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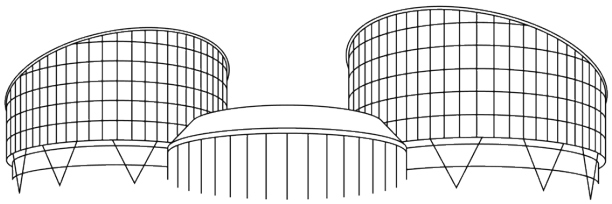

EUROPEAN COURT OF HUMAN RIGHTS
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DIVISION DE LA RECHERCHE
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Article 3
The Court's approach to burden of proof in asylum cases

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STUDY OF THE ECHR CASE-LAW
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INTRODUCTION

This report gives an overview of the Court's approach to how the burden of proof should be shared between the applicant and the Government in expulsion cases under Article 3 of the Convention in general[1]. The specific question of the impact of established ill-treatment in the past is dealt with under §§ 21-28 of the report.

I. THE INITIAL BURDEN OF PROOF LIES WITH THE APPLICANT

1. According to well-established case law of the Court, it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008; *N. v. Finland*, no. 38885/02, § 167, 26 July 2005; *NA. v. the United Kingdom*, no. 25904/07, § 111, 17 July 2008; *A.A. v. France*, no. 18039/11, § 53, 15 January 2015; *R.K. v. France*, no. 61264/11, § 59, 9 July 2015). The standard of proof on the applicant remains the same irrespective of the victim's conduct, however undesirable or dangerous that might be[2].

2. When the applicant fails to comply with this initial burden of proof, the Court can dismiss the application. When he/she does comply with it, the burden of proof shifts to the respondent Government who are then to "*dispel any doubts*" about it (see *Saadi v. Italy* [GC], cited above, § 129; *N.A. v. the*

[1]. The report, therefore, does not concern the nature of the subsequent review by this Court of the domestic authorities' assessment of the case. Taking full account of its subsidiary role underlying the Convention system, the Court is cautious to substitute its own view of the facts for that of the domestic authorities' who are directly tasked with the assessment of evidence adduced before them. The Court has frequently stated that cogent reasons are needed before the Convention organs in order to depart from the findings of fact of the national courts (see, with reference to *Klaas v. Germany*, 22 September 1993, § 30, Series A no. 269: *H. and B. v. the United Kingdom*, nos. 70073/10 and 44539/11, § 111, 9 April 2013; *R.J. v. France*, no. 10466/11, § 33, 19 September 2013; *A.A. v. France*, no. 18039/11, § 53, 15 January 2015; *R.K. v. France*, no. 61264/11, § 59, 9 July 2015).

[2]. In *Saadi v. Italy* [GC], cited above, § 140, the Grand Chamber rejected the United Kingdom Government's arguments to the effect that, where an applicant presents a threat to national security, stronger evidence should be adduced to prove that there is a risk of ill-treatment. In the Court's view such an approach was not compatible with the absolute nature of the protection afforded by Article 3 (see, also, *Bajsultanov v. Austria*, no. 54131/10, § 71, 12 June 2012).

United Kingdom, cited above, § 111; *R.C. v. Sweden*, no. 41827/07, § 50, 9 March 2010). The Court must then be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007; *Garabayev v. Russia*, no. 38411/02, § 74, 7 June 2007). If necessary the Court will further assess the issue in the light of material it has obtained *proprio motu* (*Cruz Varas and Others v. Sweden*, 20 March 1991, § 75, Series A no. 201; *H.L.R. v. France*, 29 April 1997, § 37, *Reports of Judgments and Decisions* 1997-III; *Saadi* [GC], cited above, § 128; *Salah Sheekh v. the Netherlands*, cited above, § 136) or material produced by the applicant since the final decision on domestic level (see *Hilal v. the United Kingdom*, no. 45276/99, § 62, ECHR 2001-II).

3. In *Hilal v. the United Kingdom*, cited above, the Government failed to discharge this burden of proof. Having expressed doubts on the authenticity of the medical report, the Government did not provide any evidence to substantiate these doubts or to contradict the opinion provided by the applicant. Nor did they provide an opportunity for the report, and the way in which the applicant obtained it, to be tested in a procedure before the special adjudicator (see *Hilal*, cited above, § 63). Having additionally established that the applicant had no internal flight option at his disposal, the Court concluded on a violation of Article 3 of the Convention.

4. In general terms, the level of persuasion necessary to reach a particular conclusion and, for present purposes, to shift the burden of proof, is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005‑VII; *Iskandarov v. Russia*, no. 17185/05, § 107, 23 September 2010; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 151, ECHR 2012). The Court does not require that the Government has to dispel any doubt when it has been *established* that deportation would be contrary to Article 3 but, instead, states that the burden of proof shifts to the Government when the applicant has adduced evidence *capable of proving* this. This indicates a threshold for the shift below the duty to establish substantial grounds. Roughly speaking, the threshold necessary for the burden of proof to shift appears to equal the "*arguability*" or a *prima facie* standard used under Article 13 and when determining the admissibility of an application (see *Nasimi v. Sweden* (dec.), no. 38865/02, 16 March 2004).

5. In the case of *R.C. v. Sweden*, cited above, for instance, the applicant had initially produced a medical certificate before the Swedish Migration Board as evidence of his having been tortured. Although the certificate was not written by an expert specialising in the assessment of torture injuries, the Court considered that it, nevertheless, gave a rather strong indication to

the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture. In such circumstances, it was for the Migration Board to dispel any doubts that might have persisted as to the cause of such scarring. In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a *prima facie* case as to their origin. The Court disagreed with the Government's view that it was incumbent upon the applicant to produce such expert opinion (see *R.C.*, cited above, § 53).

II. LIMITED APPLICATION OF THE PRINCIPLE *AFFIRMANTI INCUMBIT PROBATIO*

6. It is incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail (see *Said v. the Netherlands*, no. 2345/02, § 49, ECHR 2005-VI)[3].

7. The Court does, however, take account of the intrinsic difficulties of presenting evidence in the asylum context and the limitations on a rigorous use of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation) apply even more so in the context of asylum. The Court acknowledges that it may be difficult, if not impossible, for an asylum seeker to supply evidence within a short period of time, especially if such evidence must be obtained from the country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive *per se* (see *Bahaddar v. the Netherlands*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 263, § 45; *Said v. the Netherlands*, cited above, 49). To demand proof to such a high standard might present even an applicant whose fears are well-founded with a *probatio diabolica* (see *Mawajedi Shikpohkt v. Netherlands* (dec.), no. 39349/03, 27 January 2005).

8. Instead, due to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the

[3]. In view of the absolute character of Article 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe, the Court's examination of the existence of a risk of ill-treatment must necessarily be a rigorous one (*Vilvarajah and Others v. the United Kingdom*, cited above, § 108, Series A no. 215; *Jabari v. Turkey*, no. 40035/98, § 39, ECHR 2000-VIII).

documents submitted in support thereof. In *M.A. v. Switzerland*, the Court did not agree with the Swiss Government that, merely because some of the documents provided by the applicant in support of his application were copies and on the ground of a generalised allegation that such documents could theoretically have been bought in Iran, the question of whether or not the applicant was able to prove that he would face treatment contrary to Article 3 of the Convention could be decided solely on the basis of the accounts he gave during the interviews before the Swiss authorities, i.e. without having regard to the documents submitted in support of his asylum application. In the Court's view this approach disregarded the particular situation of asylum seekers and their special difficulties in providing full proof of the persecution in their home countries (see *M.A.* v. *Switzerland*, no. 52589/13, § 69, 18 November 2014).

9. Yet when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions (see *Matsiukhina and Matsiukhin v. Sweden* (dec.), no. 31260/04, 21 June 2005; *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008).

10. Moreover, the Court entertains a holistic approach with regard to the assessment of the credibility of the statements made by the applicant before the national authorities and during the proceedings before the Court (*Nasimi v. Sweden*, cited above; *Matsiukhina and Matsiukhin*, cited above). Even if the applicant's account of some details may appear somewhat remarkable, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim (see *Said v. the Netherlands*, cited above, § 53; *N. v. Finland*, cited above, § 154-155). In *R.C. v. Sweden*, cited above, the Court found that the applicant's basic story was consistent throughout the proceedings and that notwithstanding some uncertain aspects, such as his account as to how he escaped from prison, such uncertainties did not undermine the overall credibility of his story (*R.C.*, cited above, § 52).

11. Similarly, in *A.F. v. France*, the Court attached little importance to the fact that the applicant had lodged his second asylum application under a false name:

> « 56. La Cour ne considère pas non plus que la demande d'asile présentée par le requérant sous une fausse identité discrédite l'ensemble de ses déclarations devant elle. Elle note, en effet, que si le récit du requérant dans cette demande d'asile différait de celui fait initialement quant aux dates et à la manière dont il aurait quitté son pays, les risques de persécution invoqués étaient exactement les mêmes, ce qui n'est d'ailleurs pas contesté par le Gouvernement.[4] »

[4]. *A.F. v. France*, no. 80086/13, § 56, 15 January 2015. See, also, *A.A. v. France*, cited above, § 54, where the Court found, with regard to the inconsistencies in the applicant's

12. By the same token, the Court acknowledges that, as a general principle, the national authorities are best placed to assess not just the facts, but also the general credibility of the applicant or the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned (see *S.F. and Others v. Sweden*, no. 52077/10, § 66, 15 May 2012; *R.C. v. Sweden*, cited above, § 52).

III. WHEN DOES THE BURDEN OF PROOF SHIFT TO THE GOVERNMENT?

13. The initial burden of proof of the applicant entails especially the individual circumstances of his/her case. The Court has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country cannot on its own give rise to a breach of Article 3 (see *Saadi v. Italy* [GC], cited above, § 131; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 111, Series A no. 215; *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 73, ECHR 2005-I; *Müslim v. Turkey*, no. 53566/99, § 68, 26 April 2005; *Saadi* [GC], cited above, § 131). Thus, while account must be taken of the general situation of violence in a given country of origin at the present time, the Court is satisfied that it would normally not render illusory the protection offered by Article 3 to require the asylum seeker to demonstrate the existence of further special distinguishing features which would place him or her at real risk of ill-treatment contrary to that Article (see *Salah Sheekh v. the Netherlands*, cited above, § 148; *NA. v. the United Kingdom*, cited above, § 128; *H.L.R. v. France*, cited above, § 42).

14. Hence, as a general rule, the applicant cannot be seen as having discharged the burden of proof until he or she has submitted a substantiated account of an individual, thus a *real*, risk of ill-treatment upon deportation capable of distinguishing his/her situation from the general perils in a given country of destination. The Court principally considers it legitimate, when assessing the individual risk to returnees, to carry out that assessment on the basis of a list of "*risk factors*", which the domestic authorities, with the

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story underlined by the Government, that the applicant's description of events in Sudan had remained consistent both before it and before the French authorities and that only the chronology of events was different.

benefit of direct access to objective information and expert evidence, have drawn up (see *NA. v. the United Kingdom*, cited above, § 129). Even so, the Court emphasised that the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment in the individual case (see *NA.*, cited above, § 130).

(1) Risk of ill-treatment emanating from the membership of a group

15. The requirement of further special distinguishing features is, however, loosened up under certain circumstances. Where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see *Saadi v. Italy* [GC], cited above, § 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh v. the Netherlands*, cited above, § 148; *NA. v. the United Kingdom*, cited above, § 116).

16. In *S.H. v. the United Kingdom*, the applicant had adduced several expert reports, which supported his claim that he would be at risk of imprisonment and ill-treatment upon return to Bhutan. Furthermore, human rights reports indicated that the ethnic Nepalese in Bhutan were subjected to discriminatory treatment on account of their ethnicity. The Government had not adduced any evidence capable of dispelling the concern of such treatment arising upon removal of the applicant and could thus not discharge the burden of proof that had shifted on them (see *S.H. v. the United Kingdom*, no. 19956/06, § 71, 15 June 2010).

(2) General situation of violence

17. Despite its general focus on individual risk assessment the Court has never excluded the possibility that a general situation of violence in a country of destination may – in the most extreme cases – be of a sufficient level of intensity as to render any removal to it necessarily a breach of Article 3. This could only be accepted if the situation of general violence was such that there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA. v. the UK*, cited above, § 115; *H.S. and Others v. Cyprus*, nos. 41753/10 and 13 others, § 274, 21 July 2015; *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and

11449/07, § 218, 28 June 2011). When reports of human rights organisations submitted by the applicant or considered by the Court *proprio motu*, show the existence of such a situation of general violence in the country of origin, it is then up to the determining authority to contradict that information. The burden of proof with regard to the risks emanating from the general situation in the country of origin thus shifted to the State.

18. In *Sufi and Elmi v. the United Kingdom*, cited above, the Court held it established, on the basis of human rights reports, that the violence in Mogadishu was of such a level of intensity that in principle anyone in that region would be at a real risk of treatment prohibited by Article 3. The Court accepted that some persons who were exceptionally well-connected to "*powerful actors*" could find protection. However, it was for the Government to show that a person could find protection for such reasons (see *Sufi and Elmi*, cited above, §§ 249-250).

19. In the Court's view, due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk, but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case (see *Hilal v. the United Kingdom*, cited above, § 60; *NA. v. the United Kingdom*, cited above, § 130). The following elements may represent such acceptable risk factors: previous criminal record and/or arrest warrant; the age, gender and origin of a returnee; a previous record as a suspected or actual member of a persecuted grouping; having made an asylum claim abroad (see *NA.*, cited above, §§ 143-144 and 146).

(3) Past experiences of ill-treatment

20. Whether the burden of proof should shift in cases where the applicant has made a plausible case that he was tortured or ill-treated in the past appears still unsettled in the case-law of the Court.

21. From the point of view of the general principles, as confirmed by the Grand Chamber in *Saadi v. Italy* [GC], this appears unlikely. The Court is to focus its examination on the foreseeable consequences of sending the applicant to the receiving country (see *Saadi* [GC], cited above, § 130). If the applicant has not yet been extradited or deported when the Court examines the case, the existence of the risk must be assessed with regard to the date of the Court's examination (see *Chahal v. the United Kingdom*, 15 November 1996, §§ 85-86, *Reports of Judgments and Decisions* 1996-V; *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004; *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 69). An *ex*

nunc assessment is also called for due to the fact that the situation in a country of destination may change in the course of time (see *Salah Sheekh v. the Netherlands*, cited above, § 136; *NA. v. the United Kingdom*, cited above, § 142). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive for the Court's assessment (see *Saadi* [GC], cited above, § 133; *NA.*, cited above, § 112). This emphasis on the present arguably leans against a shifting of the burden of proof on the Government by virtue of the mere existence of past experiences of ill-treatment.

22. Yet in *R.C. v. Sweden*, cited above, the Court adopted a different line of reasoning. It was satisfied that the applicant had substantiated his claim that he had been detained and tortured by the Iranian authorities following a demonstration. Having regard to the finding that the applicant had already been tortured, the Court considered that the onus shifted to the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded (see *R.C.*, cited above, § 55)[5].

23. Later, in *D.N.W. v. Sweden*, the burden of proof did not shift to the State even though the Court accepted that the applicant had been detained and subjected to ill-treatment in the past. It simply found that the main issue of the case was whether it had been substantiated that the applicant would be at a real risk of being subjected to such treatment upon return. In this regard, the Court noted that the applicant appeared to have been travelling around and preaching in public for almost a year, after having escaped from prison and before leaving the country for Sweden, without the Ethiopian authorities showing any adverse interest in him (see *D.N.W. v. Sweden*, no. 29946/10, § 43, 6 December 2012). Referring to *R.C. v. Sweden*, cited above, two judges dissented arguing that the burden of proof should have shifted to the State[6].

24. Subsequently, in *S.A. v. Sweden*, the fact that the applicant was able to substantiate a credible account of threats to his life and limb in the past by non-state actors almost, of itself, led to the conclusion that there was a risk of ill-treatment should the applicant be returned to his hometown. The applicant had fled from Iraq after her fiancée and his mother had been killed by members of the fiancée's family who disapproved of the couples' marriage plans and after the applicant had received death threats from the same perpetrators. The Court considered that the events that led the

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5. Judge Fura disagreed with this finding of the majority in her dissenting opinion. In her opinion, the fact that the applicant had in all probability been tortured in Iran was not enough, of itself, to substantiate that he ran a real risk of being tortured again if returned (*R.C. v. Sweden*, cited above, Dissenting opinion of Judge Fura, § 13).

6. *D.N.W. v. Sweden*, cited above, Dissenting opinion of Judge Power-Forde joined by Judge Zupančič.

applicant to leave Iraq strongly indicated that he would be in danger upon return to his home town, all the more so considering the numerous commentators stressing the gravity of honour-related violence in Iraq. In the Court's view, there was a real risk that relatives of his fiancée would try to seek revenge in order to uphold their perception of honour, if the applicant were to be returned to his home town (see *S.A. v. Sweden*, no. 66523/10, § 49, 27 June 2013). The Court thus readily linked the past experiences of persecution with the risk of their reoccurrence in the future. To what extent this was due to the fact that the applicant was able to show that the threat had, as a matter of fact, not dissipated after his departure from Iraq was not addressed by the Court. The Court further held that, although the applicant could not be expected to avail himself of the authorities' protection in his home town, he could safely relocate to other parts of Iraq. The Court thus found that the implementation of the deportation order against the applicant would not give rise to a violation of Article 3[7].

25. In *I. v. Sweden*, the first applicant of Chechen origin had significant and visible scars on his body, including a cross burned into his chest. The medical certificates stated that his wounds could be consistent with his explanation both as to the timing and the extent of the torture to which he maintained he had been subjected in the hands of the "Kadyrov's group" prior to his flight from Chechnya. The Court considered that, if the applicant was subjected to a body search during a possible detention and interrogation by the Federal Security Service or local law-enforcement officials upon return to Russia, the latter would immediately see that the first applicant had been subjected to ill-treatment, and that these scars were recent, which could indicate that the applicant had taken active part in the second war in Chechnya (see *I. v. Sweden*, no. 61204/09, §§ 67-68, 5 September 2013). The Court held that where an asylum seeker invokes that he or she has previously been subjected to ill-treatment, whether undisputed or supported by evidence, it may nevertheless be expected that he or she indicates that there are substantial and concrete grounds for believing that upon return to the home country he or she would be exposed to a risk of such treatment again, for example because of the asylum seeker's political activities, membership of a group in respect of which reliable sources confirm a continuing pattern of ill-treatment on the part of the authorities, a pending arrest order, or other concrete difficulties with the authorities concerned (see *I.*, cited above, § 62).

26. The later case of *R.J. v. France*, concerned a Tamil from Sri Lanka. The Court found, while sharing the French Government's doubts as to the

[7]. Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, cited above, § 40).

claims made by the applicant about detention conditions and financial support for the LTTE, that the Government had failed to effectively rebut the strong presumption raised by the medical certificate of treatment contrary to Article 3. Despite an interim measure under Rule 39 requesting a Government inquiry into the origin and nature of the applicant's wounds, no such inquiry was conducted. The Court appears to implicitly affirm that the burden of proof shifted to the Government and the latter's failure to discharge that burden led the Court to find that the forced return of the applicant to Sri Lanka would constitute a violation of Article 3 (see *R.J. v. France*, no. 10466/11, § 42, 19 September 2013).

27. Finally, in a recent case concerning the removal of the applicant from France to Sudan, the Court drew a direct link from pre-flight experiences of torture due to membership of one of the main rebel movements in Darfur to the prevailing risk of ill-treatment upon return to Sudan. However, without an express reference to the bearer of the burden of proof, the Court found:

> « 60. La Cour est d'avis que la peine infligée au requérant reflète nécessairement le fait que les autorités soudanaises sont convaincues de l'implication de ce dernier dans un mouvement de rébellion quand bien même celui-ci affirme le contraire. De plus, la Cour estime que s'il est manifeste que les autorités locales portent un intérêt particulier aux darfouris transitant par Khartoum après un séjour à l'étranger, le fait que le requérant soit considéré comme un soutien du JEM ne peut qu'aggraver le risque de mauvais traitement à son égard.[8] »

CONCLUSION

28. According to well-established case law of the Court, it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, cited above, § 167). Where such evidence is adduced, it is for the Government to dispel any doubts about it (see *NA. v. the United Kingdom*, cited above, § 111).

29. While taking account of the inherent difficulties in presenting evidence in an asylum context, the Court does acknowledge that it is frequently necessary to give an asylum seeker the benefit of the doubt and not to raise too high the threshold for discharging the initial burden of proof. In such circumstances, all that can reasonably be expected of the applicant is the establishment of a consistent and credible *prima facie* case.

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[8]. *A.A. v. France*, cited above, § 60.

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