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The "individualisation" of the risk of torture, inhuman or degrading treatment or punishment in the jurisprudence of the European Court of Human Rights

I. Introduction

When establishing the risk of torture or inhuman or degrading treatment or punishment in asylum procedures, states often face questions like, "to what extent should this risk be of an individual character", or "to what extent the alleged victim should be 'singled out' by the perpetrator of such harm"? This issue has become a key point of debate in many member states concerning the application of the common EU concept of subsidiary protection.

Article 15 of the Qualification Directive[1] defines what sorts of harm generate a need for subsidiary protection. The so-called "serious harm" can be:

(a) death penalty or execution;

(b) torture or inhuman or degrading treatment or punishment; or

(c) a threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict.

In the recent *Elgafaji* judgment[2], the European Court of Justice (ECJ) provided guidance on how to interpret Article 15 (c) of the Directive. In its reasoning, the Court made it clear that Article 15 (c) provides protection above and beyond the European Convention of Human Rights (ECHR). The Court observed that Article 15 (b) of the Directive "corresponds, in essence, to Article 3 of the ECHR" and therefore Article 15 (c) has a separate meaning. In contrast to Articles 15 (a) and (b), which refer to harm specifically targeting the applicant, Article 15 (c) "covers a more general risk of harm". The Court decided that people seeking subsidiary protection because they fear for their life at home do not have to prove that they have been personally targeted if their country is seen as sufficiently dangerous.

Acknowledging that the ECJ held in the *Elgafaji* judgment that a certain level of individualisation is required in Article 15 (b) of the Qualification Directive (as in contrast to Article 15 (c)), this paper aims to clarify how the European Court of Human Rights (ECtHR), in its evolving jurisprudence, interprets the requirement of individualisation when defining the threshold for a real risk of torture or inhuman or degrading treatment or punishment. Article 15 (b) is directly inspired by and basically copies Article 3 of the ECHR, and it is clear from the legislative history that it must be read in the light of the relevant *non-refoulement* jurisprudence of the ECtHR. Therefore, the Article 3 case law of the ECtHR should be seen by states as guidance when setting their own threshold of "individualisation" in the application of Article 15 (b) of the Qualification Directive.

II. Article 3 of ECHR – general principles

Article 3 of the ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 3 is not subject to any derogations[3] and the ECtHR has consistently held that returning an individual to a country where there are substantial grounds for believing that he or she is "at real risk of being subjected to torture or inhuman or degrading treatment or punishment" is a violation of Article 3.[4] The ill-

[1] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted adopted on 29 April 2004, OJ L304/12.
[2] *Elgafaji v. Staatssecretaris van Justitie*, C-465/07,17 February 2009.
[3] Article 15 of ECHR.
[4] For example: *Soering v. The United Kingdom*; *Cruz Varas and Others v. Sweden* (the Court confirmed that Article 3 is applicable in extradition as well as in expulsion cases).

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treatment must attain "a minimum level of severity", and the standard of proof for such treatment is "substantial grounds for believing". It is irrelevant whether the proposed return would take place directly or indirectly.[5]

The risk of death penalty, execution, torture, or inhuman treatment may often be a highly individual one: Soering did not face inhuman treatment for reason of belonging to any larger discriminated group, but because of the very personal circumstance that he had committed murder.[6] In addition, many of the expulsion cases handled by the ECtHR have involved treatment in the country of origin similar to that envisaged by the 1951 Refugee Convention, and the ECtHR has generally deemed it necessary to assess the real risk of prohibited treatment arising from the individual situation of the applicants. However, the Court's approach has also evolved in this respect in recent years, indicating a clear shift in the jurisprudence in 2007.

III. Early case law

Vilvarajah and Others v. the United Kingdom concerned Tamil asylum-seekers who were ill-treated when returned to Sri Lanka after the UK denied their asylum request. In this case, the ECtHR found that as

> their personal situation was [not] any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country […] A mere possibility of ill-treatment […] is not sufficient […] there existed no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way.[7]

What would have been considered sufficient, and indeed necessary, by the Court was the existence of "special distinguishing features" setting the applicants apart from the "generality" of their ethnic and age group – something that would make them, as individuals, not just likely but indeed likelier targets of prohibited treatment. This principle, which the Court reaffirmed in subsequent decisions, made the personal nature of the risk a constitutive element of a "real risk" of prohibited treatment upon return.

Venkadajalasarma v. The Netherlands concerned a Tamil applicant from Sri Lanka. After assessing the general situation in Sri Lanka, the ECtHR found that "no substantial grounds have been established for believing that the applicant, if expelled, would be exposed to a real risk" of ill-treatment, as the peace process looked promising and the country's human rights situation appeared to be stabilising.[8] The case is another example of the fact that the ECtHR does not exclude risks arising in the context of situations of conflict and generalised violence from the scope of Article 3, although in this specific case the Court found that the situation in Sri Lanka did not give rise to a real risk for the applicant.

In ***H.L.R. v. France***, in which the Sri Lankan applicant claimed that he faced attacks by drug traffickers in Colombo, the ECtHR held that it

> can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3.[9]

[5] *T.I. v. United Kingdom*, Decision 7 March 2000, no. 43844/98.
[6] *Soering v. The United Kingdom*, 7 July 1989, no. 25803/94.
[7] *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, nos. 13163/87, 13164/84, 13165/87, 13447/87 and 13448/87, §111f.
[8] *Venkadajalasarma v. The Netherlands,* 17 February 2004, no. 58510/00, §68.
[9] *H.L.R. v. France,* 29 April 2004, no. 24573/94, §41.

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IV. Salah Sheekh – Shift in the Jurisprudence

In ***Salah Sheekh v. the Netherlands***, a judgment concerning a Somali national and member of the minority Ashraf clan, the ECtHR reconsidered the rather restrictive application of the "real risk" criterion it used in *Vilvarajah*. It contrasted the situation of Salah Sheekh to that of Vilvarajah, finding that

> on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia for members of the Ashraf minority, it is foreseeable that upon his return the applicant will be exposed to treatment in breach of Article 3.

The Court explicitly lowered the "real risk" threshold by stating that

> [i]t might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf […], the applicant be required to show the existence of further special distinguishing features.[10]

The Court's reasoning clearly shows a shift in interpreting the individualisation criterion; while it emphasises that the mere possibility of ill-treatment is insufficient to establish a real risk of Article 3 treatment, it lowers the threshold with regard to the requirement of showing special distinguishing features:

> 147. While the Netherlands authorities were of the opinion that the problems experienced by the applicant were to be seen as a consequence of the generally unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people […] the Court is of the view that is insufficient to remove the treatment meted out to the applicant from the scope of Article 3 […].
>
> 148. The Court would further take issue with the national authorities' assessment that the treatment to which the applicant was subjected was meted out arbitrarily. It appears from the applicant's account that he and his family were targeted because they belonged to a minority and for that reason it was known that they had no means of protection; they were easy prey, as were the other three Ashraf families living in the same village […]. **The Court would add that, in its opinion, the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk.** In this context it is true that a mere possibility of ill-treatment is insufficient to give rise to a breach of Article 3. Such a situation arose in the case of Vilvarajah and Others v. the United Kingdom, where the Court found that the possibility of detention and ill-treatment existed in respect of young male Tamils returning to Sri Lanka. The Court then insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Article 3 (§§ 111-112). However, in the present case, the Court considers, on the basis of the applicant's account and the information about the situation in the "relatively unsafe" areas of Somalia in so far as members of the Ashraf minority are concerned, that it is foreseeable that on his return the applicant would be exposed to treatment in breach of Article 3. **It might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf – which the Government have not disputed –, the applicant were required to show the existence of further special distinguishing features.**

The Salah Sheekh reasoning has since then been repeatedly confirmed by the Court.

The principle developed in Salah Sheekh was first reiterated in ***Saadi v. Italy***, where the Court held that

> In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-149).[11]

In ***NA. v. the United Kingdom*** the Court held unanimously that the applicant's expulsion to Sri Lanka would be in violation of Article 3. The applicant, an ethnic Tamil, applied for asylum in the UK, because he feared ill-

[10] *Salah Sheekh v. The Netherlands*, no. 1948/04, 11 January 2007, §148.
[11] *Saadi v. Italy*, no. 37201/06, 28 February 2008, §132.

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treatment in Sri Lanka by the Tamil Tigers. His claim was refused because the authorities found that the applicant's fear of ill-treatment upon his return was unjustified. The general situation in Sri Lanka did not indicate any personal risk of ill-treatment and there was no evidence that he would be personally affected upon return.

In this case the Court referred to the entire previously established jurisdiction on this matter. First it stated that

> in particular the need to examine all the facts of the case require that this assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination. This in turn must be considered in the light of the general situation there as well as the applicant's personal circumstances (*Vilvarajah and Others v. the United Kingdom*, §108) […]. A general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (*H.L.R.* §41, *Müslim v. Turkey*, no. 53566/99, 26 April 2005).[12]

However, the Court pointed out that it

> […] has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return […][13].
>
> In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (*Saadi v. Italy*, §132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (*Salah Sheekh*, §148) […][14].
>
> It follows that the Court may take account of the general situation of violence in a country. It considers that it is appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question (*Salah Sheekh*, §148; *Saadi v. Italy*, §§ 132, by converse implication, *Thampibillai,* §§64 and 65; *Venkadajalasarma,* §§66 and 67).[15]

In the case ***Y v. Russia***, although the Court did not find the violation of Article 3, it affirmed the principle established in Salah Sheekh.[16]

> 80. Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see *Saadi v. Italy,* cited above, § 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, § 148).

In ***Muminov v. Russia***[17] the Court held that the expulsion of the applicant to Uzbekistan would violate Article 3 of the Convention. In making the argumentation, the Court referred to the *Saadi* and *NA* cases (*Saadi* v. Italy (§ 132), *NA. v. the United Kingdom*, §116), among others.

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[12] *NA. v. the United Kingdom,* no. 25904/07, 17 July 2008, §113.
[13] *NA. v. the United Kingdom,* no. 25904/07, 17 July 2008, §115.
[14] *NA. v. the United Kingdom,* no. 25904/07, 17 July 2008, §116.
[15] *NA. v. the United Kingdom,* no. 25904/07, 17 July 2008, §117.
[16] *Y v. Russia*, Application no. 20113/07*,* 4 December 2008.
[17] *Muminov v. Russia*, (Application no. 42502/06),11 December 2008.

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> 95. As the Court has recently held in Saadi (§ 132), in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the information contained in recent reports from independent international human-rights-protection associations or governmental sources, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned. In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3 (see NA. v. the United Kingdom, no. 25904/07, § 116, 17 July 2008).

V. Conclusion

As stated in the introduction, this paper aims to show how ECtHR assesses the issue of individualisation or "singling out" while defining the real risk of torture or inhuman or degrading treatment or punishment.

According to the jurisprudence of the ECtHR, there should be substantial grounds for believing that there is a real risk of prohibited treatment in the country of origin. Furthermore, the risk should be current, continuing, and credible – here it is important to take into account the possible sources of information (recent reports from independent international human-rights-protection associations or governmental sources) to verify the claims of the applicant.

The assessment of the risk includes the assessment of the general situation and the personal circumstances of the applicant. The Court's approach concerning the role and importance of special distinguishing features in this assessment has significantly changed in recent years. With emphasis on more recent judgments, the following summary principles can be derived from the Article 3 jurisprudence of the ECtHR regarding the assessment of a real risk of torture or inhuman and degrading treatment or punishment:

- **A mere, rather theoretical possibility of ill-treatment (e.g., based on the frequent occurrence of violence in the country of origin) is insufficient to establish the real risk of such treatment.**
- **If the person in question is a member of a group systematically exposed to a practice of ill-treatment (regardless of the size of the group), there is no need to prove the existence of further special distinguishing features (i.e., why the person would be more at risk than the others in the same group).**
- **If the person in question does not belong to such a group, the "real risk assessment" includes the analysis of personal circumstances or special distinguishing features that may give rise to torture or inhuman or degrading treatment or punishment. However, there is no requirement for the person to show that he or she, as an individual, is *personally* targeted or "singled out" by the perpetrator of such treatment.**