



## Committee Against Torture, D. v. Switzerland

(Communication no. 700/2015)

REDRESS Brief, 27 July 2016

### 1. Introduction

1. This case concerns a Syrian refugee, a torture survivor with severe physical and psychological medical needs. Switzerland wishes to send him back to Italy under the Dublin III Regulation, in circumstances in which the Applicant argues would constitute a breach of the prohibition of non-refoulement under Article 3 and Article 16 of the UN Convention Against Torture (UNCAT),<sup>1</sup> together with Article 14 (right to rehabilitation). This is due to both the destitution the Applicant would face in Italy *and* his lack of access to appropriate services necessary for his rehabilitation, given his particular physical and psychological needs.
2. In brief, Switzerland argues that sending the Applicant to Italy would not breach his rights under Article 3 and 16 UNCAT because (1) the Swiss Tribunals took the medical condition of the Applicant into account and Italy has the necessary medical infrastructures to adequately treat the Applicant's medical conditions (paras 12 – 16 Switzerland's submission);<sup>2</sup> (2) whilst there have been capacity issues in the past, there is no evidence of systemic violations of human rights in Italy, and the European Court of Human Rights (ECtHR) has held on a number of occasions that although the general situation and living conditions in Italy of asylum seekers is 'far from ideal', there is no 'systemic failure' in providing support or facilities catering for asylum seekers (para 19 of Switzerland's submission), and many of the relevant ECtHR cases concern vulnerable and mentally ill individuals similar to the applicant in this case (paras 19-20 of Switzerland's submission). Switzerland argues that the principles in *Tarakhel*<sup>3</sup> (concerning the particular

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<sup>1</sup> See UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 6, regarding the fact that Article 3 also applies to cruel, inhuman and degrading treatment (CIDT) under Article 16 as well as to torture under Article 2. See OMCT, SOS-Torture Network, 'Non-refoulement: Achievements and Challenges', p. 14 for examples from the Committee's recent Concluding Observations referring to CIDT in the context of Article 3 (available at: [http://www.omct.org/files/2015/08/23316/nonrefoulement\\_backgroundpaper.pdf](http://www.omct.org/files/2015/08/23316/nonrefoulement_backgroundpaper.pdf)).

<sup>2</sup> CAT: D. contre Suisse (communication no 700/2015, Observations du Gouvernement Suisse sur le bien-fondé de la communication (hereinafter referred to as 'Switzerland's submission').

<sup>3</sup> ECtHR, *Tarakhel v Switzerland* (Grand Chamber), Application no. 29217/12), 4 November 2014.

vulnerability of asylum seekers, their need for ‘special protection’ from being subjected to cruel, inhuman and degrading treatment,<sup>4</sup> and the need for states to take this into account) are limited to families with children (para 22 of Switzerland’s submission). With respect to Article 14, Switzerland argues that the primary aim of this rehabilitation is to re-establish the dignity of the victim; States parties have a margin of appreciation in how they achieve this. Switzerland argues that neither the text of the UNCAT, nor the views of the Committee Against Torture in its General Comment No. 3<sup>5</sup> exclude the possibility of cooperation between States parties to the Convention as a means of rehabilitation. All that is required, Switzerland asserts, is for the victim to be able to commence a rehabilitation programme. The choice of individual measures falls to the service provider; victims have no say in this, nor in where they are placed (Switzerland’s submission para. 10).

3. In this submission, REDRESS provides an analysis of relevant jurisprudence and offers its views on the basis of more than twenty years of working with torture survivors in a variety of countries and contexts. It submits that it is well-established that the subjection of asylum seekers to adverse living conditions (including lack of access to appropriate health care), either in the country in which they are seeking asylum or on refoulement to a third State, can amount to inhuman and degrading treatment. It is equally well established that, when considering whether the threshold of minimum severity for inhuman and degrading treatment will be met, States must give special and individuated consideration as to whether the individuals affected form part of any particularly vulnerable groups. Such vulnerable groups are not limited to families with young children<sup>6</sup> and can include young men and torture survivors. Further, it is not necessary to show that systemic human rights violations exist in the country in question.<sup>7</sup> The needs of a torture survivor, and that survivor’s right to rehabilitation under Article 14 UNCAT require that specific consideration be given to a torture survivor’s right to rehabilitation by any State under whose jurisdiction that torture survivor finds him or herself, including a State that is proposing to send that survivor to a third country. In addition, Article 14 UNCAT provides a freestanding right to a remedy which includes rehabilitation, an obligation by which Switzerland is bound.

In this submission, REDRESS first sets out and analyses comparative domestic, regional and international human rights jurisprudence on factors that a State must take into consideration when assessing whether the threshold of minimum severity for inhuman and degrading treatment will be met in the context of asylum seekers and adverse living conditions/lack of access to appropriate health facilities. It then considers in detail the content of the right to rehabilitation in international law, explaining the breadth and depth of States’ obligations under Article 14 UNCAT. It then considers the free-standing civil right to rehabilitation for torture survivors.

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<sup>4</sup> *Tarakhel*, para 118.

<sup>5</sup> UN Committee Against Torture, General Comment no. 3, 2012: implementation of article 14 by States parties, 13 December 2012.

<sup>6</sup> Cf. Switzerland’s assertions in its submission, para 22).

<sup>7</sup> Cf. Switzerland’s submission para 19. See *R (on the application of EM (Eritrea) and others v SSHD* [2014] UKSC 12 on this point, described in more detail below.

## 2. Factors that a State must take into consideration when assessing whether the threshold of minimum severity for inhuman and degrading treatment will be met in the context of asylum seekers & adverse living conditions

5. In this section, REDRESS analyses the standards that States are required to apply when considering whether an asylum seeker may be returned to a third State. It shows how an individualised assessment is required taking into account all relevant circumstances for a particular individual, and how asylum seekers are widely accepted in domestic, regional and international jurisprudence to be a particularly vulnerable group. It sets out jurisprudence which underscores that special psychological and health needs must be taken into consideration in the context of asylum seekers.

### 2.1 ECtHR and UN Human Rights Committee jurisprudence on vulnerability & asylum seekers

6. Both the ECtHR and the UN Human Rights Committee have emphasised the need for an individualised assessment when deciding whether an individual is 'vulnerable' and whether the threshold of minimum severity for inhuman and degrading treatment is met.
7. In *Jasin et al. v Denmark (Communication No. 2360/2014)*, which concerned refoulement from Denmark to Italy, the UN Human Rights Committee confirmed that an 'individualized assessment' of the risk faced by the author was necessary.<sup>8</sup>

8. The ECtHR Grand Chamber held in *Tarakhel v Switzerland* that the State must:

...[carry] out a thorough and individualised examination of the situation of the person concerned and...[suspend] enforcement of the removal order should the risk of inhuman or degrading treatment be established. [para. 104] (emphasis added)

9. The ECtHR has considered that this individualised assessment should include consideration of the claimant's status as an asylum-seeker. In *MSS v Belgium*,<sup>9</sup> which concerned the refoulement of a man from Belgium to Greece, the Grand Chamber held that:

the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the

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<sup>8</sup> UN Human Rights Committee, *Jasin et al. v Denmark* (Communication No. 2360/2014), para 8.9.

<sup>9</sup> ECtHR, *MSS v Belgium* (Grand Chamber), App. No 30696/09. 21 January 2011.

total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention. [para 263] (emphasis added)

10. In *Tarakhel v Switzerland*, the Court followed *MSS*, holding:

The Court reiterates that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see paragraph 94 above). It further reiterates that, as a 'particularly underprivileged and vulnerable' population group, asylum seekers require 'special protection' under that provision (see *M.S.S.*, cited above, § 251). [para 118] (emphasis added)

The applicants in question were a family with children; however, the principles in the judgment are not limited to children (and were not stated by the Court to be so). As summarised by the European Legal Network on Asylum (ELENA),

16. As the individual facts of this case relate to young children, a dominant theme of the judgment was the best interests of the child and family unity. However, there is nothing in the judgment to suggest that individualised guarantees or even an assessment need only be provided for families with young children.

17. The judgment explicitly states that all asylum seekers require special protection under Article 3 due to their vulnerability, which means that authorities should have regard to the specific situation of other especially vulnerable groups such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence<sup>10, 11</sup>.

11. The recent case of *V.M. v Belgium*,<sup>12</sup> confirmed the line of jurisprudence in *MSS v Belgium* and *Tarakhel* with respect to the special consideration to be afforded to asylum seekers when considering whether the threshold for cruel, inhuman and degrading treatment is met. The Court held at paragraph 136:

la Cour amorça une nouvelle jurisprudence. Après avoir noté qu'à la différence de l'affaire *Muslim*, l'obligation de fournir des conditions matérielles décentes aux demandeurs d'asile démunis faisait partie du droit positif, la Cour considéra que, pour déterminer si le seuil de gravité requis par l'article 3 était atteint, il fallait accorder un poids tout particulier au statut de demandeur d'asile du requérant. Il appartenait de ce fait à un groupe de la population particulièrement défavorisé et vulnérable qui avait besoin d'une protection spéciale, besoin

<sup>10</sup> See Article 20(3) Recast Qualification Directive and Article 32(1) Dublin III Regulation.

<sup>11</sup> Elena Information Note, *Dublin transfers post-Tarakhel: Update on European case law and practice*, October 2015, p. 4 (available at: [http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Dublin%20transfers%20post-Tarakhel-%20Update%20on%20European%20case%20law%20and%20practice%20\(3\).pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Dublin%20transfers%20post-Tarakhel-%20Update%20on%20European%20case%20law%20and%20practice%20(3).pdf)).

<sup>12</sup> Application No. 60125/11, 7 July 2015. The case is pending before the Grand Chamber.

faisant, du reste, l'objet d'un large consensus à l'échelle internationale et européenne (M.S.S., précité, § 251).

While this case did concern a family with children, in the ratio of its judgment the Court indicated:

la Cour est d'avis que la situation vécue par les requérants appelle la même conclusion que dans l'affaire M.S.S. Elle considère que les autorités belges n'ont pas dûment tenu compte de la vulnérabilité des requérants comme demandeurs d'asile **et** de celle de leurs enfants. [para 162]. (emphasis added)

Thus, the Court considered the vulnerability of the asylum seekers separately from the vulnerability of their children.

12. As determined by the ECtHR in *VM v Belgium*, the special consideration that should be afforded to asylum seekers when considering whether the threshold for cruel, inhuman and degrading treatment is met, is the subject of a wide consensus at both European and international level. A review of domestic, regional and international human rights jurisprudence shows that to be the case. Also, such a review makes clear that the requirement to give special and individuated consideration to all the circumstances of the case and as to whether the individuals affected have any particular vulnerabilities, includes a wide range of factors. As is set out below, the jurisprudence makes clear that for a State to subject even young, single male asylum seekers to adverse living conditions and/or destitution (or to return them to a State where they will face such conditions) can reach the threshold of inhuman and degrading treatment.

## **2.2 Comparative domestic jurisprudence which shows that the principles laid out in *V.M. v Belgium*, *MSS v Belgium* and *Tarakhel* are not restricted to families with young children and apply equally to young men in certain circumstances**

13. The **UK** case of *R (ex parte Limbuela and others) v SSHD [2005] UKHL 66* highlights this. The case concerns three young single male asylum seekers facing destitution in the UK due to support under section 95 of the Immigration and Asylum Act 1999 being withdrawn. When considering whether their situation led to a breach of Article 3 ECHR, the House of Lords made clear the nature of individuated assessment that was required, holding that the:

[A]ssessment of the minimum threshold is relative and depends on all the circumstances of the case...The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3. (at [54], per Lord Hope)

14. The correct test was for the court to look at the context and facts of the particular case, including factors such as the age, sex, and health of the claimant and the length of time spent or likely to be spent without the required means of support. (at [59], per Lord Hope)
15. The fact that young asylum seeking men can fall into a particularly vulnerable group was again highlighted in *MK, AH v. The Secretary of State for the Home Department [2012] EWHC 1896 (Admin)*. The case concerned two male asylum seekers who failed in their initial claims for

asylum and then submitted new representations. When considering their applications, the Court followed *Limbuela* and held:

whilst every case will depend ultimately upon its own facts, street homelessness, or imminent street homelessness, caused by the positive action of the State would ordinarily amount to a breach of Article 3. [para 100]

The Court went on to indicate, with respect to the particular applicants in that case:

there are human beings behind each application made and that some (including single men) may be extremely vulnerable at the time of making the application for support, the vulnerability being exacerbated by being destitute and homeless at the time. [para 183]

16. In *R (on the application of EM (Eritrea)) and others v SSHD [2014] UKSC 12*, the UK courts again emphasised the importance of assessing each case on its facts. The case concerned the question of whether the appellants (young men, including a torture victim who showed evidence of torture and post-traumatic stress syndrome), who resisted their return to Italy under Dublin II were required to establish that there were in Italy systemic deficiencies in the reception conditions of asylum seekers, in order to show they would face a real risk of inhuman and degrading treatment. The Court held that the applicants were not required to establish systemic deficiencies.<sup>13</sup> This ruling supports the proposition that an applicant does not have to show that there are systemic violations in the country of proposed return (contrary to the assertion at para 19 of Switzerland's submissions).
17. In *The Netherlands*, the Courts have repeatedly held that the ECtHR *Tarakhel* judgment does not apply solely to families with young children, and that individual guarantees may therefore be required in other circumstances, based on the specific vulnerabilities of the applicants. They point towards paragraph 118 and 119 of the *Tarakhel* ruling in noting that all asylum seekers have been recognised as needing special protection, with the ECtHR finding that this applied to children 'in particular', rather than exclusively.<sup>14</sup> In *The Hague Tribunal, case numbers: AWB 15/9055 (injunctive relief) AWB 15/9051 (appeal)*,<sup>15</sup> the Hague District Court explicitly recognised the importance of taking into account an individual's particular vulnerability to prevent an imminent breach of Article 3. It explained that the *Tarakhel* judgment did not restrict the need for individual safeguards just to families with children, but that the need for individual safeguards could also apply to, for example, adult asylum seekers who need special protection because of medical problems. The Court stated:

The judgment in *Tarakhel*, contrary to what is stated by the defendant, does not state that the question of individual safeguards to prevent an imminent breach of Article 3 ECHR can only apply to families with (young) children. Paragraph 118 of that judgment provides that asylum seekers are treated as a vulnerable group that requires special protection ('special

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<sup>13</sup> *R (on the application of EM (Eritrea)) and others v SSHD [2014] UKSC 12*, para 63.

<sup>14</sup> Elena Information Note, Dublin transfers post-*Tarakhel*: Update on European case law and practice, October 2015, p.12

<sup>15</sup> The case, decided 25 June 2015 is available at:

<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7843> (Summary of case from Elena Information Note p. 12)

protection'). In paragraph 119, the ECHR provides that the requirement of special protection in particular (ie not exclusively) is important when it comes to young children, either alone or with their parents. It does not appear that adult asylum seekers who need special protection because of medical problems are automatically excluded from the application of the judgment (...).<sup>16</sup> [para 6.3]

18. In the **Netherlands Regional Court, 17 April 2015, AWB 15/328 case**<sup>17</sup> a case which relates to a challenge to the Dublin transfer of an Iraqi asylum applicant from the Netherlands to Italy, the District Court did not rule out that an asylum seeker with serious psychological problems, if he could substantiate this, could be regarded as extremely vulnerable in line with the judgment of *Tarakhel*. It points towards paragraphs 118 and 119 of that case in considering that the need for special protection does not only apply to families with minor children and notes that 'all the circumstances of the case, such as the duration of the treatment and its physical or mental effects, and in some instances, the sex, age and state of health of the victim' need to be taken into account.
19. In **Belgium**, the courts have suspended transfers to Italy of single, young, and healthy men under the 'extremely urgent necessity' procedure where they have considered that the individual could be placed at risk of poor treatment because of the country's reception conditions. In **judgment no. 144 188 of 27 April 2015**, a case concerning a single man, **the Conseil de Contentieux Etrangers (Council of Alien Law Litigation)** held that there was an 'extremely urgent' situation, that there were 'serious' grounds for overturning the state decision, and that there was an 'irreparable prejudicial risk'. All three conditions of the urgent procedure were thus fulfilled. The court held:<sup>18</sup>

...il n'est nullement garanti que tout demandeur d'asile qui arrive en Italie sera prise en charge par les autorités italiennes – lui offrant ainsi un abri -, où qu'il ne sera pas contraint de séjourner dans des conditions extrêmement difficiles – les capacités maximales des centres d'accueil étant régulièrement dépassées -, le temps de l'examen de la demande d'asile...

En espèce, au vu des diverses informations sus évoquées, dont disposait la partie défenderesse, le Conseil estime *prima facie* qu'il lui appartenait, à tout le moins, d'examiner le risque invoqué par la partie requérante, à savoir celui de se retrouver sans hébergement, et sans les moyens de pourvoir à ses besoins élémentaires (laquelle situation serait constitutive d'une violation de l'article 3 de la CEDH), en tenant compte de la situation actuelle invoquée et étayée par la partie requérante, ainsi que des éléments particuliers propres au cas du requérant, ne fussent-ils pas jugés comme étant des éléments susceptibles d'établir une 'vulnérabilité aggravée.' [paras. 3.3.2.2.3.2. and 3.3.2.2.3.3.]

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<sup>16</sup> Unofficial translation.

<sup>17</sup> Summary of case available on European Database of Asylum law, available at: <http://www.asylumlawdatabase.eu/en/content/netherlands-regional-court-17-april-2015-awb-153284> [No English translation available].

<sup>18</sup> Case available at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Belgium%20-%20CCE%20144%20188%20April%202015.pdf>.

Later, the Conseil indicated:

...il n'apparaît pas que la simple mention, sans autre forme de précision, de ce que les autorités italiennes ont indiqué que le requérant 'fera l'objet du projet FER' suffise a considérer que la partie défenderesse n'a pas manqué à cette exigence et ce, compte tenu de ce qui précède, notamment l'actuel afflux massif de demandeurs d'asile en Italie, invoqué par la partie requérante en termes de plaidoiries et non contesté par la partie défenderesse. [para. 3.3.2.2.3.3]

20. The fact that the applicant was likely to be homeless and without the means to tend to his basic needs, coupled with the influx of asylum seekers in Italy, was such as to constitute a breach of Article 3 ECHR, fulfilling the requirement for 'serious' grounds. The same reasons were given by the court in case no. 144 400 of 28 April 2015,<sup>19</sup> concerning a single female, in which the grounds for the urgent procedure were also held to have been fulfilled.
21. The first instance Administrative courts in **Germany** (the venue in which an asylum applicant can appeal against a rejection decision by the Federal Office) have repeatedly held that it is only possible to transfer an individual to Italy if Italy issues individual guarantees that it will provide adequate housing and care, following findings of systemic deficiencies in the Italian reception system.<sup>20</sup> The requirement for individual guarantees has been said to apply not only to families with children, but also to single male applicants. The Schwerin Administrative Court has held that:<sup>21</sup>

Die aufgezeigten Bedenken werden sowohl vom Bundesverfassungsgericht (BVerfG) als auch vom Europäischen Gerichtshof für Menschenrechte (EGMR) geteilt und **beschränken sich nicht nur auf Familien mit (kleinen) Kindern**. Das BVerfG hat ausgeführt, dass „jedenfalls“ bei der Abschiebung von Familien mit Neugeborenen und Kleinstkindern Garantieerklärungen der italienischen Regierung notwendig sind. **Dies schließt entprechende Erklärungen für Einzelpersonen nicht aus**. [page 5, para. bb]

Mere confirmation by the Italian authorities that the applicant would be placed into Italy's European Refugee Fund funded projects providing accommodation for those transferred under the Dublin system did not guarantee that the applicant would be accommodated in Italy. The ECtHR's *Tarakhel* judgment required more concrete guarantees concerning the individual facility

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<sup>19</sup> Case available at:

<http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Beglium%20-%20CCE%20144%204000%2C%2028%20April%202015.pdf>.

<sup>20</sup> Elena Information Note 2015, pp.62 – 71, citing the following cases: *VG Hannover B. v. 22.12.2014 – 10 B 11507/14* (original German judgment available at:

<http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE15000027&st=null&showdoccase=1>); *VG Hannover, 29.01.2015 - 3 B 13203/14* (original German judgment available at: <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE150000437&st=null&showdoccase=1>); and *VG Hannover, 04.02.2015 - 3 B 388/15* (original German judgment available at: <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=MWRE150000438&st=null&showdoccase=1>). See, also, the concerns of the Federal Constitutional Court in *Bundesverfassungsgericht, 17.9.2014, 2 BvR 732/14*.

<sup>21</sup> Available at: [http://www.asyl.net/fileadmin/user\\_upload/dokumente/22669.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/22669.pdf)

in which the asylum seeker would be accommodated. Further, these guarantees were required not just for families with children, but also for individuals.

22. In **Austria**, the **Constitutional Court, 7 October 2010, U694/10**<sup>22</sup> has held, in the context of a return of a single-mother asylum seeker from Austria to Greece, and with respect to conditions in Greece:

Whilst capacity issues may cause longer waiting times in terms of providing accommodation and care for asylum seekers in individual cases, where particular individual reasons for the adoption of a specific vulnerability existed (e.g. persons with diseases, families with small children or pregnant women), there would be an infringement of Article 3 of the ECHR in the event of their return to Greece.<sup>23</sup> (emphasis added) [unofficial translation]

27. These cases give support for the proposition that with respect to asylum seekers, including single men, States must take into account their particular vulnerability and need for special protection from being subjected to cruel, inhuman and degrading treatment.

### **2.3 Comparative domestic jurisprudence on how special psychological and health needs must be taken into consideration in the context of asylum seekers**

28. An asylum seeker's particular health needs are one factor to be taken into account when considering whether the threshold for inhuman and degrading treatment will be met.

29. This is shown by the decision of the French **Administrative Court Nantes, 24 July 2015, M. S, No 1506136**.<sup>24</sup> The case concerned the proposed return of the applicant to Italy, with the applicant arguing that such a return would put him at risk of cruel, inhuman and degrading treatment. The State argued that the applicant's needs could be met in Italy. The Tribunal found that the Prefect's arguments were too general and not adapted to the circumstances of the Applicant (including the fact that he was infected with Hepatitis B) and were too general to demonstrate that transferring the Applicant to the Italian authorities would not have a substantial impact on the Applicant's fundamental rights and the right of asylum in accordance with Article 3 of Regulation (EU) no. 604/2013 known as the Dublin III Regulation.

30. This approach is also seen in Court of Justice of the European Union (CJEU) jurisprudence: **Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Abdida (C-562/13)**.<sup>25</sup> The case concerned

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<sup>22</sup> Available at:

[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Original%20judgement\\_1\\_2.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Original%20judgement_1_2.pdf).

<sup>23</sup> At para 4. The original German text reads: '(...)Zwar könne es im Einzelfall zu durch Kapazitätsprobleme bedingten längeren Wartezeiten hinsichtlich der Unterkunftsgewährung und der Versorgung bei Asylwerbern, bei denen besondere individuelle Gründe für die Annahme einer speziellen Schutzbedürftigkeit bestünden (zB Personen mit Erkrankungen, Familien mit Kleinkindern oder schwangeren Frauen), somit zu einer Verletzung des Art3 EMRK im Falle ihrer Rücküberstellung nach Griechenland kommen.'

<sup>24</sup> Available at: <http://www.asylumlawdatabase.eu/en/case-law/france-administrative-court-nantes-24-july-2015-m-s-no-1506136#content>.

<sup>25</sup> The case, decided by the Grand Chamber on 18 December 2014, is available at :

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd8a876a6d72b64fd3aa1eb7096>

Directive 2008/115 and the EU Charter of Fundamental Rights and the provision of basic needs for so-called 'illegally remaining third country nationals.' The applicant, an AIDS sufferer, had his basic social security and medical care withdrawn during his non-suspensive appeal against the refusal for leave to remain in Belgium. The Advocate General's Opinion in the case, issued 4 September 2014, referred to the right to health enshrined in the Charter. It also made specific reference to the prohibition of inhuman or degrading treatment. The Advocate General set out:

In my view, the respect for human dignity and the right to life, integrity and health enshrined in articles 1, 2, 3 and 35 of the Charter respectively, as well as the prohibition of inhuman or degrading treatment contained in article 4 of that Charter, mean that, in a situation such as that in the main proceedings, an illegally staying third-country national whose removal has been de facto suspended must not be deprived of the means necessary to meet his basic needs pending the examination of his appeal.

To have one's most basic needs catered for is, in my opinion, an essential right which cannot depend on the legal status of the person concerned.

Although the extent of the provision for basic needs must be determined by each of the member states, given the discretion conferred on them by Directive 2008/115, it seems to me that such provision must be sufficient to ensure the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health, by enabling him, inter alia, to secure accommodation and by taking into account any special needs that he may have. I refer, in this regard, to *Federaal agentschap voor de opvang van asielzoekers v Saciri* (Case C-79/13) EU:C:2014:103, in which the court ruled on the material reception conditions for asylum seekers, in particular in para 40.<sup>26</sup> (emphases added)

## **2.4 Conclusion**

31. It is clear from domestic, regional and international jurisprudence that careful, individuated consideration must be given to ensure special protection for asylum seekers (who are considered particularly vulnerable) from being subjected to cruel, inhuman and degrading treatment, whether such treatment will be suffered in the sending or receiving state. As part of such individuated consideration, the special needs of the individual, including his or her mental and physical health needs, must be taken into account.

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[0e24545.e34KaxiLc3gMb40Rch0SaxuTbNn0?text=&docid=160943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=441553](https://eur-lex.europa.eu/lexuri/ui.do?uri=OJ:L:2015:158:FULLTEXT&docid=160943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=441553).

<sup>26</sup> *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Abdida* (C-562/13), Opinion of the Advocate General, 4 September 2015, paras. 155-158.

### 3. Right to rehabilitation under Article 14 CAT

32. In this section, we set out the content of the right to rehabilitation and explains the considerations that ought to have been taken into account in cases such as the present one. We then proceed to consider the right to rehabilitation as a remedy.

#### 3.1 Standards relating to the right to rehabilitation

33. The right to rehabilitation as part of a torture victim's right to reparation is set out in Article 14 UNCAT, which provides in relevant part:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (emphasis added)

34. The importance that the Committee Against Torture placed on the fact that rehabilitation must be as full as possible and without geographic distinction is shown by an examination of the *travaux préparatoires* on the drafting of the UNCAT. After discussion on Article 14 by the Working Group in 1981, the word 'rehabilitation', was modified to require that it be 'for as full a rehabilitation as possible'.<sup>27</sup> Rehabilitation is also recognised as an essential component of the right to redress by the UN Human Rights Committee,<sup>28</sup> while the need for a full holistic means of rehabilitation is also recognised by the UN General Assembly's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which provides that rehabilitation 'should include medical and psychological care as well as legal and social services' (Principle 21).<sup>29</sup>

35. More recently, CAT General Comment No. 3 on Article 14 (2012)<sup>30</sup> elaborates in detail on the nature of a right to rehabilitation and affirms that:

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<sup>27</sup> Christopher K. Hall, 'The duty of states parties to the Convention against Torture to provide procedures permitting victims to recover reparations for torture committed abroad', (2007) 18(5) EJIL 921 at 932, available at: [http://www.ejil.org/article.php?article=246&issue=10#download\\_acrobat\\_reader](http://www.ejil.org/article.php?article=246&issue=10#download_acrobat_reader) citing UN Doc. E/CN.4/1475 (1981) 62; and J.H. Burgers and H. Danelius, *The United Nations Convention: A Handbook on the Convention and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff Publishers, 1988), 74.

<sup>28</sup> UN Human Rights Committee (HRC), General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 16.

<sup>29</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (hereinafter referred to as the UN Basic Principles and Guidelines). The need for 'as full a rehabilitation as possible' was also emphasised by the Special Rapporteur on Torture on a number of occasions, see eg: UNGA, Fifty Fourth Session, Report on torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights A/54/426, 1 October 1999, para. 49; UNGA, Fifty fifth session, Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment A/55/290, 11 August 2000, para. 24.

<sup>30</sup> UN Committee Against Torture, General Comment no. 3.

...the provision of means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention should be holistic and include medical and psychological care as well as legal and social services.<sup>31</sup>

36. Consistent with the further elaboration of CAT General Comment no. 3 in the Applicant's submissions in this case at paragraphs 34 – 39, para 12, sets out the depth and breadth of States' obligations with respect to services for the rehabilitation of torture victims. States must ensure that:

specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible. These should include: a procedure for the assessment and evaluation of individuals' therapeutic and other needs, based on, inter alia, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol); and may include a wide range of interdisciplinary measures, such as medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education etc<sup>32</sup>

37. The nature of States' obligations with respect to providing as full a rehabilitation as possible can be elucidated by an examination of the use and explanation of the term rehabilitation in the UN Convention on the Rights of Persons with Disabilities.<sup>33</sup> 'Habilitation' and 'rehabilitation' is referred to in Article 26 of that Convention, which requires states to enable persons with disabilities 'to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.'<sup>34</sup> REDRESS has previously argued that this definition could be adjusted for victims of torture to allow the victim to 'regain, as far as possible, their independence, full physical, mental social and vocational ability, and full inclusion and participation in all aspects of life.'<sup>35</sup> This is supported by statements made by the previous Special Rapporteur on Torture, who emphasised that States must provide long-term assistance to torture victims which should be 'multidimensional and interdisciplinary.'<sup>36</sup>

38. A recent Comment by the Council of Europe's Commissioner for Human Rights, elaborates further on the detailed requirements on States to provide rehabilitation to torture survivors:

Setting things "right" after such a traumatic life experience as torture or ill-treatment requires holistic and long-term rehabilitation efforts to restore the dignity, physical and mental ability, and social independence of the individuals concerned, as well as their full re-

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<sup>31</sup> Ibid, para 11.

<sup>32</sup> Id, para 12.

<sup>33</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

<sup>34</sup> UN Convention on the Rights of Persons with Disabilities, adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 26.

<sup>35</sup> REDRESS, 'Draft General Comment on Article 14, Comments of REDRESS, September 2011, available at: <http://www.redress.org/downloads/publications/REDRESS%20comment%20on%20draft%20General%20Comment%20on%20Article%2014.pdf>.

<sup>36</sup> UN General Assembly, fifty-ninth session, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/59/324, 1 September 2004, para. 57.

inclusion in society. The rehabilitation process should include not only medical and psychological care, but also social, legal, educational and other measures, as well as family support.<sup>37</sup> To be effective, rehabilitation must be victim-centred and be provided at the earliest possible point in time after the torture event based on the recommendations by a qualified health professional. Rehabilitation should be tailored to the specific needs of a given victim.<sup>38</sup>

### **3.2 The right to rehabilitation must be effective in practice**

40. The obligation to provide the means for as full a rehabilitation as possible does not relate to the available resources of States parties and may not be postponed.<sup>39</sup> This applies *a fortiori* when the right to rehabilitation is read (as it must be) consistently with the right to an ‘effective’ remedy as embodied by Principle 3(d) of the UN Basic Principles and Guidelines and Article 2(3) ICCPR. The Committee Against Torture underscored in its General Comment no. 3 at paragraph 38 that ‘States parties to the Convention have an obligation to ensure that the right to redress is effective.’ That rehabilitation must be effective and accessible in practice has been highlighted in recent years by a number of relevant UN bodies.

41. The Committee Against Torture emphasised, in the context of trafficking victims, in its Concluding Observations on Bulgaria (2013), that the State should:

improve the identification of victims of trafficking and provide means of effective redress, including compensation and rehabilitation, to victims of trafficking, including assistance to victims to report incidents of trafficking to the police, in particular by providing legal, medical and psychological aid and rehabilitation, inter alia, through genuine access to health care and counselling and adequate shelters, in accordance with article 14 of the Convention.<sup>40</sup> (emphasis added)

42. The Special Rapporteur on Torture has stated in his most recent report with regard to women, girls, and lesbian, gay, bisexual and transgender persons in detention that migrants, refugees, and asylum seekers should be ‘individually assessed, including with respect to their need for protection’, and emphasised the necessity of ‘adequate screening and assessment procedures are in place to identify victims of torture and illtreatment’.<sup>41</sup> (emphasis added)

43. The fact that the right to rehabilitation is an immediate and urgent requirement has been highlighted by the Committee Against Torture in its recent Concluding Observations on Cyprus

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<sup>37</sup> See, Committee of Ministers Recommendation Rec (2006)8 to Member States on assistance to crime victims adopted on 14 June 2006.

<sup>38</sup> Council of Europe Commissioner for Human Rights Nils Muižnieks, ‘Torture survivors have the right to redress and rehabilitation,’ 7 June 2016 available at: [http://www.coe.int/en/web/commissioner/-/torture-survivors-have-the-right-to-redress-and-rehabilitation#\\_ftn4](http://www.coe.int/en/web/commissioner/-/torture-survivors-have-the-right-to-redress-and-rehabilitation#_ftn4).

<sup>39</sup> CAT, General Comment no. 3, para 12.

<sup>40</sup> CAT, Concluding Observations on Bulgaria, 20 March 2013, para 27.

<sup>41</sup> Human Rights Council, Thirty-First Session, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, para 70.

(2014). The Committee noted problems with identification and treatment of torture victims during the asylum process and urged that the State Party should:

Urgently improve the screening system introduced by the Asylum Service to ensure that effective measures are in place to identify as early as possible victims of torture and trafficking, and provide them with immediate rehabilitation and priority access to the asylum determination procedure.<sup>42</sup> (emphasis added)

44. This requirement of immediacy has been echoed by the Committee on the Rights of the Child, in its Concluding Observations on Portugal (2014), in which it urged the State party to:

take all the necessary measures to ensure that all refugee and asylum-seeking children who may have been recruited or used in hostilities have the right to have access to adequate physical and psychological recovery and social reintegration measures. Such measures should include careful assessment of the situation of the children, the provision of immediate, child-sensitive and multidisciplinary assistance for their physical, psychological and emotional recovery and their social reintegration, in accordance with the Optional Protocol [para 25]<sup>43</sup> (emphasis added)

45. This need for rehabilitation to be provided urgently and immediately, and to be effective in practice means that no State can return a person to another State if such a level of care would not be provided in the receiving State.

### **3.3 Right to rehabilitation as a remedy**

46. The fact that an interpretation of the right to be free from CIDT extends into the sphere of socio-economic rights does not mean that such an interpretation should not be adopted. In the context of the ECHR, in *Budina v Russia*,<sup>44</sup> the ECtHR reiterated its earlier finding in *Airey v Ireland*<sup>45</sup> that the mere fact that an interpretation of the ECHR may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation, as there is no water-tight division separating that sphere from the field of civil and political rights covered by the ECHR. The same applies to the UN Convention Against Torture.

47. Further, and in any event, the right not to be sent back to a country with inadequate provision for rehabilitation of torture survivors can be distinguished from cases such as *N v UK*<sup>46</sup> and *D v UK*<sup>47</sup> which concerned medical care for naturally occurring illnesses. The 'exceptionally high threshold' referred to in those cases<sup>48</sup> does not apply with respect to a torture survivor's right to

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<sup>42</sup> CAT, Concluding observations on the fourth report of Cyprus, 16 June 2014, CAT/C/CYP/CO/4, para 11(a).

<sup>43</sup> Committee on the Rights of the Child, Concluding observations on the report submitted by Portugal under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 24 February 2014, CRC/C/OPAC/PRT/CO/1, para 25.

<sup>44</sup> ECtHR, *Budina v Russia*, Application No. 45603/05, 18 June 2009.

<sup>45</sup> ECtHR, *Airey v Ireland*, Application No. 6289/73, 9 October 1979.

<sup>46</sup> ECtHR, *N v UK*, Application no. 26565/05, 27 May 2008.

<sup>47</sup> ECtHR, *D v UK*, Application no. 30240/96, 2 May 1997.

<sup>48</sup> See *N v UK*, para 43.

rehabilitation under Article 14 UNCAT. As explained by the Medical Foundation for the Care of Victims of Torture (now Freedom from Torture):

in medical cases involving the proposed removal of a torture survivor the right in respect of which protection is sought, and against which breach is assessed, is the survivor's right to a remedy, and not their right to health. As a result, rather than asking itself whether medical facilities in the Receiving State are adequate to meet the needs of the returnee, the Court should ask whether there are existing rehabilitative facilities and services in the Receiving State which are available and sufficient to meet the torture survivor's right to 'the means for as full rehabilitation as possible.' This assessment must necessarily take into account the specific prioritisation of resources that a torture survivor should be afforded under the right to rehabilitation and the very limited degree of flexibility afforded to the Receiving State in that regard.

Courts must also consider the context in which rehabilitative care would take place in the Receiving State, with particular reference to the interdependence and positive therapeutic benefits of other reparative measures, together with the need for security in the recovery environment. Factors which relate to the recovery environment in the Receiving State, such as ongoing violence, perpetrator impunity, a lack of housing or the means to make a living and social ostracism will also impact upon treatment needs in the Receiving State, and consideration must therefore also be given to the security of the recovery environment and the ability of the individual to return in safety and dignity to the extent that these factors impact upon the torture survivors' condition and their rehabilitation.<sup>49</sup>

48. With respect to the ECtHR chamber ruling of *AS v Switzerland*,<sup>50</sup> on which Switzerland relies in this case:

(a) The Court in *AS*<sup>51</sup> applied the 'high threshold' set down in *D v UK* (which concerned naturally occurring illness and not state-inflicted torture and corresponding rehabilitative needs). Although the Court referred to the Grand Chamber judgments of *Tarakhel* and *MSS v Belgium*, it did not apply the reasoning set down in those cases. Rather than focussing on the special protection that should be afforded to the applicant as a member of a particularly vulnerable category (asylum seeker), and the fact that as a mentally ill asylum seeker with specific rehabilitative needs, he was even more vulnerable within that category, the Court in its *ratio decidendi* on the Article 3 ECHR point (paragraphs 35 – 38) focussed purely on the applicant's illness, allowing it to apply the exceptionally high threshold set out in *D v UK*. The ECtHR judgment in *AS v Switzerland* stands in contrast to the slightly later ECtHR judgment of *VM v Belgium*, which, as described earlier in this submission, applied the *MSS* and *Tarakhel* line of reasoning.

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<sup>49</sup> Medical Foundation for the Care of Victims of Torture (now Freedom from Torture), *Interpreting Rehabilitation*, 2010, available at: <https://www.freedomfromtorture.org/sites/default/files/documents/MF%20Rehabilitation%202010%20Final.pdf>, p. 24.

<sup>50</sup> ECtHR, *AS v Switzerland*, Application no. 39350/13, 30 June 2015.

<sup>51</sup> At para 31 of the judgment.

(b) Unlike under the ECtHR, under UNCAT Article 14, the right of a torture survivor to rehabilitation is a separate freestanding right and, as set out in Section 3.1 above, has been elaborated upon by the Committee Against Torture as such.