

Why was Totopa v. Spain struck out from the list? A case of silenced vulnerability of a migrant mother under complex procedural constraints

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Totopa v. Spain was struck out from the list on May 10, 2022. The case has not been judged. It was rather considered as “resolved” under Article 37(1)(b) ECHR. For once the application had been lodged, the Spanish Government finally gave the applicant what she had been asking for months: the custody of her four-year-old child. Yet the applicant was still complaining about the lack of any contact with her child during seven months and the complexity of the reunification procedure, while the Government did not recognise the alleged violation of Articles 8 and 13 ECHR. There was no agreement between them. Albeit not ruling on the merits, the Court blamed the applicant for the delay, overlooking the fact that domestic procedural constraints aggravated the “*migratory vulnerabilities*” she was facing – and caused the alleged violations of the Convention. Vulnerability was met with victim blaming.

1. Facts

The applicant is an Ivorian woman and mother of a four-year-old child. She decided to migrate to Europe with her son and her sister. Arrived in Morocco, she temporarily entrusted her son to her sister so that they would reach Europe first. They departed on a makeshift boat in March 2017. After having been subjected to a pushback, they were taken to the Spanish enclave of Melilla, where the applicant’s child was placed in the protection of social services and separated from his aunt.

The applicant reached Spain a month later. The boat she was traveling on sank and two people drowned. She was rescued by the Spanish Coast Guard and placed in detention in Cadiz. She was finally released in May 2017. From then on, she started making several requests to the Spanish administrative authorities to get her child back, with the support of a Spanish NGO (*Women’s Link Worldwide*). After sending DNA tests to various laboratories, these tests were sent to the accredited laboratory on September 13, 2017.

Five months after they separated in Morocco, the applicant had still not been able to have any contact with her son, even by phone. She therefore initiated civil proceedings to obtain measures to allow her, at least, a meeting or a phone call with her son. She also lodged a complaint for administrative inaction and negligence with the Spanish Office of the Ombudsperson.

Having received no satisfaction from both administrative and civil proceedings, she lodged a request for interim measures with the ECtHR on October 17, 2017. The Court asked the State to submit information. On November 8, the results of the DNA test established the biological link between the applicant and her child. The reunification occurred a few days later, in Melilla.

2. Decision

We were provided the case file, which helps understand the legal discussion that took place in Strasbourg. The parties discussed at length the responsibility for the extensive duration of the proceedings that led to the seven-month separation between the applicant and her child. However, those arguments are only partially reflected in the Court's decision.

The applicant claimed that she had been proactive during the whole reunification procedure. She filed three written complaints and had to wait until September 3 (i.e., five months after her arrival in Spain and three months after her third written request) before receiving the first information about the protocol for conducting a DNA test. She stressed that she filed documents attesting to her parentage, as well as to the steps she took to obtain a DNA test as soon as she made her second written request to the administration, in July 2017. She also argued that the Spanish authorities did not take prompt actions to enable her to have some contacts with her son for a long period, failed to comply with their own protocols, and burdened excessive legal formalism on her shoulders.

The Government rebutted that the reunification process was delayed because of the applicant's procedural inability. It considered that, upon request, the authorities informed her on the best way to exercise her rights as well as on the evolution of the proceedings, and proactively took all necessary steps to verify the mother and son relationship. It concluded that the applicant had lost her status of victim, as she and her child were reunited in November 2017.

The Court decided not to examine the victim status question (Article 34 of the Convention). It rather looked at the case through the lens of Article 37(1)(b) of the Convention. The latter provides that the Court may decide to strike out an application if it considers the matter resolved and unrelated to key or structural human right issues (*Petrescu v. Portugal*, §§ 62-68). Under the existing case-law, there are two conditions to strike out an application on that ground (§ 14). First, the facts that are complained about must have ceased. Second, the consequences of the potential breach of the Convention must have been deleted (*Association SOS Attentats et De Boery v. France* (G.C.), § 32).

The central legal issue pertained to this second condition: does a reunification between mother and son after seven months of separation suffice to consider a case resolved under Articles 8, 13, and 37(1)(b) of the Convention? With a view to answering this question, the Court tested the applicant's procedural command, and hastily concluded that all procedural delays at domestic level were imputable to her (§§ 18-19).

Since the applicant and her child were eventually reunited and the procedural command of the applicant was judged insufficient, the case is deemed resolved under Article 37(1)(b) of the Convention.

3. Analysis

The strike-out of *Totopa* suggests that when the Court shifts from Article 34 (victim status) to Article 37(1)(b) ECHR (case resolved) on its own motion, it in fact shifts to benevolence towards national authorities, benevolence that here comes with victim blaming. This hypothesis would explain why neither the familial link between a mother and her young child, the consequences of a separation on that link (A), nor the intersectional – migratory, racial and gendered – vulnerability of the applicant were taken into consideration by the Court (B).

However, benevolence finds one legal limit in Article 37(2) of the Convention and Article 43(5) of the Rules of Court: exceptional circumstances may justify restoring the case to the list. And the withdrawal of the favourable domestic decision that resolved the case could qualify as such an exceptional circumstance (comp. *Willems et Gorjon v. Belgium*, § 66).

A. From Article 34 to Article 37(1)(b) ECHR: The victim must be adept at complex legal procedures...

Article 37(1)(b) ECHR allows the Court to strike out a case from the list even though the applicant has not formally lost the status of victim where the defending Government took steps to address the consequences of the alleged violation of the Convention. Strike-out decisions may be taken although the Government did not recognise the alleged violation (*El Majjaoui et Stichting Toubia Moskee v. Pays-Bas* (G.C.), § 28).

Faced with this issue, the Court must verify whether the consequences of the potential breach of the Convention were deleted by the favourable decision taken by the Government. For instance, where the applicant received an exit order which execution could have breached her fundamental rights, the subsequent decision of the Government not to enforce this order justifies striking out the case (*Yang Chun Jin Alias Yang Xiaolin v. Hungary*, §§ 20-22; *Syssoyeva and others v. Latvia* (G.C.), §§ 98-100; *E.G. v. Belgium* (dec.), § 27; *Gana v. Belgium*, § 33).

However, when a long separation between a parent and his or her child occurred, the Court used to apply a more cautious analysis. Specially, in *Tanda-Muzinga v. France*, the Court held that consequences from a six-year family separation cannot be “deleted” by subsequent reunification where the applicants did not delay the proceeding with “a manifestly fraudulent attitude”, and where the applicants’ children are minors (§ 58).

In *Totopa*, the Court opted for another line of reasoning that exclusively focussed on the procedural attitude of the applicant. The consequences of the separation are silenced, as well as the complexity of the domestic procedure the applicant had to comply with (§ 18).

By contrast, the applicant's procedural conduct is described at length with a blaming tone overlooking the vulnerability of the applicant whose conduct did not prove fraudulent in any aspect (see below, section B).

How to reconcile these two precedents in their interpretation of Article 37(1)(b) ECHR in the event of a family separation involving young children? There are two paths. The first would be that the separation in *Totopa* being less long (7 months) than in *Tanda-Muzinga* (6 years), the consequences of the alleged violation were seen as easier to "delete". A seven-month separation would be considered a "normal separation" (comp. *Wampach v. Luxembourg*, § 58). The second path would be that the consequences of the family separation are only considered by the Court where the applicant cannot be held responsible for procedural mistakes, be they fraudulent or not. This second path better fits with the decision's wording that bluntly blames the applicant for all procedural delays regardless of the disputed procedural context and the nature of the alleged violation. Therefore, by contrast with *Tanda-Muzinga*, the Court did not question the reasons behind these delays: was the applicant voluntarily fraudulent or careless, or was she confused by over-complex procedures?

B. ... Otherwise, she is blamed regardless of her vulnerability

Confusion could have been highlighted if the vulnerability component of the case had been considered. The concept of vulnerability is a polyvalent legal tool, a "chameleon concept", that might influence judicial reasoning in various ways. It plays a "normative pivotal role" in the moral structure of human rights. This is especially true when multiple factors of vulnerability cumulate (*Muskhadzhiyeva et al. v. Belgium*, § 56; *B.S. v. Spain*, § 71), as in *Totopa*.

While certain categories of vulnerable persons are clearly defined, the Court has proved open to a gradual and cumulative analysis of different criteria, the sum of which may lead to the qualification of vulnerability (see *M.S.S. v. Belgium and Greece* (GC), §§ 232-233).

From a human right perspective, vulnerability implies both material and procedural effects.

The procedural dimension of vulnerability specially operates on the analysis of admissibility. On several occasions, the Court has relied on the vulnerability of an applicant to facilitate its jurisdiction on the basis of Article 34 (e.g., on the examination of the victim status: *Ilhan v. Turkey*, § 35) or Article 35(1) ECHR (e.g., on the exhaustion of domestic remedies: *Aksoy v. Turkey*, §§ 56-57 ; *V.D. v. Romania*, § 127; on the compliance with the four-month time-limit: *Chiragov and others v. Armenia*, § 146; and on the duty of diligence: *Monacu and others v. Romania*, § 265). Vulnerability may also constitute an obstacle to the effective exercise of the right of appeal within the meaning of Article 34, last sentence, ECHR (*Akdivar and others v. Turkey*, § 105) or be considered when assessing the ability to lodge a complaint under Rules of Court 36(1) and 45(3)

(Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, § 103 ; comp. G. J. v. Spain, § 52). The procedural dimension of vulnerability has also led the Court to lighten the burden of proof of a migrant applicant (M.S.S. v. Belgium and Greece, § 352).

By contrast, the Court barely seems to rely on vulnerability in strike-out decisions. Admittedly, this idea appears in the background of Tanda-Muzinga v. France, where it refers to a “*difficult context after their flight from the Democratic Republic of Congo*” as a factor that necessarily led to “*serious consequences*” that their subsequent reunion could not delete (§ 58). Other strike-out decisions are yet far less sensitive to the vulnerability component. For instance, in Hussun, the application of dozens of irregular migrants was struck out for want of details in the powers of attorney (§§ 49-50). The Court reached a similar outcome in V.M. and others v. Belgium.

In Totopa, the applicant was both inherently vulnerable, as a racialized woman, and contextually vulnerable, as a single mother, irregular migrant, previously detained and smuggled to Spain. Yet the Court did not draw any legal consequence from her alleged intersectional vulnerability. Instead, it proceeded to an abstract analysis of the case’s context and asserted that the domestic proceedings were only delayed because of her own procedural conduct (§ 18).

On top of the fact that its reasoning does not make intelligible why the Court preferred to support the Government’s argument regarding the contested factual background, such a bias shows benevolence towards national authorities and is phrased with an unnecessarily blaming tone (comp. V.M. and others v. Belgium, § 36).

Doing so, the Court missed an important opportunity to assert vulnerable migrant women’s fundamental rights when they meet unbending and complex procedural constraints at European borders. Totopa is indeed not isolated in Spain or at other European external borders, although these situations frequently go unnoticed because of multiple “migratory vulnerabilities”. Targeting practices by police and immigration authorities in public places and services, such as public transportation or hospitals, to apprehend irregular migrants are also a reality. And such realities have a severe impact on the exercise of irregular migrants’ human rights, prompting fears of detection and arrest, and complicating a range of administrative procedures. In this context, irregular migrants often lack means of communication and/or knowledge of procedural requirements.

Procedural and administrative obstacles faced by the applicant were substantiated in the Totopa case file. The procedure was indeed very complex. Ms Totopa lacked legal landmarks, did not speak Spanish, and was not allowed to move, even less to travel to Melilla, because of her irregular status. As for the fact that an NGO attempted to mitigate these obstacles by supporting the applicant before domestic courts, it should not allow Spain to circumvent the normative consequences flowing from a pre-existing intersectional and migratory vulnerability.

In light of these elements, the Court's decision of striking out *Totopa* from the list could have included her specific situation of vulnerability and assessed whether the State had taken appropriate measures to reduce the effects of this situation on her. At least, the Court could have referred to it and motivated its decision as to why it decided to follow the polished factual background presented by the responding State. In sharp contrast, the Court chose to follow neither of these two lines of reasoning. As in other strike-out decisions, migratory vulnerabilities were thus overshadowed.

4. Concluding remarks

Together with inadmissibility decisions, strike-out decisions represent 32 961 of the total of 39 092 applications decided in 2021, namely 91% of last year ECtHR's case law. Despite their importance in the Court's legal impact, such decisions are relatively under-researched.

Totopa is one more missed opportunity to clarify the implication of procedural vulnerability when it arises in that context. It rather illustrates the Court's reluctance to recognise normative effects to procedural vulnerability when assessing striking out criteria. This reluctance narrows the access to the ECtHR for vulnerable migrants, such as newly migrant mothers under complex domestic procedural constraints.

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