Basra v. Belgium: a structural problem struck from the list

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On 13 September 2018, the European Court of Human Rights struck the application of *Basra v. Belgium* out of its list. Mr. Basra argued not having benefited from an effective remedy in the sense of article 13 ECHR, with respect to his arguable claim of being subjected to treatment prohibited by Article 3 ECHR in case of return to Pakistan.

After efforts to reach a friendly settlement had failed, the Belgian Government made a unilateral declaration in order to solve the issue, and invited the Court to struck the case from the list. The Court took up this invitation on the basis of Article 37 (1) (c) ECHR, which allows the Court to strike out an application where, for any reason established by the Court, it is no longer justified to continue its examination.

During this procedure, a third party intervention was submitted to the Court by NANSEN – the Belgian Refugee Council, EDEM (Equipe droits européens et migrations) from the UCLouvain, the Equality Law Clinic of the Université libre de Bruxelles and the Human Rights Centre of Ghent University.

After presenting the facts of the case, this blogpost summarizes the main arguments made in our third party intervention, and reflects on the arguments provided to strike out the case and the issue of subsequent applications.

Facts

Mr. Basra, an Ahmadi Muslim, applied for international protection in Belgium in 2012, on the basis of religious persecution by the Sunni majority in his country of origin, Pakistan. In 2016, the Commission General for Refugees and Stateless Persons (CGRS) refused to recognize him as a refugee, among others because the mere fact of being an Ahmadi Muslim was not sufficient to obtain protection. Moreover, in light of substantial contradictions in his story, the CGRS did not deem it credible that the applicant had fulfilled multiple functions within his community in Pakistan, which would have ‘raised’ his profile and could have contributed to establishing a risk of persecution.

During his appeal before the Council for Alien Law Litigation (CALL) against this decision, Mr. Basra submitted a document from the Ahmadi association of Belgium, which confirmed his functions within the Ahmadi community of Pakistan. The CALL refused to take this document into consideration, without verifying its authenticity, arguing that the document did not have any probative value (even more because it had been requested by the applicant) and could only support credible statements. Since the statements of Mr. Basra had not been deemed credible, it was not considered necessary to verify the authenticity of this document. An appeal on points of law before the Council of State was deemed inadmissible as it was

considered to relate to an appreciation of facts. In January 2017, the applicant was granted a temporary residence permit of one year, renewable, on humanitarian grounds, on the basis of Article 9bis of the Belgian Immigration Act of 15 December 2018 ('humanitarian regularisation').

Arguments from the third party intervention

The third party intervention focused on the large weight attached to the credibility assessment of asylum seekers in the Belgian asylum procedure. This may in certain cases impede the proper and thorough assessment of the fear of persecution and the possible risk of refoulement.

The problem lies in the fact that the Dutch-speaking chambers of the CALL do not interpret the judgment *Singh and Others v. Belgium* of the ECtHR in the same way as the French-speaking chambers. In the Singh case, the CGRS and the CALL had rejected the asylum applications lodged by the alleged Afghan applicants on the grounds that their Afghan origin was not credible. Both the CGRS and the CALL had focused on the credibility of the applicants' account of their journey prior to their arrival in Belgium, without checking the authenticity of the identity documents filed, on the ground that they were easily falsifiable copies. The Court considered that removing documents from the core of the application for protection by considering them unconvincing, without first verifying their authenticity, when it would have been easy to do so, violates Article 3 ECHR combined with the right to an effective remedy (Article 13).

Following the Singh judgment, the French-speaking chambers consider it imperative that investigations are conducted when an applicant produces documents of such a nature as to remove the doubts expressed by the administrative authority as to the merits of its claim, and such documents are not insignificant. It should then be determined whether those documents support the allegations of fear or risk in the event of the applicant's return to his country of origin. The Dutch-speaking chambers, on the other hand, generally consider that the Singh case only concerns documents that may remove doubts about the nationality and origin of the asylum seeker. Consequently, the judges refuse to apply the Singh ruling and conclude that documentary evidence does not restore the asylum seeker's credibility. This divergence between the Dutch- and French-speaking jurisprudence triggers questions as to the quality of the appeal procedure in asylum cases before the CALL and the compliance with Articles 3 and 13 ECHR.

In our third party intervention, we set out the various relevant principles of international and European law regarding the burden of proof, the evaluation of credibility, and the weight that should be given to the concept of credibility in the asylum procedure and its relation with documentary evidence. Taking into account the vulnerable situation of asylum seekers and the unequal procedural power relations that characterize asylum proceedings, various actors have established that the burden of proof is shared between the asylum authorities and the asylum seeker. As such, the position of both UNHCR and the Court of Justice of the European Union is that states have the obligation to contribute to the establishment of the facts on which the asylum application is based. Moreover, states are obliged to accord the benefit of the doubt to the asylum seeker when unproven elements of his account appear likely in view of his generally credible profile. In some cases, the competent authority is also required to contribute to the establishment of facts by using 'all the means at its disposal' to gather the necessary evidence to support the request. In light of existing case law of the ECtHR and the

UN Committee against Torture, the burden of proof shifts to the asylum authorities when the asylum seeker establishes a *prima facie* risk of refoulement, for instance when documentation indicates that the asylum seeker is a victim of torture.

As the role of credibility is concerned, in our intervention, we emphasise that there is no rule of international or European law that states that credibility is a necessary requirement to be recognised as a refugee, or that a lack of credibility should lead to the rejection of the asylum application. The only consequence of the applicant's lack of credibility is that the principle of the benefit of the doubt cannot apply to aspects of the applicant's statements that are not supported by documentary or other evidence. According to UNHCR and the ECtHR, in assessing credibility, all available evidence must be considered, including documentary evidence. Even when statements are not perceived as credible, the authority should take into account the documentary evidence presented, as it may be sufficient on its own to support the real risk faced by the applicant *(I. v. Sweden*). In *Singh and Others v. Belgium*, as mentioned above, and in *Mo.M. v. France*, the ECtHR has stressed the importance for asylum authorities to examine in a rigorous manner the documents produced by the asylum seeker. It considered that not taking into account documents that are at the heart of the application for international protection without first verifying their authenticity, when it would have been easy to do so, cannot be considered as a careful and rigorous examination as required under Article 13 ECHR. The Court also applies this reasoning to medical reports, for example in *R.J. v. France* or in *I. v. Sweden*. In our intervention, we recall the general obligation established in ECtHR case law to state reasons as to why documents are not taken into account (*K.K. v. France*). More broadly, it is argued that, under international human rights law, the decisions of the Human Rights Committee, the Committee against Torture and the Committee on the Rights of the Child (in cases involving female genital mutilation) show that credibility concerns may not impede an objective examination of risk.

Striking out the case: arguments of the Court

In its unilateral declaration, the Belgian Government guaranteed that the CGRS will take into consideration Mr. Basra's subsequent application for international protection, "in order to repair the *appearance of* a lack of effective remedy of the applicant to complain about a risk of violation of Article 3 of the Convention in case of expulsion to Pakistan, which could flow from the brief motivation of the judgment of the Council for Alien Law Litigation, rejecting the last elements submitted to it by an Ahmadi association from Belgium" (emphasis added). Although the Belgian Government made some concession, it did not clearly recognize a violation of Article 13 in conjunction with Article 3 ECHR. Moreover, this guarantee may lead to a satisfactory treatment of the individual case of Mr. Basra, but it does not tackle the structural problem complained of, namely the flawed case law of the Dutch-speaking chambers of the CALL.

Even though the nature of assurances in a governmental declaration, and especially the recognition of a violation, are generally considered as relevant factors when deciding to strike out a case, the Court did not take an issue with the lack of recognition of a violation by the Belgian government. The Court did refer, however, to *Khan v. Germany*, according to which an application can be struck out when there is no more risk of expulsion (critically discussed on Strasbourg Observers here). This was the case here, as the applicant had obtained a temporary residence permit on humanitarian grounds.

The Court did not see any reason to doubt the serious and mandatory nature of the assurances provided by the Belgian Government. Moreover, the Court did not follow the applicant's argumentation that the Belgian Government is not competent to instruct the CGRS to take a new application for international protection into consideration, and that the CGRS would have been bound by the prior judgment of the CALL rejecting the evidence. Referring to *Assandize v. Georgia*, the Court reiterated that, for the purposes of the Convention, the only relevant issue is the international responsibility of the contracting State, irrespective of the national authority to which the Convention violation is imputable. Under these conditions, and referring to the subsidiary nature of its human rights protection system, the Court found it no longer justified to continue the examination of the application (art. 37 § 1 c ECHR) and struck it of the list. Moreover, in the view of the Court, there were no special circumstances related to the respect for human rights that would require the continued examination of the case (art. 37 § 1 *in fine* ECHR).

The ambivalence surrounding subsequent applications

In the *Basra* case, the Belgian Government ordered the CGRS to take a new application of Mr. Basra into consideration. In Belgian practice, the recourse to subsequent applications remains very frequent. Final positive answers (i.e. recognition as a refugee or granting of subsidiary protection status) are not rare in second, third, or even later, applications. This must be seen as a signal that something does not work in the main asylum procedure, and leads to a reflection about its effectiveness. On the other hand, immigration legislation increasingly tries to discourage the use of subsequent applications (see e.g. art. 1 § 2 and art. 39/70 Aliens Act). One cannot at the same time limit subsequent applications and refuse to see that a significant part of them are linked to a first deficient procedure.

As regards the consideration of new elements in support of a subsequent asylum procedure, two judgments handed down by the ECtHR on the same day in different directions will be remembered. One considered that a detailed medical certificate filed in support of a new application did not necessarily have to be taken into account since it could have been produced previously (*Sow v. Belgium*, §§ 67-82). The other held that the ground for refusal related to the fact that documents could have been produced previously could be set aside when the applicants alleged that it had not been possible for them to file them earlier. The Court criticised the Belgian authorities' overly strict approach in view of the absolute nature of Article 3 ECHR (*M.D. and M.A. v. Belgium*, §§ 57-67). The Basra case would have been an opportunity for the ECtHR to clarify its position on this matter.

Conclusion

Through its unilateral declaration, the Belgian Government avoided a possible new conviction by the ECtHR, for something which seems to be a structural flaw within the Belgian appellate asylum procedure. Notwithstanding a previous violation by Belgium established in *Singh*, the Dutch-speaking chambers of the CALL have not adapted their jurisprudence. The divergence in case law between the French and Dutch-speaking chambers moreover raises serious concerns as to legal certainty and equality before the law.