



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF T.K.H. v. SWEDEN

(Application no. 1231/11)

JUDGMENT

STRASBOURG

19 December 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of T.K.H. v. Sweden,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President*,

Ann Power-Forde,

Ganna Yudkivska,

André Potocki,

Paul Lemmens,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 19 November 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1231/11) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Iraqi national (“the applicant”) on 28 November 2010. The President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Ms R. Fardnicklasson, a lawyer practising in Gothenburg. The Swedish Government (“the Government”) were represented by their Agent, Ms G. Isaksson, of the Ministry for Foreign Affairs.

3. The applicant alleged that his deportation to Iraq would involve a violation of Articles 2 and 3 of the Convention.

4. On 10 February 2011 the President of the Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicant should not be deported to Iraq until further notice.

5. On 8 November 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, who was born in 1985, is a Sunni Muslim from Mosul.

7. The applicant arrived in Sweden on 21 December 2007 and applied for asylum the same day. He stated in essence the following in support of

his application. Following the fall of the Saddam Hussein regime, he had served in the new Iraqi army, which he had joined in October 2003 and which had involved work with the American troops. As a consequence of his military service, he claimed that he had been subjected to threats and ill-treatment. At the end of 2004, terrorists had thrown a grenade at him and his colleagues and he had injured his foot. In March 2006, when his unit had guarded a recruitment session at a military base, two suicide bombers had detonated bombs that killed 25 Iraqi soldiers and 5 Americans. One of the bombs had detonated close to the applicant and he had been severely injured. He had been hospitalised for approximately two and a half months. He had ended his military service in March 2006, after this incident. Upon release from hospital he had moved to Mosul to live with his family for one year. In June 2007, while he had been with his sister in the front yard, a car had approached them and opened fire on them. His sister had been hit by four shots and had become paralysed. The applicant himself had been hit once in the shooting and had again been taken to hospital for care. While still in hospital, he had been told by his brother that a letter had been left for him at his house containing death threats against him. When he had left the hospital, he had gone into hiding for five months at a friend's house in Mosul before leaving Iraq. The applicant also referred to the injuries he had sustained and submitted photographs and extracts from medical journals.

8. On 12 March 2009 the Migration Board (*Migrationsverket*) rejected the application and ordered the applicant's deportation to Iraq. The Board first accepted that the documentation supplied by the applicant showed that he had served in the Iraqi army and that he had been shot at and had, as a consequence, sustained serious injuries. It went on to note that the incidents in late 2004 and March 2006 had been connected to the applicant's military service and had not been directed at him personally. He had not received any personal threats or been subjected to ill-treatment while serving in the army or during a period of 15 months after he had left the army. Having regard to this 15-month period without incidents and noting that the applicant did not know who had shot at him and his sister or the reason for the June 2007 attack, the Board considered that the shooting was connected to the difficult security situation at the time rather than the applicant's previous military service. Further, the applicant had remained in Mosul for five months after the threatening letter had been received without anything happening to him. Moreover, the applicant had been in contact with his family since he had left Iraq and had been informed that they had not been subjected to threats or ill-treatment after his departure. Nor was there any indication that the applicant was being searched for in Iraq. In conclusion, he had failed to make plausible that he would be at risk of persecution or ill-treatment if he were to return to Iraq. Furthermore, his state of health was not such that it gave reason to grant him a residence permit, as a return to Iraq was not deemed to cause any danger to his life or health.

9. The applicant appealed, stating that he was convinced that he would be killed if returned to Iraq. He further claimed that he had injuries which required medical treatment unavailable in his country of origin. He had infections and low blood circulation in his legs. Further, because of his injuries and the other circumstances invoked, he was in a very bad mental state. He submitted a medical certificate issued by M. Eves, chief physician at Lindesberg Hospital, according to which he had been injured many years before in his home country, had a remaining handicap with recurring numbness and ulcerations in his foot and received treatment for infections. He also had large scars on his left leg after substantial soft tissue injuries.

10. On 9 February 2009 the Migration Court (*Migrationsdomstolen*) upheld the decision of the Board, agreeing generally with its conclusions. In regard to the applicant's state of health, the court found that it was not sufficient for the grant of a residence permit. It noted that he had been injured several years before and that he had received treatment for his injuries in Iraq.

11. In March 2010 the applicant left Sweden and applied for asylum in Germany. He was transferred back to Sweden in April 2010, in accordance with the provisions of the Dublin Regulation.

12. On 22 April 2010 the Migration Court of Appeal (*Migrationsöverdomstolen*) refused the applicant leave to appeal.

13. Subsequently, the applicant claimed that there were impediments to the enforcement of his deportation order, reiterating the claims he had made previously. He submitted another medical certificate dated 6 August 2010, issued by M. Eves. It stated that the applicant was under treatment for injuries to his left leg. The injuries did not require urgent treatment, but there was a need of future care.

14. On 1 October 2010 the Migration Board rejected the petition, finding that no new circumstances justifying a reconsideration had been presented. It does not appear that any appeal was made against this decision.

II. RELEVANT DOMESTIC LAW

15. The basic provisions applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the Aliens Act (*Utlänningslagen*, 2005:716).

16. An alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden (Chapter 5, section 1 of the Act). The term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that

country (Chapter 4, section 1). This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By “an alien otherwise in need of protection” is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2).

17. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) to allow him or her to remain in Sweden (Chapter 5, section 6). Special consideration should be given, *inter alia*, to the alien’s health status. According to the preparatory works (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien’s home country could constitute a reason for the grant of a residence permit.

18. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 12, section 1). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2).

19. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has acquired legal force. This is the case where new circumstances have emerged which indicate that there are reasonable grounds for believing, *inter alia*, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced (Chapter 12, section 18). If a residence permit cannot be granted under these criteria, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, sections 1 and 2, and these circumstances could not have been invoked previously or the alien shows that he or she has a valid excuse for not having done so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, section 19).

20. Matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal.

III. RELEVANT INFORMATION ABOUT IRAQ

A. General human rights situation

21. On 31 May 2012 the United Nations High Commissioner for Refugees (UNHCR) issued the latest *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq* (hereafter “the UNHCR Guidelines”). They contain the following account (at p. 8):

“[A]rmed groups opposed to the Iraqi Government remain active and capable of disrupting the security environment with regular mass casualty attacks, often directed at Shi’ite civilians, reportedly aiming to reinvigorate sectarian violence. Armed groups are also thought to be responsible for targeted attacks on government and security officials, politicians, tribal and religious leaders, and members of religious and ethnic minorities, among others. Occasionally, local cells manage to coordinate attacks across the country. The number of civilian casualties, though less than at the peak of violence in 2006 and 2007, remains nonetheless significant with around 4,000 civilians killed in both 2010 and 2011, respectively. At least 464 civilians were killed in January 2012, in what appeared to be a surge in mass casualty attacks. Shi’ite civilians have been the most affected. After a short lull in violence, several major attacks across central Iraq were again reported in late February, March and April 2012.

These casualty figures are indicative of the significant risks still faced by Iraqi civilians. The number of civilian deaths from suicide attacks and car bombs decreased in 2011 compared to previous years, to an average of 6.6 per day. While these attacks still account for the highest number of civilian deaths each month, the number of civilians killed from gunfire/executions rose to an average of 4.6 per day in 2011. This suggests that an increasing number of Iraqis, especially government and security officials, are being individually targeted. Violence is mostly concentrated in the predominantly Sunni or mixed central governorates of Al-Anbar, Baghdad, Diyala, Ninewa, Kirkuk, and Salah Al-Din, but occasionally moves into the mainly Shi’ite governorates further south. Armed Sunni groups such as Al-Qa’eda in Iraq and Ansar Al-Islam are thought to be responsible for most of the violence. Shi’ite armed groups have to a large extent been integrated into the ISF [Iraqi security forces] and the political process, though they reportedly maintain their independent military capabilities and at times threaten to use it to further their political agendas. Armed groups target civilians on the basis of their (imputed) political views, religion, ethnicity, social status or a combination of reasons. As a result of the weak law enforcement and justice system, persons at risk of persecution are reportedly unable to find protection or judicial redress. Observers mention undue political influence, the lack of trained legal professionals and corruption as further obstacles to the administration of justice, including in the Kurdistan Region. Legal professionals continue to work in a very difficult security environment, and remain a target of armed groups. Crime is widespread and some armed groups reportedly engage in extortion, kidnappings and armed robberies to fund their other, politically – or religiously, or ideologically – motivated activities, conflating acts of persecution and

criminality. Consequently, the line between persecution and criminality appears to be increasingly blurred.”

22. In its *Report on Human Rights in Iraq: July – December 2012*, published in June 2013, the Human Rights Office of the United Nations Mission for Iraq (UNAMI) gave, *inter alia*, the following summary (at p. vii):

“Violence and armed violence continued to take their toll on civilians in Iraq. According to the Government of Iraq, 1,704 civilians were killed and 6,651 were injured in the second half of 2012, resulting in a total of 3,102 killed and 12,146 injured for 2012. According to UNAMI, 1,892 civilians were killed and 6,719 were injured in the last six months of 2012, resulting in a total of at least 3,238 civilians who were killed and 10,379 who were injured for the year. These figures indicate that the trend of recent years of a reduction in the numbers of civilian casualties has reversed and that the impact of violence on civilians looks set to increase in the near to medium future. Terrorists and armed groups continued to favour asymmetric tactics that deliberately target civilians or were carried out heedless of the impact on civilians.

Political instability and regional developments continued to impact negatively on the security situation in Iraq, with its concomitant toll on civilians. Although the Government takes the impact of violence on civilians extremely seriously and has taken measures to enhance security, more needs to be done to ensure the proper coordination of financial, medical and other forms of support for the victims of violence.”

23. The UK Border Agency *Iraq Operational Guidance Note* of December 2012 describes the general security situation thus (at pp. 21-22):

“3.6.2 The security situation in Iraq continues to affect the civilian population, who face ongoing acts of violence perpetrated by armed opposition groups and criminal gangs. In particular, armed groups continue to employ tactics that deliberately target crowded public areas and kill and maim civilians indiscriminately. While some attacks appear to be sectarian in nature, frequently targeting religious gatherings or residential areas, others seem random, aimed at creating fear and terror in the population at large and casting doubt over the ability of the Government and Iraqi security forces to stem the violence. Assassinations also persist across the country, targeting, *inter alia*, Government employees, tribal and community leaders, members of the judiciary and associated persons.

3.6.3 Apparently making use of the political wrangling which has followed the elections for Iraq’s Council of Representatives (CoR) held on 7 March 2010, armed Sunni groups (such as Al-Qaeda in Iraq) have stepped up attacks since December 2011. These attacks have been carried out primarily against Shi’ite civilians in what appears to be an effort to stir sectarian tensions and undermine confidence in the ISF and, ultimately, the Iraqi Government. The political stalemate also comes at an uncertain period in the wider region: the repercussions of ongoing unrest and tensions in Syria and Iran, with which Iraq shares porous borders and political and economic ties, are not yet known. Iraq’s political difficulties have also reportedly increased tensions with neighbouring Turkey.”

24. In a country guidance determination, *HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409 (IAC)*, delivered on 13 November 2012, the UK Upper Tribunal (Immigration and Asylum Chamber) reached, *inter alia*, the following conclusions (at p. 2):

“ii. As regards the current situation, the evidence does not establish that the degree of indiscriminate violence characterising the current armed conflict taking place in the five central governorates in Iraq, namely Baghdad, Diyala, Tameen (Kirkuk), Ninewah, Salah Al-Din, is at such a high level that substantial grounds have been shown for believing that any civilian returned there would solely on account of his presence there face a real risk of being subject to that threat.

iii. Nor does the evidence establish that there is a real risk of serious harm under Article 15(c) [of the Refugee Qualification Directive 2004/83/EC] for civilians who are Sunni or Shi’a or Kurds or have former Ba’ath Party connections: these characteristics do not in themselves amount to “enhanced risk categories” under Article 15(c)’s “sliding scale” ...”

B. The specific situation of certain groups, in particular former members of the Iraqi army

25. The UNHCR Guidelines contain the following account in regard to former members of the Iraqi security forces (ISF) (at p. 15):

“... [I]n 2010 and 2011 armed groups increased attacks against the ISF in an apparent effort to destabilize the country and undermine confidence in the ability of the Iraqi Government to provide security. Iraqi soldiers and policemen are killed on a daily basis. This trend is expected to continue following the USF-I [United States Forces in Iraq]’s withdrawal from Iraq in December 2011. Members of the Iraqi Police are often particularly targeted: they do not have heavy weapons and equipment and receive less training than the Iraqi Army, and are accordingly reportedly considered the weakest element of the ISF. In 2011, according to Iraqi Government statistics, about 40 per cent of Iraqis killed were ISF members, including 609 Iraqi police and 458 soldiers.

ISF patrols, convoys, checkpoints, army bases and police stations are subject to daily attacks, mainly by roadside bombs and gunfire. Checkpoints are also regularly attacked by sniper fire. The ISF are frequently targeted in larger attacks involving car bombs or suicide bombers, including in multiple coordinated attacks across the country. Major attacks against the ISF in 2011 and 2012, some of them claimed by Al-Qa’eda in Iraq (ISI/AQI), were carried out in Al-Anbar, Babel, Baghdad, Basrah, Diyala, Kirkuk, Ninewa and Salah Al-Din Governorates.

In addition, targeted killings of ISF personnel have been increasing since late 2010. While most attacks occur in the cities of Baghdad and Kirkuk, senior ISF officials have also regularly been targeted in the central governorates of Al-Anbar, Diyala, Ninewa and Salah Al-Din. In southern Iraq, targeted attacks on senior ISF officials are less frequent. Most assassinations are reportedly carried out through the use of weapons with silencers or “sticky bombs” attached to vehicles. The victims have likely been monitored in advance of an attack. According to Iraqi officials, senior ISF members of Sunni background have been particularly singled out for assassinations. Both Sunni and Shi’ite armed groups are thought to be responsible for the targeting of senior ISF officials. Iraqi officials suggested that Shi’ite groups strengthened their

campaign against those of Sunni background due to fears that they could lead a military coup against the Government after the USF-I's withdrawal from Iraq. According to Ministry of Defense officials, "hit lists" have been issued by armed Shi'ite groups and published on websites, and some officers have received threatening phone calls. Acknowledging the increased risks, the Ministry of Interior introduced measures to help officials avoid assassination – even though, according to experts, "*there are few preventive measures against the use of such economical and low-profile tactics*" as sniper fire or sticky bombs.

Members of the ISF are also reportedly singled out for assassination when off-duty, including in their homes, sometimes in apparently coordinated multiple attacks. Attacks on off-duty ISF members, as reported by the media, occur mainly in Ninewa and Kirkuk Governorates, but also in Al-Anbar, Babel, Baghdad, Diyala and Salah Al-Din Governorates. Because members of the ISF, regardless of rank, are often attacked in their private environment, e.g. their homes or private vehicles, their family members, guards and drivers as well as civilian passers-by are also at risk of being killed or wounded."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

26. The applicant complained that his return to Iraq would involve a violation of Articles 2 and 3 of the Convention. These provisions read as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
..."

Article 3

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

A. Admissibility

27. The respondent Government claimed that the application was inadmissible for failure to comply with the six-month rule in Article 35 § 1 of the Convention, as the final decision in the domestic proceedings had been taken on 22 April 2010, more than seven months before the applicant initiated the present proceedings.

28. The applicant contested this argument.

29. The Court dealt with this issue recently in two cases against Sweden, *P.Z. and Others* and *B.Z.* (nos. 68194/10 and 74352/11, decisions of 29 May 2012), in which it found as follows (§§ 34 and 32, respectively):

“While ... the date of the final domestic decision providing an effective remedy is normally the starting-point for the calculation of the period of six months, the Court reiterates ... that the responsibility of a sending State under Article 2 or 3 of the Convention is, as a rule, incurred only at the time when the measure is taken to remove the individual concerned from its territory. Specific provisions of the Convention should be interpreted and understood in the context of other provisions as well as the issues relevant in a particular type of case. The Court therefore finds that the considerations relevant in determining the date of the sending State’s responsibility must be applicable also in the context of the six-month rule. In other words, the date of the State’s responsibility under Article 2 or 3 corresponds to the date when the six-month period under Article 35 § 1 starts to run for the applicant. If a decision ordering a removal has not been enforced and the individual remains on the territory of the State wishing to remove him or her ... the six-month period has not yet started to run.”

30. The Court sees no reason to find otherwise in the present case. The Government’s objection under Article 35 § 1 must accordingly be rejected.

31. No other ground for declaring the application inadmissible has been invoked or established. It must therefore be declared admissible.

B. Merits

1. The submissions of the parties

(a) The applicant

32. The applicant maintained that the statements that he had given to the Swedish authorities – on his former position in the army, the attacks to which he had been subjected and the injuries suffered – were true and had been accepted by these authorities which had found no reason to question his credibility in general.

33. As for the perpetrators of the attack in June 2007 and their motives, he asserted that it would be totally unreasonable to demand of him, as a victim of a violent attack, to present evidence, especially since he did not know of any police investigation or court judgment regarding the incident. Before they shot him, one of the men had shouted to him: “Are you still alive?”. He knew that one of his neighbours had been working for the Ba’ath party. As Ba’ath party members were against the new Iraqi army, he was of the opinion that the only reasonable conclusion was that the neighbour had informed the applicant’s attackers of his former position. Therefore, it had to be considered as an attack against him personally, which was further shown by the threatening letter received later. In the autumn of 2011 the applicant had been told by one of his brothers that he had been sought after in his former home in Iraq on several occasions by unknown

persons. The applicant – as well as his family – were accordingly of the opinion that the threat against him was still present.

34. The applicant further stated that he had severe difficulties and pain from the injuries sustained in Iraq and that he was taking morphine and undergoing regular medical supervision due to complications caused by his injuries. He submitted the medical certificate of 6 August 2010 which had been invoked also before the domestic authorities, extracts of medical journals, several pictures of his injuries and a letter of 7 December 2010 from M. Eves, the physician who had treated him. According to the letter, the applicant had been examined at two medical centres which had both concluded that there was no need of further surgical measures. The applicant had been offered an amputation of the injured leg, if it was functioning very badly, but had declined such an operation. M. Eves therefore concluded that there was no further medical care to offer him, except for treatment of his pain and discomfort. The applicant asserted that he was suffering mentally due to the traumatic events that he had experienced as well as his physical pain.

(b) The Government

35. The Government, while not wishing to underestimate the concerns that could legitimately be expressed about the current human rights situation in Mosul or in Iraq as a whole, maintained that this did not in itself suffice to establish that the forced removal of the applicant there would breach Article 3 of the Convention.

36. As to the present case, the Government first asserted that the Migration Board and the courts had made thorough assessments. In the proceedings, the applicant had been assisted by legal counsel and had been given many opportunities to present his case. Further, the Migration Board had conducted a long interview with him in the presence of his counsel and an interpreter. Moreover, having regard to the expertise held by the migration bodies, the Government maintained that significant weight should be given to their findings.

37. In regard to the applicant's personal risks, the Government agreed with the domestic authorities that the two terrorist attacks in 2004 and 2006, which occurred while the applicant was still working for the Iraqi army, had not been directed towards the applicant personally, but had rather been connected to his position in the army, which he had thereafter left. Thus, these events did not support a conclusion that there was a real and personal risk for the applicant of being killed or ill-treated upon return. In this connection, the Government pointed out that the applicant had not received any personal threats during his time in the army or during a period of 15 months after leaving the army.

38. Turning to the attack against the applicant and his sister in June 2007, the Government noted that the applicant himself was not aware of the

identity of the perpetrators or their motives, nor did he know who had sent the subsequent threatening letter. They submitted that the applicant's statements concerning the possible involvement of his former neighbour were remarkably vague and that his allegations were based on mere speculation. They further pointed to the fact that, after having received the letter, the applicant had chosen to stay in Mosul for another five months without anything having happened to him or his family. In any event, referring to international reports, the Government asserted that it was unlikely that an individual would be targeted solely because he had worked for international forces. Moreover, a considerable amount of time had passed since the applicant had left the army until he was attacked. The attack thus seemed to have been connected to the general situation in Mosul rather than the applicant's military background.

39. With respect to the applicant's claim that he suffered from injuries for which he needed medical treatment that was not available in Iraq, the Government noted that the applicant had not submitted any recent documentation on his state of health. In any event, his condition was not life-threatening and certain medical care was available in Iraq, where he had already received proper treatment for his injuries. Considering the high threshold set in the Court's case-law in these matters, the Government maintained that it would not be contrary to the Convention to deport him.

2. *The Court's assessment*

(a) **General principles**

40. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67; *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42; and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

41. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assesses the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC],

nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

42. The assessment of the existence of a real risk must necessarily be a rigorous one (*Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. In this respect, the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008).

43. Moreover, aliens who are subject to expulsion 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 an applicant's circumstances, including his life expectancy, would 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. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see, *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).

44. In cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. It must be satisfied, though, that the assessment made by the

authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations (*NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

45. The above principles apply also in regard to Article 2 of the Convention (see, for example, *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009).

(b) The general situation in Iraq

46. The Court notes that a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (*H.L.R. v. France*, cited above, § 41). However, the Court has never excluded the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (*NA. v. the United Kingdom*, cited above, § 115).

47. While the international reports on Iraq attest to a continued difficult situation, including indiscriminate and deadly attacks by violent groups, discrimination as well as heavy-handed treatment by authorities, it appears that the overall situation has been slowly improving since the peak in violence in 2007. In the case of *F.H. v. Sweden* (no. 32621/06, § 93, 20 January 2009), the Court, having at its disposal information material up to and including the year 2008, concluded that the general situation in Iraq was not so serious as to cause, by itself, a violation of Article 3 of the Convention in the event of a person's return to that country. Taking into account the international and national reports available today, the Court sees no reason to alter the position taken in this respect four years ago.

48. However, the applicant is not in essence claiming that the general circumstances pertaining in Iraq would on their own preclude his return to that country. Instead, he asserts that this situation together with his former service in the Iraqi army would put him at real risk of being subjected to treatment prohibited by Articles 2 and 3. He also claims that the deportation of him to Iraq in his present physical and mental state would involve a violation of these provisions.

(c) The particular circumstances of the applicant

49. The Court first notes that the applicant was heard by the Migration Board, that his claims were carefully examined by both the Board and the

Migration Court and that they delivered decisions containing extensive reasons for their conclusions.

50. The Court has regard to recent country information from which it transpires that members of the Iraqi security forces are subjected to frequent targeted attacks by various armed groups and that many Iraqi soldiers and policemen are killed (see the UNHCR Guidelines, § 25 above). However, the applicant ended his job in the Iraqi army in March 2006, more than seven years ago, and it would seem unlikely therefore that he would be at risk of personal attacks today. In this connection, the Court considers that the attacks that occurred at the end of 2004 and in March 2006, although they inflicted serious injuries on the applicant, must be seen as events that affected him solely because he was on duty at the places in question and not as attacks directed at him personally. Following the applicant's retirement from the army, 15 months passed without anything happening to him or his family. Then, in June 2007, the drive-by shooting of him and his sister, leaving her paralysed, happened while they were in the front yard of the family's house. This appears to have been an attack specifically targeting him or his family. Still, the perpetrators and their motive are unknown and, according to the applicant, there does not seem to have been any police investigation or other proceedings as a result of the incident. While not questioning that the attack may have been made in retaliation for the applicant's former military service, the Court again notes that it occurred more than six years ago, at a time when violence in Iraq reached its highest levels. There is no indication that members of the applicant's family, who appear to have stayed in Iraq, have been subjected to attacks or other forms of ill-treatment since and the applicant's claim that unknown persons have been searching for him on several occasions remains unsubstantiated. Thus, having regard to the above, the Court considers that the applicant has not substantiated that there is a remaining personal threat of treatment contrary to Article 2 or 3 of the Convention against him upon return to Iraq.

51. In regard to the applicant's health status, the Court acknowledges that he sustained serious injuries in Iraq, in particular while he was serving in the army, that have left him with a badly damaged leg and severe pain. However, the threshold under Article 3 for concluding that a medical condition precludes the deportation of an individual is very high (see § 43 above). Medical evidence showing the applicant's present health status has not been presented to the Court but, according to the medical certificate of 6 August 2010 and the physician's letter of 7 December 2010, both of which have been submitted to the Court, the applicant's injuries did not require urgent treatment and no further surgery except amputation of the leg could be done. As the applicant had refused amputation, all that remained was treatment for his pain and discomfort. Noting that the applicant had received medical care for his injuries in Iraq, the Court cannot find that the remaining treatment would be unavailable in Iraq, although the care given

may well not meet the standards of the care available in Sweden. Furthermore, there is no evidence that, because of his injuries, he will be unable to travel to Iraq. In these circumstances, the threshold set under Article 3 for preventing the applicant's deportation on account of his physical health problems has not been met. The same conclusion must be drawn in relation to the applicant's alleged mental suffering which, moreover, has not been confirmed by any medical evidence.

(d) Conclusion

52. The Court finds, having regard to all the circumstances of the case, that it has not been shown that the applicant would face a real risk of being subjected to treatment contrary to Article 2 or 3 of the Convention upon return to Iraq. Moreover, his health status is not of such a serious nature that his deportation would give rise to a breach of these provisions.

Consequently, his deportation to Iraq would not involve a violation of Article 2 or 3.

II. RULE 39 OF THE RULES OF COURT

53. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

54. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above paragraph 4) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;
2. *Holds*, by six votes to one, that the implementation of the deportation order against the applicant would not give rise to a violation of Article 2 or 3 of the Convention;
3. *Decides*, unanimously, to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the

proper conduct of the proceedings not to deport the applicant until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 19 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly concurring, partly dissenting opinion of Judge Lemmens;
- (b) dissenting opinion of Judge Power-Forde.

M.V.
C.W.

PARTLY CONCURRING, PARTLY DISSENTING OPINION
OF JUDGE LEMMENS

I voted with my colleagues in finding that there would be no violation of Article 3 of the Convention if the deportation order were implemented.

In my opinion, however, it was not necessary to discuss the merits of the application as it should have been declared inadmissible for failure to comply with the six-month rule.

The objection raised by the Government is the same as that raised in the cases referred to in paragraph 29 of the judgment, as well in *M.Y.H. v. Sweden*, n° 50859/10, in which the Court handed down a judgment on 27 June 2013. At the time of adoption of the present judgment a request for referral of the *M.Y.H.* case to the Grand Chamber is pending before the screening panel of the Grand Chamber.

For the reasons for my dissent on the admissibility issue I refer to my separate opinion in *M.Y.H. v. Sweden*.

DISSENTING OPINION OF JUDGE POWER-FORDE

As in the case of *T.A. v Sweden* (no. 48866/10), my reason for being unable to accept the majority's conclusion in this case is based upon the cumulative weight of a number of factors that come into focus when assessing the risk of treatment prohibited by Articles 2 and 3 of the Convention.

Following the fall of Saddam Hussein the applicant joined the new Iraqi army in October 2003. His army service involved work with American forces. Individuals associated with or perceived to be supporting the Iraqi authorities or the US forces, as well as their families, are at risk of being targeted by non-State actors. The UNHCR considers that such individuals are, depending on the circumstances, likely to be in need of international refugee protection on account of their (imputed) political opinion.¹ The applicant's general credibility was not questioned by the domestic authorities. Indeed, they accepted that documentation submitted in his case showed that he had served in the Iraqi army and that he had sustained serious injuries in grenade and bomb attacks connected with his military service (§ 8). The applicant's profile thus places him, to my mind, within a specific risk category of Iraqi asylum seekers.

Having raised no serious issue as to the applicant's credibility, it is, to my mind, somewhat questionable as to whether the reasons given by the migration authorities in rejecting the applicant's claim for asylum are sufficiently robust as to meet the level of 'rigorous' assessment required under Articles 2 or 3 of the Convention (*Chahal v United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, § 96). The domestic authorities and the Respondent State make much of a distinction drawn between attacks connected with the applicant's military service and attacks based upon the applicant personally. For example, the Migration Board found that the military attacks in 2004 and 2006 were based upon his military service and not directed at the applicant 'personally'. When suicide bombers attacked a military base *precisely because it was a military base* and the applicant was a member of the military injured in that attack, it is difficult to see how the attack was not directed at him 'personally' precisely because he was a member of the army. The applicant left the army and was the subject of a further serious attack and a death threat while living in Mosul. Because the applicant 'did not know' the identity of his attackers or 'the reason for the attack' the Migration Board considered that this shooting was not connected to him 'personally' but was rather connected to the

¹ UNHCR (21 May 2012) *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq*, at page 14 and following. These Guidelines replaced the earlier 2009 Guidelines. They were prepared based on an analysis of up-to-date and relevant information from a wide variety of sources as of the 18th of March 2012. Various news reports confirm that the general security situation in Iraq has deteriorated since then.

‘difficult security situation’. Why, precisely, are victims of targeted violence supposed to ‘know’ the identity of those who terrorize them in arbitrary and unpredictable attacks and how or why would such ‘knowledge’ strengthen an asylum claim? To be required to meet such an onerous test of knowledge of the identity of an attacker is to impose upon a person seeking asylum an unreasonable and disproportionate burden.

The majority accepts that the 2007 drive-by attack appears to have been ‘specifically targeting’ the applicant and his family (§ 50). Nevertheless, because it happened six ago at the height of the violence in Iraq, it considers that the applicant has not substantiated that there remains a personal threat of treatment contrary to Article 2 or 3 of the Convention should he be forcibly returned to Iraq. I disagree.

The applicant’s entire claim, however, is based upon the fact that he has been targeted on several occasions because of his service in the new Iraqi army and his perceived association with the US military. That such attacks occur precisely because of perceived cooperation with foreign forces or the Iraqi authorities is confirmed by international observers.¹ Furthermore, the applicant has substantiated his claim with evidence that has not been questioned by the authorities.

Despite the passage of six years, regard must be had to the serious decline in the general situation in Iraq today. The majority, whilst noting the existence of the indiscriminate and deadly violence, nevertheless, considers that ‘the overall situation has been slowly improving since the peak in violence in 2007’ (§ 39) and it sees no reason to depart from the position it took over four years ago in *F.H. v Sweden* (no. 32621/06). I cannot share this perspective. It has been reported that 2013 has, thus far, been the deadliest year in Iraq since 2008.² The Interior Ministry has put the death toll for the month of November alone at 1,121 and the number of people injured at 1,349. Thus, even if one were to accept that the general situation in Iraq is not to be regarded as being sufficiently serious as to cause by itself a violation of Article 3 of the Convention in the event of an individual’s forcible return thereto, the significant escalation in violence this year is, nevertheless, of sufficient seriousness as to weigh heavily in the balance when assessing, cumulatively, whether this applicant would face a real risk of exposure to treatment that would violate Article 3 of the Convention.

In making the requisite assessment under Articles 2 and 3 of the Convention, I have also had regard to the fact that the applicant has sustained serious injuries and suffers significant physical and psychological pain. This has been substantiated by medical evidence. The applicant has physical disabilities and amputation of his left leg has been recommended. Whilst I accept that according to the court’s jurisprudence his state of health

¹See UNHCR (21 May 2012) *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq*, at page 14 and following.

²See, for example, <http://rt.com/news/Iraq> and various other news agencies.

alone is not sufficient to support his claim against deportation, nevertheless I consider that, in the overall circumstances of this case, the applicant's serious disability is an important factor to which regard should be had when considering his deportation to a country where random violence and terrorist attacks are widespread.

The unquestioned credibility of the applicant's account coupled with his specific risk profile and viewed in the light of the deteriorating security situation in Iraq and his own serious physical disabilities, taken together, lead me to conclude that the applicant would face a real risk of being subjected to treatment contrary to Article 2 or 3 of the Convention should the Respondent State return him to Iraq at this time.