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

THIRD SECTION

DECISION

Application no. 5868/13
S.M.H.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 17 May 2016 as a Committee composed of:

Helen Keller, *President,*
Johannes Silvis,
Alena Poláčková, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 17 January 2013,

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 respondent Government and the Government of Italy, and the applicant's written comments in reply,

Having regard to the observations and additional documents submitted by the respondent Government, and the applicant's written comments in reply,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms S.M.H., states that she is a Somali national who was born in 1981. She is currently living in the Netherlands. The President decided that the applicant's identity was not to be disclosed to the public (Rule 47 § 4). She was represented before the Court by Ms J. Jansen, a lawyer practising in Kapelle.

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 facts of the case, as submitted by the parties and the Italian Government, may be summarised as follows.

4. On 1 April 2003, the applicant entered Italy, landing in Lampedusa. On 15 April 2003, she applied for asylum in Italy, stating that she had been born in 1983. She was registered accordingly by the Italian authorities. After her fingerprints had been taken and verified, it transpired that she had already been registered in Italy under another identity in October 2000 at the Milan Malpensa border.

5. The applicant applied for asylum on 15 April 2003 and was admitted to a reception centre in Capo Rizzuto. She was later transferred to another reception facility in Cirò Marina and also provided with a temporary residence permit for asylum-seekers. On 14 February 2004, the reception facility in Cirò Marina informed the authorities that the applicant had left the centre for an unknown destination.

6. By a decision of 20 January 2005, having noted that the applicant had left for an unknown destination, the competent territorial commission for the recognition of international protection (*Commissione Territoriale per il Riconoscimento della Protezione Internationale*) dismissed the applicant's request for international protection.

7. On an unspecified date, the applicant was transferred back to Italy, in accordance with EU Council Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national ("the Dublin Regulation"). On 13 September 2005, she was notified of the decision of 20 January 2005 and ordered to leave Italy within 15 days. However, the applicant did not leave and found shelter in accommodation run by a non-governmental organisation.

8. On 25 October 2005, the special bench of the National Commission for Asylum (*Commissione Nazionale per il diritto d'Asilo, Sezione Speciale Stralcio*) heard the applicant and held that she did not qualify for the status of a refugee within the meaning of the 1951 Geneva Refugee Convention, but granted her a residence permit for compelling humanitarian reasons under Article 5 § 6 of Legislative Decree (*decreto legge*) no. 286/1998. On the basis of that decision, the applicant was provided with a residence permit that was valid until October 2006.

9. On 22 December 2006, having moved to Naples, the applicant applied to the Naples police headquarters for a renewal of the residence permit.

After that request had been accepted by the National Commission, which found that she was still entitled to international protection, the applicant received a residence permit which was valid until 22 December 2007. On 12 February 2008, at the applicant's request, the basis for her residence permit was converted into a residence permit for employment purposes, which was valid until 27 December 2009.

10. On 19 November 2009, the applicant entered the Netherlands and applied for asylum. In her interviews with the Netherlands immigration authorities, she stated, *inter alia*, that she was a Somali national, born in 1981. She further stated that she was pregnant, but that the father had left her after she had become pregnant. She also declared that she had lived in Italy before going to the Netherlands and that she had a sister who was living in the Netherlands.

11. An examination and comparison of the applicant's fingerprints by the Netherlands authorities generated a Eurodac report, indicating that she had applied for asylum in Italy on 15 April 2003.

12. On 27 March 2010 the applicant gave birth to a daughter in the Netherlands.

13. On 7 May 2010 the Italian authorities accepted a request by the Netherlands authorities to take the applicant back, in accordance with the Dublin Regulation.

14. On 7 June 2010, the Netherlands Minister of Justice (*Minister van Justitie*) rejected the applicant's asylum request. The Minister found that, pursuant to the Dublin Regulation, Italy was responsible for the processing of the asylum application and that this was not altered by the fact that she had a baby. The Minister rejected the applicant's argument that she would risk treatment in breach of Article 3 of the Convention in Italy.

15. An appeal by the applicant against that decision was dismissed on 22 October 2010 by the single-judge chamber (*enkelvoudige kamer*) of the Regional Court (*rechtbank*) of The Hague. The applicant did not avail herself of the possibility of lodging a further appeal with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State.

16. On 31 January 2011, with reference to the acceptance of 7 May 2010, the Netherlands authorities informed their Italian counterparts that the transfer of the applicant and her child had been scheduled for 3 February 2011. It was specified that they would not be accompanied, that the applicant was pregnant, with delivery expected on 6 May 2011, but that that did not prevent a transfer.

17. On 2 February 2011, the applicant filed a fresh asylum request in the Netherlands. Pursuant to section 4(6) of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), the application had to be based on newly emerged facts or altered circumstances (*nieuw gebleken feiten of veranderde omstandigheden*; "nova") warranting a revision of the initial

decision. During her interview on the new request, the applicant stated, *inter alia*, that her sister had been granted international protection in the Netherlands, that the father of her daughter was living in Norway, that she had seen him in July 2010 when he had visited a relative in the Netherlands and that she was now carrying a second child by him. On the basis of the fresh asylum request, the scheduled transfer to Italy was cancelled.

18. On 8 February 2011, the Minister for Immigration, Integration and Asylum Policy (*Minister voor Immigratie, Integratie en Asiel*) rejected the fresh asylum request, concluding that it had not been based on nova. The Minister rejected the applicant's claim that she should be admitted to the Netherlands asylum procedure because she was pregnant and that the principle of mutual inter-State trust could no longer be regarded as applicable in respect of Italy.

19. On 7 May 2011, the applicant gave birth to a second child in the Netherlands.

20. An appeal by the applicant against the Minister's decision of 8 February 2011 was accepted in December 2011 by the single-judge chamber of the Regional Court of The Hague. The court quashed the impugned decision and ordered the Minister to take a fresh decision. It took into account several reports on the situation for asylum-seekers in Italy, drawn up between January and May 2001 by various non-governmental organisations, a report by Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, drawn up in September 2011 after a formal visit to Italy in May 2011, and the indication of several interim measures by the Court under Rule 39 of the Rules of Court. It considered that the applicant had submitted sufficient concrete indications that Italy was failing to respect its international treaty obligations in respect of asylum-seekers and refugees. It therefore concluded that the Minister could not have relied on the principle of mutual inter-State trust without carrying out a further examination.

21. On 20 May 2012, the applicant gave birth to a third child in the Netherlands.

22. An appeal by the Minister against the judgment in the applicant's favour was accepted on 13 November 2012 by the Administrative Jurisdiction Division. It quashed the parts of the judgment of 21 December 2011 where the court had not indicated that the legal effects of the decision of 8 February 2011 were to remain intact and where it had ordered the Minister to take a fresh decision. It further ordered that the legal effects of the decision of 8 February 2011 were to remain intact and upheld the rest of the impugned judgment. Although it accepted that the applicant, being a pregnant, single mother, could be regarded as a vulnerable alien, it agreed with the Minister that the applicant's transfer to Italy would not be contrary to her rights under Article 3 of the Convention. It took note of the Court's judgment in the case of *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09,

ECHR 2011), observed that the applicant had relied from the outset on the Hammarberg report and other documents and found that they had not been examined by the Minister in the manner described in *M.S.S. v. Belgium and Greece*. However, it did not find any reason for reaching a different decision in the applicant's case, noting in particular that prior to every transfer the Italian authorities were notified by the Netherlands authorities about the personal situation and, where necessary, the special care needs of the person concerned. No further appeal lay against that decision.

23. On 21 December 2012, with reference to the Italian authorities' acceptance in 2010 to take the applicant back, the Netherlands authorities informed their Italian counterparts that the transfer of the applicant and her three children had been scheduled for 10 January 2013. It was specified that they would not be escorted. That transfer was subsequently cancelled.

24. On 7 January 2013 the applicant filed a request under section 64 of the Aliens Act 2000 (*Vreemdelingenwet 2000*) for deferral of her removal for medical reasons. She pointed out that she was pregnant and due to give birth in April 2013 and submitted that she was therefore unfit to travel. The Minister rejected her request on 15 January 2013 after referring to Chapter A4/7.6 of the Aliens Act 2000 Implementation Guidelines (*Vreemdelingencirculaire 2000*), pursuant to which expulsion of pregnant women by air cannot take place in the six weeks leading up to the due date or the first six weeks after giving birth.

25. On 21 January 2013, submitting that she was a single mother of three children and pregnant with a fourth child, the applicant filed an objection with the Minister of Security and Justice (*Minister van Veiligheid en Justitie*) against their scheduled transfer to Italy. On the same day, she filed a request for a provisional measure with the Regional Court of The Hague for a stay of her transfer to Italy, pending determination of her objection.

26. On 28 January 2013, the Netherlands authorities informed their Italian counterparts that the transfer of the applicant and her three young children had been scheduled for 7 February 2013. Apart from detailed flight information, the letter further specified in bold characters that the applicant was pregnant, that the due date was 21 April 2013, that she would be examined by a doctor before the transfer and that she and her three children would be escorted.

27. On 4 February 2013, the provisional-measures judge of the Regional Court of The Hague dismissed the applicant's application for a provisional measure, noting that the Italian authorities had been duly notified of the transfer of the applicant and her children and their particular circumstances, and that they would be accompanied by four escorts who would personally hand them over to the Italian authorities. The judge did not find that the transfer would entail a violation of Article 3 or Article 8 of the Convention.

28. After that decision, an additional notification of transfer was sent to the Italian authorities on 5 February 2013, informing them that the transfer had been scheduled for 7 February 2013. The notification contained a further specification, set out in bold, stating that the applicant would "be transferred with her three minor children, age below 3 years. They are considered as vulnerable persons." The transfer was later cancelled, pursuant to an indication given under Rule 39 of the Rules of Court (see paragraph 29 below).

B. Events after the lodging of the application

29. The application was lodged with the Court on 17 January 2013. On 6 February 2013, the Acting 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 the proper conduct of the proceedings before the Court not to remove the applicant to Italy until further notice. The Acting President further decided under Rule 54 § 2 (b) to give notice of the application to the Netherlands Government. The Acting President also decided to put a factual question to the Netherlands Government (Rule 54 § 2 (a)), which concerned the information provided to the Italian authorities in relation to the applicant's scheduled transfer to Italy. The Netherlands Government submitted their reply on 26 February 2013.

30. On 6 February 2013, the Acting President of the Section further decided that information was required from the Italian Government and a number of factual questions were put to the Government of Italy (Rule 44 § 3 (a)), which concerned the applicant's situation in Italy before her arrival in the Netherlands. The Italian Government submitted their replies on 26 and 28 March 2013 and the applicant's comments in reply were submitted on 6 May 2013.

31. On 13 January 2013, the respondent Government were invited to submit their written observations on the admissibility and merits of the application. These were received by the Court on 24 February 2015. The applicant was invited to submit her observations in reply and claims for just satisfaction under Article 41 of the Convention by 10 April 2015.

32. On 10 April 2015, the applicant's representative requested an extension of this time-limit until 17 April 2015. This request was granted by the President. When the time-limit expired, no observations in reply or just satisfaction claims had been submitted by the applicant. By letter of 30 April 2015, the Court brought this failure to the knowledge of the applicant's representative, drawing her attention to Article 37 § 1 (a) of the Convention.

33. On 15 June 2015, the applicant's representative requested two more weeks for submitting the applicant's observations in reply to those of the respondent Government. Having noted that the time-limit fixed for that

purpose had expired on 20 April 2015 and that no further extension had been sought before or on this date, the President rejected the request on 17 June 2015.

34. By letter of 5 August 2015 the respondent 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 which accompanied the circular reads:

> "A new policy was considered necessary in view of the fact that reception facilities specifically reserved for such families frequently remained unused 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.
>
> 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 the requirements the accommodation must fulfil, and on two projects they had visited at the invitation of the Italian Government. It is understood that later this year the European Asylum Support Office (EASO) will also report on the matter.
>
> The Government is of the opinion that the new Italian policy will provide adequate safeguards that families with minor children are kept together in accommodation appropriate to their needs."

35. On 26 January 2016, the applicant filed written comments on the respondent Government's submissions of 5 August 2015.

36. On 22 February 2016, the respondent Government submitted a copy of a fresh circular letter dated 15 February 2016 and sent by the Dublin Unit of the Italian Ministry of the Interior to the Dublin Units of the other member States of the European Union, in which the Italian Dublin Unit provided an updated list of "the SPRAR projects where asylum-seeker family groups with children will be accommodated, in full respect of their fundamental rights and specific vulnerabilities".

C. Relevant law and practice

37. 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* ([GC], no. 29217/12, §§ 28-48, ECHR 2014 (extracts)); *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).

COMPLAINT

38. The applicant complained that the removal to Italy of herself and her children without any guarantees from the Italian Government that she would be able to apply for asylum, or that she and her children would be provided with reception facilities and medical care in Italy pending the determination of her asylum request, would be contrary to Article 3 of the Convention.

THE LAW

39. The applicant complained that if she and her children were transferred to Italy they would be exposed to a risk of treatment proscribed by Article 3 of the Convention owing to the difficult living conditions of asylum-seekers in Italy. Article 3 of the Convention reads:

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

A. The parties' submissions

40. The respondent Government referred to the new Italian policy, as set out in its letters of 5 August 2015 and 22 February 2016, and the Court's findings in *J.A. and Others v. the Netherlands* ((dec.), no. 21459/14, 3 November 2015), and *A.T.H. v. the Netherlands* ((dec.), no. 54000/11, 17 November 2015), and submitted that there were no substantial grounds for believing that the applicant and her children would be subjected to treatment contrary to Article 3 if transferred to Italy.

41. The applicant argued that the policy set out in the circular letter sent by the Italian authorities on 5 June 2015 was not sufficient in that it was

likely that the number of reserved places indicated by the Italian Government would be far from enough.

B. The Court's assessment

42. The Court reiterates the relevant principles of Article 3 of the Convention, as set out most recently in *Tarakhel* (cited above, §§ 93-99), which include the need for the ill‑treatment to attain a minimum level of severity to fall within the scope of Article 3. 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.

43. The Court considers that the applicant's situation as a single mother of minor children, who were all born during her stay in the Netherlands, is one of the relevant factors in making this assessment. The material date for making this assessment is the actual date of expulsion. However, if an applicant has not yet been removed when the Court examines the case, the relevant time for assessing the existence of the risk of treatment contrary to Article 3 will be that of the proceedings before the Court (see *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports of Judgments and Decisions* 1996-V; *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008; *M.A. v. Switzerland*, no. 52589/13, § 54, 18 November 2014; and *Khamrakulov v. Russia*, no. 68894/13, § 64, 16 April 2015).

44. The applicant is to be considered as an asylum-seeker in Italy because even though she has been admitted to Italy in the past as an alien requiring subsidiary protection, the validity of her Italian residence permit has expired. Consequently, she would have to file a fresh asylum request in Italy if she was returned there.

45. It thus has to be determined whether the situation in which the applicant is likely to find herself in Italy can be regarded as incompatible with Article 3, taking into account her situation as an asylum-seeking single mother with young children and, 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).

46. The Court reiterates that the current situation in Italy for asylum-seekers cannot 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).

47. As to the applicant's personal situation, the Court has noted that she landed on the coast of Lampedusa in April 2003, where she applied for asylum and where she was admitted to a reception centre for asylum-seekers

which she left in February 2004 for an unknown destination. Being unaware of her whereabouts, the Italian authorities eventually rejected her asylum request in January 2005. However, in October 2005, after she had been returned to Italy under the terms of the Dublin Regulation and had apparently filed a fresh asylum request, the Italian authorities granted her a residence permit based on compelling humanitarian reasons. That permit was later converted at her request to a residence permit for employment purposes. She then moved to the Netherlands, where she unsuccessfully applied for asylum and where her children were born.

48. Similar to the applicants in *Tarakhel* (cited above), who were a family with six minor children, the applicant is a single mother with at least three young children. However, unlike the situation in *Tarakhel*, the Netherlands authorities – as regards transfers to Italy under the Dublin Regulation – decide in consultation with the Italian authorities how and when the transfer of an asylum-seeker to the competent Italian authorities will take place. In particular, where it concerns a family with children, prior notice of transfer is given to the Italian authorities, thus allowing the latter to identify where adequate accommodation is available.

49. The Court accepts that for efficiency reasons the Italian authorities cannot be expected to keep open and unoccupied for an extended period of time places in specific reception and accommodation centres reserved for asylum-seekers awaiting transfer to Italy in accordance with the Dublin Regulation and that, for this reason, once a guarantee of placement in a reception centre has been received by the State requesting transfer, transfer should take place as fast as practically possible.

50. In this context, the Court has noted that on 5 February 2013 the Italian Government were duly informed by the Netherlands authorities about the applicant's family situation and the scheduled arrival of the applicant and her children. The Court further understands from the two circular letters sent by the Italian Dublin Unit (see paragraphs 34 and 36 above), that the applicant and her children will be placed in one of the reception facilities in Italy which have been earmarked for families with minor children.

51. The Court has noted the applicant's concern that the number of places earmarked will be insufficient but, in the absence of any concrete indication in the case file, does not find it demonstrated that the applicant and her children will be unable to obtain such a place when they arrive in Italy. Furthermore, bearing in mind how the applicant was treated by the Italian authorities after her arrival in Italy in 2003, the Court considers that the applicant has not demonstrated that her future prospects, if returned to Italy with her children, whether looked at from a material, physical or psychological perspective, disclose a sufficiently real and imminent risk of hardship that is severe enough to fall within the scope of Article 3.

52. 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.

53. Consequently, the application of Rule 39 of the Rules of Court comes to an end.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 June 2016.

Stephen Phillips
Registrar

Helen Keller
President