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Tarakhel v. Switzerland: Where does the Dublin system stand now?

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This article is to be read in conjunction with the EDAL case summary [1]

Introduction

On the 4th November the Grand Chamber provided its much anticipated judgment in Tarakhel v. Switzerland (no. 29217/12). The Court?s judgment, concerning the proposed return of a family to Italy under the Dublin Regulation, had been awaited with bated breath given a divide between domestic and European jurisprudence on whether return to Italy could give rise to a violation of Article 3 ECHR. By comparing Tarakhel with other jurisprudence, this article hopes to bring into sharper relief the Court?s conclusions; firstly, concerning the contours of challenging a decision to return under Dublin including Member States presumed compliance and secondly, on the requisite types of evidence needed to demonstrate a risk of inhumane or degrading treatment.

Facts of the case

The Tarakhel case concerns the return of a family of eight Afghans from Switzerland to Italy, the first country through which the family entered the EU and thus the responsible examining country of the Tarakhel?s asylum application under the Dublin II Regulation [2] (Article 10 para 1). However, the Tarakhel family challenged their removal on a number of grounds including under Article 3 European Convention on Human Rights [3] (ECHR). They submitted that reception conditions for asylum seekers in Italy amounted to inhuman treatment.

Judgment of the ECtHR

The ECtHR held that notwithstanding the factual differences between accommodation conditions in Greece at the time of *M.S.S v Belgium and Greece* [4] and Italy?s current situation, the risk that a significant number of asylum seekers may be left without accommodation or accommodated in insalubrious conditions in Italy could not be dismissed as being unfounded [115]. Consequently, and with regards to the individual circumstances, the Court concluded that if the Swiss authorities were to send back the family without having first obtained verifiable and individual guarantees concerning the specific facility, the physical reception conditions, including its adaptability to the age of the children, and the preservation of family unity, Article 3 would be breached [122].

Commentary

The ambit of challenging a decision to return under Dublin

Permitting challenges to a decision to return under Dublin in front of the ECtHR have principally been grafted onto Article 3 ECHR complaints. The Court has held on numerous occasions that Article 3 issues are triggered and the responsibility of the expelling State engaged where substantial grounds have been shown for believing that a person, if returned, would face a real risk of being subjected to treatment contrary to Article 3 in the returning State. This test is unaltered when removal is to a member state of the European Union (*Soering v. the United Kingdom [5]*, 7 July 1989, para 91 and *Vilvarajah and Others v. the United Kingdom* [6], 30 October 1991 para 103).

Appearing at the forefront of litigation following the well-known ECtHR judgment in *MSS* [4] and the Court of Justice of the European Union?s (CJEU) ruling in *NS and others v United Kingdom* [7] , however, has been the question of whether there is a requirement that the conditions, said to be inhumane, are the product of inherent shortcomings in that country?s system. The path carved out by *MSS* and later *NS/ME* demonstrates that the means to find a violation of Article 3 ECHR (or the equivalent Article 4 Charter of Fundamental Rights [8]) was facilitated by but not contingent upon the clear evidence of deficiencies in the asylum procedures and reception conditions in Greece. Similarly, in *NS/ME* the Court highlighted that ?in situations such as that at issue in the main proceedings? [94] ie systemic deficiencies, transfers are prevented. The Court does not submit, however, that these major operational problems are necessary to raise a breach of Article 4 of the Charter. In fact it is clear from ECtHR case in *Sufi and Elmi v. United Kingdom* [9] that a finding of deficiencies is not a requisite condition of proving an Article 3 breach, instead what is essential is that the risk of an Article 3 breach exists. As the Court highlighted ?if the existence of such a risk is established, the applicant?s removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation ... a personal characteristic of the applicant, or a combination of the two? [218]. This approach was followed clearly by the Frankfurt Administrative Court [10] and the UK Supreme Court in *EM (Eritrea)* [11] who surmised that the critical test of returns remains the *Soering* one. The latter Court held that to say that a violation of an Article 3 right is first dependent on a finding of a systemic deficiency would go against the reality of Article 3 violations occurring without there being any systemic failure in the state of destination. To conclude the opposite would be arbitrary both in conception and practice [48].

The CJEU in *Abdullahi* [12], however, served to murky the waters considerably by stating that the only possibility of challenging return to a Member State where the State has agreed to take charge of the applicant under Article 10 para 1 of Dublin II is to argue that there are systemic deficiencies in the Member State?s asylum reception conditions and procedure which provide substantial grounds for believing that the applicant would face a real risk of an Article 4 Charter violation [60]. The case has been heavily criticised on several accounts [13], not least because it significantly curtails the right to effective judicial protection (Article 47) and arguably nullifies the principle of effectiveness with regards to the right to asylum (Article 18). Additionally, although arguably not applicable to Dublin III transfers [14], the restrictive approach of the Court in *Abdullahi* not only creates a double obligation on the applicant to prove that in both reception and procedural systems there are systemic deficiencies but it also puts in place a pre-conditional hurdle to first surmount before the applicant is able to prevent transfer.

This has unfortunately permeated into a recent Court of Appeal UK case (not yet published), *Tabrizagh & Others* [15], which denies permission to appeal a High Court judgment that finds removal to Italy will not expose a group of applicants to a violation of Article 3 given that the evidence submitted does not demonstrate ?substantial operational problems? in Italy ?with the whole asylum *acquis*?. The applicants were therefore unable to rebut the presumption of Italy?s compliance with the Convention which according to the High Court requires ?omissions on a widespread and substantial scale.?not just operational problems with some aspects of the *acquis*.?

In light of the foregoing jurisprudence the *Tarakhel* judgment serves to clarify three main issues.

First, in direct contrast to *Abdullahi* and *Tabrizagh*, deficiencies do not have to be evidenced in both the reception conditions and asylum procedures for issues of an Article 3 violation to be raised and for the presumption of Member States compliance with its obligations to be refuted. The Tarakhels? submissions related solely to access to reception facilities, capacity and inadequate living conditions [57] and it was consequently on evidence relating to reception that the court found Italian accommodation capacities to be limited with risks of overcrowding and living conditions insalubrious [115]. Hence, it was with regards to explicit and verifiable assurances concerning reception capacity and conditions that Italy needed to give and Switzerland procedurally obligated to request in order for a return not to be in violation of Article 3.

Second, systemic deficiencies are not the only situation where Member State?s compliance may be challenged and an Article 3 violation triggered. The line of reasoning in *Tarakhel* is one which reverts fully back to *Soering, Sufi and Elmi*, and the interpretation advanced by *EM (Eritrea).* Finding that neither the evidence nor the applicant?s situation is analogous to *MSS* the Court reiterates that the ?source of the risk does nothing to alter the level of protection guaranteed by the Convention?and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established? [104]. Hence, although ?extreme poverty on a large scale in Greece at the time of *MSS* is in no way comparable to the current situation in Italy? [144] the Court still concludes that there are problems with reception capacities and living conditions. Consequently and examining the individuals situation, the Court surmises that given children?s ?extreme vulnerability? (a dual layer of vulnerability which firstly stems from their status as asylum seekers) specific guarantees must be given to the family that they will be received in facilities and that they will be kept together in order to assure compliance with Article 3 [120]. The Court?s submissions reaffirm that there is nothing to stop the transferring state acquiring knowledge of inhumane treatment through a different medium than that of systemic deficiencies. Consequently, *Tarakhel* directly opposes the finding in *Tabrizagh*, which appears to have interpreted *EM (Eritrea)* and *NS/ME* as requiring nothing less than evidence of omissions on a widespread and substantial scale to prevent removal. It further counters the jurisprudence in *Abdullahi* by halting transfers due to a risk of an Article 3 violation where there is a particular deficiency in reception rather than systemic deficiencies in asylum procedures and reception conditions.

Where novel elements come into the Court?s decision is its engagement with the standards for rebutting the presumption of compliance. Conceding that a violation of Article 3 does not have to be conditional on first documenting systemic deficiencies, the Court implicitly states that Italy?s presumed compliance with convention obligations is also rebutted where the evidence is not akin to *MSS NS/ME* systemic deficiencies but where there are ?serious doubts as to the current capacities of the system? in one particular area. Obliging Switzerland to request guarantees from Italy on the back of this information reasserts individual State responsibility and requires national authorities to question compliance on the basis of information which may not necessarily evidence systemic problems. This is a blow to previous case law, especially *Abdullahi* which re-cemented strong presumptions of compliance and efficiency in the Dublin system to the detriment of a series of fundamental rights. Instead, *Tarakhel* realigns itself with *TI v. UK* [16] which affirms that removal to a contracting state does not affect the responsibility of the sending state to ensure that the individual is not exposed to inhuman treatment. Procedurally this has meant that *Tarakhel* has put in place a safeguarding mechanism, or as Peers has highlighted [17], an intermediate category of Dublin transfers. Thus, rather than stating all removals to Italy are allowed or are prohibited, *Tarakhel* obliges the sending state to undertake a thorough and individualised assessment of the applicants situation [104] (also confirmed in *Sharifi v. Italy and Greece* [18] [223]) and to request and obtain certain explicit conditions from the receiving state. These guarantees must be provided in light of the individuals needs so that a finding of compliance with Article 3 can be assured and

return can be effectuated.

Third, guarantees that a State is complying with their obligations under Article 3 should not apply solely to asylum applicants with families. Following *Tarakhel*, arguments [19] appear to advance the proposal that prior-return assurances need only be sought where the applicants are a family with children. Arguably, this reading is misplaced. In light of the Court?s reasoning that the applicant?s specific situation needs to be ascertained when assessing an Article 3 violation [105] it is hardly surprising that their conclusion turns on the facts of the *Tarakhel* case and consequently the guarantees relating to the children?s needs. However, to surmise that the Court?s judgment introduces a qualification to request guarantees only for the proposed return of families ignores the general conclusion by the Court that there are risks for any asylum seeker returning to Italy that they will not be accommodated or will have to live in insalubrious conditions. The gravity of this risk is all the more pertinent given that the Court reiterates its previous finding in *MSS* [251] that all asylum seekers are members of a particularly underprivileged and vulnerable group in need of special protection and that the obligation to provide accommodation and decent material conditions to asylum seekers has entered into positive law under the Reception Conditions Directive [20] [96-97]. Therefore, whilst *Tarakhel* relates to a violation of Article 3 if there is an absence of guarantees relating to the family?s needs, this does not prevent an individualised and thorough assessment of other asylum seekers needs who are equally as vulnerable and who are equally entitled to special protection under Article 3 [119]. This reasoning is in line with jurisprudence from *Hirsi Jamaa and Others v. Italy* [21] which requires individual assessments on a case-by-case basis so as to render Convention guarantees practical and effective and not theoretical and illusory [175].

In this regard, it is further arguable that the provision of guarantees should also apply to beneficiaries of international protection (BIPs) who may be on a ?on a par, as regards rights and obligations ? with the general population? [179] *Hassan and others v. Netherlands and Italy* [22] but are nevertheless still owed duties under the Qualification Directive [23], EU and International law and are not any less likely to be at a risk of inhumane treatment solely because of their status.

Requirements of evidence

In *Tabrizagh* a heavy reliance was placed on UNHCR evidence and attention was paid to the absence of a call from the UNHCR to halt Dublin removals, which was to be given ?considerable weight.? In fact, the High Court submits that ?the UNHCR report reveals a picture of compliance by Italy with its EU and International obligations.? The judgment from the UK Court clearly ignores the capacity and political climate that the UNHCR works in, evidenced by its calls to halt transfers in only two EU Member States (Greece and Bulgaria, the latter having been lifted [24]) where the situation was described as a humanitarian crisis. Regardless of these limited calls other national Courts have proceeded to nevertheless suspend transfers based on individual assessments to several others States [25], namely Poland, Malta and Hungary on the basis of deteriorating procedural and reception systems (See ILPA information sheet Dublin III Regulation, January 2014). Additionally, and as Costello has noted [26] ?requiring a UNHCR statement akin to that made in relation to Greece before transfer to other countries will be stopped is a dereliction of judicial authority and against the notion of effective judicial protection.? Indeed, to require nothing less than a UNHCR statement would counter the right of effective judicial protection as can be read from Article 6 and 13 of the Convention. *Tarakhel*, by clarifying that the ?current approach cannot be the same as in MSS? yet still finding a risk of Article 3 violation, rejects the rigid evidential requirements advocated in *Tabrizagh*, taking a far more holistic approach to the available evidence. Furthermore it sheds light on *NS/ME* [90-91] where the CJEU notes that evidence ?such as? a UNHCR correspondence could be used to evaluate risks of fundamental rights breaches. *Tarakhel,* which advocates a fulsome assessment of all available evidence,

clarifies that the CJEU?s evidential requirements are non-exhaustive ones.

Conclusion

It is hoped that with the judgment in *Tarakhel* future jurisprudence (both domestic and from the CJEU) will remain faithful to the *Soering* test and *EM (Eritrea),* which *Tarakhel* clearly aligns itself with. Not only is it apparent from the judgment that systemic deficiencies do not have to be the necessary cause of inhumane treatment, the judgment?s conclusions on when a Member States presumed compliance is rebuttable serves to place a visible Article 3 barrier in the path of returns to other Member States under Dublin. This in itself places the breaks on transfers to Member States with sending states now obliged to carry out a holistic assessment of evidence, namely of the overall situation and individual circumstances of a proposed return, requiring guarantees and preventing transfer where necessary. This should be applicable to any proposed Dublin returnee and to any Dublin Member State where evidence indicates a violation of fundamental rights.

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Dublin Transfer
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Vulnerable person
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Return

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