EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 54000/11
A.T.H.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 17 November 2015 as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 26 August 2011,

Having regard to the interim measure indicated in the present application to the Netherlands Government under Rule 39 of the Rules of Court, and the fact that this interim measure has been complied with,

Having regard to the factual information submitted by the Government of Italy and the Government of the Netherlands, and the applicant's written comments in reply,

Having regard to the decision of 24 March 2015 to lift the interim measure under Rule 39 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms A.T.H., was born in 1979 in Ethiopia and is currently living in the Netherlands. She was represented before the Court by Ms S. den Boer, a lawyer practising in Eindhoven.

2. The Netherlands Government were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs. The Italian Government, who had been invited to intervene under Rule 44 § 3 of the Rules of Court, were represented by their Agent, Ms E. Spatafora, and their co-Agent, Ms P. Accardo.

A. The circumstances of the case

3. The following summary of the facts of the case is based on the submissions of the applicant and on the replies received from the Governments of the Netherlands and Italy to factual questions put to them under Rule 49 § 3 (a) of the Rules of Court.

4. The applicant claims to be a national of Eritrea because both her parents were nationals of that country. She had lived in Ethiopia all her life when she left that country in 1999, out of fear of deportation to Eritrea, where she would have to undertake military service. Subsequently, having stayed for some time in Sudan and Libya, the applicant arrived in Italy on 2 October 2007, where she applied for asylum under another identity. She was granted a residence permit in Italy which was valid for one year until 26 November 2008 and was later extended for another three years until 7 April 2012. However, she left Italy for the Netherlands in 2009 because, having been granted a residence permit, she purportedly received no other support. She was not provided with (money for) food or medical assistance, and was forced to live on the street. Allegedly, she applied to State authorities and human rights organisations for help on a number of occasions, but without success.

5. At the time of her entry to the Netherlands in 2009, the applicant was pregnant. She was subsequently diagnosed as being HIV-positive.

6. The applicant applied for asylum in the Netherlands on 2 October 2009.

7. On 11 February 2010 the applicant gave birth to a daughter in the Netherlands.

8. On 14 April 2010 the Minister of Justice (*Minister van Justitie*) rejected the applicant's request, finding Italy responsible for the determination of her asylum application, pursuant to Council Regulation (EC) no. 343/2003 of 18 February 2003 ("the Dublin Regulation"). The Minister dismissed the applicant's claim that, given her appalling living conditions in Italy between 2007 and 2009, she would risk treatment contrary to Article 3 if returned to Italy, considering that that claim remained wholly unsubstantiated. The general reports relied on by the applicant, which contained negative accounts of the situation of asylum-seekers in Italy, were not considered specific facts and circumstances relating to her individual case such as to form a basis for assuming that Italy would not comply with its obligations flowing from the Convention. Lastly,

the applicant's contention that her medical situation did not allow her transfer to Italy was rejected by the Minister, who considered that the applicant was not receiving any specialist medical treatment in the Netherlands and that, moreover, it had not been alleged or demonstrated that adequate medical treatment would not be made available to her in Italy.

9. An appeal by the applicant against the Minister's decision was rejected by the Regional Court (*rechtbank*) of The Hague sitting in Maastricht on 7 July 2010. It upheld the Minister's decision and reasoning.

10. A further appeal, together with a request for a provisional measure (*voorlopige voorziening*) staying her removal, was lodged by the applicant with the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*) of the Council of State. On 23 September 2010 the President of the Division granted the request for a provisional measure, deferring the applicant's transfer to Italy pending the outcome of the further appeal proceedings.

11. On 14 July 2011 the Division allowed the further appeal. It quashed the judgment of 7 July 2010, as well as the Minister's decision, as it found that he had failed to have due regard to the general reports submitted by the applicant concerning the situation of asylum-seekers in Italy, which might be relevant to the applicant's individual case. As to the merits of the case, the Division found that the reports submitted by the applicant were insufficient to assume that her transfer to Italy would result in a violation of Article 3 due to the general living conditions of asylum-seekers in that country. Furthermore, as the applicant had been granted a residence permit in Italy earlier, she was not at risk of expulsion to her country of origin. The Division ordered that the legal consequences of the refusal of the applicant's asylum request should be maintained.

12. No further appeal lay against that decision. On an unspecified date the applicant was informed that she and her child would be placed in an aliens' detention centre (*vreemdelingenbewaring*) for removal purposes.

B. Events after the lodging of the application

13. The application was lodged with the Court on 26 August 2011, and on the same day the applicant asked the Court to issue an interim measure within the meaning of Rule 39 of the Rules of Court.

14. On 31 August 2011, in reply to questions put to them under Rule 49 § 3 (a), the Netherlands Government informed the Court of practical aspects of the applicant's scheduled transfer to Italy. A copy of that reply was sent to the applicant for information.

15. On 31 August 2011 the President of the Section decided, under Rule 39, to indicate to the Netherlands Government that it was desirable, in the interests of the parties and of the proper conduct of the proceedings

before the Court, not to expel the applicant to Italy for the duration of the proceedings before the Court.

16. On 18 January 2012 the President of the Section decided that the Government of Italy should be invited, under Rule 44 § 3, to answer factual questions about the applicant's situation in Italy when she had lived there previously and about the general accommodation, subsistence and medical care offered to asylum-seekers in Italy.

17. The Government of Italy submitted their answers on 12 March 2012. The applicant's comments in reply were received on 25 April 2012. Additional information was received from the Government of Italy on 15 October 2013. A copy was sent to the Netherlands Government and the applicant for information.

18. On 3 December 2014 additional factual questions were put to the Netherlands Government about the practical effects given to the Court's judgment of 4 November 2014 in the case of *Tarakhel v. Switzerland* ([GC], no. 29217/12, ECHR 2014 (extracts)).

19. In their reply of 7 January 2015, the Netherlands Government indicated that – following the *Tarakhel* judgment and where a case concerned the transfer of a family with minor children to Italy – the Netherlands authorities would only transfer such a family after guarantees had been obtained from the Italian authorities that the family would remain together, and where information was available about the specific facility where the family was to be accommodated, in order to guarantee that the conditions there were age-appropriate in respect of the children. For this reason, the actual transfer to Italy would be announced ten to fifteen days beforehand, in order to give the Italian authorities the opportunity to provide information on the specific facility where the family was to be accommodated, to guarantee that the conditions in this facility were suitable, and to guarantee that the family would not be split up. If these guarantees were not received within the time-limit for transfers, as laid down in the Dublin Regulation, the persons involved would be channelled into the Netherlands asylum procedure. However, as long as a Rule 39 indication was in place, the Government were not in a position to commence the preparations for the applicant's transfer to Italy.

20. The applicant's comments in reply were submitted on 27 February 2015. Having noted those submissions, the Chamber decided to lift the Rule 39 indication on 24 March 2015.

21. By letter of 5 August 2015 the Netherlands Government submitted a copy of a circular letter dated 8 June 2015 and sent by the Dublin Unit of the Italian Ministry of the Interior (*Ministero dell Interno*) to the Dublin Units of the other member States of the European Union, in which the Italian Dublin Unit set out the new policy of the Italian authorities on transfers to Italy of families with small children. The relevant part of the Netherlands Government's letter reads:

> "A new policy was considered necessary in view of the fact that reception facilities, specifically reserved for such families, frequently remained unavailed of as a result of families having left for an unknown destination prior to transfer, or having obtained a court order barring their transfer. In order to safeguard appropriate facilities where families may stay together, the Italian authorities earmarked a total of 161 places, distributed over twenty-nine projects under the System for Protection of Asylum Seekers and Refugees (SPRAR). The authorities confirmed that this number will be extended should the need arise. As may be inferred from the letter of 8 June, this comprehensive guarantee is intended to avoid the need for guarantees in specific cases.
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> The Dutch Dublin-Unit will continue to inform its Italian counterpart at an early stage of an intended transfer of a family with minor children. On 13 July 2015, the Dutch, German and Swiss migration liaison officers to Italy issued a report on SPRAR in general, including on the requirements the accommodations must fulfil, and on two projects they had visited on the invitation of the Italian Government. It is understood that later this year also the European Asylum Support Office (EASO) will report on the matter.
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> The Government is of the opinion that the new Italian policy will adequately safeguard that families with minor children are kept together in accommodations appropriate to their needs."

22. On 31 August 2015 the Netherlands Government informed the Court that the applicant's transfer to Italy under the Dublin Regulation had been scheduled for 7 September 2015, that the Italian authorities had been informed that the transfer concerned a single mother with a minor child, and that, with the applicant's permission, due reference had been made to her medical condition and the treatment required. They also submitted a copy of a letter of 4 May 2015 from the Head of Office of the Italian Ministry of the Interior, Department for Civil Liberties and Immigration, received by the Dublin Unit of the Netherlands Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) via e-mail as a document titled "*Tarakhel Garanzie* – [the applicant's name]". The letter stated, *inter alia*, "We assure you that, after the transfer to Italy, this family group will be accommodated in a manner adapted to the age of the children and the family members will be kept together". The letter enclosed a note from the Ministry of the Interior, detailing a reception project regarding the transfer of the applicant and her child.

23. The Netherlands Government further submitted a copy of the standard form – prescribed under Article 31 of Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 – by which the Italian authorities had been notified on 19 August 2015 of the applicant's transfer to Italy, scheduled for 7 September 2015. It was indicated in that form that the applicant had health problems and that a medical report was attached to the form. The Netherlands official completing the form also noted:

> "Since this transfer concerns a mother with a minor child, I assume this family will be accommodated in one of the centres included in the list of SPRAR-projects as mentioned in the annex to your letter dated 8 June 2015."

24. The applicant's comments on the Government's submissions of 5 and 31 August 2015 were submitted on 2 September 2015. On the same day she asked the Court to issue a fresh indication under Rule 39 of the Rules of Court, submitting that the information provided by the Netherlands Government contained only general guarantees, which were insufficient to ensure that she and her child would be provided with suitable accommodation and adequate medical care in Italy, emphasising her special needs as a HIV-positive person. The applicant further contended that the 161 places in SPRAR projects which were earmarked for families with minor children were far from sufficient, taking into account the high number of migrants having arrived in Italy in 2015. The applicant argued that, without individual and specific guarantees, she ran a considerable risk of ending up living on the streets, without the special care she and her child needed.

25. Having noted the parties' submissions, on 3 September 2015 the President of the Section decided to reject the applicant's fresh Rule 39 request.

26. No further information about the current whereabouts of the applicant and her child has been submitted.

C. Relevant law and practice

27. The relevant European, Italian and Netherlands law, instruments, principles and practice in respect of asylum proceedings, reception of asylum-seekers and transfers of asylum-seekers under the Dublin Regulation have recently been summarised in *Tarakhel v. Switzerland* (cited above, §§ 28-48); *Hussein Diirshi v. the Netherlands and Italy and 3 other applications* ((dec.), nos. 2314/10, 18324/10, 47851/10 & 51377/10, §§ 98-117, 10 September 2013); *Halimi v. Austria and Italy* ((dec.), no. 53852/11, §§ 21-25 and §§ 29-36, 18 June 2013); *Abubeker v. Austria and Italy* (dec.), no. 73874/11, §§ 31-34 and §§ 37-41, 18 June 2013); *Daybetgova and Magomedova v. Austria* ((dec.), no. 6198/12, §§ 25-29 and 32-39, 4 June 2013); and *Mohammed Hussein v. the Netherlands and Italy* ((dec.), no. 27725/10, §§ 25-28 and 33-50, 2 April 2013).

28. The Joint United Nations Programme on HIV and AIDS (UNAIDS) estimated that in 2013 a total of 120,000 (between 110,000 and 140,000) persons aged 15 or more with HIV or AIDS were living in Italy, of whom 13,000 (between 11,000 and 15,000) were women. According to a comparative study carried out by the HUMA Network (Health for Undocumented Migrants and Asylum Seekers) – covering 16 European Union member States and published in November 2010 – on the question of

whether undocumented migrants and asylum-seekers are entitled to access health care in the European Union, asylum-seekers in Italy are entitled to access health care on equal grounds as Italian nationals with regard to coverage and conditions. The same applies for unaccompanied children.

29. An information brochure on access to the Italian National Health Service by non-EU nationals, published (in English, among other languages) by the National Institute for Health, Migration and Poverty (*Istituto Nazionale Salute, Migrazione e Povertà*) of the Italian Ministry of Health, and provided to asylum-seekers and undocumented migrants, states that asylum-seekers have a statutory right to registration in the National Health Service (SSN) system and to be provided with an SSN health insurance card. It further reads:

> "Asylum or international protection seekers are exempted from the co-pay fee following the statement of indigence. This principle is valid up to six months following the submittal of the asylum application. As of the seventh month, asylum seekers are entitled to work. In order to notify their status of unemployment, they need to register with the Employment Office and obtain the exemption card for low-income reasons."

COMPLAINT

30. The applicant complained under Articles 2 and 3 that her transfer to Italy under the terms of the Dublin Regulation would expose her to a real risk of death and very poor living conditions in Italy.

THE LAW

31. The applicant complained that her transfer to Italy would violate her rights under Articles 2 and 3 of the Convention. Article 2 of the Convention provides:

> " 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
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> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
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> (a) in defence of any person from unlawful violence;
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> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
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> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

32. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

33. The Court finds that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3, and will proceed on this basis (see *J.H. v. the United Kingdom*, no. 48839/09, § 37, 20 December 2011).

34. The Court reiterates the relevant principles under Article 3 of the Convention, as set out recently in its judgment in the case of *Tarakhel* (cited above, §§ 93-99 and 101-104), including that, to fall within the scope of Article 3, 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. In determining whether it has been shown that the applicant runs a real risk of suffering treatment proscribed by Article 3 if transferred to Italy, the Court will examine the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* (see *Saadi v. Italy* [GC], no. 37201/06, § 128, ECHR 2008).

35. In the present case, the applicant was diagnosed as HIV-positive after her arrival in the Netherlands. As the material date for making the assessment under Article 3 is the actual date of expulsion (see *Saadi*, cited above, § 133, and *A.L. v. Austria*, no. 7788/11, § 58, 10 May 2012), the applicant's health condition is a relevant factor to be taken into account by the Court, together with the fact that she is the mother of a five-year-old child.

36. The applicant is to be regarded as an asylum-seeker in Italy as, even though she was admitted to Italy in the past as an alien requiring subsidiary protection, the validity of her Italian residence permit has expired in the meantime. Consequently, she will have to file an asylum request in Italy. It therefore has to be determined whether the situation in which the applicant is likely to find herself in that capacity can be regarded as incompatible with Article 3, taking into account her medical condition and her situation as a single mother with a minor daughter, as such belonging to a particularly underprivileged and vulnerable population group in need of special protection (see *Tarakhel*, cited above, § 97, and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 251, ECHR 2011).

37. The Court reiterates that the current situation in Italy for asylum-seekers can in no way be compared to the situation in Greece at the time of the *M.S.S. v. Belgium and Greece* judgment (cited above), and that the structure and overall situation of the reception arrangements in Italy cannot, in themselves, act as a bar to all removals of asylum-seekers to that country (see *Tarakhel*, cited above, §§ 114-115).

38. The Court notes that the Italian Government have been duly informed by the Netherlands authorities that the applicant is an HIV-positive single mother with a minor child, and about their scheduled transfer to Italy. The Court understands from the circular letter dated 8 June 2015 (see paragraph 21 above) and from the letter of 4 May 2015 from the Head of Office of the Italian Ministry of the Interior, Department for Civil Liberties and Immigration (see paragraph 22 above) that the applicant and her child will be assigned one of the 161 places in reception facilities in Italy which have been reserved for families with minor children.

39. The Court has noted the applicant's concern that the 161 places earmarked so far will be insufficient, but, in the absence of any specific indication in the case file, it does not find it established that none of these places will be available to the applicant when she arrives in Italy with her child.

40. As to the applicant's health condition, the Court notes that the applicant does not contend that the necessary treatment for her condition is unavailable in Italy. Her fear is rather that she will not be provided with the necessary care and medication in a timely manner after her transfer to Italy. However, the Court notes that the applicant's submissions do not include any detailed information about her current state of health or the treatment she currently receives, or about whether her transfer to Italy will have consequences for her health, and, if so, the nature and scope of those consequences (compare with *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008, 27 May 2008; *Arcila Henao v. the Netherlands* (dec.), no. 13669/03, 24 June 2003; and *Ndangoya v. Sweden* (dec.), no. 17868/03, 22 June 2004). As the Italian authorities have duly been informed by the Netherlands authorities about the applicant's individual circumstances (see paragraph 37 above), and noting that the applicant has a statutory right in Italy to be registered in the Italian national health system, the Court does not find it established that she will have no access to the treatment which she requires.

41. The Court further finds that the applicant has not demonstrated that her future prospects, if returned to Italy with her child, whether considered from a material, physical or psychological perspective, disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3. The Court has found no basis on which it can be assumed that the applicant will not be able to have access to the available resources in Italy for an asylum-seeking single mother with a minor child, or that, in the event of health-related or other difficulties, the Italian authorities would not respond in an appropriate manner. In any event, it will remain possible for the applicant to lodge a fresh application with the Court (including a request for an interim measure under Rule 39 of the Rules of Court) should that need arise.

42. It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 10 December 2015.

Stephen Phillips
Registrar

Luis López Guerra
President