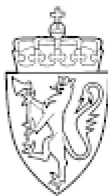

The Supreme Court of Norway

On 18 May 2016, the Supreme Court of Norway delivered judgment in

HR-2016-01051-A, (case no. 2015/1857), civil case, appeal against judgment.

A	(Counsel Terje Einarsen – qualifying test case)
vs.	
The State, represented by the Immigration Appeals Board	(The Attorney General represented by Counsel Karl Otto Thorheim)

V O T I N G :

(1) Justice **Falch**: The case concerns the validity of the Immigration Appeals Board's (UNE) administrative decision to refuse to examine an asylum claim, by a Somali national who had been granted refugee status – asylum – in Hungary, on its merits. The question is whether the Court of Appeal has assessed, according the correct standard, whether her removal to Hungary would be in breach of the European Convention of Human Rights (ECHR) Article 3.

(2) A was born in 1982 and is originally from Somalia. She was granted asylum in Hungary on 13 March 2009. She explained to Hungarian authorities that she had been a victim of violence and abuse in Somalia, perpetrated by Somalis belonging to a different clan, and that she therefore had fled Somalia.

(3) On 30 July 2009, A claimed asylum in Norway. Her stated reason was that she had been a victim of human trafficking and forced into prostitution in several countries by a man against whom she now sought protection.

(4) A was granted limited temporary residence in Norway while the human trafficking case was being investigated. After the criminal case was dismissed on 30 November 2010, the processing of her asylum case was continued.

(5) With reference to the fact that A was granted asylum in Hungary, the Immigration Directorate (UDI) on 28 August 2012, rejected the application without examination on its merits. A submitted an appeal to UNE, which on 10 May 2013 rejected the appeal. The basis for this decision was, *inter alia*, that Hungary complies with its obligations under the ECHR Article 3 in relation to persons in the country with refugee status.

(6) A submitted a petition for a reversal of the decision and referred, *inter alia*, to her health condition. On 12 July 2013 and 21 February 2014, UNE rejected the petitions. The Appeals Board held that removing her to Hungary would not be in breach of the Norwegian Immigration Act Section 73, nor the ECHR Article 3.

(7) On March 20 2014, A took out a subpoena at Oslo District Court, with a claim that UNE's decision of 10 May 2013 and the following decisions were invalid. In its ruling of 5 September 2014, the District Court overturned the decision and following decisions on the grounds that removing her to Hungary was in breach of the Immigration Act Section 73, cf. Section 32, subsection three. At that time, the details of A's asylum claim in Hungary were unknown.

(8) The State appealed the judgement before Borgarting Court of Appeal, which delivered judgment on 17 August 2015, with the following ruling:

> **"1. The State represented by the Immigration Appeals Board is acquitted.**
>
> **2. A is ordered to pay NOK 220,720 – two-hundred-and-twenty-thousand-seven-hundred-and-twenty in costs for the District Court and Court of Appeal within two weeks after the pronouncement of this judgment."**

(9) The Court of Appeal found that the conditions for examination of A's asylum claim on its merits were not met, cf. the Immigration Act Section 32, subsection three, and that returning her to Hungary was not in breach of the ECHR Article 3.

(10) A submitted an appeal to the Supreme Court concerning the Court of Appeal's application of the law and assessment of evidence, as regards the question of whether the ECHR Article 3 provides protection against removal to Hungary in light of her health situation.

(11) The Appeals Selection Committee of the Supreme Court permitted the submitted appeal as regards the question of whether, in the Court of Appeal's assessment of whether Article 3 had been breached, it was sufficient to primarily refer to "Hungary's internal regulations and the country's international obligations […] or if a closer assessment of A's situation upon a potential return to Hungary was also necessary."

(12) For the Supreme Court, the case is therefore limited to the question of whether the Court of Appeal's interpretation of ECHR Article 3 was correct and sufficiently extensive.

(13) The appellant, *A*, has mainly argued the following:

(14) The Court of Appeal based its decision on an incorrect standard when it found that the ECHR Article 3 was not a hindrance for A to be sent to Hungary. A had an arguable complaint concerning a breach of Article 3, and was therefore entitled to an individual, in-depth and rigorous processing of the claim.

(15) The Court of Appeal did not process A's claim in this manner, and the Court of Appeal's rationale is in any case insufficient. A's health situation is and was critical, and she has also been the victim of human trafficking, an issue which should have been considered by the Court of Appeal. The Court of Appeal has also not considered whether there was a need for special assurances from Hungarian authorities as to whether A, upon return, would receive treatment in accordance with Article 3. The Court of Appeal should have done the this.

(16) The Court of Appeal has furthermore applied an excessively high threshold when it held that Article 3 is only a hindrance for return if there are compelling and exceptional humanitarian grounds. A lower threshold applies for the illness and history that A has, and for returns to states within Europe.

(17) A has submitted the following claim:

> **"The Court of Appeal's decision is set aside and the case is referred back to the Court of Appeal for continued processing."**

(18) The respondent, *the State, represented by the Immigration Appeals Board*, has mainly argued the following:

(19) The decision of the Court of Appeal is based on a correct interpretation of the ECHR Article 3. In cases involving a possible return to a country which is a State Party to the Dublin Agreement, the presumption that the receiving state complies with Article 3 is a general rule. This must apply even more so when the applicant has been granted asylum in such a country. This presumption can be rebutted, but this requires that there are "substantial grounds" to suggest that A is exposed to a real risk of a breach of Article 3 in Hungary. There were no such grounds, and therefore the ECHR does not set special requirements for a rigorous assessment in the national courts.

(20) The threshold applied by the Court of Appeal for a breach of Article 3 is correct. There must be compelling and exceptional humanitarian grounds if A is to not be returned to Hungary. This threshold has not been met.

(21) The State, represented by the Immigration Appeals Board has submitted the following claim:

"The appeal is rejected."

(22) *I have reached the conclusion* that the appeal must be rejected, and will first review the applicable rules in the Immigration Act.

(23) It follows from Section 32, subsection one, letter a, that an application for a residence permit in Norway may be refused examination on its merits if the applicant has been granted asylum in another country, which A has been granted.

(24) For the sake of context, I note that examination on the basis of merits can also be refused if it may be demanded that the applicant be accepted by another country participating in cooperation under the Dublin Agreement, even if the applicant has not been granted asylum in that country, cf. Section 32, subsection one, letter b. This is a cooperation between the EU countries, Iceland, Switzerland, Liechtenstein and Norway, to which I will return.

(25) According to Section 32, subsection three, the application shall still be examined on the basis of its merits if required by Section 73. Section 73 holds that a foreign national may not be sent to an area where he or she would be in a situation as mentioned in Section 28, if the applicant meets the requirements for protection against refoulement. The Court of Appeal has taken a final decision that A cannot invoke this exception.

(26) Removal from Norway also cannot occur if it is in breach of the ECHR. The ECHR takes precedence over the Immigration Act, cf. the Norwegian Human Rights Act Section 3, cf. Section 2 no. 1 and the Immigration Act Section 3. This entails that the immigration administration must still examine A's application for residence in Norway on the basis of its merits, to the extent necessary in order to prevent a breach of the ECHR article 3.

(27) The courts must also consider if the ECHR Article 3 has been breached when A has claimed that the relevant decisions are invalid for this reason. The courts shall then build upon the actual conditions, as they were at the time of the decision – in this case 21 February 2014 – cf. Rt. 2012 page 1985, paragraph 98.

(28) I will now move on to consider the requirements of the ECHR Article 3 before returning to the question of whether the Court of Appeal's ruling meets these requirements.

(29) The ECHR Article 3 holds that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The European Court of Human Rights (ECtHR) has held that in cases involving the possible extradition of a person from a Contracting State, the above provision will be breached if

> **"substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."**

(30) This was established already in the judgment (plenary) of 7 July 1989, *Soering v. United Kingdom*, paragraph 91 and has been repeated in several later judgments. See for example the Grand Chamber judgment of 4 November 2014, *Tarakhel v. Switzerland*, paragraph 93.

(31) Regarding the question of how severe the feared treatment in the receiving country must be for a breach of Article 3 to have occurred, the ECtHR has in a number of cases held that "a minimum level of severity" is required. This term is relative and depends on the circumstances in each individual case. See for example the *Tarakhel* judgement, paragraph 94. Regarding persons with poor health, as A has invoked in the appeal to the Supreme Court, the ECtHR has determined that a breach of Article 3 is only applicable in "a very exceptional case, where the humanitarian grounds against the removal are compelling". See for example the Grand Chamber judgment of 27 May 2008 *N v. United Kingdom*, paragraph 42. The ECtHR Chamber judgment of 2 May 1997 *D v. United Kingdom* is an example of such very exceptional conditions. In the latter case, the applicant was critically ill and near death without foreseeable access to necessary treatment in the country of return.

(32) On this basis, the Court of Appeal has based its decision on a correct interpretation of the ECHR Article 3, when it held that the threshold is "very high" and that there must be "very exceptional circumstances" in order for the health of the foreign national to be a hindrance for removal. I disagree with the appellant's claim that this high threshold only applies to certain diseases or only for removal to countries outside of Europe.

(33) I will now consider the question of how extensively the ECHR requires the national authorities to process a case which considers whether this threshold has been exceeded.

(34) In cases like this, which involve the potential return of an applicant to a country which is participating in cooperation under the Dublin Agreement, special considerations apply. There is to a great extent freedom of movement between these countries (the Dublin countries). However, this freedom presupposes that asylum seekers cannot demand that their application is processed in several Contracting States, in hope of finding the country with the most advantageous conditions for the application and for the desires and needs of the applicant. The Dublin Agreement, which has been translated into Norwegian law by way of the Immigration Act Section 32, subsection four, therefore ensures that the application is only processed in one of the Dublin countries, which, as a general rule, is the first country to which the asylum seeker travelled. Those Dublin countries in which the applicant may later arrive, are given the opportunity to return the concerned individual to the first country without examining the application on the basis of its merits.

(35) The Dublin Agreement is therefore based on a *presumption* that the first country will meet its obligations according to the Dublin regulations, and also according to the ECHR, to which all of the Dublin countries are bound. The presumption applies both in the event that the applicant has been granted asylum in the first country and in the event that applicant has not. The ECtHR has recognized this presumption. See for example the Grand Chamber judgment of 21 January 2011, *M.S.S. v. Belgium and Greece*, paragraphs 341 to 345.

(36) However, this is merely a presumption. It can therefore be rebutted. When deliberating how strong the evidence must be for the ECHR Article 3 to prohibit a return to the first country, including how extensive the assessment of the evidence must be, it is important to consider that Article 3 protects a fundamental right – one which is enshrined in our Constitution Section 93, subsection two – that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The presumption should therefore not serve as a tool to avoid considering evidence which could suggest that the applicant will actually be subjected such treatment upon return. In paragraph 104 of the *Tarakhel* judgment, the ECtHR stated the following:

> **"In the case of 'Dublin' returns, the presumption that a Contracting State which is also the 'receiving' country will comply with Article 3 of the Convention can therefore validly be rebutted where 'substantial grounds have been shown for believing' that the person whose return is being ordered faces a 'real risk' of being subjected to treatment contrary to that provision in the receiving country"**

(37) This entails that the Norwegian immigration administration and Norwegian courts must process a case in which it has been alleged that Article 3 would be breached in the event of a return to a Dublin country, as rigorously and extensively as necessary in order to determine whether there are "substantial grounds" which show that there is a "real risk" that the concerned individual will be subjected to treatment prohibited by Article 3, upon return.

(38) The appellant has submitted that A, with reference to, *inter alia*, the ECHR Article 13, is entitled to a rigorous national processing of her claim that her removal to Hungary will be contrary to Article 3. Reference is made, *inter alia*, to paragraph 126 the *Tarakhel* judgment where the ECtHR stated the following:

> **"The Court reiterates that an applicant's complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under Article 3 of the Convention 'must imperatively be subject to close scrutiny by a 'national authority'' […]. That principle led the Court to rule that the notion 'effective remedy' within the meaning of Article 13 taken in conjunction with Article 3 requires, firstly, 'independent and rigorous scrutiny' of any complaint made by a person in such a situation, where 'there exist substantial grounds for fearing a real risk of treatment contrary to article 3', and secondly […]".**

(39) It follows from the *M.S.S.* judgment, paragraphs 288 and 294, that this right to rigorous processing according to Article 13 arises in the event that the concerned individual has "an arguable complaint" of a breach of Article 3. It is therefore not sufficient to claim a breach in order for the right to arise. There must be a reasonably justified complaint.

(40) I cannot see that the requirement for rigorous processing set by the ECtHR, adds anything to what I have already established – i.e. that the Norwegian courts must process the substance in a complain concerning a breach of the ECHR Article 3, in the event of a removal to a Dublin country, as broadly and rigorously as necessary in order determine whether the claim is successful.

(41) I will now deliberate whether the Court of Appeal has met this requirement.

(42) In its assessment of the evidence, the Court of Appeal has found the A is "severely physically and psychologically traumatised", and that her health condition "corresponds with a life characterised by extensive violence and torture". The Court of Appeal has based this on the fact that A suffers from a severe Post-Traumatic Stress Disorder and dissociative disorder, that she often faints when experiencing stress, and that she has attempted to commit suicide. She is deemed to clearly be in need of treatment.

(43) However, the Court of Appeal has not found it "proven on a balance of probabilities that A is in real risk of being subjected to abuse upon return to Hungary".

(44) A's claim before the Court of Appeal was that she would not receive the health care and assistance she needs in Hungary, with the consequence that her situation there, in light of her condition, will conflict with Article 3. Why this claim was unsuccessful has been justified by the Court of Appeal as follows:

> **"In Hungary, A is entitled to health care and other social rights in the same manner as other Hungarian citizens. However, the submission of evidence has shown that she will encounter several bureaucratic obstacles upon return to Hungary, which the State does not dispute. She will, *inter alia*, have to register upon arrival in order to access these rights. Everything suggests that she has also exceeded the deadline to receive integration support.**
>
> **However, the State has referred to the fact that bureaucratic obstacles are common in Europe, and that this does not constitute a breach of the Convention *per se*. The obstacles must as a general rule manifest themselves as a form of systemic failure, which is obviously not the case here. The Court of Appeal agrees with the State's interpretation of the ECtHR's practice on this point. Although it is clear that A will live under more difficult conditions in Hungary than in Norway, this is not sufficient to establish a breach of the ECHR Article 3.**
>
> **Hungary is bound by a number of international rules, hereunder the ECHR and the EU's qualification directive. In her witness statement, Krisin Søvik, Senior Advisor at UNE, expressed that the immigration authorities follow the situation in Hungary closely. Although not decisive, the Court of Appeal has placed a certain importance on the fact that UNHCR**

> **has not recommended a moratorium on returns of vulnerable groups to Hungary, as has been done for several other countries. According to UDI, there are no recent cases from EU countries in which the return of vulnerable groups to Hungary constituted a breach of the ECHR Article 3. There is also no ECtHR practice in which reception conditions or living conditions upon return to Hungary were considered a breach of this provision."**

(45) In my opinion, this assessment meets the requirements for breadth and depth set by the ECtHR, in order to conclude that the return of A to Hungary in February 2014 would not be contrary to Article 3. The Court of Appeal has fulfilled its obligation to conduct an assessment of A's claims as broadly and rigorously as necessary. Not only has the possibility of systemic failure in Hungary been included in the assessment, but also her individual situation and what she will encounter upon return. It is therefore substantially broader than merely referring to the presumption that Hungary complies with its international obligations. In this connection, it was not necessary for the Court of Appeal to consider whether or not A had been subjected to human trafficking. The reason is that the assessment under Article 3 relates to what treatment she – in her condition – will receive in Hungary upon return, not to the background for why she is affected by this condition.

(46) I also agree with the Court of Appeal that the threshold for a breach of the ECHR Article 3 – compelling humanitarian grounds in a "very exceptional case" – was not met in A's case. A's health condition was not life threatening *per se*, and I understand from the Court of Appeal that at least basic health care services would have been available to her in Hungary. The description of the situation in Hungary also did not suggest that Norwegian authorities in February 2013 would have required special assurances from Hungarian authorities – as the ECtHR required Switzerland to obtain from Italy in the *Tarakhel* judgment, paragraph 121 – in order to return A to Hungary.

(47) The State has not demanded coverage of costs for the Supreme Court.

(48) I hereby vote for this

J U D G M E N T :

The appeal is rejected.

(49) Justice **Noer:** Concerning the outcome and all material respects, I agree with the Justice delivering the leading opinion.

(50) Justice **Webster:** Likewise

(51) Justice **Matheson:** Likewise

(52) Justice **Skoghør:** Likewise

(53) After voting, the Supreme Court delivered the following

J U D G M E N T :

The appeal is rejected.

True transcript confirmed: