Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances

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ABSTRACT

When evaluating whether the expulsion or return of an applicant gives rise to a real risk of treatment proscribed by Article 3 of the European Convention on Human Rights, and the principle of non-refoulement contained therein, the European Court of Human Rights must assess the general situation in the relevant country as well as the applicant’s personal circumstances. It is therefore of the utmost importance to identify which individual factors are considered relevant to this assessment. At the same time, however, the case law has been considered unclear on this issue. This article presents the findings of a thematic analysis of the Court’s case law, which seeks to clarify the Court’s practice by identifying the key individual factors that either enhance or ameliorate risk of ill-treatment in different contexts.

Keywords:
Non-refoulement, asylum, Article 3 ECHR, individual circumstances, resilience, vulnerability.
1. INTRODUCTION

The principle of non-refoulement is the cornerstone of international refugee law, reflecting the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. The protection against refoulement emerged under Article 33(1) of the Convention Relating to the Status of Refugees (the Refugee Convention),1 which applies to those who meet the requirements of the refugee definition contained in its Article 1A(2) and do not come within the scope of one of the exclusion provisions in Article 1F. Non-refoulement obligations complementing the obligations under the Refugee Convention have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life,2 or torture or other cruel, inhuman or degrading treatment or punishment.3

While the European Convention on Human Rights (ECHR) is not an international instrument concerned with the protection of refugees per se, its Article 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In relation to deportation and expulsion cases, the responsibility of the State is engaged 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 destination country.’4 The European Court of Human Rights (ECtHR, the Court) has further stated that in such circumstances, ‘Article 3 implies an obligation not to deport the person in question to that country,’5 which reflects a Convention-protected principle of non-refoulement.6 Specifically, the assessment of whether there exists a real risk of treatment contrary to Article 3 must be assessed by the Court in light of the general situation in the receiving country, and the personal circumstances of the applicant.7

Everyone can seek protection of their rights under the ECHR, provided they are present on the territory of a Contracting State and the right in question is protected in the Convention. Article 3 further encompasses an absolute guarantee against refoulement. Indeed, the Court has stated that ‘Article 3 […] makes no provision for exceptions and, under Article 15 para. 2 […], there can be no derogation therefrom even in the event of a public emer-

1. Adopted 28 July 1951, 189 UNTS 137.
2. The right to life is e.g. guaranteed under Article 6 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (ICCPR) and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 (European Convention on Human Rights, ECHR).
3. The right to be free from such treatment is e.g. guaranteed under Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Article 7 of the ICCPR, and Article 3 of the ECHR.
4. F.G. v Sweden, no 43611/11 (ECtHR [GC], 23 March 2016) § 111. See also e.g. J.K. and Others v Sweden, no 59166/12 (ECtHR [GC], 23 August 2016) § 79.
5. F.G. v Sweden, ibid.
6. J.K. and Others v Sweden, no 59166/12 (ECtHR [GC], 23 August 2016) § 78.
7. See for example J.K. and Others v Sweden, § 87 and F.G. v Sweden, § 113.
gency threatening the life of the nation. It can therefore also cover those who would be excluded from refugee status under the exclusion provisions in the Refugee Convention.

Various scholars, however, argue that some groups do not benefit equally from the supposedly universal protection of human rights. In response to this problem, specific treaties have been adopted, such as the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child. Similarly, while the ECHR has a general scope of application, the ECtHR has been forced to attend to the disadvantage of certain groups and individuals, and in so doing has increasingly deployed the concept of vulnerability to augment its analysis under the Convention.

As already mentioned, the Convention principle of non-refoulement calls for an assessment not only of the general situation in the receiving country, but also of the personal circumstances of the applicant when placed in the context of that general situation. The Court’s approach to these personal circumstances, therefore, is a key factor in ensuring effective – as opposed to merely theoretical – protection against refoulement. An approach that focuses attention on socially constructed patterns of power and disadvantage and recognises that these need to be taken into account in the analysis seems conducive towards effective protection and would, further, be in line with a substantive concept of equality. The Court seems to have begun applying such an approach in its non-refoulement case law by employing the term ‘vulnerability’ to identify socially disadvantaged groups in need of enhanced protection. At the same time, however, it has been argued that in the context of Article 3, the Court’s approach to the vulnerability of applicants is ‘complex and problematic’, and that the Court does not sufficiently take lived vulnerabilities into account.

8. *Ireland v the United Kingdom*, no 5310/71 (ECtHR, 18 January 1978) § 163.
17. Peroni and Timmer have said that in response to the exclusions of human rights law, the ECtHR has been forced to attend to the constructed disadvantage of certain groups, and in so doing, has deployed the concept of group vulnerability. See Peroni and Timmer (n 15) 1063.
Indeed, in recent case law it seems that the criteria that form the basis of the Court’s risk assessment are unclear, subjective and contested.19

Against this background, and by offering a thematic analysis of the Court’s case law under Article 3 from the perspective of Martha Fineman’s vulnerability theory, this article will endeavour to develop a clearer understanding of how group-based characteristics and individual circumstances contribute to the assessment of the minimum level of severity required under Article 3 in non-refoulement cases. Section 2 will set the scene by presenting the general principles relevant to non-refoulement under Article 3. This will be followed by a case law analysis that identifies the most common individual factors in the Court’s assessment of whether there is a real risk of ill-treatment contrary to Article 3, and their function as factors that either indicate the existence or absence of resilience in the face of such risk. The findings of the analysis will, finally, be presented in Section 4.

2. ASSESSING VIOLATIONS OF THE PRINCIPLE OF NON-REFOULMENT UNDER ARTICLE 3

2.1 The general principles relevant to non-refoulement under Article 3 ECHR

The ECtHR has established certain criteria for assessing whether a return of an individual would violate Article 3 and the non-refoulement principle. Originally, in Soering v. United Kingdom from 1989, the Court established that despite the lack of an express non-refoulement provision in the ECHR, such a provision was already inherent in Article 3.20 The Court has further established that there must be substantial grounds for believing there is a real risk of ill-treatment in a case of deportation,21 and that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.22

In J.K. and Others v. Sweden in 2016, the Grand Chamber of the Court summed up its case law under Article 3 in asylum cases and provided ‘a detailed restatement of the jurisprudential principles relevant to the principle of non-refoulement.’23 Elaborating on the details of the guarantee, it stated that the assessment of whether there are substantial grounds for believing that the applicant faces a real risk of ill-treatment in case of deportation requires the ECtHR to assess conditions in the receiving country against the standards of Article 3.24 These standards imply that the ill-treatment the applicant alleges he/she will

19. See e.g. S.H.H. v the United Kingdom, no 60367/10 (ECtHR, 29 January 2013) and Tarakhel v Switzerland, no. 29217/12 (ECtHR [GC] 4 November 2014).
20. Soering v the United Kingdom, no 14038/88 (ECtHR, 7 July 1989) § 88. The case involved the extradition of a fugitive indicted for murder in the United States and a potential violation of Article 3 due to the conditions he would live under while awaiting execution on death row in Virginia.
21. Soering v the United Kingdom, ibid, § 91.
22. Ireland v the United Kingdom, no 5310/71 (ECtHR, 18 January 1978) § 162.
24. J.K. and Others v Sweden, ibid § 79. See also F.G. v Sweden, no 43611/11 (ECtHR [GC], 23 March 2016) § 112; Mamatkulov and Abdurasulovic v Turkey, nos 46827/99 and 46951/99 (ECtHR, 6 February 2003) § 67.
face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of the risk and of the minimum level of severity required, however, is relative, and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. This approach accords with the general logic of Article 3 case law, whereby the more vulnerable the victim is, the more likely it is that the threshold of minimum severity will be met.

According to ECtHR jurisprudence, the assessment of the existence of a real risk must be rigorous. The risk of ill-treatment must apply to the applicant personally, and be present in the sense that it applies at the present time and in the present situation. An applicant who claims that his/her expulsion would violate Article 3 has to provide information proving that such a risk is present to the extent practically possible, including information distinguishing his/her situation from the general perils in the country of destination. Once such evidence is presented, it is for the government to dispel any doubts about it. Furthermore, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. Therefore, where the State is made aware of facts that could expose an applicant to an individual risk of ill-treatment, regardless of whether the applicant chooses to rely on such facts, the Contracting State is obliged to assess this risk ex proprio motu. The credibility of the applicant and the evidence before the ECtHR is very important. However, the ECtHR has acknowledged that the lack of direct documentary evidence cannot be decisive per se, as it may be difficult or impossible for asylum seekers to supply evidence.

25. J.K. and Others v Sweden, ibid. See also F.G. v Sweden, ibid; Sufi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) § 213.
27. See e.g. F.G. v Sweden, ibid; N. v the United Kingdom, no 26565/05 (ECtHR [GC], 27 May 2008) § 29.
28. Price v the United Kingdom, no 33394/96 (ECtHR, 10 July 2001) § 30. The case concerned the conditions of detention for a disabled prisoner.
29. J.K. and Others v Sweden, § 86. See also F.G. v Sweden, § 113.
30. See e.g. Kaboulou v Ukraine, no 41015/04 (ECtHR, 19 November 2009) § 112.
31. Venkadajalasarma v the Netherlands, no 58510/00 (ECtHR, 17 February 2004) § 67.
32. J.K. and Others v Sweden, § 92.
33. ibid § 91. See also F.G. v Sweden, § 120; Saadi v Italy, no 37201/06, (ECtHR [GC] 28 February 2008) § 129; NA. v the United Kingdom, no 25904/07 (ECtHR, 17 July 2008) § 111 and R.C. v Sweden, no 41827/07 (ECtHR, 9 March 2010) § 50.
34. F.G. v Sweden, § 115. Similarly, if expulsion has been barred by an interim measure under Rule 39 of the Rules of Court, the Court’s own risk assessment is performed ex nunc: see J.K. and Others v Sweden, 23 August 2016) § 83.
35. J.K. and Others v Sweden, ibid § 87.
36. Hilal v the United Kingdom, no 45276/99 (ECtHR, 6 June 2001) § 64.
37. J.K. and Others v Sweden, § 92.
38. J.K. and Others v Sweden, § 92.
Sometimes, the risk of ill-treatment arises based on the applicant’s activities in the host country (sur place) after he/she has left country of origin. As the protection against refoulement in Article 3 ECHR is future oriented, the ECtHR must in such cases also examine the foreseeable consequences of sending the applicant to the receiving country. Given the difficulties in assessing the genuineness of sur place activities, and in view of the importance attached to Article 3 ECHR, the Court’s recent jurisprudence has involved assessing the applicants’ claims on the grounds of the activities they actually and effectively carried out. The Court has also made clear that Article 3 does not prevent States from relying on the existence of an internal flight alternative if certain preconditions are fulfilled. This provides States the option to send an individual to a region in the receiving State where he/she is not originally from, but where there is no real risk of ill-treatment. This is more likely to be considered safe where the alleged risk of ill-treatment emanates from non-State actors. Generally, internal relocation requires a risk assessment of the same kind as otherwise in non-refoulement cases. Here, however, according to the jurisprudence of the ECtHR, it should principally be up to the government to show that an internal flight alternative is safe, but the applicant may also in some circumstances have to substantiate his/her claims about lack of appropriate protection from the authorities or risk of ill-treatment in the alternative area. The Court has also noted that internal flight inevitably involves a certain hardship, and stated that socioeconomic and humanitarian considerations do not ‘necessarily have a bearing, and certainly not a decisive one’ on the question of whether an applicant would face a real risk of ill-treatment in areas considered as an alternative flight option. However, as we shall see in the following, the social context awaiting the applicant can nevertheless be an important factor in the Court’s risk assessment in all non-refoulement cases, especially if the applicant is considered to be in a difficult or vulnerable position.

39. See e.g. N. v Sweden, no 23505/09 (ECtHR, 20 July 2010) § 62 (application for asylum for the most part based on a petition for divorce submitted in Sweden); S.F. and Others v Sweden, no 52077/10 (ECtHR, 15 May 2012) §§ 66 – 68 (extensive and genuine political and human rights activities sur place).
40. A.A. v Switzerland, no 58802/12 (ECtHR, 7 January 2014) § 41; N.A. v Switzerland, no 50364/14 (ECtHR, 30 May 2017) § 45 and A.I. v Switzerland, no 23378/15 (ECtHR, 30 May 2017) § 51. See also F.G. v Sweden, no 43611/11 (ECtHR [GC], 23 March 2016) § 156 – 158.
41. The person to be expelled must be able to travel safely to, gain admittance, and be able to settle in the area concerned, see J.K. and Others v Sweden, no 59166/12 (ECtHR [GC], 23 August 2016) § 82. See also Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 141; Safi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) § 266; H. and B. v the United Kingdom, nos 70073/10 and 44539/11 (ECtHR, 9 April 2013) § 91; M.Y.H. and Others v Sweden, no 50859/10 (ECtHR, 27 June 2013) § 62.
42. Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 136.
43. ibid §§ 141 and 143.
44. H.L.R. v France, no 24573/94 (ECtHR, 29 April 1997) § 43.
45. M.Y.H. and Others v Sweden, no 50859/10 (ECtHR, 27 June 2013) § 69; S.A. v Sweden, no 66523/10 (ECtHR, 27 June 2013) § 56.
46. See e.g. M.K.N. v Sweden, no 72413/10 (ECtHR, 27 June 2013) § 39.
47. Salah Sheekh v the Netherlands, § 141 and Husseini v Sweden, no 10611/09 (ECtHR, 13 October 2011) § 97.
48. See e.g. Husseini v Sweden, § 96, where the Court stated: ‘Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. See also e.g. N.M.Y. and Others v Sweden, no 72686/10 (ECtHR, 27 June 2013) §§ 32 and 42.
Diplomatic assurances have been of relevance throughout the Court’s jurisprudence and can in certain circumstances be a sufficient guarantee of safety against the risk of ill-treatment. This is especially relevant regarding extraditions to countries with lower human rights standards – in particular in the context of the death penalty, but also where there is a risk of other ill-treatment or poor prison conditions – and in cases concerning the expulsion or extradition of suspected or convicted terrorists considered a threat to national security.

However, the Court has made clear that the existence of assurances does not absolve the deporting State or the Court from the obligation to examine whether such assurances provide a sufficient guarantee that the applicant would be protected against treatment prohibited by Article 3 ECHR. According to the Court, the weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time. This approach has been reaffirmed by the Court in Othman (Abu Qatada) of 2012 where the Court then elaborated a non-exhaustive list of elements that should be taken into account when assessing the quality of assurances. Those factors are a useful summary of what the Court has previously taken into account when assessing the quality of assurances. The Court has rejected the reliability of assurances in several cases on grounds of their vagueness and/or doubt on whether the authorities in question have in fact the power to ensure their observance, and in some cases when independent sources report systematic practices of ill-treatment in the country in question.

2.2 Individual factors in the assessment of real risk of proscribed treatment

The Court has stated that the applicant’s personal circumstances – for example psychological condition, age or health – may exacerbate to a certain extent their feelings of distress, anguish and fear. This also applies in the context of non-refoulement. Furthermore, it

49. The Court has rejected several complaints of individuals charged with murder in the United States, noting that the extraditing state had obtained assurances according to which the prosecution would not seek the death penalty, see Harkins and Edwards v UK, nos 9146/07 and 32650/07 (ECtHR, 17 January 2012); Rrapo v Albania, no 58555/19 (ECtHR, 25 September 2012).
50. Saadi v Italy, no 37201/06 (ECtHR [GC], 28 February 2008).
51. ibid § 148.
52. ibid § 148.
53. Abu Qatada v UK, no 8139/09 (ECtHR 17 January 2012) § 189.
54. In Abdulhakov v Russia, no 14743/11 (ECtHR 2 October 2012) § 150, the Court indicates that state parties should use the standards elaborated in Othman when assessing the reliability of diplomatic assurances.
55. See for example Kaboulou v Ukraine, no 41015/04 (ECtHR, 19 November 2009) § 113; Baysakov and Others v Ukraine, no 54131/08 (ECtHR, 18 February 2010) § 51; Klein v Russia, no 24268/08 (ECtHR, 1 April 2010) § 55; M.S.S. v Belgium and Greece, no 30696/09 (ECtHR [GC], 21 January 2011) §§ 353 and 354; Yefimova v Russia, no 39786/09 (ECtHR, 19 February 2013) §§ 202 and 203; K. v Russia, no 69235/11 (ECtHR, 23 May 2013) § 65; Saliyev v Russia, no 39093/13 (ECtHR, 17 April 2014) § 65–69.
56. See for example Shananov and Others v Georgia and Russia, no 36378/02 (ECtHR, 12 April 2005), §§ 340–353 and Eshonkulov v Russia, no 68900/13 (ECtHR, 15 January 2015), § 45.
57. Price v the United Kingdom, no 33394/96 (ECtHR, 10 July 2001) § 30; Bouyid v Belgium no 23380/09 (ECtHR [GC], 28 September 2015) § 86; Pretty v the United Kingdom, no 2346/02 (ECtHR, 29 April 2002) § 74.
58. Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 141; Sufi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) § 266.
is not only personal characteristics that can put persons at risk, but also their social backgrounds and association with family members.\textsuperscript{59} The weight the Court attributes to family bonds will depend, however, on the particular circumstances of the case,\textsuperscript{60} and the authorities’ awareness of the affiliation.\textsuperscript{61}

Except in cases of extreme violence\textsuperscript{62} and situations where the applicant belongs to a group systematically exposed to serious human rights violations,\textsuperscript{63} which will be discussed in section 2.3 infra, the Court has held that the applicant should in principle provide evidence of ‘special distinguishing features’ establishing a personal and individualised risk of ill-treatment.\textsuperscript{64} Generally speaking, such distinguishing features seem to refer to specific factors or vulnerabilities that put individuals at even more risk than others.\textsuperscript{65} In some cases, also, the relevant individual factors may not contribute to a real risk on their own, but only when assessed cumulatively and when considered in a situation of general violence and heightened security concerns.\textsuperscript{66}

The Court has further stated that the risk assessment in refoulement cases is to some degree speculative.\textsuperscript{67} The assessment of the personal circumstances of applicants and their relevance in light of the situation in the receiving country is also a highly contextual exercise. It is therefore a difficult task for the Court to balance equality and predictability against the necessity of an individualised approach in every case.

2.3 Groups systematically exposed to ill-treatment and general situations of violence

When applicants can show that they belong to a group that is systematically threatened with ill-treatment in the receiving country,\textsuperscript{68} the requirement to establish individual ‘distinguishing risk factors’ is relaxed.\textsuperscript{69} The Court has, however, only recognised such groups in a few cases, e.g. regarding members of the Ashraf minority,\textsuperscript{70} persons accused of terrorism in

\textsuperscript{59} Azimov v Russia, no 67474/11 (ECtHR, 18 April 2013) § 126 and Bajsultanov v Austria, no 54131/10 (ECtHR, 12 June 2012) § 66.
\textsuperscript{60} Nnyanzi v the United Kingdom, no 21878/06 (ECtHR, 8 April 2008) §§ 61–65.
\textsuperscript{61} N.S. v Denmark, no 58359/08 (ECtHR, 20 January 2011) § 94.
\textsuperscript{62} NA. v the United Kingdom, no 25904/07 (ECtHR, 17 July 2008) § 114; Sufi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) §§ 216 – 218.
\textsuperscript{63} J.K. and Others v Sweden, no 59166/12 (ECtHR [GC], 23 August 2016) § 103; Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 148; NA. v the United Kingdom, ibid § 116 and Saadi v Italy no 37201/06, (ECtHR [GC] 28 February 2008) §§ 128 – 133.
\textsuperscript{64} J.K. and Others v Sweden, ibid § 94; Vilvarajah and Others v the United Kingdom, no 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) §§ 111 – 112.
\textsuperscript{65} Ilias and Ahmed v Hungary, no 47287/15 (ECtHR, 14 March 2017) § 87.
\textsuperscript{66} J.K. and Others v Sweden, § 95 and NA. v the United Kingdom, § 130.
\textsuperscript{67} Saadi v Italy, no 37201/06, (ECtHR [GC] 28 February 2008) § 142.
\textsuperscript{68} ibid § 132.
\textsuperscript{69} J.K. and Others v Sweden, § 103; Salah Sheetk v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 148; S.H. v the United Kingdom, no 19956/06 (ECtHR, 15 June 2010) §§ 69–71; and NA. v the United Kingdom, § 116. 70. Salah Sheetk v the Netherlands, § 148.
Tunisia, prisoners in some Central Asian States, and potentially asylum seekers in certain host countries. The Court’s assessment is, further, subject to re-evaluation and changes over time, sometimes quite quickly. Groups once considered systematically ill-treated can, in light of changing circumstances, be considered differently by the Court next time.

Where the existence of a real risk of treatment contrary to Article 3 ECHR is established, it does not per se matter where the risk emanates from. In some cases, therefore, extremely poor human rights conditions can on their own trigger the application of the principle of non-refoulement, without the need to assess the personal circumstances of applicants. This may occur when violence is widespread and intense enough to indicate that ‘everyone who is present [is] at a real risk of treatment contrary to Article 3 of the Convention.’ In such circumstances, the Court will not insist that the applicant also shows the existence of further special distinguishing features if this would render illusory the protection offered by Article 3 and call into question the absolute nature of Article 3. The Court has, however, stated that it would adopt such an approach only in the most extreme situations.

The Court’s evaluation of a general situation in a country can also change relatively quickly depending on circumstances.

3. INDIVIDUAL FACTORS RELEVANT TO ASSESSMENT UNDER THE PRINCIPLE OF NON-REFOULEMENT

3.1 Introduction

While some situations might bar the removal of anyone to a particular area, and while membership of certain groups might suffice in certain other situations, in most cases the Court requires an applicant to show individual risk elements that give rise to a violation

71. Saadi v Italy, no 37201/06 (ECtHR [GC] 28 February 2008) §§ 143 – 146.
72. See e.g. Sidikov v Russia, no 73455/11 (ECtHR, 20 June 2013) § 149; Kasynakhunov v Russia, no 29604/12 (ECtHR, 14 November 2013) §§ 122–128; Mamazhonov v Russia, no 17239/13 (ECtHR, October 2014) §§ 136–146.
73. M.S.S. v Belgium and Greece, no 30696/09 (ECtHR [GC], 21 January 2011) § 251. This group will be discussed in more detail in section 3.11 infra.
74. For example, the Court’s approach to persons accused of terrorism in Tunisia changed after the fall of the Tunisian government in 2011, see Al Hanchi v Bosnia and Herzegovina, no 48205/09 (ECtHR, 15 November 2011) § 44.
75. Sufi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) § 218.
76. K.A.B. v Sweden, no 886/11 (ECtHR, 5 September 2013) § 91. See also e.g. NA. v the United Kingdom, no 25904/07 (ECtHR, 17 July 2008) § 115; Sufi and Elmi v the United Kingdom, ibid § 218; L.M. and Others v Russia nos 40081/14 and 2 others (ECtHR, 15 October 2015) §§ 124 – 126.
77. NA. v the United Kingdom, ibid § 116.
78. Sufi and Elmi v the United Kingdom, § 217. See also L.M. and Others v Russia, §§ 124 – 126 (the burden switched to the authorities to show ‘any special circumstances’ which could demonstrate sufficient protection for the applicants if returned to Syria.)
79. NA. v the United Kingdom, no 25904/07 (ECtHR, 17 July 2008) § 115.
80. Compare e.g. Sufi and Elmi v the United Kingdom, nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) § 293 with K.A.B. v Sweden, no 886/11 (ECtHR, 5 September 2013) § 91.
81. Sufi and Elmi v the United Kingdom, ibid.
82. Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 148.
of Article 3. Even when the Court identifies that membership of a particular threatened or vulnerable group is involved, it may nevertheless base its conclusions on other more individualised risk factors. The Court, therefore, applies an individualised approach, evaluating each case on grounds of the particular circumstances of the applicant and the factors that might enhance or ameliorate his/her risk of ill-treatment, all in light of the situation prevailing in the receiving country. These individual factors are sometimes drawn from group-based identity markers, such as ethnicity, religion, or sexual orientation, but sometimes from other characteristics of the applicant’s circumstances, such as available family support or realistic possibility for internal flight. We will now turn to identifying the key personal factors emphasised by the Court, and their function in its analysis under the non-refoulement principle.

3.2. Case selection and analytical framework

The assessment of individual circumstances is very context-dependent. In some cases the cumulative effect of various risk factors has also been considered to create a real risk of ill-treatment in the event of return. The systematic analysis and presentation of individual factors in non-refoulement cases is therefore a rather difficult task.

This chapter will nevertheless analyse the ‘Courts’ judgments with a view to discerning how it goes about the assessment of individual risk factors. The case law analysis performed reaches all Chamber and Grand Chamber Judgments on HUDOC until 31 November 2017, where Article 3 was raised, and where the keywords expulsion and/or extradition appeared. The cases analysed were restricted to reported judgments, and judgments at importance level 1. This rendered a total of 315 judgments (in English and French). The HUDOC database was also searched for Article 3 judgments where the search term ‘level of severity’ appears. This rendered 153 judgments. Both searches included many of the same judgments (in English and French alike). To place this case law analysis in context, and present as full a picture of the Court’s practice as possible, the literature on Article 3 ECHR generally, and non-refoulement specifically, was also consulted to identify additional case law of interest.

While individual factors of relevance vary between cases, and their influence on the Court’s assessment is very context-dependent, certain factors reappear in many decisions and judgments. In the following analysis, the individual factors primarily relied on by the Court in different kinds of non-refoulement cases will be identified, as well as their dual role as factors that either indicate a heightened risk of exposure to ill-treatment contravening Article 3 ECHR, or as ameliorating factors that function to alleviate that same risk. Martha Fineman’s vul-

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83. See for example A.M. v the Netherlands, no 29094/09 (ECtHR, 5 July 2016) § 87; Abdolkhani and Karimnia v Turkey, no 30471/08 (ECtHR, 22 September 2009) §§ 78–83; Keshmiri v Turkey, no 36370/08 (ECtHR, 13 April 2010) §§ 26 and 27; A.S. v Switzerland, no 39350/13 (ECtHR, 30 June 2015) §§ 37 – 38 and Ilias and Ahmed v Hungary, no 47287/15 (ECtHR, 14 March 2017) § 87.

84. The Court’s approach in asylum cases thus reflects the idea that vulnerability may arise or be ameliorated by a varied plethora of personal or social factors, which to a certain extent seems in line with Fineman’s vulnerability theory: see Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 Yale Journal of Law and Feminism 1, 8. It does not, however, reflect Fineman’s theory in its entirety: see Peroni and Timmer (n 15) 4, 5; Timmer (n 18) 5. 169; and Oddný Mjöll Arnardóttir, ‘Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?’(2017) 4 Oslo Law Review 150.

85. J.K. and Others v Sweden, no 59166/12 (ECtHR [GC], 23 August 2016) § 121.
Vulnerability theory posits that vulnerability is a universal, inevitable and enduring aspect of the human condition. Everyone can therefore be more or less vulnerable depending on context, and no one is invulnerable; there is only the possibility of resilience, i.e. resources that ameliorate, compensate for, or contain vulnerability. In contrast, the ECtHR employs the term ‘vulnerable’ to indicate socially disadvantaged populations in need of enhanced human rights protection. While this article does not intend to provide an in-depth analysis of the Court’s jurisprudence from the perspective of Fineman’s vulnerability theory, or the fit between the theory and the practice, it will employ the above-mentioned key elements of Fineman’s theory as an analytical framework. Accordingly, the following case law analysis seeks systematically to identify the individual factors that either undermine the resilience of applicants and increase risk of ill-treatment proscribed under Article 3, or factors that enhance the resilience of applicants and ameliorate the risk of such ill-treatment. All the individual factors identified are, thus, conceptualised as factors relevant to the vulnerability of applicants, irrespective of whether the Court explicitly refers to the term ‘vulnerability’ or not in individual judgments. The Court’s use of the term ‘vulnerability’ will, however, also be pointed out when relevant.

3.3 Health and disability

3.3.1 Factors that undermine resilience and increase risk of ill-treatment

The state of health or disability of applicants may affect the Court’s assessment of whether ill-treatment reaches the minimum level of severity required under Article 3. This situation is likely to arise in various circumstances where the suffering that may flow from illness or disability ‘is, or risks being, exacerbated by treatment […] for which the authorities can be held responsible’, or where suffering caused by other events is likely to be exacerbated by illness or disability.
In light of the absolute character of Article 3, the Court can also examine an applicant’s claim under Article 3 ‘where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country’.\(^9\) In a judgment from 1997, \(D. v. United Kingdom\), which concerned the expulsion of a man suffering from AIDS to St Kitts, the Court found that his suffering if returned would attain the minimum level of severity required by Article 3 because of ‘the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake’.\(^\text{94}\) This was owing to the fact that the applicant suffered from an incurable illness in the terminal stages, that there was no guarantee that he would be able to obtain any nursing or medical care in St Kitts, and that he had no family home or close family in St Kitts other than a cousin and no one willing or able to care for him or provide him with even a basic level of food, shelter, or social support.\(^\text{95}\) The removal of an applicant to a country with inferior facilities for the treatment of his/her illness may thus be found in violation of Article 3. However, in \(N. v. United Kingdom\) from 2008, which also concerned the expulsion of a person suffering from AIDS to a country with inferior facilities, the Grand Chamber of the Court found no violation and stated that the protection of Article 3 in such situations was only triggered in ‘very exceptional’ cases.\(^\text{96}\) Similarly, in the Court’s judgment in 2013, \(S.H.H. v. UK\), the applicant had been left disabled by a rocket launcher in Afghanistan, and the future harm would have emanated ‘from a lack of sufficient resources to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State.’\(^\text{97}\) Even though the removal of the applicant from the United Kingdom to Afghanistan would undoubtedly have a negative effect on the quality of the applicant’s life, which was already severely diminished by his disabled condition,\(^\text{98}\) the Court concluded that the case did not disclose very exceptional circumstances.\(^\text{99}\)

In the 2016 judgment of \(Paposhvili v. Belgium\) the Grand Chamber clarified the requirement, first put forward in \(N. v. United Kingdom\) in 2008, that the applicant’s case must be ‘very exceptional’ for Article 3 to be engaged in cases where the source of the risk is simply the lack of resources in the receiving country. In \(Paposhvili v. Belgium\) the Court stated that the term:

‘should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his/her state of health resulting in intense suffering or to a significant reduction in life expectancy.’\(^\text{10}\)

\(^\text{93.} D. v the United Kingdom, no 30240/96 (ECtHR, 2 May 1997) § 49.\)
\(^\text{94.} ibid § 54.\)
\(^\text{95.} ibid § 51-53.\)
\(^\text{96.} N. v the United Kingdom, no 26565/05 (ECtHR [GC], 27 May 2008) § 42.\)
\(^\text{97.} S.H.H. v the United Kingdom, no 60367/10 (ECtHR, 29 January 2013) § 89.\)
\(^\text{98.} ibid § 93.\)
\(^\text{99.} ibid § 95.\)
\(^\text{100.} Paposhvili v Belgium, no 41738/10 (ECtHR[GC], 13 December 2016) § 183.\)
The case law analysis did not reveal examples where the Court explicitly referred to the vulnerability of applicants based on their health in the context of non-refoulement. However, the Court has on some other occasions considered individuals with health issues vulnerable under Article 3, most commonly with reference to mental health\(^\text{101}\) and in the context of conditions of detention,\(^\text{102}\) but on occasion also with reference to other issues.\(^\text{103}\)

### 3.3.2 Factors that enhance resilience and ameliorate risk of ill-treatment

In *Paposhvili v. Belgium*, the Court also found that where serious doubts persist concerning removal, the State must obtain guarantees that the individual will actually receive appropriate treatment and care with regard to both the general situation in the receiving State and the individual’s personal circumstances.\(^\text{104}\) In this respect, the Court stated that the authorities must consider whether the person in question will actually have access to this care and these facilities in the receiving State and referred to the need to consider the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care.\(^\text{105}\) If sufficiently provided, such guarantees could clearly be a factor that ameliorates risk of ill-treatment, since their existence would be enough to prevent a finding of violation under Article 3.

Along with such guarantees, in many judgments concerning health and disability, when assessing whether removal would violate Article 3, the existence of social/family network has been considered an important resilience-enhancing factor that could ameliorate risk of ill-treatment.\(^\text{106}\) However, in judgments where this issue has been raised, the Court has repeatedly concluded that the applicant’s claims of the lack of family support are speculative, and thus not sufficiently established, which has led to the conclusion that deportation would not constitute a violation of Article 3.\(^\text{107}\) This even seems to be the case when there is nothing in the case file indicating that family members would be able or willing to provide the applicant with the relevant help and support that might alleviate in a meaningful way the obvious severe hardship facing him/her.\(^\text{108}\) It is also interesting to note how broadly the

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\(^{101}\) Gorobet *v.* Moldova, no 30951/10 (ECtHR, 11 October 2011) § 39 (‘“Persons of unsound mind” are the vulnerable group concerned’).

\(^{102}\) Bekirski *v.* Bulgaria, no 71420/01 (ECtHR, 2 September 2010) § 152 (‘particularly vulnerable state’); Aden Ahmed *v.* Malta, no 55352/12 (ECtHR, 9 December 2013) § 97 (the Court considered that the applicant was in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances, but also because of her fragile health).

\(^{103}\) Pretty *v.* the United Kingdom, no 2346/02 (ECtHR, 29 April 2002) § 74 (‘vulnerable’, regarding terminally ill individuals.)

\(^{104}\) *Paposhvili v. Belgium* [GC], ibid § 191.

\(^{105}\) ibid § 190.

\(^{106}\) ibid § 190; S.C.C. *v.* Sweden, no 46553/99 (ECtHR(dec), 15 February 2000); S.H.H. *v.* the United Kingdom, no 60367/10 (ECtHR, 29 January 2013) § 93; Yoh-Ekale Mwanje *v.* Belgium, no 10486/10 (ECtHR, 20 December 2011) § 84; Bensaid *v.* the United Kingdom, no 44599/98 (ECtHR, 6 May 2001) § 39; N. *v.* the United Kingdom, no 26565/05 (ECtHR [GC], 27 May 2008) § 50. In *Paposhvili v. Belgium*, § 190, this issue was also mentioned as part of the Court’s approach, although the Court found a violation without actually assessing the applicant’s family network in Georgia.

\(^{107}\) S.H.H. *v.* the United Kingdom, ibid § 93; Bensaid *v.* the United Kingdom, ibid § 39; N. *v.* the United Kingdom [GC], ibid § 50.

\(^{108}\) N. *v.* the United Kingdom [GC], ibid §§ 48-51; Yoh-Ekale Mwanje *v.* Belgium, no 10486/10 (ECtHR, 20 December 2011) § 84.
3.4 Political opinion

3.4.1 Factors that undermine resilience and increase risk of ill-treatment

Applicants must have sufficiently high political profiles and be of interest to the receiving State's authorities to activate the protection of Article 3 for political reasons. In some cases they also have to show additional distinguishing features that would bring them to the attention of authorities or the nationals of the receiving country. In this respect, the Court has noted that being a member of an opposition party or group does not by itself justify a fear of ill-treatment and that it is necessary to examine the specific situation of the applicant in each case. When examining the relevance of a complainant's political activities or background, the Court will often look at the fate of individuals with similar backgrounds and information about the human rights situation of the group they belong to. Documentation of previous ill-treatment of the applicant can also be an important factor in the assessment, while it should nevertheless be borne in mind that there is no strict requirement on applicants to provide documentation on these issues. The Court has, on certain occasions and in the context of non-refoulement under Article 3, considered members of political opposition as a particularly vulnerable group.

3.4.2 Factors that enhance resilience and ameliorate risk of ill-treatment

If it is shown that an applicant is at risk of being persecuted by State actors, as might often be the case regarding persecution based on political opinion, the Court has been strict when assessing the possibility of the internal flight alternative as a resilience-enhancing factor. It has, however, considered it possible when the applicant has a very low profile or where the authorities' influence is restricted to a certain region. If a considerable amount of time has passed since the authorities showed interest in the applicant, this has in some

110. Chahal v the United Kingdom, no 22414/93 (ECtHR, 15 November 1996) § 106; Venkatajalsarma v the Netherlands, no 58510/00 (ECtHR, 17 February 2004) § 68; H.N. v Sweden, no 30720/09 (ECtHR, 15 May 2012) § 41; F.G. v Sweden, no 43611/11 (ECtHR [GC], 23 March 2016) § 88.
111. Azimov v Russia, no 67474/11 (ECtHR, 18 April 2013) § 141.
112. Iskandarov v Russia, no 17185/05 (ECtHR, 23 September 2010) § 131; R.C. v Sweden, no 41827/07 (ECtHR, 9 March 2010) §§ 54 – 56; S.F. and Others v Sweden, no 52077/10 (ECtHR, 15 May 2012) § 63; M.A. v Switzerland, no 52589/13 (ECtHR, 18 November 2014) § 56.
113. R.C. v Sweden, ibid § 53.
114. Mamazhonov v Russia, no 17239/13 (ECtHR, October 2014) § 146.
115. Puzan v Ukraine, no 51243/08 (ECtHR, 18 February 2010) § 34 (political opposition widely recognised as a particularly vulnerable group in Belarus). See similar in Kanyshhev v Ukraine, no 3990/06 (ECtHR 20 May 2010) § 44.
117. See e.g. Thampibillai v the Netherlands, no 61350/00 (ECtHR, 17 February 2004) § 67.
cases been considered to ameliorate risk of ill-treatment. The low profile of the applicant can, thus, enhance resilience just as a high profile can undermine resilience and increase risk of ill-treatment.

3.5 Religion

3.5.1 Factors that undermine resilience and increase risk of ill-treatment

When it comes to alleged risk of ill-treatment on account of religious belief, the Court has taken into account considerations similar to those with regard to political opinion, i.e. the interest of the applicants to the receiving State’s authorities, distinguishing features that would bring them to the attention of the authorities or the nationals of the receiving country, documentation of previous ill-treatment, the fate of individuals with similar backgrounds and information about the human rights situation of the relevant groups. Even when it has been undisputed that certain religious groups are under a threat of persecution, the Court has stated that every case should be assessed on an individual basis, insofar as the risk of ill-treatment is involved. In a 2013 judgment, N.K. v France, the Court for example concluded that, in view of the situation of persons belonging to the Ahmadiyya religion in Pakistan, only those who publicly practise that religion and proselytise seemed to be persecuted in society and by the authorities. When evaluating the personal circumstances of the applicant, the Court stated that an arrest warrant and report of preliminary investigations against him showed that the authorities knew about his religious activities. He would therefore be exposed to a risk of ill-treatment contrary to Article 3 if returned to Pakistan. Risk of ill-treatment based on religion has, however, rarely been the sole reason for activating the protection of Article 3. The Court has nevertheless on several occasions considered religious groups as vulnerable under Article 3 in the context of non-refoulement.

3.5.2 Factors that enhance resilience and ameliorate risk of ill-treatment

Like otherwise, the internal flight alternative can indicate resilience of applicants fearing ill-treatment based on religion. The Court has, for example, examined the situation of Christians in Iraq in several judgments. In M.Y.H. and Others v. Sweden in 2013, the Court concluded that the number of targeted attacks by extremists against this minority appeared to have escalated and that Christians formed a vulnerable minority in the southern and

118. S.F. and Others v Sweden, no 52077/10 (ECtHR, 15 May 2012) § 67.
120. Y. v Russia, no 20113/07 (ECtHR, 4 December 2008) § 86.
121. N.K. v France, no 7974/11 (ECtHR, 19 December 2013) § 46.
123. See M.Y.H. and Others v Sweden, no 50859/10 (ECtHR, 27 June 2013) § 60 (‘vulnerable minority’). See also e.g. N.A.N.S. v Sweden, no 68411/10 (ECtHR,27 June 2013) § 32; A.G.A.M. v Sweden, no 71680/10 (ECtHR, 27 June 2013) § 37.
central parts of Iraq. However, it also concluded that relocation to the Kurdistan region was a viable alternative, as this was a relatively safe and accessible resettlement area for Christians. When assessing the safety of this relocation option, the Court looked towards job prospects, healthcare access, and available assistance from the UN High Commissioner for Refugees (UNHCR) or local authorities according to international reports. Reliance by a Contracting State on relocation alternatives meeting those standards would thus not, in general, give rise to an issue under Article 3. Situations may, however, change over time. It seems, for example, that relocation in the Kurdistan region would no longer be considered acceptable.

3.6 Ethnicity

3.6.1 Factors that undermine resilience and increase risk of ill-treatment

Similarly to members of political or religious groups, members of ethnic groups can be systematically targeted for ill-treatment and ethnicity has specifically been noted as a risk factor in the jurisprudence of the Court. In such instances, the Court has requested applicants who fear ill-treatment based on ethnicity to show ‘special distinguishing features’ putting them individually at risk, and has considered the protection of Article 3 of the Convention activated when an applicant can establish that there are serious reasons to believe that he or she would be of sufficient interest to the authorities. In that assessment the Court has evaluated the particular background of the applicants, including a number of factors that could increase the possibility of such interest or attention, such as the existence of visible scars on the applicant, his/her gender or age, previous arrest and detention, whether the applicant has made an asylum claim abroad etc. The Court has, in some cases, referred to the vulnerability of individuals belonging to ethnic minorities under Article 3 in the context of non-refoulement.

126. ibid § 66. See also M.K.N. v Sweden, no 72413/10 (ECtHR, 27 June 2013) § 39 and A.G.A.M. v Sweden, no 71680/10 (ECtHR, 27 June 2013) § 43.
127. See also W.H. v Sweden, no 49341/10 (ECtHR, 27 March 2014) § 76 (relocation to the Kurdistan Region considered acceptable for a single woman of Mandaean minority denomination).
128. ibid § 76. The case was referred to the Grand Chamber, but before being heard the Swedish Migration Board granted the applicant a permanent residence permit. As hundreds of thousands of Iraqis had fled to the Kurdistan Region within the space of a few months, there was no longer an acceptable internal relocation alternative, see W.H. v Sweden, no 49341/10 (ECtHR (striking out) [GC], 8 April 2015).
129. See Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 148 (Ashraf minority clan, removal to Somalia would result in an Art. 3 violation).
130. NA. v the United Kingdom, no 25904/07 (ECtHR, 17 July 2008) § 131.
131. ibid § 128.
132. ibid §§ 123–147.
134. W.H. v Sweden, no 49341/10 (ECtHR, 27 March 2014) § 65 (the vulnerability of Mandaeans); Salah Sheekh v the Netherlands, no 1948/04 (ECtHR, 11 January 2007) § 146 (the particular and continuing vulnerability to this kind of human rights abuses of members of minorities like the Ashraf.)
3.6.2 Factors that enhance resilience and ameliorate risk of ill-treatment

The internal flight alternative can indicate resilience in cases concerning ethnicity, but within certain limits and depending on the specific circumstances in each country. Family or social ties play a significant role when assessing whether the internal flight alternative is a safe option in this context, and the Court may, for example, look into questions of whether the applicant is sufficiently well connected to powerful actors or a clan in the area to enable him/her to obtain protection.\(^{135}\) In 2007 the Court noted in this respect that as regards the expulsion of a Somali national to a part of the country from which he or she does not originate, the UNHCR is of the opinion that ‘considerations based on the prevailing clan system are of crucial importance’.\(^{136}\) Clan affiliation has further been described as the most important common element of personal security across all of Somalia and thus not merely in the ‘relatively unsafe’ areas.\(^{137}\) The internal flight alternative could thus only be an option if an applicant would be able to obtain protection and security in the ‘relatively safe’ areas.

3.7 Past ill-treatment

3.7.1 Factors that undermine resilience and increase risk of ill-treatment

Previous documented and verified ill-treatment against the applicant can be enough to establish the individually distinguishable circumstances required by the Court. Established past ill-treatment contrary to Article 3 also provides a strong indication of a future risk of ill-treatment, although the Court has made that principle conditional on the applicant having made ‘a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue’.\(^{138}\) The Court has, further, stated that ‘where such evidence is adduced, it is for the Government to dispel any doubts about it’.\(^{139}\) In certain contexts, the presence of scarring can also be considered to undermine resilience and increase risk of ill-treatment. Thus, in 2008, in *NA. v. the United Kingdom*, the Court recognised that the Sri Lankan authorities were known to perceive scars as indication of training by the Liberation Tigers of Tamil Eelam (LTTE), or participation in active warfare, and noted that torture-related scars on the body of a person could enhance the likelihood of ill-treatment upon return since this could raise the interest of the authorities.\(^{140}\) However, as the Court’s focus is on the risk of ill-treatment at the time of assessment, the presence of scars does not by itself suffice to

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establish a real risk ill-treatment upon return. The Court has acknowledged the vulnerability of victims of torture and ill-treatment under Article 3. This applies in the context of non-refoulement as well, even though the Court will in such cases focus on the enhanced risk of future ill-treatment.

3.7.2 Factors that enhance resilience and ameliorate risk of ill-treatment

The Court has rejected several applications where applicants have previously been ill-treated if the situation in their country has changed or when the time passed since the alleged events is likely to have diminished interest in the applicant. Even if the applicant provides evidence of ill-treatment, the internal flight alternative is also always a possible resilience-enhancing factor if certain guarantees are in place, i.e. if the applicant can safely reach and reside in the alternative area and if it would not be unduly harsh to require him/her to move there. However, the Court has been strict when assessing the possibility of internal flight when State actors have previously subjected an applicant to ill-treatment.

3.8 Sexual orientation and gender identity

3.8.1 Factors that undermine resilience and increase risk of ill-treatment

The Court has in general terms acknowledged the enhanced vulnerability and struggle of LGBT individuals that come from countries where cultural or religious prejudice against such persons is widespread. However, even where the Court acknowledges a very difficult situation for real or perceived homosexuals, the applicants have sometimes not been considered credible. In other instances, the Court has not been persuaded that the applicant has shown that he or she is at a real risk of being ill treated on that ground, some-
times with reference to information that legislation criminalising homosexual acts is not actively enforced or systematically applied.\textsuperscript{149} It is therefore clear that cases regarding possible refoulement because of sexual orientation rarely reach the threshold of Article 3. In fact, the research performed for this article revealed no examples of violations of Article 3 based on sexual orientation or gender identity.

\textbf{3.8.2 Factors that enhance resilience and ameliorate risk of ill-treatment}

In some judgments it seems that the Court may be suggesting that the applicant could ameliorate the risk of ill-treatment if discreet about his/her sexual orientation.\textsuperscript{150} In the 2014 judgment of \textit{M.E. v. Sweden}, the Court placed emphasis on the presumption that the expulsion would only be a temporary return and stated that ‘even if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of time.’\textsuperscript{151} In the opinion of the Court, this situation would not reach the level of severity required under Article 3. The Court also mentioned that the applicant had hidden his sexuality from his family as evidence that he had already chosen to be discreet, not for fear of persecution but due to private considerations.\textsuperscript{152} How it is possible to establish that a certain person lives discreetly because of social pressure and not because of fear of persecution seems unclear, but according to this judgment, as long as it is only temporary, the Court may expect an individual to try to hide his/her sexual orientation and consider this a factor that indicates resilience in the face of potential ill-treatment.\textsuperscript{153}

The case law analysis revealed no examples of the application of the internal flight alternative as an ameliorating factor indicating resilience when an LGBT applicant’s claim was considered credible.\textsuperscript{154} This may nevertheless be a possibility if the required guarantees are in place.\textsuperscript{155} However, in countries criminalizing same-sex sexuality, State protection should be considered unavailable to LGBT people unless the State’s authority is limited to certain

\textsuperscript{149} \textit{I.I.N. v the Netherlands}, no 2035/04 (ECtHR (dec), 9 December 2004); \textit{A.N. v France}, no 12956/15 (ECtHR (dec), 19 April 2016) § 41; \textit{M.E. v Sweden}, no 71398/12 (ECtHR, 26 June 2014) § 87.

\textsuperscript{150} See \textit{F. v the United Kingdom}, no 17341/03 (ECtHR (dec), 22 June 2004) where the Court referred to the privacy of the home, thus seemingly suggesting the applicant could be discreet about his sexual orientation if returned.

\textsuperscript{151} \textit{M.E. v Sweden}, no 71398/12, (ECtHR 26 June 2014) § 88.

\textsuperscript{152} ibid § 86.

\textsuperscript{153} The applicant lodged a request for referral to the Grand Chamber, which was accepted, but as the Migration Board in Sweden reassessed the applicant’s claim following a deterioration of the security situation in Libya, the Court decided to strike the case out of its list; see \textit{M.E. v Sweden}, no 71398/12 (ECtHR (striking out) [GC], 8 April 2015) §§ 32–38.

\textsuperscript{154} In \textit{M.K.N. v Sweden}, no 72413/10 (ECtHR, 27 June 2013) §§ 39, 40 and 43, the Court considered internal relocation to Kurdistan a viable alternative for a Christian, but did not find the applicant’s claim concerning risk of ill-treatment due to sexual orientation credible.

\textsuperscript{155} See e.g. \textit{J.K. and Others v Sweden}, § 82.
parts of the country.\textsuperscript{156} Where the risk of persecution emanates from non-State actors, the willingness and ability of the State to provide protection must be assessed.\textsuperscript{157}

3.9 Women

3.9.1 Factors that undermine resilience and increase risk of ill-treatment

The Court has dealt with a number of non-refoulement cases concerning gender-based violence under Article 3,\textsuperscript{158} and has also addressed the social exclusion certain groups of women might face upon return to country of origin.\textsuperscript{159} While it has explicitly referred to the vulnerability of victims of domestic violence under Article 3 outside the context of non-refoulement,\textsuperscript{160} it has not referred specifically to the vulnerability of female applicants who claim to be at real risk of ill-treatment based on gender if deported. In some judgments, however, the Court has discussed extensive documentation of the human rights abuses and risks women face in the receiving country, and even especially mentioned the gravity of the situation.\textsuperscript{161} Nevertheless, it appears that the Court has not given decisive weight to the special risks facing women as a group, such as heightened risks of domestic or gender-based violence in certain countries, when discussing whether the return of an applicant would violate Article 3. The Court, therefore, does not seem to consider women asylum seekers to be a vulnerable group \textit{per se},\textsuperscript{162} and when violation has been found, it rather seems based on the cumulative risks associated with the applicant’s individual situation and lack of family and social network.\textsuperscript{163}

3.9.2 Factors that enhance resilience and ameliorate risk of ill-treatment

When assessing the risks potentially facing women asylum seekers upon return, the Court has placed emphasis on the importance of family support and a male protection network as factors indicating resilience. For example, in the 2015 judgment of \textit{R.H. v. Sweden} the applicant claimed risk of honour crimes or forced marriage if she were returned to Moga-
dishu. The Court stated that women were generally discriminated against in Somali society and that a single woman returning to Mogadishu without access to protection from a male network would face a real risk of living conditions constituting inhuman or degrading treatment.\textsuperscript{164} However, and even though the applicant had left Somalia as a teenager some 10 years earlier, the Court noted that she had been informed of the death of her father in 2010 and her mother in 2011, indicating that she had retained contacts in Mogadishu. It also pointed out that she had family living in the city, including a brother and uncles. The Court therefore considered her to have access to both family support and a male protection network, and found no violation of Article 3.\textsuperscript{165}

As exhibited by \textit{A.A. and Others v. Sweden} in 2012, the individual resilience of a woman can also affect the Court’s assessment and lead to the conclusion that Article 3 has not been violated. Here the Court mentioned that the applicant, who was a Yemeni mother fearing honour crimes, had shown proof of independence by going to court in Yemen on several occasions to file for divorce, and that she had also shown strength by managing to obtain the necessary practical and financial means to leave Yemen. However, in addition to her own resilience, the case was also assessed in light of other ameliorating factors, such as support from her brother, adult sons and other family members in Yemen and the existence of NGOs who operate shelters and provide help for exposed women in Sana’a.\textsuperscript{166} In this context, it should also be mentioned that in addition to local NGOs, the presence of UN organizations in the receiving country can sometimes also function as an ameliorating factor and affect the Court’s evaluation.\textsuperscript{167}

In the context of female genital mutilation (FGM), the Court has emphasised individual independence and strength as ameliorating factors. Thus, in 2007 in \textit{Collins and Akaziebie v. Sweden}, and partly because of the fact the young woman in this case had actually managed to get from Nigeria to Sweden, the Court found it difficult to see why the applicant, ‘having shown such a considerable amount of strength and independence’, could not protect her daughter from being subjected to FGM, at least in one of the Nigerian States where the practice is prohibited or less widely practiced.\textsuperscript{168} The Court declared this application manifestly ill-founded because the applicant had failed to substantiate a real and concrete risk.

All these factors can also be of importance when evaluating the possibility of the internal flight alternative for women.\textsuperscript{169} In the context of assessing whether this is a reasonable

\textsuperscript{164}. \textit{R.H. v Sweden}, no 4601/14 (ECtHR, 10 September 2015) § 44.
\textsuperscript{165}. \textit{ibid} § 74.
\textsuperscript{166}. \textit{A.A. and Others v Sweden}, no 14499/09 (ECtHR, 28 June 2012) § 84.
\textsuperscript{167}. \textit{Izevbekhai and Others v Ireland}, no 43408/08 (ECtHR(dec), 17 May 2011) § 75. See also the emphasis on assistance from the UNHCR in \textit{M.Y.H. and Others v Sweden}, no 50859/10 (ECtHR, 27 June 2013) (concerning religion).
\textsuperscript{168}. \textit{Collins and Akaziebie v Sweden}, no 23944/05 (ECtHR(dec), 8 March 2007). See similarly in \textit{Sow v Belgium}, no 27081/13 (ECtHR, 19 January 2016) § 68 (where the Court emphasised that the applicant had been educated and that neither she nor her mother had been circumcised. In the context of a claim regarding the risk of FGM, the Court therefore concluded that she ‘could not be regarded as a particularly vulnerable young woman.’
\textsuperscript{169}. \textit{Izevbekhai and Others v Ireland}, § 81; \textit{Collins and Akaziebie v Sweden}; \textit{N.M.Y. and Others. v Sweden}, no 72686/10 (ECtHR, 27 June 2013) § 42.
option, the Court has sometimes found that the skills, education and work experience of women enhance their resilience to the point that they are not considered in need of support from family members.170

3.10 Age

3.10.1 Factors that undermine resilience and increase risk of ill-treatment

Age can be considered a risk factor in certain cases, both young and mature.171 Elderly people have, however, not received significant attention in the jurisprudence of the Court on non-refoulement. Alleged risk factors related to the applicant’s mature age and the accompanying health issues can, however, concern questions of access to health services and care in the receiving country in the same manner as previously discussed in Chapter 3.3 supra.172

Several judgments under Article 373 and other Convention Articles174 signal that the Court conceptualises children as a vulnerable group. The Court has also pointed out that State obligations under Articles 3 in cases regarding children require that the best interests of the child are respected,175 and shall be a primary consideration in all actions taken by public authorities concerning children.176 In general terms, the Court has stated that “[t]he child’s best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences”.177 In the context of non-refoulement, when evaluating whether a return of a child would violate Article 3, the Court needs to examine the applicant’s circumstances in light of his/her age to reach a conclusion on whether the threshold of Article 3 has been reached. For example, in Mubilanzila

170. Omeredo v Austria, no 8969/10 (ECtHR(dec), 20 September 2011).
171. Under Article 3, but outside the context of non-refoulement, the Court has noted mature age as a risk-enhancing factor: see Mudric v the Republic of Moldova, no 74839/10 (ECtHR, 16 July 2013) § 51.
172. Senchishak v Finland, no 5049/12 (ECtHR, 18 November 2014).
173. Specifically regarding non-refoulement see Mubilanzila Mayeka and Kaniki Mittinga v Belgium, no 13178/03 (ECtHR, 12 October 2006) § 55 (‘extremely vulnerable situation’ and ‘within the class of highly vulnerable members of society’); Tarakhel v Switzerland, no 29217/12 (ECtHR [GC] 4 November 2014) § 99 (‘extreme vulnerability’). See also under Article 3, but outside the context of non-refoulement, C.A.S. and C.S. v Romania, no 26692/05 (ECtHR, 20 March 2012) § 74 (‘particular vulnerability’); Muskhutshiyeva and Others v Belgium, no 41442/07 (ECtHR, 19 January 2010) § 56 (‘extreme vulnerability’); Popov v France, nos 39472/07 and 39474/07 (ECtHR, January 19, 2012) § 64 (‘extreme vulnerability’); Rahimi v Greece, no 8687/08 (ECtHR, 5 April 2011) § 86 (‘extreme vulnerability’); V.M. and Others v Belgium, no 60125/11 (ECtHR, 7 July 2015) § 153 (‘vulnerable’, with an even stronger requirement for ‘special protection’ if the child is very young or disabled).
174. For examples under other Convention Articles see e.g. D.H. and Others v the Czech Republic, no 57325/00 (ECtHR [GC], 7 February 2006) §§ 181 and 182; Aune v Norway, no 52502/07 (ECtHR, 28 October 2010) § 8; E.S. v Sweden, no 5786/08 (ECtHR, 21 June 2012) § 48.
175. C.A.S. and C.S. v Romania, no 26692/05 (ECtHR, 20 March 2012) § 72.
176. See Neulinger and Shuruk v Switzerland, no 41615/07 (ECtHR[GC], 6 July 2010) § 135; Kanagaratnam v Belgium, no 15297/09 (ECtHR, 13 December 2011) §§ 62 and 67 and Popov v France, nos 39472/07 and 39474/07 (ECtHR, January 19, 2012) § 91.
177. Neulinger and Shuruk v Switzerland, no 41615/07 (ECtHR [GC], 6 July 2010) §§ 135-138. The case did not concern non-refoulement.
Mayeka and Kaniki Mitunga v. Belgium in 2006, the applicant’s very young age, her status as an illegal immigrant in a foreign land and the fact that she was unaccompanied by any family members led the Court to conclude that she was ‘within the class of highly vulnerable members of society’.178

Children have specific needs that are related in particular to their age and lack of independence. The Court has, therefore, observed that the Convention on the Rights of the Child179 encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his/her parents.180 Nevertheless, even though the Court has in several cases acknowledged the particular or extreme vulnerability of children asylum seekers, the threshold of severity under Article 3 has in some instances seemed quite high.181

The Tarakhel v. Switzerland 2014 judgment, however, exhibits a heightened awareness of special protection needs for children when assessing whether the minimum level of severity has been met under Article 3. It thus seems that the threshold for the minimum level of severity required is lower for children as opposed to other applicants seeking protection from refoulement, and this applies even when the child is accompanied by parents.182 In V.M. and Others v. Belgium in 2015 it was further established that the vulnerability of children is an even stronger factor to weigh into the assessment if the child in question is very young or disabled.183

3.10.2 Factors that enhance resilience and ameliorate risk of ill-treatment

As famously established in Tarakhel v. Switzerland in 2014, the Court obliged the sending State to undertake a thorough and individualised assessment of the applicants’ situation,184 and to obtain individual guarantees that the receiving State, Italy, would receive the family into appropriate conditions and keep them together.185 These guarantees must be provided in light of individual needs, but obviously function as a resilience-enhancing factor if they are sufficiently provided.186 The internal flight alternative might also theoretically be relevant in some cases involving children, but the case law analysis performed for this article did not reveal examples of that or other additional resilience enhancing factors when children are involved. As in the case of adults, the internal flight alternative would only be relevant where the applicant can safely access the area concerned, and be reasonably expected

178. Mubilanzila Mayeka and Kaniki Mitunga v Belgium, no 13178/03 (ECtHR, 12 October 2006) § 55.
180. Tarakhel v Switzerland, no 29217/12 (ECtHR [GC] 4 November 2014) § 99, See also under Article 3 but not in the context of non-refoulement, Popov v France, nos 39472/07 and 39474/07 (ECtHR, January 19, 2012) § 91.
181. See e.g Hukic v Sweden, no 17416/05 (ECtHR (dec), 27 September 2005) (less favorable conditions in the receiving country for a child with Down’s syndrome not regarded as decisive from the point of view of Article 3).
182. Tarakhel v Switzerland, § 119.
183. V.M. and Others v Belgium, no 60125/11 (ECtHR, 7 July 2015) § 153.
184. Tarakhel v Switzerland, § 104.
185. Ibid § 122.
186. As pointed out in section 3.3, the same approach has recently also been applied in situations where serious doubts persist concerning removal because of health issues of the applicant: see Paposhvili v Belgium, no 41738/10 (ECtHR [GC], 13 December 2016) § 191.
to settle there.\textsuperscript{187} What can be considered reasonable for an adult may, however, not be reasonable for a child, and even more so when the child is unaccompanied.\textsuperscript{188}

\subsection*{3.11 Asylum seekers}

The case law on refoulement under the Dublin regulation reveals an interesting development on the question of whether all asylum seekers awaiting decision on their refugee status are in a vulnerable position in the receiving State.\textsuperscript{189} Originally, in \textit{M.S.S. v. Belgium and Greece} of 2011, which concerned the transfer of an adult asylum seeker to Greece, the Grand Chamber stated that asylum seekers are members of ‘a particularly underprivileged and vulnerable population group in need of special protection’.\textsuperscript{190} Similarly, in \textit{Tarakhel v. Switzerland} in 2014, which concerned the transfer of a family with children to Italy, the Grand Chamber considered this ‘special protection’ of asylum seekers particularly important when children are involved in view of their specific needs and their ‘extreme vulnerability’.\textsuperscript{191} In both cases, and in light of the poor reception conditions in the relevant States, this resulted in the finding that Article 3 had been violated by sending the applicant back to Greece\textsuperscript{192} or would be violated if the applicants were transferred to Italy without the Swiss authorities having ‘obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together’.\textsuperscript{193}

At first sight, these judgments may seem to indicate that all asylum seekers awaiting status determination are conceptualised as inherently vulnerable in the receiving European State by the Court. \textit{A.S. v. Switzerland} of 2015, however, concerned the removal to Italy of an adult Syrian national of Kurdish origin who showed severe symptoms of post-traumatic stress disorder. The applicant referred to his vulnerable status as asylum seeker in Italy, but the Court’s view was that the applicant’s case did not disclose very exceptional circum-

\textsuperscript{187} See e.g. \textit{J.K. and Others v Sweden}, no 59166/12 (ECtHR [GC], 23 August 2016) § 82.
\textsuperscript{188} See \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium}, no 13178/03 (ECtHR, 12 October 2006) § 55 and UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, para 55 – 56.
\textsuperscript{189} Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31. This regulation stipulates rules on the question of which EU State is responsible for deciding an asylum claim, and provides for a system whereby asylum seekers that apply for protection in a different EU State may be sent to the responsible EU State. The sending State is, however, responsible under Article 3 ECHR not to deport a person to a State where he/she is at a real risk of ill-treatment in violation of Article 3 ECHR, either directly on the basis of the conditions in the receiving EU State, or indirectly by virtue of the risk that the authorities in the receiving EU State deport the applicant to a third State where there is a real risk of proscribed treatment.
\textsuperscript{190} \textit{M.S.S. v Belgium and Greece}, no 30696/09, (ECtHR [GC] 21 January 2011) § 251. See also \textit{Hirsi Jamaa and Others v Italy}, no 27765/01 (ECtHR [GC] 23 February 2012) § 155 (where the Court stated that acknowledged refugee status attested to the vulnerability of applicants in the context of their situation in country of origin.)
\textsuperscript{191} \textit{Tarakhel v Switzerland}, no 29217/12 (ECtHR [GC] 4 November 2014) § 99.
\textsuperscript{192} \textit{M.S.S. v Belgium and Greece}, no 30696/09, (ECtHR [GC], 21 January 2011) §§ 263 and 264.
\textsuperscript{193} \textit{Tarakhel v Switzerland}, § 122.
stances meriting heightened protection. This applied even though the care the applicant would receive in Italy was speculative. Similarly, in *Ilias and Ahmed v. Hungary* of 2017, the Court stated:

‘While it is true that asylum seekers are considered particularly vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S. v. Belgium and Greece*, cited above, § 232), for the Court, the applicants in the present case were not more vulnerable than any other adult asylum seeker detained at the time.’

As the case has been referred to the Grand Chamber, it remains to be seen whether the Chamber’s approach will be confirmed. Taken together, *A.S. v. Switzerland* and *Ilias and Ahmed v. Hungary* nevertheless seem to indicate that the Court is moving away from the general vulnerability approach originally indicated by *M.S.S. v. Belgium and Greece*. Instead, the Court now seems to require that all such asylum seekers show additional personal risk elements to give rise to a violation of Article 3. The confirmation of the Chamber judgment seems the most likely outcome of the referral to the Grand Chamber. Under such an approach the vulnerability associated with a status as asylum seeker would not be enough to facilitate enhanced protection *per se*, while asylum seeker status in combination with other risk-enhancing factors might. The Grand Chamber’s emphasis in *Tarakhel v. Switzerland* of 2014, on the ‘extreme vulnerability’ of children asylum seekers, which was reiterated in *Abdullahi Elmi and Aweys Abubakar v. Malta* of 2016 further supports that prediction.

In cases of this kind, where the applicant was to be sent from one EU State to another on grounds of the Dublin regulation, it seems that the key factor capable of indicating resilience is the possibility of sending States to obtain individual guarantees from the receiving State.

196. *A.S. v Switzerland*, no 39350/13 (ECtHR, 30 June 2015) § 37 (where an asylum seeker who suffered from severe post-traumatic stress disorder (PTSD) did not fall under ‘very exceptional circumstances’); *Ilias and Ahmed v Hungary*, ibid § 87 (where asylum seekers in detention were not considered more vulnerable than any other adult asylum seeker detained at the time); *Mahamed Jama v Malta*, no 10290/13 (ECtHR, 26 November 2015) § 100 (asylum seeker, considered by the Court to be in a state of vulnerability which exists irrespective of other health concerns or age factors, but not more vulnerable than any other adult asylum seeker detained at the time.) *Aden Ahmed v Malta*, no 53552/12 (ECtHR, 9 December 2013) §§ 97-99 (where detention of an asylum seeker that suffered from, *inter alia*, insomnia, recurrent physical pain and episodes of depression was considered amounted to degrading treatment within the meaning of Article 3).
197. This would, for example, be more in line with the application of vulnerability as an analytic lens under Article 14 of the Convention, where vulnerability often seems to function as a tool for variations in approach as between sub-groups otherwise defined by a common characteristic or identity marker, see Arnardóttir, (n 84) 14, 16, 31, 150-171.
198. *Abdullahi Elmi and Aweys Abubakar v Malta*, nos 25794/13 and 28151/13 (ECtHR, 22 November 2016) § 113 (the case did not concern non-refoulement, but the Court found that there had been a violation of Article 3 as the applicants, who were sixteen- and seventeen-year-old asylum seekers, were even more vulnerable than any other adult asylum seeker detained at the time).
199. *M.S.S. v Belgium and Greece*, no 30696/09 (ECtHR [GC], 21 January 2011) §§ 286 and 298; *Sharifi and Others v Italy and Greece*, no 16643/09 (ECtHR, 21 October 2014) § 214; *Tarakhel v Switzerland*, no 29217/12 (ECtHR [GC] 4 November 2014) § 122.
4. CONCLUSIONS

When evaluating whether expulsion or return of an applicant would violate Article 3 ECHR, several criteria need to be met. First, there must be a real risk that the applicant will face ill-treatment if returned. Second, the ill-treatment in question must be severe enough to fall under the scope of Article 3. Third, resilience factors possibly ameliorating or removing that risk need to be considered and weighed against it. Which factors are most relevant to different kinds of risks differ from case to case, but they can include elements such as the availability of internal flight alternatives, the personal characteristics of the applicant, social networks, availability of health care or guarantees from recipient governments. Individual factors indicating risk or ameliorating circumstances are also always assessed in light of the social, political and/or legal situation in the receiving country.

Section 3 presented the findings of a systematic analysis of the case law of the ECtHR on non-refoulement with the aim to identify the most common individual factors in the Court’s risk assessment and their function. The key factors identified as indicating undermined resilience and enhanced risk of ill-treatment in the jurisprudence of the ECtHR are health and disability, political opinion, religion, ethnicity, past ill-treatment, sexual orientation and gender identity, gender, age and status as asylum seeker awaiting decision on refugee status. With each of these comes a set of resilience-enhancing factors that may ameliorate the risk of ill-treatment, some of them specific to a certain risk and others more general. The possibility of internal flight is the most general resilience-enhancing factor, but the other key ameliorating factors identified are the existence of a local support network, family, and in the case of single women, a male protection network; the applicant’s qualities such as education, independence and/or resourcefulness, the presence of local NGOs or UN organizations in the receiving country, factors that lead to diminished interest of authorities and non-State actors in the applicant, the availability of health care and reception facilities where the Court may sometimes require guarantees that the individual will actually receive appropriate treatment and care, and, it seems, temporary discretion about sexual orientation. In sum, the final conclusion of the Court on whether the applicant is at real risk of treatment proscribed by Article 3 ECHR is the result of an overall assessment of all such factors relevant to the applicant’s resilience, negative and positive, and their importance in the context of the actual situation in the receiving country.

Taking a closer look at the resilience-enhancing factors identified by the jurisprudence of the ECtHR, the case law analysis has shown that the internal flight alternative has played an important role. When assessing whether an alternative area would be a safe and reasonable option, the Court looks towards what awaits the individual in the proposed area, family or social ties, healthcare access, job prospects, and assistance from the UNHCR and local bodies, according to international reports. Even though the Court takes individual circumstances into account in this assessment, which may also include factors that undermine the resilience of the applicant, the threshold for violation of Article 3 is high and the applicant may be expected to endure a certain amount of hardship.

In many judgments the factor of social and family network also appears as an important resilience-enhancing factor when assessing whether removal would violate Article 3. The elements taken into account in this respect include e.g. questions of whether someone would be willing or able to care for an sick applicant, provide him or her with a basic level
of food, shelter and social support, whether a single female has a male support network, or whether protection based on the prevailing clan system is available to an applicant. The assessment of whether the care or support is actually a real possibility is, however, very difficult, and the Court is often left to speculate on what awaits an applicant. The burden of proof, therefore, becomes very important to the outcome of individual assessments. In this respect, the Court seems to place the burden of proof on the applicant to show severed family links and no prospects of care.

The applicant’s qualities such as education, independence, work experience and/or resourcefulness can also function as resilience-enhancing factors and may lead to the conclusion that Article 3 has not been violated. This is most often mentioned with regard to single women, which the Court considers having shown strength and independence, for example by filing for divorce and/or managing to obtain the necessary practical and financial means to leave their country of origin. In cases of this kind, this is usually assessed in conjunction with other factors, such as family and social ties, male protection network and sometimes the presence of local or international organisations that can provide support. In other cases, the qualities of an applicant can be used to substantiate that the person is not in need of social, family or other kind of support. Other factors regarding the backgrounds of applicants can also function as resilience-enhancing, most notably factors that could lead to diminished interest in the applicant, such as a low political profile or the passing of time. This consideration has even been applied by the Court when the risk emanates from State actors.

Regarding seriously ill applicants, the Court has found that where, after the relevant information has been examined, serious doubts persist concerning the possible impact of removal on the applicant, the only relevant resilience-enhancing factor seems to be the requirement that the State must obtain guarantees that address not only whether adequate treatment is generally available but also whether the applicant will actually receive appropriate treatment and care. This obligation, however, only arises under Article 3 where the absence or lack of access to such appropriate treatment or care in the receiving country exposes the individual to a serious, rapid and irreversible decline in his/her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court has also required such guarantees when evaluating whether Article 3 would be violated in the so-called Dublin cases, where a State intends to send an asylum seeker to another European State responsible for determining refugee status, which raises certain doubts about the practicality of the European system for allocating protection responsibilities.

In the rather limited case law of the Court regarding sexuality or gender identity it seems that an applicant being temporarily discreet about his/her sexual orientation or gender identity, even in countries where homosexual or transgender behaviour and/or identity are criminalised, can been seen as a resilience-enhancing factor ameliorating the risk of ill-treatment. According to the Court, there is no real risk provided that the applicant behaves discreetly, although this can only be required of him/her for a relatively short period of time. This also points towards a cross-cutting – but to a certain extent questionable – underlying theme which emerges in relation to a number of the factors the Court looks towards as ameliorating risk of ill-treatment. This is the notion that applicants can be required to adhere to social norms and rely on informal networks governed by such norms.
to stay safe. This is visible not only in relation to sexuality but also with respect to the Court’s emphasis on the existence of protection from clans or male networks in patriarchal societies.

In the final analysis, it has been shown that the Court’s assessment in non-refoulement cases is highly dependent on the facts of each case and that the vulnerability of an applicant to harm is always contextual in the sense that it must be assessed with respect to the particular factual situation in question. It is therefore not surprising that the case law might at first sight seem inconsistent and problematic. It is, however, submitted that the analysis performed in section 3 has clarified somewhat the Court’s approach to factors that either undermine or enhance the resilience of individuals who face risk of ill-treatment prescribed under Article 3 EHCR, and that this article has, thus, contributed to making sense of the Court’s case law. At the same time, however, it also exhibits that a deeper normative assessment of the Court’s approach to resilience-enhancing factors is called for in future research.

200. For example, in *Sufi and Elmi v the United Kingdom*, nos. 8319/07 and 11449/07 (ECtHR, 28 June 2011) § 275, the Court stated that areas controlled by al-Shabaab were ‘generally safe for Somalis provided that they were able to “play the game” and avoid the attention of al-Shabaab by obeying their rules.’ Although this was not applied as an ameliorating factor in the case, it points to the theme discussed here.

201. *A.A. v Switzerland*, no 58802/12, (ECtHR, 7 January 2014); *R.H. v Sweden*, no 4601/14 (ECtHR, 10 September 2015).