Application No. 57467/15

Savran v. Denmark

Request for referral to the Grand Chamber

1. On 1 October 2019, the European Court of Human Rights (hereinafter 'the Court'), sitting as a Chamber, delivered a judgment in the case *Savran v. Denmark* (appl. No. 57467/15). A majority of four of the seven judges found a violation of Article 3 of the European Convention on Human Rights (hereinafter 'the Convention').

2. It is the opinion of the Government of Denmark (hereinafter 'the Government') that the present case raises serious questions affecting the interpretation and application of Article 3 of the Convention and therefore a serious issue of general importance.

3. With the judgment, the scope of Article 3 in relation to illness has been broadened substantially compared to previous case-law, see the judgment delivered by the Court, sitting as the Grand Chamber, on 13 December 2016 in *Paposhvili v. Belgium* (appl. No. 41738/10), including with regard to mental illness, and in the same way the threshold for when an act might be considered to be degrading or inhuman treatment has been altered. It is the opinion of the Government that the judgment will have very serious consequences for the Member States' ability to remove an alien, should the judgment become final.

4. The Government submits that such an interpretation and broadening of the scope of Article 3 should be determined by the Grand Chamber, cf. Article 43 of the Convention and Rule 73 of the Rules of Court.

5. The Government also refers to the joint dissenting opinion in *Savran v. Denmark* which states in para. 9, *inter alia*, that:

   > '9. In our view and to our regret, the majority in the present case have not faithfully abided by and applied the recent and unanimous *Paposhvili* judg-

ment to the facts of the case. On the contrary, the majority have seized the first available opportunity to further broaden the scope of Article 3 in this sensitive area, thus in practice pushing wide open the door that the Grand Chamber deliberately and for sound legal and policy reasons decided only to open slightly compared to the previous strict case-law. Therefore, the majority should have relinquished jurisdiction in favour of the Grand Chamber rather than deciding to broaden the protection to be granted in the event of the expulsion of physically or mentally ill persons.'

6. The joint dissenting opinion also states in para. 21, *inter alia*, that:

> '[...] the approach of the majority represents a lowering of the requirements established in the recent judgment of the Grand Chamber [*Paposhvili v. Belgium*]. Whether such a change or further development in the Court's case-law is called for and justified should, in our view, have been left for the Grand Chamber to decide. Therefore, in our assessment, the present case raises a serious question affecting the interpretation and application of the Convention, and the majority's reasoning will have significant implications for the member States in cases concerning the removal of persons suffering from mental illnesses. In addition, the approach adopted by the majority in the present case will have implications for the Court's practice concerning requests for interim measures under Rule 39 of the Rules of Court from applicants suffering from mental illnesses who challenge expulsion orders. [...]'

7. For these reasons, the Government respectfully requests that the case be referred to the Grand Chamber. The Government will further elaborate on its position in the following.

The legal situation following *Paposhvili v. Belgium*

8. With the judgment delivered by the Grand Chamber in the case *Paposhvili v Belgium* (cited above), the Court clarified what – aside from cases where the applicant was terminally ill – might be held as *compelling humanitarian grounds* in cases concerning the removal of aliens suffering from serious illness.

9. In the *Paposhvili* judgment, the Court found that the approach adopted hitherto should be clarified and stated in para. 183:

> '[...] that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* [...] which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.'

The *Paposhvili* judgment and mental illness

10. In the *Paposhvili* judgment, which concerned a terminally ill man, more detailed guidelines for what constitutes 'other very exceptional circumstances' in situations where the applicant is not 'close to death' were clarified.

11. The *Paposhvili* judgment does not explicitly state whether the criteria laid down in the judgment, see para. 183, also apply when assessing whether the removal of mentally ill aliens would be in violation of Article 3. Thus, it is not explicitly stated whether and under what circumstances mental illnesses might be considered a 'very exceptional circumstance' or 'compelling humanitarian reasons'.

12. It is the opinion of the Government that the question of whether the criteria laid down in the *Paposhvili* judgment can be applied in an identical manner to mental illness should be decided by the Grand Chamber.

13. In this connection, the Government refers to the joint dissenting opinion para. 21, which states that:

> '[...] we find it relevant to point out that a physical medical condition relies more on objective elements than mental illness, which can sometimes be assessed subjectively, or even wrongly, owing to symptoms being simulated. [...]'.

14. Furthermore, reference is made to the last paragraph of the additional dissenting opinion to the judgment, which states that:

> 'Mental illness is more "volatile" and open to question. It cannot therefore constitute an obstacle to removal in the light of the criteria established in *Paposhvili* and requires a different approach and a higher threshold for finding a violation of Article 3, which the Grand Chamber will no doubt be called upon to set.'

15. Based on the above, the Government submits that the criteria laid down in the *Paposhvili* judgment cannot in a meaningful way be equally applied when assessing whether the removal of mentally ill aliens would be in violation of Article 3. The Government refers to, *inter alia*, that the criteria of 'rapid and irreversible' or 'intense suffering' cannot in a meaningful way be transferred from an assessment of aliens suffering from very serious physical illnesses to aliens suffering from serious mental illnesses. In this connection, the Government refers to the fact that mental illness with regard to its nature, symptoms and possible treatments cannot and should not be compared to terminal physical illnesses, which the Court has previously assessed as falling within the scope of Article 3 of the Convention, cf. the *Paposhvili* judgment.

16. Overall, it is the opinion of the Government that the question of whether – and if so, how – the criteria laid down in the *Paposhvili* judgment may be implemented when assessing the removal of mentally ill aliens should be determined by the Grand Chamber. Similarly, the Government submits that any new criteria that are directly applicable to the removal of mentally ill aliens should be determined by the Grand Chamber.

The *Savran* judgment and the *Paposhvili* judgment

17. If the criteria laid down in the *Paposhvili* judgment are directly applicable in the case of removal of mentally ill aliens, it is the opinion of the Government that the majority's application of the criteria laid down in the *Paposhvili* judgment has not been proper and faithful.

18. The Government submits that the majority have not applied the necessary test to ascertain whether the criteria laid down in the *Paposhvili* judgment are met. The majority have thus not examined whether the applicant upon discontinuation of treatment would face a real risk of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy. The majority have only ascertained that the applicant suffers from a mental illness, but without performing an assessment of whether the nature and scope of the mental illness is such that the applicant, in the event of expulsion and without proper medical treatment, would risk treatment in violation of Article 3 of the Convention. The majority have thus not performed the preliminary and necessary test before assessing whether treatment was available and accessible.

19. The Government also refers to the joint dissenting opinion, para. 9 (cited above) and para. 11. In para. 11, the joint dissenting judges stated the following:

> '11. The majority fail to engage in an assessment of the new criterion adopted by the Grand Chamber, namely whether the applicant, in the event of expulsion and without proper medical treatment, would be "exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".'

The *Paposhvili* judgment and *Tarakhel* assurances

20. Furthermore, the Government submits that the case establishes a new and broadening interpretation with regard to the use of individual assurances if such an assurance is deemed necessary pursuant to Article 3 of the Convention, compare the judgment delivered on 4 November 2014 in *Tarakhel v. Switzerland* (appl. No. 29217/12).

21. In the *Tarakhel* judgment para. 120, the Court found that it was the responsibility of the Swiss authorities to obtain assurances from their Italian counterparts that on the applicants' arrival in Italy, the applicants would be received in facilities and in

conditions adapted to the age of the children, and that the family would be kept together. The case concerned an asylum-seeking family with six minor children who according to the Court belonged to a particularly underprivileged and extremely vulnerable population group.

22. The Court has previously established that it is only when the applicant has adduced evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 and after the relevant information has been examined, serious doubts persist regarding the impact of removal on the persons concerned – on account of the general situation in the receiving country and/or their individual situation – the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3 (see *Paposhvili v. Belgium*, para. 191).

23. The *Paposhvili* judgment concerned a seriously ill man suffering from leukaemia, where the Belgian authorities had not examined the existence of appropriate treatment in Georgia, including specialised chemotherapy. It was the specific type of treatment in relation to the illness that a prior assurance had to be obtained for.

24. In the present case, the majority have decided that the Danish authorities should have obtained an assurance from the Turkish authorities stating that the applicant upon removal to Turkey would continue to have access to assistance in the form of a regular and personal contact person, offered by the Turkish authorities, suitable to the applicant's needs, see para. 64 of *Savran v. Denmark*. This assurance therefore goes further than what follows from the *Paposhvili* judgment, which referred to an assurance of *the specific treatment option* for a terminally ill individual.

25. The Government thus submits that imposing on Member States that they assume liability for obtaining an individual assurance (compare *Tarakhel v. Switzerland*, cited above) for a personal contact person who is not responsible for the medical treatment of the applicant but only a social measure, lowers the threshold for when the returning State should obtain an assurance as compared to what follows from the present case-law.

26. It is the opinion of the Government that the majority in the *Savran* judgment by setting a criterion for ensuring a personal contact person in the receiving State have further broadened the scope of Article 3. The Government submits that a lack of an individual assurance in this respect cannot constitute degrading or in-humane treatment.

27. Furthermore, an assurance of this nature would entail that the majority in the *Savran* judgment de facto invalidates the well-established case-law that the benchmark is not a question of ascertaining that the care in the receiving State would be equivalent to that provided by the health-care system in the returning State. The Member States could therefore in the future, according to the majority's assessment, be obliged only to remove a mentally ill alien to countries that have a similar psychiatric system and at the same level as the returning State.

The *Savran* judgment and the future use of interim measures under Rule 39 of the Rules of Court

28. As mentioned above, it is the opinion of the Government that the majority with the *Savran* judgment have significantly lowered the threshold for finding a violation of Article 3 of the Convention in cases concerning the removal of mentally ill aliens compared with the criteria established in the *Paposvili* judgment concerning the removal of physically ill individuals.

29. As a result, it is the opinion of the Government that the *Savran* judgment, should it be final, would entail that the Court would have to apply Rule 39 to a far greater

extent and more tenuously than is the case today. Rule 39 would thus have to be used when merely suspecting that there might be a potential violation of Article 3 with the removal of a mentally ill alien.

30. It might therefore prove necessary for the Court to use Rule 39 as soon as an alien alleges that removal might severely worsen his or her mental condition or that the treatment options in the receiving State are different or inferior from the treatment options in the returning State. This could also be the case even if the alleged risk had not been substantiated when the application with the Court was lodged. The Government also refers to the joint dissenting opinion, para. 21 (cited above).

Conclusion

31. In conclusion, the Government respectfully requests that the present case be referred to the Grand Chamber according to the procedure in Article 43 of the Convention and Rule 73 of the Rules of Court, as the case raises grave and serious questions affecting the interpretation and application of the Convention with significant consequences for the Member States.

Copenhagen, 12 December 2019

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