cannot in themselves act as a bar to all removals of asylum-seekers to that country (see *Tarakhel*, cited above, §§ 114-115).
24. The Court therefore finds, bearing in mind how he was treated by the Italian authorities after his arrival in Italy in 2008 and his failure to inform the Court of his situation after this removal to Italy, that the applicant has not established that his situation in Italy, whether taken from a material, physical or psychological perspective, entails a degree of hardship severe enough to fall within the scope of Article 3. The Court has found no basis on which it can be assumed that the applicant will not be able to benefit from the available resources in Italy for asylum-seekers or that, in case of difficulties, the Italian authorities would not respond in an appropriate manner.
25. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and therefore inadmissible pursuant to Article 35 § 4.
26. The applicant further complained that his removal from the Netherlands would be contrary to Article 8 of the Convention in that he has a relative in the Netherlands who is willing to care for him. Article 8 provides in its relevant part:
"Everyone has the right to respect for his private and family life ..."
27. The case file contains, however, no indication that the applicant has raised this complaint, either in form or substance, before the domestic authorities.
28. It follows that this part of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously Declares the application inadmissible.

107

Europees Hof voor de Rechten van de Mens
26 februari 2015, nr. 1412/12
(Villiger, Nußberger, Yudkivska, De Gaetano, Potocki, Jäderblom, Pejchal)
Noot dr. K.M. Zwaan

Uitzetting. Kirgizië. Onmenselijke behandeling. Medische omstandigheden.

[EVRM art. 3]

Garanties toegang tot medische behandeling in land van herkomst.

Klager, ethnisch Oeigoer van Kirgizische nationaliteit, verblijft momenteel in Zweden. Klager vroeg in 2009 asiel aan in Zweden. Hij leidt aan een chronische nierziekte en moet drie keer per week gedialyseerd worden. Hij stelt in Bishkek (Kirgizië) medische behandeling te zijn geweigerd na zij arrestatie aldaar en dat er onvoldoende dialyse apparaten zijn om aan de behoefte te voldoen. De Zweedse migratie-autoriteiten stellen dat hij niet heeft aangetoond dat hij in geval van uitzetting naar Kirgizië zal worden vervolgd of geen adequate medische behandeling zal ontvangen binnen een redelijke termijn. In januari 2012 heeft de President van het EHRM een interim measure getroffen.Het Hof stelt vast dat in Kirgizië gratis dialyse aanwezig is in publieke ziekenhuizen en tegen een zekere vergoeding in private klinieken. Hiermee is vastgesteld dat klager een dialysebehandeling kan ontvangen in zijn eigen land (r.o. 51). Hoewel klager betoogt dat hij niet op een wachtlijst voor dialyse staat en hij daarvan af is gehaald na zijn arrestatie, is het Hof van oordeel dat uit de stukken blijkt dat hij sinds oktober 2012 op een nationale wachtlijst staat, en dat niet is gebleken dat gelet op zijn medische situatie hij geen prioriteit zou kunnen krijgen om behandeld te worden. Het Hof is niet overtuigd dat klager medische behandeling zal worden geweigerd bij terugkeer nu hij al bijna twee keer zo lang als de wachttijd op de wachtlijst staat (r.o. 52-54). Klager heeft tevens niet aangetoond dat hij niet voor een behandeling in een private kliniek in aanmerking kan komen, al was het maar voor een korte periode (r.o. 55). Het Hof hecht grote waarde aan de garanties van de Zweedse regering dat de immigratie-autoriteiten klager zullen assisteren bij het treffen van de noodzakelijke voorbereidingen om te verzekeren dat zijn behandelingen niet zullen

worden onderbroken en dat hij toegang tot medische behandeling zal krijgen bij terugkomst in zijn land van herkomst (r.o. 56). Ten slotte heeft klager niet aangetoond dat hij op grond van zijn etnische afkomst of anderzins behandeling zal worden geweigerd, m.n. nu hij al tweemaal medische behandeling heeft ontvangen in Kirgizië (r.o. 57).
Het Hof oordeelt met zes stemmen tegen één dat de uitzetting van klager naar Kirgizië geen schending van art. 3 EVRM oplevert. Dissenting opinion rechter De Gaetano over waarde van de afgegeven garanties mede in relatie tot het arrest Tarakhel («JV» 2014/384).

M.T.
tegen
Zweden

(...; *red*.)
(De volledige tekst van het arrest is te vinden op www.echr.coe.int; *red*.)

THE LAW

I. Alleged violation of Article 3 of the Convention
31. The applicant complained that, if he were forced to return to Kyrgyzstan, he would not receive adequate medical treatment for his illness there and would die within a few weeks. He relied on Article 3 of the Convention, which reads as follows:
"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility
32. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant
33. The applicant maintained that the implementation of the Swedish authorities' decision to expel him to Kyrgyzstan would violate Article 3 as he would die within a few weeks if returned to his home country where he would not receive adequate treatment.
34. In his view, the migration authorities had made errors when assessing his case. For instance, the supplementary interview with the Migration Board was the only opportunity given to tell his story in detail, since the first interview had served to register his asylum application and briefly state his reasons for leaving his country. Moreover, in its reasoning, the Migration Court seemed to have concluded that he did receive blood dialysis in Kyrgyzstan in November 2009. However, this conclusion was wrong. His medical records from the hospital in Kyrgyzstan showed that he had received medical care but not blood dialysis. Here, he referred to an attached medical certificate, dated 3 July 2012 and issued by his treating physician, a specialist in kidney diseases at Karolinska University Hospital. The medical certificate stated that the medical records from Kyrgyzstan did not show that he had received blood dialysis. What these records showed was that in April 2009 he had been diagnosed with high blood pressure and kidney infection (chronic *glomerulonephritis*) which caused a successive decrease in kidney function until they stopped functioning completely and dialysis would be needed. References in the medical records to "filtration" most probably referred to a measure of the applicant's own kidney function as this measurement decreased from April to November 2009, indicating a progression of the illness. However, the "filtration" level in November 2009 (13.99 ml/min) was, according to the certificate, still above the level where dialysis would be commenced in Sweden. Furthermore, when the applicant had first come to the hospital in Sweden, he had had no physical preparation for receiving blood dialysis (for example an AV-fistula). The certificate finally stated that, at the present time, the applicant's disease had progressed to the point where he no longer had any kidney function and thus needed blood dialysis to survive.
35. Consequently, the applicant argued that although blood dialysis was available in Kyrgyzstan, he had never received it there and, more importantly, he would not obtain access to it within the few weeks necessary upon return. Before leaving Kyrgyzstan in 2009, he had been informed orally that the waiting time for blood dialysis was two to three years. Since he had not heard anything since, he submitted that his statements should be accepted as they were credible.

36. Lastly he noted that his family in Kyrgyzstan would not be able to provide any help or care for him during the short period he would survive without blood dialysis before dying. He had already had a crisis reaction following the final negative decision from the Migration Board of Appeal where he had missed two sessions of dialysis and medical staff had found him in very bad shape. Thus, it was clear that, if expelled to Kyrgyzstan, he would face an early death after a short period of acute physical and mental suffering, in violation of Article 3 of the Convention.

(b) The Government

37. The Government contended that the applicant had failed to substantiate his claims and, thus, the application did not reveal a violation of Article 3 of the Convention.

38. They stressed that the issue of whether the applicant's ill-health entitled him to a residence permit on grounds of exceptionally distressing circumstances had been considered at length by the domestic migration authorities, including in 2012 by the Migration Board which considered whether his ill-health was an impediment to the enforcement of the expulsion order. The Government further argued that Swedish legislation and the domestic examination fulfilled the requirements set by the Convention and the Court's case-law as regards the expulsion of the seriously ill. In their view, great weight should therefore be attached to the findings of the Swedish migration authorities in the instant case.

39. In line with the above, the Government noted that it was not disputed, either during the domestic proceedings or before the Court, that the applicant suffered from chronic *glomerulonephritis* and chronic kidney failure, that he needed regular blood dialysis and medication, and that without this treatment he would die within a couple of weeks. A kidney transplant would also improve his health and increase his life expectancy. They further observed that blood dialysis was available in Kyrgyzstan. In fact, the Government had requested information from the Kyrgyz authorities about the availability and access to dialysis there. In a reply, dated 27 September 2012, the Kyrgyz Ministry of Health had stated that the country had 55 dialysis machines for treating acute and chronic *glomerulonephritis*. 38 of these machines were located at three different hospitals in Bishkek. Thus, the Government considered it clear that treatment was readily available and performed in Kyrgyzstan and that the applicant, who had the burden of proof, had failed to adduce any evidence in support of his submissions that the waiting time for dialysis was two to three years and that kidney transplants were not available in Kyrgyzstan.

40. Moreover, the Government submitted that, in the light of the available medical information in the case, there was no doubt that the applicant had been given the same diagnosis when he was in Kyrgyzstan as when examined in Sweden. They also noted that the Kyrgyz medical records showed that the applicant had received adequate treatment in his home country, both before and after his alleged arrests by the authorities. The fact that the health care would not be readily available or would come at a substantial cost would, according to the Court's case-law, not mean that an expulsion would be in violation of Article 3.

41. Furthermore, the Government observed that the applicant had family in Kyrgyzstan, including his parents and younger siblings, with whom he kept in contact. Also, according to the Government, the fact that the applicant was of Uyghur ethnicity did not in itself put him at risk. They referred to country information which indicated no signs of direct discrimination against the Uyghur minority on the part of the Kyrgyz authorities or with regard to access to health care in the country.

42. As concerned the actual enforcement of the deportation order, the Government submitted that no enforcement of an expulsion order would occur unless the authority responsible for the enforcement of the order (normally the Migration Board) deemed that the medical condition of the individual so permitted. If considered necessary, the responsible authority could, for example, arrange for medical staff and any necessary equipment to be available onboard during the flight. On condition that the individual concerned consented, the responsible authority could also make arrangements for his or her assistance in the country of origin upon return, such as ensuring that the alien was met and taken care of by medical staff upon arrival and that medical records were sent in advance so that proper care could be arranged.

43. In the applicant's case, the Government observed that the Migration Board had not yet initiated the practical arrangements for his return.

However, if the enforcement of the expulsion order were to materialise, the Government had been informed by the Migration Board that it would encourage the applicant to contact the doctors responsible for his current dialysis treatment in Sweden in order to receive relevant information and instructions about his need for dialysis, also in connection with the journey. The Migration Board would further encourage the applicant to contact the medical institutions in his home country to make sure that dialysis treatment was reserved for him upon return and that an appointment was scheduled for his first treatment. If the applicant would need assistance in making these preparations, the Migration Board would assist him in making the necessary contacts. Thus, the Government was convinced that the Migration Board would make every effort to ensure that the applicant would not have to interrupt his dialysis if expelled and that he would have access to necessary medical care upon return to Kyrgyzstan.
44. In conclusion, the Government maintained that the applicant had failed to substantiate his claim and that the case did not disclose a violation of Article 3 of the Convention.

2. The Court's assessment

(a) General principles
45. The Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, *inter alia, Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102 Series A no. 215, p. 34). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 of the Convention implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008).
46. Moreover, the suffering which flows from naturally-occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III).
47. However, aliens who are subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).
48. Furthermore, it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see *NA. v. the United Kingdom*, no. 25904/07, § 111, 17 July 2008).

(b) The applicant's case
49. The Court notes at the outset that the applicant exclusively complains that his expulsion would entail a violation of Article 3 due to his ill-health. Thus, he has not maintained before the Court his claims relating to persecution in his home country, as presented before the Swedish authorities. Since the Court can see no reason to examine them of its own motion, it will only consider the applicant's complaint as presented to the Court in his application.
50. As concerns the applicant's health, the Court notes that it is undisputed, and supported by medical certificates, that he suffers from chronic *glomerulonephritis* and chronic kidney failure for which he receives blood dialysis in Sweden three times per week. Without this regular treatment, his health would rapidly deteriorate and he would die within a few weeks.

51. It is further clear that blood dialysis treatment is available in Kyrgyzstan. According to information obtained by the Swedish Government from the Kyrgyz authorities in September 2012 (see above paragraph 39), the country had 55 dialysis machines of which 38 were located at three public hospitals in Bishkek, the applicant's home town. It further appears from a recent article from a Kyrgyz news agency (see above paragraph 29), that there are now 65 dialysis machines in the country although not all seem to be working properly. The article further notes that dialysis treatment is available in private centres at a cost. From this, the Court can conclude that free dialysis is available at public hospitals in Kyrgyzstan and that there are also private centres where patients can receive dialysis, albeit at a certain cost. Consequently, the Court finds it established that the applicant would be able to receive dialysis treatment in his home country.

52. However, the applicant has argued that there is a waiting time of two to three years for dialysis at the public hospitals and that thus, in reality, he would not have access to treatment necessary for his survival within the very short time of a few weeks. To support his claim, he has submitted a letter from his father to the Kyrgyz authorities in which they are asked to provide the applicant with dialysis treatment, as well as the reply from the authorities, dated February 2014, in which they state that they cannot provide the requested treatment due to the long waiting time and lack of dialysis equipment (see above paragraphs 22-23).

53. While the Court accepts that there is a waiting list for dialysis treatment due to the limited number of machines in proportion to the number of patients in need, it is not clear whether this waiting list consists only of persons in urgent need of dialysis or also of persons who will need dialysis in the future. It would rather appear to be the latter, since the Court observes that the applicant claimed before the migration authorities that he had been put on the waiting list in April 2009, at a time when he was not yet in need of dialysis, but that he had been removed in September 2009 after his arrest. Moreover, according to a certificate by the Kyrgyz Ministry of Health, dated 9 July 2012, and submitted by the applicant to the Migration Board, he had been on the national waiting list for blood dialysis since 27 October 2009, which was also confirmed by a certificate, dated 23 December 2011, from the hospital where the applicant had been treated (see above paragraph 20). In the Court's view, this indicates that persons may be put on the waiting list before they are in actual need of dialysis (as was the applicant's situation in April and October 2009) and thus that it should still be possible to be granted priority on the list and be given treatment if there is an urgent need for immediate dialysis due to the progression of the illness. The fact that the applicant claims that he was not given dialysis while in Kyrgyzstan appears natural to the Court in view of the medical certificate by the Swedish physician stating that he would not have been given dialysis in Sweden either, as the illness was not sufficiently advanced (see above paragraph 34).

54. Furthermore, having regard to the certificates mentioned above, the Court cannot but conclude that the applicant is on the national waiting list for dialysis treatment and that he has now been on the list for roughly five years, much longer than the two to three years' waiting time indicated by him. In this respect, the Court observes that the letter from the applicant's father to the Kyrgyz Ministry of Health, dated February 2014 (see above paragraph 22), does not mention the waiting list at all but only states that the applicant is being treated in Sweden and the family would like him to come back and be treated in Kyrgyzstan. Likewise, the reply from the Ministry (see above paragraph 23) does not mention the waiting list, or the applicant's placement on it, but is rather a request to the Swedish authorities to continue treating the applicant, than a reply to the applicant's father. Thus, this last exchange of letters does not alter the Court's conclusion that the applicant is on the national waiting list and has been for the last five years. It follows from this that the Court is not convinced by the applicant's submission that he would be refused treatment in Kyrgyzstan upon return, since he has been on the waiting list for almost twice the waiting time indicated by him.

55. Moreover, and as noted above, the Court observes that there are also private centres in Kyrgyzstan where it is possible to receive blood dialysis treatment. Although this would come at a certain cost, the applicant has not argued that this option would not be open to him. In this respect, the Court notes that the applicant has his parents and siblings in Kyrgyzstan, with whom he remains in contact and who are actively assist-

ing him, as is shown by the letter the applicant's father wrote to the authorities. It should thus be possible for the applicant to use this option as well, at least as a temporary measure if he had to wait for access to the free public dialysis treatment or, possibly, until he could have a kidney transplant as such procedures have been carried out in Kyrgyzstan since 2012 and consequently would also be an option for the applicant.

56. The Court further takes note of the Government's submission that no enforcement of the expulsion order will occur unless the authority responsible for the enforcement of the expulsion deems that the medical condition of the applicant so permits and that, in executing the expulsion, the authority will also ensure that appropriate measures are taken with regard to the applicant's particular needs. Moreover, it attaches significant weight to the Government's statement that the Migration Board will encourage and assist the applicant in making the necessary preparations in order to ensure that his dialysis treatment is not interrupted and he has access to the medical care he needs upon return to his home country. The Court further sees no reason to doubt the Government's assertion that the Migration Board would make every effort to see to it that the applicant would not have to pause his dialysis if expelled and that he would have access to the medical care he needs upon return to Kyrgyzstan. While the Court would stress that it is the applicant's responsibility to cooperate with the authorities and primarily for him to take the necessary steps to ensure the continuation of his treatment in his home country, it considers that in the very special circumstances of the present case, where the applicant would die within a few weeks if the dialysis treatment were interrupted, the domestic authorities' readiness to assist the applicant and take other measures to ensure that the removal can be executed without jeopardising his life upon return is particularly relevant to the Court's overall assessment.

57. Lastly, the Court considers that the applicant has failed to substantiate that he would be refused care on the basis of his ethnicity or otherwise, noting in particular that he has already received treatment twice in his home country, the second time after his alleged arrest.

58. Having regard to all of the above, as well as to the high threshold set by Article 3 particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find, in the special circumstances of the present case, that there is a sufficiently real risk that the applicant's expulsion to Kyrgyzstan would be contrary to Article 3 of the Convention. The present case does not disclose the very exceptional circumstances of *D. v. the United Kingdom* (2 May 1997, *Reports of Judgments and Decisions* 1997-III). Contrary to that case, where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts, in the present case, blood dialysis is available in Kyrgyzstan, the applicant's family are there and he can rely on their assistance to facilitate making arrangements for treatment and he can also count on help from the Swedish authorities for such arrangements if necessary.

59. Consequently, the Court finds that the implementation of the expulsion order of the applicant to Kyrgyzstan would not violate Article 3 of the Convention.

II. Rule 39 of the Rules of Court

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

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

For these reasons, the Court

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that the expulsion to Kyrgyzstan of the applicant would not give rise to a violation of Article 3 of the Convention;

3. *Decides*, unanimously, to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the

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

Dissenting opinion of Judge de Gaetano

1. I cannot share the opinion expressed by the majority in the operative part of the judgment to the effect that the applicant's expulsion to Kyrgyzstan in the circumstances of the present case would not give rise to a violation of Article 3 of the Convention. In my view it would give rise to such a violation.

2. The basic facts are not disputed. The applicant has been in Sweden for just over five years. Irrespective of the original reason for his arrival in that country, and regardless of his state of health at that time, the applicant *today* suffers from chronic kidney failure which necessitates haemodialysis three times per week. If this treatment were interrupted, he would die within a couple of weeks, at the very most three. This has been acknowledged by both the domestic courts (see paragraphs 10 and 14) and the Court (paragraph 50).

3. The critical issue in this case is whether the applicant's removal to Kyrgyzstan would expose him to a real risk of suffering treatment which reaches the minimum threshold to engage Article 3. As was stated in *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002, at § 52:

"The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible..."

Considering the absolute nature of Article 3, there is no logical reason why the prohibition of removal or expulsion should not equally apply "where the harm stems from a naturally occurring illness and a lack of adequate resources to deal with it in the receiving country, if the minimum level of severity, in the given circumstances, is attained. Where a rigorous examination reveals substantial grounds for believing that expulsion will expose the person to a real risk of suffering inhuman or degrading treatment, removal would engage the removing State's responsibility under Article 3 of the Convention." (see § 5 of the joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008); see also in this respect the partly concurring joint opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto de Albuquerque in *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011). The same reasoning is implicit in the judgment of the Fourth Section of the Court in the case of *Aswat v. the United Kingdom*, no. 17299/12, 16 April 2013 (see in particular §§ 49 to 52) – although the case concerned the extradition of a suspected terrorist to the United States of America, the applicant's enduring mental disorder (paranoid schizophrenia) coupled with the uncertainty as to the conditions of detention *and the medical services that would be made available to him* in the requesting State, led to a unanimous finding of a violation of Article 3.

4. In the instant case the applicant has, in my view, convincingly shown that he stands very little chance of receiving the required haemodialysis immediately upon his return to Kyrgyzstan. Of course haemodialysis is carried out in that country (and probably even the less effective peritoneal dialysis, but there seems to be no information on that); the applicant had also received some form of treatment there before he had left for Sweden. The question, however, is whether the applicant can *now* have access to haemodialysis *immediately* upon his arrival there. The Court, in coming to its conclusion, has regrettably glossed over with hypotheses and conjectures the hard evidence provided by the letter of 17 February 2014 from the Kyrgyz Ministry of Health in reply to the applicant's father request (see paragraph 54), and also ignored the certificate of 29 December 2011 issued by the Chief Physician at the Kidney Medical Clinic of Karolinska University Hospital (paragraph 18) to the effect that it "would be completely unreasonable to expel [the applicant] without ensuring that dialysis would be available to him upon return to his home country" (paragraph 18). Instead the Court relies mainly on general (and unsubstantiated) assumptions (paragraphs 53 and 54) that the applicant has "moved up" the list of those waiting for haemodialysis since he was first placed on it. The Court also argues, or seems to argue, that since there are also "private centres" in Kyrgyzstan which offer haemodialysis and the applicant has family in his country of origin (even though the applicant has clearly stated that his family there would not be able to provide any help – paragraph 36 – a

statement which the respondent Government have not really challenged) the "*Pretty* threshold" has not been reached.
5. The clearest indication that that threshold *has been* reached in the instant case is, in my view, provided by the Court's own emphasis in paragraph 56 on the "assurances", provided by the respondent Government in their submissions, as to the manner of execution of the expulsion order, and in particular on the assurance that "the Migration Board would make *every effort* to see to it that the applicant would not have to pause his dialysis if expelled and that he would have access to the medical care he needs upon return to Kyrgyzstan" (emphasis added). What does the expression "every effort" imply in a situation like the one at hand? Does it mean that if the Migration Board does its very best (even with the full cooperation of the applicant) but is ultimately unsuccessful in securing uninterrupted haemodialysis, the expulsion can go ahead without there being any breach of Article 3? In *Tarakhel v. Switzerland* [GC], no. 29217/12, 4 November 2014, the Court found that *there would be* a violation of Article 3 if the applicants were removed to *another State party to the Convention* without the Swiss authorities having first obtained certain guarantees from that other State. I fail to see why such a condition was not inserted into the operative part of the judgment in the instant case, particularly when the country to which the present applicant is to be removed is *not* a party to the Convention (there is nothing in the case file to suggest that if diplomatic or other assurances were sought from the authorities of Kyrgyzstan and obtained, these would be worthless – see, by converse implication, §§ 147 and 148 of *Saadi v. Italy*, [GC] no. 37201/06, 28 February 2008). Conditions have been inserted without difficulty in other judgments against Sweden, such as *W.H. v. Sweden*, no. 49341/10, 27 March 2014,[1] and *A.A.M. v. Sweden* no. 68519/10, 3 April 2014, although the conditional finding in both cases was one of no violation, and the factual context was different from the one at hand.

1 Currently before the Grand Chamber. (Struck out of the list, *red.)*

NOOT

1. In het kort de casus. Klager, etnische Oeigoer van Kirgizische nationaliteit, verblijft in Zweden waar hij in 2009 asiel vroeg. Hij leidt aan een chronische nierziekte en moet drie keer per week gedialyseerd worden. De Zweedse migratieautoriteiten stellen dat hij niet heeft aangetoond dat hij in geval van uitzetting naar Kirgizië zal worden vervolgd of geen adequate medische behandeling zal ontvangen binnen een redelijke termijn. In januari 2012 heeft de President van het Europees Hof voor de Rechten van de Mens (EHRM of Hof) een interim measure getroffen.
2. Onder verwijzing naar de zaak *Pretty* (EHRM 29 april 2002, no. 2346/02, § 52, *NJ* 2004, 543 m.nt. Alkema) geeft het Hof aan dat: 'the suffering which flows from naturally-occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.' Het feit dat de levensverwachting van een persoon zou afnemen door de uitzetting, is geen reden om dan direct te oordelen dat sprake is van een schending van art. 3 EVRM (zie par. 47 *M.T.*). Het EHRM benadrukt nogmaals dat uitzetting van een (fysiek of psychisch) zieke vreemdeling naar een land waar de medisch faciliteiten minder goed zijn dan in de verdragsstaat, dit mogelijk een art. 3 EVRM aspect kan betreffen, maar (zie par. 47 *M.T.*) "only in a very exceptional case, where the humanitarian grounds against the removal are compelling (see *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008, «JV» 2008/266)."
3. Sinds 2 mei 1997 (EHRM 2 mei 1997, *RV* 1997, 70 m. nt. Terlouw, *D.* t. *het VK*, *St. Kitts*) geldt dat art. 3 EVRM in bepaalde gevallen uitzetting verbiedt van ernstig zieke personen van wie de situatie dramatisch zou verslechteren na uitzetting, bijvoorbeeld door het ontbreken van adequate medische voorzieningen.
In recente uitspraken van het Hof van Justitie (HvJ) is duidelijk gemaakt dat er verschil is tussen non-refoulement in het kader van een recht op asiel, en non-refoulement in het kader van traumabeleid (waarvan sprake is in de EHRM zaken van *D. en N.*) Het HvJ oordeelde in de uitspraak inzake *M'Bodj* dat medische gevallen

niet onder de werking van de Definitierichtlijn vallen (HvJ EU 18 december 2014, C-542/13, «JV» 2015/23 m.nt. Battjes; S. Kok, 'Uitspraak van de Maand', *A&MR* 2015, nr. 1, p. 37-41). Ernstig zieke personen zonder een asielrelevant relaas vallen dus niet onder de bescherming geboden onder art. 15b van de Definitierichtlijn 2011/95/EU. Het Unierecht biedt hier geen bescherming. Het EVRM zal in zeer uitzonderlijke situaties nog steeds leiden tot een verbod op uitzetting (zie hierover R. Bruin, 'Kroniek toelatingsgronden asiel', *A&MR* 2015, nr. 2, p. 76 e.v.). Battjes geeft in zijn noot al aan dat de gevolgen voor het Nederlandse asielbeleid aanzienlijk zijn, omdat in de Vc 2000 C/2.3.2 staat dat op grond van art. 29 lid 1b Vw 2000 de verblijfsvergunning asiel kan worden verleend aan deze art. 3 EVRM-gevallen; deze categorie zal overgeheveld moeten worden naar de reguliere vergunningen.

In een arrest van dezelfde datum heeft het HvJ in de zaak *Abdida* een prejudiciële vraag beantwoord over de Terugkeerrichtlijn (HvJ EU 18 december 2014, C-562/13, *Abdida*, «JV» 2015/59 m.nt. Larsson). In deze zaak van de Nigeriaan Abdida gaat het HvJ verder dan in de zaak *M'Bodj*. Het HvJ beslist – onder verwijzing naar *M'Bodj* – dat de Definitierichtlijn, de Procedurerichtlijn en de Opvangrichtlijn niet van toepassing zijn op medische gevallen als die van Abdida. Het HvJ oordeelt dat in de zeer uitzonderlijke gevallen waarin de verwijdering van een derdelander die aan een ernstige ziekte lijdt, naar een land waar geen adequate behandeling beschikbaar is, het beginsel van non-refoulement schendt - verwezen wordt in punt 47 naar EHRM 27 mei 2008 (appl.nr. 26565/05, *N.* t. *het Verenigd Koninkrijk*, «JV» 2008/266 m.nt. Battjes). Art. 5 Terugkeerrichtlijn 2008/115/EU (waarin vervat een verbod van refoulement) verzet zich ertegen, gelezen in het licht van art. 10 lid 2 Handvest, dat de lidstaten die verwijdering uitvoeren. Battjes wijst er in zijn noot bij *M'Bodj* («JV» 2015/23) op dat het onderscheid tussen de "gewone" art. 3-gevallen en medische gevallen niet overdreven moet worden, en verwijst daarbij naar Straatsburgse jurisprudentie in o.a. *Sufi en Elmi* (EHRM 28 juni 2011, «JV» 2011/332).

4. Het EHRM stelt vast dat in Kirgizië gratis dialyse aanwezig is in publieke ziekenhuizen en tegen een zekere vergoeding in private klinieken. Hiermee is vastgesteld dat klager een dialysebehandeling kan ontvangen in zijn eigen land (par. 51; vgl ook ABRvS 13 mei 2014, 201310962/1/V1, «JV» 2014/220 m.nt. Battjes; beroep op art. 64 Vw 2000 door een Nigeriaanse nierpatiënt). Zie voor de Nederlandse situatie B. Wallage, 'Inhumaan vreemdelingenbeleid, de zieke vreemdeling', *NJB* 2014, nr. 12, p. 624 e.v.; L. van Wijnbergen, 'Het Bureau Medische Advisering: de stand van zaken', *JNVR* 2014, nr. 2 /16; T. Hasselo & I. van der Zaal-van Bommel, 'De werkwijze van Bureau Medische Advisering', *JNVR* 2014, nr. 2 /17. Zie ook Vc 2000, paragraaf A3/7, B8/9 en B9/9; en Protocol BMA oktober 2010, p. 8 (te vinden op www.ind.nl).

Het Hof is er niet van overtuigd dat klager de medische behandeling zal worden geweigerd bij terugkeer nu hij al bijna twee keer zo lang als de wachttijd op de wachtlijst staat, namelijk vijf jaar (par. 52-54). Klager heeft tevens niet aangetoond dat hij niet voor een behandeling in een private kliniek in aanmerking kan komen, al was het maar voor een korte periode (par. 55).

5. Het Hof hecht grote waarde aan de garanties van de Zweedse regering dat de immigratie autoriteiten klager zullen assisteren bij het treffen van de noodzakelijke voorbereidingen om te verzekeren dat zijn behandelingen niet zullen worden onderbroken en dat hij toegang tot medische behandeling zal krijgen bij terugkomst in zijn land van herkomst (par. 56).

6. Ten slotte heeft klager niet aangetoond dat hij o.g.v. zijn etnische afkomst of anderszins behandeling zal worden geweigerd, met name nu hij al tweemaal medische behandeling heeft ontvangen in Kirgizië (par. 57). Het Hof oordeelt met zes stemmen tegen één dat de uitzetting van klager naar Kirgizië geen schending van art. 3 EVRM oplevert.

7. In de dissenting opinion (van De Gaetano) wordt aandacht besteed aan de waarde van de afgegeven garanties mede in relatie tot het arrest-*Tarakhel*. In de zaak-*Tarakhel* (EHRM 4 november 2014, no. 29217/12, *Tarakhel* t. *Zwitserland*, «JV» 2014/384 m.nt. Battjes) kijkt het EHRM eerst naar de algemene situatie en vervolgens naar de bijzondere, individuele omstandigheden. Het minimumniveau van ernst dat een behandeling moet hebben om als onmenselijke of verneder ende behandeling te kwalificeren, hangt af van individuele omstandigheden zoals leeftijd (par. 118 *Tarakhel*), maar ook gezondheid. In *Tarakhel* eist het Hof nadere details over de

"specifieke omstandigheden", en ook "gedetailleerde en betrouwbare informatie over de specifieke opvanglocatie" (par. 121 *Tarakhel*). Bij geheel individuele omstandigheden kunnen garanties het risico wegnemen.
De Gaetano is van oordeel dat wel sprake zou zijn van een mogelijke art. 3 EVRM-schending. De Gaetano geeft aan dat hij er niet van overtuigd is dat de vreemdeling inderdaad toegang zal hebben tot nierdialyse. Met name par. 56, grijpt hij aan om te betogen dat er in dit geval onvoldoende garanties zijn; "the Migration Board would make every effort to see to it that the applicant would not have to pause his dialysis if expelled and that he would have access to the medical care he needs upon return to Kyrgyzstan". De Gaetano vraagt zich af: "What does the expression "every effort" imply in a situation like the one at hand? Does it mean that if the Migration Board does its very best (even with the full cooperation of the applicant) but is ultimately unsuccessful in securing uninterrupted haemodialysis, the expulsion can go ahead without there being any breach of Article 3?" Hij refereert specifiek aan het vereiste uit *Tarakhel*, waarin individuele garanties werden gevraagd voordat tot overdracht mocht worden overgegaan. Dit is alleen maar meer van belang in dit geval, wanneer de staat waarnaar wordt uitgezet geen partij is bij het EVRM, aldus De Gaetano.
8. Deze uitspraak bevestigt de status quo waar het gaat om een mogelijke schending van art. 3 EVRM bij het uitzetten van zieke vreemdelingen. De art. 3-jurisprudentie van het EHRM is buitengewoon restrictief. Het Hof geeft nog immer geen precieze criteria, wanneer sprake is van "exceptional cases" and "compelling humanitarian grounds". In bovenstaande casus was hiervan in ieder geval geen sprake, aldus het Hof.

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108

Europees Hof voor de Rechten van de Mens
17 februari 2015, nr. 10260/13,
Ontvankelijkheidsbeslissing
(Casadevall, López Guerra, Popović, Pardalos, Silvis, Griţco, Antoanella Motoc)

Uitzetting. Democratische Republiek Congo. Identiteit en nationaliteit, vaststellen van. Onmenselijke behandeling. Verblijfsalternatief, binnenlands.

[EVRM art. 3, 35 lid 3 sub a]

Geen misbruik klachtrecht op grond van onduidelijkheid over identiteit klager; geen situatie van extreem geweld buiten Oost-Congo.

Klager, burger van de DRC en lid van de Banyamulenge (Tutsi) gemeenschap, heeft op 19 juni 2012 een asielaanvraag ingediend in Nederland. Op 11 april 2013 heeft de President van het EHRM een interim measure getroffen. Op 18 februari 2014 hebben de Belgische autoriteiten informatie uit het EU-VIS overgelegd waaruit blijkt dat een persoon met de naam van klager een toeristenvisum heeft aangevraagd op 17 april 2012 en gekregen en dat deze persoon een Rwandees paspoort bezit. De Nederlandse regering stelt dat de klacht niet-ontvankelijk zou moeten worden verklaard omdat klager misbruik heeft gemaakt van het klachtrecht, art. 35 lid 3 sub a EVRM.
1. Enkel op basis van paspoortfoto's of in combinatie met andere elementen (taalanalyse die hem herleid tot spraakgemeemschap in Rwanda) is onvoldoende aangetoond dat de persoon aan wie een toeristenvisum is verleend en klager een en dezelfde persoon zijn. Er zijn geen andere objectieve bewijsmiddelen, zoals vingerafdrukken, aangevoerd die klager ontegenzeggelijk linken aan de Rwandese paspoorthouder. Onder deze omstandigheden is er geen sprake van opzettelijke misleiding van het Hof (r.o. 33).
2. Met betrekking tot art. 3 EVRM verwijst het Hof naar M.E. tegen Denemarken (8 juli 2014, 58363/10, r.o. 47-51) en B.K.A. tegen Zweden (r.o. 44, ve13002587). Hoewel discriminatie op grond van etniciteit voorkomt in de DRC heeft klager niet aangetoond dat behalve in gebieden in het Oosten van de DRC, welke volgens de Nederlandse autoriteiten vallen onder art. 15 onder c Definitierichtlijn, de algemene veiligheidssituatie in de DRC, inclusief