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VULNERABILITY AND THE PRINCIPLE OF *NON-REFOULEMENT* IN THE EUROPEAN COURT OF HUMAN RIGHTS: TOWARDS AN INCREASED SCOPE OF PROTECTION FOR PERSONS FLEEING FROM EXTREME POVERTY?

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ABSTRACT. "Economic refugees" largely remain outside the international protection regimes of refugee and human rights law.[1] Nevertheless, recent case law of the European Court of Human Rights (ECtHR) opens up limited possibilities for economic refugees to rely on Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhuman or degrading treatment or punishment. The present paper asks: can, and if so, under what circumstances does, the deportation to situations of economic, social and cultural rights (ESCR) violations caused by conditions of extreme poverty form a violation of the *non-refoulement* principle? The present study conducts a doctrinal legal analysis of the most remarkable cases of the ECtHR in that respect. The delimitation and use of the concepts of exceptional circumstances and vulnerability are especially intriguing in this regard and are the main focus of this paper. Most ground-breaking was the case of *MSS v Belgium and Greece* in which the ECtHR recognized the living conditions of "most extreme poverty" of the applicant in Greece as falling within the scope of Article 3 ECHR. With the subsequent cases of *Sufi and Elmi v UK*, *SHH v UK* and *Tarakhel v Switzerland*, the innovative character of *MSS v Belgium and Greece* has been challenged, redefined and put into perspective. It can be concluded that the ECtHR has increasingly recognized vulnerability as a relevant criterion to be applied in addition to, or possibly even as a substitute for, the previously applied exceptional circumstances standard. The burden of proof for vulnerability seems to be lower than for the exceptional circumstances threshold and more attention seems to be paid to the general environment and situation in the country of origin rather than only to the individual circumstances of the applicant.

Keywords: Article 3 ECHR; *non-refoulement*; extreme poverty; economic, social and cultural rights violations; exceptional circumstances; vulnerability

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1. Introduction

> "He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. […] Such living conditions […] have attained the level of severity required to fall within the scope of Article 3 of the Convention."
>
> –*MSS v Belgium and Greece* paragraphs 254 and 263[2]

As the above quote from the 2011 *MSS v Belgium and Greece* case suggests, the European Court of Human Rights (ECtHR) seems increasingly inclined to consider economic, social and cultural rights (economic, social and cultural rights) violations under Article 3 of the European Convention of Human Rights (ECHR), which prohibits torture and inhuman or degrading treatment or punishment.[3] The present paper therefore asks: can, and if so, under what circumstances does, the deportation to situations of economic, social and cultural rights violations caused by conditions of extreme poverty form a violation of the *non-refoulement* principle?[4]

The research rests on the 1993 Vienna Declaration and Programme of Action's statement that all human rights are "universal, indivisible and inter-dependent and interrelated."[5] This leaves room for a connection of extreme poverty, as encompassed in economic, social and cultural rights, with the prohibition of torture and inhuman or degrading treatment, a right with a civil and political connotation. In order to approach the topic from a legal perspective, extreme poverty is understood as a general concept along the lines of the economic, social and cultural rights it violates. As is stated in the Human Rights Council's Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, "[p]overty is not solely an economic issue, but rather a multidimensional phenomenon that encompasses a lack of both income and the basic capabilities to live in dignity" and as such has to be considered in a more holistic manner.[6] The economic, social and cultural rights dealt with in the context of economic refugees in this study are thus considered in general rather than as individual economic, social and cultural rights.[7]

The principle of *non-refoulement* of Article 33 of the Convention Relating to the Status of Refugees (CRSR) may offer a possible argument for additional protection requirements.[8] *Non-refoulement* is paradoxical since it is explicitly

stated in the CRSR but its content remains undefined under international law.[9] As a result, international, regional and national bodies have wide discretion in clarifying its meaning.[10]

Previous research has discussed and refined the scope of the principle of *non-refoulement*.[11] However, the exact meaning for persons fleeing from extreme poverty remains disputed. This is particularly problematic in light of the current public debate surrounding the deservingness of protection: is someone only entitled to protection if fleeing for reasons recognized by the traditional refugee protection regime of Article 1(A)2 CRSR or subsidiary protection regimes such as Article 15 of the EU Qualifications Directive?[12] Or is there also a legal responsibility to not return those leaving their home country for other reasons, particularly if they are or will be in a vulnerable situation upon return?

The subsequent study focuses on the interpretation of the scope of the principle of *non-refoulement* in the context of the ECHR. This is especially valuable since it is within the Council of Europe that the interpretation of the concept has developed furthest due to the ECtHR's case law.[13] Moreover, previous research reveals that the concept of vulnerability is an increasingly important balancing tool for the ECtHR with regard to discrimination issues.[14] The present study therefore investigates the extent to which this is also the case with regard to the principle of *non-refoulement*.

In *Airey v UK* the ECtHR expressed the opinion that the civil and political rights entailed in the ECHR have social and economic implications. Consequently, even where a situation extends to economic, social and cultural rights violations, it can still be considered under the ECHR.[15] Although itself not directly related to *non-refoulement*, *Airey v UK* forms the basis for any possible claims by economic refugees to rely on Article 3 ECHR. Several subsequent cases are of particular significance for defining the scope of *non-refoulement* through establishing two thresholds of inhuman or degrading treatment under Article 3 ECHR, namely the requirement of exceptional circumstances and the question of vulnerability. Both concepts are analyzed and compared in detail below by referring to the relevant case law on *refoulement* to situations of economic, social and cultural rights violations.

The analysis is based on the presumption that, although the ECtHR has taken a very strict view on allowing invocations of Article 3 ECHR on the basis of economic, social and cultural rights violations in the past, there has been a gradual opening to this idea. While previously relying on the exceptional circumstances approach, there seems to be a slow movement beyond that concept and towards vulnerability. The paper does not discuss the clarification or desirability of this move but tries to deduct what each approach has to offer for *non-refoulement* protection in situations of economic, social and cultural rights violations.

The research methods are primarily doctrinal and positivistic. As such, the study includes an analysis of the ECHR and case law of the ECtHR in order to clarify and increase the coherence of the *non-refoulement* principle as embedded within the larger international legal system.[16] The research analyzes the ECtHR's approach towards economic, social and cultural rights violation claims under Article 3 ECHR through noting gaps, inconsistencies, ambiguities and possibilities in the ECtHR's approach with the aim of establishing the current state of the law and its possible future developments.

First, the study provides a short overview of the threshold for relying on the *non-refoulement* principle of Article 3 ECHR more generally through identifying the severity of treatment and the real risk involved as the two decisive factors. The second part of this study examines this threshold in the ECtHR's case law directly related to economic refugees and *refoulement* in light of the concepts of exceptional circumstances and vulnerability before concluding on the prospects for the *non-refoulement* protection of economic refugees.

2. The Scope of *Non-refoulement* under Article 3 ECHR

Article 3 ECHR holds that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". Although this article does not explicitly refer to *non-refoulement*, the ECtHR has, ever since *Soering v UK*, consistently interpreted the principle to be implied in the article.[17] As such, a large number of cases has dealt with the question of *non-refoulement* and the provision is nowadays unquestioningly established as one of the strongest protection mechanisms in the Council of Europe area.[18] Article 3 ECHR is absolute and states cannot rely on any justification for violating the principle of *non-refoulement*.[19] When analyzing the ECtHR's case law, it becomes evident that two aspects are relevant for determining the scope of *non-refoulement* under Article 3 ECHR: i) the severity of suffering as part of the actual treatment inflicted and ii) the real risk that this treatment would be inflicted if the person was deported.

The severity of suffering involved

As the ECtHR held in *Ireland v UK*, there exists a "minimum level of severity" threshold for Article 3 ECHR. Accordingly, the ECtHR held that treatment which has been or will be inflicted must be evaluated relatively and depending "on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the person concerned."[20] Regarding the degradingness of a certain treatment, the ECtHR emphasized that there must be a certain degree of humiliation which needs to be established separately for each case.[21]

According to *Peers v Greece*, the ill-treatment must cause "feelings of anguish and inferiority capable of humiliating and debasing him."[22] The humiliating effect is thus most relevant for the establishment of the severity of the degrading treatment but, regardless of any publicity, a treatment might also be degrading if the applicant himself feels that he has been humiliated. In turn, inhuman treatment – while in most cases also being degrading – is primarily based on the physical integrity of a person and the bodily harm inflicted.[23] Moreover, according to the cases of *Tyrer v UK* and *Costello-Roberts v UK*, also the publicity involved is a relevant criterion.[24] Generally, it can thus be assumed that the threshold for inhuman treatment is higher than for degrading treatment but in both cases it is the severity of suffering that matters most. However, the severity of suffering threshold does not entail any clarification for when someone may or may not be returned under the *non-refoulement* principle. It is for this reason that it is necessary to take an additional criterion into account: the real risk threshold.

Substantial ground for believing the real risk

With regard to the determination of *non-refoulement* in relation to inhuman or degrading treatment, the real risk involved is of additional relevance in order to determine whether a state would violate its obligations under Article 3 ECHR by returning someone to his or her country of origin. In the ECtHR's case law, a temporal and a personal scope have been identified as the relevant criteria for the real risk assessment. According to *Soering v UK*, Article 3 ECHR requires "substantial grounds for believing" that the person concerned faces "a real risk of exposure to inhuman or degrading treatment."[25] In *Saadi v Italy* and later in *N v UK*, the ECtHR clarified that the criterion which is especially relevant is the real risk involved.[26]

With regard to the temporal scope, the ECtHR held in *Chahal v UK* that the real risk must be assessed in a "rigorous" manner and, as such, "it is the present conditions which are decisive".[27] This has been interpreted in *Jabari v Turkey* to mean that a "meaningful assessment of the applicant's claim" is necessary and that changed circumstances must be taken into account.[28] However, in *Salah Sheekh v the Netherlands* there was no need to establish past persecution, but the ECHR was interpreted to require a future-oriented risk for which past persecution may only be suggestive but not necessarily conclusive.[29]

In addition to the temporal scope, the ECtHR established in *Vilvarajah and Others v UK* that, while general human rights violations of a massive scale in the respective country may be indicative of a real risk, they may not be conclusive for granting protection under Article 3 ECHR.[30] Accordingly, the real risk assessment should be based on general and personal circumstances.[31] There is a need to show that one would be in a worse position than "the generality of" people in a similar situation.[32] Furthermore, the "mere

possibility of ill-treatment" does not suffice to claim protection under Article 3 ECHR.[33] Yet, in *Salah Sheekh v the Netherlands* the ECtHR applied a more group-oriented approach where, in order to establish a real risk, the applicant cannot be asked to prove that he has "special distinguishing features" other than being the member of a minority group.[34] The "mere possibility of ill-treatment" was considered to be sufficient to grant Article 3 ECHR protection.[35]

It becomes apparent that the ECtHR's approach has gradually been evolving and has not yet reached its limits of interpretation. The scope of Article 3 ECHR has been interpreted in an open-ended manner with much of its substance being decided on a case by case basis. Similarly, previous authors suggest that the threshold that needs to be met to qualify as inhuman or degrading treatment is relative.[36] It is therefore necessary to examine the case law directly related to economic refugees in order to clarify the legal obligations of the state under Article 3 ECHR for the return to situations of economic, social and cultural rights violations. As is revealed below, it is the exceptional circumstances and the vulnerability of the applicant involved that play a distinguishing role in cases of *refoulement* to situations of economic, social and cultural rights violations. The ECtHR has used both concepts as a justification for cases to meet or not meet the relevant threshold of severity of suffering and substantial grounds for believing the real risk involved.

3. Exceptional Circumstances and Vulnerability in the ECtHR's Case Law

Vulnerability is a widely discussed concept in the academic field.[37] Nevertheless, its content remains largely unclear and it goes beyond the scope of this paper to discuss its meaning in more detail. For the present analysis, both the term vulnerability and the concept of exceptional circumstances are used purely in the context of the ECtHR's case law regarding the severity of suffering and the substantial grounds for believing the real risk of *refoulement*. Their meanings are left undefined where the ECtHR itself does not offer additional information. Since the ECtHR seems to be increasingly shifting from the exceptional circumstances criterion towards vulnerability, the following part starts with discussing the cases relevant for exceptional circumstances before analyzing the cases on vulnerability.

The decisiveness of exceptional circumstances

One of the essential cases on the exceptional circumstances criterion is the case of *D v The United Kingdom* (UK). The case dealt with an AIDS-suffering drug trafficker from the St. Kitts island who was to be deported to St. Kitts by the UK governement.[38]

With regard to the severity of suffering involved, the ECtHR established that the deportation of the applicant would mean that he would have to die

"under most distressing circumstances".[39] This would amount to a violation of Article 3 ECHR despite the fact that the conditions in the country of origin were not in themselves conflicting with the *refoulement* prohibition.[40] With regard to the severity of suffering involved, the ECtHR emphasized the extraordinary "humanitarian considerations" at stake and found that the return would therefore amount to inhuman treatment.[41] Moreover, the ECtHR found that due to the "exceptional circumstances" and "the critical stage" of the illness, the applicant could be considered to face the real risk of being subjected to "inhuman treatment" contrary to Article 3 ECHR if he was to be returned to St. Kitts.[42]

Hence, the exceptional circumstances were decisive for both the severity of suffering and for the substantial grounds for believing a real risk of inhuman treatment. However, according to Arai-Takahashi, this does not mean that circumstances of economic, social and cultural rights violations can generally be sources of a real risk within the meaning of Article 3 ECHR and that the real risk of the applicant being exposed to "the most dramatic consequences" upon removal was clearly existent. Rather, it shows that it were the personal circumstances of suffering from a fatal disease in its terminal stage and not the lower standard of health care available in St. Kitts which were decisive for the ECtHR.[43] Nevertheless, Stoyanova remarks that the case promotes the principle of *non-refoulement* to include instances where there is, similarly to situations of economic, social and cultural rights violations, no deliberate infliction of ill-treatment. Hence, it furthers the idea that even the country of origin's failure to sustain the basic human needs of its people can be sufficient to establish a violation of Article 3 ECHR.[44]

It can be argued that the application possibilities Article 3 ECHR are both broadened and limited due to the ECtHR's emphasis on the exceptional circumstances criterion in *D v UK*. It even seems like the ECtHR had already detected a particular vulnerability of the applicant but – consciously or unconsciously – chose not to use that term. However, the ruling in favor of a person with a medical condition under the *non-refoulement* principle remains exceptional. Subsequent cases have shown that claiming protection on the basis of a similarity with *D v UK* is difficult. The restrictive view of the ECtHR has, for instance, been confirmed in the European Commission of Human Rights case *Karara v Finland* and the ECtHR case *SCC v Sweden* which were considered to be inadmissible because they did not meet the required severity and real risk threshold.[45]

Another case dealing extensively with the exceptional circumstances threshold was the ECtHR case *Bensaid v UK*. In this case, the ECtHR dealt with a person suffering from schizophrenia who was supposed to be returned to Algeria despite the limited treatment possibilities in Algeria and the severity of symptoms such as hallucinations.[46] The ECtHR concluded that

the return of the applicant would not be a violation of Article 3 ECHR.[47] The fact that the conditions in Algeria were less favorable than in the UK was not considered to be decisive and did not meet the threshold of "exceptional circumstances" as in *D v UK*.[48] the ECtHR did not find a real risk for Article 3 ECHR to be violated but rather established a "high threshold" and the requirement of a "sufficiently real risk" for situations where the circumstances are not directly caused by the country of origin.[49] The case was therefore distinguished from *D v UK* on the grounds that the risk of exposing the applicant to a situation contrary to Article 3 ECHR was only "speculative" rather than "sufficiently real."[50]

The case of *Bensaid v UK* clearly highlights the limited application possibilities of *D v UK* and the absolute necessity of an "exceptional" nature of the case in order to be granted Article 3 ECHR protection for economic, social and cultural rights violations.[51] The door which had been opened in *D v UK* for economic refugees to possibly rely on Article 3 ECHR in situations of economic, social and cultural rights violations in the country of origin was closed again by a very strict application of the threshold of exceptionality in cases such as *Bensaid v UK*. The ECtHR confirmed its restrictive approach in subsequent cases such as *Arcila Henao v the Netherlands*, *Ndangoya v Sweden*, *Amegnigan v the Netherlands* and, most significantly, in *N v UK*.[52]

In *N v UK* the Ugandan applicant suffered from AIDS in a less severe stadium than the applicant in *D v UK*.[53] In a what seems to be very strict interpretation of the ECtHR, the ECHR maintained that medical treatment, as an economic, social and cultural rights, did not fall within Article 3 ECHR and states were hence not required to provide medical treatment under the ECHR.[54] The applicant, the ECtHR concluded, was not "at the present time critically ill" and future conditions would be mere speculations, which is why no exceptional circumstances could be found.[55] While previous cases allowed for some leeway with regard to the interpretation of exceptional circumstances, the case of *N v UK* clearly establishes a tremendously high threshold for Article 3 ECHR and maintains that there are no economic, social and cultural rights obligations for Council of Europe member states entailed in the ECHR. Based on this case, there seem to be little prospects for economic refugees to claim *non-refoulement* protection. The ruling in *N v UK* is still met with fierce criticism, even from judges of the ECtHR, as being too stringent and incorrect in light the object and purpose of the ECHR.[56]

Judging from the three above discussed cases *D v UK*, *Bensaid v UK* and *N v UK*, the prospects for economic refugees to rely on Article 3 ECHR on the basis of the right to health, let alone any other economic, social and cultural rights, seemed dim in the past. As Stoyanova rightly observes, all of the above cases merely dealt with "naturally occurring illness" rather than direct violations of economic, social and cultural rights through the acts or

omissions by states or non-state entities.[57] Due to the fact that extreme poverty is, in most cases, no personal but a more general condition, the real risk threshold of exceptional circumstances appears to be impossible to reach for any applicant. However, the case of *MSS v Belgium and Greece* provides a remarkable reinterpretation of *non-refoulment* in the light of vulnerability which may provide a possible opening for economic refugees to rely on Article 3 ECHR.

Towards a vulnerability criterion

MSS was an asylum-seeker from Afghanistan who entered the EU through Greece and moved on to Belgium after having been registered in the Eurodac system.[58] When Belgium wanted to return him to Greece on the basis of the EU's Dublin II Regulation (Regulation 2003/343/EC),[59] MSS filed a request for interim measures under Rule 39 of the ECtHR's Rules of Court, which was rejected.[60] MSS was consequently removed to Greece where he was subjected to degrading treatment in the form of conditions of "most extreme poverty" which gave rise to a violation of Article 3 ECHR.[61] Taking account of the ECtHR's statement in the previous case of *KRS v UK* to directly complain against Greece rather than against the refouling state, MSS consequently lodged a complaint against both, Belgium and Greece, on the basis of Article 2, 3 and 13 ECHR.[62]

In this case, the ECtHR clearly established for the first time that certain living conditions can amount to inhuman or degrading treatment in the context of Article 3 ECHR.[63] The ECtHR unanimously considered the detention conditions of asylum-seekers in Greece to violate Article 3 ECHR.[64] Moreover, the ECtHR considered the applicant's situation to be especially severe since, according to his own portrayal, he had lived on the streets for several months, having to search food and without access to sanitation.[65]

The ECtHR again established in *MSS v Belgium and Greece* that a certain level of severity needed to be met in all cases.[66] It distinguished and defined inhuman as compared to degrading treatment and came to the conclusion that the conditions MSS had been exposed to were of a "humiliating" nature within the meaning of Article 3 ECHR.[67] This is generally in line with the ECtHR's judgment in, among other cases, *Tyrer v UK* where it was held that for each individual case a certain degree of humiliation needed to be met.[68]

In *MSS v Belgium and Greece*, the ECtHR employed a more liberal severity standard compared to earlier judgments since it did not require "exceptional circumstances" but rather relied on "the general situation" to find a *refoulement* violation by Belgium.[69] In addition, the ECtHR did not – as in *D v UK, Bensaid v UK* and *N v UK* – only consider medical conditions to be of relevance but explicitly referred to the living conditions MSS had found himself in.[70]

The statement by the ECtHR that general living conditions can fall under Article 3 ECHR is particularly interesting with regard to the above discussion of whether the real risk requirement necessitates the applicant to be individually singled out.[71] Although in *MSS v Belgium and Greece* the applicant was in a situation similar to that of many other asylum-seekers, this did not preclude the ECtHR from judging that his living conditions violated Article 3 ECHR.[72] For economic refugees, this lowers the threshold of proving a real risk that they, individually, are in a more severe danger to be subjected to inhuman or degrading treatment due to extreme poverty than everyone else living in the country of origin.

Moreover, relying on its earlier judgment in *Budina v Russia*, the ECtHR held that not only state action but also inaction can lead to state responsibility.[73] Again, this is especially important for economic refugees who do not want to be refouled to conditions of extreme poverty since, in most cases, extreme poverty is rather related to the inaction than to the action of a state.[74] While public authorities were responsible for MSS's treatment in detention, they were only indirectly responsible for his general living conditions in poverty. Nevertheless, the ECtHR considered that due to the fact that the applicant was an asylum-seeker and thus especially vulnerable, Greece could be held responsible for its inaction.[75] Diluting the requirement to prove direct state action hence provides an additional opening of Article 3 ECHR protection for economic refugees.

However, special attention was paid to the importance of an asylum-seeker status which made the applicant part of an especially vulnerable group.[76] It remains unclear what exactly qualifies someone as vulnerable and whether economic refugees, who fall within the groups of undocumented migrants or rejected asylum-seekers rather than within the vulnerable group of asylum-seekers, would still be considered vulnerable.

As the initial quote of this paper already shows, *MSS v Belgium and Greece* introduced a radical change to the hitherto very hesitant and restrictive ECtHR approach. While *MSS v Belgium and Greece* clearly being the most outspoken case by the ECtHR in this respect so far, the antecedent cases of *AA v Greece* and *SD v Greece* in which the respective conditions of detention were found to be violations of Article 3 ECHR should be remembered as having provided the basis for a judgment as liberal as *MSS v Belgium and Greece*.[77] Never before, however, had living conditions of extreme poverty been found to give rise to state responsibility under Article 3 ECHR. Although not easily applicable to all cases, the ECtHR's reasoning in this respect is an essential step towards economic, social and cultural rights violation claims under Article 3 ECHR. The judgment widens the restrictive view of the preceding cases, such as *N v UK*, and seems to constitute a

possibility for economic refugees to claim protection from *refoulement* to situations of extreme poverty.[78]

The subsequent case of *Sufi and Elmi v UK* dealt with two Somali nationals whom the UK wanted to deport back to Somalia because of their criminal offences and the government's obligation "to protect the public from serious crime and its effects."[79] The ECtHR concluded that this deportation would be in violation of Article 3 ECHR.[80] In its judgment, the ECtHR referred to the ""dire" humanitarian conditions in Somalia as creating the risk of ill-treatment contrary to Article 3 [ECHR]."[81] In so doing, the ECtHR relied upon the previous cases of *Salah Sheekh v the Netherlands* and *N v UK* as compared to *MSS v Belgium and Greece* and came to the conclusion that *MSS v Belgium and Greece* was the proper standard to apply.[82]

The ECtHR explained its decision with the belief that the situation in Somalia was not only caused by the insufficient resources of the state but rather by the "direct and indirect actions of the parties to the conflict" which has caused "the breakdown of social, political and economic infrastructures."[83] Consequently, the ECtHR reaffirmed the standard it had established in *MSS v Belgium and Greece* that in any decision on the applicability of Article 3 ECHR, the ECtHR must take into account "an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame."[84]

Accordingly, the ECtHR concluded that both applicants would face the real risk of ill-treatment due to the "dire humanitarian conditions" if returned and that therefore a deportation of either of the two applicants to Somalia would be a violation of the *refoulement* prohibition entailed in Article 3 ECHR.[85] It appears as if this case established additional, more liberal real risk standards through neglecting the previous necessity of relying on both the exceptional circumstances and the vulnerability of the applicant. Hence, *Sufi and Elmi v UK* suggests that *MSS v Belgium and Greece* has indeed been a turning point in the ECtHR's application of Article 3 ECHR to cases of economic, social and cultural rights violations. It confirms a more liberal real risk standard which reasserts that poor living conditions can fall within the scope of inhuman or degrading treatment of Article 3 ECHR.

The more recent case of *SHH v UK*, however, may lead to a different conclusion. The applicant SHH was of Afghan nationality and applied for asylum in the UK on the basis of being afraid of the Hizb-i-Islami and because he had been left disabled after a rocket launch.[86] In *SHH v UK*, the ECtHR once again – and contrary to *Sufi and Elmi v UK* and *MSS v Belgium and Greece* – relied on the limited very exceptional circumstances standard of previous cases such as *N v UK*.[87]

The ECtHR argued that *SHH v UK* could be distinguished from *MSS v Belgium and Greece* because Afghanistan is, contrary to Greece, not a contracting state to the ECHR.[88] In this regard, the ECtHR also recalled the *Al-Skeini and Others v UK* case and emphasized that ECHR standards cannot be imposed on other, non-contracting states.[89] Moreover, SHH was not and would not be an asylum-seeker – and therefore not especially vulnerable – when in Afghanistan.[90] With regard to the *Sufi and Elmi v UK* case, the ECtHR remarked that this more lenient approach had only been adopted "because of the exceptional and extreme conditions prevailing in south and central Somalia."[91] Accordingly, in *SHH v UK* the ECtHR arrived at the conclusion that "the applicant's case does not disclose very exceptional circumstances as referred to in the applicable case-law [i.e. *N v UK*]."[92]

Hence, *SHH v UK* turns away from the more liberal standard applied in *MSS v Belgium and Greece* and *Sufi and Elmi v UK* and returns to the strict application of the real risk standard of only the most exceptional circumstances which denies that poor living conditions can fall within the scope of inhuman or degrading treatment of Article 3 ECHR.

However, the ECtHR seems to not yet agree on one singular standard to apply. Also the recent *Tarakhel v Switzerland* case reflects this inconsistency. In the case, eight asylum-seekers from Afghanistan, among which six children, appealed to Article 3 ECHR in order to not be sent back to Italy because they would allegedly remain "without accommodation or [be] accommodated in inhuman and degrading conditions" upon return to Italy.[93] The possibility to remain without accommodation was explicitly considered by the ECtHR and was found to not be unfounded.[94] The ECtHR concluded that, in order to not violate Article 3 ECHR, Switzerland was obliged to request and receive official assurances from the Italian government "that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together."[95] Moreover, the ECtHR held that state responsibility under Article 3 ECHR might be invoked for an "official indifference in a situation of serious deprivation."[96] In addition, the ECtHR established that, as a "particularly underprivileged and vulnerable "population group, asylum seekers require "special protection" under that provision [article 3]."[97] Not only asylum-seekers but also children are considered to be extremely vulnerable by the ECtHR.[98] However, individual vulnerability is not enough for invoking the *non-refoulement* principle. Rather, the ECtHR considers it necessary to examine "the applicant's individual situation in the light of the overall situation."[99] Remarkably, the exceptional circumstances threshold of earlier cases was not mentioned at all in *Tarakhel v Switzerland*.

4. Conclusion

Based on the three pre- and three post-*MSS v Belgium and Greece* cases it can be observed that the ECtHR's approach towards an application of Article 3 ECHR to cases of extreme poverty is still ambiguous and no final conclusion can be drawn, yet, as to which approach is most likely to become the dominant view.

Contrasting the cases of *Sufi and Elmi v UK* and *SHH v UK* leaves some ambiguity as to which standard should apply to economic refugees relying on Article 3 ECHR for not being returned to a situation of extreme poverty. While the 2011 case of *Sufi and Elmi v UK* leans into the direction of *MSS v Belgium and Greece*, the 2013 case of *SHH v UK* once again returned to the stricter exceptional circumstances standard of earlier cases such as *N v UK* and even denies the indirect application of Article 3 ECHR to a non-member state of the Council of Europe. This ambiguous application by the ECtHR makes it impossible to draw a final conclusion as to which standard is the one that will or should be followed in the future.

With the exception of *SHH v UK*, it can be concluded that since *MSS v Belgium and Greece* there has been an increasing recognition of vulnerability as relevant criterion to be applied in addition to, or possibly even as a substitute for, the previously applied exceptional circumstances standard. The burden of proof for vulnerability seems to be lower than for the exceptional circumstances threshold and more attention seems to be paid to the general environment and situation in the country of origin instead of only to the individual circumstances of the applicant. While in *D v UK* the ECtHR held that it is primarily the individual situation of the applicant and not the conditions in the country of origin that is decisive, the ECtHR even explicitly remarked in more recent cases such as *Tarakhel v Switzerland* that the individual situation has to be viewed in light of the overall situation. It is clear that the concept of vulnerability has a broader scope than the previous exceptional circumstances standard but it remains to be seen how broad it can be interpreted and what its limits are with regard to so-called vulnerable groups other than asylum-seekers or children.

For economic refugees fleeing extreme poverty this means that, following *MSS v Belgium and Greece* and *Tarakhel v Switzerland*, the most clearly established economic, social and cultural rights-related state obligations under Article 3 ECHR have been found in deportation issues of the Dublin system and within the Council of Europe area. As the contrast between *Sufi and Elmi v UK* and *SHH v UK* shows, there is little probability that similar violations will soon be found by the ECtHR with regard to deportations to countries outside of the Council of Europe area. Moreover, the ECtHR has hitherto only found *non-refoulement* violations under Article 3 ECHR in

relation to the right to health care and, to a more limited extent, with regard to the right to shelter. Whether other economic, social and cultural rights, such as the right to food or the right to employment, could possibly also fall within the scope of the *non-refoulement* principle seems highly unlikely but not completely impossible at this point.

NOTES

1. Although not strictly a legal concept, the term economic refugee was chosen because it most clearly refers to the main subject of this study: persons fleeing their home country due to economic, social and cultural rights violations. It is no evaluative statement regarding their right to protection or refugee status.

2. ECtHR, Grand Chamber, MSS v Belgium and Greece, Merits, 21.01.2011, Application no. 30696/09, paragraphs 254 and 263.

3. Ibid. Convention for the Protection of Human Rights and Fundamental Freedoms, 04.11.1950, Council of Europe, ETS 5, Article 3.

4. The principle of *non-refoulement* prohibits states to return individual to situations in which their human rights might be violated.

5. Vienna Declaration and Programme of Action, 12.07.1993, World Conference on Human Rights, UN Document A/CONF.157/23, paragraph 5.

6. Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, 18.07.2012, Human Rights Council, UN Document A/HRC/21/39, 4.

7. Also in the case of *MSS v Belgium and Greece*, the ECtHR only refers indirectly to economic, social and cultural rights and mentions them explicitly only in paragraph 254 while for the rest of its analysis – for instance in paragraphs 247, 366, 367 and 401 – referring to them in a more holistic way in relation to general living conditions. MSS v Belgium and Greece, paragraphs 247, 254, 366, 367 and 401.

8. Convention Relating to the Status of Refugees, 28.07.1951, UN, Treaty Series, vol. 189, p. 137, Articles 1(A)(2) and 33.

9. Pirjola, Jari (2007), "Shadows in Paradise – Exploring Non-Refoulement as an Open Concept," *International Journal of Refugee Law* 19(4): 639.

10. Ibid.

11. See, e.g. Foster, Michelle (2009), "*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complemnetary Protection in International Human Rights Law," *New Zealand Law Review* 2: 257–310. Hesselman, Marlies (2013), "Sharing International Responsibility for Poor Migrants: An Analysis of Extra-territorial Socio-Economic Human Rights Law," *European Journal of Social Security* 15(2): 187–208.

12. Council Directive 2011/95/EU, 20.12.2011, Council of the European Union, Official Journal L 337, 9–26.

13. See, for instance, Weissbrodt, David, and Isabel Hörtreiter (1999), "The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties," *Buffalo*

Human Rights Law Review 5: 28ff, and Stoyanova, Vladislava (2011), "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights," *Goettingen Journal of International Law* 3(2): 789ff.

14. Peroni, Lourdes, and Alexandra Timmer (2013), "Vulnerable Groups: The Promise of an Emerging Concept in the European Human Rights Convention Law," *International Journal of Constitutional Law* 11(4): 1080.

15. ECtHR, Court (Chamber), Airey v Ireland, Merits, 09.10.1979, Application no. 6289/73, paragraph 26. Stoyanova, "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights," 803.

16. Hutchinson, Terry, and Nigel Duncan (2012), "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17(1): 84.

17. ECtHR; Court (Plenary), Soering v UK, Merits, 07.07.1989, Application no. 14038/88, paragraph 87 and 88. The ECtHR reaffirmed this interpretation, for instance, in ECtHR, Court (Plenary), Cruz Varas v Sweden, Merits, 20.03.1991, Application no. 15576/89, paragraph 99 and in ECtHR, Court (Chamber), Vilvarajah and Others v UK, Merits, 26.09.1991, Application no. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, paragraph 108. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 27f.

18. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 27f.

19. The absolute character of Article 3 ECHR has repeatedly been established by the ECtHR in, for instance, *Soering v UK*, *Chahal v UK* and *Ahmed v Austria*. Soering v UK, paragraph 88. ECtHR, Grand Chamber, Chahal v UK, Merits, 15.11.1996, Application no. 22414/93, paragraph 78. ECtHR, Court (Chamber), Ahmed v Austria, Merits, 17.12.1996, Application no. 25964/94, paragraph 40. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 36f. Goodwin-Gill, Guy, and Jane McAdam (2007), *The Refugee in International Law*. Oxford University Press, Oxford, 311.

20. ECtHR, Court (Plenary), Ireland v UK, Merits, 18.01.1978, Application no. 5310/71, paragraph 162. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 30.

21. Ireland v UK, paragraph 167. ECtHR, Court (Chamber), Tyrer v UK, Merits, 25.04.1978, Application no. 5856/72, paragraph 30. Van Dijk, Pieter, and Godefridus J.H. van Hoof (1998), *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer Law International, 311. Röhl, Katharina (2005), "Fleeing Violence and Poverty: Non-Refoulement Obligations under the European Convention of Human Rights," Working Paper No. 111, UNHCR Evaluation and Policy Unit, Geneva, January, 15.

22. ECtHR, Second Section, Peers v Greece, Merits, 19.04.2001, Application no. 28521/95, paragraph 75. Röhl, "Fleeing Violence and Poverty," 15.

23. Tyrer v UK, paragraph 32. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 31.

24. Tyrer v UK, paragraph 30, 32, 35. ECtHR, Court (Chamber), Costello-Roberts v UK, Merits 26.03.1993, Application no. 13134/87, paragraph 8, 9, 31, 32. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 31.

25. Soering v UK, paragraph 88. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 34.

26. ECtHR; Grand Chamber, Saadi v Italy, Merits, 28.02.2008, Application no. 37201/06, paragraphs 124-125. ECtHR, Grand Chamber, N v UK, Merits, 27.05.2008, Application no.26565/05, paragraph 30.

27. Chahal v UK, paragraphs 86 and 96. See also, for example, ECtHR, Court (Chamber), Ahmed v Austria, paragraph 42f. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 34.

28. ECtHR, Fourth Section, Jabari v. Turkey, 11.10.2000, Application no. 40035/98, paragraph 40. See, for example, *Cruz Varas and Others v Sweden*, where the ECtHR rejected the applicants claim on the basis of the "improvements in the political situation" in Chile. ECtHR, Court (Plenary), Cruz Varas v Sweden, paragraph 80. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 34f.

29. ECtHR, Third Section, Salah Sheekh v the Netherlands, Merits, 11.01.2007, Application no. 1948/04, paragraph 136.

30. Vilvarajah and Others v UK, paragraphs 9–66, 111. Weissbrodt and Hörtreiter, "The Principle of *Non-refoulement*," 35.

31. Chahal v UK, paragraph 96. Vilvarajah and Others v UK, paragraph 108.

32. Vilvarajah and Others v UK, paragraph 111.

33. Ibid.

34. Salah Sheekh v the Netherlands, paragraph 148.

35. Ibid.

36. Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 311. Röhl, "Fleeing Violence and Poverty," 15.

37. See, for instance, Turner, Bryan S. (2006), *Vulnerability and Human Rights*, University Park, PA: Pennsylvania State University Press. Albertson Fineman, Martha (2008), "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20(1): 1–23. Neal, Mary (2012), "Human Dignity and Vulnerable Subjecthood," *Liverpool Law Review* 33: 177–200. Peroni and Timmer, "Vulnerable Groups," 1056–1085. Da Lomba, Sylvie (2014), "Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights," *European Journal of Health Law* 21: 339–364.

38. D v UK, paragraphs 6–12.

39. Ibid., paragraph 53.

40. Ibid., paragraph 54.

41. Ibid. Arai-Takahashi, Yutaka (2002), "Uneven, but in the Direction of Enhanced Effectiveness – A Critical Analysis of Anticipatory Ill-Treatment under Article 3 ECHR," *Netherlands Quarterly of Human Rights* 20(1): 12.

42. D v UK, paragraph 53. Stoyanova, "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights," 799.

43. D v UK, paragraph 54. Arai-Takahashi, "Uneven, but in the Direction of Enhanced Effectiveness," 12.

44. D v UK, paragraph 49. Stoyanova, "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights," 799.

45. In *Karara v Finland*, the European Commission of Human Rights decided that the applicant's AIDS illness had not yet reached the required threshold of severity as compared to *D v UK* and *BB v France* which is why he could be send back to Uganda. European Commission of Human Rights, Karara v Finland,

Decision on Admissibility, 29.05.1998, Application no. 40900/98. Similarly, in *SCC v Sweden*, the ECtHR declared the application of the AIDS patient SCC to be inadmissible because, again, her condition did not yet meet the necessary threshold of severity and she could receive the same medical treatment in Zambia as she could have received in Sweden. ECtHR, First Section, SCC v Sweden, Decision on Admissibility, 15.02.2000, Application no. 46553/99. N v UK, paragraph 36f.

46. ECtHR, Third Section, Bensaid v UK, Merits, 06.05.2001, Application no. 44599/98, paragraphs 7, 10, 19, 40. Arai-Takahashi, "Uneven, but in the Direction of Enhanced Effectiveness," 12.

47. Bensaid v UK, paragraph 41.

48. D v UK, paragraph 53. Bensaid v UK, paragraphs 36–40. Stoyanova, Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights, 800.

49. Bensaid v UK, paragraphs 7, 10, 19, 40. Arai-Takahashi, "Uneven, but in the Direction of Enhanced Effectiveness," 12.

50. Bensaid v UK, paragraph 39f. Arai-Takahashi, "Uneven, but in the Direction of Enhanced Effectiveness," 12.

51. D v UK, paragraph 53.

52. In *Arcila Henao v the Netherlands*, the ECtHR once more made a distinction of the AIDS-suffering applicant whose illness had not reached a critical stage from the applicants in *D v UK* and *BB v France*. Arcila Henao's situation did thus not meet the requirement of exceptional circumstances, which is why he could be returned to Colombia and his application was found to be inadmissible. ECtHR, Second Section, Arcila Henao v the Netherlands, Decision on Admissibility, 24.06.2003, Application no. 13669/03. On the basis of the same reasoning, the applicant in *Ndangoya v Sweden*, who also suffered from AIDS not yet in a terminal stage, was considered to be able to return to Tanzania, which was why the application was considered to be inadmissible, as well. ECtHR, Fourth Section, Ndangoya v Sweden, Decision on Admissibility, 22.06.2004, Application no. 17868/03. Also similar was the case of *Amegnigan v the Netherlands* where the applicant could be returned to Togo since his AIDS disease has equally not reached a critical stage and no exceptional circumstances where thus at stake. ECtHR; Third Section, Amegnigan v the Netherlands, Decision on Admissibility, 25.11.2004, Application no. 25629/04. N v UK, paragraphs 39–41.

53. N v UK, paragraphs 8–14, 50–51.

54. Ibid., paragraph 44. Clayton, Gina (2011), "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," *Human Rights Law Review* 11(4): 768f.

55. N v UK, paragraphs 8–14, 50–51.

56. See, for instance, ECtHR, Grand Chamber, S. J. v Belgium, Merits (struck out), 19.03.2015, Application no. 70055/10, dissenting opinion judge Pinto de Albuquerque.

57. Stoyanova, "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights," 801.

58. MSS v Belgium and Greece, paragraph 10f.

59. Previously to the Dublin III Regulation, Dublin II determined "the criteria and mechanisms for determining the Member State responsible for examining an

application for asylum lodged in one of the Member States by a third-country national." Council Regulation 363/2003/EC, 18.02.2003, Council of the EU, Official Journal L 30, 1–10, Article 1.

60. Rule 39 of the ECtHR's Rules of Court holds: "The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." ECtHR, Rules of Court, ECtHR, 01.09.2012, at <http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf> (accessed on 29.04.2013). The ECtHR later justified its rejection on the basis that it was lacking sufficient information of the case and the fact that a quick decision had to be taken. MSS v Belgium and Greece, paragraphs 32 and 355.

61. With "most extreme poverty" the ECtHR referred to the fact that he was "unable to cater for his most basic needs: food, hygiene and a place to live." MSS v Belgium and Greece, paragraphs 254, 263 and 367.

62. ECHR, Articles 2 (right to life), 3 (prohibition of torture) and 13 (right to effective remedy). MSS v Belgium and Greece, paragraph 3. In *KRS v UK* the applicant had lodged a complaint against the UK instead of Greece, which was why no interim measures were granted. The ECtHR suggested that the application "should be the subject of a Rule 39 application lodged with the Court against Greece following his return there, and not against the United Kingdom." ECtHR, Fourth Section, KRS v UK, Decision on Admissibility, 02.12.2008, Application no. 32733/08. MSS, on the contrary, had already been returned to Greece and had lodged his claim against both Greece and Belgium, which was exactly what the ECtHR had recommended in *KRS v UK*. MSS v Belgium and Greece, paragraph 33. Clayton, Asylum Seekers in Europe: M.S.S. v Belgium and Greece, 761.

63. Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," 765.

64. MSS v Belgium and Greece, paragraphs 3 and 10 of the *dispositif*. Costello, Cathryn (2012), "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored," *Human Rights Law Review* 12(2): 321.

65. MSS v Belgium and Greece, paragraph 254. Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," 767.

66. MSS v Belgium and Greece, paragraphs 219 and 254.

67. The ECtHR established that a treatment was "inhuman" when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering" and "degrading" when it "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance". Ibid., paragraphs 220 and 263f.

68. See Tyrer v UK, paragraph 32; Peers v Greece, paragraph 74 and ECtHR, Fourth Section, Pretty v UK, 29.04.2002, Application no. 2346/02, paragraph 52. MSS v Belgium and Greece, paragraph 220. Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 311. Röhl, "Fleeing Violence and Poverty," 15.

69. MSS v Belgium and Greece, paragraph 324. Compare, for instance, D v UK, paragraph 53; Bensaid v UK, paragraphs 36–40; N v UK, paragraphs 8–14, 50–51.

70. MSS v Belgium and Greece, paragraphs 263 and 367. D v UK, paragraphs 49–54. Bensaid v UK, paragraph 36. N v UK, paragraph 50.

71. MSS v Belgium and Greece, paragraph 263. See also the cases of *Vilvarajah and Others v UK* and *Salah Sheekh v the Netherlands.*

72. The ECtHR considered general information, such as reports from the UNHCR and other international organizations as well as similar cases such as *SD v Greece* and *AA v Greece* to support the applicants claim. ECtHR, First Section, SD v Greece, Merits, 11.06.2009, Application no. 53541/07. ECtHR, First Section, AA v Greece, Merits, 22.07.2010, Application no. 12186/08. MSS v Belgium and Greece, paragraphs 160ff and 222. Costello, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored," 321. Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," 765.

73. ECtHR, First Section, Budina v Russia, Decision on Admissibility, 18.06.2009, Application no. 45603/05. MSS v Belgium and Greece, paragraph 253. Clayton, Asylum Seekers in Europe: M.S.S. v Belgium and Greece, p.767.

74. Inaction of the state manifests itself, for instance, in a lacking social security system, insufficient poverty relief programs, an unsatisfactory fight against corruption, a poor political responsibility and many other structural flaws. Sachs, Jeffrey (2005), *The End of Poverty: How We Can Make It Happen in Our Lifetime.* London: Penguin Books, 226f.

75. MSS v Belgium and Greece, paragraph 263.

76. MSS v Belgium and Greece, paragraph 251. Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," 767.

77. *SD v Greece* dealt with the detention conditions of the asylum-seeker SD which amounted to degrading treatment in violation of Article 3 ECHR such as the lack of hygiene products, blankets and clean sheets and not having been allowed to go outside. SD v Greece, paragraphs 49–54. Similarly, *AA v Greece* primarily dealt with the lack of medical assistance during the detention of asylum-seeker as well as with overcrowding and dirty conditions all of which was found to be degrading treatment contrary to Article 3 ECHR. AA v Greece, paragraph 222. Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," 763.

78. Clayton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece," 769.

79. ECtHR, Fourth Section, Sufi and Elmi v UK, 28.06.2011, Application nos. 8319/07 and 11449/07, paragraphs 11–21.

80. Ibid., paragraph 259.

81. Ibid., paragraph 259.

82. Ibid., paragraphs 278–283.

83. Ibid., paragraph 282.

84. MSS v Belgium and Greece, paragraph 254. Sufi and Elmi v UK, paragraph 283.

85. Sufi and Elmi v UK, paragraphs 292, 304, 312.

86. ECtHR, Fourth Section, SHH v UK, Merits, 29.01.2013, Application no. 60367/10, paragraphs 7 and 8.

87. N v UK paragraph 42. SHH v UK, paragraph 75.

88. SHH v UK, paragraph 90.

89. ECtHR, Grand Chamber, Al-Skeini and Others v UK, Merits, 07.07.2011, Application no. 55721/07, paragraph 141. SHH v UK, paragraph 90.

90. SHH v UK, paragraph 65, 90.

91. SHH v UK, paragraph 91.

92. Ibid., paragraph 95.

93. ECtHR, Grand Chamber, Tarakhel v Switzerland, Merits, 04.11.2014, Application no. 29217/12, paragraph 3.

94. Ibid., paragraph 115.

95. Ibid., paragraph 122.

96. Ibid., paragraph 98.

97. Ibid., paragraph 118.

98. Ibid., paragraphs 99 and 119.

99. Ibid., paragraph 101.

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