



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

GRAND CHAMBER

CASE OF V.M. AND OTHERS v. BELGIUM

(Application no. 60125/11)

JUDGMENT
(Striking out)

STRASBOURG

17 November 2016

This judgment is final but it may be subject to editorial revision.

In the case of V.M. and Others v. Belgium,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Khanlar Hajiyev,
Ganna Yudkivska,
Linos-Alexandre Sicilianos,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Faris Vehabović,
Ksenija Turković,
Yonko Grozev,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Pauliine Koskelo, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 28 September 2016,

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

PROCEDURE

1. The case originated in an application (no. 60125/11) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by seven Serbian nationals, Mr V.M., Mrs S.G.M. and their five children S.M., E.M., S.M., E.M. and E.M.M. (“the applicants”), on 27 September 2011. The President of the Section to which the case had been assigned acceded to the applicants’ request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Ms E. Néraudau, a member of the Nantes Bar. The Belgian Government (“the Government”) were represented by their Agent, Mr M. Tysebaert, and by their co-Agent, Ms I. Niedlispacher, of the Federal Justice Department.

3. The applicants alleged that they had been subjected to living conditions in Belgium that had been incompatible with Article 3 of the Convention and had caused their eldest daughter’s death. They also submitted that the removal order against them had exposed them to a

situation which had put their lives and physical integrity at risk. They complained, further, that they had not had an effective remedy in that regard.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1). In a judgment of 7 July 2015 a Chamber of that Section composed of the following judges: Işıl Karakaş, President, András Sajó, Nebojša Vučinić, Helen Keller, Paul Lemmens, Egidijus Kūris and Jon Fridrik Kjølbro, judges, and also of Abel Campos, Deputy Section Registrar, declared the application admissible and concluded that there had been a violation of Article 3 on account of the applicants' reception conditions (five votes to two); no violation of Article 2 regarding the first and second applicants' daughter's death (unanimous); and a violation of Article 13 taken in conjunction with Articles 2 and 3 regarding the effectiveness of the appeal against the removal order (four votes to three). The dissenting opinions of Judges Sajó, Keller and Kjølbro were annexed to the Chamber judgment.

5. On 7 October 2015 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 14 December 2015 the panel of the Grand Chamber granted that request.

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicants and the Government each filed further written observations (Rule 59 § 1).

8. Observations were also received from the French Government, from Myria, the Federal Migration Centre, and from the non-governmental organisations Coordination et initiatives pour réfugiés et étrangers (Ciré), Défense des enfants international (DEI) and Groupe d'information et de soutien des immigrés (GISTI), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

9. The Serbian Government, who had been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 §§ 1 and 4), gave no indication that they wished to do so.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 May 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*

Mrs I. NIEDLISPACHER,	<i>co-Agent,</i>
Mr N. JACOBS, Deputy director, Federal Agency for the Reception of Asylum-seekers (Fedasil),	
Mr D. KOOTZ, Senior lawyer, Fedasil,	<i>Advisers;</i>

(b) *for the applicants*

Mrs E. NÉRAUDAU, lawyer,	<i>Counsel,</i>
Mr L. LEBŒUF, lawyer, EDEM-UCL researcher,	
Mr Y. PASCOUAT, director of the European Policy Centre,	
Mrs A. PERROT,	<i>Advisers.</i>

The Court heard addresses by Mrs Néraudau and Mrs Niedlispacher and their replies to the questions put by the judges.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

11. The applicants were born in 1981, 1977, 1999, 2001, 2004, 2007 and 2011 respectively. The eldest daughter of the first and second applicants, S.M., died after the application had been lodged, on 18 December 2011.

12. The applicants have spent the greater part of their lives in Serbia. They left Serbia in 2010 for Kosovo and in February 2010 they went to France, where they lodged applications for asylum. The second applicant's application was registered by the French Office for the Protection of Refugees and Stateless Persons ("the OFPRA") on 10 May 2010 and the first applicant's on 18 May 2010. On 4 June 2010 their applications were rejected on the grounds that they had not responded to the summons to appear before the OFPRA on 31 May 2010 and that their written statements, which were too vague, did not enable the OFPRA to grant their application.

13. According to the information provided by the applicants, they stayed in France for about two months, apparently in Mulhouse. They alleged that they had only been provided with night-time accommodation and had been obliged to leave the hostel in the mornings, taking their physically and mentally disabled daughter, S.M., in a pushchair. They submitted that they had left France before the OFPRA issued its decision and returned to Kosovo, and subsequently to Serbia, in May 2010.

14. In March 2011 they went to Belgium, where they lodged an asylum application on 1 April 2011. On the same day the Federal Agency for the reception of asylum seekers (Fedasil) assigned them a place in a reception facility, the Morlanwez asylum-seekers' reception centre.

15. On 4 April 2011 the applicants had an interview with the "Dublin" department of the Aliens Office during which they gave an account of their journey and their reasons for seeking asylum.

16. On 12 April 2011 the Belgian authorities sent France a request to take the applicants back under Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining

the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (“the Dublin II Regulation”).

17. Initially, France refused to take charge of the applicants on the grounds that they had probably left the territory of the Member States for more than three months, which was a ground for refusing to take them back under Article 16(3) of the Dublin II Regulation. After the Belgian authorities had reiterated their request, on 6 May 2011 the French authorities agreed to take the family back. They indicated that the transfer should be effected under escort to the border control post of Rekkem and asked to be given three days’ notice of the transfer.

18. On 17 May 2011 the Aliens Office issued a decision refusing the applicants leave to remain and ordering them to leave the country for France within seven days (decision known as an “*annex 26quater*”, which is the name of the corresponding form) on the grounds that Belgium was not responsible for examining the asylum application under Article 16(1)(e) of the Dublin II Regulation and that France had agreed to take the applicants back. The decision indicated that as the applicants had not expressed fears regarding the French authorities or adduced evidence of any traumatic experience in France and France was a country which respected human rights, was a signatory to many conventions and had independent courts to which the applicants could apply, Belgium did not have to take responsibility for the asylum application under Article 3(2) of the Dublin II Regulation. The applicants were issued with *laissez-passer* to enter France.

19. On 26 May 2011 execution of the order to leave the country was extended until 25 September 2011 on grounds of the second applicant’s pregnancy.

20. In May 2011 the applicants contacted a lawyer with a view to challenging the Dublin transfer decision. On 16 June 2011 they lodged an application with the Aliens Appeals Board through their lawyer seeking judicial review of the decision and an ordinary request for an order staying execution. They relied on a number of grounds, in particular the failure to mention any statutory basis for their transfer to France and their fears regarding the poor reception conditions they had experienced during their first stay in France and a possible transfer to Serbia, and adduced evidence that they had left the territory of the European Union for more than three months.

21. After the second applicant had given birth at the end of July, on 5 August 2011 the family was assigned a place in a new reception centre, in Saint-Trond, 66 km from Brussels.

22. The applicants appeared at the hearing on 26 August 2011 before the Aliens Appeals Board to examine their request for judicial review of the order to leave the country.

23. On 22 September 2011, relying on the state of health of their daughter S.M., they sought leave to remain on medical grounds under section 9~~ter~~ of the Aliens Act. Their application was declared inadmissible by the Aliens Office on 30 September 2011 on the grounds that the medical certificate produced in support of their application certified the existence of a medical condition and the treatment considered necessary but, contrary to the statutory requirements, did not specify the degree of seriousness of the young S.M.'s illness. The applicants did not learn of that decision until much later, during the proceedings before the Court.

24. On the expiry of the time-limit granted in the order to leave the country the applicants were excluded from the Saint-Trond reception facility, which they left on 27 September 2011. They travelled to Brussels by train and went to Place Gaucheret, where other Roma families were staying. They spent a number of days there.

25. On 29 September 2011 the applicants' lawyer applied to the French-speaking community's General Delegate to the Rights of the Child seeking his assistance in finding accommodation for the family. On 5 October, after the General Delegate had contacted various institutions, the applicants were given a place in the Woluwe-Saint-Pierre transit centre in Brussels.

26. On 7 October 2011 Fedasil assigned them a reception centre in Bovigny 160 km from Brussels. The applicants were provided with train and bus tickets and directions to the reception centre.

27. The applicants submitted before the Court that they had gone to the Bovigny centre but had been refused entry on the grounds that their documents (their "annexes") were not valid. The Government stated, for their part, that the applicants had been expected at the Bovigny centre but had failed to turn up. In the proceedings before the Grand Chamber the Government produced exchanges of correspondence between Fedasil and the employees at the centre indicating that a room with a baby's cot had been prepared for the applicants, that a shuttle service from the station to the centre had been organised and that their place had been kept for them for several days before being reassigned.

28. The family then went to the Gare du Nord in Brussels where they stayed for over two weeks before accepting a voluntary return programme and returning to Serbia on 25 October 2011.

29. The first and second applicants' eldest daughter died there of a pulmonary infection on 18 December 2011.

30. In a judgment of 29 November 2011 the Aliens Appeals Board set aside the order to leave the country (see paragraph 18 above) on the grounds that the decision had not properly established the legal basis on which France had been designated as the responsible State. With regard to the risk of treatment contrary to Article 3 referred to by the applicants, the Aliens Appeals Board considered that such a risk had not been made out. It

observed that the applicants had not drawn the administrative authority's attention to any particular difficulties regarding the reception arrangements organised by the French authorities, particularly concerning access to medical care for their children, and that they had not submitted any evidence corroborating their allegations regarding the conditions of their accommodation. With regard to the general situation concerning reception arrangements in France, the Aliens Appeals Board observed that the applicants had not referred to circumstances of which the respondent had or ought to have had knowledge, the evidence submitted before it having been considered vague and incomplete.

31. The Belgian State lodged an appeal on points of law with the *Conseil d'État*. The appeal was initially declared admissible, but ultimately declared inadmissible on 28 February 2013 on grounds of the State's lack of interest in appealing given that the applicants had left Belgian territory more than three months ago and Belgium was no longer responsible for determining the State responsible under the Dublin II Regulation.

THE LAW

32. In her observations before the Grand Chamber the applicants' representative informed the Court that she had maintained contact with the applicants almost until the end of the proceedings before the Chamber but had not had any further contact with them since then. At the hearing on 25 May 2016 she confirmed that, despite several attempts on her part, she had been unable to renew contact with the applicants and that she did not know their current address. She submitted that the Court should nonetheless continue its examination of the application and argued that she had been authorised to represent the applicants throughout the entire proceedings. The representative pointed out that it was always difficult to maintain contact with persons in a precarious situation such as that of the applicants and that the referral of the case to the Grand Chamber at the Government's initiative could not justifiably have the effect of depriving the applicants of the benefit of the judgment of the Chamber, which had ruled in their favour.

33. The Government did not expressly comment on the question of continuing the examination of the case by the Court. They observed, however, that on account of the loss of contact with their lawyer the applicants had not been in a position to submit observations on the new evidence produced before the Grand Chamber which showed, in the Government's view, that the applicants had not gone to the Bovigny reception centre (see paragraph 27 above).

34. Having regard to these circumstances, the Court considers it necessary first to examine the need to continue the examination of the

application according to the criteria set forth in Article 37 of the Convention. This provision reads as follows:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

- (a) the applicant does not intend to pursue his application; or
- (b) the matter has been resolved; or
- (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.”

35. The Court reiterates that an applicant’s representative must not only supply a power of attorney or written authority (Rule 45 § 3 of the Rules of Court) but that it is also important that contact between the applicant and his or her representative be maintained throughout the proceedings. Such contact is essential both in order to learn more about the applicant’s particular situation and to confirm the applicant’s continuing interest in pursuing the examination of his or her application (see *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 124, 21 October 2014, and, *mutatis mutandis*, *Ali v. Switzerland*, 5 August 1998, § 32, *Reports of Judgments and Decisions* 1998-V).

36. In the present case the Court observes that the applicants did not maintain contact with their lawyer and failed to keep her informed of their place of residence or to provide her with another means of contacting them. Accordingly, it considers that it can conclude on that basis that the applicants have lost interest in the proceedings and no longer intend to pursue the application, within the meaning of Article 37 § 1 (a) of the Convention (see *Ibrahim Hayd v. the Netherlands* (dec.), no. 30880/10, § 10, 29 November 2011; *Kadzoev v. Bulgaria* (dec.), no. 56437/07, § 7, 1 October 2013; *M.H. and Others v. Cyprus* (dec.), no. 41744/10, § 14, 14 January 2014; and *M.Is. v. Cyprus* (dec.), no. 41805/10, § 20, 10 February 2015).

37. Whilst it is true that the applicants’ representative has power to represent them throughout the entire proceedings before the Court, that power does not by itself justify pursuing the examination of the case (see *Ali*, cited above, § 32, and *Ramzy v. the Netherlands* (striking out), no. 25424/05, § 64, 20 July 2010). It would appear in the present case that the last time the applicants and their lawyer were in contact was on a date prior to the judgment given by the Chamber on 7 July 2015 and that the applicants are unaware of that judgment and of the referral of the case to the Grand Chamber. In the circumstances the Court considers that the applicants’ representative cannot now meaningfully pursue the proceedings

before it, in the absence of instructions from her clients, particularly regarding the factual questions raised by the new documents produced by the Government (see *Ali*, § 32; *Ramzy*, § 64; and *M.H. and Others*, § 14, all cited above).

38. Regarding the submission by the applicants' representative that this situation has arisen as a result of their precarious living conditions in Serbia, the Court observes that the applicants returned to their country of their own volition and that their departure from Belgium does not appear to have resulted in the loss of contact with their lawyer. She affirms that she maintained contact with them throughout the proceedings before the Chamber. In the present case the loss of contact was not therefore a consequence of any act of the respondent Government (see, conversely, *Diallo v. the Czech Republic*, no. 20493/07, §§ 44-47, 23 June 2011). Nor is there anything to suggest that the precarious conditions in which the applicants lived in Serbia were such as to prevent them from maintaining some form of contact with their lawyer, if necessary through a third party, for such a long period (see *Sharifi and Others*, cited above, §§ 131-32, and *M.H. and Others*, cited above, § 14).

39. The Court also takes note of the concern expressed by the applicants' representative that in the event that the case were struck out of the list by the Grand Chamber the applicants would lose the benefit of the judgment delivered by the Chamber. It does indeed appear from the relevant provisions of the Convention that where a request for referral has been accepted by the panel of the Grand Chamber the judgment of the Chamber does not become final (Article 44 § 2 of the Convention, *a contrario*) and thus produces no legal effect. The judgment of the Chamber will be set aside in order to be replaced by the new judgment of the Grand Chamber delivered pursuant to Article 43 § 3 (see *K. and T. v. Finland* [GC], no. 25702/94, § 140, ECHR 2001-VII) with which the parties are obliged to comply in accordance with Article 46 § 1. Such a situation, which, in the instant case, would be prejudicial to the applicants is, however, the consequence of their lack of contact with their lawyer and not of the Government's use of the possibility, provided for in Article 43 § 1 of the Convention, of requesting that the case be referred to the Grand Chamber. The Court would observe, moreover, that if the circumstances justify such a course the applicants can request that the application be restored to the list of cases under Article 37 § 2 of the Convention.

40. Having regard to the foregoing and in accordance with Article 37 § 1 (a) of the Convention, the Court has to conclude that the applicants do not intend to pursue their application. It also considers that no particular circumstance relating to respect for the rights guaranteed by the Convention or its Protocols requires it to continue the examination of the application pursuant to Article 37 § 1 *in fine*.

41. Accordingly, the case should be struck out of the list.

FOR THESE REASONS, THE COURT

Decides, by twelve votes to five, to strike the application out of its list.

Done in English and in French, and notified in writing on 17 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert
Deputy to the Registrar

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Ranzoni joined by Judges López Guerra, Sicilianos and Lemmens is annexed to this judgment.

G.R.
J.C.

DISSENTING OPINION OF JUDGE RANZONI, JOINED BY
JUDGES LÓPEZ GUERRA, SICILIANOS AND LEMMENS*(Translation)*

1. I can without hesitation agree with the judgment, up to and including the first sentence of paragraph 40, and with the majority's conclusion in accordance with Article 37 § 1 (a) of the Convention that the applicants do not intend to pursue their application. However, in my view the Grand Chamber should have continued the examination of the application under Article 37 § 1 *in fine* because there are special circumstances in the present case relating to respect for human rights as defined in the Convention or the Protocols thereto which go beyond the particular situation of the applicants.

2. In a judgment recently delivered by the Grand Chamber, *F.G. v. Sweden* ([GC], no. 43611/11, ECHR 2016), the Court held that the circumstances of the case justified striking it out of the list in accordance with Article 37 § 1 (c) on the grounds that the deportation order could no longer be enforced. However, it decided to continue the examination of the application for the following reasons:

“81. It will be recalled that on 2 June 2014 the case was referred to the Grand Chamber in accordance with Article 43 of the Convention, which provides that cases can be referred if they raise “a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance”.

82. The Court notes that there are important issues involved in the present case, notably concerning the duties to be observed by the parties in asylum proceedings. Thus, the impact of the current case goes beyond the particular situation of the applicant, unlike most of the similar cases on expulsion decided by a Chamber.”

3. Similar considerations applied here. The panel of the Grand Chamber agreed to refer the case to the Grand Chamber. In doing so it acknowledged in substance that the case raised serious questions affecting the interpretation or application of the Convention or the Protocols thereto, or serious issues of general importance.

4. As in *F.G. v. Sweden* I think that important issues were at stake in the present case and that the Grand Chamber should have seized the opportunity to rule on certain principles.

5. Firstly, the Grand Chamber should have taken advantage of the opportunity provided by the present case to define or adjust the concept of “vulnerability”. In its case-law the Court has had regard to the vulnerability of the applicants both in assessing whether the threshold of severity justifying the application of Article 3 had been attained, a greater degree of vulnerability justifying a lower threshold of tolerance, and in determining the scope of the positive obligations on the State, extreme vulnerability requiring a greater duty of protection (see *M.S.S. v. Belgium and Greece*

[GC], no. 30696/09, § 251, ECHR 2011, and *Tarakhel v. Switzerland* [GC], no. 29217/12, § 119, ECHR 2014 (extracts)).

6. In *M.S.S.* the Court considered that asylum-seekers were a “particularly underprivileged and vulnerable” population group. However, the fact is that asylum-seekers may vary in their degree of vulnerability according to their means of subsistence, the type of treatment or persecution of which they have been or are liable to be victims, their age, their family situation or their state of health or their disability. As rightly pointed out by Judge Sajó in his dissenting opinion in *M.S.S. v. Belgium and Greece*, “although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group ... Asylum-seekers are far from being homogeneous, if such a group exists at all”.

7. Even though the applicants in the present case were, in my view, undeniably vulnerable, the Court could have seized the opportunity to define that concept.

8. Moreover, in its judgment the Chamber noted that the applicants had been “overwhelmed” by the situation and that the Belgian authorities should have “show[n] greater diligence in finding them accommodation” (see paragraph 151 of the Chamber judgment). The Government indicated, however, that the fact that the applicants were unfamiliar with the correct procedure had not been such as to cause them be overwhelmed by the situation.

9. The national authorities do of course have the responsibility of organising the reception of asylum-seekers and examining their applications. However, in my view asylum-seekers must also satisfy certain obligations and undertake reasonable steps as long as those obligations are adapted to their actual situation. The present case raised questions of general importance concerning the various responsibilities relating to the conditions of reception of asylum-seekers which the Grand Chamber could have answered.

10. I note, lastly, that the case raised important questions regarding the concepts of “effectiveness” of a remedy and “arguable complaint” in the context of expulsion of aliens, particularly in the event of transfers carried out under the Dublin Regulation. It would have been desirable for the Grand Chamber to express itself on those points with a view to clarifying, or even specifying the answers to be given to questions whose importance goes beyond the facts of the case, especially in the current context.

11. In conclusion, I regret that the majority did not acknowledge that in the present case there were special circumstances regarding respect for human rights as defined in the Convention and the Protocols thereto within the meaning of Article 37 § 1 *in fine* which required that the application continue to be examined. The Grand Chamber should have seized the opportunity to develop the principles concerning the above-mentioned points or, at least, to clarify and adjust the Court’s case-law.

12. For these reasons I have voted against striking the application out of the list.