/10 - Admissibility Decision [33]

ECtHR - M.S.S. v Belgium and Greece [GC], Application No. 30696/09 [34]

ECtHR - Beldjoudi v France, Application No. 12083/86

Germany - Frankfurt Administrative Court, 9 July 2013, No. 7 K 560/11.F.A

UK - Supreme Court of the United Kingdom, 19 February 2014 ([2014] UKSC 12)

ECtHR - Aksu v. Turkey, Applications nos. 4149/04 and 41029/04

ECtHR - H.L.R. v. France, Application no. 24573/94

ECtHR - Halil Yüksel Akinciand Others v. Turkey, Application no. 39125/04

ECtHR - Saadi v Italy, Application no. 37201/06 [35]

Attachment(s):

CASE OF TARAKHEL v. SWITZERLAND.pdf[36]

Tarakhel third party intervention narrative and list of annexes.2-16 (1).pdf[37]

Other sources cited:

- Recommendations of the Office of the United Nations High Commissioner for Refugees on important aspects of refugee protection in Italy (July 2013)
- Report by Nils Mui?nieks, Commissioner for Human Rights of the Council of Europe, published on 18 September 2012, following his visit to Italy from 3 to 6 July 2012 (CommDH(2012)26)
- Information provided by the International Organization for Migration in a press briefing note of 28 January 2014
- The Swiss Refugee Council (SFH-OSAR), *Reception conditions in Italy: Report on the current situation of asylum seekers and beneficiaries of protection, in particular Dublin returnees*, Berne, October 2013 (?the SFH-OSAR report?);
- PRO ASYL, Maria Bethke, Dominik Bender, *Zur Situation von Flüchtlingen in Italien*, 28 February 2011, www.proasyl.de [38] (?the PRO ASYL report?);
- Jesuit Refugee Service-Europe (JRS), *Dublin II info country sheets. Country: Italy*, November 2011 (?the JRS report?);
- The European network for technical cooperation on the application of the Dublin II regulation, *Dublin II Regulation National Report on Italy*, 19 December 2012 (?the Dublin II network 2012 report?).

Authentic Language:
English

State Party:
Switzerland

National / Other Legislative Provisions:
Switzerland - Federal Asylum Act of 26 June 1998
Switzerland - Asylum Ordinance 1 of 11 August 1999 concerning procedure (Asylum Ordinance 1 OA 1)
Italy - Legislative Decree No. 251/2007
Italy - Law Decree No. 286/1998
Italy - Law Decree No. 25/2008

Links:
[1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1213
[2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A17

[3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A237
[4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A40
[5] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A196
[6] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A56
[7] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A43
[8] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2485
[9] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A1200
[10] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A753
[11] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2490
[12] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2495
[13] http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention
[14] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF
[15] http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr
[16] https://www.asylumlawdatabase.eu/node/195#toc_12
[17] https://www.asylumlawdatabase.eu/node/19
[18] https://www.asylumlawdatabase.eu/node/453
[19] https://www.asylumlawdatabase.eu/node/453#toc_29
[20] https://www.asylumlawdatabase.eu/node/195#toc_46
[21] http://www.asylumlawdatabase.eu/en/content/qualification-directive
[22] https://www.asylumlawdatabase.eu/node/195#toc_60
[23] https://www.asylumlawdatabase.eu/node/353
[24] https://www.asylumlawdatabase.eu/node/453#toc_85
[25] https://www.asylumlawdatabase.eu/node/453#toc_88
[26] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c13dd
[27] https://www.asylumlawdatabase.eu/en/content/ecthr-salah-sheekh-v-netherlands-application-no-194804-resource
[28] https://www.asylumlawdatabase.eu/en/case-law/uk-high-court-18-november-2011-medhanye-r-application-v-secretary-state-home-department
[29] https://www.asylumlawdatabase.eu/en/case-law/uk-high-court-11-august-2011-elayathamby-r-application-v-secretary-state-home-department
[30] https://www.asylumlawdatabase.eu/en/case-law/ecthr-mubilanzila-mayeka-and-kaniki-mitunga-v-belgium-application-no-1317803
[31] https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509
[32] https://www.asylumlawdatabase.eu/en/content/ecthr-popov-v-france-application-nos-3947207-and-3947407
[33] https://www.asylumlawdatabase.eu/en/content/ecthr-samsam-mohammed-hussein-and-others-v-netherlands-and-italy-application-no-2772510
[34] https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609
[35] https://www.asylumlawdatabase.eu/en/content/ecthr-saadi-v-italy-application-no-3720106
[36] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20TARAKHEL%20v.%20SW
[37] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Tarakhel%20third%20party%20intervention%16%20%281%29.pdf
[38] http://www.proasyl.de