



INSIGHT

## A EUROPEAN COURT OF HUMAN RIGHTS' SYSTEMATIZATION OF PRINCIPLES APPLICABLE TO EXPULSION CASES

GLORIA FERNÁNDEZ ARRIBAS\*

**ABSTRACT:** The European Court of Human Rights has developed a large case-law regarding expulsion cases, of which cases linked to asylum applications constitute a significant number. This *Insight* analyses the case of *J.K. et al. v. Sweden* [GC] (judgment of 23 August 2016, no. 59166/12), which constitutes an attempt on the part of the Court to systematise the main principles and to clarify the procedure and elements to be taken into account by national authorities when deciding on expulsion cases, and therefore on asylum applications. The Court first enumerates and briefly analyses the applicable principles: the risk of ill-treatment by private groups, the principle of *ex nunc* evaluation of the circumstances, the principle of subsidiarity, the assessment of the existence of a real risk, distribution of the burden of proof, past ill-treatment as an indication of risk, membership of a targeted group. Second, the Court applies the principles to the case of *J.K. et al. v. Sweden*, but the interpretation and application of those principles is the object of dissenting opinions of seven judges, which are also taken into account in this *Insight*.

**KEYWORDS:** asylum – expulsion – real risk – burden of proof – benefit of the doubt – ill-treatment.

### I. INTRODUCTION

In the judgement in the case of *J.K. et al. v. Sweden* [GC],<sup>1</sup> the European Court of Human Rights referred to its previous case-law with a view to determining the general principles applicable to expulsion cases and to clarifying the procedure and elements to be taken into account by national authorities when deciding on asylum applications.

This judgment has been the object of dissenting opinions from seven judges out of the seventeen in the Grand Chamber, focusing, in particular, on the way in which the

\* Associate Professor of Public International Law, University Pablo de Olavide, Seville, gferarr@upo.es.

<sup>1</sup> European Court of Human Rights, judgment of 23 August 2016, no. 59166/12, *J.K. et al. v. Sweden* [GC].

Court analyses these principles, specifically past ill-treatment as an indication of risk, the applicant's credibility regarding the assessment of a real risk and the burden of proof.

The applicants were a family of Iraqi nationals who, in 2010, applied for asylum and residence permits in Sweden on the grounds that if they returned to Iraq they would be subject to persecution by non-state actors, namely Al-Qaeda. The first applicant had a construction and transport business and was working with American clients in Baghdad, and because of having US clients he was the target of a murder attempt, and also a bomb was placed next to the family's house by Al-Qaeda. The family left Iraq in 2006 and returned in 2008, and since then had not been personally threatened. As it has been mentioned, in 2010 the applicants applied for asylum in Sweden. After various stages and appeals, the application was finally rejected in 2012 on the grounds that the Iraqi forces were able and willing to protect the family.

The applicants lodged an application against Sweden with the Court<sup>2</sup> on the grounds that expulsion to Iraq would entail a violation of Art. 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Chamber held that "the implementation of the deportation order in respect of the applicants would not give rise to a violation of article 3",<sup>3</sup> since the evidence was insufficient to conclude that there was a real risk of being subject to treatment contrary to Art. 3 if they returned to Iraq. In 2015, the applicants referred the case to the Grand Chamber, whose judgment is analysed in this *Insight*.

## II. GENERAL PRINCIPLES AND THEIR APPLICATION

Before deciding on the applicants' case, the Court refers to the general principles to be applied on expulsion cases, for which the Court takes into account not only its previous case-law, but also European Union Law,<sup>4</sup> United Nations High Commissioner for Refugees (UNCHR) guidelines and other materials.

Even though it is well-known that the European Convention of Human Rights (ECHR) does not include the right of asylum and the principle of *non-refoulement*, it is worth mentioning that the interpretation given by the Court of Art. 3 of the Convention has led to the development of the principle of *non-refoulement*, which has become a key notion in expulsion cases regarding asylum claims. Also, this principle is essential in order to prevent the applicant from being sent back to a country where their life may be en-

<sup>2</sup> European Court of Human Rights, judgment of 4 June 2015, no. 59166/12, *J.K. et al. v Sweden*.

<sup>3</sup> *J.K. et al. v Sweden* [GC], cit., para. 4.

<sup>4</sup> Regarding the European Court of Human Rights interpretation of the Charter of Fundamental Rights of the European Union see G. GAJA, *The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights*, in *European Papers*, 2016, Vol. 1, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 791 *et seq.*

dangered, so States have been “forced” to grant international protection to those applicants as a solution to the risk they face if they return.<sup>5</sup>

The present judgement goes a step further. Beyond with the restatement of the principle of *non-refoulement* in its relation with Art. 3, the Court lays down other principles, maybe in an attempt to systematise the main legal framework applicable to expulsion cases which has emerged from the large case-law. These principles are: the risk of ill-treatment by private groups, principle of *ex nunc* evaluation of the circumstances, principle of subsidiarity, assessment of the existence of a real risk, distribution of the burden of proof, past ill-treatment as an indication of risk, membership of a targeted group.

In regard to Art. 3, the Court first recognises the absoluteness of this prohibition that must also be respected in “the most difficult circumstances”, and must be prohibited in “absolute terms”.<sup>6</sup> Even though the Court does not refer in this section to the UNCHR guidelines, it is worth noting that the UNCHR has also recognised that the *non-refoulement* principle is not subject to derogation.<sup>7</sup> Finally, the Court points out that, in order to determine in a specific case the obligation not to deport because of the existence of substantial grounds to believe that the applicant would face a real risk of being subjected to a treatment included in Art. 3, the Court must examine the conditions in the destination country.

The next principle refers to the risk of ill-treatment by private groups, that concerns practices of persecution by private entities (organisations or individuals). Interestingly, the Court links this principle with the issue of relocation inside the country of destination, relying on the internal flight alternative, but establishing a number of guarantees that must be respected: “the person to be expelled must be able to travel to the area concerned, gain admittance and settle there” and guarantees that the person will not end up in a part of the country where they may be the object of ill-treatment.<sup>8</sup> Even though it is not mentioned by the Court, we consider that the area’s safety should be analysed in a broader sense, which means taking into account the country’s stability and the possibility of long-term protection, and therefore having in mind that, in armed conflicts, safe areas may change quickly.

We will focus next on the controversial part of the judgement, sharply contested by concurring or dissenting opinions.

<sup>5</sup> See. C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, 2016, p. 157.

<sup>6</sup> *J.K. et al. v. Sweden* [GC], cit., para. 77.

<sup>7</sup> For further reference, see J. ALLAIN, *The Jus Cogens Nature of Non-Refoulement*, in *International Journal of Refugee Law*, 2003, p. 539.

<sup>8</sup> *J.K. et al. v. Sweden* [GC], cit., para. 80.

## II.1. THE ASSESSMENT OF THE RISK

Regarding the risk, the Court refers in this case to its previous case-law in which it has been clearly established that there must exist a *real* risk. For a real risk to exist, it is necessary to establish with a high degree of probability that the applicant will suffer treatment proscribed by Art. 3 if he is sent to a third country. The Court considers that the examination to establish such a risk must be especially rigorous. In principle, the demonstration must refer to the personal circumstances of the asylum seeker and the general situation in the country.<sup>9</sup> Alternatively, it is possible to refer just to a general situation of violence in the country, but only in the most extreme cases of violence.<sup>10</sup>

In order to assess the existence of the real risk, the Court will take into account not only the evidence provided by the applicants, but also materials provided by governments, NGOs or other actors as well as materials obtained *motu proprio*.

In the present applicants' case, the Court concludes that the general situation of violence in Baghdad has not reached the threshold of an extreme case of violence, so the risk of the applicants' ill-treatment must be analysed with regard to their personal circumstances.

It is in this context that further element of risk assessment comes into play. According to the Court, past ill-treatment provides a "strong indication of a future, real risk of treatment contrary to Article 3",<sup>11</sup> something that, according to the Court, is confirmed by the previous case-law, by the EU Qualification Directive<sup>12</sup> and by the UNHCR Note on Burden and Standard of Proof in Refugee Claims.<sup>13</sup> The word "strong" has been subject to criticism in Judge O'Leary's concurring opinion and Judge Ranzoni's dissenting opinion. In both cases, the judges refer to the Qualification Directive which includes the previous ill-treatment as a *serious* indication. Therefore, the word "strong" would be a crea-

<sup>9</sup> *Ibid.*, para. 86.

<sup>10</sup> It is worthy to notice that this interpretation has been the object of an evolution in the Court's case-law, since firstly the evidence must be linked to the applicant's personal situation and the general situation in the destination State. This led in an initial case-law to the personalisation of the risk, meaning that a context of general war would not be enough to be able to claim the presence of a real risk. This case-law evolved, as has been mentioned, in such a way that, although the Court now only accepts as grounds of real risk the existence of general violence, it clarifies that the violence must be of such significance that there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

<sup>11</sup> *J.K. et al. v. Sweden* [GC], cit., para. 102.

<sup>12</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

<sup>13</sup> *J.K. et al. v. Sweden* [GC], cit., paras 99-101.

tion of the Court in the present case since, as Judge Ranzoni manifests, it hadn't been used in that context in the previous case-law.<sup>14</sup>

In the case at hand, two periods of time can be established regarding past ill-treatment as an indication of future ill-treatment: the first from 2004 until 2008, and the second from 2008 until 2010. The existence of past ill-treatment during the first period has not been contested. However, the evidence of past ill-treatment during the second period shows some weaknesses,<sup>15</sup> which the Court set aside by considering that the applicants' account of events was generally coherent and credible. The weaknesses of the accounts were largely considered in the six judges' dissenting opinion,<sup>16</sup> which concluded that the applicants' account of the events was not generally credible. In this situation, the principle of the benefit of the doubt and the burden of proof should be examined.

## II.2. PRINCIPLES OF THE BENEFIT OF THE DOUBT AND THE BURDEN OF PROOF

According to the UNHCR, if "the applicant's story is on the whole coherent and plausible; any element of doubt should not prejudice the applicant's claim";<sup>17</sup> therefore the applicant does not need to prove all the facts. In the present case, it can be said that the clearness and evidence of ill-treatment during the initial time period would entail a disadvantage in establishing the credibility of the applicants' story during the second period, where the evidence was not very clear, and in some cases had not been proved. Therefore, a comparative analysis of both time periods may lead to a lack of general credibility of the existence of past ill-treatment from 2008 to 2010. In this sense, it seems that the six judges in their dissenting opinion took the applicants' delay in providing some facts, and the lack of evidence of the facts, as an indicator that their account of events was not generally credible.<sup>18</sup> This may be a restricted interpretation of the UNHCR guidelines, which refer only to a coherent and credible story, without demanding proof of all facts. In addition, during the analysis of the general principles the Court establishes that, "the lack of direct documentary evidence thus cannot be decisive *per se*", and even though some details "may appear implausible", none should detract the Court from the credibility of the applicant's claim.<sup>19</sup>

<sup>14</sup> European Court of Human Rights, judgment of 23 August 2016, no. 59166/12, *J.K. et al. v. Sweden* [GC], dissenting opinion of judge Ranzoni, para. 8. But the previous ill-treatment as strong indication of a real risk seems to have been the minority position of the Commission in the Cruz Varas report of 9 June 1999. See R. ALLEWELDT, *Protection Against Expulsion Under Article 3 of the European Convention on Human Rights*, in *European Journal of International Law*, 1993, p. 368.

<sup>15</sup> *J.K. et al. v. Sweden* [GC], cit., paras 70-75.

<sup>16</sup> European Court of Human Rights, judgment of 23 August 2016, no. 59166/12, *J.K. et al. v. Sweden* [GC], joint dissenting opinion of judges Jäderblom, Gričco, Dedov, Kjølbro, Kucsko-Stadlmayer and Poláčková.

<sup>17</sup> *J.K. et al. v. Sweden* [GC], cit., para. 53.

<sup>18</sup> Joint dissenting opinion of Judges Jäderblom, Gričco, Dedov, Kjølbro, Kucsko-Stadlmayer and Poláčková, *J.K. et al. v. Sweden* [GC], cit., paras 5 and 6.

<sup>19</sup> *J.K. et al. v. Sweden* [GC], cit., paras 92 and 93.

This interpretation has been also contested by Judge Ranzoni, who considers that the accounts must be coherent and credible, not *generally* coherent and credible as the Court established in this judgment. The judge refers to previous judgments in which there were references to coherent and credible accounts without the term “generally”, and concludes that this is an addition of the Court in order to lower the credibility threshold and shift the burden of the proof to the government. The two cases referred by Judge Ranzoni do not mention the term “generally”, but they do modulate credibility by adding the terms “overall”<sup>20</sup> and “sufficiently”.<sup>21</sup> Thus, the Court did not refer in those cases to an exclusive coherent and credible account of the facts, but did apparently seem to relax the threshold of credibility.

In the present case, the findings of the Court regarding the credibility of the applicants’ story led the burden of proof being shifted to the government in order to dispel any doubts about the risk. This finding is in line with the previous analysis regarding the distribution of the proof, in which the Court held that the special situation the asylum seekers found themselves in made it difficult for them to supply evidence, and therefore it was necessary to give them the benefit of the doubt when analysing the statements and documents.<sup>22</sup> It is this benefit of the doubt which led the burden of proof being shifted to the government, even though in principle, as the Court established, the burden of proof lies on the applicants since they are the parties who are able to provide the information.<sup>23</sup>

Once this aspect, a reference to the opinion of Judge Bianku appears the most opportune. This opinion has a special interest in order to establish the obligations of the national authorities when examining the applications, since the judge states that: “When absolute rights are at stake, the national authorities cannot discharge their obligations by concluding that it is likely that these rights will not be violated in the country of destination. The rigorous test requires that in their assessment the authorities should check whether there are substantial grounds to believe that there would be no real risk for the applicants’ rights in the event of their return to Iraq”.<sup>24</sup>

According to the Court, the Swedish Migration Agency did not comment on the applicants’ credibility, and focused mainly on the lack of evidence. Neither the Migration Agency nor the Migration Court exclude the existence of a risk from Al-Qaeda. In addition, the

<sup>20</sup> European Court of Human Rights, judgment of 5 July 2005, no. 2345/02, *Said v. The Netherlands*, para. 53.

<sup>21</sup> European Court of Human Rights, judgment of 26 July 2005, no. 38885/02, *N. v. Finland*, paras 155 and 156.

<sup>22</sup> *J.K. et al. v. Sweden* [GC], cit., para. 92.

<sup>23</sup> *Ibid.*, para. 96.

<sup>24</sup> Concurring opinion of Judge Bianku, *J.K. et al. v. Sweden* [GC], cit.

Court refers to two reports from 2009 and 2014<sup>25</sup> released by the UK Home Office, which confirm that people who had been working for the occupying forces are still being subject to persecution and targeted by Al-Qaeda and other groups. Therefore, the Court held that the family would face a real risk of persecution if they returned to Iraq.

### 11.3. TARGETED GROUP AND INABILITY TO PROTECT

In their dissenting opinion, the six judges claimed that the applicants' past ill-treatment must not be the main basis for assessing the risk of persecution, and in this regard even though the Court pays special attention to those facts, it also refers to the present situation of targeted groups in Iraq. According to previous analysis of the general principles, the Court is reliant on the applicant's account of the events and the information of the country of origin to determine if the person belongs to a targeted group.<sup>26</sup>

As we have mentioned, the applicant J.K. worked with the occupying powers in Baghdad, and therefore belonged to a group targeted by Al-Qaeda. As the Court states, from the UK Home Office reports it cannot be assumed that these people were free of being targeted once the relationship with the American forces had ended.<sup>27</sup>

In this situation, where the persecution comes from private entities, it is necessary to analyse whether the State can provide adequate protection. The Court refers to the Qualification Directive,<sup>28</sup> and, in particular, to its Art. 7, para. 2, in order to establish the standards of protection: an "effective legal system for the detection, prosecution and punishment". The ECJ has interpreted this article in the sense that "verification means that the competent authorities must assess, in particular, the conditions of operation of the institutions, authorities and security forces, on the one hand, and, on the other hand, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country", together with "the laws and regulations of the country of origin and the manner in which they are applied".<sup>29</sup>

In the present case, the Court considers the level of efficiency of the Iraqi security and legal system, concluding that it presents some shortcoming; there is a widespread corruption, the security forces have made limited efforts to respond to violence, and even though the Swedish Migration Court found in 2012 that the government was willing and able to protect targeted groups, the situation has deteriorated since then (*ex*

<sup>25</sup> The period of time to analyse the existence of previous ill treatment is from 2008 to 2010, but the Court developed an *ex nunc* evaluation of the circumstances therefore the present situation in Iraq can be taken into account in order to decide on a decision taken in 2012. See *ibid.*, para. 83.

<sup>26</sup> *J.K. et al. v. Sweden* [GC], cit., para. 105.

<sup>27</sup> *Ibid.*, para. 117.

<sup>28</sup> *Supra*, footnote 12.

<sup>29</sup> Court of Justice, judgment of 22 March 2010, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla*, para. 71.

*nunc* assessment), and the government is not in control of large parts of the territory.<sup>30</sup> Therefore, the Court concludes that, while acknowledging the capability of the Iraqi system to protect the public in general, the State is not able to protect targeted groups, and thus there is a real risk of ill-treatment if they return to Iraq.

### III. CONCLUDING REMARKS

This judgment entails important progress in the protection of asylum seekers against *refoulement*, since it clarifies the main principles applicable to these cases, and also pays attention to the special and difficult situation in which the applicants find themselves. The systematization of the principles was not the subject of the main dissenting opinion, which focused, rather, on applying those principles to the case at hand. Arguably, this means that the principles restated in this judgment can be considered to be widely accepted by the members of the Court. This systematization of principles could amount to an emerging judicial “regulation” of the right of asylum in the context of the Convention.

The restatement of general principles is based not only on the Court case-law and the European Convention of Human Rights, but also on UNHCR’s documents and EU law, which the Court takes into account in order to analyse the content of the principles and to support its interpretation. The reference made by the ECHR to EU asylum law, which it considers applicable to these cases, increases the value of EU law and its case-law when interpreting the rights protected by the Convention. These references also confirm the extent to which EU asylum law has contributed to the development of ECHR principles for protecting asylum seekers and highlight the beneficial effect of a combined consideration of the two systems.

The applicants’ special circumstances may have as a consequence the shift of the burden of proof to the government in application of the principle of the benefit of the doubt, in cases where the account of events is consistent and generally credible. This “pro-asylum applicant” analysis may prevent national institutions from adopting too a restrictive approach towards asylum applications in European countries, and may constitute a considerable hurdle to the measures recently taken by the EU and its Member States to face the refugee crisis.<sup>31</sup>

<sup>30</sup> *J.K. et al. v. Sweden* [GC], cit., para. 120.

<sup>31</sup> See E. CANNIZZARO, *Disintegration Through Law?*, in *European Papers*, Vol. 1, No 1, 2016, www.europeanpapers.eu, p. 3 *et seq.*; J.C. HATHAWAY, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, Vol. 1, No 1, 2016, www.europeanpapers.eu, p. 93 *et seq.*; B. NASCIBENE, *Refugees, the European Union and the “Dublin System”. The Reasons for a Crisis*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 101 *et seq.*; T. SPIJKERBOER, *Minimalist Reflection on Europe, Refugees and Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 553 *et seq.*; E. TSOURDI, *Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office*, in *European Papers*, Vol. 1, No 3, 2016, www.europeanpapers.eu, p. 997 *et seq.*