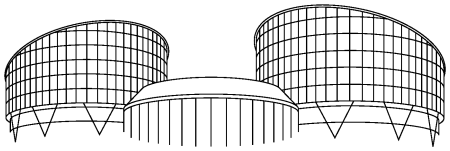

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF S.J. v. BELGIUM

(Application no. 70055/10)

JUDGMENT
(Striking out)

STRASBOURG

19 March 2015

This judgment is final but may be subject to editorial revision.

In the case of S.J. v. Belgium,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Işıl Karakaş,
Isabelle Berro-Lefèvre,
Khanlar Hajiyev,
Ján Šikuta,
Päivi Hirvelä,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Erik Møse,
Paul Lemmens,
Johannes Silvis,
Valeriu Griţco,
Ksenija Turković, *judges,*
and Erik Fribergh, *Registrar,*

Having deliberated in private on 11 February 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 70055/10) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Ms S.J. ("the applicant"), on 30 November 2010. The President of the Grand Chamber granted the applicant's request for her identity not to be disclosed to the public (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Ms S. Micholt, a lawyer practising in Bruges. The Belgian Government ("the Government") were represented by their Agent, Mr M. Tysebaert, Senior Adviser, Federal Justice Department.

3. The applicant alleged that her expulsion to Nigeria would expose her to a risk of treatment contrary to Article 3 of the Convention and would infringe her right to respect for her private and family life as guaranteed by Article 8 of the Convention. She also complained of the lack of an effective remedy within the meaning of Article 13 of the Convention.

4. On 30 November 2010 the applicant applied to the Court requesting interim measures under Rule 39 of the Rules of Court, with a view to staying execution of the order to leave the country. She relied in particular on the risks to herself and her children in the event of their expulsion to Nigeria, on account of her state of health. While acknowledging that the domestic proceedings had not been concluded, she argued that the remedies in question did not suspend her removal. On 17 December 2010, under Rule 39 of the Rules of Court, the Court requested the Government not to expel the applicant and her children pending the outcome of the proceedings before the Court.

5. The application was assigned to the Fifth Section of the Court (Rule 52 § 1). On 18 December 2012 it was declared admissible by a Chamber of that Section composed of Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Ann Power-Forde, Paul Lemmens, Helena Jäderblom and Aleš Pejchal, judges, and also Claudia Westerdiek, Section Registrar. On 27 February 2014 the Chamber delivered a judgment in which it held unanimously that there had been a violation of Article 13 taken in conjunction with Article 3 of the Convention. It further held unanimously that it was not necessary to examine the applicant's complaints under Article 13 taken in conjunction with Article 8 of the Convention. By a majority, it held that the enforcement of the decision to deport the applicant to Nigeria would not entail a violation of Article 3 of the Convention. Lastly, it held unanimously that, even assuming that the Court could examine the complaint under Article 8 of the Convention, there had been no violation of that provision. A concurring opinion by Judge Lemmens joined by Judge Nußberger and a dissenting opinion by Judge Power-Forde were annexed to the judgment.

6. In letters of 23 and 26 May 2014 respectively, the applicant and the Government requested the referral of the case to the Grand Chamber under Article 43 of the Convention. A panel of the Grand Chamber granted the request on 7 July 2014.

7. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. A hearing initially scheduled to take place on 18 February 2015 was postponed, the parties being engaged, with the assistance of the Court Registrar, in attempts to reach a friendly settlement (Article 39 § 1 of the Convention).

9. On 17 September 2014, the Court was informed by the applicant and by the Government that they agreed to a friendly settlement of the case.

10. Accordingly, the hearing scheduled for 18 February 2015 was cancelled on 17 September 2014.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

A. Asylum proceedings

11. The applicant arrived in Belgium in the summer of 2007. On 30 July 2007, when she was eight months pregnant, she lodged an application for asylum in which she stated that she had fled her country after the family of the child's father, M.A., in whose home she had lived since the age of eleven, had tried to put pressure on her to have an abortion.

12. Because the applicant was a minor, a guardian was appointed. The guardianship ended when the applicant reached full age on 26 December 2007.

13. After the applicant's fingerprints had been recorded in the EURODAC system, the Aliens Office observed that she had already lodged an asylum application in Malta on 29 June 2007.

14. On 3 August 2007 the Aliens Office requested the Maltese authorities to take charge of the applicant's asylum application under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin II Regulation"). On 17 September 2007 the Maltese authorities accepted the request.

15. The applicant nevertheless remained in Belgium on account of the request for leave to remain which she had lodged and the ensuing proceedings (see paragraphs 37 et seq. below).

16. Subsequently, owing to the imminent birth of the applicant's second child (see paragraph 24 below), the Aliens Office decided in early 2009 to examine her asylum application itself. A first interview was held, after which the file was sent to the Commissioner General for Refugees and Stateless Persons ("the Commissioner General").

17. On 25 May 2010 the Commissioner General rejected the asylum application because of inconsistencies in the applicant's account. Among other factors, the Commissioner General observed that the applicant had claimed not to have applied for asylum in another country. She had also been unable to explain how she had travelled to Belgium and did not know how much time she had spent in Malta or the exact identity of the persons she had lived with in Nigeria.

18. The applicant appealed to the Aliens Appeals Board. In judgment no. 49.384 of 12 October 2010, the Board upheld the Commissioner General's decision on the grounds that no credence could be lent to the

applicant's alleged fear of pursuit or to the existence of a real risk of serious harm.

19. No administrative appeal on points of law was lodged with the *Conseil d'État* against that judgment.

B. The applicant's medical, family and social situation

20. On 1 August 2007, in the course of an antenatal examination, the applicant was diagnosed as HIV positive with a serious immune system deficiency requiring antiretroviral ("ARV") treatment.

21. The applicant gave birth to her first child on 5 September 2007. The infant was given treatment to prevent HIV infection.

22. In October 2007 a course of ARV treatment (a combination of the drugs Kalestra and Combivir) was started at St Pierre University Hospital in Brussels ("the University Hospital").

23. During 2008 the applicant attended a semi-residential facility and was monitored by the not-for-profit association *Lhiving*, which specialises in providing psychosocial assistance to underprivileged persons living with HIV and to their children.

24. On 27 April 2009 the applicant gave birth to a second child by the same father, M.A. (see paragraph 36 below).

25. On 14 July 2010 the University Hospital, at the request of the Aliens Office, issued a medical certificate which stated that the applicant's treatment had been changed to a combination of the drugs Kivexa, Telzir and Norvir.

26. On 25 November 2010 the University Hospital issued a further certificate stating that the applicant's CD4 count had stabilised at 447, with an undetectable viral load. On the same date an official of the association *Lhiving* drew up a report on the applicant's psychosocial situation, stressing the need to provide her with psychological support because of her young age and her introverted temperament.

27. In the meantime, following the refusal of her request for leave to remain on medical grounds (see paragraph 47 below), the applicant's certificate of registration, which allowed her free access to the treatment she required and to material assistance from the Brussels social welfare office, was withdrawn. She lodged an appeal with the Brussels Employment Tribunal seeking material assistance, and made a fresh application to the social welfare office.

28. On 16 May 2011 the social welfare office decided to continue providing financial assistance to the applicant. As a result, the appeal to the Employment Tribunal was struck out of the list.

29. On 14 December 2011 the University Hospital issued a certificate addressed to the Aliens Office in the following terms:

> "The latest blood test of 14 December 2010 shows a CD4 count of 269 and a viral load of 42,900. These may be due to treatment failure (development of resistance?) or to poor adherence to the treatment, possibly linked to the patient's numerous social problems ..."

30. On 23 February 2012 the University Hospital issued a certificate addressed to the Aliens Office stating that the treatment had been modified, with the use of Telzir and Norvir being discontinued and being replaced by a combination of Reyataz and Kivexa.

31. On 1 March 2012 a report by the association *Lhiving* stated that the applicant was continuing to receive, and to need, psychosocial support and that the focus was on working with the applicant on articulating her concerns and on issues including the difficulties connected to her role as a mother, family life, her children's schooling in Dutch and the monitoring of her own illness.

32. A further certificate addressed to the Aliens Office on 7 June 2012 by the University Hospital stated that the applicant was pregnant with her third child and was due to give birth in November 2012. The certificate went on to state as follows:

> "Her latest blood sample shows an uncontrolled HIV infection with an increased viral load of 18,900 and a reduced T4 count of 126. The situation is therefore worrying as regards both the patient and her unborn child.
>
> ...
>
> Medical treatment/medical supplies: Reyataz 200 2 per day and Kivexa.
>
> Need for regular blood tests with lymphocyte typing and HIV viral load, stethoscope, blood pressure monitor, weighing scales, needles and syringes, dressings, gynaecological check-ups ...
>
> Specific medical needs? Supervision by a multidisciplinary team specialising in the treatment of HIV."

33. A similar certificate was issued on 1 February 2013 which reported the addition of the drug Norvir, an increase in the applicant's T4 count to 200 and a lower positive viral load. It confirmed that the situation was worrying both for the applicant and for her children.

34. In the meantime, on 23 November 2012, the applicant gave birth to a third child. According to the birth certificate, M.A. was again the father.

35. On 18 March 2013 the association *Lhiving* issued another certificate similar to the previous one (see paragraph 31 above), stating that the applicant was continuing to receive psychosocial support.

36. Beginning on an unspecified date M.A., the father of the three children, spent occasional periods in Belgium without a residence permit.

C. Refusal of leave to remain on medical grounds and order to leave the country

37. On 30 November 2007 the applicant submitted a request for leave to remain on medical grounds under section 9*ter* of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980 ("the Aliens Act").

38. On 13 February 2008 the Aliens Office declared the request admissible and a certificate of registration was issued to the applicant, authorising her to remain in Belgium for three months.

39. At the request of the Aliens Office, the applicant sent the latter a medical certificate drawn up by her general practitioner stating that she was HIV positive and would be unable to travel for six months, during which time she required psychological counselling.

40. On 8 July 2008 the Aliens Office enquired of the Maltese authorities about the accessibility of the appropriate medical treatment in Malta. The same day the applicant was examined by the Aliens Office's medical adviser, who considered that she would be able to travel as of 1 September 2008.

41. On 4 August 2008, on the basis of the information received from the Maltese authorities, the medical adviser of the Aliens Office wrote as follows:

> "[From] a medical point of view, ... although [AIDS] can be considered to be a disease entailing a real risk to life or physical well-being, in the present case [S.J.] is not at risk of inhuman or degrading treatment since treatment is available in Malta."

42. On 20 August 2008 the Aliens Office issued a decision refusing the request for leave to remain on medical grounds, stating that it was clear from the information received from the Maltese embassy and featured on the website of the Maltese Minister of Social Policy that treatment for AIDS was available in Malta and was accessible to non-nationals.

43. The applicant lodged an appeal with the Aliens Appeals Board against the Aliens Office's decision of 20 August 2008.

44. On 11 March 2009 the Aliens Office revoked its decision of 20 August 2008, as a consequence of its decision to examine the applicant's asylum application (see paragraph 16 above), and began to explore the possibilities for treatment in Nigeria. The applicant was again issued with a certificate of registration and the Aliens Office requested a fresh medical opinion from its medical adviser concerning a possible return to Nigeria.

45. On 7 May 2009 the Aliens Appeals Board, noting that the Aliens Office's decision of 20 August 2008 had been revoked, dismissed the applicant's appeal as being devoid of purpose.

46. On 17 September 2010 the Aliens Office's medical adviser issued the following opinion:

"From a medical point of view, the applicant's infection, although it can be considered to entail a real risk to life or physical well-being if it is not treated in an appropriate manner and is not monitored, does not involve a real risk of inhuman or degrading treatment, given that the treatment and monitoring in question are available in Nigeria. There are therefore no medical objections to the applicant's return to Nigeria, her country of origin."

47. On the basis of this opinion and the information received from the Nigerian embassy, on 27 September 2010 the Aliens Office refused the request for leave to remain submitted on 30 November 2007, but extended the applicant's registration pending the outcome of the asylum proceedings. The reasons for the decision read as follows:

« [The] medication currently being administered to the applicant is available in Nigeria ... Nigeria has numerous treatment programmes for the applicant's condition ... The cost is low because the authorities subsidise the medication ... The applicant's condition can be treated free of charge in all the country's public hospitals. ... Furthermore, in Ogun State, where the applicant was born and lived, there are two hospitals. ... Moreover, it appears very unlikely that in Nigeria, the country where she spent the first eighteen years of her life, the applicant would not have family, friends or acquaintances willing to take her in, help her to obtain the necessary medication and/or provide her with temporary financial support. ... It follows that it is not established that her return to her country of origin ... would be in breach of European Directive 2004/83/EC or of Article 3 of the European Convention on Human Rights."

48. On 20 October 2010 – the asylum proceedings having ended in the meantime with the rejection of the applicant's asylum application (see paragraph 18 above) – the Aliens Office confirmed its decision refusing the applicant's request to have her residence status regularised. An order to leave the country was served on the applicant on 22 November 2010, worded as follows:

"Pursuant to the decision of ... 20 October 2010, the aforementioned [S.J.] and her children ... are hereby ordered to leave Belgium not later than [20 December 2010] ...

GROUNDS:

The applicant has remained in the Kingdom beyond the time-limit laid down in accordance with section 6, or is unable to provide evidence that this time-limit has not been exceeded (Act of 15 December 1980, section 7, sub-paragraph 1.2°).

If the applicant fails to comply with this order she faces possible removal from the country and detention for that purpose for the time strictly necessary to enforce the measure, in accordance with section 27 of the Act. This is without prejudice to any judicial proceedings that may be brought on the basis of section 75 of the Act.

In accordance with section 39/2, paragraph 2, of the Act of 15 December 1980, an application to set aside the present decision may be made to the Aliens Appeals Board. The application must be lodged within thirty days of notification of the present decision.

A request for a stay of execution may be lodged in accordance with section 39/82 of the Act of 15 December 1980. Except in cases of extreme urgency, the request for a stay of execution and the application to set aside must be submitted in a single document."

49. On 26 November 2010 the applicant lodged a request under the extremely urgent procedure for a stay of execution of the Aliens Office's decision of 20 October 2010 and the order to leave the country of 22 November 2010, together with an application to set aside those decisions. She alleged a violation of Articles 3, 8 and 13 of the Convention on account of the risk that she would not have access to the appropriate treatment if she returned to Nigeria and of the infringement of her right to respect for her private and family life.

50. The request for a stay of execution was rejected by the Aliens Appeals Board in judgment no. 51.741 of 27 November 2010. The Board gave the following reasons for its decision:

> "... The applicant acted in an alert and diligent manner in lodging a request on the fourth day following notification of the impugned decision, but has not shown by means of specific evidence that a stay of execution of the measure in question granted under the ordinary procedure would be too late. The impugned order states that the applicant has until 22 December 2010 to leave the country. For the time being, the applicant is not being detained with a view to her repatriation and no date has been set for repatriation.
>
> She simply asserts that a stay of execution under the ordinary procedure would be too late since the time taken to process requests is four to five months.
>
> The mere fear that the impugned decision could be enforced at any time after 22 December 2010 does not mean that a stay of execution of the decision could not be granted in good time under the ordinary procedure.
>
> In the present case it has not been shown that there is extreme urgency.
>
> ... The Board would refer to the possibility ... of lodging a request for interim measures under the extremely urgent procedure during the proceedings. In that case, [that request and the request for a stay of execution] may be examined jointly."

51. On 8 December 2010 the applicant lodged an appeal on points of law with the *Conseil d'État* against the Aliens Appeals Board judgment of 27 November 2010. She alleged that the risk of serious and irreversible harm in the event of her return to Nigeria, and the presence of her two young children, had not been specifically taken into consideration, and that appeals to the Aliens Appeals Board were ineffective.

52. On 24 December 2010 the time-limit for enforcement of the order to leave the country was extended by the Aliens Office for one month, as follows:

> "Grounds: exceptional reason (awaiting decision by European Court of Human Rights).
>
> Please request a further extension each month. The request will be reviewed each month in the light of developments in the case."

53. On 6 January 2011 the *Conseil d'État* declared the appeal against the Aliens Appeals Board judgment of 27 November 2010 inadmissible. It held that the arguments relied on by the applicant, even supposing that they were

admissible, were in any event manifestly unfounded since the assessment of extreme urgency was a matter solely for the judge hearing the case on the merits and the applicant could still submit a request for a stay of execution under the ordinary procedure, together with a request for interim measures made during the proceedings. She therefore had effective remedies available to her.

54. According to the information in the file, the application to set aside the decisions of the Aliens Office (see paragraph 49 above) is still pending before the Aliens Appeals Board. In reply to a letter from the applicant asking whether a hearing date had been set, the registry of the Aliens Appeals Board informed her in a letter of 14 May 2012 that the Board was making every effort to ensure that her case was dealt with as quickly as possible.

55. On 11 February 2013, following a request from the Government made in the context of the proceedings before the Court, the Aliens Office's medical adviser prepared a fresh report on the applicant's medical situation on the basis of a medical certificate issued by the University Hospital in 2010 (see paragraph 25 above). The report noted that the applicant was receiving daily treatment using a combination of three drugs (Kivexa, Telzir and Norvir). The report continued as follows:

> "It appears from the medical certificate of 25 November 2010 that the applicant is making good progress and that her immunity has stabilised at 447 with a viral load that was undetectable on 5 May 2010. We have no other medical certificates providing clinical and immunological data after November 2010 and/or concerning a change in the applicant's medical condition or her medication.
>
> The aforementioned medical certificate of 25 November 2010 does not show that travel was or is strongly contra-indicated for this patient [or that she] is in need of medical attention.
>
> As regards the availability of medication and monitoring in the patient's country of origin, Nigeria, the following sources were consulted (this information has been added to the patient's administrative file):
>
> - information from the MedCOI database ... of local doctors working in the patient's country of origin who work on a contract basis for the medical advisory service of the Dutch Ministry of the Interior, dated 1 June 2011 ... and 28 March 2012...;
> - information from the site http://www.abuth.org ...;
> - information from the site http://www.buth.org ...;
> - information from the site http://www.who.int/selection_medicines/country_lists, (...), containing a list of the main drugs available in Nigeria in 2010.
>
> It is clear from this information that drug therapy using a combination of abacavir, lamivudine and protease inhibitors is available in Nigeria. The information shows that the current availability of fosamprenavir in Nigeria is not confirmed, but that other protease inhibitors are available as an alternative, for instance a preparation combining lopinavir and ritonavir...
>
> Laboratory tests (to determine CD4 count) are available in Nigeria. Treatment/monitoring by a specialist in internal medicine is also available in Nigeria."

THE LAW

56. On 26 August 2014 the Court received a proposal for a friendly settlement from the Government providing as follows:

> "The applicant's case is ... characterised by strong humanitarian considerations weighing in favour of regularising her residence status and that of her children on the basis of section 9*bis* of the Aliens Act of 15 December 1980."

57. On 11 September 2014 the Court received the following reply from the applicant:

> "[The applicant] has decided to accept the proposal made by the Belgian State, subject to certain conditions.
>
> Firstly, that she and her three children be granted unconditional and indefinite leave to remain.
>
> Secondly: [she] also claims compensation for the pecuniary and non-pecuniary damage sustained on account of the Belgian State's decision finding her application for regularisation of her status under section 9*ter* of the Aliens Act to be unfounded and on account of the order to leave the country.
>
> ...
>
> [A] sum of 7,000 euros *ex aequo et bono* would cover the suffering undergone by the [applicant] as a result of the Belgian State's decision.
>
> Thirdly: [the applicant] will agree to the striking-out of the case from the Court's list only once the residence permit has been issued to her in person.
>
> ..."

58. On 17 September 2014 the Government informed the Court that they agreed to the conditions stipulated by the applicant. They specified that the applicant's residence status, and that of her children, would be regularised immediately and unconditionally on an indefinite basis.

59. The Court notes that, on 6 January 2015, the applicant and her children were issued with residence permits granting them indefinite leave to remain.

60. The Court further considers that the settlement is based on respect for human rights as defined in the Convention and its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court).

61. Accordingly, it is appropriate to strike the case out of the list in accordance with Article 39 § 3 of the Convention.

FOR THESE REASONS, THE COURT

1. *Takes formal note* of the agreement between the parties and the arrangements made to ensure compliance with the undertakings given therein;

2. *Decides,* by sixteen votes to one, to lift the interim measure;

3. *Decides*, by sixteen votes to one, to strike the case out of its list.

Done in English and in French, and notified in writing on 19 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik Fribergh	Dean Spielmann
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

D.S.
E.F.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I subscribed to the separate opinion of Judges Tulkens, Jočienė, Popović, Karakaş and Raimondi in *Yoh-Ekale Mwanje v. Belgium*[1], in which we called on the European Court of Human Rights ("the Court") to reconsider the unfortunate principle set out in *N. v. the United Kingdom*[2]. In so doing, we followed Judges Tulkens, Bonello and Spielmann, the dissenters in the case of *N*. I am still of the same view today and that is why I dissent. I believe that this case was a good opportunity to depart from *N*. and therefore should not have been struck out. The continuation of the examination of the application, in accordance with Article 37 § 1, second paragraph, of the European Convention on Human Rights ("the Convention"), was necessary for the sake of decent protection of the human rights of seriously ill persons in Europe[3].

The principle of the "very exceptional" protection of seriously ill illegal aliens

2. In *N.*, the majority of the Grand Chamber established that "[a]liens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment

1 *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011.

2 *N. v. the United Kingdom* [GC], no. 26565/05, *Reports of Judgments and Decisions* 2008. The same call was made in the present case by Judge Power-Forde in her remarkable dissenting opinion annexed to the Chamber judgment.

3 The Belgium Government decided not to remove the applicant, on the basis of humanitarian considerations. That decision is unsufficient for the protection of human rights in Europe. My concern is not only for the fate of the applicant and her family, but for the fate of those in a similar situation in Belgium and all over Europe. While the individual problem of the applicant in the present case is solved, the Court cannot neglect the general problem of the hopeless, terrible situation of seriously ill persons waiting to be extradited, expelled, deported or removed in Europe. As will be shown, casuistic, humanitarian considerations do not provide a reliable basis for addressing the situation of these people, and there is a genuine, urgent and general interest in dealing with their situation in terms of a rights-based approach in the light of the Convention, an interest which called for the case not to be struck out. Moreover, I cannot accept the apparent cost-benefit strategy consisting in "buying" a strike-out decision and thus resolving the situation of the present applicant in order to remain free "to do business as usual" with all other foreign nationals in a similar situation.

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, where the humanitarian grounds against the removal are compelling."[4]

The majority went even further and extrapolated a general principle from the situation relating to the expulsion of a person with a HIV and AIDS-related condition: "The same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

Finding that this "high threshold" should be applied to N., who "was fit to travel", the Court agreed to her removal from the Contracting State in spite of her poor state of health and the doubts about the possibility of her obtaining the appropriate health care in the receiving State. Unsurprisingly, N. died shortly after her removal to Uganda[5].

3. Recently, the Court's case-law was replicated by the Luxembourg Court of Justice ("ECJ"), in the Grand Chamber judgment delivered in *Mohamed M'Bodj v Belgian State*: "None the less, the fact that a third country national suffering from a serious illness may not, under Article 3 ECHR as interpreted by the European Court of Human Rights, in highly exceptional cases, be removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under Directive 2004/83. In the light of the foregoing, Article 15(b) of Directive 2004/83 must be interpreted as meaning that serious harm, as defined by the directive, does not cover a situation in which inhuman or degrading treatment, such as that referred to by the legislation at issue in the main proceedings, to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care."

Stretching this reasoning to its limits, the Luxembourg Court left no margin of discretion to Member States to extend the applicability of subsidiary protection to seriously ill foreign nationals: "The reservation set out in Article 3 of Directive 2004/83 precludes a Member State from introducing or retaining provisions granting the subsidiary protection status

4 *N.*, cited above, § 42.

5 It is indeed sad to compare the embellished portrayal that paragraph 47 gave of the situation of *N.* ("She is fit to travel and will remain fit as long as she continues to receive the basic treatment she needs. The evidence before the national courts indicated, however, that if the applicant were to be deprived of her present medication her condition would rapidly deteriorate and she would suffer ill heath, discomfort, pain and death within a few years.") with the cruel reality that she died soon after arriving in the receiving State.

provided for in the directive to a third country national suffering from a serious illness on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is not available in his country of origin, as such provisions are incompatible with the directive."[6]

4. Having taken this extremely restrictive approach to the scope of substantive protection under the "Qualification" Directive, the Luxembourg Court, in another judgment delivered on the very same day, adopted a markedly broad interpretation of Articles 5 and 13 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, taken in conjunction with Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union and Article 14(1)(b) of that Directive. In *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, it criticised national legislation that did not endow with suspensive effect an appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision might expose that third country national to a serious risk of grave and irreversible deterioration in his state of health, and did not make provision, in so far as possible, for the basic needs of such a third country national to be met, in order to ensure that emergency health care and essential treatment of illness were in fact made available during the period in which that Member State was required to postpone removal of the third country national following the lodging of the appeal[7].

The fact that the dates of delivery of the judgments in *M'Bodj* and *Abdida* coincided is certainly no accident, and may have been intended to give a balanced image of the Luxembourg Court's case-law. If that was the intention, it failed. The opposite happened. In fact, the coincidence only highlights the unbalanced nature of the rulings delivered. Firstly, the two judgments demonstrate a contradictory approach to the issue of the protection of seriously ill foreign nationals, by providing them with reasonable procedural guarantees and at the same time depriving them of the most elementary substantive guarantees. The positive obligation set out in paragraphs 59 and 61 of the *Abdida* judgment is hardly compatible with the rejection of that same positive obligation in paragraph 39 of the *M'Bodj* judgment. Secondly, the *M'Bodj* judgment affords legally resident foreign nationals a lesser standard of protection in terms of health care than that

6 See the Judgment of the ECJ (Grand Chamber) of 18 December 2014, *Mohamed M'Bodj v Belgian State*, C-542/13. In paragraph 44, the Court does not even refrain from saying that the protection of third country nationals suffering from a serious illness has "no connection with the rationale of international protection"!

7 See the Judgment of the ECJ (Grand Chamber) of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, C-562/13.

afforded by the *Abdida* judgment to those who are illegally resident, since pending an appeal against a return decision whose enforcement may expose them to a serious risk of grave and irreversible deterioration in their state of health, the latter must be able to avail themselves, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the Charter; in addition, they enjoy "emergency health care and essential treatment of illness" during that period.

5. In sum, the contradictory approach of the Luxembourg Court reflects the current contradiction in the Strasbourg Court's case-law itself, which has simultaneously sustained an unreasonably restrictive interpretation of the Article 3 substantive guarantee, in *N. v. the United Kingdom*, and a reasonably broad procedural interpretation of the right to an effective remedy for asylum seekers in *Hirsi Jamaa and Others v. Italy* and, less clearly, for undocumented migrants in *De Souza Ribeiro v. France*[8]. The messy state of the European case-law, with its flagrant internal contradictions, makes it even more urgent to review the standard set out in *N.* in the light of international refugee law and international migration law.

Critique of *N.*

6. According to *N.*, illegally resident foreigners do not benefit from Convention protection, namely from any positive obligation on the part of the State to guarantee the health treatment necessary for a life-threatening or serious illness, when the foreseeable Article 3 violation stems from a naturally occurring illness and a lack of adequate resources to deal with it in the receiving country. This principle does not stand up to closer scrutiny[9].

8 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012. See my separate opinion on individuals in need of complementary international protection and the content of international protection, including the guarantee of *non-refoulement*, when the risk of serious harm may result from foreign aggression, internal armed conflict, extrajudicial death, enforced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, trial based on a retroactive penal law or on evidence obtained by torture or inhuman and degrading treatment, or a "flagrant violation" of the essence of any Convention right in the receiving State. See also my separate opinion in *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012, on the protection of illegal or undocumented migrants under international human rights law and international migration law.

9 See the relevant critique in Nicolas Klausser, "Étrangers malades et droit de l'Union européenne : Entre accroissement et restriction des garanties juridiques, Droits des étrangers (Directives 2004/83/CE et 2008/115/CE)", in *La Revue des Droits de l'Homme*, January 2015 ("clumsy and paradoxical reasoning", "shaky arguments"); Jean-Pierre Marguenaud, "L'eloignement des étrangers malades du sida : la Cour européenne des droits de l'homme sur 'les sentiers de la gloire'", in *Revue trimestrielle des droits de l'homme*,

7. Firstly, it clearly distorts the reasoning behind Article 3 of the Convention, by watering down the legal force of that provision on the basis of purely speculative assumptions regarding both the future care and support that seriously ill persons will receive from the national authorities in the receiving State and the economic burden they represent for the Contracting Parties to the ECHR.

The ground put forward by the majority to deny a positive obligation for the State to treat seriously ill foreign nationals is purely axiomatic. It does not provide any rational justification for the lesser protection given to them other than an aprioristic view that no positive obligations are to be derived from Article 3 in relation to them. Put differently, paragraph 43 of the *N.* judgment reveals nothing but a circular reasoning whose ultimate purpose is explained in the following paragraph. The purpose of this reasoning is, as the majority of the Grand Chamber explicitly acknowledges in the subsequent paragraph 44, to avoid a supposedly uncontrollable massive influx of medical migrants towards the Contracting Parties to the Convention, with its allegedly exponential financial cost[10]. This is a typical

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100/2014, pp. 977-989 ("the Court is willing to lose its soul", "disconcerting cynicism", "implacable severity", "such a baffling solution"); Slama Serge and Parrot Karine, "Etrangers malades: l'attitude de Ponce Pilate de la Cour européenne des droits de l'Homme", in *Plein droit*, 2014/2 no. 101, p. I-VIII ("These rulings by the Court of Human Rights, which sound like death sentences, should be seen for what they are: legal barricades being erected at the entrance to our rich societies"); Emilie Cuq, "*S J. v Belgium* and the inexplicably high threshold of article 3 engaged in deportations of terminally-ill applicants", in *Cyprus Human Rights Law Review*, Volume 3 (2014), No. 1 ("hardly comprehensible", "artificial", "incomprehensible double standards"); Emmanuelle Néraudau, "Le contrôle requis par l'article 9 ter de la loi du 15 décembre 1980 n'est pas restreint 'au risque pour la vie', ni au seuil de gravité posé par l'arrêt N. c. R-U de la Cour EDH (article 3 CEDH)", in *Newsletter EDEM*, March 2013, on the judgment of the Aliens Appeals Board (3 judges) of 27 November 2012, no. 92 258; Luc Leboeuf, "Droit à un recours effectif et séjour médical. Le *statu quo*", in *Newsletter EDEM*, March 2014; "Le séjour médical (9*ter*) offre une protection plus étendue que l'article 3 C.E.D.H.", in *Newsletter EDEM*, December 2013, on the judgment of the *Conseil d'État* of 28 November 2013, no. 225.632; "Le non-refoulement face aux atteintes aux droits économiques, sociaux et culturels. Quelle protection pour le migrant de survie?", in *Cahiers du CeDIE Working Papers*, 2012; Nicolas Hervieu, "Conventionalité du renvoi d'étrangers atteints par le VIH et dilemme de la 'dissidence perpétuelle'", in the CREDOF Newsletter *«Actualités Droits-Libertés»*, 27 December 2011; François Julien-Laferrière, "L'éloignement des étrangers malades : faut-il préférer les réalités budgétaires aux préoccupations humanitaires?", in *Revue trimestrielle des droits de l'homme*, no. 77, 2009, pp. 261-277; Jean-Pierre Marguenaud, "La trahison des étrangers sidéens", in *Revue trimestrielle de droit civil*, 2008, p. 643 ("a wicked judgment", "a real betrayal", "dangerous relativisation of inviolable rights", "a risky initiative").

10 *N.*, cited above, § 44: "A finding to the contrary would place too great a burden on the Contracting States". This argument follows Lord Hope's line of reasoning, according to which: "It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would

argumentum ad consequentiam, which considers that the disadvantages of a course of action based on a certain legal solution outweigh its advantages. The fallacy is presented in its worst version, the *argumentum ad terrorem*, which invokes the supposedly (but not proven) catastrophic consequences of adopting a particular legal solution.

8. Furthermore, *N.* lacks any clear legal criteria for deciding when a terminally ill person may or may not be removed, either in terms of the degree of seriousness of the illness (what is a "critically ill" person?) or in terms of the quality, accessibility and cost of the treatment provided in the receiving State (what are the required minimum standards which should be accepted by the Court in this regard?). For example, the majority refrains from saying that, in the case of AIDS patients, antiretroviral treatment can be likened to a life-support machine and that terminating it in the receiving State would be tantamount to having a life-support machine turned off and therefore to a breach of Article 3. Instead, the majority focuses on "fitness to travel" as the ultimate, practical criterion for deciding who is to be removed!

9. As a matter of fact the majority of the Grand Chamber considers, in *N.*, that the uncertainty about the specific features of the health care available in the receiving State operates against the applicant. The elliptical sentence contained in paragraph 50 of *N.* is quite telling, if one reads between the lines: "The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and Aids worldwide." This *argumentum ad ignorantiam* not only contradicts a basic tenet of legal reasoning, according to which one should not draw conclusions from a lack of information or incomplete or insufficient sources of information[11]. Worse still, the majority is ready to exchange the available scientific treatment of a fatal disease like HIV in the removing country for faith in uncertain scientific developments that might one day eventually also reach the receiving country. Worst of all, the majority surreptitiously imposes on the applicant an untenable burden of proof. Since *Soering*, mere uncertainty about the possibility of ill-treatment in the receiving State bars removal from any Contracting Party to the ECHR, precisely because the implementation of the removal measure could lead to prohibited

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result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the States Parties to the Convention would ever have agreed to."

11 A very different approach was taken in *Aswat v. the United Kingdom*, no. 17299/12, 16 April 2013, § 52. It is puzzling to me that a suspected terrorist with a mental disorder gets a more thorough analysis of his personal condition than a common citizen.

ill-treatment[12]. It is up to the removing State to ensure that the removal measure will not put the removed person's Article 2 and 3 rights in danger, if necessary by obtaining valid international assurances, and to provide that evidence to the Court[13]. Implicitly, in *N.*, the majority departs from this wise rule of evidence by relieving the Government of the burden to provide similar assurances that the removed seriously ill person will not be subjected to any form of prohibited ill-treatment, by action or omission, and by imposing on the applicant the burden of providing evidence, without any margin for "speculation", that he or she will face such prohibited ill-treatment or even death in the receiving State in view of the deficiencies of its health system. This hidden reversal of the burden of proof is not acceptable, for the reasons mentioned above.

10. In addition, by introducing considerations of "compassion" or "sympathy" in place of rights-based arguments, the Court leaves unfettered discretion to Governments to do as they please with costly and undesirable sick people. In fact, in its opaque language, the *N.* judgment betrays the real concern of the majority, which is to reverse the approach taken in *Airey v. Ireland*[14]. The worrying policy considerations set out by the majority, which are aimed at downplaying the importance of the social or economic implications of the protection of civil and political rights, are particularly misplaced in view of the absolute character of the prohibition of ill-treatment in the Convention system. Legal reasoning is abandoned in favour of politics. The protection of the right to life and the right to physical integrity is no longer the subject of a State obligation, but of a more or less obscure policy of mercy which may vary in each State according to the political sensitivity of the Government in power.

11. Finally, *N.* was rejected in no uncertain terms by the Inter-American Commission of Human Rights ("IACHR") in the case of *Andrea Mortlock v. the United States*, in which it opposed the expulsion from the US of a Jamaican with AIDS whose state of health was stable but whose removal would have led to a premature death: "... stopping the treatment would lead to a revival of the symptoms and an earlier death. Therefore, even though the risk of death may not be so imminent [as in the ECtHR *D. v. UK* case] in the case of Ms. Mortlock, the effects of terminating the antiretroviral treatment may well be fatal"[15]. In blunt terms, the European standard of human rights protection is today well below the American one.

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12 *Soering v. the United Kingdom*, 7 July 1989, § 98, Series A no. 161.

13 Again the comparison with *Aswat*, cited above, § 56, is telling.

14 The passage from *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32, was literally and logically reversed: "Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights".

15 IACHR, 25 July 2008, *Andrea Mortlock v. United States*, Case 12.534, § 90.

Conclusion

12. Six years have passed since the N. judgment. When confronted with situations similar to that of N., the Court has reaffirmed its implacable position, feigning to ignore the fact that the Grand Chamber sent N. to her death. Too much time has elapsed since N.'s unnecessary premature death and the Court has not yet remedied the wrong done. I wonder how many N.s have been sent to death all over Europe during this period of time and how many more will have to endure the same fate until the "conscience of Europe" wakes up to this brutal reality and decides to change course.

Refugees, migrants and foreign nationals are the first to be singled out in a dehumanised and selfish society. Their situation is even worse when they are seriously ill. They become pariahs whom Governments want to get rid of as quickly as possible. It is a sad coincidence that in the present case the Grand Chamber decided, on the World Day of the Sick, to abandon these women and men to a certain, early and painful death alone and far away. I cannot desert those sons of a lesser God who, on their forced path to death, have no one to plead for them.