FOURTH SECTION

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 31007/20

Alaa ASAAD and Others

v.

The Netherlands

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)
DUTCH COUNCIL FOR REFUGEES (DCR)

---

pursuant to the Registrar's notification dated 28 January 2021 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

19 February 2021

Summary

I. Without being informed of an international protection status being granted and being issued a resident permit upon status recognition, the derived rights cannot be accessed – rendering the international protection status ineffective. In such cases, the rights and procedural safeguards this Court laid down for the protection of asylum seekers from *refoulement*, including under article 3 ECHR, should equally apply to such beneficiaries of international protection.

II. An effective investigation into the real-time conditions in the receiving country prior to transfer must include consideration of the *de facto* access to rights derived from an international protection status, such as housing, the labour market, social security and healthcare, in light of the individual circumstances, past experiences, including prior treatment in the country of removal, and particular vulnerabilities of the applicant. When access to those rights is contingent upon holding a residence permit, issuing the residence permit will be essential and urgent in order to access the rights.

III. The Contracting Party proposing a transfer must recognise and address the vulnerability of beneficiaries of international protection, who do not hold a valid residence permit or whose protection status is ineffective for other reasons, including their prior treatment in the country of proposed return. Such persons are in a comparable situation to asylum seekers. In case of individuals belonging to groups expressly recognised as vulnerable by supranational law, there should be a presumption of vulnerability, shifting the burden of proof onto the Contracting Party, when it wishes to refuse such recognition.

IV. For diplomatic assurances to be reliable they must be individualised, precise and cover the needs of the particular person. An assurance given by a State, where shortcomings and previous violations of Convention rights have been recognised and documented in the asylum or integration system, will presumptively struggle to satisfy the requirements of specificity or practicality.

I. *Non-refoulement* and procedural guarantees under Article 3 and 13 ECHR in cases involving return of vulnerable beneficiaries of international protection to another Contracting Party

1. The principle of *non-refoulement* is essential in order to protect 'the fundamental values of democratic societies'[1] and is well established in this Court's case law.[2] The *non-refoulement* obligation includes, among others, the prohibition of torture or inhuman or degrading treatment in absolute terms,[3] including under Article 3 ECHR. This Court ruled that treatment prohibited by Article 3 ECHR must attain a minimum level of severity, the assessment of which is "relative, depending on all the circumstances of the case" including its physical or mental effects, and the age, sex, vulnerability and state of health of the victim."[4] A Contracting Party will violate Article 3 by removal "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country" under the classic *Soering* test.[5] This Court has held that living conditions which fail to respect human dignity, can undoubtedly give rise to feelings of fear, anxiety or inferiority that can lead to despair. This situation combined with the lack of perspective to see their situation improve can reach the threshold of severity required by Article 3 ECHR and constitute degrading treatment. This Court found this threshold to be met, among others, when asylum

[1] *Chahal v. the United Kingdom* [GC], no. 22414/93, (15 November 1996), para. 96; *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, (30 October 1991), para. 108.

[2] *Soering v. the United Kingdom*, no. 14038/88 (7 July 1989), Series A no. 161, pp. 35-36, paras 88-91.

[3] Article 3 European Convention on Human Rights; Article 7 International Covenant on Civil and Political Rights; Article 4 Charter of Fundamental Rights of the European Union, Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3 1951 Convention relating to the Status of Refugees; Article 5 American Convention on Human Rights; Article 5 African Charter on Human and Peoples' Rights

[4] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09 (21 January 2011) para 219; *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07 (28 June 2011) para 213.

[5] *Soering v. the United Kingdom*, no. 14038/88 (7 July 1989) paras 90-91, Series A no. 161; *Vilvarajah and Others v. the United Kingdom,* nos. 13163/87 13164/87 13165/87 13447/87 13448/87 (30 October 1991) para 103, Series A no. 125; *H.L.R. v. France*, no. 24573/94 (29 April 1997) para 34, Reports 1997-III; *Jabari v Turkey,* no. 40035/98 (11 July 2000) para 38; *Salah Sheekh v. the Netherlands*, no. 1948/04 (11 January 2007) para 135; and *Saadi v Italy,* no. 37201/06 (28 February 2008) para 152. in *M.S.S. v. Belgium and Greece* [GC], no. 30696/09 (21 January 2011) para 365.

seekers, who were left out on the streets with no resources, no access to sanitary facilities, and no means of providing for their essential needs for four weeks.[6]

2. In the context of returnee beneficiaries of international protection, the Court has specifically recognised that those who have previously been admitted to a first country of asylum as beneficiaries of international protection can still be regarded as asylum seekers "when they do not hold a valid residence permit at present."[7] The interveners consider that, in the same vein, when the status of beneficiaries of international protection is ineffective for other reasons, such as their individual circumstances, past experiences and particular vulnerabilities, including their prior treatment in the country of proposed return, they should be regarded as particularly underprivileged and vulnerable persons requiring special protection, with their situation being comparable to that of asylum seekers in that regard.[8] This Court has, *mutatis mutandis*, noted that the possibility to lodge an asylum application in practice is a prerequisite for the effective protection of those in need of international protection, as without access to the asylum procedure, the applicants cannot benefit from the guarantees afforded by it.[9] Similarly, the interveners submit that effective access of a beneficiary of international protection to the protection status in practice is a prerequisite of benefitting from the rights and safeguards attached to it.[10]
3. This Court has not extensively ruled on the difference between the treatment of asylum seekers and beneficiaries of international protection for the purpose of Article 3 ECHR. However, in its decision in *Hassan* it noted "that the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee."[11] The distinction has been made on the basis that asylum seekers are considered to be "a particularly underprivileged and vulnerable population group in need of special protection"[12], while recognised refugees are considered to be "on a par, as regards rights and obligations … with the general population" – by virtue of their residence permit when so warranted by domestic law.[13] The interveners consider that it would be anomalous were there to be a different test applicable to asylum seekers and applicants granted international protection status, which is ineffective in practice. A person might be destitute and homeless one day as an asylum seeker, and still destitute, homeless and without access to healthcare, notwithstanding the grant of a status (of which they may not yet be aware). In each case, the individual is owed obligations under the Convention, as well as either under the recast Reception Conditions Directive in case of asylum seekers or the recast Qualification Directive[14] in case of beneficiaries of international protection, by virtue of Article 53 ECHR. It is antithetical to the practical and effective protection of fundamental rights to treat the two differently.
4. **The interveners submit that without being informed of the granting of an international protection status and being issued a resident permit upon status recognition, the derived rights cannot be accessed – rendering the international protection status ineffective. In such cases, the rights and procedural safeguards this Court has laid down for the protection of asylum seekers from *refoulement*, including under Article 3 ECHR, should equally apply to such beneficiaries of international protection.**
5. In assessing the risk of *refoulement*, national authorities must carry out a thorough assessment of the protection *de facto* available for beneficiaries of international protection and the safeguards and benefits it affords in practice in the proposed receiving country. They must thoroughly assess the risk of the individual being subjected to conditions in breach of Article 3 ECHR and the foreseeable consequences of removal in the light of the general situation in the proposed receiving country. These must be examined together with the applicant's individual circumstances, past experiences

[6] *V.M. and others v. Belgium*, no.60125/11, (7 July 2015) paras 162-163.
[7] *Mohammed Hassan and Others v the Netherlands and Italy*, no. 40524/10, (27 August 2013) para 174.
[8] Oršuš and Others v. Croatia [GC], no. 15766/03 (16 March 2021) para 147.
in *M.S.S. v. Belgium and Greece* [GC], no. 30696/09 (21 January 2011) para 251.
[9] *A.E.A. v Greece*, no. 39034/12 (15 June 2018) para 85.
[10] *A.E.A. v Greece*, no. 39034/12 (15 June 2018) para 85.
[11] *Mohammed Hassan and Others v the Netherlands and Italy*, no. 40524/10, para 174.
[12] *M.S.S. v. Belgium and Greece*, no. 30696/09, para 251.
[13] *Mohammed Hassan and Others v the Netherlands and Italy*, no. 40524/10 (27 August 2013) para 179.
[14] Directive 2011/95/EU (recast) Qualification Directive; Directive 2013/33/EU (recast) Reception Conditions Directive

in the country of proposed removal, and particular vulnerabilities. It is the duty of those authorities to seek all relevant, up-to-date and generally available information to that effect. Articles 3 and 13 require the Contracting Parties, *inter alia,* to assess all evidence at the core of a *non-refoulement* claim,[15] including, where necessary: to obtain such evidence *proprio motu*; not to impose an unrealistic burden of proof on applicants or require them to bear the entire burden of proof,[16] and to apply the principle of the benefit of the doubt in the light of the specific vulnerabilities of the applicants.[17] This Court has held in the context of "asylum claims based on a well-known general risk, [that] when information regarding such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the Contracting Parties under Articles 2 and 3 … in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion."[18] This should also apply, by analogy, to those beneficiaries of international protection, who do not hold a valid residence permit or whose protection status is ineffective for other reasons.

6. **The interveners consider that, *mutatis mutandis*, a *proprio motu* investigation is required from the Contracting Parties when removal is considered in cases of beneficiaries of international protection to a country, where well-known general risk exists, of which information is freely ascertainable from a wide number of sources.**
7. This Court's case law prohibits evasion of state responsibility regardless of whether the non-compliance with Convention standards is made with reference to other legal obligations. In the *Bosphorus v Ireland* judgment, the Court stated that "a Contracting Party is responsible under Article 1 … for all acts and omissions of its organs regardless of whether the act or omission... was a consequence of domestic law or of the necessity to comply with international legal obligations."[19] The Court has further explained in its *Hirsi Jamaa and Others v Italy* judgment that "where the Contracting Parties cooperated in an area where there might be implications as to the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned."[20]
8. This Court's jurisprudence has made it clear that the presumption of compliance is exactly that, a mere presumption that can and, in fact, is required to be rebutted by up-to-date relevant evidence should the situation be sub-standard in reality.[21] In the same vein, the CJEU has long held that "European Union law precludes the application of a conclusive presumption that the Member State … observes the fundamental rights of the European Union."[22] The interveners consider that the presumption that those beneficiaries of international protection, who do not hold a valid residence permit or whose protection status is ineffective for other reasons will be treated in a way which complies with fundamental rights, must be regarded as rebuttable. In this context, the CJEU's more recent case law clarifies that Member States can reject an application for international protection as inadmissible, "where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State **would <u>not</u> expose him to a substantial risk** of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter"[23] which corresponds to Article 3 ECHR.

<u>Effectiveness of international protection status</u>

9. The interveners note that under Article 53 ECHR, where Contracting Parties are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner which

[15] *Jabari v. Turkey*, no. 40035/98, (11 July 2000), paras 39-40; *Singh and Others v. Belgium*, no. 33210/11, (2 October 2012), para 104.
[16] *M.S.S. v. Belgium and Greece*, op. cit., paras. 344-359; *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 122-158.
[17] *M.A. v. Switzerland*, no. 52589/13, (18 November 2014), para. 55.
[18] *Hirsi Jamaa and Others*, op.cit., paras 131-33., and *M.S.S. v. Belgium and Greece*, op cit., para 366. in *F.G. v Sweden* [GC], no. 43611/11 (23 March 2016) para 126.
[19] *United Communist Party of Turkey and Others v. Turkey* (30 January 1998) Reports 1998-I, pp. 17-18, para 29. in *Bosphorus v Ireland,* no. 45036/98 (30 June 2005) para 153.
[20] *M.S.S. v Belgium and Greece*, op cit., para 342.
[21] see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06 (28 February 2008) para 147. in *M.S.S. v Belgium and Greece*, op cit., para 353.
[22] CJEU, Judgment of 21 December 2011, *N. S. v SSHD*, C-411/10 and C-493/10, EU:C:2011:865 paras 103 – 105.
[23] [emphasis added] CJEU, Judgment of 19 March 2019, *Ibrahim*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, para 101.

does not diminish the rights guaranteed under the applicable EU law. The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the CJEU.

10. EU standards on the content of international protection are laid down in Chapter VII of the Qualification Directive.[24] Article 24 (1) of the Directive requires that "[a]s soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit…". The Directive does not leave the issuance of the residence permit to the discretion of the Member States, neither allows for the imposition of further conditions – other than qualifying as a beneficiary of international protection - such as presence on the territory of the Member State. Separately from the standards applicable to the asylum procedure in general, the Directive requires the issuance of the residence permit 'as soon as possible'. This requirement is also in line with the general principle of the right to a good administration, which requires handling institutional affairs, such as the issuance of a residence permit, 'within a reasonable time'.
11. Akin to this Court's teleological approach[25] that aims at ensuring that the Convention "guarantee[s] not rights that are theoretical or illusory but rights that are practical and effective",[26] the UN Human Rights Committee (CCPR) has also held, in the context of the prospective return of a single mother with a child, who was a beneficiary of international protection in the first country of asylum, that the information that the authorities can renew her residence permit upon re-entry, is not sufficient *per se* to ensure that, if returned, they will in fact renew her permit and issue one to her child.[27]
12. In this context, the interveners recall that, in *M.S.S. v Greece and Belgium*, when assessing the adequacy of a 'pink card' issued for applicants with the promise to ensure their access to the labour market, this Court looked at whether such a card would be "of any practical use whatsoever to the applicant."[28] To that end, the Court looked at reports on whether such a card in practice would be capable of ensuring effective access to the labour market. **The interveners consider that, by analogy, the same standard should be applied to the assessment of any cards issued with the promise of providing access to essential rights and services, such as housing, education or healthcare.[29]** Similarly, according to this Court's assessment, the personal difficulties, vulnerabilities and past experiences of the applicant should be taken into account, including an initial lack of access to reception facilities, a "lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate."[30]
13. The interveners consider recognised international protection status without practical and effective access to the derived rights as mere 'protection status on paper' (whether that is due to a lack of valid residence permit or to the *de facto* ineffectiveness of the international protection status). This not only renders their Convention rights theoretical and illusory, and international protection status itself hollow, but also systematically places status-holder returnees in a legal lacuna where the substantive rights and procedural safeguards applicable to asylum seekers no longer apply, while the rights derived from a protection status are not (yet) accessible either.
14. **The interveners submit that for the Contracting Party to comply with its obligations under Article 3 ECHR, an effective investigation into the real-time conditions in the receiving country must include an examination of the *de facto* access to rights derived from an international protection status, such as housing, the labour market, social security and healthcare in the light of the individual circumstances, past experiences and particular vulnerabilities of the applicant. An automatic reliance on general principles entailing a presumption that a receiving country complies with Convention and EU standards will not be sufficient. In particular, when deficiencies in the protection of beneficiaries of international protection were known, or ought to have been known by authorities of the returning Contracting Party, including due to publicly available information from reputable**

[24] Directive 2011/95/EU (recast) 'Qualification Directive'
[25] The Conscience of Europe: 50 Years of the European Court of Human Rights, p 169.
[26] *Airey v. Ireland*, no. 6289/73 (9 October 1979) para 24.
[27] UN Human Rights Committee, *Bayush Alemseged Araya v Denmark* (2018), para 9.8; *Raziyeh Rezaifar v. Denmark* (Communication no. 2512/2014) para 8.9; *A.A. and F.H.M. v. Denmark* (Communication no. 2681/2015) para 7.9
[28] *M.S.S. v Greece and Belgium*, op cit., para 261.
[29] For more information on access to residence cards see pp. 204 – 205; for access to housing p. 217 – 2018; for access to the labour market – and for access to education – p. 220 of the *AIDA Country Report: Greece – 2019 Update*
[30] *M.S.S. v Greece and Belgium*, op cit., para 261.

sources. Disregarding country reports, the lack of adequate investigation of the actual circumstances awaiting the individual upon return, and the lack of access to clear information render rights under Articles 3 and 13 ECHR ineffective, theoretical and illusory.

15. **When access to rights is contingent upon holding a residence permit, the need to be issued a residence permit will be essential and urgent in order to access the derived rights, such as housing, the labour market, social security or healthcare. The interveners submit that the Contracting Parties cannot evade their responsibility under this Convention, including under Articles 3 and 13, with reference to a status that is theoretical and illusory and in reality fails to guarantee access to the derived rights guaranteed in national and EU law to status-holders.**

II. International and European legal standards as those relate to vulnerability

16. The obligation to treat all individuals compatibly with the Convention includes the obligation to identify and give special consideration to the needs of people in a vulnerable situation. This Court has held that vulnerability can be individual as well as a product of specific group-based experiences such as social, economic, political, and historical circumstances.[31] The Court has identified a number of particularly vulnerable groups that suffered a history of prejudice and social exclusion, in respect of which the Contracting Party has a narrower margin of appreciation.[32] Accordingly, if a restriction on fundamental rights applies to such a vulnerable group, then the Contracting Party must have "very weighty reasons" for the restrictions.[33] This Court has in the past identified a number of such vulnerable groups that suffered different treatment on account of their sex,[34] sexual orientation,[35] race or ethnicity,[36] mental faculties,[37] disability[38] or health status, such as living with HIV.[39] In particular, the Court has emphasised the "particularly vulnerable situation of victims of torture"[40] and has set out several procedural obligations for the domestic authorities on the assessment of the risk of ill-treatment and the respect of Article 3 ECHR.[41]
17. Further, this Court has specifically recognised that asylum seekers are members of a "particularly underprivileged and vulnerable population"[42] and emphasised that Contracting Parties must "exercise particular care to avoid situations which may reproduce the plight that forced these persons to flee in the first place."[43] As highlighted above, this should apply, by analogy, to those beneficiaries of international protection, who do not hold a valid residence permit or whose protection status is ineffective for other reasons.
18. Article 4 of the Qualification Directive requires that the individualised assessment of an application for international protection takes into account not only all relevant facts, laws and regulations but also "the manner in which they are applied."[44] The Charter of Fundamental Rights of the EU (the Charter)[45] guarantees rights fundamental to the issues under consideration, such as the right to asylum (Article 18), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or

[31] *M.S.S. v. Belgium and Greece*, op cit., paras 232, 251.
[32] *Kiyutin v. Russia*, no. 2700/10, (15 September 2011) para 48.
[33] *Kiyutin v. Russia*, no. 2700/10 (15 September 2011) para 63.
[34] *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* no. 9214/80; 9473/81; 9474/81 (28 May 1985) para 78, and *Burghartz v. Switzerland,* no. 16213/90 (22 February 1994) para 27.
[35] *Schalk and Kopf v. Austria*, no. 30141/04 (22 November 2010) para 97.
Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96 (27 December 1999) para 90.
[36] *D.H. and Others v. the Czech Republic* [GC], no. 57325/00 (13 November 2007) para 182.
Timishev v. Russia, nos. 55762/00 and 55974/00 (13 March 2006) para 56.
[37] *Alajos Kiss v. Hungary*, no. 38832/06 (20 August 2010) para 42, and, *mutatis mutandis*, *Shtukaturov v. Russia*, no. 44009/05 (27 June 2008) para 95.
[38] *Glor v. Switzerland*, no. 13444/04 (6 November 2009) para 80.
[39] *Kiyutin v. Russia*, No. 2700/10, (15 September 2011) para 64.
[40] *Batı and Others v. Turkey*, nos. 33097/96 et 57834/00 (3 September 2004) para 133; *Gisayev v. Russia*, no. 14811/04 (20 June 2011) para 116; *Aydın v. Turkey*, no. 57/1996/676/866 (25 September 1997) para 103.
[41] *Paposhvili v. Belgium*, no. 41738/10 (17 April 2014) para 189.
[42] *M.S.S. v. Belgium and Greece*, op cit., para 251.
[43] *O.M. v. Hungary*, no. 9912/15 (5 July 2016) para 53.
[44] Directive 2011/95/EU (recast) Qualification Directive
[45] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

extradition (Article 19), the rights of the child (Article 24) and the right to an effective remedy and to a fair trial (Article 47).

19. In this context, the CJEU has recently clarified that the return of beneficiaries of international protection to the first country of asylum would be in violation of EU law if the return would "entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment."[46] At the same time, the CJEU has made clear that the threshold[47] for finding a violation of Article 4 of the Charter could be met by particularly vulnerable applicants under circumstances that may not constitute a violation *vis-à-vis* all applicants.[48]
20. This is also in line with the understanding of the concept of vulnerability by the UN Treaty Bodies. The CCPR, found that "individual circumstances … include factors that increase the vulnerability of such persons and that could transform a situation that is tolerable for most into an intolerable one for others."[49] The "vulnerability-increasing factors" according to the CCPR include age,[50] medical conditions,[51] or being a victim of trafficking.[52] It considers the "cumulative effect" of specific vulnerable circumstances and requires the same from national authorities to be in line with ICCPR standards.[53] Among others, in the case *Jasin v. Denmark*, the CCPR heavily relied on the family's vulnerable status to find a violation of the Covenant due to the mother being single with children and because their residence documents had expired.[54] In *R.A.A. and Z.N. v. Denmark* and *Abubakar v. Denmark,*[55] the CCPR recognised vulnerability due to the child's age combined with medical conditions – and the state's failure to explain how residence permits would protect them.[56]
21. Similarly, the UN CAT has found violation in cases where the authorities did not consider particular vulnerability factors such as: past experience of torture,[57] young age and low level of education/lack of family networks,[58] and (gender-based) violence in the country of return.[59]
22. The UN CRC puts the child's inherent vulnerability at the centre of its decision-making. The Committee will examine all the circumstances of the child's return when assessing vulnerability factors, including any vulnerability relating to the parents. In *I.A.M. v. Denmark*, the Committee noted the lack of domestic consideration of the fact that the child would return with her single mother without a male supportive network.[60] In *D.D. v. Spain*, the CRC confirmed that for a *refoulement* assessment to be in accordance with the best interests of the child and Article 20 CRC, it should necessarily include an examination of the child's potential vulnerabilities.[61]
23. EU law adopts varying definitions of which individuals or groups of individuals should be classified as vulnerable.[62] In particular, the recast Reception Conditions Directive in Article 21 specifically refers to 'single parents with minor children' as vulnerable with special reception needs.[63] The EU legislated these matters within its shared competence leaving room for the Member States to adopt legally binding acts, and corresponding domestic policies and practices, only to the extent that those do not conflict with the Directive. Hence, **national laws, policies or practices that deny the**

---

[46] CJEU, Judgment of 19 March 2019, *Ibrahim*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, para 91.
[47] Ibid paras 89-91.
[48] Ibid para 93.
[49] [emphasis added] UN Human Rights Committee, *Bayush Alemseged Araya v. Denmark*, para. 9.7.
[50] CCPR, *O.A. v. Denmark*, Communication no. 2770/2016, 11 December 2017, 8.11.
[51] CCPR, R.*A.A. and Z.N. v. Denmark*, Communication No. 2608/2015, 29 December 2016, 7.8.
[52] CCPR, *Osayi Omo-Amenaghawon v. Denmark*, Communication No. 2288/2013, 23 July 2015, 7.5.
[53] CCPR, *A.A.S. v. Denmark*, Communication No. 2464/2014, 16 September 2016, 7.7; HRC, *X. v. Denmark*, Communication no. 2389/2014, 21 October 2015, 7.7.
[54] CCPR, *Jasin v. Denmark*, Communication No. 2360/2014 25 September 2015, 8.4 and 8.9.
[55] CCPR, *Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark*, Communication no. 2409/2014, 16 June 2016
[56] CCPR, *R.A.A. and Z.N. v. Denmark*, Communication No. 2608/2015, 29 December 2016, 7.7 and 7.8.
[57] CAT, Adam Harun v. Switzerland, Communication No. 758/2016, 8 February 2019, 9.9 and 9.10; CAT, *Khademi v. Switzerland*, 20 January 2015, 7.6.
[58] CAT, *N.A.A. v. Switzerland*, Communication No. 639/2014, 16 June 2017, 7.5.
[59] CAT, *F.B. the Netherlands*, Communication No. 613/2014, 15 December 2015, 8.8.
[60] CRC, *I.A.M. v. Denmark*, Communication No. 3/2016, 8 March 2018, 11.8 (a).
[61] CRC, *D.D. v. Spain*, Communication No. 4/2016, 15 May 2019, 14.3.
[62] *See, e.g.*, Asylum Information Database (AIDA), The concept of vulnerability in European asylum procedures, August 2017, p. 10-11: Art. 22(1) Committee on the Rights of the Child (CRC); UNHCR EXCOM Conclusion No. 105 (LVII) – 2006; and ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, *inter alia*, paras 232,233, 251
[63] Directive 2013/33/EU (recast) Procedures Directive

recognition on the basis of a specific characteristic/situation expressly recognised by secondary EU law as rendering affected individuals vulnerable, will struggle to meet EU as well as Convention standards, by virtue of Article 53 ECHR.[64] National laws across Europe also reflect a wide recognition of the vulnerability of single-parent families with minor children.[65] In the same vein, the CCPR has also recognised the vulnerability of single parents when finding that their prospective return would constitute a violation of Article 7 ICCPR, which corresponds to Article 3 ECHR.[66] It further held that "the previous experiences of removed individuals in the first country of asylum, may underscore the special risks that they are likely to face, and may thus render their return to the first country of asylum a particularly traumatic experience for them.[67]

Vulnerability and the best interests of the child principle as primary considerations in cases involving children

24. This Court has held that where children are also seeking asylum they are in a situation of enhanced and extreme vulnerability.[68] Respect for this enhanced vulnerability of child asylum seekers,[69] *qua* child and *qua* asylum seeker, must be a primary consideration, taking precedence over their irregular migration status.[70] The Court has recognised the right of children to have their best interests assessed and taken as a primary, and in some contexts, paramount consideration.[71] In *Rahimi v. Greece* it confirmed that in all actions relating to children, a best interests assessment must be undertaken separately and prior to any decision that will affect that child's life.[72]
25. This Court has held that the ECHR does not exist in a vacuum and the Contracting Parties remain bound by their obligations under international law by virtue of Article 53 ECHR.[73] The particular vulnerability of a child seeking asylum is recognised by Article 22 CRC and elaborated on by the Committee on the Rights of the Child in its General Comment 14.[74] To fully enjoy their CRC rights, children must be appropriately protected and assisted.[75] On a procedural level, respect for this principle requires the Contracting Parties to ground any decision to remove a child 'on evidentiary considerations on a case-by-case basis and pursuant to a procedure with appropriate due process safeguards, including a robust individual assessment and determination of the best interests of the child [ensuring], *inter alia*, that the child, upon return, will be safe and provided with proper care and enjoyment of rights.'[76] The assessment of the risk of *refoulement* should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services."[77]
26. In addition, as recognised by this Court and the CRC, the principle that the best interests of the child must be a primary consideration in all actions concerning children is a fundamental general and interpretative legal principle, a substantive right and a rule of procedure.[78] In procedural terms, the

---

[64] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02; CJEU (Grand Chamber), Judgment of 15 October 2019, Dorobantu, C-128/18, EU:C:2019:857, paras. 49 -52;
CJEU, Judgment of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, paras. 88-95.

[65] Belgium, Bulgaria, Cyprus, Spain, Croatia, Hungary, Ireland, Italy, Malta, Poland, Switzerland in AIDA '*The concept of vulnerability in European asylum procedures'*, p 16.

[66] UN Human Rights Committee, *Bayush Alemseged Araya v Denmark* (2018), para 9.11.

[67] UN Human Rights Committee, *Bayush Alemseged Araya v Denmark* (2018), para 9.7.

[68] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03 (12 January 2007) para. 55; *Popov v. France*, nos. 39472/07 and 39474/07 (19 April 2012) para. 91; *Tarakhel v. Switzerland* [GC], no. 29217/12 (4 November 2014) para. 99.

[69] *M.S.S. v. Belgium and Greece* [GC], op. cit., para. 232.

[70] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *op.cit.,* para. 55.

[71] *Neulinger and Shuruk v. Switzerland*, no. 41615/07 (6 July 2010) para.135; *Yousef v. Netherlands*, no. 33711/96 (5 February 2003) para. 73; *Wagner and J.M.W.L. v. Luxembourg*, no.76240/01 (28 September 2007) para. 133.
For a commentary on this line of jurisprudence see C. Simmonds, *Paramountcy and the ECHR: A conflict resolved?* Cambridge Law Journal, Volume 71, Issue 3 November 2012, pp. 498-501.

[72] see also EASO *Practical Guide on the Best Interests of the Child in Asylum Procedures*, 2019, p.17 and 25.

[73] *Pini and Ors v. Romania*, no. 78028/01, (22 June 2004), para 138.

[74] UN CRC General Comment No. 14, paras 75-76; UN CRC Article 22.

[75] UN CRC General Comment No. 7, para 32.

[76] UN CRC General Comment No. 7, para 32., para. 33.

[77] Ibid., para. 27.

[78] *Rahimi v. Greece*, op. cit*.,* para. 108.; UN CRC, General comment No. 14 (2013), op. cit. See also, N*eulinger and Shuruk v. Switzerland* [GC] no. 41615/07 (6 July 2010) para 135.

CRC clarified that "the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, … or expulsion of a parent."[79] The assessment must be carried out systematically,[80] by actors independent of the migration authorities and ensure meaningful participation of the child, his/her representative and child protection authorities.[81]

27. The best interests principle is aimed at ensuring the child's full, equal and effective enjoyment of human rights, including non-discrimination, the right to be heard,[82] protection from abuse, access to asylum, the receipt of appropriate protection and a standard of living adequate for the child's development.[83] It imposes an obligation to identify and evaluate in the specific factual context the relevant elements of a best interests assessment and to follow a procedure that ensures legal guarantees and the proper application of the right.[84]
28. The Committee on the Rights of the Child (CRC) and the Committee on the Protection of the Rights of All Migrant Workers (CMW) have also recognised that vulnerability of children in the migration context requires that they are "treated first and foremost as children" and regarded as "individual rights holders", unaffected by their parents' or guardians' migration status.[85] In the Greek context, they have not only a right but in fact a legal obligation to study in institutions of public primary and secondary education, under the same conditions as nationals.[86]
29. The CRC-CMW affirmed that in case it has been duly established through an age and gender-sensitive individualised assessment that it is in fact in the best interests of the child to be returned, an individual plan should be prepared, together with the child where possible, for his or her sustainable (re/)integration.[87] In cases of children returning to third countries, their effective (re/)integration should be ensured through a rights-based approach, including immediate protection measures and long-term solutions, in particular effective access to education, health, psycho-social support, family life, social inclusion, access to justice and protection from all forms of violence. The Committees have highlighted that return and (re/)integration measures should be sustainable from the perspective of the child's right to life, survival and development.[88]
30. Further, the interveners address statelessness as a vulnerability within the asylum context. The 1954 Statelessness Convention acknowledges that stateless persons are vulnerable and, *inter alia*, oblige States Parties to extend administrative assistance and to issue them with identity papers, regardless of their legal status,[89] as well as to facilitate their naturalization process.[90] Whereas it is the prerogative of States to determine the rules for acquisition of nationality, in doing so they must comply with international law, in particular human rights law,[91] that provides that "everyone has the right to a nationality." This right, albeit with diversified formulations, is included in a number of international legal instruments.[92] Although the ECHR does not provide for a right to nationality, it applies to stateless persons under the jurisdiction of the Contracting Parties. Furthermore,

---

[79] *Joint general comment No. 3 (2017)* of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families *and No. 22 (2017)* of the Committee on the Rights of the Child *on the general principles regarding the human rights of children in the context of international migration*, 16 Nov. 2017, CMW/C/GC/3-CRC/C/GC/22, para 30.
[80] CRC/CMW, Joint General Comment No. 22/3 (2017) op. cit., para. 31
[81] CRC/CMW, Joint General Comment No. 22/3 (2017) op. cit., para. 32(c)
[82] UN CRC, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12**.**
[83] Articles 2, 5, 10, 12, 19, 22 and 27 Convention on the Rights of the Child; UN CRC General comment No. 14, paras. 4, 51, 82; UN CRC, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para. 12.
[84] UN CRC General comment No. 14, para. 46; *N.Ts. v. Georgia*, No. 71776/12, (2 February 2016).
[85] CMW and CRC, Joint GC No. 3 and No. 22, op. cit., para. 3.
[86] Greek Council for Refugees: *Country Report: Education* (2020)
[87] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (k) and European parliament and Council, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, Art. 5.
[88] CMW and CRC, Joint GC No. 3 and No. 22, *op. cit.*, para. 32 (k).
[89] The 1954 Convention Relating to the Status of Stateless Persons, Articles 25 and 27.
[90] Ibid, Article 32.
[91] Universal Declaration of Human Rights, Article 15(1).
[92] International Covenant on Civil and Political Rights, Article 24; International Convention on the Elimination of All Forms of Racial Discrimination, Article 5.; Convention on the Elimination of All Forms of Discrimination against Women, Article 9. Convention on the Rights of the Child, Articles 7 and 8.

statelessness may itself constitute, or lead to a violation of, one or more, of the rights enshrined in the ECHR.[93] As Greece has not introduced a dedicated Statelessness Determination Procedure into national legislation, it does not have any way to ensure the procedural safeguards and access to effective remedies for stateless persons.

31. **The interveners submit that in order to treat all individuals compatibly with the Convention, vulnerability must be given special consideration. This must include the specific circumstances of each individual as well as group-specific vulnerabilities. In this context, the Contracting Party must recognise and address the vulnerable condition of those beneficiaries of international protection, who do not hold a valid residence permit or whose protection status is ineffective for other reasons, including their prior treatment in the country of return, and can, therefore, be regarded as vulnerable in a comparable situation to asylum seekers.**
32. **The interveners further submit that where individuals belong to groups expressly recognised as vulnerable under international or regional standards applicable to the Contracting Party (such as being a child, a single parent with a minor child, stateless person or torture survivor) there should be a presumption of vulnerability, shifting the burden of proof onto the Contracting Party, when it wishes to refuse such recognition. The interveners stress that the best interests of the child principle requires assessing the risk of all harm, not only irreparable harm, should the child be removed. The assessment of a risk of *refoulement* should be conducted in an age and gender-sensitive manner and in compliance with the child-specific guarantees under international and EU law. Authorities of the Contracting Parties must, taking into account reliable, objective and up-to-date information, also ascertain whether the overall situation with regard to the services in fact available in the country of return comply with the child's right to be free from ill-treatment, to adequate healthcare, to adequate standard of living and to education in line with the best interests of the child principle.**

III. Individual assurances in the context of return to another Contracting Party with regard to Article 3 ECHR

33. This Court laid down the standards, which must be applied to reliance on diplomatic assurances in various cases.[94] In particular, in *Othman (Abu Qatada) v. UK,* it identified 11-points required in extradition cases. However, guaranteeing the applicants' Article 3 rights in the asylum context, with various procedural possibilities that - unlike in criminal cases - may not fall under formal state monitoring mechanisms, calls for an even more stringent application of the 11-point criteria. According to this Court's established case law, a Contracting Party wishing to rely on diplomatic assurances must ascertain, on the basis of objectively verifiable evidence, that the assurances will be complied with in practice.[95] The risk of ill- treatment must be ruled out.[96] While in some cases the general situation in a country is such that no weight can be given to diplomatic assurances, in other cases individual assurances can provide a legal avenue to formally commit the receiving state not to expose the specific individual to treatment by act or omission falling under Article 3 ECHR.[97]
34. In the case of *M.S.S. v Belgium and Greece*, where the Belgian Government had sought assurances from the Greek authorities that, Belgium argued, were sufficient to support a presumption that Greece fulfilled its international obligations in asylum matters, the Court observed that "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection

[93] For instance, the Chamber underlined in its judgment that the European Court of Human Rights did not exclude the possibility that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 because of the impact of such denial on the private life of the individual: see, European Court of Human Rights, *Kurić and others v. Slovenia*, no. 26828/06 (13 July 2010) para. 353.
[94] *Trabelsi v Belgium*, no. 140/10 (7 October 2014); *Othman (Abu Qatada) v. UK,* no. 8139/09 (17 January 2012); *Ryabikin v. Italy.* No. 8320/04 (19 June 2008), *Ismoilov and Others v. Russia,* no. 2947/06 (24 April 2008); *Saadi v. Italy* no. 37201/06 (28 February 2008)
[95] *Othman (Abu Qatada) v. UK,* no. 8139/09 (17 January 2012), para 189.
[96] *Saadi v. Italy,* op cit, para 148; *Ismoilov and Others v. Russia,* no. 2947/06 (24 April 2008), para 127. *Ryabikin v. Italy,* no. 8320/04 (19 June 2008), para 119.
[97] *Tarakhel v Switzerland,* no. 29217/12 (4 November 2014) para 120.

against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."[98] This applies *a fortiori* when the Contracting Party has adopted legislation making it difficult or impossible to enforce Convention rights.

35. In particular, in *M.S.S. v Belgium and Greece,* the assurances were effectively rebutted by detailed information from credible sources, including reports by reputable human rights organisations.[99] The Court found this rebuttal important due to the applicant being "particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously" and referred specifically to the fact that there was "no guarantee concerning the applicant in person."[100] This Court has thus made expressly clear that assurances can only be sufficient if sought based on the needs of the specific individual. The interveners consider that reserving the request of assurances to particular groups goes against the letter and spirit of this Court's case law, which is centred around the requirement of individualised assessment of the risk of *refoulement* as well as corresponding individual assurances, where appropriate.
36. In *Tarakhel v Switzerland*, this Court held that although the situation in the receiving country was not comparable to the one in *M.S.S.*, the possibility that removed asylum seekers would be left under inadequate reception conditions was not unfounded. It was, therefore, incumbent on the sending state to obtain assurances as to the conditions faced by the applicants upon return. Further, it was the increased vulnerability of a family that gave rise to the need for 'specific' assurances regarding the reception of the applicants in facilities and conditions tailored to their needs.[101]
37. In this context, the CCPR held that the sending country failed to seek effective assurances where it did not require the receiving country to provide an assurance that would have guaranteed that "it undertake[s]: (a) to renew the author's residence permit as part of subsidiary protection and to issue a permit to her child; and (b) to receive the author and her son in conditions adapted to the child's age and the family's vulnerable status that would enable them to remain in [the country]."[102]
38. Further, the UN Committee against Torture has warned that "diplomatic assurances … should not be used as a loophole to undermine the principle of *non-refoulement."*[103]
39. Lastly, the Court will recall that the case of *K.R.S v United Kingdom* (2009), concerning returns to Greece, was declared inadmissible. In *K.R.S.,* the Court had sought informal clarification from the UK who in turn sought information from the Greek authorities. The Court's decision refers to a concatenation of letters from the Greek authorities that did not specifically address relevant matters "even though they were requested to do so."[104] The UK submitted a further letter from Greece, asserting that asylum applicants' rights generally would be respected. As has been well documented since these assurances were at best unduly optimistic and at worst disingenuous.
40. **The interveners submit that in situations where reliance on diplomatic assurances is appropriate, those must not only be tested against detailed and reliable information but also examined in the light of the context in which they are given. For such assurances to be reliable they must be individualised, precise and cover the needs of the particular person. The interveners consider that in countries where conditions rapidly change, where numbers of people in need of protection are higher than the capacity of the asylum or integration systems may handle, and where inadequate reception conditions and deficiencies in the asylum or integration systems prevail, general assurances cannot be relied upon. An assurance given by a State, where shortcomings and previous violations of Convention rights have been recognised and documented in the asylum or integration system, will presumptively struggle to satisfy the requirements of specificity or practicality.**

---

[98] *mutatis mutandis*, *Saadi v. Italy* [GC], op cit., para 147. in *M.S.S. v Belgium and Greece,* op cit., para 353.
[99] *M.S.S. v Belgium and Greece,* op cit., para 160.
[100] *M.S.S. v Belgium and Greece,* op cit., paras 232 and 354.
[101] *Tarakhel v Italy*, op cit., paras 120-121.
[102] UN Human Rights Committee, *Bayush Alemseged Araya v Denmark* (2018), para 9.8.
[103]UN CAT General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para 20.
[104] *K.R.S. v the United Kingdom*, no. 32733/08 (2 December 2008) page 17.