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PROTECTIONS AGAINST INHUMAN PUNISHMENT FAIL MIGRANTS WITH MENTAL ILLNESSES IN EUROPE

by Hannah Friedrich*

In *Savran v. Denmark*, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled that the Danish government did not violate the European Convention on Human Rights' (ECHR) prohibition of torture when it deported the petitioner, a man diagnosed with schizophrenia, to Turkey through a criminal sentencing in spite of the risk to his mental health.¹ The petitioner, Arif Savran, had lived in Denmark from the age of six until his 2016 deportation, when he was thirty-one.² After the government of Denmark deported him to Turkey, he had unpredictable access to medication, and he did not receive the follow-up consultations his previous treating psychiatrist in Denmark recommended.³ In 2015, Mr. Savran petitioned the ECtHR to hear his case. He alleged that the Danish government breached Article 3 by deporting him because it disregarded his medical needs, jeopardized his access to care, and exacerbated his condition.⁴ Reversing the lower chamber's decision, the Grand Chamber voted to uphold a strict

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¹ *Savran v. Denmark*, App. No. 57467/15, ¶ 148 (December 7, 2021), [https://hudoc.echr.coe.int/eng?i=001-214330; Convention for the Protection of Human Rights and Fundamental Freedoms](https://hudoc.echr.coe.int/eng?i=001-214330;Convention%20for%20the%20Protection%20of%20Human%20Rights%20and%20Fundamental%20Freedoms), Art. 5, Nov. 4, 1950, 005 E.T.S. 4 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

² *Savran*, App. No. 57467/15 at ¶¶ 68, 70–71.

³ *Id.* at ¶¶ 70–71 (noting specifically that Arif Savran could not access his prescriptions because they were not reliably available near him).

⁴ *Id.* at ¶¶ 3, 68.

interpretation of the standard for finding deportations in violation of Article 3 on the basis of a medical risk.⁵

The standard for withholding deportation due to medical risk is set out in *Paposhvili v. Belgium*.⁶ For a state to violate Article 3, deportation must expose the person to a substantial risk that their condition will suffer a "serious, rapid, and irreversible decline" as a result of the deporting authority's action.⁷ This standard creates a high burden of proof for a petitioner to meet before the ECtHR will find a violation of the ECHR. Nevertheless, the ECtHR upheld a strict interpretation of this standard and found that Mr. Savran did not face a high enough risk of a swift and permanent decline as a result of his schizophrenia.⁸ The ECtHR confirmed that applicants with mental illnesses can meet the *Paposhvili* threshold but found that Mr. Savran's lack of access to appropriate care did not rise to that level.⁹

The ECtHR's decision to uphold the *Paposhvili* standard calls into question the effectiveness of Article 3 protections for migrants at risk of deportation.¹⁰ Seven European governments intervened in *Savran*, advocating to maintain the high threshold of the *Paposhvili* standard and emphasizing the requirement of an "irreversible" decline in health.¹¹ In Mr. Savran's case, that requirement is particularly challenging to meet due to the chronic nature of his illness and the lack of consistent medical supervision which could have gathered stronger evidence.¹² One contributing factor to this decision was the ECtHR's skepticism about the severity of Mr. Savran's condition, as well

⁵ *Id.* at ¶¶ 88, 143.

⁶ *Paposhvili v. Belgium*, App. No. 41738/10, ¶ 183 (December 13, 2016), <https://hudoc.echr.coe.int/eng?i=001-169662>.

⁷ *Id.*

⁸ *Savran*, App. No. 57467/15 at ¶ 143.

⁹ *See id.* at ¶ 137.

¹⁰ *See Savran*, App. No. 57467/15 at Partly Concurring and Partly Dissenting Opinion of Judge Serghides, ¶ 16.

¹¹ *See Savran*, App. No. 57467/15 at ¶¶ 110, 112 (The Dutch, French, German, Norwegian, Russian, Swiss, and United Kingdom governments intervened).

¹² *Id.* at Partly Concurring and Partly Dissenting Opinion of Judge Serghides, ¶ 21.

as the government intervenors' concerns that individuals may lie about mental health conditions to avoid expulsion.¹³

The ECtHR has a pattern of requiring a showing of some irreversible or permanent detrimental effect resulting from a deportation, extradition, or other form of expulsion.¹⁴ For instance, the standard to stay an extradition under Article 3 requires a showing of an irreducible life sentence.¹⁵ The standard of irreversible consequences puts little to no restrictions on member states' authority to expel individuals facing serious health risks or life in prison. If the ECtHR continues to uphold these standards, Article 3 protections will remain nominal at best.¹⁶ *Savran* has particularly troubling implications for individuals with mental illnesses facing deportation, as the swift and irreversible decline requirement not only imposes a high burden of proof but is also misaligned with many experiences of mental illness. The United Nations' "Principles for the Protection of Persons with Mental Illness" establishes a right to "the best available mental health care."¹⁷ The ECtHR's strict *Paposhvili* standard as applied in *Savran* undercuts that right for migrants to Europe. The intervention of multiple member states indicates a political unwillingness to reshape immigration law around migrants' health and best interests.

As Europe reacts to the current Ukrainian refugee crisis, commentators have noted an apparent hypocrisy in the willingness to take in white refugees in comparison to the European response to the Syrian

refugee crisis and backlash against African migration.¹⁸ At this pivotal moment when double standards in the treatment of white migrants and migrants of color are being exposed,¹⁹ there is also an opportunity for European authorities to correct this imbalance. To fully protect the rights and well-being of migrants of color, it is necessary to confront the hostile legal environment facing vulnerable migrants whose ethnicity intersects with their mental or chronic illness. The unfavorable ruling in *Savran* demonstrates the need for a new push to fully recognize the right to treatment for migrants with mental illnesses.

¹³ See *Savran*, App. No. 57467/15 at ¶¶ 19, 113.

¹⁴ See *Paposhvili*, App. No. 41738/10, ¶ 183; *Vinter and Others v. United Kingdom*, App. Nos. 66069/09, 130/10, and 3896/10, ¶¶ 83–88 (July 9, 2013), <https://hudoc.echr.coe.int/eng?i=001-122664>; *Harkins and Edwards v. United Kingdom*, App. Nos. 9146/07 and 32650/07, ¶¶ 129–31 (Jan. 17 2012), <https://hudoc.echr.coe.int/eng?i=001-108599>.

¹⁵ *Vinter*, App. Nos. 66069/09, 130/10, and 3896/10, ¶¶ 83–88.

¹⁶ See *Savran*, App. No. 57467/15 at Partly Concurring and Partly Dissenting Opinion of Judge Serghides, ¶¶ 16, 36 (advocating for an expansive interpretation based on the principle of effectiveness).

¹⁷ G.A. Res. 46/119 (Dec. 17, 1991).

¹⁸ See Nadia Hardman, *Denmark's Mismatched Treatment of Syrian and Ukrainian Refugees*, HUM. RTS. WATCH (Mar. 16, 2022, 12:00 AM), <https://www.hrw.org/news/2022/03/16/denmarks-mismatched-treatment-syrian-and-ukrainian-refugees#>; Hassan Hankir and Hams Rabah, *Arab Refugees see Double Standards in Europe's Embrace of Ukrainians*, REUTERS (Mar. 2, 2022, 10:57 AM), <https://www.reuters.com/world/arab-refugees-see-double-standards-europes-embrace-ukrainians-2022-03-02/>; Liliane Mouan et al., *After the 'Migration Crisis,' How Europe Works to Keep Africans in Africa*, OPENDEMOCRACY (May 17, 2020, 12:00 AM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/after-migration-crisis-how-europe-works-keep-africans-africa/>.

¹⁹ Amie Ferris-Rotman, *They Called Ukraine Home. But They Faced Violence and Racism When They Tried to Flee*, TIME (Mar. 1, 2022, 9:28 PM), <https://time.com/6153276/ukraine-refugees-racism/>.