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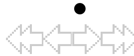

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OPINION OF ADVOCATE GENERAL

BOT

delivered on 24 October 2017 (1)

Case C‑353/16

MP

v

Secretary of State for the Home Department

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling — Asylum policy — Minimum standards regarding the granting of refugee status — Conditions for eligibility for subsidiary protection — After-effects of torture suffered in the country of origin — Risk of serious harm to the psychological health of the applicant if returned to his country of origin — No suitable treatment for those pathological conditions in the country of origin)

I. Introduction

1. May a national of a third country, still suffering the effects of torture inflicted in his country of origin, but who is no longer likely to undergo such treatment if he returns there, receive subsidiary protection on the grounds that his psychological conditions would not be treated adequately by the healthcare system in that third country?

2. This is the question, in essence, that the Court is asked to answer in the present case. This will be an opportunity for the Court to rule again on Article 2(e) and Article 15(b) of Directive 2004/83/EC (2) or, in the alternative, on Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (3) and Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.(4)

3. At the end of my analysis, I shall be proposing that the Court should rule that Article 2(e) and Article 15(b) of Directive 2004/83 impose no obligation on Member States to extend the scope of subsidiary protection to a case such as this one, irrespective of Article 3 of the ECHR and Article 14(1) of the Convention against Torture.

II. Legal context

A. International law

4. Article 14(1) of the Convention against Torture provides:

'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.'

5. Article 3 of the ECHR states:

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

B. EU law

6. Recitals 9, 25 and 26 in the preamble to Directive 2004/83 state:

'(9) Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.

...

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.'

7. Article 2 of that directive provides:

‘For the purposes of this Directive:

...

(e) “person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

...’

8. Article 3 of that directive provides:

‘Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.’

9. Article 4(4) of Directive 2004/83 provides:

‘The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.’

10. Article 6 of that directive provides:

‘Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.’

11. Article 15 of that directive provides:

‘Serious harm consists of:

(a) the death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

12. Article 16 of Directive 2004/83 provides:

‘1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.’

III. The dispute in the main proceedings and the question referred for a preliminary ruling

13. MP, a national of Sri Lanka who arrived in the United Kingdom in January 2005, was given leave to remain as a student. On 11 December 2008 he was refused further leave to remain.

14. On 5 January 2009, MP submitted an asylum application, arguing that he had been a member of the organisation ‘Liberation Tigers of Tamil Eelam’ (‘LTTE’), had been detained and tortured by the security forces in his country of origin and that he ran the risk of again undergoing ill-treatment if he were returned there.

15. On 23 February 2009, that application was refused on the ground that it was not established that he would once again be at risk if he returned to his country of origin.

16. MP challenged that decision before the Upper Tribunal by providing medical evidence that he presented sequelae of acts of torture, was suffering post-traumatic stress syndrome and depression, he showed a suicidal tendency and seemed determined to kill himself if he were returned to his country of origin. That court, nevertheless, rejected his appeal in so far as, first, it was based on the Convention on the Status of Refugees (5) and Directive 2004/83 and, second, that it had not been established that MP was still threatened in his country of origin.

17. However, the Upper Tribunal allowed MP’s appeal in so far as it was based on the provisions of Article 3 of the ECHR, on the ground that, in essence, if the appellant was returned to his country of origin he would not receive the appropriate care for treating his psychological condition, contrary to that article.

18. That decision was upheld by the Court of Appeal (England and Wales), taking the view that Directive 2004/83 did not cover cases under Article 3 ECHR in which the risk was to health or of suicide rather than of persecution.

19. MP brought an appeal against that decision before the Supreme Court of the United Kingdom, the referring court. He claims that Directive 2004/83 cannot have such a narrow scope as the courts of first instance and of appeal gave it, and that he ought to have been given subsidiary protection, having regard to, first, his history of ill treatment in his country of origin which caused his condition and, second, the lack of facilities allowing suitable treatment of his resulting health problems in his country of origin. According to the appellant in the main proceedings, the fact that he is not at risk of suffering future ill treatment, if returned to his country of origin, should not be taken into consideration when his right to receive subsidiary protection is assessed.

20. The referring court considers that this matter has not yet been specifically dealt with by the case-law of the Court of Justice or by that of the European Court of Human Rights.

21. In those circumstances, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 2(e), read with Article 15(b), of Directive 2004/83 cover a real risk of serious harm to the physical or psychological health of the applicant if returned to the country of origin, resulting from previous torture or inhuman or degrading treatment for which the country of origin was responsible?'

IV. My analysis

22. As a preliminary remark, it should be noted that the Court has two options available to it for dealing with this request for a preliminary ruling. The Court may rule on this matter within the limits of the question asked by the referring court: that is, simply regarding the interpretation of Article 2(e) and Article 15(b) of Directive 2004/83. However, its reply may equally include an assessment of those provisions in the light of the provisions of Article 3 of the ECHR and Article 14 of the Convention against Torture.

23. In the first place, regarding an answer exclusively focusing on the provisions of Directive 2004/83, it should be noted that a purely literal interpretation of Article 15 of that directive, which exhaustively defines serious harm, excludes from the scope of subsidiary protection lack of suitable care for treatment of a condition in the country of origin to which it is envisaged that the person concerned will be returned.

24. The terms of Article 15(b) of that directive are clear. They allow the granting of subsidiary protection only if there is a risk of serious harm resulting from torture or inhuman or degrading treatment or punishment of an applicant, in the future, if he were returned to his country of origin.

25. The Court has also held that the three types of serious harm defined in Article 15 of Directive 2004/83 constitute the conditions to be fulfilled if a person is to be eligible for subsidiary protection, when, in accordance with Article 2(e) of that directive, substantial grounds have been shown for believing that the applicant faces a real risk of such harm if returned to the relevant country of origin.(6)

26. That interpretation means, in the present case, that MP may not claim subsidiary protection, inasmuch as it is common ground that he no longer runs the risk of undergoing torture if he is returned to his country of origin, even if it is unlikely that he could receive the necessary treatment to manage the post-traumatic stress syndrome he suffers from, owing to shortcomings in the health system, and is likely to commit suicide if he is returned to his country of origin.

27. In that respect, the Court has held that the likelihood of deterioration in the state of health of a third country national not arising from that person being deliberately deprived of health care is not covered by Article 15 of Directive 2004/83. Article 15(b) of that directive defines serious harm as the torture or inhuman or degrading treatment or punishment of a third country national in his country of origin.(7)

28. According to that case-law, it is clear from the interpretation of Article 6 of that directive that such serious harm must take the form of conduct by a third party and cannot simply be the result of general shortcomings in the health system of the country of origin.(8)

29. It is worth pointing out that although, in certain specific circumstances, the suffering caused by an illness might constitute inhuman or degrading treatment, (9) the fact remains that one of the

key criteria for granting subsidiary protection, namely, identification of those responsible for inflicting harm, against whom protection is needed, is not fulfilled in the present case.

30. In order for a person to be considered eligible for subsidiary protection, it is not sufficient to prove that he would run the risk of being exposed to inhuman or degrading treatment if he were returned to his country of origin. It must also be demonstrated that that risk arises from factors that are, directly or indirectly, but always intentionally, attributable to the public authorities of that country, either because the threats to the person concerned are being made or tolerated by the authorities in the country of which that person is a national, or because those threats are made by independent groups against which the authorities of that country are unable to provide effective protection to their citizens.

31. When an individual's state of health is such that he requires medical treatment and no appropriate medical treatment is available in his country of origin, the inhuman or degrading treatment which the individual is likely to undergo if he is returned to that country does not stem from any intentional act or omission by the public authorities or bodies acting independently of the State and is not directed towards a specific individual.

32. In the case in question, one of the key criteria for granting subsidiary protection, namely that the public authorities in the country of origin should be directly or indirectly responsible for inflicting the serious harm against which protection is needed, does not in fact exist.

33. Therefore, in a situation such as that in the main proceedings, the protection provided by the Member State does not meet any need of international protection within the meaning of Article 2(e) of Directive 2004/83 and does not, therefore, form part of the Common European Asylum System.

34. It follows that the risk of deterioration in the health of a third country national suffering from a psychological condition, as a result of there being no appropriate treatment in his country of origin, is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection, (10) even if the condition from which the applicant suffers is a consequence of past torture in his country of origin.

35. Thus, there is no reason at all to consider, as the appellant in the main proceedings and the Republic of Poland suggest, that the only difference between this and the case giving rise to the judgment of 18 December 2014, *M'Bodj*, (11) namely: the fact that MP's conditions are the after-effects of torture suffered in the past in his country of origin and not of a naturally occurring illness, is such as to alter the conditions for granting subsidiary protection as set out in the provisions of Directive 2004/83 and as previously interpreted by the Court.(12)

36. As a result, I must propose that the Court rule that the definition appearing in Article 2(e), read in conjunction with Article 15(b) of Directive 2004/83, does not include the real risk, should the applicant be returned to his country of origin, of serious harm to his physical or psychological health resulting from the torture or inhuman or degrading treatment he suffered in the past and for which that country was responsible.

37. In the second place, if the Court wished to provide a more comprehensive answer, making it possible to read the provisions of Directive 2004/83 in conjunction with Article 3 of the ECHR and Article 14(1) of the Convention against Torture, I would make the following observations.

38. As regards, first, Article 3 of the ECHR, the case-law already offers some important guidance.

39. As a preliminary remark, it should be noted that the Court has already ruled that the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of EU law, observance of which is ensured by the Court, and that the case-law of the European Court of Human Rights must be taken into consideration when interpreting the scope of that right in the Community legal order, since Article 15(b) of Directive 2004/83 corresponds, in essence, to Article 3 of the ECHR.(13)

40. However, the Court has held that it is apparent from recitals 5, 6, 9 and 24 in the preamble to Directive 2004/83 that, while the directive is intended to complement and add to, by means of subsidiary protection, the protection of refugees enshrined in the Geneva Convention, through the identification of persons genuinely in need of international protection, its scope does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds. The requirement to interpret Article 15(b) of Directive 2004/83 taking into account Article 3 of the ECHR, to which it corresponds, in essence, is not such as to call that interpretation into question.(14)

41. Nevertheless, it has also been held (15) that the interpretation of Article 15 of Directive 2004/83 in the light of Article 3 of the ECHR may lead to the grant of subsidiary protection, but only in very exceptional cases and where the humanitarian grounds against removal are compelling, in accordance with the case-law of the European Court of Human Rights.(16)

42. The court has held, in this respect, that the fact that a national of a third country suffering from a serious illness may not, in very exceptional cases, be removed to a country in which appropriate treatment for his condition is not available does not necessarily mean that the person concerned should be granted leave to reside in a Contracting State. (17)

43. That case-law could be applied to the circumstances of the case in the main proceedings and would mean that the Member States are not obliged to allow persons with pathological conditions acquired as a result of torture suffered in the past in their country of origin automatically to receive subsidiary protection. Indeed, it cannot be considered that MP's case corresponds to an exceptional case in which humanitarian grounds are overriding.

44. In the present case, it has not been established that the inadequacy of the health system, in itself, constitutes an infringement of the provisions of Article 3 of the ECHR. However, if that inadequacy led to a worsening of the health of the person concerned, then it could infringe that provision. It is solely for the national court to assess whether there is such an infringement, even if it seems likely that the present case falls within such a situation taking into account the post-traumatic stress that MP suffers and the risk of him committing suicide if he were to be returned to his country of origin. Indeed, the national courts of first instance and of appeal are of the opinion that there is an infringement of those provisions and it is apparent from the documents in the file that MP will not be returned to his country of origin, a fact which is not disputed.

45. It should also be borne in mind that the subsidiary protection scheme must be detached from the considerations that guide the case in the main proceedings, in which it is not disputed that the applicant is no longer at risk of being tortured if he were to return to his country of origin.

46. The Court has ruled, in that regard, that it would be contrary to the general scheme and objectives of Directive 2004/83 to apply the protections that it provides for to third country nationals in situations quite unconnected to the rationale of that international protection.(18)

47. Indeed, and having regard to the considerations above regarding the interpretation of Article 2(e) and Article 15(b) of that directive, if the applicant were to be granted international protection, it would be of a different kind, in accordance with Article 2(g), *in fine*, of that directive. That protection would be granted for other reasons, on a discretionary basis and on compassionate or humanitarian grounds, based on compliance with Article 3 of the ECHR, inter alia.

48. However, the legislature clearly wished to exclude cases based on humanitarian grounds from the scope of Directive 2004/83, in accordance with recital 9 of that directive.(19)

49. It therefore follows from the foregoing that a combined reading of the provisions of Directive 2004/83 and of Article 3 of the ECHR does not prevent the Member States excluding from the scope of subsidiary protection persons in a situation such as that of MP, who are suffering the after-effects of torture undergone in the past but are no longer at risk of being faced with such treatment if they return to their country of origin, even if they are exposed to a risk of suicide and certainly will not receive suitable treatment for their conditions. Against this background, it is exclusively for the national court to assess, in the light of the evidence available to it, whether there is an infringement of Article 3 of the ECHR.

50. As regards, second, Article 14 of the Convention against Torture, I would note at the outset that the provisions of Directive 2004/83 and the other provisions forming the basis of the Common European Asylum System were adopted in order to help the competent authorities of the Member States to apply the Geneva Convention and the other relevant treaties in this area, in accordance with Article 78(1) TFEU. (20) Therefore, the provisions of that directive must be interpreted in the light of the general scheme and purpose of those provisions.(21)

51. However, it is established case-law that the application of EU law must be independent of that of international humanitarian law. (22) In addition, it should be noted that the Court has held that international humanitarian law and the subsidiary protection regime introduced by Directive 2004/83 pursue different aims and establish quite distinct protection mechanisms.(23)

52. Accordingly, I would observe that Directive 2004/83 contains no provision in any way similar to that of Article 14(1) of the Convention against Torture obliging the States Parties to provide procedures and means allowing victims of torture to obtain redress.

53. It is, therefore, to that extent only that the Court could possibly question whether infringement of Article 14 of the Convention against Torture, by a third state the nationality of which the applicant holds, is liable to influence the obligations of the Member States of the European Union, as far as the grant of subsidiary protection is concerned, that arise from Directive 2004/83 enabling individuals to be safeguarded from all serious harm.

54. It is clear from a literal interpretation of Article 14(1) of the Convention against Torture that it is the State responsible for torture committed in its territory that must, in principle, provide the means and procedures allowing persons concerned to obtain redress or enjoy as full rehabilitation as possible.(24)

55. A comprehensive reading of the provisions of that convention reinforces that literal interpretation, inasmuch as Article 13 et seq. are essentially addressed to the State responsible for the breach.(25) To that extent, there are grounds for asking whether, if Sri Lanka failed to fulfil its obligations deriving from the Convention against Torture, to which it is party, that would extend the obligations of the Member States as far as concerns subsidiary protection.

56. Could breach of the Convention against Torture by a country outside the European Union allow individuals to exercise a right to subsidiary protection in the European Union? Could that breach be interpreted as proof that there is a risk of inhuman or degrading treatment if the person concerned is returned to their country of origin? Could the lack of a procedure allowing redress in the country of origin be considered a risk of serious harm? It is on such questions that the Court may wish to take a position.

57. Some States might agree to assume the obligations that the Convention against Torture gives rise to, even though they are not responsible for the acts of torture in question. Such universal jurisdiction is recognised in criminal matters, in respect of the prosecution and trial of perpetrators of torture. Indeed, the convention recognises that the only link between the State of the forum and the commission of the offence is the presence of the suspected perpetrator of torture in the territory of the State, which is competent either to extradite or prosecute and try that suspected perpetrator. (26) However, it is not common for universal jurisdiction to be recognised as far as concerns civil liability and the right of victims of damaging acts to compensation. (27) The only link required in that context between the offence and the State would be the presence of the victim of torture, committed abroad, in the territory of the State that will assume responsibility for the action for compensation. Such extension of the jurisdictional competence of the States Parties of the Convention against Torture, if allowed by the Court,(28) would allow victims of torture effectively to exercise their rights to compensation and fully echo *jus cogens,*(29)thus reinforcing the fight against torture at international level.(30)

58. It is to that extent, alone, that it could be conceded that Article 14(1) of the Convention against Torture could be applied to the case in the main proceedings in a way that allows the obligations of the Member States in relation to subsidiary protection to be extended. That being said, to recognise such universal jurisdiction would go beyond what European case-law has already accepted, and the case in the main proceedings does not seem to be the appropriate occasion for taking that step, inasmuch as two things prevent Article 14(1) of the Convention against Torture being applicable.

59. First, it is not apparent from any evidence in the case file that Sri Lanka would intentionally breach the obligations arising from Article 14(1) of the Convention against Torture in respect of MP if he was to be returned there. In fact, it follows from the foregoing that MP cannot reasonably accuse Sri Lanka of intentional deprivation of care and that, therefore, cannot constitute a risk of serious harm like those set out by the provisions of Article 15 of Directive 2004/83 allowing the grant of subsidiary protection, even though the inadequacy of the health system is not contested. Therefore, it cannot be recognised, a priori, that Sri Lanka breached the obligations arising from the Convention against Torture in respect of MP.

60. Second, in order for the right to redress to be accepted, it is also necessary for a complaint to be lodged or legal proceedings to be brought. Indeed it is for the person claiming to be a victim of torture to bring an action in order to obtain redress or to benefit from appropriate conditions allowing for as full rehabilitation as possible, in accordance with the provisions of Article 14(1) of the Convention against Torture itself. However, in the present case, the appellant in the main proceedings has not proved or even claimed that he submitted a request to be granted compensation or means for rehabilitation, either to the Sri Lanka authorities or to those of a Member State, assuming the latter can claim jurisdiction. There is no evidence in the file to show that MP brought any such action on the basis of the provisions of Article 14(1) of the Convention against Torture.

61. Therefore, and necessarily, the only way to include the circumstances of the case in the main proceedings within the scope of those provisions would be to find, first, that the inadequacies of the

health system in Sri Lanka are the source of an intentional breach of that State's obligations under Article 14(1) of the Convention against Torture in respect of MP and, second, that the submission of a request for subsidiary protection, in a Member State of the EU, is tantamount to an application for the right to receive compensation or the resources necessary to achieve as full a rehabilitation as possible.

62. That interpretation appears, however, to extend excessively the scope of both the provisions of Directive 2004/83 and the provisions of Article 14(1) of the Convention against Torture.

63. Moreover, it is necessary to assess the practical consequences of such an extensive interpretation. If all persons who had in the past suffered ill-treatment were given a right to subsidiary protection, as long as their country of origin did not provide the facilities and procedures to allow victims to be compensated or rehabilitated, including by means of setting up an adequate health system, the obligations of the Member States would be considerably increased with regard to subsidiary protection, posing both procedural and practical problems. Such an interpretation would certainly go beyond what the EU legislature intended when adopting Directive 2004/83 and the Common European Asylum System and would very probably lead to an increase in the number of applications for international protection and problems in putting an end to those systems of protection, in accordance with Article 16 of Directive 2004/83, in cases of post-traumatic stress or risk of suicide. In addition, the case-law of the Court applies without prejudice to Member States' discretion to grant persons with such conditions leave to stay for humanitarian reasons.

64. It follows from the above that I propose that the Court rule that it is not contrary to the provisions of Article 14(1) of the Convention on Torture for an applicant in a situation such as that in the main proceedings not to be granted subsidiary protection.

65. As a result, I propose that the Court rule that the definition appearing in Article 2(e), read in conjunction with Article 15(b) of Directive 2004/83, does not include the real risk, should the applicant be returned to his country of origin, of serious harm to his physical or psychological health resulting from the torture or inhuman or degrading treatment he suffered in the past and for which that country was responsible, and this is not precluded by Article 3 of the ECHR and Article 14(1) of the convention against torture.

V. Conclusion

66. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Supreme Court of the United Kingdom as follows:

67. The definition appearing in Article 2(e), read in conjunction with Article 15(b) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, does not include the real risk, should the applicant be returned to his country of origin, of serious harm to his physical or psychological health resulting from the torture or inhuman or degrading treatment he suffered in the past and for which that country was responsible.

1 Original language: French.

2 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

3 European Convention on Human Rights, signed in Rome on 4 November 1950 ('ECHR').

4 Concluded in New York on 10 December 1984 ('the Convention against Torture').

5 Signed in Geneva on 28 July 1951, 'the Geneva Convention'.

6 Judgments of 17 February 2009, *Elgafaji* (C-465/07, EU:C:2009:94, paragraph 31); of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39, paragraph 18); and of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraph 30).

7 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraphs 31 and 32).

8 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraph 35).

9 See my Opinion in *M'Bodj* (C-542/13, EU:C:2014:2113, points 44 to 46) and the case-law of the ECtHR cited. Also see ECtHR, 29 April 2002, *Pretty v. United Kingdom* (CE:ECHR:2002:0429JUD000234602, § 52).

10 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraph 36).

11 C-542/13, EU:C:2014:2452.

12 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452).

13 Judgment of 17 February 2009, *Elgafaji* (C-465/07, EU:C:2009:94, paragraph 28). For a reminder of the interpretation of Article 3 of the ECHR by the European Court of Human Rights, see ECtHR, 28 February *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 134 and 135), and 21 January 2011, *M.S.S. v. Belgium and Greece* (CE:ECHR:2011:0121JUD003069609, § 219 et seq.). In that judgment the European Court of Human Rights notes that the treatment proscribed by Article 3 of the ECHR must, inter alia, be of a minimum level of severity, be inflicted with premeditation, and be humiliating and degrading.

14 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraphs 37 and 38).

15 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraphs 39 and 40).

16 Also see ECtHR, 27 May 2008, *N. v. United Kingdom* (CE:ECHR:2008:0527JUD002656505, § 42 to 45). In that judgment, the European Court of Human Rights states that its case-law principally concerned HIV-positive people, but that other cases could very exceptionally prevent removal of persons with naturally occurring physical or mental illnesses.

17 ECtHR, 27 February 2014, *S.J. v. Belgium* (CE:ECHR:2015:0319JUD007005510 § 118 to 120). The European Court of Human Rights notes in that judgment that, according to its case-law, third country nationals subject to a removal measure cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, might be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3 of the ECHR.

18 Judgment of 18 December 2014, *M'Bodj* (C-542/13, EU:C:2014:2452, paragraph 44).

19 See my Opinion in *M'Bodj* (C-542/13, EU:C:2014:2113, points 60 to 63).

20 See, inter alia, my Opinion in *Danqua* (C-429/15, EU:C:2016:789, point 55).

21 Judgment of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720, paragraphs 39 and 40 and the case-law cited).

22 Judgments of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39, paragraphs 24 to 26), and of 14 March 2017, *A and Others* (C-158/14, EU:C:2017:202, paragraph 91).

23 Judgment of 30 January 2014, *Diakité* (C-285/12, EU:C:2014:39, paragraph 24).

24 See, to that effect, Chanet, C., 'La Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants', *Annuaire français de droit international*, volume 30, Persée, Paris, 1984, pp. 625 to 636.

25 See, to that effect, Ponroy, E., and Jacq, C., 'Étude comparative des Conventions des Nations Unies et du Conseil de l'Europe relatives à la torture et aux peines ou traitements inhumains ou dégradants', *Revue de science criminelle et de droit pénal comparé*, Dalloz, Paris, 1990, p. 317.

26 See Article 5(2) of the Convention against Torture, according to the principle *aut dedere aut judicare*. See, to that effect, Vandermeersch, D., 'La compétence universelle', *Juridictions nationales et crimes internationaux*, Presses universitaires de France, Paris, 2002, pp. 590 to 594.

27 ECtHR, 21 June 2016, *Nait-Liman v. Switzerland* (CE:ECHR:2016:0621JUD005135707, § 49 et seq. and § 115 et seq.). In this judgment the European Court of Human Rights refuses to consider that Article 6(1) of the ECHR obligates the States Parties to provide mechanisms for civil redress for torture committed in a Third State. The Court explains that acceptance of universal jurisdiction in this area would have caused a mass influx of actions. After a full examination of the European legal systems (§ 49), the Court concludes that, whilst the prohibition of torture is part of the *jus cogens* and enjoys universal jurisdiction, civil actions resulting from acts of torture must nevertheless respect the rules of territoriality of jurisdiction. Also see ECtHR, 21 November 2001, *Al-Adsani v. United Kingdom* (CE:ECHR:2001:1121JUD003576397, § 61 and 115 et seq.).

28 Knowing that there is no consensus on this matter within the European legal systems and legal literature, as the European Court of Human Rights notes in its judgments of 21 November 2001, *Al-Adsani v. United Kingdom* (CE:ECHR:2001:1121JUD003576397, § 61 and 62), and of 21 June 2016, *Nait-Liman v. Switzerland* (CE:ECHR:2016:0621JUD005135707, § 115 et seq.).

29 For a definition, see judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 87): ‘understood as a body of higher rules of public international law binding on all subjects of international law ... and from which no derogation is possible’.

30 See judgment of the International Criminal Tribunal for the former Yugoslavia of 10 December 1998, *Anto Furundzija* (IT-95-17, § 156).