

ECtHR - Paposhvili v. Belgium, Application no. 41738/10,13 December 2016

Country of Applicant:

Georgia

Date of Decision:

13-12-2016

Citation:

Application no. 41738/10

Court Name:

Grand Chamber

Keywords:[Burden of proof](#) [1][Country of origin information](#) [2][Country of origin](#) [3][Family unity \(right to\)](#) [4][Medical Reports/Medico-legal Reports](#) [5][Health \(right to\)](#) [6][Relevant Documentation](#) [7][Inhuman or degrading treatment or punishment](#) [8]

Relevant Legislative Provisions:Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [9] > [Article 2](#) [10]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [9] > [Article 3](#) [11]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [9] > [Article 8](#) [12]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [13] > [Article 19](#) [14]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [9] > [Article 26](#) [15]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [16]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [9] > [Article 34](#) [17]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#)

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European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [13] > [Article 52](#) [21]

European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [22] > [Article 3](#) [23]

Headnote:

Article 3 ECHR is triggered in cases involving the removal of a seriously ill individual where the absence of appropriate treatment in the receiving country or the lack of access to such treatment, exposes the individual to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.

Access to sufficient and appropriate medical care must be available in reality, not merely in theory and the impact of removal on an applicant must be assessed by considering how an applicant's condition would evolve after transfer to the receiving State.

Facts:

The applicant, a Georgian national facing removal due to criminal activity in Belgium, suffered from leukaemia and recurrent tuberculosis which had caused lung disease. He claimed that he would be unable to access adequate medical treatment in Georgia and was therefore at risk of ill-treatment in violation of Article 3 and accelerated death in breach of Article 2 if he were expelled. In addition the applicant argued that his removal to Georgia in conjunction with a ten-year ban on re-entering Belgium would result in separation with his family, who had leave to remain in Belgium.

The Fifth Section Chamber judgment of April 2014 held that Mr Paposhvili's removal would not encroach upon his Article 3 and 8 rights under the ECHR. The case was later referred to the Grand Chamber and the applicant died pending these proceedings. The applicant's family continued proceedings before the Chamber.

Decision & Reasoning:

As a preliminary point the Grand Chamber decided to examine his complaint in accordance with Article 37(1) due to its wider impact on cases involving aliens who are seriously ill and facing removal.

Presenting its well-versed findings on Article 3 the Court holds that the severity of ill-treatment under Article 3 must attain a minimum level and that the suffering flowing from a natural occurring illness may be or risks being 'exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.' Notwithstanding this the Court goes on to note that its scrutiny cannot be prevented even where the source of the risk of treatment in the receiving country does not engage the responsibility of the public authorities of that country.

The Court highlights that since its case law in *N. v. the United Kingdom*, an extremely high threshold (exceptional circumstances) has been set when applying Article 3 to seriously ill

persons, indeed only those close to death appear to be covered by the provision (as per D. v. United Kingdom). That said, the Court notes that "other very exceptional cases" within the meaning of N. v. UK needs to be clarified.

The Court determines that Article 3 is triggered in these cases where "the absence of appropriate treatment in the receiving country or the lack of access to such treatment, exposes the individual to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy". In ensuring that Article 3 is respected the Court goes on to highlight that appropriate procedures need to be put in place which allows the individual to adduce evidence of the potential risk upon return to the country of origin and for the State to examine the foreseeable consequences of return with regard to both the general situation and the individual's circumstances. Thus the applicant is not obliged to present clear proof that they would be exposed to proscribed treatment.

In addition the authorities should assess whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness. Thus States must assess the impact of removal on the individual by comparing his health prior to removal and how it would evolve after transfer. A factor in this assessment will be whether the care is generally available in the receiving State is sufficient and appropriate in practice for the applicant's treatment and whether the individual will actually have access to this care and these facilities in the receiving State. This includes considerations relating to costs, existence of social networks and distances to access the relevant treatment. The Court finds that where serious doubts persist concerning removal the State must obtain [Tarakhel](#) [24]-like guarantees that the individual will actually receive appropriate treatment. Therefore, the Court found that the Belgian Aliens Office had not examined the applicant's medical conditions in light of Article 3 in the context of his regularisation of status nor his proposed removal and as a result violated Article 3 of the Convention. The Court subsequently finds that there is no need to examine the complaint under Article 2.

With regards to Article 8 the Chamber emphasises the positive obligations on Belgium, especially in light of the facts of the case. Much like the lack of assessment on Article 3 the authorities did not examine the degree of the applicant's dependence on his family or the impact of removal on his family life. The Court thus found Article 8 to be additionally breached.

Outcome:

The Grand Chamber finds that there would have been a violation of Articles 3 and 8 of the Convention if the applicant had been removed to Georgia without the Belgian authorities having assessed the risk faced by him/ impact of his removal in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia.

The Chamber additionally finds that there is no need to examine the complaint under Article 2.

Observations/Comments:

Judge Lemmens provided a concurring opinion in this case. He underlined that *N. v. UK* had left a gap in protecting seriously ill people who were not close to death. Judge Lemmens further points out that domestic case law in Belgium had tended away from the strict interpretation provided in *N. v. UK* and had rules in several cases that a residence permit on medical grounds for persons where there is a risk of inhuman or degrading treatment should be provided if no appropriate treatment exists in the receiving country. The judgment by the Grand Chamber therefore consolidates the position in Belgium by confirming their approach.

Case Law Cited:

Belgium - Aliens Appeals Board, judgments nos. 135.035, 135.037, 135.038, 135.039 and 135.041 of 12 December 2014

[CJEU - C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida](#) [25]

ECtHR - *Maslov v. Austria* ([GC], no 1638/03)

[ECtHR - A.S. v. Switzerland, Application no. 39350/13, 30 June 2015](#) [26]

ECtHR - *Kochieva and Others v. Sweden* (dec.), no. 75203/12

[ECtHR - Yoh-Ekale Mwanje v. Belgium, Application No. 10486/10, 20 December 2011](#) [27]

ECtHR - *Aswat v. the United Kingdom*, Application No. 17299/12

[ECtHR - Tatar v. Switzerland, Application no. 65692/12, 14 April 2015](#) [28]

[CJEU - C-542/13, Mohamed M'Bodj v État belge](#) [29]

ECtHR - *S.H.H. v. UK*, no 60367/10

[ECtHR - Tarakhel v. Switzerland, Application no. 29217/12](#) [30]

[ECtHR - M.S.S. v Belgium and Greece](#) [GC], Application No. 30696/09 [31]

ECtHR - *El Masri v. the former Yugoslav Republic of Macedonia* [GC], Application No. 39630/09

[ECtHR - Sufi and Elmi v. the United Kingdom, Application Nos. 8319/07 and 11449/07](#) [32]

ECtHR - *Airey v Ireland*, 9 October 1979, Series A No. 32 § 26

[ECtHR - Hirsi Jamaa and Others v Italy](#) [GC], Application No. 27765/09 [33]

ECtHR - *N v United Kingdom* (Application no. 26565/05)

ECtHR - *Bouyid v. Belgium*, Application no. 23380/09

[ECtHR - F.G. v. Sweden \(no. 43611/11\) \(Grand Chamber\), 23 March 2016](#) [34]

Belgium - Conseil d'État, judgments nos. 225.522 and 225.523 of 19 November 2013

ECtHR - Karagoz v. France (dec.), no. 47531/99, 15 November 2001

Belgium - Conseil d'État, judgments nos. 225.522 and 225.523 of 19 November 2013

Belgium - Conseil d'État, judgment no. 226.251 of 29 January 2014

Belgium - Conseil d'État, judgments nos. 225.632 and 225.633 of 28 November 2013

Belgium - Conseil d'État, judgment no. 223.961 of 19 June 2013

Belgium - Aliens Appeals Board, judgments no. 92.393 of 29 November 2012 and no. 93.227 of 10 December 2012

Belgium - Aliens Appeals Board, judgments nos. 92.258, 92.308 and 92.309 of 27 November 2012

ECtHR - Khachatryan v. Belgium (dec.), no. 72597/10, 7 April 2015

ECtHR - Karner v. Austria, No. 40016/98, 24 July 2003

ECtHR - V.S. and Others v. France (dec.), no. 35226/11, 25 November 2014

ECtHR - E.O. v. Italy (dec.), no. 34724/10, 10 May 2012

[Luxembourg - Tribunal Administratif, 21 Avril 2017, 2017-04-21 39131](#) [35]

[ECtHR ? Saadi v. Italy, Application No. 37201/06, 28 February 2008](#) [36]

[ECtHR - Mamatkulov and Askarov v. Turkey, Application Nos. 46827/99 and 46951/99, 4 February 2005](#) [37]

[ECtHR - D. v. The United Kingdom, Application No. 30240/96, 2 May 1997](#) [38]

ECtHR - Murray v. the Netherlands [GC], no. 10511/10, ECHR 2016

[ECtHR - Pretty v. United Kingdom \(Application no. 2346/02\)](#) [39]

Attachment(s):



[CASE OF PAPOSHVILI v. BELGIUM.pdf](#)[40]

Authentic Language:

English

State Party:

Belgium

National / Other Legislative Provisions:

Belgium - Aliens (Entry
residence

Settlement and Expulsion) Act of 15 December 1980 section 9(3)

Belgium - Aliens (Entry

Settlement and Expulsion) Act of 15 December 1980 section 9(2)

Settlement and Expulsion) Act of 15 December 1980 section 9ter

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- [1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A18
- [2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A23
- [3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A193
- [4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A196
- [5] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A47
- [6] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2491
- [7] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A67
- [8] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A43
- [9] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [10] https://www.asylumlawdatabase.eu/node/195#toc_4
- [11] https://www.asylumlawdatabase.eu/node/195#toc_12
- [12] https://www.asylumlawdatabase.eu/node/195#toc_46
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- [16] <https://www.asylumlawdatabase.eu/node/1306>
- [17] https://www.asylumlawdatabase.eu/node/195#toc_132
- [18] https://www.asylumlawdatabase.eu/node/195#toc_148
- [19] https://www.asylumlawdatabase.eu/node/195#toc_165
- [20] https://www.asylumlawdatabase.eu/node/195#toc_169
- [21] https://www.asylumlawdatabase.eu/node/453#toc_221
- [22] <https://www.asylumlawdatabase.eu/node/4038>
- [23] https://www.asylumlawdatabase.eu/node/4038#toc_90
- [24] <http://www.asylumlawdatabase.eu/en/content/ecthr-tarakhel-v-switzerland-application-no-2921712>
- [25] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-56213-centre-public-d%E2%80%99action-sociale-d%E2%80%99ottignies-louvain-la-neuve-v-moussa-abdida>
- [26] <https://www.asylumlawdatabase.eu/en/content/ecthr-v-switzerland-application-no-3935013-30-june-2015>
- [27] <https://www.asylumlawdatabase.eu/en/content/ecthr-yoh-ekale-mwanje-v-belgium-application-no-1048610-20-december-2011>
- [28] <https://www.asylumlawdatabase.eu/en/content/ecthr-tatar-v-switzerland-application-no-6569212-14-april-2015>
- [29] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-54213-mohamed-m%E2%80%99bodj-v-%C3%A9tat-belge>
- [30] <https://www.asylumlawdatabase.eu/en/content/ecthr-tarakhel-v-switzerland-application-no-2921712>
- [31] <https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>
- [32] <https://www.asylumlawdatabase.eu/en/content/ecthr-sufi-and-elmi-v-united-kingdom-application-nos-831907-and-1144907-0>
- [33] <https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509>
- [34] <https://www.asylumlawdatabase.eu/en/content/ecthr-fg-v-sweden-no-4361111-grand-chamber-23-march-2016>
- [35] <https://www.asylumlawdatabase.eu/en/node/10514>
- [36] <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-saadi-v-italy-application->

no-3720106-28-february-2008

[37] <https://www.asylumlawdatabase.eu/en/content/ecthr-mamatkulov-and-askarov-v-turkey-application-nos-4682799-and-4695199-4-february-2005>

[38] <https://www.asylumlawdatabase.eu/en/content/ecthr-d-v-united-kingdom-application-no-3024096-2-may-1997>

[39] <https://www.asylumlawdatabase.eu/en/content/ecthr-pretty-v-united-kingdom-application-no-234602>

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<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20PAPOSHVILI%20v.%20BE>