THIRD SECTION

DECISION

Application no. 30474/14
Jihana ALI and others
against Switzerland and Italy

The European Court of Human Rights (Third Section), sitting on 4 October 2016 as a Chamber composed of:

 Luis López Guerra, *President,* Helena Jäderblom, Helen Keller, Dmitry Dedov, Branko Lubarda, Pere Pastor Vilanova, Alena Poláčková, *judges,*
and Fatoş Aracı, *Deputy* *Section Registrar,*

Having regard to the above application lodged on 17 April 2014 against Switzerland and Italy,

Having regard to the interim measure indicated to the Swiss Government under Rule 39 of the Rules of Court and the fact that this interim measure has been complied with,

Having regard to the subsequent decision of the Court to lift the interim measure,

Having regard to the factual information submitted by the Swiss and/or Italian Government and the comments in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1.   The applicants are Jihana Ali (the “first applicant”), born in 1984; her brother, Netschirwan Ali (the “second applicant”), born in 1992 and sister, Saida Ali (the “third applicant”), born in 1993; and the first applicant’s daughter, Nesrin Ali (the “fourth applicant”), born in 2003. They are all Syrian nationals of Kurdish descent and were represented by Mrs S. Motz, a lawyer practicing in Zurich.

2.  The Swiss Government were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice. The Italian Government were represented by their Agent, Ms E. Spatafora and their co-Agent, Ms P. Accardo.

A.  The circumstances of the case

3.  The facts of the case, as submitted by the applicants, may be summarised as follows.

4.  The applicants arrived in Italy on 15 August 2013 where they were registered as asylum seekers. On 27 August 2013 they entered Switzerland and formally applied for asylum there. On 23, 25 and 30 September 2013, at the request of the Swiss Federal Office for Migration (the “FOM”), the Italian authorities accepted to take responsibility for the determination of the applicants’ asylum situation pursuant to Council Regulation (EC) no. 343/2003 of 18 February 2003 (“the Dublin Regulation”). Accordingly, on 30 September 2013, the FOM refused to consider the applicants’ asylum application on the merits.

On 21 October 2013, the Swiss Federal Administrative Court dismissed the applicants’ appeal against the FOM’s decision considering inter alia that the applicant had failed to establish that Italy was in breach of its international obligations with respect to the treatment of asylum seekers, in particular the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States.

In the meantime, the third applicant, who claimed to be religiously married with a man holding a temporary humanitarian residence permit (*vorläufige Aufnahme*) became pregnant. Her request to the FOM for reconsideration of the removal decision and interim relief was rejected on the ground that a humanitarian temporary permit did not constitute a stable right of residence and therefore she could not rely on Article 8 of the Convention.

5.  According to the applicants, several of their relatives reside in Switzerland (brother, uncle, cousins, brother in law).

B.  Events after the lodging of the application

6.  The application was lodged with the Court on 17 April 2014. On 23 April 2014 the Court issued an interim measure within the meaning of Rule 39 of the Rules of Court indicating to the Swiss Government that it was desirable, in the interests of the parties and of the proper conduct of the proceedings before the Court, not to expel the applicants to Italy for the duration of the proceedings before the Court.

7.  On 2 September 2014 the third applicant married.

8.  On 13 February 2015 the Swiss Government informed the Court that the third applicant had married and given birth to a child. Since her husband had in the meantime been admitted to Switzerland as a refugee, on 11 February 2015 the Secretariat of State for Migration (the “SEM”), which had in the meantime replaced the FOM, had decided not to remove her to Italy and to proceed with the examination of her asylum application in Switzerland. The Government therefore requested the Court to strike the application out of the list of cases pursuant to Article 37 § 1 of the Convention with respect to the third applicant.

9.  On 9 March 2015 the third applicant was granted refugee status in Switzerland.

10.  On 23 March 2015 the Swiss Government informed the Court that the Italian authorities had requested all their counterparts participating in the “Dublin” system to inform them at least 15 days in advance of any transfer to Italy of a family with minor children so that they could be in a position to provide the guarantees required by the Court in its judgment in the case of *Tarakhel v. Switzerland* ([GC], no. 29217/12, § 122, 4 November 2014).

On the same day the Italian Government confirmed that in order to book housing places for “Dublin” transferees they needed to be given notice of a confirmed date for any transfer reasonably in advance.

11.  On 30 March 2015, in reply to the Swiss Government’s request to strike the application out in respect of the third applicant, the applicants’ representative considered that the Court should nevertheless award Swiss Francs (CHF) 1,390.83 (approximately EURO (EUR) 1,280), for costs and expenses incurred by the third applicant as a result of the Swiss authorities’ refusal to recognise her right to maintain family life in Switzerland. The Swiss Government opposed this claim.

12.  On 6 June 2015, the Court decided to lift the application of the interim measure.

13.  On 22 June 2015 the first and fourth applicants requested that the SEM re-examine their asylum application in Switzerland. After their request was rejected by the SEM, they appealed to the Federal Administrative Court.

In an interim decision of 3 September 2015 the Federal Administrative Court considered that the Italian authorities had given sufficient guarantees and, on 15 October 2015, rejected the first and fourth applicants’ appeal.

14.  On 11 November 2015, the first and fourth applicants, whose transfer to Italy was scheduled for 17 November 2015, lodged a fresh Rule 39 request considering that the Swiss authorities had not received sufficient guarantees from their Italian counterparts.

15.  In their comments submitted on 16 November 2015, the Swiss Government referred to a leading judgment delivered by the Federal Administrative Court on 12 March 2015 (E-6629/2014) pursuant to which transfers to Italy of families with minor children could not take place in the absence of guarantees that the family would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

They also submitted copies of official guarantees provided by the Italian Government. In a circular letter of 2 February 2015, specifically referring to the *Tarakhel* judgment, the Italian Ministry of the Interior guaranteed their Dublin counterparts that “all families with minor children (...) [would] be kept together and accommodated in a facility which the reception conditions [were] adapted to the family and to the age of the children”. In a second letter of 15 April 2015, the Italian Ministry of the Interior informed the European Commission that housing facilities within the SPRAR (*Sistema di protezione per richiedenti asilo e rifugiati*) had been reserved for families transferred to Italy in the context of a Dublin procedure. The list of available facilities was circulated among States participating in the Dublin system by a circular letter from the same ministry of 8 June 2015. This letter stated that each family with minor children would be assigned to a specific local reception ensuring family unity and social integration.

Moreover, the Swiss Government indicated that in a judgment of 27 July 2015 (D-4394/2015), the Federal Administrative Court had considered that the list of SPRAR facilities provided by the Italian authorities constituted *per se* a sufficient guarantee with regard to the *Tarakhel* requirements.

16.  On 16 November 2015, having noted the parties’ submissions, the Court decided to reject the applicants’ fresh Rule 39 request.

17.  On 8 December 2015, the Swiss Government informed the Court that the transfer of the first and fourth applicants to Italy had been scheduled for 17 November 2015 but did not take place because the first applicant refused to leave and the fourth applicant had disappeared. The second applicant had also disappeared.

The Government therefore considered that these applicants did not intend to maintain their application and requested that the application be struck out in their respect pursuant to Article 37 § 1 of the Convention.

18.  On 20 January 2016, the applicants’ representative informed the Court that the second and fourth applicants had left the asylum centre because they were afraid of being removed to Italy. However, they had maintained contact with their family and wished that the Court continue the examination of their application.

19.  On 18 February 2016, the applicants’ representative informed the Court that the fourth applicant had returned to the asylum centre where she was living with her mother.

20.  On 24 March 2016, the Swiss Government informed the Court that a tentative transfer of the first and fourth applicants to Italy, scheduled for 16 March 2016, had had to be cancelled due to the violent resistance of the first applicant who, on that occasion, had injured a police officer with a razor blade.

21.  On 11 May 2016, the Swiss Government informed the Court that the first and fourth applicants had been transferred to Italy on 5 May 2016.

C.  Relevant domestic law with regard to the Dublin Regulation

22.  The relevant domestic law is set out in the *Tarakhel* judgment (cited above, §§ 22-23 and 26-27).

23.  The relevant instruments and principles of European Union law are set out in the same judgment (§§ 28-36).

24.  In particular, the Dublin Regulation is applicable to Switzerland under the terms of the association agreement of 26 October 2004 between the Swiss Confederation and the European Community regarding criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 53 of 27 February 2008). The Dublin Regulation has since been replaced by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (the “Dublin III Regulation”), which is designed to make the Dublin system more effective and to strengthen the legal safeguards for persons subject to the Dublin procedure.

25.  The Dublin III Regulation entered into force on 1 January 2014 and was passed into law by the Swiss Federal Council on 7 March 2014.

D.  The Italian context

26.  A detailed description of the asylum procedure and the legal framework and organisation of the reception system for asylum seekers in Italy is also set out in the *Tarakhel* judgment(§§ 36-50).

COMPLAINT

27.  The applicants complained that if returned to Italy they would face treatment contrary to Article 3 of the Convention. This complaint was brought against both Switzerland and Italy.

28.  Under Article 8 of the Convention they alleged that, by severing their relationship with several relatives living in Switzerland their removal to Italy would violate their right to respect for their family and private life. This complaint was brought only against Switzerland.

29.  Under Article 13 in conjunction with Articles 3 and 8, the applicants claimed that they did not have an effective remedy to assess the alleged violation of their rights under Article 3 and 8 of the Convention. Also this complaint was brought only against Switzerland.

THE LAW

A.  Alleged violation of the Convention in respect of the first, second and fourth applicants

1.  Complaint under Article 3 of the Convention

30.  The first, second and fourth applicants alleged that given the poor general reception conditions of asylum seekers in Italy, if removed to that country they would be subjected to inhuman and degrading treatment prohibited by Article 3 of the Convention. Article 3 provides as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

31.  The Court reiterates the relevant principles under Article 3 of the Convention, as set out in its judgment in the case of *Tarakhel* (cited above, §§ 93-99 and 101-104), including that, to fall within the scope of Article 3, 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. In determining whether it has been shown that the applicant runs a real risk of suffering treatment proscribed by Article 3 if transferred to Italy, the Court will examine the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* (see *Saadi v. Italy* [GC], no. 37201/06, § 128, ECHR 2008).

32.  The first, second and fourth applicants are to be regarded as asylum‑seekers in Italy. It therefore has to be determined whether the situation in which these applicants are likely to find themselves in that capacity can be regarded as incompatible with Article 3, taking into account that they belong to a particularly underprivileged and vulnerable population group in need of special protection (see *Tarakhel*, cited above, § 97; and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 251, ECHR 2011).

33.  The Court reiterates that the situation in Italy for asylum‑seekers can in no way be compared to the situation in Greece at the time of the *M.S.S. v. Belgium and Greece* judgment (cited above), and that the structure and overall situation of the reception arrangements in Italy cannot, in themselves, act as a bar to all removals of asylum-seekers to that country (see *Tarakhel*, cited above, §§ 114-115).

34.  The Court notes that the Italian Government were duly informed by their Swiss counterparts that the first and fourth applicants are a single mother with a minor child, and about their scheduled transfer to Italy. The Court understands from the circular letters dated 2 February, 15 April and 8 June 2015 from the Italian Ministry of the Interior (see paragraph 15 above) that the first and fourth applicants would be assigned one of the places in reception facilities in Italy which have been reserved for families with minor children and has no reason to believe that none of these places would be available to them upon their arrival in Italy (see *A.T.H. v. the Netherlands* (dec.), no. 54000/11, § 38, 17 November 2015).

35.  The Court further finds that the first and fourth applicants have not demonstrated that their prospects, on return to Italy, whether considered from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3. The Court finds no basis on which it can be assumed that the applicants would not have access to the available resources in Italy for an asylum-seeking single mother with a minor child, or that, in the event of health-related or other difficulties, the Italian authorities would not respond in an appropriate manner. In any event, it remains possible for the first and fourth applicants to lodge a fresh application with the Court (including a request for an interim measure under Rule 39 of the Rules of Court) should that need arise (*A.T.H. v. the Netherlands*, cited above, § 41). No submissions have been made by the applicant since the return.

36.  As to the second applicant, the Court recalls that it has already concluded that the transfer from Switzerland to Italy of adult asylum seekers, including those requiring medical treatment but who are not critically ill, would not give rise to a violation of Article 3 of the Convention (*A.S.* *v. Switzerland*, no. 39350/13, § 38, 30 June 2015; *A.M. v. Switzerland* (dec), no. 37466/13, § 20, 3 November 2015).

Since the second applicant is an adult and has not established that he is critically ill, the Court does not see any reason to depart from its conclusions in the above-mentioned cases.

37.  It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4.

2.  Complaints under Article 8 of the Convention

38.  Under Article 8 of the Convention the first, second and fourth applicants alleged that, by severing their ties with their numerous relatives living in Switzerland, in removing them to Italy, Switzerland would violate their right to respect for their private and family life. Article 8 reads as follows:

“1.  Everyone has the right to respect for his private and family life, his home and his correspondence.

2.  There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

39.  The Court recalls that where a Contracting State tolerates the presence of an alien in its territory, thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country’s society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (*Jeunesse* *v. the Netherlands* [GC], no. 12738/10, § 103, 3 October 2014).

40.  The same applies to cases of asylum seekers whose presence on the territory of a Contracting State is tolerated by the national authorities on their own motion or accepted in compliance with their international obligations (*A.S.* *v. Switzerland*, cited above, § 44).

41.  Like *Jeunesse* (§ 104) and *A.S. v. Switzerland* (§ 45), the present case may be distinguished from cases concerning “settled migrants” as this notion has been used in the Court’s case-law, namely, persons who have already been granted formally a right of residence in a host country. A subsequent withdrawal of that right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right to respect for private and/or family life within the meaning of Article 8. In such cases, the Court will examine whether the interference is justified under the second paragraph of Article 8. In this connection, it will have regard to the various criteria which it has identified in its case-law in order to determine whether a fair balance has been struck between the grounds underlying the authorities’ decision to withdraw the right of residence and the Article 8 rights of the individual concerned (*Jeunesse*, § 104).

42.  As the factual and legal situation of a settled migrant and that of an alien seeking admission, whether or not as an asylum seeker, are not the same, the criteria developed in the Court’s case-law for assessing whether the withdrawal of a residence permit of a settled migrant is compatible with Article 8 cannot be transposed automatically to the situation of the first, second and fourth applicants. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Swiss authorities were under a duty pursuant to Article 8 to grant the first, second and fourth applicants a residence permit in Switzerland, whether or not as asylum seekers, thus enabling them to exercise any family life they might have established on Swiss territory (*mutatis mutandis*, *ibid.*, § 105). The instant case thus concerns not only family life but also immigration *lato sensu*. For this reason, it is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation under Article 8 of the Convention (*mutatis mutandis*, *ibid.*, § 105).

43.  The Court recalls that in a case which concerns family life as well as immigration, the extent of a State’s obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (*ibid.*, § 107).

44.  Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court’s well‑established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (*ibid.*, § 108).

45.  In the present case, the Court notes that there is no trace of the applicants’ presence in Switzerland before they had lodged their asylum request on 27 August 2013 and their presence thereafter on Swiss territory was tolerated by the domestic authorities for about one month (see paragraph 4 above) and only for the purpose of assessing their status as asylum seekers and complying with their relevant obligations under the Dublin Regulation and national law (*mutatis mutandis*, *A.S. v. Switzerland*, cited above, § 49).

The Court has previously held that there will be no family life, within the meaning of Article 8, between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence (*Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003-X; *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000), and similar considerations apply to other familial relations such as that between aunt and niece(*F.N. v. the United Kingdom* (dec.), no. 3202/09, § 36, 17 September 2013).

Assuming that the first, second and fourth applicants and their relatives living in Switzerland, including the third applicant, had maintained family ties when they were living in Syria and assuming that additional elements of dependence could be demonstrated in the applicants’ case, it cannot be argued that the tolerance by the domestic authorities of the applicants’ presence on Swiss territory for a lengthy period of time had enabled them to establish and develop strong family ties in Switzerland (*a contrario*, *Jeunesse,* cited above, § 116).

Bearing in mind the margin of appreciation afforded to States in immigration matters, the Court found that a fair balance had been struck between the competing interests at stake, namely the personal interests of the first, second and fourth applicants, in establishing any family life in Switzerland on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration (*ibid*., § 51).

46.  In view of the above considerations, the first, second and fourth applicants’ complaint under Article 8 is manifestly ill-founded and therefore inadmissible, pursuant to Article 35 §§ 3 and 4 of the Convention.

3.  Complaint under Article 13 combined with Articles 3 and 8 of the Convention

47.  The first, second and fourth applicants alleged that they had been denied an effective remedy in Switzerland, in respect of their complaints under Articles 3 and 8 of the Convention because in its decision of 21 October 2013 the Federal Administrative Court failed to take into account the information indicating a real risk that they would be exposed to extremely poor living conditions in Italy. Article 13 of the Convention provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

48.  The Court will confine itself to noting that, according to its standing case-law, Article 13 requires a remedy in domestic law to be available in respect only of such grievances as are “arguable” in terms of the Convention (see, among many other authorities, *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131; more recently, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 58, ECHR 2000‑IV; *Hatton and Others v. the United Kingdom* [GC],no. 36022/97, § 137, ECHR 2003‑VIII; *Taheri Kandomabadi v. the Netherlands* (dec.), nos. 6276/03 and 6122/04, 29 June 2004; and *El Morabit v. the Netherlands* (dec.), no. 46897/07, 18 May 2010). In view of its findings above, the Court does not consider that an arguable claim has been established under Articles 3 and 8 of the Convention.

49.  Consequently this complaint too is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 and of the Convention.

B.  Alleged violation of the Convention in respect of the third applicant

50.  The Court notes that the third applicant has been granted refugee status in Switzerland on 9 March 2015. She is therefore no more subject to a risk of transfer to Italy.

For this reason, the Court considers that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention (*Khan v. Germany* [GC], no. 38030/12, § 33, 21 September 2016; *K.U. v. Switzerland* (dec.), no. 30349/13, 20 January 2015; *T.A. and others v. Switzerland* (dec.), no. 50165/14, 7 July 2015) and that this part of the application should be struck out of its list of cases.

Moreover, in accordance with Article 37 § 1 *in fine*, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case in respect of the third applicant.

51.  The Court points out that, unlike Article 41 of the Convention, which comes into play only if the Court has previously found “that there has been a violation of the Convention or the Protocols thereto”, Rule 43 § 4 allows it to make an award solely for costs and expenses in the event that an application has been struck out of the list of cases (see *Sisojeva and Others v. Latvia*[GC],no. 60654/00, § 132, ECHR 2007 and *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, § 275, 3 October 2008).

52.  In the present case, the third applicant claims CHF 1,390.83 (approximately EUR 1,280) for costs and expenses incurred as a result of the Swiss authorities’ refusal to recognize he right to maintain family life in Switzerland (see paragraph 11 above).

53.  The Court notes that, when the Federal Administrative Court delivered its judgment on 21 October 2013, the third applicant was not legally married and her partner was only tolerated on Swiss territory for the purpose of his own asylum application. She could therefore not reasonably expect to be entitled to stay in Switzerland.

In these circumstances, the Court finds no reason to make any specific award in respect of reimbursement of costs.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible in respect of the first, second and fourth applicants ;

*Decides* to strike the application out of the list of cases in respect of the third applicant.

Done in English and notified in writing on 27 October 2016.

 Fatoş Aracı Luis López Guerra
 Deputy Registrar President