EUROPEAN COURT OF HUMAN RIGHTS
Paposhvili v. Belgium (Application no. 41738/10)

Third Party Intervention – Human Rights Center of Ghent University

These written comments are submitted by the Human Rights Center of Ghent University in Belgium, pursuant to leave granted by the European Court of Human Rights in its letter of 3 July 2015, and in accordance with rule 44 § 3 of the Rules of the Court.

Executive Summary

The Human Rights Center of Ghent University respectfully submits that *Paposhvili v. Belgium* offers a momentous opportunity to depart from the unduly restrictive approach set by *N. v. United Kingdom*[1] in the Article 3 case law concerning the expulsion of the seriously ill.[2] The first part of the intervention draws attention to the problematic bases used to justify the application of an exceptionally high threshold in this area of Article 3 jurisprudence. The second part argues that this threshold and its restrictive application are difficult to reconcile with the absolute character of the Article 3 prohibition and suggests an alternative test focused on the adequacy of available treatment and on applicants' actual access to such treatment in the receiving state. The third part respectfully invites the Court to require procedural duties from domestic decision makers, in particular, obtaining assurances from the receiving state in order to ensure that the Convention effectively protects against treatment proscribed by Article 3.

I. Expulsion of the Seriously Ill: The Problematic Bases for the Exceptionally High Threshold

The Court currently applies a particularly high threshold in its Article 3 case law concerning the expulsion of seriously ill non-nationals. A significant reduction in their life expectancy in the receiving state "is not sufficient in itself to give rise to breach of Article 3."[3] Their expulsion "to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case."[4] As a result, a breach of Article 3 arises only where the humanitarian considerations against the expulsion are "compelling."[5]

The standard – as set in *N. v. the United Kingdom* and known as the "very exceptional circumstances" test – is so high that no applicant to date has passed it. The only applicant who has won a case of this type was the one in *D. v. the United Kingdom* back in 1997.[6] The Court

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[1] *N. v. the United Kingdom* (GC), 27 May 2008.
[2] A number of judges have followed *N.* with reluctance and called for its adjustment. See joint partly concurring opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto de Albuquerque in *Yoh-Ekale Mwanje v. Belgium*, 20 December 2011. Others have gone further and dissented. See dissenting opinion of Judge Power-Forde in *S.J. v. Belgium*, 27 February 2014; dissenting opinion of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015; dissenting opinion of Judge Pinto de Albuquerque in *S.J. v. Belgium* (GC), 19 March 2015; and partly dissenting opinion of Judge Lemmens in *Tatar v. Switzerland*, 14 April 2015.
[3] *N. v. the United Kingdom* (GC), 27 May 2008. para. 42.
[4] Ibid.
[5] Ibid.
[6] *D. v. the United Kingdom*, 2 May 1997.

has offered two main reasons to defend the application of the high threshold. The first reason is that the alleged future harm would emanate from naturally occurring illnesses and the lack of sufficient resources in the receiving state. The second is the need to balance the applicant's treatment against the financial burden on the expelling state for health care provision. In this first part of our intervention, we respectfully submit that these bases cannot convincingly be squared with the absolute nature of Article 3 and its fundamental importance in the Convention.

A. Obscuring the Contracting State's Responsibility

In *N.*, the Grand Chamber decided to maintain the high threshold applied in its Article 3 cases concerning expulsion of the seriously ill because "the alleged future harm would emanate … from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."[7] In formulating the principles this way, *N.* moves away from the "*Pretty* threshold,"[8] which sheds light precisely on the responsibility of the Contracting state in such cases. *Pretty v. the United Kingdom* states that suffering from illness "may be covered by Article 3, where it is, or risks being, *exacerbated by treatment*, whether *flowing from* conditions of detention, *expulsion* or other measures, *for which the authorities can be held responsible*."[9] The *Pretty* formulation thus stands in contrast with the Grand Chamber's emphasis in *N.* that the future harm would emanate from natural causes and the lack of resources in the receiving country to deal with them. Whereas *Pretty* explains why and to what extent the expelling state can be held responsible, *N.* obscures the Contracting state's responsibility.[10]

In line with *Pretty*, we respectfully submit that the Contracting state may be held responsible for the *exacerbation* of an ill applicant's suffering flowing from expulsion. The crucial act that would provoke an applicant's death and acute suffering is not the lack or the lower quality of medical treatment in the receiving state.[11] The crucial act, the one that will determine whether the applicant dies earlier and experiences acute suffering, is the act of knowingly sending her/him to such fate.[12] That is to say, what engages the Contracting state's responsibility under the Convention is the deliberate expulsion to a place where it knows that vital treatment would not be available to the applicant or the deliberate exposure to a real risk of death and suffering that reaches the Article 3 threshold.[13]

Where substantial grounds have been shown for believing that the person, if deported or extradited, would face a real risk of being subjected to treatment contrary to Article 3, this provision implies "the obligation not to expel" the person to the receiving or requesting state.[14] This is because of "the serious and irreparable nature of the alleged suffering risked" and to

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[7] *N. v. the United Kingdom* (GC), 27 May 2008, para. 43.
[8] See joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* (GC), 27 May 2008, para. 5 and dissenting opinion of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015, para. 3.
[9] *Pretty v. the United Kingdom*, 29 April 2002, para. 52. Emphasis added. Referring to *D.*, the Court adds: "The responsibility of the State would have been engaged by its act ('treatment') of removing him in those circumstances." Ibid. para. 53.
[10] See Brems, Eva, "Thank you, Justice Tulkens: A comment on the dissent in N v UK," 14 August 2012, Strasbourg Observers Blog.
[11] See dissenting opinion of Judge Power-Forde in *S.J. v. Belgium*, 27 February 2014, pp. 40-41.
[12] Ibid. p. 41.
[13] Ibid.
[14] See e.g., *Chahal v. the United Kingdom* (GC), 15 November 1996, para. 74.

ensure the effectiveness of the Article 3 safeguard.[15] Therefore, and given the absolute nature of Article 3, the prohibition of expulsion should equally apply in cases concerning seriously ill people if the minimum level of severity is reached.[16] As the Grand Chamber has most recently noted in *Tarakhel v. Switzerland*, "[t]he source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal."[17]

B. Balancing Suffering Against Budgetary Considerations

The second problematic basis for applying a particularly high Article 3 threshold can be found in the part of *N.* that states that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[18] This search for a fair balance led the Court to rule that "Article 3 does not place an obligation on the Contracting State to alleviate [social and economic differences between countries] through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction."[19] According to the Court, providing such health care would "place too great a burden on the Contracting States."[20]

The references to fair balance and the burden on Contracting states call into question the absolute character of the Article 3 prohibition. As the *N.* dissenters point out, this brings back balancing in Article 3,[21] which had been explicitly rejected by the Court as a threat to the absolute character of this provision in *Saadi v. Italy* adopted just three months earlier.[22] The same applies to the assumption implicit in this part of the *N.* reasoning that finding a violation in cases concerning applicants afflicted with serious illnesses would encourage a "massive influx of medical migrants"[23] or "open up the floodgates to medical immigration."[24]

We respectfully argue that, unless the Court amends the current bases for maintaining an exceptionally high threshold, its Article 3 case law concerning the expulsion of seriously ill applicants will continue to exhibit "cracks in the absolute prohibition of Article 3."[25] If the Court is to keep consistency with its wider Article 3 expulsion case law and to uphold the absolute nature of this guarantee, the sole and critical question when examining the responsibility of the Contracting state should be whether "substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to

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[15] *Soering v. the United Kingdom* (Plenary), 7 July 1989, para. 90.
[16] See dissenting opinion of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015, para. 3.
[17] *Tarakhel v. Switzerland* (GC), 4 November 2014, para. 104.
[18] *N. v. the United Kingdom* (GC), 27 May 2008, para. 44.
[19] Ibid.
[20] Ibid.
[21] Joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* (GC), 27 May 2008, paras. 7-8.
[22] *Saadi v. Italy* (GC), 28 February 2008, para. 138.
[23] Dissenting opinion of Judge Pinto de Albuquerque in *S.J. v. Belgium* (GC), 19 March 2015, para. 7.
[24] Joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* (GC), 27 May 2008, para. 8.
[25] Smet, Stijn, "The 'Absolute' Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly A Question of Scope Only?" in E. Brems and J. Gerards (eds.) SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS (Cambridge University Press, 2013) at 289.

treatment contrary to Article 3."[26] The criterion should thus be whether the person would undergo pain and suffering that reaches the Article 3 threshold.

II. Flaws of the "Very Exceptional Circumstances" Test and Alternative Test

A. Incompatibility of Current Test with the Absolute Prohibition of Article 3

The very exceptional circumstances that the Court seminally found in *D. v. the United Kingdom* were the result of an assessment of the applicant's health condition both prior to and upon expulsion. The Court found that, prior to the intended expulsion, the applicant was "in the advanced stages of a terminal and incurable illness."[27] It also found that, upon expulsion, the applicant would find himself without prospect of medical care and family support in the receiving state.[28]

In the post-*D* case law, the Court has not excluded that "there may be other very exceptional cases where the humanitarian considerations are equally compelling" as in *D.*[29] In practice, however, the Court has refused further extension of the exceptional circumstances that *D.* represents. In *N.*, for instance, the Grand Chamber accepted "that the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda" [30] but concluded that she was not "at the present time critically ill"[31] and that she was actually "stable" and "fit to travel."[32]

In this way, *N.* has come to set a threshold that several separate opinions have subsequently found "very high"[33] or "extreme" and hardly compatible with the spirit of Article 3.[34] Being in the last stages of a terminal illness and unfit to travel are obviously relevant considerations, which may raise *per se* an issue under Article 3 in the event of expulsion.[35] However, being medically stable and fit to travel should arguably not be a determining criterion in allowing expulsion. Rather, the inquiry should involve a thorough assessment of the risk of ill treatment stemming from the discontinuation of medical treatment in the receiving state. As the Court noted in *D.*, considerations "must be seen as wider in scope than the question whether or not the applicant is fit to travel."[36]

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[26] See *Saadi v. Italy* (GC), 28 February 2008, para. 125.
[27] *D. v. the United Kingdom*, 2 May 1997, para. 51.
[28] Ibid. para. 52.
[29] *N. v. the United Kingdom* (GC), 27 May 2008, para. 43.
[30] Ibid. para. 50.
[31] Ibid.
[32] Ibid. para. 47. See also *S.J. v. Belgium*, 27 February 2014, para. 124.
[33] Concurring opinion of Judge Lemmens, joined by Judge Nussberger, in *S.J. v. Belgium*, 27 February 2014, p. 37.
[34] Joint partly concurring opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto de Albuquerque in *Yoh-Ekale Mwanje v. Belgium,* 20 December 2011, para. 6. See also dissenting opinion of Judge Power-Forde in *S.J. v. Belgium*, 27 February 2014, p. 42: "Dans les affaires de type *N.*, l'obligation de protection contre un risque réel de traitement inhumain ou dégradant ne naît que si la maladie du requérant a atteint le stade terminal. Une application plus humaine du critère des 'circonstances exceptionnelles' s'impose d'urgence…".
[35] See joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* (GC), 27 May 2008, para. 20 ("deportation of an 'applicant on his or her death bed' would *in itself* be inconsistent with the absolute provision of Article 3 of the Convention."
[36] *D. v. the United Kingdom*, 2 May 1997, para. 53.

In its post-*D* case law, the Court has largely failed to engage in such a thorough assessment. In particular, whether adequate medical care and family support would be effectively available to the applicant in the receiving state has not carried rigorous consideration. The assessment of these conditions has largely remained one of theoretical availability rather than one of actual access for the applicant in question. Thus, the assessment of a real risk upon expulsion in the receiving state has generally been limited to whether medical treatment is "in principle"[37] or "in general"[38] available. In *N.*, for example, the Grand Chamber simply admitted that this part of the assessment "must involve a certain degree of speculation."[39]

As a result, applicants' expulsions have sometimes been found compatible with Article 3 despite doubts about their possibility of obtaining appropriate treatment[40] or despite the lack of information on whether the required medicines were available in the receiving state.[41] Some dissenters have – in our opinion rightly so – criticized the majority's reliance on "general (and unsubstantiated) assumptions"[42] or their "very theoretical assessment of the situation."[43] Dissenting in the Grand Chamber judgment in *S.J. v. Belgium*, Judge Pinto de Albuquerque has critiqued *N.* by noting how "purely speculative assumptions" about future care and support in the receiving state water down the legal force of Article 3.[44] The fact that N died within a few months after her return to Uganda[45] illustrates the highly speculative character of the Grand Chamber's assessment of her situation in the receiving state.

We respectfully submit that, by adopting a less extreme threshold under Article 3, coupled with a rigorous assessment of applicants' actual access to adequate medical care in the receiving state, the Court could prevent such regrettable situations from arising in the future. *Paposhvili v. Belgium* thus provides the Court with the occasion to adopt a less extreme threshold by developing an alternative test compatible with the absolute nature of the prohibition and the fundamental importance of Article 3. *Paposhvili* further offers the Court the opportunity to bring its case law concerning the expulsion of the seriously ill more in line with its wider Article 3 expulsion and extradition case law. According to this wider case law, the Court's examination of the existence of a real risk "must necessarily be a rigorous one."[46] In particular, in determining whether there is a risk of ill-treatment, "the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances."[47]

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[37] See e.g., *Arcila Henao v. the Netherlands*, 24 June 2003, p. 8 and *Amegnigan v. the Netherlands*, 25 November 2004, p. 9.
[38] See e.g., *S.B. v. Finland*, 24 June 2014, para. 37.
[39] *N. v. the United Kingdom* (GC), 27 May 2008, para. 50. This was "particularly in view of the constantly evolving situation as regards the treatment of HIV and Aids worldwide". Ibid.
[40] See dissenting opinion of Judge Pinto de Albuquerque in *S.J. v. Belgium* (GC), 19 March 2015, para. 2 *in fine* (referring to *N.*).
[41] See *S.J. v. Belgium*, 27 February 2014, para. 122 and dissenting opinion of Judge Power-Forde in the case, p. 40.
[42] See dissenting opinion of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015, para. 4.
[43] See partly dissenting opinion of Judge Lemmens in *Tatar v. Switzerland*, 14 April 2015, para. 4.
[44] Dissenting opinion of Judge Pinto de Albuquerque in *S.J. v. Belgium* (GC), 19 March 2015, para. 7.
[45] See ibid. para. 2 and dissenting opinion of Judge Power-Forde in *S.J. v. Belgium*, 27 February 2014, p. 39.
[46] *Saadi v. Italy* (GC), 28 February 2008, para. 128.
[47] Ibid. para. 130.

B. An Alternative Test Compatible with Article 3 Absolute Prohibition

Given that seriously ill applicants will inevitably suffer some pain and suffering from their illnesses, the relevant question should be whether "the difference between the pain and suffering [they face] in the sending state and what [they] would face in the receiving state is sufficient to bring Article 3 into play."[48] The relevant inquiry is thus *the extent* to which applicants' pain and suffering would increase if they were expelled to the receiving state.[49]

Applicants' conditions, though serious, may be well controlled in the expelling state.[50] Yet the (increased) likelihood of a *relapse* if treatment were discontinued or reduced in the receiving state may engage Article 3 if the suffering and pain associated with such relapse reaches this provision's threshold.[51] The aim should be to determine whether the reduction of applicants' life expectancy and deterioration of quality of life would be such as to reach the level of severity required by Article 3.[52]

The determination of whether there would be a real risk that applicants' expulsion would run counter to Article 3 should thus be made in view of their "present medical condition"[53] in the expelling state and of their access to medical treatment and family support in the receiving state. In what follows, we respectfully suggest two sets of considerations that may guide the Court's assessment of applicants' situation in the receiving state. The first set concerns the *adequacy* of the medical treatment applicants would obtain in the receiving state and the second their *actual access* to such treatment. We respectfully invite the Court to assess the risk of treatment contrary to Article 3 in serious-illness expulsion cases by *thoroughly* examining such adequacy and access.

1. Adequacy of Available Medical Treatment in Receiving State

In assessing available medical assistance, the issue is not whether the facilities in the receiving state will be inferior to those available in the Contracting state. Some degree of difference is to be expected and compatible with Article 3. In cases concerning medical care in prison, for example, the Court does not interpret Article 3 as securing medical facilities of the same level as the ones available outside the prison.[54] Instead, the Court examines the "adequacy" of medical care offered to the prisoner in question. While admitting that determining such "adequacy" is a difficult task,[55] the Court has used a flexible-but-compatible-with-human-dignity reasoning. The standard is usually formulated as follows:

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[48] Smet, *op. cit.* at 289.
[49] Ibid.
[50] See e.g., *Aswat v. the United Kingdom*, 16 April 2013, para. 51.
[51] See e.g., ibid. paras. 51 and 57 and *Bensaid v. the United Kingdom*, 6 February 2001, para. 37.
[52] *D.* offers guiding factors such as further reduction of an "already limited life expectancy" and "acute mental and physical suffering." *D. v. the United Kingdom*, 2 May 1997, para. 52. Exposure to a real risk of "dying under most distressing circumstances" would amount to inhuman treatment. Ibid. para. 53. The Inter-American Commission on Human Rights also offers some guidance, including whether deportation will create "extraordinary hardship" and "may well amount to a death sentence," "a *de facto* sentence to protracted suffering" and "unnecessarily premature death." IACmmHR, *Andrea Mortlock v. the United States*, Merits Report, 25 July 2008, paras. 91 and 94.
[53] See e.g., *D. v. the United Kingdom*, 2 May 1997, para. 50.
[54] See e.g., *Khatayev v. Russia*, 11 October 2011, para. 85 and *Grishin v. Russia*, 15 November 2007, para. 76.
[55] See e.g., *Amirov v. Russia*, 27 November 2014, para. 85.

> On the whole, the Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with the human dignity" of a detainee, but should also take into account "the practical demands of imprisonment."[56]

Applied to cases concerning the expulsion of seriously ill people, this line of reasoning suggests that medical assistance in the receiving state must not necessarily be equivalent to the one available in the sending state but should be, as a bottom line, respectful of human dignity. The assessment of the adequacy of medical care will depend on the particular circumstances of each case and should rely on the medical diagnosis and prognosis offered at the relevant time. In assessing this adequacy, the Court may consider elements concerning the quality and promptness of the available medical treatment.

Quality

Elements already considered in the Court's case law on medical assistance in prison include whether the treatment offered is one that is prescribed by competent doctors[57] and of the level required by the applicant's condition;[58] whether it corresponds to the established diagnosis;[59] and whether it is provided with diligence and frequency in light of the applicant's particular state of health.[60] Other relevant elements may include the level of effectiveness of the available medicine; the presence of healthcare professionals specialized in the applicant's condition; and the availability of minimal equipment required by such condition.

Promptness

Whether the applicant would obtain treatment in a timely fashion, as required by the nature of her/his medical condition, may also be part of the assessment.[61] In some instances, even the briefest interruptions may have irreparable health effects or fatal consequences. This question will be particularly crucial where medical evidence shows that applicants' health condition or survival requires immediate or rapid provision of treatment upon return.[62]

2. From Theoretical Availability to Real Access in Receiving State

While the question whether the medically prescribed treatment is available in the receiving state is relevant, the critical question is whether the treatment would be available to the particular applicant if s/he were expelled to this state. As stated in *Aswat,* whether an applicant's expulsion would breach Article 3 very much depends on "the medical services *that would be made available to him there*."[63] Thus, the analysis should not stop once it is shown that adequate treatment is generally available in the receiving country. The analysis should further consider whether such treatment would in reality be available to the applicant. In determining the applicant's actual access, the following factors may be of particular relevance.

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[56] *Amirov v. Russia*, 27 November 2014, para. 86; *Aleksanyan v. Russia*, 22 December 2008, para.140.
[57] See e.g., *Xiros v. Greece*, 9 September 2010, para. 75.
[58] See e.g., *Paladi v. Moldova* (GC), 10 March 2009, para. 72.
[59] See e.g., *Poghossian v. Georgia*, 24 February 2009, para. 59.
[60] See e.g., *Xiros v. Greece*, 9 September 2010, para. 75.
[61] See e.g., *Khudobin v. Russia*, 26 October 2006, para. 96.
[62] See approach in the dissent of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015, para. 4.
[63] *Aswat v. the United Kingdom*, 16 April 2013, para. 52. Emphasis added.

Affordability

One relevant consideration may be whether the applicant would in practice be able to afford the medically prescribed treatment. This assessment should not be limited to abstract cost considerations. Rather, it requires interrelated considerations of treatment's cost and applicants' actual capacities to afford it. Questions may include whether the treatment's cost is prohibitive;[64] whether it is subsidized and to what extent; whether the applicant would subscribe to public insurance and be able to claim reimbursement of the costs[65] and to what extent; whether the applicant has sufficient means to afford it if available at private centers;[66] and whether the applicant would or not be able to work given her/his health condition.

Family Support

The mere presence of family members in the receiving state cannot be equated with their willingness/capacity to attend to applicants' needs financially or otherwise. As the Court observed in *D.*: "While he may have a cousin in St Kitts … *no evidence has been adduced* to show whether this person would be willing or in a position to attend to the needs of a terminally ill man."[67] Moreover, the relevant issue is not whether applicants would be able to seek the support upon return from those relatives with whom they have been in contact.[68] The relevant question is rather whether the family members would be able to provide help.[69] In assessing family support in the receiving country, the Court may look at the extent to which the applicant's family links have been maintained or severed. Relevant factors may include the time the applicant has lived away from her/his country of origin[70] and the frequency of contact maintained with her/his relatives living there.

Geographical Distance and Safety

The geographical distance within which applicants would have access to the medically indicated treatment may be another relevant consideration. Questions may include whether treatment is provided in applicants' former hometowns[71] or the towns where their families live and, if not, whether they would have to travel considerable distances to obtain it elsewhere.[72] In assessing the feasibility of travelling or a possible internal relocation, consideration may be given to the level of hardship that travelling or relocation may entail for the applicant,[73] in light of her/his health condition. Another question may be whether travelling or relocating could be safely made, in light of the situation in the region.[74]

Vulnerabilities

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[64] See e.g., separate opinion of Judge Sir Nicolas Bratza joined by Judges Costa and Greve in *Bensaid v. the United Kingdom*, 6 February 2001, p. 17 (noting that one required drug would be likely to prove prohibitive).

[65] See e.g., approach in *Bensaid v. the United Kingdom*, 6 February 2001, para. 36.

[66] See e.g., *M.T. v. Sweden*, 26 February 2015, para. 55 (reasoning that the applicant had not argued that paying the cost of treatment at private centers would not be an option open to him).

[67] *D. v. the United Kingdom*, 2 May 1997, para. 52. Emphasis added.

[68] Being able to seek support is the approach followed in *Ndangoya v. Sweden*, 22 June 2004, p. 13.

[69] See e.g., critique in dissent of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015, para. 4.

[70] See e.g., approach in partly dissenting opinion of Judge Lemmens in *Tatar v. Switzerland*, 14 April 2015, para. 3 (noting that the applicant had left Turkey in 1988, no less than 26 years ago).

[71] See e.g., *M.T. v. Sweden*, 26 February 2015, para. 51.

[72] See e.g., *Bensaid v. the United Kingdom*, 6 February 2001, para. 36.

[73] See e.g., *Tatar v. Switzerland*, 14 April 2015, paras. 47-48.

[74] See e.g., *Bensaid v. the United Kingdom*, 6 February 2001, para. 39.

In examining the above-mentioned factors, the Court may consider the vulnerabilities associated with the applicant's specific health condition.[75] For example, while travelling or relocating inevitably entails a certain degree of hardship for any person, this hardship is likely to have a greater impact on applicants whose health is particularly vulnerable. Also, in some cases, applicants' vulnerable health may not allow them to work. This element may therefore play a role in assessing their financial capacity to afford treatment. In other instances, applicants will be unable to live on their own and seek medical assistance on their own behalf.[76] This specific vulnerability may then be taken into account for example when examining the applicant's family situation or other social support in the receiving state. *D.* is a good illustration of a vulnerability analysis in assessing the adequacy of treatment in the receiving state: "Any medical treatment which he might hope to receive there could not contend with the infections which he may possibly contract on account of *his lack of shelter and of a proper diet* as well as *exposure to the health and sanitation problems* which beset the population of St Kitts."[77]

III. Procedural Duties on Domestic Decision Makers

Access to adequate medical care upon return should not be a theoretical option. It should be a real and guaranteed one, and the burden of proving that such a real option exists – or of arranging through diplomatic means the availability of such an option to the applicant – should lie on the expelling state.[78] In this last part of the intervention, we respectfully invite the Court to impose on the sending state the procedural duty to obtain assurances from the receiving state in cases concerning the expulsion of seriously ill persons.

The Court has long considered the need for assurances upon expulsion/extradition where a real risk of violation of Article 3 exists in other areas of its case law.[79] One recent illustration is *Tarakhel v. Switzerland*, concerning the expulsion of a family of asylum seekers to reception facilities in Italy.[80] In this case, the Grand Chamber held that the applicants could not be returned without the respondent state having first obtained guarantees from the receiving state (another state party to the Convention) that such facilities would be adapted to the applicants' needs.[81] More recently, dissenters have suggested this option in cases concerning the expulsion of seriously ill people,[82] including when the receiving state was another state party.[83]

If assurances are given by the receiving state, the Court is respectfully invited to examine whether they provide "in their practical application, a sufficient guarantee that the applicant

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[75] On considering illness-associated vulnerability when assessing the compatibility of treatment with Article 3, see e.g., approach in *Aswat v. the United Kingdom*, 16 April 2013, para. 50.
[76] See e.g. partly dissenting opinion of Judge Lemmens in *Tatar v. Switzerland*, 14 April 2015, para. 3.
[77] *D. v. the United Kingdom*, 2 May 1997, para. 52. Emphasis added.
[78] See Brems, Eva, "Moving away from N v UK – Interesting tracks in a dissenting opinion (Tatar v Switzerland)," 4 May 2015, Strasbourg Observers Blog.
[79] Examples of Article 3 cases involving suspected terrorists include *Saadi v. Italy* (GC), 28 February 2008, paras. 147 and 148; *Othman (Abu Qatada) v. the United Kingdom*, 17 January 2012, paras. 187-189. See also *Aswat v. the United Kingdom*, 16 April 2013, para. 56. Examples in another line of Article 3 case law include *A.A.M. v. Sweden*, 3 April 2014, para. 68; *M.Y.H. and Others v. Sweden*, 27 June 2013, para. 62 and *Sufi and Elmi v. the United Kingdom*, 28 June 2011, para. 266.
[80] *Tarakhel v. Switzerland* (GC), 4 November 2014.
[81] Ibid. paras. 120 and 122.
[82] Dissenting opinion of Judge De Gaetano in *M.T. v. Sweden*, 26 February 2015, para. 5 and of Judge Pinto de Albuquerque in *S.J. v. Belgium* (GC), 19 March 2015, para. 9.
[83] Partly dissenting opinion of Judge Lemmens in *Tatar v. Switzerland*, 14 April 2015, para. 4.

would be protected against the risk of treatment prohibited by the Convention."[84] The Court has considered a series of factors when assessing the quality of assurances and whether, in light of the receiving state's practices, such assurances can be relied upon.[85] Whether such assurances "are specific or are general and vague," is one of such factors.[86] The content and extent of the protection assured by the receiving state should therefore be one that responds to the applicant's specific condition.[87]

In view of the "rigorous" character that the Court requires of the assessment of existence of a real risk of ill-treatment,[88] procedural duties on domestic decision makers may also include carrying out a "thorough and individualised examination of the situation of the person concerned."[89] Moreover, domestic authorities' assessment of a real risk must be "adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations."[90]

IV. Conclusion

This third-party intervention respectfully invites the Grand Chamber to take on the opportunity offered by *Paposhvili v. Belgium* to revisit the bases for applying the "very exceptional circumstances" test in Article 3 case law concerning the expulsion of seriously ill persons. The intervention additionally invites the Grand Chamber to depart from the unduly restrictive threshold set therein and to develop an alternative test compatible with the absolute nature of the Article 3 prohibition. This intervention respectfully suggests that, in developing such a test, the Grand Chamber consider the proposed lines of reasoning. These lines of reasoning include (i) assessing the *adequacy* of available treatment and applicants' *actual access* to such treatment in receiving states and (ii) requiring procedural duties from domestic decision makers, in particular, obtaining *assurances* that adequate medical care would be effectively offered to applicants upon return.

Professor Dr. Eva Brems

Dr. Lourdes Peroni

17 July 2015.

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[84] *Saadi v. Italy* (GC), 28 February 2008, para. 148.
[85] See *Othman (Abu Qatada) v. the United Kingdom*, 17 January 2012, para. 189.
[86] Ibid.
[87] See e.g., approach in partly dissenting opinion of Judge Lemmens in *Tatar v. Switzerland*, 14 April 2015, para. 4 and dissenting opinion of Judge Power-Forde in *A.A.M. v. Sweden*, 3 April 2014, para. 9.
[88] See e.g., *Chahal v. the United Kingdom* (GC), 15 November 1996, para. 96.
[89] See *Tarakhel v. Switzerland* (GC), 4 November 2014, para. 104.
[90] *Al Hanchi v. Bosnia and Herzegovina*, 15 November 2011, para. 40.