



Asylum and the European Convention on Human Rights

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Asylum and the European Convention on Human Rights

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Introduction

In many parts of Europe (and at least in the 27 of the 47 Council of Europe member states which are now also members of the European Union),¹ there exist four main simultaneous and, often, overlapping legal regimes for the international protection of asylum seekers and refugees. These are:

- the 1951 Geneva Convention relating to the Status of Refugees (the Geneva Convention) and its 1967 Protocol;
- the law of the European Union (EU law);²
- the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); and
- the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols.

In addition, all member states of the Council of Europe are also parties to the various other UN human rights treaties, in particular the 1966 International Covenant on Civil and Political Rights (ICCPR) which offers broadly comparable protection to that of the European Convention on Human Rights (ECHR). For reasons of space, reference is only made in this book to the most important case-law of the UN Human Rights Committee (UN HRC), as the supervisory body for the ICCPR. Other UN key human rights instruments (for example, the 1948 Universal Declaration of Human

1. Not all EU states are bound by all measures: see the section on EU measures.

2. EU member states are required to transpose directives in time and to implement them fully. If they fail to do so they must pay compensation to individuals who suffer as a result of their failure to do so. See *Francovich and Bonifaci v. Italy* (Cases C-6 and 9/90 [1991] ECR I-5357).



Rights (UDHR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1989 Convention on the Rights of the Child (CRC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD) may also be relevant to asylum issues.

This book is primarily about the standards of protection offered by the ECHR. However, the standards of some or all of the other legal regimes are, in many cases, part and parcel of those standards and are referred to as and when appropriate.

There are many individuals whose situation falls outside the scope of the 1951 Geneva Convention, of the UNCAT and of the EU measures, but who are protected by the ECHR. The ECHR is not so limited, as it protects (at least in theory) “everyone” without distinction. In the following pages the standards of the Geneva Convention, the UNCAT, and the applicable EU regulations and directives will all be referred to when considering the standards of the ECHR.

This may be because the Convention prohibits arbitrariness and so requires that decisions be in accordance with the law – which for EU states includes EU law – or it may be simply because Article 53 of the ECHR provides that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”. The European Court has, however, frequently stated that it has no power to rule on whether a state has acted in conformity with its obligations under other treaties except in so far as it is required to determine whether there has been an interference with rights guaranteed by the Convention.³ The Court has recalled that its sole task under Article 19 of the ECHR is to ensure the observance of the engagements of the Contracting Parties to the ECHR – it is not the Court’s task to apply directly the level of protection offered in other inter-

3. *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008.



national instruments.⁴ This approach may be problematic when the national law protecting ECHR rights is either directly applicable EU law (regulations) or derived from EU law (transposed directives or framework decisions).

The 1951 Geneva Convention is the *lex specialis* of asylum and its pre-eminence as the key international instrument for protecting those who fall within its scope is unquestioned. This guide makes frequent references to the protection offered by the Geneva Convention, but for reasons of space and because this text is primarily about the ECHR, those references are brief and thus perform incomplete.

The Council of Europe's Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) set up a system for monitoring all places where people are deprived of their liberty. The European Committee for the Prevention of Torture (CPT) makes periodic and ad hoc visits to all contracting states and publishes (with the consent of the state) reports on those visits. It also produces General Reports and the CPT standards.⁵ Its reports carry great weight and are often relied on by the Court when examining complaints. Both the country reports and the general reports have frequently looked at both the legal and physical conditions in which asylum seekers and other immigration detainees have been held. Although the CPT itself cannot make legal findings that states have violated the prohibition on torture or inhuman and degrading treatment – only the Court can do that – it can make factual findings and recommendations. The work of the Committee is referred to throughout this book.

The pages that follow are divided into three parts.

Part One of this handbook looks at the extraterritorial application of the Convention in connection with the risks faced on expulsion to the pro-

4. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.

5. The CPT standards. "Substantive" sections of the CPT's general reports. CPT/Inf/E (2002) 1 – Rev. 2006. The CPT standards set out its recommendations to be applied in different contexts, including as regards "Foreign nationals detained under aliens legislation" (extract from the 7th General Report [CPT/Inf (97) 10]) and the "Deportation of foreign nationals by air" (extract from the 13th General Report [CPT/Inf (2003) 35]).



posed country of destination. This section explores the possible future extraterritorial application of those Convention articles on which no ruling has as yet been made.

Part Two examines the application of the Convention to asylum issues other than the extraterritorial application of the Convention's provisions.

Part Three concerns the subsidiary protection of the Convention organs.

Overview

A key attribute of national sovereignty is the right of states to admit or exclude aliens from their territory.⁶ Only if exclusion from the territory or from protection would involve a breach of some other provision of international law are states bound to admit aliens. The concept of asylum is the most important example of the latter principle. Although Article 14 of the UDHR expressly protects the right to “seek and enjoy asylum from persecution”, this right is not found in the texts of other general instruments of international human rights law such as the ICCPR or the ECHR. When those human rights instruments were drafted it was thought that the Geneva Convention relating to the status of refugees would constitute a *lex specialis* which fully covered the need, and no express provision on asylum was thus included.

The Geneva Convention treats those who are recognised as falling within the scope of its protection as a privileged group and provides them with a comprehensive bundle of rights. In the early years of the Geneva Convention, recognition as a refugee in Europe was not a problem; everyone knew who refugees were. The United Nations High Commissioner for Refugees (UNHCR) saw no need to produce a handbook to guide asylum determination procedures until 1979. In the past decades European states have been more reluctant to recognise people in need of protection as “refugees”. The role previously played by the Geneva

6. See, amongst many others, *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §135.



Convention is now in many respects performed in the European context by general human rights instruments and, in particular, by the ECHR.

The Geneva Convention remains effective – and essential – as an instrument which provides additional benefits to an increasingly small number of people who are recognised as falling within its ambit by governments.⁷ However, many of those who need international protection because they are at risk of expulsion to situations where they would face serious harm such as torture or inhuman and degrading treatment or punishment, or whose expulsion would in itself constitute such treatment, fall outside the ambit of the Geneva Convention, primarily because no nexus or link can be established between the persecution feared and one of the five Convention grounds.⁸

The new EU regime set up under the Common European Asylum System (CEAS) fills some of these lacunae but still fails to apply to all those who are recognised by the European Court of Human Rights as being in need of – and entitled to – international protection. Article 18 of the Charter of Fundamental Rights of the EU guarantees the right to asylum, however it remains to be seen how it will operate in practice. Even if not actually expelled, those who are refused recognition as refugees and not otherwise granted the appropriate subsidiary (or complementary) protection are often left drifting in a state of undocumented uncertainty (see section on *Status*, page 190).

Both the ECHR, which was opened for signature in November 1950, and the Geneva Convention, which was opened for signature the following year, were drafted as the polarisation in international relations which marked the Cold War set in. Both conventions reflect the concerns and thinking of the period. Over the next 50 years, when the conflict between the two opposing ideologies dominated international relations, the definition of a refugee set out in Article 1A §2,⁹ and the principle of

7. Persons can also be recognised as refugees by UNHCR under its mandate but this grant is declaratory rather than constitutive in nature.

8. Under the 1951 Convention a well-founded fear of persecution must be “for reasons of” race, religion, nationality, membership of a particular social group or political opinion.



non-refoulement established in Article 33 §1,¹⁰ of the Geneva Convention became well recognised in international law. Drafted in the wake of the massive forced displacement at the time of the Second World War, the Geneva Convention was designed to provide a legal status for those persons who found themselves outside their country of nationality or habitual residence and in fear of persecution as a consequence of “events occurring in Europe before 1 January 1951”.

The ECHR, on the other hand, was intended to provide legal regional recognition of most of the rights set out in the UDHR and to provide international mechanisms to police their implementation. It did not, however, contain any express provision to reflect Article 14 of the UDHR, which guarantees the right to seek and enjoy asylum from persecution.

Background considerations: movement of refugees in Europe from the aftermath of the Second World War to the present

There is a long history of people seeking international protection in Europe. While the Geneva Convention was primarily an instrument devised to meet a humanitarian need by providing a proper legal framework for asylum, it was also an instrument which was intended to serve the aims of Cold War politics. The emphasis was on providing protection for those who fled from those countries behind the Iron Curtain. In 1967 the New York Protocol to the Geneva Convention removed the reference

9. An asylum seeker is an individual who has sought international protection and whose claim for refugee status has not yet been determined. However, a refugee is a person who fulfils the criteria of the 1951 Convention. Article 1A, §2 of the 1951 Convention, defines a refugee as someone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it...”.

10. Article 33, §1, states: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”



to 1 January 1951,¹¹ and almost all the countries¹² which were then members of the Council of Europe subsequently removed the geographical limitation so that those who arrived from any part of the world were protected, not just European asylum seekers. This was recognition that the refugee question was not simply an isolated European phenomenon. During the years of rapid economic expansion of the 1960s, the Cold War meant that very few refugees or asylum seekers were able to reach western countries and arrivals were, in any case, welcomed to feed the expanding economies' demand for increased labour.

Since then people seeking international protection have arrived in Europe both from the former communist states, from sub-Saharan Africa and from the many other regions of the world which are devastated by civil war, natural disasters or grinding poverty or where they live under oppressive regimes. States have found their commitment to their obligations under international law strained as a result of this greater freedom of movement. Legitimate concerns have also arisen that economic migrants may be misusing asylum legislation in an attempt to secure entry to countries which have closed normal immigration routes.¹³ Many of those who seek international protection are not entitled to it, but in efforts to exclude those people, states are sometimes denying international protection to those who have a real need.

Recent trends in Europe

The vast majority of asylum seekers arriving in Europe since the end of the Cold War have fled countries where serious human rights abuses are

11. New York Protocol to the Geneva Convention, 1967, Article 1, §2.

12. Of the present Council of Europe member states, only Monaco and Turkey still retain the geographical restriction. Monaco provides refugee protection under its bilateral agreements with France. In Turkey, whilst non-European asylum seekers are formally excluded from 1951 Convention protection, they may apply for "temporary asylum-seeker status" under Turkish law, pending UNHCR's efforts to find a solution for them elsewhere. See e.g. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009; *Z.N.S. v. Turkey*, application no. 21896/08, judgment of 19 January 2010.

13. See Nicholson, F. and Twomey, P. (eds.), *Refugee rights and realities*, Cambridge University Press, 1999.



endemic – countries racked by civil war or countries where the machinery of the state has broken down to such a degree that it can no longer offer protection to its citizens. The early 1990s saw a significant increase in the number of asylum applications in Europe, largely as a result of the Balkan wars and an exodus of people from the countries of the former Yugoslavia. The late 1990s saw yet another rise in applications during the Kosovo crisis, in particular the events of the spring of 1999, which brought about refugee movements in Europe on a scale unseen since the Second World War.

While many of those seeking protection came from within the Council of Europe itself (for example, Turkish Kurds or Roma from the former communist states), others were fleeing repression and civil war in countries further afield such as Sri Lanka, Somalia, the Democratic Republic of the Congo (DRC), Rwanda and Algeria.

The trend in the first few years of the new millennium unsurprisingly showed an increase in asylum seekers from Iraq and Afghanistan. The majority of asylum claims lodged in the first half of 2009 were made by persons from Iraq, followed by those from Afghanistan and Somalia. The other main countries are China, Serbia (including Kosovo),¹⁴ the Russian Federation, Nigeria, Mexico, Zimbabwe, Pakistan and Sri Lanka.¹⁵ In the first part of 2009 up to 2 million people had been uprooted by violence between the government and militant forces in Pakistan alone, representing the most challenging protection crisis since Rwanda in the mid-1990s.¹⁶

14. All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

15. UNHCR, *Asylum Levels and Trends in Industrialized Countries First Half 2009: Statistical overview of asylum applications lodged in Europe and selected non-European countries*, 21 October 2009; and UNHCR “2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons” 16 June 2009.

16. Statement of UN High Commissioner for Refugees, António Guterres, on the release of the 2008 Global Trends report.



Nevertheless, it is clear that Europe remains a primary destination for individual asylum seekers, with increased numbers of asylum applications having been received during 2008 for the second consecutive year.

The expansion of the European Union on 1 May 2004 from 15 to 25 member states and to 27 on 1 January 2007 also extended the EU's external borders. The EU-27 also received an increase in asylum applications during 2008. However, whilst there were significant differences between the 15 "old" and the 12 "new" member states, some of the new member states, such as Malta, experienced a large increase in asylum applications.¹⁷

The member states of the EU have sought to develop a comprehensive Common European Asylum System (CEAS), as defined in the Tampere and the Hague Programme. It was intended to be built in two phases. The first one is now complete and the second phase instruments should be adopted by the end of 2010.

A section of this book deals with the measures adopted at EU level in so far as they are relevant to the application of the ECHR. A list of all the relevant EU measures – which now normally regulate asylum in most of the member states of the EU and thus more than half the member states of the Council of Europe – is appended (see page 257).

Most of those in need of international protection find themselves seeking asylum in member states of the Council of Europe which are outside the EU. Many would prefer to be able to travel on to the EU states where there are established communities of the groups to which they belong and where support networks and thus work opportunities exist. Refugees failing to reach western European countries remain in the member states of the Council of Europe in central and eastern Europe and the former Soviet Union and in some cases in the Mediterranean. These states are under considerable strain as they often lack the mechanisms, legislation, experience, or appropriate resources to handle their caseload.

17. UNHCR Asylum levels and Trends Report 2008.



The provisions of the ECHR now bind 47 countries (as at 9 October 2007).¹⁸ The experience of the Council of Europe in brokering agreements, conventions, recommendations, resolutions and declarations complementary to refugee instruments, the forum for discussion which it offers and the body of case-law built up by the European Commission and Court of Human Rights are invaluable in assisting these states – indeed, all Council of Europe member states – to ensure that their humanitarian obligations under international law are upheld and the rights of refugees protected.¹⁹ There is a pressing need for the Committee of Ministers of the Council of Europe to consider re-establishing a new inter-governmental committee with a permanent mandate to examine asylum and refugee issues to replace the work formerly carried out by the *ad hoc* Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR), which was disbanded.

18. The date at which Monaco became a party. Serbia and Montenegro acceded on 3 April 2003 and have now separated. The accession of the independent Montenegro took place on 11 May 2007.

19. A list of Council of Europe instruments relating to refugees is attached in Appendix I at page 251.



Part One – The role of the European Convention on Human Rights in protection from expulsion to face human rights abuses

Whilst UNHCR keeps a vigilant watch on the way in which national authorities comply with their obligations, the Geneva Convention has no formal international supervision procedure to review the correctness of individual decisions to recognise, or withhold recognition of, refugee status. There is no right of individual petition to a judicial body comparable to that which exists under Articles 34²⁰ and 35²¹ of the ECHR. A large body of specialised case-law has developed on its interpretation and application by national courts. However, there is no uniformity of approach and the result has been a patchwork of disparate decisions. This lack of consistency in approach to the determination of refugee status was one of the problems identified by the EU and addressed in the “Qualification Directive” (EU Directive 2004/83),²² which had to be transposed

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20. Article 34 states: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”
 21. Article 35 §1 states: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”
 22. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 of 30 September 2003, p. 12) (“the Qualification Directive”).



into the law of all EU member states by October 2006. The definitions contained in the directive, even of the meaning to be given to the provisions of the Geneva Convention, are EU definitions and do not necessarily reflect the views of UNHCR.

The Directive states in its preamble (4) that the Common European Asylum System “should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status”. In its preamble (6) it states that its main objective is “on the one hand, to ensure that member states apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all member states”. In defining “acts of persecution” in connection with the recognition of Geneva Convention refugee status for the purposes of the Directive, the Directive provides in Article 9 §1 (a), that such acts must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which no derogation is permitted under Article 15 §2 of the ECHR.²³ The Directive makes no reference, however, to the ECHR when defining “serious harm”, the risk of which entitles people to “subsidiary protection”.²⁴ However, the European Court of Justice (ECJ) in a reference sent by a Dutch Court in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie*²⁵ concluded that whilst Article 15 (b) corresponds in essence to Article 3 of the ECHR, Article 15 (c) was different in content from Article 3 and was to be interpreted independently. The case is considered in more detail below. The UNHCR Study of the Implementation of the Qualification Directive²⁶ in five EU member states concluded that the Directive had achieved greater conformity in some areas of legal practice (e.g. on the

23. “No derogation from Article 2, except in respect of deaths arising from lawful acts of war, or from Articles 3, 4 (§1), and 7 shall be made under this provision.”

24. The other key EU provision refers only to those seeking recognition as Geneva Convention refugees.

25. *M. and N. Elgafaji v. Staatssecretaris van Justitie* (Case C-465/07) (2008/C 8/08).

26. UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007.



notion of serious harm) but wide divergences of interpretation remained in other areas (e.g. the “internal protection alternative”). However, divergences were thought to be more marked if viewed across the EU-27. Accordingly, domestic cases on the interpretation of the directive are pending, in addition to further preliminary references by domestic courts to the ECJ.

The applicability of the ECHR to asylum cases

There is no express provision relating to asylum contained in the ECHR and it might therefore seem to be of only marginal relevance to those seeking asylum in Europe.²⁷ This is far from the case. The substantial body of jurisprudence that has emerged from the Convention organs between 1989 and 2009 now sets the standards for the rights of asylum seekers all across Europe.

The first issue considered by the Convention organs and eventually ruled on by the Court was whether the ECHR applied at all to asylum situations. The Court has repeatedly stated that there is no right to asylum as such in the Convention or its protocols.²⁸ Whilst the Geneva Convention protected those at risk of persecution, it was Article 3 of the UN Convention against Torture (UNCAT) which was the first provision of an international human rights treaty which expressly prohibited expulsion to face the risk of torture.

However, the European Court ruled that it would not be compatible with the “common heritage of political traditions, ideals, freedom and rule

27. A number of other international instruments also affect the rights of asylum seekers: the Universal Declaration of Human Rights, Articles 13 and 14; the International Covenant on Civil and Political Rights, Articles 12 and 13; the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 5.d.i and ii; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3; the Convention on the Status of Stateless Persons, Articles 27 and 28; the Organization of African Unity’s Refugee Convention (1969); the Organization of American States’ Declaration; the United Nations Declaration on Territorial Asylum; and the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country where they Live.

28. *Vilvarajah and others v. the United Kingdom*, §102, *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 13 January 2007.



of law” to which the preamble refers, were a Contracting State to the ECHR knowingly to surrender a person to another state where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or inhuman or degrading treatment or punishment.²⁹

From the 1960s the Convention’s supervisory organs have regularly considered the question of whether extradition, expulsion, or deportation to a country where an individual is likely to be subjected to such treatment is contrary to Article 3.³⁰ The question of applicability was first considered in detail by the European Court of Human Rights in the case of *Soering v. the United Kingdom*, a case concerning not political asylum but extradition.³¹ The US State of Virginia wished to extradite Mr Soering from Britain to stand trial on capital charges. At the time prisoners in Virginia often remained on death row awaiting execution for between six and eight years. It was alleged that this constituted inhuman and degrading treatment contrary to Article 3.

The Court noted the existence of other international instruments, such as the Geneva Convention and the UNCAT, which expressly and specifically address the question of sending individuals to a country where they will be exposed to the risk of prohibited treatment. It nevertheless found that the application of the ECHR was not excluded by the existence of the other instruments. Their existence could not “absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction”.³²

The Court observed:

The fact that a specialised treaty should spell out in detail a specific obligation attaching to a prohibition on torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3.³³

29. *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, §88.

30. See, for example, *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989; *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991; *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991; *Nasri v. France*, application no. 19465/92, judgment of 13 July 1995.

31. *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989.

32. *Ibid.*, p. 26, §86.



The Court noted that the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.³⁴ It found that the inherent obligation under Article 3 also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment proscribed by that article. The Court noted that:

It is a liability incurred by the Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to such treatment.³⁵

Shortly after the judgment in *Soering*, the case of *Cruz Varas v. Sweden* came before the Court. It was the first case which concerned a refused asylum seeker. The Court held that the principle enunciated in *Soering* applied to decisions to expel as well as to extradite.³⁶ This view was reaffirmed in the judgment in *Vilvarajah v. the United Kingdom*.³⁷

Although the question of the applicability of Article 3 to expulsion cases has now been established beyond any doubt, as late as 1995 the United Kingdom Government still tried to put forward the contrary argument in the case of *Chahal*.³⁸ This was firmly rejected by the Commission, which reaffirmed the principle laid down in *Vilvarajah*:

Expulsion by the Contracting State of an asylum seeker 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 faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.³⁹

33. *Ibid.*, p. 26, §88.

34. *Ibid.*, p. 27, §90.

35. *Ibid.*, p. 27, §91.

36. *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991, §70.

37. *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, judgment of 30 October 1991, p. 32, §103.

38. *Chahal v. the United Kingdom*, application no. 22414/93, report of 27 June 1995.

39. *Vilvarajah and others v. the United Kingdom*, *op. cit.*



The government eventually accepted the applicability of the Convention in its pleadings before the Court.⁴⁰

The position was succinctly put in the recent *Salah Sheekh* judgment:

The right to political asylum is not contained in either the Convention or its Protocols. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, however undesirable or dangerous. The expulsion of an alien may give rise to an issue under this provision, and hence engage the responsibility of the expelling state under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.⁴¹

Despite this, the United Kingdom Government argued as third party intervener (as supported by the respondent state) in the case of *Saadi v. Italy* that there was no right to political asylum in the Convention and this right was governed by the position under the Geneva Convention, which explicitly provided that there was “no entitlement” to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations.⁴² Notwithstanding the questionable nature of this argument from the perspective of UNHCR's own interpretation of the Geneva Convention,⁴³ the United Kingdom continued that whilst Article 3 provided an absolute guarantee against torture, inhuman and degrading treatment, since the signatory state did not inflict the torture itself, it was bound “only” by an

40. *Chahal v. the United Kingdom*, application no. 22414/93, report of 27 June 1995, §74.

41. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §135.

42. *Saadi v. Italy*, application no. 37201/06, [GC] judgment of 28 February 2008, §§119, 120, 122.

43. UN High Commissioner for Refugees, UNHCR Statement on Article 1F of the 1951 Convention, July 2009 which considers proportionality as an important safeguard in the application of Article 1F and the provision to be interpreted restrictively given the important human rights consequences for the individual concerned.



implied positive obligation not to return a suspected terrorists to a situation of risk. In line with its previous case-law, the Grand Chamber of the Court firmly rejected this argument.⁴⁴ The case is considered below in more detail.

While the Commission and Court have most frequently considered asylum issues in the context of Article 3, it is clear that it is not the only Convention article relevant to asylum questions. As is set out below, the processing of applications for asylum may also raise issues of return to face risks under Article 2 (right to life), Article 4 (prohibition of slavery, servitude, and compulsory labour), Article 5 (right to liberty and security of the person), Article 6 (right to a fair trial), Article 7 (prohibition on retroactive criminal punishment), Article 8 (right to respect for family and private life), Article 9 (right to freedom of thought, conscience, and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 14 (prohibition of discrimination in the enjoyment of Convention rights), Article 4 of Protocol No. 4 (collective expulsion of aliens), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), Article 3 of Protocol No. 7 (exclusion of own nationals), Article 4 of Protocol No. 7 (prohibition on double jeopardy), and Article 1 of Protocol No. 12 (general prohibition on discrimination).

The protection from expulsion to face treatment contrary to Article 3 – An absolute right

The Court has repeatedly stressed in cases involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms expulsion to face a real risk of torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the authors of the risk, the context of the risk, or the conduct of the applicant.

44. *Saadi v. Italy*, application no. 37201/06, [GC] judgment of 28 February 2008, §138.



There are a number of key differences between the protection guaranteed by the ECHR and that of the other legal regimes offering international protection.

Alienage

To attract the protection of the Geneva Convention a person must, under Article 1 of that instrument, be outside the country of his or her nationality or habitual residence. However, the ECHR has a wider application. The Commission considered in the case of *Fadele v. the United Kingdom*⁴⁵ that Article 3 could apply to cases where British citizen children were being constructively exiled from the United Kingdom by the deportation of their custodial parent and where the conditions which they would face on return could amount to inhuman and degrading treatment.

The same reasoning as was applied in *Fadele* would apply to situations where a refused asylum seeker's close family members include, as they sometimes do, nationals of the expelling state. The constructive deportation of such nationals might infringe Article 3 (taken together with Article 8) if it could be shown they would be exposed to the risk of ill-treatment should they accompany the refused asylum seeker. The same principle would also apply to the extradition of a state's own nationals or in cases of revocation of citizenship followed by expulsion.⁴⁶ Such situations also raise issues under Article 3 of Protocol No. 4 to the Convention, which states that:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.

No one shall be deprived of the right to enter the territory of a state of which he is a national.⁴⁷

45. *Fadele v. the United Kingdom*, application no. 13078/87, decision of 12 February 1990.

46. *Naumov v. Albania*, application no. 10513/03, decision of 3 December 2002. The Court declared the case inadmissible.

47. This provision could not be invoked in the case of *Fadele* as the United Kingdom is not a party to Protocol No. 4. It was noted by Fawcett in the report on the East African Asians case that the failure to admit nationals may be a breach of Article 3 (Report, §242, 3 EHRR 76, 1973).



The United Kingdom is not a party to Protocol No. 4 so no issues under that provision arose in the *Fadele* case.

Persecution for a “Convention reason”

To attract the protection of the Geneva Convention a person must fear “persecution” for one or more of the reasons set out in Article 1A §2, of that instrument: “race, religion, nationality, membership of a particular social group or political opinion”.

Under the Geneva Convention, it is not only a well-founded fear of persecution which needs to be present but also the reasons for that fear of persecution.

No similar qualification applies to Article 3 of the ECHR. If there is a real risk of exposure to ill-treatment the reasons for it are immaterial. Article 3 applies equally in cases of extradition. It applies to the removal of refused asylum seekers or of those who have been granted humanitarian status, but are not recognised Geneva Convention refugees, or to those who have been recognised as refugees but have lost the protection of the Geneva Convention.

The case of *H.L.R. v. France*⁴⁸ concerned a convicted drug dealer who had provided evidence at his trial which had led to the conviction of several other members of a Colombian drugs ring and had significantly impeded its operation. On his release from prison he was to be returned to Colombia where he would have been at risk from revenge by the members of the cartel. The Court held that, if he was at risk, the reasons for his anticipated ill-treatment were not material to the protection guaranteed under Article 3. In some circumstances, individuals may also face ill-treatment due to the activities of family members, in particular when the family member is a political opponent or part of a group which faces ill-treatment by the authorities. In *Nyanzi v. the United Kingdom* the Court considered that even though the applicant’s father had spent 10 years in pre-trial detention on treason charges the applicant would not have been

48. *H.L.R. v. France*, application no. 24573/94, judgment of 29 April 1997.



at risk of ill-treatment if returned to Uganda. However, no compelling evidence was provided that the authorities would detain and question her in connection with her father's trial, and in any event the general situation in Uganda had improved.⁴⁹

*D. v. the United Kingdom*⁵⁰ concerned the proposed expulsion of a person already irremediably dying of Aids to his home country where he had no family or material resources, where there was no social welfare provision available to him and no treatment for Aids. He was in no sense being persecuted for a Geneva Convention reason. The Court found that his expulsion would constitute a violation of Article 3. Ten years later the Court was asked to consider the case of *N*. The applicant in *N v. the United Kingdom* had claimed asylum in the United Kingdom. Her claim was based solely on her serious medical condition (HIV, which she alleged was the consequence of a rape) and the lack of adequate treatment available for it in Uganda.⁵¹ The Court found that her removal would not violate Article 3. It gave a detailed judgment in which it held that the ECHR could not be invoked to guarantee economic and social rights.

Article 3 of the UNCAT also prohibits expulsion, return or extradition to "another state where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact of the risk of torture is what is important, not the reasons for it.

State responsibility – The source of the risk

State responsibility for the feared persecution was considered an inherent part of the definition contained in Article 1 of the Geneva Convention, which safeguards the situation of those who have for one reason or another lost the protection of their own state. Under the Geneva Convention it is generally considered that a refugee must fear persecution either by the state itself or because the state is unable or unwilling to pro-

49. *Nyanzi v. the United Kingdom*, application no. 21878/06, judgment of 8 April 2008.

50. *D. v. the United Kingdom*, application no. 30240/96, judgment of 2 May 1997.

51. *N. v. the United Kingdom*, application no. 26565/05, [GC] judgment of 27 May 2008, §§46 and 51.



vide protection to the person concerned. In contrast, the Court held in *Soering v. the United Kingdom* that in looking at the responsibility of the expelling state under Article 3 of the ECHR: "There is no question of adjudicating on or establishing the responsibility of the receiving country."⁵²

It was, for instance, argued before the Court⁵³ that since the UNCAT expressly provides that ill-treatment must involve the responsibility of state authorities, the ECHR should be applied in the same way. In *T.I. v. the United Kingdom*⁵⁴ the Court noted that the German courts not only excluded persecution by non-state agents as a ground for asylum, but, despite the jurisprudence of the European Court, in applying the provision of their law which expressly refers to Article 3 of the ECHR, they did recognise threats from non-state agents as qualifying an individual for subsidiary protection under that provision. In *Tatete v. Switzerland*⁵⁵ the Swiss Government had also argued that the Convention did not apply because the risk did not emanate from agents of the state.

The Court has expressly rejected this argument in several cases. In *Ahmed v. Austria*⁵⁶ the applicant was threatened with return to Somalia, a country, at the time, in the grip of various warlords and with no government as such, and consequently no state to exercise responsibility. The Convention organs considered that the absence of state authority was immaterial to the risk to which the applicant would be exposed. The Court reiterated this view in *H.L.R. v. France*.⁵⁷ The French Government sought to argue before the Commission and the Court⁵⁸ that as other international instruments, such as the UNCAT, expressly provide that the ill-treatment must involve the responsibility of state authorities, the Convention should be interpreted in this way too. In *D. v. the United Kingdom*⁵⁹ it was accepted

52. *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, p. 27 §91.

53. See, for example, *H.L.R. v. France*, application no. 24573/94, judgment of 29 April 1997.

54. *T.I. v. the United Kingdom*, application no. 43844/98, decision of 7 March 2000. The Court declared it inadmissible.

55. *Tatete v. Switzerland*, application no. 41874/98, judgment of 24 June 1998.

56. *Ahmed v. Austria*, application no. 25964/94, judgment of 17 December 1996.

57. *H.L.R. v. France*, application no. 24573/94, judgment of 29 April 1997.

58. *H.L.R. v. France*, Government Memorial, Court (96) 322.

59. *D. v. the United Kingdom*, application no. 30240/96, judgment of 2 May 1997.



by all parties that the Government of St Kitts (D's country of origin) could not be held responsible for the poverty of the island that led to the absence of the socio-medical support on which the applicant relied in the United Kingdom. The same principle was also applied in *B.B. v. France*.⁶⁰

In *Ammari v. Sweden*⁶¹ the applicant claimed that he was at risk of being subjected to treatment contrary to Article 3, not only by the Algerian authorities but also by the Armed Islamic Group (AIG). The Court stated that "owing to the absolute character of the right guaranteed, it cannot be ruled out that Article 3 may also apply where the danger emanates from persons or groups of persons who are not public officials". The Court further stated that the risk must be "real" and that the authorities of the receiving state must be unable to obviate the risk by providing appropriate protection.

The Court in *Salah Sheekh*⁶² made clear its position regarding ill-treatment emanating from non-state actors:

The existence of the obligation not to expel is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials.⁶³

This conclusion was reiterated in *N. v. the United Kingdom*, the Court reserving to itself sufficient flexibility to address the application of Article 3 in other contexts which might arise.⁶⁴ An example of this flexibility was seen in *F.H. v. Sweden* where the applicant invoked several grounds for his fear of returning to Iraq, namely: his Christian faith, his membership of the Republican Guard and the Ba'ath Party (which would lead to him being charged with crimes before the Iraqi courts and even sentenced to death for having been a member, or in the case of his membership of the Republican Guard, being killed extra judicially by Shi'a

60. *B.B. v. France*, application no. 30930/96, judgment of 7 September 1998.

61. *Ammari v. Sweden*, application no. 60959/00, decision of 22 October 2002.

62. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007.

63. *Ibid.*, §147.

64. *N. v. the United Kingdom*, application no. 26565/05, [GC] judgment of 27 May 2008, §§31-32.



milita groups seeking revenge for previous wrongdoing) and finally, his fear of being convicted a second time in Iraq for the murder of his wife in Sweden. The Court held by 5 votes to 2 that the implementation of the deportation order would not violate Articles 2 or 3. Despite the Court's flexibility in examining each of the grounds for his fears, the minority took the view that the "rigour" required in the assessment of the risk fell short of that required and that the government had not dispelled any doubts concerning the evidence presented.⁶⁵

The EU Qualification Directive 2004/83/EC (Article 6) lists the "actors of persecution or serious harm" as:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

A minority of European states were unwilling to recognise as refugees those whose claims relate to persecution by "non-state agents", such as clans, tribes, criminal organisations, rebel groups, terrorist groups, guerrilla armies, or family members, for example in cases of domestic violence. Since the adoption of the Qualification Directive 2004/83/EC, all EU states are now required to recognise persecution by non-state agents as falling within the refugee definition. However, in practice, whilst the refugee definition in the EU Qualification Directive 2004/83/EC has led some countries that previously did not include persecution by such groups to provide protection, other countries have adopted a more restrictive approach.⁶⁶

The approach of the Committee against Torture requires the threat to result from state action or acquiescence, or acts by groups exercising quasi-governmental authority (see page 81).

65. *F.H. v. Sweden*, application no. 32621/06, judgment of 20 January 2009.

66. European Council on Refugees and Exiles, *The Impact of the EU Qualification Directive on International Protection*, October 2008.



The Court has repeated several times the principle in *Soering* that it cannot adjudicate on the responsibility of the receiving state. However, an exception to this rule exists in cases of return from one member state to another, which necessarily entails an assessment of the risk emanating from the authorities of other Convention (and also EU) states in order to establish liability under the Convention.⁶⁷

Exclusion clauses

Article 1F of the Geneva Convention states that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

This curious exception crept into the Geneva Convention during the *travaux préparatoires*. As a leading commentator has observed:

It is difficult to see why a person who, before becoming a refugee, has been convicted of a serious crime and has served his sentence, should forever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice on account of the offence committed.⁶⁸

The purpose of Article 1F recognised by the *travaux préparatoires* was to deny benefits to persons who would otherwise qualify as refugees so as

67. See e.g. *K.R.S v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008 (declared inadmissible); *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009, pending.

68. Weis P., "The concept of the refugee in international law", *Journal du droit international*, 87, 1960, p. 928 at pp. 984-6, cited in Hathaway, *The law of refugee status*, Butterworths, 1991.



to ensure the integrity of the institution of asylum (by guarding against misuse and requiring individuals to be responsible for their actions).⁶⁹

In the case of *Paez v. Sweden*⁷⁰ the applicant had been excluded from recognition as a refugee and refused asylum in Sweden as his case was found to fall within Article 1F of the Geneva Convention. However, when his brother, who had a similar case, won before the UNCAT Committee on 28 April 1997, the Swedish Government felt constrained to grant both brothers protection from expulsion.

As was noted at the outset, international human rights law provides protection to all human beings and that protection is absolute where Article 3 is engaged. The Geneva Convention provides protection for only a privileged group of people at risk of persecution for a “Convention reason” and if the exclusion clauses apply even that group will not be eligible for protection.

However, Article 1F is to be distinguished from Article 33 (2) of the Geneva Convention, which provides exceptions to the principle of *non-refoulement*.

Article 33 §1 of the Geneva Convention affirms that no one shall be returned (*refoulé*):

in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This protection is lost if Article 33 §2 applies. It states:

A refugee may lose the protection of the Geneva Convention if there are reasonable grounds for regarding him as a danger to the security of the country

69. UN High Commissioner for Refugees, UNHCR Statement on Article 1F of the 1951 Convention, July 2009 which clarifies and complements the position in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1 January 1992 and UNHCR Guidelines on International Protection No 5: application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05 and the UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003.

70. *Paez v. Sweden*, application no. 29482/95, judgment of 30 October 1997.



in which he is or if he is convicted of a particularly serious crime and constitutes a danger to the community.

The application of Article 33 §2 is constrained by Article 32, which stipulates a refugee may only be expelled “on grounds of national security or public order” and that such an expulsion may only be “in pursuance of a decision reached in accordance with due process of law”. Any determination of whether or not one of the exceptions provided for in Article 33 §2 is applicable must be made in a procedure which offers adequate safeguards, that is, an individualised determination by the country of asylum that the person concerned constitutes a present or future danger to the security or the community of the host country. Nevertheless, those found to present such a threat can lose their protection from return under the Geneva Convention.

Whilst Article 1F forms part of the refugee definition in the Geneva Convention and spells out the grounds for exclusion from that status, Article 33 §2 is completely unrelated to the refugee definition but was designed to protect national security and therefore affects the treatment afforded to refugees – i.e. permitting in exceptional circumstances – the withdrawal of protection from *refoulement* of those previously recognised as refugees under the Geneva Convention. The distinction between Article 1F and Article 33 §2 therefore would mean that an application of the exclusion clause under Article 1F on the basis that the person constitutes a risk to national security would be contrary to the object and purpose of that provision.⁷¹

The protection accorded by Article 3 of the ECHR is not limited in this way. This was stated by the Court in *Soering*, a case concerning extradition to face charges of a brutal murder allegedly committed before admission to the territory of the respondent state. The Court held:

71. UN High Commissioner for Refugees, UNHCR Statement on Article 1F of the 1951 Convention, July 2009, issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12 (2) b and (c) of the Qualification Directive (C-57/09 *Bundesrepublik Deutschland v. B* (OJ C 129/3, 6 April 2009) and C-101/09 *Bundesrepublik Deutschland v. B* (OJ C 129/7, 6 June 2009).



It would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture, *however heinous the crime allegedly committed*.⁷² [emphasis added]

However, the Court went on to observe that “inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”. It noted further that the danger for a state obliged to harbour a fugitive was “a consideration which must be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases”.⁷³

Unfortunately, the judgment does not fully explain what was meant by this comment. It is difficult to see how the notion of inhuman and degrading treatment anticipated in the state of destination can be interpreted by reference to the perceived danger to the expelling state of keeping the individual concerned on its territory. The Court was perhaps merely signifying that it did not seek to undermine the foundations of extradition and that it did not wish its judgment in *Soering* to be taken as a message to governments that they were obliged to harbour dangerous fugitives from justice unless both the risk of exposure and the threshold of severity tests were clearly met.

But this is quite different from taking the danger to the expelling state into account in assessing the dangers in the state of proposed destination.

The Court considered these comments again. In *Chahal*, the United Kingdom Government relied on Grotius’ *De Iure Belli ac Pacis* to support the proposition that asylum is to be enjoyed by people “who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men”.⁷⁴

72. *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, p. 26, §88.

73. *Ibid.* However, see below, page 54, for the test applied in *Saadi v. Italy*.

74. *Chahal v. the United Kingdom*, application no. 22414/93, report of 27 June 1995, p. 21 §98.



The Court rejected this argument, as the Commission had. It reaffirmed the absolute character, permitting no exception, of this provision which had been noted by the Court in *Vilvarajah*.⁷⁵ It found itself “unable to accept the government’s submission that Article 3 of the Convention may have implied limitations entitling the state to expel a person because of the requirements of national security”.⁷⁶ It stated:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.⁷⁷

The Court thus endorsed the Commission’s view that:

While it is accepted that this may result in undesirable individuals finding a safe haven in a Contracting State, the Commission observes that the state is not without means of dealing with any threats posed thereby, the individual being subject to the ordinary criminal laws of the country concerned.

The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the Geneva Convention.

In *Chahal*, the Court also considered the dicta in *Soering* quoted above. It held, in a somewhat Delphic comment, that:

[I]t should not be inferred from the Court’s remarks concerning the risks of undermining the foundations of extradition... that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a state’s responsibility under Article 3 is engaged.⁷⁸

It did not, however, offer any suggestion as to what was to be inferred from the remarks.

75. *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, p. 34 §108.

76. *Chahal*, report of 27 June 1995, p. 22 §102.

77. *Chahal v. the United Kingdom*, application no. 22414/93, judgment of 15 November 1996 §80.

78. *Chahal*, judgment of 15 November 1996, §81.



Any further debate on this issue was laid to rest in the case of *Saadi v. Italy*⁷⁹ in which the Grand Chamber of the Court found that the enforcement of the deportation decision would violate Article 3. The applicant had been prosecuted, but not convicted, in Italy for participation in international terrorism but had also been sentenced in Tunisia, in his absence, to 20 years' imprisonment for membership of a terrorist organisation. The Court held that:

Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule... It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, §81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Chahal*, cited above, §80 and §63 above). [...]

The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other.⁸⁰

This conclusion was held to be in accordance with the standards of the UNCAT and with guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.

The conclusion in *Saadi v. Italy* has been subsequently reaffirmed, including in the case of *Ismoilov and others v. Russia* which concerned the proposed extradition of 12 Uzbek nationals to face trial for terrorism and aggravated murder. The Court reiterated that:⁸¹

79. *Saadi v. Italy*, application no. 37201/06, [GC] judgment of 28 February 2008.

80. *Saadi v. Italy*, application no. 37201/06, [GC] judgment of 28 February 2008, §§138-141.



... whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion or extradition. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration (see, *mutatis mutandis*, *Chahal*, cited above, §§79 to 81; and *Saadi*, cited above, §§138 to 141).

The case of *Ramzy v. the Netherlands*⁸² raised similar issues to those in *Saadi v. Italy*. The applicant in *Ramzy* was charged with terrorism and other serious offences in the Dutch courts in what was known as the “Rotterdam jihad trial”. The trial received media attention. Whilst the applicant was acquitted of all charges, he argued that the “stigma” attached to him in connection with terrorism will attract the interest of the Algerian authorities, which will subject him to ill-treatment. The Dutch Government did not seek to argue that where the individual poses a threat to national security, that in the assessment of the risk on return under Article 3, his or her interest be balanced against the interests of the community as a whole (unlike the four interveners⁸³ as well as the United Kingdom Government as third party intervener in the case of *Saadi v. Italy*) rather than in national security cases it was even more important that burden of proof to be discharged by the applicant was “strict”. The intervention of the four governments prompted nine international human rights non-governmental organisations to intervene also, and to challenge the United Kingdom’s position. The case of *A. v. the Netherlands* raises similar issues. Both have been declared admissible and judgments on the merits are

81. *Ismoilov and others v. Russia*, application no. 2947/06, judgment of 24 April 2008, §126.

82. *Ramzy v. the Netherlands*, application no. 25424/05, decision (admissible) of 27 May 2008; and *A. v. the Netherlands*, application no. 4900/06, decision (admissible) of 17 November 2009.

83. The Lithuanian, Portuguese and Slovakian Governments, together with, and at the instigation of, the United Kingdom, intervened in the case. However the intervention as presented by the Court in the admissibility decision is identical to that of the United Kingdom government as presented by the Court in *Saadi v. Italy*.



awaited. The Court has now reiterated its position in *Saadi v. Italy* on numerous occasions.⁸⁴

The EU Qualification Directive 2004/83/EC states in its preamble that its objective is to ensure common criteria for the identification of persons genuinely in need of international protection. Its text then goes on to exclude from the protection it offers those who are excluded under the Geneva Convention. However, it also excludes from “subsidiary protection” those who are *suspected* of having committed criminal offences or of being a danger to the community (Article 17). Article 12 excludes from the refugee definition a third country national or a stateless person where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the preamble and Articles 1 and 2 of the Charter of the United Nations.

In February and March 2009 the German Federal Administrative Court made two references to the ECJ for a preliminary ruling⁸⁵ concerning the interpretation of Articles 12 §2 (b) and (c) of the Qualification Directive

84. The Court has reiterated its Grand Chamber judgment in the case of *Saadi v. Italy*, application no. 37201/06, judgment of 28 February 2008, on a number of occasions, including, *inter alia*, in *Ben Khemais v. Italy*, application no. 246/07, judgment of 24 February 2009; and unanimously in each of eight cases where judgment was given on 24 March 2009: *Abdelhedi v. Italy*, application no. 2638/07; *Ben Salah v. Italy*, application no. 38128/06; *Bouyahia v. Italy*, application no. 46792/06, judgment of 24 March 2009; *C.B.Z. v. Italy*, application no. 44006/06; *Darraji v. Italy*, application no. 11549/05; *Hamraoui v. Italy*, application no. 16201/07; *O. v. Italy*, application no. 37257/06; *Soltana v. Italy*, application no. 37336/06. The position in *Saadi* has also been reaffirmed in relation to other respondent states, e.g. *Ryabikin v. Russia*, application no. 8320/04, judgment of 19 June 2008; and *Soldatenko v. Ukraine*, application no. 2440/07, judgment of 23 October 2008.



2004/83/EC. At the time of writing, there had been several references for a preliminary ruling regarding the interpretation of the Qualification Directive. As is clear from what has been written above, whether such individuals are considered in this way, or even if they constitute a more substantiated threat, that they still enjoy absolute protection from expulsion under the ECHR. States need to be as aware of that overarching obligation as they are of the exclusion clauses of the Geneva Convention and the Qualification Directive.⁸⁶

In addition, there are currently several cases which have been communicated concerning the application of Article 1F of the Geneva Convention to, predominantly, Afghan nationals suspected of having committed war crimes. These cases also raise the issue of the effect of exclusion of an individual on their families.⁸⁷

The risk of torture and inhuman or degrading treatment

For Article 3 of the Convention to be engaged, it must be shown that the applicant is at risk of treatment prohibited by that article.

The Qualification Directive 2004/83/EC (Article 15 §b) gives the right to EU “subsidiary protection” to those who are not at risk of persecution, but who are at risk of “torture or inhuman or degrading treatment or punishment ... in the country of origin”.

Article 3 of the UNCAT prohibits expulsion to face torture.

The risk must be real. In *Thampibillai and Venkadajalasarma v. the Netherlands*⁸⁸ the Court observed that the applicant left Sri Lanka in 1994, almost four years after the killing of his father by the army and some three and a half years after he himself was arrested by the army and detained for

85. C-57/09 *Bundesrepublik Deutschland v. B* (OJ C 129/3, 6 April 2009) and C-101/09 *Bundesrepublik Deutschland v. B* (OJ C 129/7, 6 June 2009).

86. EU measures are discussed further in Part Three, pp. 213 ff.

87. *M.R.A. v. the Netherlands*, application no. 46856/07, communicated 9 March 2009; and *A.A.Q. v. the Netherlands*, application no. 42331/05, communicated 9 March 2009; see also the Report by the Commissioner for Human Rights, Thomas Hammarberg, on his visit to the Netherlands 21-25 September 2008, 11 March 2009, CommDH (2009) 2, §§69-73.

88. *Thampibillai and Venkadajalasarma v. the Netherlands*, application no. 61350/00, judgment of 17 February 2004.



two weeks. Therefore, since they found that it did not appear that these events constituted the reason for the applicant to flee his country,⁸⁹ they relied on this finding to support their view that he was not at a real risk on return.

In determining whether Article 3 is engaged, consideration must be given to what it is that is risked. The necessary threshold of severity must be met. In *Cruz Varas* the Court noted:

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case.⁹⁰

Citing these dicta with approval in *Vilvarajah v. the United Kingdom*, the Court went on to add:

The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.⁹¹

For those who are not victims of persecution as defined in the Geneva Convention, the risk of acts of physical torture, or of inhuman and degrading treatment is the most commonly invoked ground.

The Court in *N.A. v. the United Kingdom* stated that the requirement that treatment alleged must attain a minimum level of severity is implied by the assessment of the conditions in the receiving country against the standards of Article 3 of the Convention.⁹²

In *Said v. the Netherlands*⁹³ the applicant was a deserter from the Ethiopian Army whose expulsion would have violated Article 3 as he risked punishment by, *inter alia*, being tied up in prolonged exposure to the sun in very high temperatures. In *Jabari v. Turkey*⁹⁴ an Iranian woman who had

89. Cf. the approach of the UNCAT, page 81 ff.

90. *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991, §83.

91. *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991, §108.

92. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §110.

93. *Said v. the Netherlands*, application no. 2345/02, judgment of 15 July 2005.



committed adultery argued successfully that were the Turkish authorities to expel her to Iran, she would be exposed to treatment contrary to Article 3 in the form of whipping, flogging and stoning on account of her extramarital affair.

As noted above, the first ever decision of the Court in the case of *Soering* concerned the risk of facing the psychological distress of being subject to the death row phenomenon if extradited to stand trial in the USA. The Court found that this risk reached the necessary level of severity.

The effect of expulsion on the medical condition of the applicant has also been considered. For such claims to succeed, the circumstances of the particular case must be “exceptional”, such as those found in *D. v. the United Kingdom*⁹⁵ or even “very exceptional”.⁹⁶ *D. v. the United Kingdom* concerned the proposed expulsion of a person in the terminal stages of Aids to a country where he had no family or material resources, where there was no social welfare provision available to him and no treatment for Aids. The Court found a violation of Article 3 because his actual removal from the hospital bed where he was dying engaged that Article as well as his imminent deterioration and death in conditions of destitution that would have awaited him on return.

However, since the judgment in *D. v. the United Kingdom*, the Court has never found a proposed removal of an alien from a Contracting State to give rise to a violation of Article 3 on grounds of the applicant’s ill-health.⁹⁷ In *B.B. v. France*⁹⁸ the Commission found that there was a high probability that the applicant would suffer inhuman and degrading treatment on return to the Democratic Republic of Congo due to the onset of the Aids virus, epidemics sweeping the country increasing the risk of infection, and the absence of family support. The case was referred to the Court but was never examined, it being struck out of the list when the French Government provided an undertaking not to deport the applicant.

94. *Jabari v. Turkey*, application no. 40035/98, judgment of 11 July 2000.

95. *D. v. the United Kingdom*, application no. 30240/96, judgment of 2 May 1997.

96. *N. v. the United Kingdom*.

97. *Ibid.*, §34.

98. *B.B. v. France*, application no. 30930/96, Commission Reports 1998-VI.



Six subsequent cases were declared inadmissible where the HIV-positive applicants argued that their forcible return to Tanzania,⁹⁹ Togo,¹⁰⁰ Zambia,¹⁰¹ Columbia¹⁰² and Uganda¹⁰³ respectively would expose them to treatment contrary to Article 3. In each of the cases the treatment feared was not found to reach the threshold set by *D. v. the United Kingdom*.

In *Hukić v. Sweden*¹⁰⁴ the Court considered a complaint alleging that the expulsion of a 5-year-old boy with Down's syndrome from Sweden to Bosnia and Herzegovina, where the care he would receive would fall far short of that which he was presently enjoying in Sweden, would violate Article 3. The Court found the case inadmissible.

Psychiatric patients at risk of expulsion have also, albeit unsuccessfully, advanced arguments under Article 3.¹⁰⁵ In *Bensaid v. the United Kingdom*¹⁰⁶ the applicant was a schizophrenic suffering from a psychotic illness and feared treatment contrary to Article 3 should he be returned to Algeria. The Court considered that the suffering associated with an illness could, in principle, fall within the scope of Article 3 but the exceptional circumstances found in *D. v. the United Kingdom* were lacking.

Most recently, in *N. v. the United Kingdom*, the Grand Chamber found that:

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 the 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 breach of Article 3.

99. *Ndangoya v. Sweden*, application no. 17868/03, decision of 22 June 2004.

100. *Amegnigan v. the Netherlands*, application no. 25629/04, decision of 25 November 2004.

101. *S.C.C. v. Sweden*, application no. 46553/99, decision of 15 February 2000.

102. *Arcila Henao v. the Netherlands*, application no. 13669/03, decision of 24 June 2003.

103. *Karara v. Finland*, application no. 40900/98, decision of 29 May 1998 and most recently *N. v. the United Kingdom*.

104. *Hukić v. Sweden*, application no. 17416/05, decision of 27 September 2005.

105. *Ovdienco v. Finland*, application no. 1383/4, decision of 31 June 2005, *Bensaid v. the United Kingdom* (Schizophrenia), application no. 44599/98, judgment of 6 February 2001.

106. *Bensaid v. the United Kingdom*, application no. 44599/98, judgment of 6 February 2001.



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.¹⁰⁷

The dissenting Judges Tulkens, Bonello and Spielmann attacked the majority ruling in *N.* on the basis that policy considerations such as budgetary constraints in a case of “such extreme facts with equally compelling humanitarian considerations” run “counter to the absolute nature of Article 3” and negate the very nature of the rights guaranteed.

The personal nature of the risk

The United Kingdom Government in *Vilvarajah* argued:

The consequences of finding a breach of Article 3 in the present case would be that all other persons in similar situations facing random risks on account of civil turmoil in the state where they lived would be entitled not to be removed, thereby permitting the entry of a potentially very large class of people with the attendant serious social and economic consequences.¹⁰⁸

In practice, and perhaps to alleviate those concerns, the approach of the Court has been highly cautious. The Court is silently conscious of the fact that the Strasbourg system of supervision needs to retain the fullest possible support and compliance of the contracting parties if it is to be at all effective.

In a different context, in *Vilvarajah*, the Court agreed with the United Kingdom Government that the evidence concerning the background of the applicants, as well as the general situation in Sri Lanka did not show that the applicants’ position was any worse than the generality of other

107. *N. v. the United Kingdom*, application no. 26565/05, judgment [GC] 27 May 2008, §42.

108. Compare Article 2, OAU 1969 Refugees Convention 1000 UNTS 46, which expressly covers such situations: “The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”



young male members of the Tamil community returning to their country. “A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3.”¹⁰⁹

The reason given by the Court in exculpating the United Kingdom Government was that “there existed no special distinguishing features in their cases that could or should have enabled the Secretary of State to foresee that they would be treated in this way”. The Court found no breach of Article 3 despite the fact that the applicants, who had been returned to Sri Lanka before the case was examined by the Commission and Court, had in fact been subjected to treatment contrary to Article 3 on their return.

The United Kingdom’s own independent asylum appeal tribunal (which was only able to consider the appeal against the refusal of asylum on the merits after the applicants had been removed) had had no difficulty in deciding that asylum had been wrongly refused. The Strasbourg Court was not persuaded, even by the finding of that tribunal that the government had erred. (The Commission, when considering the same case, had been evenly divided as to whether there was a breach or not – the president’s casting vote being required to find no breach.)

It is difficult to reconcile the absolute nature of the protection offered by Article 3 with the view that an individual must show not just that he or she is at real risk of prohibited treatment but that he or she is relatively more at real risk of prohibited treatment than others in similar vulnerable circumstances. However, the same approach was adopted in 2005 to returns to Iraq (see *Muslim v. Turkey*¹¹⁰ below).

The judgment in *Salah Sheekh v. the Netherlands* revisited the approach taken in *Vilvarajah*. Finding, as had the Dutch Government, that the applicant and his family belonged to a targeted minority, the Court stated that:

109. See *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991, §111.
110. Application no. 53566/99, judgment of 26 April 2005.



... it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk. ... it might render the protection offered [by Article 3] illusory if, in addition to the fact that he belongs to the Ashraf ... the applicant be required to show the existence of further special distinguishing features.¹¹¹

The Court in *N.A. v. the United Kingdom* stated that the presence of further distinguishing features would be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question. The Court left open the possibility that the most extreme cases of general violence would expose an individual to ill-treatment of a sufficient level of intensity to entail a breach of Article 3 simply by virtue of being returned there:

Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see *Saadi v. Italy*, cited above, §132).¹¹²

In those circumstances, the Court has confirmed on several occasions that it will not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3.¹¹³ As is clear from the above, the applicant is nevertheless obliged to substantiate through the relevant documentation, membership of the group in question and the treatment meted out as a result. In *N.A. v. the United Kingdom* the Court was satisfied that it would not render illusory the protection offered by Article 3 to require Tamils challenging their removal to Sri Lanka to demonstrate the existence of further special distinguishing features, such as "risk factors"¹¹⁴ which would

111. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §148.

112. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §116; *Muminov v. Russia*, application no. 42502/06, judgment of 11 December 2008, §95; *Ryabikin v. Russia*, application no. 8320/04, judgment of 19 June 2008, §114.

113. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.



place them at a real risk of being detained and interrogated at Colombo airport as someone of interest to the authorities. The Court stated further that “while this assessment is an individual one, it too must be carried out with appropriate regard to all relevant factors taken cumulatively including any heightened security measures that may be in place as a result of an increase in the general situation of violence in Sri Lanka”.¹¹⁵

The Qualification Directive 2004/83/EC includes in its definition of “serious harm”, the risk of which entitles individuals to subsidiary protection, “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict” (Article 15c). The ECJ in *M. and N. Elgafaji v. Staatssecretaris van Justitie*¹¹⁶ recently interpreted Article 15c in conjunction with Article 2e¹¹⁷ to mean that in order to qualify for subsidiary protection; an individual did not need to be specifically targeted by reason of factors particular to his personal circumstances. A situation of armed conflict could be of such a high level that there would be substantial grounds for believing that the individual, on return, would face a real risk of being subject to a serious threat, solely on account of his or her presence on the territory. This interpretation was held to be fully compatible with the case-law of the Euro-

114. These were derived from the domestic Asylum and Immigration Tribunal Country Guidance case of *L.P. (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG [2007] UKAIT 00076* on which the European Court of Human Rights relied. Risk factors included, but were not limited to: “a previous record as a suspected or actual LTTE member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of LTTE fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad; having relatives in the LTTE. In every case, those factors and the weight to be ascribed to them, individually and cumulatively, must be considered in the light of the facts of each case but they are not intended to be a check list.”

115. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §134.

116. *M. and N. Elgafaji v. Staatssecretaris van Justitie* (Case C-465/07) (2008/C 8/08).

117. In conjunction with Article 2 (e): “person eligible for subsidiary protection” means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15... and [who] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”;



pean Court of Human Rights under Article 3 of the ECHR (specifically in *N.A. v. the United Kingdom*¹¹⁸).

A finding to the contrary would result in an inherent contradiction – the concept of “individual threat” by reason of violence which is “indiscriminate”. It would also be strange if only threats to civilians are covered (see, for example, *Said v. the Netherlands*, above¹¹⁹).

The UNCAT Committee applies the test of “personal, present, foreseeable, and real” risk (see page 84).

Time of assessing risk

A “present” risk

The passing of time has been held by the Court to erase, or reduce to a negligible level, a risk that may once have existed.

The Geneva Convention (Article 1C) and the EU Qualification Directive 2004/83/EC (Article 11) both include “cessation clauses” which preclude protection under their provisions when circumstances in a country have sufficiently improved.

The applicant in *Said v. the Netherlands*¹²⁰ demonstrated an ongoing risk. The applicant claimed to have deserted the Eritrean army, and maintained that, in the current climate in Eritrea, he still ran a real risk of being subjected to treatment proscribed by Article 3 on account both of his criticism of the military and of his desertion:

Since the nature of the Contracting States’ responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion (see *Vilvarajah and others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, §107, and *H.L.R. v. France*, cited above, p. 758, §37). In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court’s con-

118. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.

119. *Said v. the Netherlands*, application no. 2345/02, judgment of 15 July 2005.

120. *Ibid.*



sideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, pp. 1856 and 1859, §§86 and 97, Reports 1996-V, and *H.L.R. v. France*, cited above).¹²¹

In *Tomic v. the United Kingdom*¹²² a majority of the Chamber rejected the application of an ethnic Serb who alleged that his return to Croatia would put him at risk. The Court dismissed his claim as manifestly ill-founded and attached importance to the facts that the hostilities had ceased and Croatia was now a party to the ECHR.

In *Hida v. Denmark*¹²³ the applicant, a Kosovan, alleged that his forced return to Kosovo would subject him to treatment in violation of Article 3. Taking into account the general situation in Kosovo at the time (2004), the Court noted that incidents of violence and crimes against minorities continued to be a cause for concern and that the need remained for international protection of members of ethnic minority communities. However, despite this cause for concern, forced returns to Kosovo were taking place subject to an individualised screening process performed by the United Nations Interim Administration Mission in Kosovo (UNMIK). The Court noted that Denmark had already presented to UNMIK a number of Kosovans whose applications for a residence permit in Denmark had been refused, following which they were forced to leave the country. In some cases, UNMIK objected to the return of the persons in which case the Danish suspended their return until further notice. In the applicant's case this "safety" process of individualised screening also applied, that is, in the event that UNMIK objected to his return, it would be suspended until further notice. The Court therefore found no substantial grounds for

121. *Said v. the Netherlands*, cited above §48.

122. *Tomic v. the United Kingdom*, application no. 17837/03, decision of 14 October 2003.

123. *Hida v. Denmark*, application no. 38025/02, decision of 19 February 2004.



believing that the applicant, an ethnic Roma, would face a real and present risk of being subjected to treatment contrary to Article 3.

The EU Qualification Directive 2004/83/EC (Article 7) specifically provides that protection can be provided, *inter alia*, by international organisations. Austria considered UNMIK as a provider of protection in Kosovo but other countries have not considered that non-state actors including organisations can formally provide protection. UNHCR recommends that only in the most exceptional cases should non-state actors be considered providers of protection.

In *Muslim v. Turkey*¹²⁴ the applicant (whose application had been lodged in 1999) had alleged that if sent back to Iraq he would face execution by the authorities of the former regime that held him responsible for an attack against a member of the Baath party who was close to Saddam Hussein. Having regard to the conditions in Iraq when the complaint was considered in 2005, the Court came to the conclusion that the applicant no longer faced the same level of risk. The Court reaffirmed the principle that a mere “possibility” of ill-treatment on account of the unsettled general situation in a country is in itself insufficient to give rise to a breach of Article 3 of the Convention.¹²⁵

Where the threatened removal has not yet occurred

Where applicants have not yet been deported, a finding of the Court in their favour will not be that the *decision* to expel them was a violation but only that it would be a violation of the Convention were the expulsion or extradition to go ahead.

In *Chahal v. the United Kingdom* and *Ahmed v. Austria* the Court noted “the material point in time must be that of the Court’s consideration of the case”¹²⁶ and not the time at which the decision to remove was made.

124. *Muslim v. Turkey*, application no. 53566/99, judgment of 26 April 2005.

125. See for further information *Katani and others v. Germany*, application no. 67679/01, judgment of 31 May 2001.

126. *Chahal v. the United Kingdom*, application no. 22414/93, judgment of 15 November 1996, §86, and *Ahmed v. Austria*, application no. 25964/94, judgment of 17 December 1996, §43.



This may mean that the Court is revisiting the decision to expel months or even years (cf. *Muslim v. Turkey* above) after it has been taken in the light of any changes in circumstances, particularly conditions in the country of proposed destination, which have occurred in the interim. If the situation is held to have ameliorated sufficiently since the application was first brought to the Court, the finding will be, as in *Muslim*, of no violation.

This situation typically arises when deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court.¹²⁷ The case of *Basnet v. the United Kingdom* was declared inadmissible because the most recent country information on Nepal showed a marked change in the political circumstances applicable when the parties were invited to submit their observations.¹²⁸ The Government responded to the applicant submitting additional documentary evidence to the Court on the country situation by arguing that this should have founded a fresh claim for asylum and therefore the applicant had failed to exhaust domestic remedies. The Court rejected this argument. To have found otherwise would have resulted in the absurd Alice in Wonderland procedural position that failed asylum seekers who were applicants to the Court, having exhausted domestic remedies, would be subjected by the Court to an assessment of the “present risk” on return but would not be permitted to submit the relevant evidence to enable their case to be assessed by the Court without being returned to the domestic authorities.

Following the submission by both parties of their observations, some applicants to the Court have nevertheless been invited by the Court to submit a fresh claim for asylum to the domestic authorities, during which time, the application in Strasbourg is adjourned.¹²⁹ This contributes to

127. *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, judgment of 4 February 2005, §69. Interim measures are discussed below at page 217.

128. *Basnet v. the United Kingdom*, application no. 43136/02, decision (inadmissible) of 24 June 2008.



delays in the Strasbourg system and forces individuals to wait even longer, in great uncertainty, for the important decision on their status.

In the light of the judgment in *N.A. v. the United Kingdom*,¹³⁰ the respondent state successfully argued that a considerable number of the 342 pending cases concerning returns of young male Tamils to Sri Lanka be struck off the list in order for the individuals concerned to make a fresh claim for asylum.

Since the approach of the Court is that a violation of the Convention only occurs when there is an act of expulsion rather than when there is a final decision to expel, it is immaterial that the expulsion would have violated Article 3 had it gone ahead as a result of the domestic authorities' final decision had the European Court not intervened.

This approach may not be entirely consistent with the obligation contained in Article 1 to "secure" the Convention rights¹³¹ in domestic law and practice since it is clear that the individuals would have been expelled (and therefore presumably also ill-treated) but for the intervention of the Convention organs. It is difficult to sustain the argument that the state has discharged its obligations to "secure" the domestic protection of an absolute right for a vulnerable individual if an absolutely prohibited expulsion is only prevented by recourse to the European Court.

Where the applicants have already been expelled

In the *Cruz Varas v. Sweden* judgment the Court noted the following principles as being relevant to the assessment of the risk of ill-treatment:

Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Con-

129. Legal representatives may choose to take a robust approach and invite the domestic authorities to grant status or reach a friendly settlement. Failing this, the applicant is put back in the situation he found himself in when he originally entered the country, even though it could be some years later.

130. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.

131. The English text uses the word "secure". The French text uses the word "reconnaissent".



tracting State *at the time of the expulsion*; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears.¹³² [emphasis added]

In *Vilvarajah and others v. the United Kingdom*¹³³ the applicants were expelled and there was undisputed evidence that they were ill-treated in Sri Lanka. Their return to the United Kingdom was subsequently ordered by the United Kingdom courts which held that they had been wrongly refused asylum. The European Court nevertheless found no violation of Article 3 as – despite the finding of the United Kingdom courts that they had been wrongly refused asylum – the United Kingdom executive authorities could not, apparently, have foreseen that they would in fact be ill-treated in precisely the manner which they had claimed to fear.

In *Mamatkulov and Askarov v. Turkey* the applicants were extradited to Uzbekistan, despite the Rule 39 indication to the contrary by the Court (see below, page 217, for the procedures before the European Court of Human Rights). The Grand Chamber held that the risk had to be assessed at the date of the actual extradition of the applicants. In *Mamatkulov* the majority of the Grand Chamber concluded that there was insufficient evidence to support a finding that the Turkish Government should have been aware at the time of the extradition of the existence of a real risk that ill-treatment in breach of Article 3 would occur. In *Mamatkulov* it was nevertheless stated that where an applicant has already been extradited “the Court is not precluded from having regard to information which comes to light subsequent to the extradition”.¹³⁴

Despite its clear repetition of the principle that the assessment must be of the risk at the date of the expulsion, the majority in *Mamatkulov* did not consider that they had to be satisfied that the applicants had not suf-

132. *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991, §76.

133. *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991.

134. *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, judgment of 4 February 2005.



ferred ill-treatment which they feared. They relied rather on the absence of concrete evidence that the ill-treatment feared had actually occurred. The applicants' representatives before the Court had been unable to receive any further communications from their clients after the extradition had taken place. The Court considered that this absence of evidence supported the finding that there was, apparently, no real risk of which the Turkish Government should have been aware at the time of the removal. The joint (partly dissenting) opinion disagreed with the majority that the lack of evidence of ill-treatment after the return to Uzbekistan was a relevant factor to assessing the well-foundedness of the risk of which the Turkish Government should have been aware at the time of the extradition. (The Grand Chamber did, however, find a violation of Article 34 because of the failure to comply with the Rule 39 indication.)

In three more recent cases where the removal had already taken place, the Court took a slightly different approach to the evidential aspect of the question of the "present risk". In *Shamayev v. Russia and Georgia*,¹³⁵ several of the applicants were extradited from Georgia to Russia despite there being a Rule 39 indication preventing this until further notice. The Court was unable to ascertain the facts of those cases post-removal, i.e. the conditions in which the individuals were being held, and therefore did not find a violation of Article 3. This was despite the Russian authorities having obstructed a fact-finding visit by the Court, which ultimately led to a separate violation of the Convention under Article 34 on the basis the right to individual petition had been interfered with to an "unacceptable degree".

In *Y. v. Russia* the Court had refused a request for interim measures staying the deportation to China of the first applicant, a Chinese national and member of Falun Gong. The Court looked at the evaluation by the Russian authorities of the risk to which he would be subjected in China, the applicant's testimony before the domestic authorities and at international reports on the situation of Falun Gong practitioners, before finding that it had not been established that the first applicant faced a real risk of

135. *Shamayev and others v. Georgia and Russia*, application no. 36378/02, 12 April 2005.



treatment contrary to Article 3 of the Convention upon his return to China.¹³⁶ In particular, no information had been provided that the applicant had been subjected to treatment in breach of Article 3 and it was apparent that the applicant had, after returning to China, moved in with his son. However, a cautious approach should be taken to the assessment of risk once removal has been enforced – in some cases it may be true that the ill-treatment feared had not occurred by the time the Court makes a ruling on the issue, but in other cases it may only be a matter of time before the ill-treatment happens.

A week after the *Y.* judgment the Court decided in the case of *Muminov v. Russia* that found the domestic authorities had not made an adequate assessment of the risk of torture or ill-treatment were the applicant to be expelled to Uzbekistan. One aspect of that case was that the applicant fell within the definition of a “refugee *sur place*”.¹³⁷ It appeared that the domestic decisions gave no consideration to that aspect of his case, nor to the specific and detailed arguments pertaining to a risk of torture in Uzbekistan.¹³⁸ However, at the time of the Court’s determination, the applicant had been expelled. Unlike in the *Shamayev* case, in *Muminov* the Court stated that “the absence of any reliable information as to the situation of the applicant after his expulsion to Uzbekistan, except the fact of his conviction, remains a matter of grave concern for the Court”.¹³⁹ A violation of Article 3 was found.

The evaluation of the risk

The Court, and the Commission before it, have been understandably reluctant to find that applicants have discharged the burden of proof which rests on them in the face of findings of insufficient risk, or lack of credibility, by experienced and well-informed governments. The princi-

136. *Y. v. Russia*, application no. 20113/07, judgment of 4 December 2008.

137. A refugee *sur place* is a person who was not a refugee when he or she left the country of origin, but who became a refugee at a later date as a result of sudden changes in the country of origin (for instance, a coup d’état) or as a result of the claimant’s own activities abroad (for example, taking part in political activities against the government of the country of origin).

138. *Muminov v. Russia*, application no. 43503/06, judgment of 11 December 2008, §§87-88.

139. *Muminov v. Russia*, application no. 43503/06, judgment of 11 December 2008.



ples which it clearly recites in the jurisprudence will more rarely result in a finding of a violation on the facts.

Many cases are rejected at the admissibility level because the Court is inclined to attach more weight to the government's assessment of the situation than the applicant's fears. It thus does not avail itself of the opportunity to examine the merits of the case.

The approach in ECHR jurisprudence, until recently, had been for the Convention organs to reiterate that the governments who may examine thousands of asylum applications from a given country in any year, and who have access to information through their overseas diplomatic posts, are in principle best placed to assess the situation which prevails in the country of origin or proposed destination.¹⁴⁰

Allegations of ill-treatment must be supported by appropriate evidence. In cases where ill-treatment occurs whilst an individual is in the custody and control of the authorities the standard generally applied is "beyond reasonable doubt".¹⁴¹ However, when assessing the risk of ill-treatment of an individual upon return to their country of origin, the Court in *Saadi v. Italy*, in setting out the general principles to be applied, reiterated that:

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 (see *N. v. Finland*, no. 38885/02, §167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.¹⁴²

140. See the judgments of the Court and reports of the Commission in *Vijayanathan and Puspapajah v. France*, application nos. 17550/90 and 17825/90, judgment of 27 August 1992, *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991, and many unpublished admissibility decisions. As late as 1997 the Commission was rejecting claims from Kosovan Albanians that they were at risk from Milosevic's regime in Serbia. See *Haliti v. Germany*, application no. 31182/96, decision of 3 December 1997, *Tahiri v. Sweden*, decision of 11 January 1995, application no. 25129/94, *R.B. v. Sweden*, application no. 22508/93, decision of 21 October 1993.

141. *Muradova v. Azerbaijan*, application no. 22684/05, judgment of 2 April 2009, §§105-112.

142. *Saadi v. Italy*, application no. 37201/06, judgment [GC] of 28 February 2008, §129.



In that case, the Court saw no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases where the applicant presented a threat to national security, that it be proved that subjection to ill-treatment is “more likely than not”.¹⁴³ On the contrary:

The concepts of “risk” and “dangerousness” in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.¹⁴⁴

In the concurring opinion of Judge Zupancic, it was very important this statement be read as a “categorical imperative” protecting the rights of the individual:

It is intellectually dishonest on the other hand to suggest that expulsion cases require a low level of proof simply because the person is notorious for his dangerousness. From the policy point of view it is clear that the expelling state will in such situations be more eager to expel. The interest of a party, however, is no proof of its entitlement. The spirit of the ECHR is precisely the opposite, i.e. the Convention is conceived to block such short circuit logic and protect the individual from the unbridled “interest” of the executive branch or sometimes even of the legislative branch of the state.

The case of *Ramzy v. the Netherlands*¹⁴⁵ raises similar issues to that of *Saadi v. Italy*. Following *Saadi*, one would expect the Court to treat in the same way the arguments of the third party interveners in *Ramzy*, which are presented as identical to those of the United Kingdom Government in

143. *Ibid.*, §§139-140.

144. *Saadi v. Italy*, application no. 37201/06, judgment [GC] of 28 February 2008, §139.

145. *Ramzy v. the Netherlands*, application no. 25424/05, decision (admissible) of 27 May 2008.



Saadi v. Italy (i.e. which argue for a higher burden of proof in cases concerning the return of convicted terrorists). The Dutch Government took a different approach – namely that the applicant be required to show that he *personally* is at risk of ill-treatment. The Dutch also argue that the burden to be discharged in this regard must be adhered to strictly and this was “even more important” in cases where national security interests were at stake on the basis that the State is under a positive obligation under Article 2 of the Convention to take all reasonable preventative action to protect its residents from life-threatening situations. The Court may be expected to similarly reject this argument given its relationship to the argument already rejected in *Chahal* and *Saadi*, i.e. that the risk to the individual be balanced against the risk to the community (bearing in mind the obligation of the state to guard against that risk). *Daoudi v. France* is indicative of the proposed approach – the Court gave no credence to argument that the burden of proof was “heavier” (“plus lourde”) in terrorism cases, but instead focused its examination on the narrow way the French had presented the issue of an Article 3 risk in the case.¹⁴⁶

The *Ramzy* case was declared admissible four months after the Grand Chamber judgment in *Saadi v. Italy* and is now pending before the Court. The case of *A. v. the Netherlands* raises similar issues, and judgment is also pending.¹⁴⁷

The Court will consider all relevant evidence. In order for the Court to evaluate the level of risk, it has stated that it is incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, “material information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail”. The EU Qualification Directive 2004/83/EC imposes similar obligations.

In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3:¹⁴⁸

146. *Daoudi v. France*, application no. 19576/08, judgment of 3 December 2009.

147. *A. v. the Netherlands*, application no. 4900/06, decision (admissible) of 17 November 2009.

148. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §136.



The Court will assess the issues in the light of all the material placed before it, or, if necessary obtained proprio motu, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government ... It must be satisfied that the assessment is adequate and sufficiently supported by domestic material as well as by materials originating from other reliable and objective sources such as, for instance other Contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 ... if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the state concerned without comparing these with materials from other reliable and objective sources.

In *X v. the Federal Republic of Germany*¹⁴⁹ the Court found that the behaviour of the applicant provided a good indication of whether he truly considered himself to be in real danger.

The Court will sometimes use the interventions of third parties in order to provide a more holistic view of the situation in particular countries,¹⁵⁰ and exceptionally, members of the Court will occasionally make field trips as delegates in order to make factual assessments and assess credibility.¹⁵¹

The Court will very often rely on country reports and publications of national governments and international organisations. In *Said v. the Netherlands*¹⁵² a US Department of State Country Report was used by the Court to assess human rights conditions in Eritrea. The separate opinion of Cypriot Judge Loucaides contains a scathing attack on the inclusion of a US Government report in the judgment, considering it an unreliable product of a non-independent, non-impartial political government agency, by ref-

149. *X v. the Federal Republic of Germany*, DR 5, p. 137.

150. *Mamatkulov and Askarov v. Turkey*.

151. *N. v. Finland*, application no. 38885/02, judgment of 26 February 2005.

152. *Said v. the Netherlands*, application no. 2345/02, judgment of 15 July 2005.



erence to an earlier US report that he considered grossly failed to acknowledge human rights violations in Cyprus.

The Court in *N.A. v. the United Kingdom* provided some direction on this:

In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations (see *Saadi v. Italy*, cited above, §143). ...[C]onsideration must be given to the presence and reporting capacities of the author of the material in the country in question. ... [as regards diplomatic posts] their ability to gather information, [and as regards the UN] their ability to carry out on-site inspections and assessments in a manner which states and non-governmental organisations may not be able to do. While the Court accepts that many reports are, by their very nature, general assessments, greater importance must necessarily be attached to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before the Court.¹⁵³

Nevertheless, the Court considers that there is a positive duty on the national authorities, if the need arises, to go beyond the evidence provided by the applicant and to use diverse sources of current information in order to gain a clearer understanding of the situation in the receiving country, as in *Katani and others v. Germany*.¹⁵⁴

The report of the Commission in *Chahal* marked a departure from the Commission's earlier approach to the government's assessment of the situation in the country of destination. The Commission was impressed by the evidence submitted by the applicants as to the situation in India.

On the basis of the material before it, the Court also found that the applicants would be at risk. They were unable to find in the material provided by the respondent government "any solid evidence that the police

153. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §§120 -122.

154. *Katani and others v. Germany*, application no. 67679/01, decision of 31 May 2001.



are now under democratic control or that the judiciary has been able fully to reassert its own independent authority in the Punjab". In particular they noted the views of the United Nations Special Rapporteur on Torture and dismissed the assurances given by the Indian Government to the United Kingdom Government as not providing an adequate guarantee of safety. In *Bahaddar*¹⁵⁵ the Commission had expressed the view that expulsion to Bangladesh would be a violation of Article 3, although the Court did not rule on the point since the claim was rejected for failure to exhaust domestic remedies.

R.C. v. Sweden clarified the relative evidential burdens to be discharged by the applicant and the respondent in relation to substantiating the risk. Having found the applicant to be credible, the Court's evaluation of the risk fell into three stages. Firstly the Court considered the medical and forensic evidence produced by the applicant concerning his past torture in Iran. The Swedish authorities discounted a medical certificate produced by the applicant pertaining to his injuries as it was not an expert assessment. The Court disagreed, finding that the certificate nevertheless gave a strong indication that the applicant's scars and injuries may have been caused by ill-treatment or torture. In any event it was for the Migration Board to dispel any residual doubts as to the cause of the applicant's scarring. The Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a *prima facie* case as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagreed with the Government's view that it was incumbent upon him to produce such expert opinion. Therefore, the State had a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.¹⁵⁶

Secondly, the Court noted that the applicant was detained and tortured by the Iranian authorities following a demonstration in July 2001

155. *Bahaddar v. the Netherlands*, application no. 25894/94, judgment of 19 February 1998.

156. *R.C. v. Sweden*, application no. 41827/07, judgment of 9 March 2010, §53.



and the torture he endured occurred in the months following his arrest. Therefore the applicant's account was consistent with the information available from independent sources concerning Iran. The applicant was found to have substantiated the risk on return and the onus then rested with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion were to proceed.¹⁵⁷

Thirdly, the Court considered that as a returnee, the applicant would be placed at risk by reason of his inability to verify legal departure from Iran and that the Swedish Government had not rebutted this. In light of this, the Court found that the "cumulative effect of the above factors adds a further risk to the applicant (see, *mutatis mutandis*, *NA. v. the United Kingdom*, no. 25904/07, §§134-136, 17 July 2008)." ¹⁵⁸In cases where the applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers information from independent international human rights protection associations or governmental sources as to the existence of the practice in question and his or her membership of the group concerned.¹⁵⁹ As stated above, the Court will not insist that the applicant in such a case shows further special distinguishing features, but the assessment is aided by the presentation of information relating, *inter alia*, to: details of the practice or group, problems associated with the country prior to departure, examples of persecution among members of the group, indications that the authorities in the country of destination would consider the applicant to be an active member of the group, links between circles of practising group members in the host country and destination country, information on meetings, protests, demonstrations attended, or other reliable evidence in support of the claim that activities in the host country or country of destination

157. *Ibid.*, §§54-55.

158. *Ibid.*, §56.

159. *Muminov v. Russia*, application no. 42502/06, judgment of 11 December 2008, §95; *Saadi v. Italy*, application no. 37201/06, judgment of 28 February 2008, §132.



would put the individual at risk of being treated in a way that is incompatible with Article 3.¹⁶⁰

Credibility

In the evaluation of risk on return, the Court will also have regard to the authenticity of the documents as well as the legitimacy and credibility of an applicant's claims. In *Said v. the Netherlands*, for example, the Court expressly rejected the respondent government's finding that the applicant lacked credibility. In *T.I.* (a case about a return under the Dublin Convention of a Sri Lankan whose asylum claim had been rejected in Germany)¹⁶¹ the Court expressed its concerns that the applicant would be at risk if returned to Sri Lanka although the German courts had rejected his claims as, *inter alia*, lacking credibility.

In *V. Matsiukhina and A. Matsiukhin v. Sweden*¹⁶² the Court acknowledged that, due to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions.¹⁶³ This is particularly important in the case of vulnerable persons, including females, children, the elderly, survivors of torture, victims of smuggling or trafficking, and persons with mental, physical or audio-visual impairments.

In *Hatami v. Sweden*¹⁶⁴ the Commission substituted its own evaluation of the evidence for that of the Swedish authorities, finding that the applicant's claim to have been tortured was credible, that the Swedish authorities had placed reliance on a 10-minute interview conducted without

160. *Y. v. Russia*, application no. 20113/07, judgment of 4 December 2008, §§85-88.

161. *T.I. v. the United Kingdom*, application no. 43844/98, judgment of 7 March 2000.

162. *V. Matsiukhina and A. Matsiukhin v. Sweden*, application no. 31260/04, decision of 21 June 2005.

163. Cf. case-law of the UNCAT, page 69 et seq.

164. *Hatami v. Sweden*, application no. 32448/96, judgment of 23 April 1998.



accurate interpretation, and that they had reached their decision on an incorrect interpretation of the available facts. In *Hatami* the Commission for the first time echoed (without express reference) the case-law of the UNCAT Committee to the effect that “complete accuracy is seldom to be expected from victims of torture”.¹⁶⁵

Generally speaking, the national authorities may be best placed to assess the facts and the credibility of witnesses given that they had an opportunity to see, hear and assess the demeanour of the individual concerned. However, in the circumstances of *R.C. v. Sweden*¹⁶⁶ the Court disagreed with the finding of the Government that the information provided by the applicant was such as to undermine his general credibility. It was important to establish precisely the substance of the applicant’s claim – i.e. not that he was a member of a political party but that he had participated in demonstrations to express opposition to the Iranian regime and was arrested and tortured as a result. Accordingly, the Court found that the applicant’s “basic story was consistent throughout the proceedings and that notwithstanding some uncertain aspects, such as his account as to how he escaped from prison, such uncertainties do not undermine the overall credibility of his story.”

Diplomatic assurances and the real risk test

Some states are increasingly seeking to rely on diplomatic assurances either in the course of establishing whether the real risk test is met and, if it is met, that it can somehow be displaced by reliance on such assurances. Some sending states have also signed memoranda of understanding with receiving states and these may contain diplomatic assurances.

At the most simple level assurances can clearly have a role to play. Where an expulsion or extradition might expose an individual to the death penalty, an undertaking by the receiving state that the death penalty will not be sought or carried out may be sufficient to negate the risk if the receiving state is one whose word is reliable, whose legal system ena-

165. *Ibid.*

166. *R.C. v. Sweden*, application no. 41827/07, judgment of 9 March 2010, §52.



bles such undertakings to be binding, and whose past conduct and respect for the rule of law confirms that they are both willing and, as importantly, able to ensure that its assurances are valid.

Unfortunately recourse to diplomatic assurances is increasingly being had in cases where the state of proposed destination meets none of those criteria. In *Chahal*, the United Kingdom Government sought to rely on assurances given by the Indian authorities. The Court found that the Indian Government had made the assurances in good faith, but that violations of human rights by members of the security forces in the Punjab remained a “recalcitrant and enduring problem”; despite the efforts of the government to bring about reform. The assurances were therefore insufficient to displace the risk.

The situation was somewhat different in *Mamatkulov and Askarov v. Turkey*.¹⁶⁷ There it was the government itself which was the well-documented persistent author of gross and systematic violations of human rights. The majority in *Mamatkulov and Askarov* found that the assurances given by the Uzbek Government were sufficient to negate the existence of a real risk. The Turkish Government had relied on Uzbek undertakings that the applicants’ property would not be subject to general confiscation nor would they be subjected to torture or the death penalty. The minority¹⁶⁸ disagreed. They found that the Turkish Government’s reliance on the assurances of the Uzbek regime did not dispel the existence of the real risk. They considered that the undisputed findings concerning the general widespread human rights abuses in Uzbekistan and the applicants’ specific situation as members of a particularly at-risk group who had been charged with terrorist attacks on the president himself were sufficient to support the finding of a real risk.

In *Saadi v. Italy*¹⁶⁹ the applicant claimed he would be subject to torture and inhuman and degrading treatment and punishment if deported to serve a sentence of 20 years, issued *in absentia* for membership of a ter-

167. *Mamatkulov and Askarov v. Turkey*.

168. These dissenting judges were Judges Bratza, Bonello and Hedigan.

169. Application no. 37201/06, judgment [GC] of 28 February 2008.



rorist organisation.¹⁷⁰ The Italian Embassy (whilst having requested diplomatic assurances from the Tunisian Government) was issued with a *note verbale* by the Tunisian Minister of Foreign Affairs which accepted the transfer to Tunisia of Tunisians imprisoned abroad once their identity had been confirmed and stated that Tunisian legislation guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions". The Grand Chamber stated that

the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where ... reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

Therefore, where diplomatic assurances are obtained by the sending state the Court is not absolved from the obligation to examine whether the assurances provided:

in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, §105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.¹⁷¹

In *Ismoilov v. Russia*¹⁷² the prosecuting authorities in Uzbekistan provided two separate assurances covering a number of issues relating to the extradition proceedings and treatment on return.¹⁷³ The Court stated that:

diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention... Given that the practice of torture in Uzbekistan is described by reputable international experts as

170. At the date the Grand Chamber judgment was adopted, criminal proceedings concerning his alleged terrorist activities were also pending in the Italian domestic courts.

171. *Saadi v. Italy*, application no. 37201/06, judgment of 28 February 2008, §148.

172. *Ismoilov v. Russia*, application no. 2947/06, judgment (Chamber) 24 April 2008.

173. *Ibid.*, §§31 and 32.



systematic ... the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.

The Russian authorities in *Ryabikin v. Russia*¹⁷⁴ invoked assurances from the prosecuting authorities in Turkmenistan to the effect that the applicant, a Turkmen national of Russian ethnic origin, would not be subjected to ill-treatment there. The Court stated that no paper copy of the assurances had been submitted to it, but that even accepting the assurances were provided, given the lack of any independent monitoring in Turkmenistan, the Court was bound to question the value of the assurances that the applicant would not be subjected to torture.

In *Daoudi v. France* the applicant was convicted in France of conspiracy to prepare a terrorist attack on the US Embassy in Paris in September 2001 in connection with a group affiliated with Al Qaeda. The French Government did not have recourse to diplomatic assurances but “validated through diplomatic contacts” information concerning the applicant’s marital status, the offence for which he was convicted and a copy of his Algerian passport. Whilst not expressly addressing the issue of confidentiality between states in asylum or removal procedures, the Court found that the data would have been “crucial” with respect to the profile of the applicant and the substantiation of the risk of detention by the Algerian authorities. The objective material set out in a number of human rights reports confirmed that:

No on-site monitoring seems possible, there is no system of checks to ensure that detainees will not be tortured in secret facilities and inaccessible to all, and it seems possible that, placed in such circumstances, the applicant may submit to national or international courts of any objections he might raise about the treatment he was subjected (see, *mutatis mutandis*, *Ben Khemais v. Italy*, No. 246/07, February 24, 2009).

The Court were not prepared to accept the argument that the applicant could benefit from an amnesty under the Algerian Charter for Peace and National Reconciliation - it was accepted that he fell outside the scope

174. *Ryabikin v. Russia*, application no. 8320/04, judgment (Chamber) of 19 June 2008.



of the letter of the Charter and the “spirit” of the text provided no indication that the applicant would receive an amnesty either in theory or in practice.¹⁷⁵

Similarly, whilst the case of *Salah Sheekh v. the Netherlands* did not concern diplomatic assurances, the Court took the opportunity to note that the Dutch Government lacked any mechanism for monitoring whether or not the area to which it proposed sending the applicant would prove safe in reality for him once expelled.¹⁷⁶

The approach of the Court on the issue would now seem to be beyond doubt. *Muminov v. Russia*¹⁷⁷ and several subsequent cases reiterated the warning that if diplomatic assurances are obtained, the Court retains the obligation to examine whether the assurances provide a sufficient guarantee against the risk of ill-treatment. In *Soldatenko v. Ukraine* the Court found that it had not been established that the First Deputy Prosecutor General of Turkmenistan (to where the applicant was being extradited) or the institution which he represented was empowered to provide diplomatic assurances on behalf of the state. Furthermore, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected. Finally, the Court noted that the international human rights reports also showed serious problems as regards the international co-operation of the Turkmen authorities in the field of human rights and categorical denials of human rights violations despite the consistent information from both intergovernmental and non-governmental source.¹⁷⁸ This approach was reaffirmed in *Baykasov v. Ukraine* in respect of assurances from the Kazakh authorities: the prosecutors were not empowered to provide such assurances on behalf of the State and, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would be respected. In particular, UNCAT and NGOs had reported that the political opposition in

175. *Daoudi v. France*, application no. 19576/08, judgment of 3 December 2009, §§69-71.

176. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007.

177. *Muminov v. Russia*, §97.

178. *Soldatenko v. Ukraine*, application no. 2440/07, judgment of 23 October 2008.



Kazakhstan were subjected to various forms of pressure by the authorities. Moreover, the Ukrainian authorities' decision to grant the applicants refugee status had confirmed their allegations of political persecution in Kazakhstan.¹⁷⁹ The expulsion of a Tunisian applicant in *Abdelhedi v. Italy* was also found to violate Article 3 because the existence of assurances could not negate the risk of ill-treatment.

The issue of "closed material" relied on by states in national security cases is also relevant in this context. *Ramzy v. the Netherlands*¹⁸⁰ does not concern the use of diplomatic assurances *per se*. On the one hand, the government submitted that, although they did not, as a matter of principle, rule out the use of diplomatic assurances in expulsion cases under any circumstances, they had no intention of entering into any negotiations on diplomatic assurances with the Algerian authorities concerning the applicant or any other individual for that matter. Such negotiations should preferably be preceded by the establishment of a proper institutional and legal framework. On the other hand, the applicant felt that given the insistence of the respondent government on the threat which he allegedly posed to national security, it was highly implausible that there would have been no communication, at a high level or through the security services, from the Dutch and Algerian governments. Furthermore, the allegations against him were left in a "twilight zone of unverifiable national security findings" since decision-making in criminal proceedings instituted against him and in the asylum procedure were based on closed material which he had never had access to nor could he defend himself against.

The applicant, "Abu Qatada", in *Othman v. the United Kingdom* complains that the assurances provided by the Jordanian Government to the United Kingdom pursuant to a memorandum of understanding between the two states, cannot be relied on when there remains a pattern of human rights violations in Jordan and a culture of impunity for state agents in the security service and prisons who perpetrate such violations.

179. *Baysakov and others v. Ukraine*, application no. 54131/08, judgment of 18 February 2010.

180. *Ramzy v. the Netherlands*, application no. 25424/05, decision (admissible) of 27 May 2008.



The applicant also argues that it is incompatible with Article 3 to rely upon material which is not disclosed to the applicant (“closed material”) to establish the effectiveness of those assurances.¹⁸¹

Other organs of the Council of Europe have also commented on the use of diplomatic assurances. The Commissioner for Human Rights wrote in June 2006 that diplomatic assurances from states with a track record of torture:

are not credible and have also turned out to be ineffective in well documented cases. The governments have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case.

The Parliamentary Assembly of the Council of Europe stated that “relying on the principle of trust and assurances given by undemocratic states known not to respect human rights is simply cowardly and hypocritical”.¹⁸² Such statements have a role in informing the Court’s jurisprudence, for example, Resolution 1433 (2005) was cited by the Court in *Abdelhedi v. Italy*.¹⁸³

The European Committee for the Prevention of Torture’s (CPT) 15th Report has echoed this approach: “Fears are growing that the use of diplomatic assurances is in fact circumventing the prohibition of torture and ill-treatment.”

The CPT focuses on the absence of any practical mechanisms for monitoring compliance:

To have any chance of being effective, such a mechanism would certainly need to incorporate some key guarantees, including the right of independent and suitably qualified persons to visit the individual concerned at any time

181. *Othman v. the United Kingdom*, application no. 8139/09, communicated 8 June 2009.

182. PACE Doc. 10957, 12 June 2006, Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, Report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe, §260.

183. *Abdelhedi v. Italy*, application no. 2638/07, judgment of 24 March 2009, §50 citing PACE Resolution 1433 (2005) Lawfulness of detentions by the United States in Guantánamo Bay.



without prior notice and to interview him/her in private in a place of their choosing.

The approach of the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) is similarly pragmatic.¹⁸⁴

The approach taken by the UNCAT committee to diplomatic assurances is discussed at page 86.

The UNHCR adopted a note on diplomatic assurances in August 2006¹⁸⁵ and the UN General Assembly also recognised that diplomatic assurances do not release states from their obligations, in particular the principle of *non-refoulement*.¹⁸⁶

Internal flight alternative

There is nothing in the Geneva Convention that requires an applicant to show a well-founded fear of persecution in all areas of the country. However, some states refuse to grant refugee status to asylum seekers who would otherwise fulfil the refugee definition but have an alternative location within the country of origin where they are not deemed to face persecution. This often leads to arbitrary results.

In *Chahal v. the United Kingdom*, the United Kingdom Government argued that even if the Court were to find that the applicant would be at risk in the Punjab he would be safe in other areas of India. The Court found that although the applicant was at particular risk in Punjab he was not safe elsewhere in India either.

In *Hilal v. the United Kingdom*, the government alleged that even assuming the applicant was at risk in Zanzibar the situation in mainland Tanzania was more secure. The Court found, as they had in *Chahal*, that human rights abuses were also prevalent in the areas of Tanzania other than Zanzibar. As in *Chahal*, the police could not be relied on as a safe-

184. See Final Activity Report of the DH-S-TER on diplomatic assurances (extracts from the 62nd meeting report of the CDDH), in particular paragraphs 20 and 21. Available at: [http://www.coe.int/t/e/human_rights/cddh/3_committees01.%20steering%20committee%20for%20human%20rights%20\(cddh\)/06.%20activity%20reports/2006/dh-s-ter.asp](http://www.coe.int/t/e/human_rights/cddh/3_committees01.%20steering%20committee%20for%20human%20rights%20(cddh)/06.%20activity%20reports/2006/dh-s-ter.asp).

185. <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl+RSDLEGAL&id+44dc81164>.

186. UN doc. A/C.3/60/L.25/Rev.1. See also the warning of the UN Special Rapporteur against Torture, UN press release, 23 August 2005.



guard against arbitrary acts and the applicant was at risk of being moved to an area where he would be at risk.

Salah Sheekh v. the Netherlands examines the question of the internal flight alternative in some detail. The applicant came from Somalia, where he was a member of the Ashraf minority. The Dutch Government recognised that some parts of Somalia were unsafe and did not return people to those parts. However, it considered other areas to be safe enough to justify returns. The applicant alleged that, as a member of his minority group without clan support, he would be unprotected even in those areas, and thus was not only at risk there, but also at risk of being forced into the areas which were recognised as being unsafe. The Court agreed, citing its earlier judgments in *Chahal* and *Hilal*, as well as the admissibility decision in *T.I.*, which it found applicable by analogy. The Court stated:

as a pre-condition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.¹⁸⁷

In *N.A. v. the United Kingdom*, the Court considered the UNHCR position paper on Sri Lanka and the applicant's argument that in respect of the risk to him from the Liberation Tigers of Tamil Eelam (LTTE), there was no internal flight alternative available to him since he was also at risk from the Sri Lankan authorities in government-controlled areas. The Court found that in light of the applicant's particular circumstances, the real risk to him was sufficient to make internal flight unavailable.¹⁸⁸

In a recent case, a family of four Russians alleged that if they were deported from Sweden to Russia they would be persecuted, ill-treated and maybe even killed because the father (and first applicant), a former major in the Russian army, had unveiled irregularities within the military and those involved wanted revenge. In declaring the complaint manifestly

187. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §141.

188. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §98.



unfounded, the Court was influenced by the fact that the applicants would not be obliged to return to their home town but would be able to settle in a new place of residence immediately upon return to Russia and register there.¹⁸⁹

The application of the internal flight alternative by states causes particular difficulties in cases where the source of the alleged persecution is non-state actors, for example, as regards many forms of gender-based persecution and violence (e.g. domestic violence or claims lodged on the basis of sexual orientation).

Article 8 of the EU Qualification Directive 2004/83/EC allows member states to refuse protection if they determine that the applicant would not be in undue danger in a part of the country of origin, and the applicant “can reasonably be expected to stay in that part of the country”. The danger is that this provision may be applied in a blanket fashion, by those states which have transposed it, rather than on the basis of an individualised assessment. Some states have applied the internal protection alternative even though there may be technical obstacles to return.

The internal protection alternative should be practically, safely and legally accessible.

“Safe” countries

As regards the material scope of the Geneva Convention, it is well settled that there is no distinct right to be granted asylum, only to be protected from *refoulement* to a place where one would be at risk. Article 33 §1 of the Geneva Convention, in parallel to Article 3 of the ECHR, establishes only the principle that requires contracting states to refrain from expelling or returning refugees to territories where their lives or freedom would be threatened. It follows that there is, in principle, no prohibition in refugee law on the return of a refugee to a country in which he will be safe, however reluctant he may be to go there.¹⁹⁰

189. *A.M. and others v. Sweden*, application no. 38813/08, decision (declared inadmissible) of 16 June 2009.

190. See *Rosenberg v. Yee Chien Woo*, 402 United States 49 (1970) (US Supreme Court); and *Hurt v. Minister of Manpower and Immigration* (1978), 2 C.F. 340 (Canadian Federal Court of Appeal).



The concept of a “safe” country can arise in a number of contexts: either the state where applicants claim to be at risk is considered safe, or the applicants are being sent to a so-called “safe third country” but fear that they will be removed onward to the country where they fear ill-treatment, or the conditions of onward return will violate Article 3.¹⁹¹ UNHCR has described the application of the “safe country” concept by states as referring to “protection elsewhere”, whereas states obligations under the Geneva Convention regime must operate to provide “protection somewhere”.

Asylum seekers whose country of origin is generally deemed to be free of persecution are often returned there, frequently without substantive consideration of their individual circumstances. The asylum applications of individuals from such “safe” countries are generally subjected to consideration under an accelerated procedure. Individuals can sometimes even be refused leave to enter the country where they are trying to seek asylum.¹⁹²

Expulsion to “safe third countries”

The practice of returning asylum seekers to a “safe third country”, that is, a state other than the one where the individual claims to be at risk of prohibited treatment, has been common in European states since the 1980s. During the 1990s it was applied more systematically, and has been incorporated into the national asylum legislation of most western European countries. It forms a major plank in the construction of international co-operation, particularly within the European Union.

As a result of the adoption of the Dublin Convention (now the “Dublin Regulation”) and a phalanx of bilateral readmission agreements, many states are now sending people back, not directly to the state where they

191. This was the case in the complaints relating to expulsions from Lampedusa to Libya in *Hussun and others v. Italy* (application nos. 10171/05, 10601/05, 11593/05, 17165/05, judgment of 19 January 2010 (struck out of the list). See also page 80 below concerning the situation of Dublin II Regulation transfers.

192. Lambert, *Seeking asylum: Comparative law and practice in selected European countries*, Martinus Nijhoff Publishers, Dordrecht, 1995, §§89-90.



fear ill-treatment, but to a state which may then expel them onwards to that state.¹⁹³

In *T.I. v. the United Kingdom*¹⁹⁴ the Court considered that state responsibility could arise by sending an asylum seeker to a third country under the provisions of the Dublin Convention (now Regulation; see page 240) if, in the circumstances, there was a real risk that the applicant would be sent on to a country where he faced treatment contrary to Article 3.

There are two fundamental potential dangers for the asylum seeker inherent in the “safe third country” concept. The first is that they will be “bounced” back and forth from one alleged “safe third country” to another, as successive states refuse to examine their application substantively. Whilst not contravening any express provision of the Geneva Convention, this practice raises serious issues under the ECHR. The Commission has considered the problem of “refugees in orbit” under Article 3:

Under certain circumstances the repeated expulsion of a foreigner without identity papers or travel documents and whose state of origin is unknown or refuses to accept him could raise a problem under Article 3 of the Convention which prohibits inhuman or degrading treatment.¹⁹⁵

The UNHCR sees such practices as contrary to the premise that:

an asylum seeker cannot be removed to a third country in order that he apply for asylum there, *unless that country agrees to admit him to its territory as an asylum seeker and consider his request.*¹⁹⁶ [emphasis added].

Concerns have also been raised that some Council of Europe member states, which are generally deemed to be safe third countries, are not nec-

193. See below, pages 78-80, 170, 216, 219, 225, 240, 246.

194. *T.I. v. the United Kingdom*, application no. 43844/98, judgment of 7 March 2000. It is understood that since summer 2008, the Court has granted interim measures under Rule 39 in tens of cases concerning Dublin returns to states where the applicant may face onward return to a third country, such as Somalia or Iraq. The Rule 39 indications have predominantly been communicated to the United Kingdom Government and relate to returns to Greece.

195. *X v. the Federal Republic of Germany*, application no. 8100/77, not reported. See further *Giama v. Belgium*, application no. 7612/76, *Yearbook* 23 (1980), p. 428.

196. *The “safe third country” policy in the light of the international obligations of countries vis-à-vis refugees and asylum seekers*, UNHCR, London, July 1993, §4.2.14. See Conclusion No. 85 (XLIX) 1998 UNHCR Executive Committee, § (aa).



essarily safe for certain types of asylum seeker because of the lack of a harmonised approach and consistency of procedural safeguards. For example, Austrian law did not protect deserters, or conscientious objectors, even if they faced the death penalty in their home state, while civil war victims who cited subjection to arbitrary arrest, torture or rape as reasons for being granted asylum could be turned down.¹⁹⁷ As late as 1997, Kosovan Albanians who feared serving in Milosevic's army were refused asylum in Germany.¹⁹⁸ There is a current concern regarding claims for asylum lodged in EU member states by Roma and other related groups who have been forced to flee another EU member state due to the persecution faced there.

This lack of consistency was one of the concerns leading to the adoption of the Qualification Directive 2004/83/EC which should lead to more consistent criteria being adopted by EU states.

The second danger is that, in a process of "chain removal", the asylum seeker is ultimately expelled from one country to the next and back to his or her country of origin without a substantive examination (or re-examination) of his or her claim. On this issue the UNHCR has written:

The policy whereby an asylum seeker arriving from a so-called 'safe third country' is returned to that country without his substantive claim having been considered is based on the assumption that there is an international principle by virtue of which a person who has left his country in order to escape persecution must apply for recognition of refugee status and/or for asylum in the first safe country he has been able to reach. Although the persistent repetition of this assumption has led many to accept it uncritically, the reality is that no such an international principle exists and that the claim which has been advanced to this effect appears to be the product of a misreading of the principle of 'first country of asylum'. As such, removals of asylum seekers to third countries carried out solely on the basis of this supposed principle risk running counter to accepted principles of refugee pro-

197. *Neue Zürcher Zeitung*, 8 April 1994, *Frankfurter Rundschau*, 11 April 1994.

198. The European Court of Human Rights has upheld the German approach; see, for example, *Haliti v. Germany*, application no. 31182/96, decision of 3 December 1997.



tection and may involve breaches of the international obligations of the removing country under the 1951 Convention.¹⁹⁹

The extent to which the responsibility of the expelling state is engaged under the ECHR in these situations has been examined by both the Commission and the Court.

In *Amuur v. France*²⁰⁰ a complaint under Article 3 was declared inadmissible by the Commission because the Somali applicants were returned to Syria, where they were not at risk and there was no evidence to suggest that Syria would have returned them to Somalia.

The Convention also forbids expulsion to states which do not have the necessary procedural guarantees to protect individuals from onward expulsion to situations where they will be at risk. The clarification of Convention law is of crucial importance in the light of the many readmission agreements which are now being concluded, both bilaterally and between the European Union and other territories, particularly in central and eastern Europe and the former Soviet Union and beyond. Individual states have also concluded readmission agreements – and whilst most are formal public documents – more informal policies or agreements where individuals are simply refouled are coming to light.²⁰¹ Of the formal agreements, UNHCR has taken the view that the measure should only be applied following a full and fair assessment of the individual case, and where the readmitting state has consented to readmit the individual in question. Readmission agreements would therefore only pose risks for human rights where the asylum procedures preceding the trigger of the readmission agreement were not carried out in a full and fair manner.

The test under the ECHR remains the same for all these cases. Is there a real risk of exposure to ill-treatment, either in the state of proposed desti-

199. The “safe third country” policy in the light of the international obligations of countries vis-à-vis refugees and asylum seekers, UNHCR, London, July 1993, §§1.1 and 1.2.

200. *Amuur v. France*, application no. 19776/92, judgment of 25 June 1996.

201. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009 (pending) and *Hussun and others v. Italy*, application no. 10171/05, decision of 11 May 2006 (pending).



nation or through chain *refoulement*? If there is an arguable violation, is there an effective remedy?

In some cases applicants have been expelled, but been returned by order of the national courts, like the applicants in *Vilvarajah* (whose complaint was rejected in Strasbourg and who were ill-treated on return).²⁰² In other cases the role of other treaty bodies can be important. In *Paez v. Sweden*,²⁰³ two Peruvian brothers had applied for asylum in Sweden. Both were excluded from refugee status on similar grounds (under Article 1F of the Geneva Convention). One brother then made an application to the European Commission of Human Rights, the other to the UNCAT Committee. The Commission found in April 1996 that the applicant would not be at risk if returned to Peru. A year later, the UNCAT Committee found that the return of the applicant's brother would expose him to prohibited treatment and underlined the absolute nature of the protection.²⁰⁴ The Swedish Government then granted a residence permit to the brother despite the fact that the application to the Strasbourg institutions had been rejected. The Court held that the case could be struck off without deciding whether or not the proposed expulsion would have been a violation of the Convention.

*B.B. v. France*²⁰⁵ concerned the proposed expulsion to the then Zaire of an Aids sufferer whose four brothers had all been granted asylum in France or Belgium. The applicant was made subject to a compulsory residence order, but not granted a residence permit after the Commission's report found that his expulsion would violate Article 3. The application was therefore struck off by the Court.

A significant number of cases are struck off in this way each year because, following the making of a complaint to the European Court, the government decides to withdraw the threat of expulsion. In *Abdurahim Incedursun v. the Netherlands*,²⁰⁶ the Commission had found no violation of

202. See, for example, *D.S., S.N., and B.T. v. France*, application no. 18560/91, decision of 16 October 1992, *Iruretagoyena v. France*, application no. 32829/96, decision of 12 January 1998.

203. *Paez v. Sweden*, application no. 29482/95, decision of 18 April 1996.

204. Decision of 28 April 1997, Communication No. 39/1996, UN doc. CAT/C/18/D/39/1996.

205. *B.B. v. France*, application no. 30930/96, judgment of 7 September 1998.



Article 2, Protocol No. 6 or Article 3 of the Convention. However, the applicants had succeeded in having their complaint referred to the Court under Protocol No. 9 of the Convention. Once the Filtering Committee had passed the application for onward reference to the Court, the Netherlands Government granted the applicant a residence permit. This mirrors the conduct of the same government in the case of *Nsona*.²⁰⁷

EU states and ECHR contracting parties

The Qualification Directive 2004/83/EC refers only to “third country nationals” and thus excludes from its application anyone who is a citizen of an EU state even if they would otherwise be in need of protection. The Protocol on Asylum for Nationals of Member States of the European Union, as annexed to the Treaty Establishing the European Community, provides that “Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.”²⁰⁸ Under the Protocol, applications for asylum from nationals of a member state generally may not be considered.

The case of *Iruretagoyena v. France*²⁰⁹ concerned an ETA member who feared reprisals from the Spanish police on his return. His application for a Rule 36 (now Rule 39) indication was refused and he was handed over to the Spanish police, who subjected him to ill-treatment including the administration of electric shocks. His complaint was rejected, *inter alia*, because the CPT had recently reported a diminution of the well-documented practices of the Spanish police contrary to Article 3 and it did not therefore consider that at the time of his expulsion there were serious rea-

206. *Abdurahim Incedursun v. the Netherlands*, application no. 33124/96, judgment of 22 June 1999.

207. *Nsona v. the Netherlands*, application no. 23366/94, judgment of 28 November 1996. This case was not struck off because the applicant had actually been expelled and then permitted to return without the government acknowledging that the expulsion was a violation of the Convention.

208. Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty of Amsterdam.

209. Application no. 32829/96, decision of 12 January 1998. See also *Urrutikoetxea v. France*, application No. 31113/96, decision of 5 December 1996.



sons for believing that he would be submitted to the ill-treatment which he subsequently suffered. The Commission also noted, however, that he could bring a complaint against Spain in relation to the torture which he suffered at the hands of the police on his return.²¹⁰ The Court noted that he had not made an asylum application in France. It did not note that this was unnecessary since, as he was an EEA national, he had a directly effective right to reside in France under EU law.

In *Tomic v. the United Kingdom*,²¹¹ the Court considered it significant that the state (Croatia) to which the ethnic Serb applicant was being returned was a party to the ECHR which had accepted the obligation to provide procedural guarantees and effective remedies in respect of breaches of the ECHR.

In the case of *T.I. v. the United Kingdom*²¹² the Court noted that, under the Convention, contracting parties' obligations do not stop at protecting people from expulsion to states where they will risk ill-treatment. The case concerned a Sri Lankan asylum seeker who had been refused asylum in Germany because he feared persecution by non-state agents and because his claim was not considered credible by the German authorities. He was being returned there by the United Kingdom under the (then) Dublin Convention. On the facts, his claim to asylum, had it been examined in the United Kingdom, would have been likely to succeed. The European Court considered that the evidence showed grave concerns that he would be at risk if returned to Sri Lanka. The Court accepted the German Government's assurances that he would be able to submit a second asylum claim. It was, however, not only conceded that he would be unlikely to succeed in this,

210. It would be unfortunate if the findings of the CPT that states had reduced the number of violations of Article 3 were to be used to deprive individuals of the absolute protection which that article affords. The same concerns apply, *mutatis mutandis*, to the friendly settlement adopted on 5 April 2000 in the *Denmark v. Turkey* inter-state case which records the advances that Turkey has made in improving the training of police and increasing the penalties for violations of Article 3. Whilst these advances are to be welcomed and encouraged, they should not be invoked to exculpate any future violations which occur either in the countries themselves or by the states expelling individuals to those countries.

211. Application no. 17837/03, decision of 14 October 2003.

212. Application no. 43844/98, decision of 7 March 2000.



but also that he would be unable to benefit from the specific provisions of German law relating to the application of Article 3 of the ECHR as a basis for protection from expulsion. The German case-law on Article 3 was in direct conflict with that of the European Court of Human Rights itself in that it did not at that time accord protection to those at risk from non-state agents (see above). The Court eventually accepted the German Government's assurances that there was in place another discretionary procedure which would fill the "protection gap" that would otherwise exist. The case was therefore declared inadmissible.

Some two weeks after this decision another asylum seeker was removed from the United Kingdom to Germany. Despite the assurances given to the Court in *T.I.* by the Government of Germany he was permitted neither to submit a fresh claim nor to access the discretionary procedure and was sent by the border guards onward to his own country where he was arrested and ill-treated. Concern has been expressed that the decision in *T.I.* did not meet the Convention's requirement that the rights guaranteed must be "practical and effective, not theoretical and illusory".

Within the context of the EU measures it is interesting to note that the Qualification Directive 2004/83/EC applies to many of those in need of subsidiary protection but who are not Geneva Convention refugees. However, the Dublin II Regulation²¹³ (formerly the Dublin Convention) refers only to those who seek Geneva Convention refugee status. An individual who does not claim to be a Geneva Convention refugee, but expressly seeks the protection of Article 3 of the ECHR, should not be lawfully made subject to Dublin II Regulation procedures. Nevertheless, individuals subject to the Dublin II Regulation procedure (which allocates responsibility for examining the asylum claim to the first country in which the asylum seeker claims asylum) have alleged that their transfer from one EU state to another would violate Article 3. The cases emerging in the Court's juris-

213. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 18 February 2003, No. 343/2003, ("the Dublin II Regulation").



prudence principally concern transfers to Greece or Italy, being states which receive large numbers of sea arrivals seeking to enter Europe.

In *K.R.S. v. the United Kingdom*,²¹⁴ the Court, stated that:

removal to an intermediary country which is also a Contracting State does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In *T.I.* the Court also found that the United Kingdom could not rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States established international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there could be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (*Waite and Kennedy v. Germany* [GC], no. 26083/94, §67, ECHR 1999-I).

However, the case was declared inadmissible as it had not been proven the applicant, an Iranian national, would have been at real risk in Greece of onward return to a third country. The Court recalled that Greece, as a contracting state, has undertaken to abide by its Convention obligations and to secure Convention rights to everyone within their jurisdiction. According to the Court, even if the conditions of detention to which the applicant would be subjected to were a cause for concern, any issue arising from this should be taken up with the Greek, and not the British, authorities. A violation of Article 3 of the Convention was found in *S.D. v. Greece*²¹⁵ on the basis that the conditions of detention in which the applicant was held, bearing in mind he was an asylum seeker, combined with the excessive length and conditions, amounted to degrading treatment.

The Court has communicated several cases concerning Dublin II transfers.²¹⁶ The Council of Europe Commissioner for Human Rights in March

214. *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008.

215. *S.D. v. Greece*, application no. 53541/07, decision of 11 June 2009.



2010 submitted a third party intervention in a group of cases concerning return of asylum seekers from the Netherlands to Greece by virtue of the Dublin II Regulation. Commissioner Hammarberg's written submission was based on his visits to Greece in December 2008 and February 2010 as well as on continuous country monitoring. He has provided the Court with his observations on major issues concerning the asylum procedure in Greece and human rights safeguards, as well as asylum seekers' reception and detention conditions.²¹⁷

A further case concerning the alleged *refoulement* of 35 asylum seekers, including 10 minors intercepted by the Italian coastal authorities to Greece, has been communicated both against the Greek and the Italian authorities.²¹⁸

In the light of the substantial difficulties caused, the EU Commission has proposed a number of changes to the Dublin II Regulation and the Qualification Directive 2004/83/EC.

The significance of the jurisprudence of the UNCAT Committee

The jurisprudence in this field of the Committee against Torture under UNCAT is not only informative but also has a legal role in the interpreta-

216. See for example, *Ahmed Ali v. the Netherlands and Greece*, application no. 26494/09, *Djelani Sufi & Hassan Guduud v. the Netherlands and Greece*, application no. 28631/09, *Saied Ahmed v. the Netherlands and Greece*, application no. 29936/09, *Mohammed Jele v. the Netherlands and Greece*, application no. 29940/09, *Abwali v. the Netherlands and Greece*, application no. 30416/09, *Aweys Ahmed v. the Netherlands and Greece*, application no. 31930/09, *Mohamed Ilmi v. the Netherlands and Greece*, application no. 32212/09, *Yahia Yasir v. the Netherlands and Greece*, application no. 32256/09, *Moosa Mahamoud v. the Netherlands and Greece*, application no. 32729/09, *Alem Abraha v. the Netherlands and Greece*, application no. 32758/09, *Ali Elmi v. the Netherlands and Greece*, application no. 33212/09, *Nuur Haji v. the Netherlands and Greece*, application no. 34565/09, *Abshir Samatar v. the Netherlands and Greece*, application no. 36092/09, *Malaaq Showri v. the Netherlands and Greece*, application no. 37728/09, *N.I. v. Belgium*, application no. 51599/08, and *M.S.S. v. Belgium*, application no. 30696/09, *M.E.G. v. France*, application no. 42101/09.

217. With the entry into force of Protocol No. 14 to the Convention, the Commissioner will have the right to intervene *proprio motu* as third party in the Court's proceedings.

218. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009 (pending).



tion of the ECHR. Article 53²¹⁹ of the ECHR provides that a provision of the Convention may not be applied in a way that is inconsistent with the other international obligations of the state in question.²²⁰

Signatories to the UNCAT are bound under Article 3 of that Convention to refrain from returning an individual to a state in which they would be exposed to acts of torture. A complaints mechanism to ensure that this prohibition is complied with exists in the form of the Committee against Torture which has competence to hear complaints relating to a state's violation of its obligations under the treaty provisions.²²¹ Whilst criticism has been levelled at the committee for the limited circumstances in which it will conclude that a state has violated the treaty, it should be noted that its decisions are necessarily restricted by the specific scope of UNCAT's provisions as outlined in greater detail below. These limitations are perhaps at fault for the narrow manner in which the jurisprudence of the committee has developed in recent years, a position which is no doubt highly frustrating, if not severely detrimental, to those applicants who remain outside the Convention's safeguards. As with any complaints mechanism, some cases are declared inadmissible on procedural grounds. An important case of 23 Indian migrants allegedly intercepted by boat in Senegalese waters and detained under Spanish control in Mauritania was declared inadmissible: the complainant acting on behalf of the detainees was a Spanish citizen and member of the NGO, *Colectivo por la Justicia y los Derechos Humanos*, but did not have *locus standi*.²²²

219. "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

220. See also *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989.

221. The UNCAT Committee monitors state compliance with UNCAT by examining reports submitted by states and issuing recommendations in "concluding observations". The Committee may also, under certain circumstances, consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated, undertake inquiries, and consider inter-state complaints. The UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is one of the UN mechanisms directed to the prevention of torture and other forms of ill-treatment. It started its work in February 2007. The Protocol gives the SPT the right to visit all places of detention in those States and examine the treatment of people held there.



Article 1 of the UNCAT makes clear that torture must be inflicted by or with the acquiescence of the state. Acquiescence implies complicity. A higher level of state complicity is required than a mere reluctance or *a fortiori* inability to take sufficiently robust measures to prevent the torture occurring at the hands of non-state agents. Article 1 outlines that a violation will only be found in situations where it can be shown that a state's actions or proven acquiescence will result in an individual facing a risk of torture. As a result of the natural interpretation of this provision, the committee is unable to ensure that an individual is not deported to a country in which the feared abuse will be inflicted by a non-state actor.

An exception, however, exists with regard to "acts by groups exercising quasi-governmental authority"²²³ who have *de facto* control over the territory to which the return of an individual is proposed. The committee has deemed that such "groups" must effectively undertake "certain prerogatives"²²⁴ that are comparable to those traditionally associated with a legitimate government. However, the extent of this exception is somewhat limited in terms of the situations in which the committee has interpreted it to apply. Notably, as in *H.M.H.I. v. Australia*,²²⁵ even where a centralised government maintains limited territorial control and is of a transitional nature, the committee is unlikely to consider a dominant regional faction as exercising the requisite "quasi-governmental" power to be subject to the protection afforded by the convention.

Article 16 of the UNCAT specifies that certain articles of the convention also apply to inhuman and degrading treatment as well as to torture. (The different levels of treatment are equally absolutely prohibited by the ECHR.) Article 3 is not among the articles specifically mentioned in Article 16. However, in light of post-9/11 attempts by national governments to redefine acts of torture as ill-treatment, or otherwise justify torture or ill-

222. *J.H.A (on behalf of P.K. et al) v. Spain*, Communication No. 323/2007, UN doc. CAT/C/41/D/323/2007, 21 November 2008.

223. *H.M.H.I. v. Australia*, Communication No. 177/2001, UN doc. A/57/44, p. 166 (2002), 1 May 2002.

224. *Elmi v. Australia*, Communication No. 120/1998, UN doc. CAT/C/22/D/120/1998 (1999), 14 May 1999.

225. *H.M.H.I. v. Australia*, Communication No. 177/2001, UN doc. A/57/44, p. 166 (2002), 1 May 2002.



treatment, the committee reminded states that the absolute and non-derogable character of the prohibition of torture has become accepted as a matter of customary international law and is a peremptory *jus cogens* norm. No exceptional circumstances whatsoever may be invoked by a state to justify acts of torture in any territory under its jurisdiction. General Comment No. 2 states that “the obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.”²²⁶

In terms of the approach adopted when assessing a communication, a number of considerations have been regarded as instructive when examining the risk faced by an individual. The committee appears to place particular reliance on the existence of previous acts of torture,²²⁷ the length of time that has passed since the previous abuse occurred,²²⁸ the political profile of the author²²⁹ and any pattern of consistent human rights violations in the receiving state.²³⁰ The standard to be applied to the reality of the risk feared need not be “highly probable”, but must be “personal, present, foreseeable, and real”. These requirements impose a rather exacting standard to satisfy a problem which is no doubt further exacerbated by the restrictive burden of proof imposed upon the individual who is required to demonstrate a prima facie arguable case despite the committee’s general unwillingness to re-examine a state’s domestic factual findings.²³¹ In this context, General Comment No. 1 (on the implementation of Article 3) contains a non-exhaustive list of “pertinent” information to be put forward by the parties on the merits of the case.²³² The com-

226. General Comment No. 2, implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008.

227. *K.K. v. Switzerland*, Communication No. 186/2001, UN doc. CAT/C/31/D/186/2001 (2003), 11 November 2003.

228. *Ibid.*

229. *S.U.A. v. Sweden*, Communication No. 223/2002, UN doc. CAT/C/33/D/223/2002 (2004), 22 November 2004.

230. *Mutombo v. Switzerland*, Communication No. 13/1993, UN doc. A/49/44, p. 45 (1994).

231. *P.E. v. France*, Communication No. 193/2001, UN doc. CAT/C/29/D/193/2001 (2002), 21 November 2002.

232. See General Comment No. 1: implementation of Article 3 of the Convention in the context of Article 22 (*refoulement* and communications), A/53, annex IX., 21 November 1997.



mittee has frequently found that the Convention will not be violated where complainants fail to provide insufficient evidence to substantiate the risk of torture following their expulsion or extradition.²³³

Nevertheless, a number of important principles have emerged from the decisions of the committee, particularly in relation to credibility. In *Kisoki v. Sweden*²³⁴ it was expressly recognised that it was normal for people who have been tortured not to disclose the detailed story of their experiences fully at the time they are interviewed and that this should not damage an asylum claimant's credibility. This position was reaffirmed in *Karoui v. Sweden*²³⁵ where the committee noted the importance it attached to the individual's explanation for the inconsistencies in the information provided to the state party during the asylum process. However, where there is a delay in adducing documentary evidence, such as where the individual waits until after the initial decision of a state authority, the committee appears to be loath to accept these documents' authenticity without a "coherent" explanation as to why they were not produced at an earlier stage.²³⁶ This rationale also appears to extend to situations in which the individual has waited until the appeal stage of their request for asylum before alleging that they face a risk of torture if returned to a particular state.²³⁷ Furthermore, a state party alleging before the committee that a complainant is inconsistent in their account must identify precisely what those inconsistencies are.²³⁸

Some vagueness, incredibility or inconsistencies in the presentation of the facts may be immaterial, the material facts having been proved. Whilst adverse credibility was raised in the case of a woman facing deportation

233. *X. v. Australia*, Communication No. 324/2007, UN doc. CAT/C/42/D/324/2007, 5 May 2009 (concerning expulsion); and *L.J.R. v. Australia*, Communication No. 316/2007, UN doc. CAT/C/41/D/316/2007, 26 November 2008 (concerning extradition to face the death penalty).

234. *Kisoki v. Sweden*, Communication No. 41/1996, UN doc. CAT/C/16/D/41/1996 (1996).

235. *Karoui v. Sweden*, Communication No. 185/2000, UN doc. A/57/44, p. 198 (2002).

236. *H.B. H., T.N. T., H.J. H., H.O. H., H.R. H. and H.G. H. v. Switzerland*, Communication No. 192/2001, UN doc. CAT/C/30/D/192/2001, 29 April 2003.

237. *H.K.H. v. Sweden*, Communication No. 204/2002, UN doc. CAT/C/29/D/204/2002 (2002), 19 November 2002.

238. *C.T. and K.M. v. Sweden*, Communication No. 279/2005, UN doc. CAT/C/37/D/279/2005, 7 December 2006.



to Rwanda, it had been demonstrated that the complainant was repeatedly subjected to rape in detention by public officials and that her deportation would breach the UNCAT.²³⁹ The fact that an applicant was not represented during the proceedings is also relevant.

The committee has also made significant comments concerning a state's reliance on "diplomatic assurances" to circumvent the protection against *refoulement* of an individual to an abusive state. Whilst such assurances were seemingly accepted as valid in *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*,²⁴⁰ it would appear that the committee based its decision in that instance primarily on the lack of personal risk to the individual and the fact that the guarantees had been strictly monitored and upheld in the time that had passed. In contrast, the later decision in *Agiza v. Sweden*²⁴¹ clearly establishes that diplomatic assurances cannot provide sufficient protection where there is a manifest risk of torture, especially where there is no effective mechanism for the "refouling" state to enforce them. The state party must also supply the assurances to the Committee in order for it to perform its own independent assessment of their satisfactoriness or otherwise and detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that the assurance was both in fact, and in the complainant's perception, objective, impartial and sufficiently trustworthy.²⁴²

Another pertinent issue that has been considered is that of the applicability of an internal flight alternative, discussed in *Alan v. Switzerland*.²⁴³ Here an argument that an individual could simply relocate within a state's territory was dismissed on the basis that there was little likelihood that whilst an active police search existed a safe area could be found. However, the subsequent decision specifically concerning India in *S.S.S. v. Canada*²⁴⁴

239. *Ibid.*

240. *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*, Communication No. 199/2002, UN doc. CAT/C/31/D/199/2002 (2003), 17 November 2003.

241. *Agiza v. Sweden*, Communication No. 233/2003, UN doc. CAT/C/34/D/233/2003 (2005), 20 May 2005.

242. *Pelit v. Azerbaijan*, Communication No. 281/2005, UN doc. CAT/C/38/D/281/2005, 5 June 2007.

243. *Alan v. Switzerland*, Communication No. 21/1995, UN doc. CAT/C/16/D/21/1995 (1996), 8 May 1996.



outlines that where an individual does not have a particularly high political profile, and a substantial period of time has passed since any police interest, the ability to locate a safe haven elsewhere in the country of origin is substantially increased.

The committee expressly referred to the approach of the European Court of Human Rights in *Chahal v. the United Kingdom* in a case concerning the expulsion to India of a member of a Sikh terrorist organisation, despite his request for interim measures. The committee stated that Article 3 UNCAT affords absolute protection to anyone in the territory of a state party, regardless of the person's character or the danger the person may pose to society.²⁴⁵ Furthermore, the state party's obligations include observance of the procedural rules (including those on interim measures) adopted by the Committee, which are inseparable from the Convention, and are specifically intended to give meaning and scope to Articles 3 and 22 of the Convention. Therefore Canada was found in breach of its obligations under articles 3 and 22 of the Convention and given 90 days to make reparation and establish the complainant's whereabouts and the state of his well-being.

The extraterritorial application of other articles of the ECHR

The Court has been primarily concerned with situations where expulsion would engage Article 3. In general, it has been the invocation of Article 3 that has operated as a bar to removal. The Court has emphasised the absolute nature of the prohibition as well as the serious and irreparable nature of the suffering risked. However, such compelling considerations do not *automatically* apply under the other provisions of the Convention such as Article 8, the right to private life²⁴⁶ or Article 9,

244. *S.S.S. v. Canada*, Communication No. 245/2004, UN doc. CAT/C/35/D/245/2004 (2005), 5 December 2005.

245. *Bachan Singh Sogi v. Canada*, Communication No. 297/2006, UN doc. CAT/C/39/D/297/2006, 29 November 2007 reaffirming *Tebourski v. France*, Communication No. 300/2006, UN doc. CAT/C/38/D/300/2006, 1 May 2007, §8.2.



freedom of religion.²⁴⁷ Removal can be resisted where it would result in a “flagrant breach” of a qualified Convention right (such as Articles 5, 6, 8-14), particularly where the denial of fair trial would result in a risk of execution.

What constitutes a “flagrant” denial of justice has not been fully explained in the Court’s jurisprudence, but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. As the Court has emphasised, Article 1 cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention (see *Soering*, cited above, pp. 33-34, §86). In our view, what the word “flagrant” is intended to convey is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.²⁴⁸

Whilst what constitutes a “flagrant breach” of the Convention may mean that the breach of the right in question is “fundamental”, “manifest” or “basic”, it is for the Court to clarify this.

This section looks at the other articles of the Convention which might be engaged extraterritorially.

Article 2 – The right to life²⁴⁹

The Court found in *Soering v. the United Kingdom*²⁵⁰ that it could not be considered a breach of Article 2, read together with Article 3, to expel a person to face the death penalty since Article 2 did not outlaw capital punishment. However, for those states which are parties to Protocol No. 6

246. *Z. and T. v. the United Kingdom*, application no. 27034/05, decision (inadmissible) of 28 February 2006.

247. See also *F. v. the United Kingdom*, application no. 17341/03, decision (inadmissible) of 22 June 2004 (return to Iran where homosexuality is not acceptable).

248. *Mamatkulov and Askarov v. Turkey*, §14 of the joint partly dissenting opinion of Judges Sir Nicolas Bratza, Bonello and Hedigan. This was a dissent on the facts.



to the Convention (concerning the abolition of the death penalty), it has since been held that it can be a breach of that protocol to extradite or expel a person to another state where there is a real risk that the death penalty will be imposed.²⁵¹ The asylum seeker or refugee who would face capital charges or execution on return will thus be protected from expulsion in a state which has ratified Protocol No. 6 and, *a fortiori*, Protocol No. 13 (concerning the abolition of the death penalty in all circumstances).

The Article 2 issue has not generally been raised in expulsion cases. Although the applicant in *H.L.R. v. France*²⁵² alleged that his life would be at risk if he returned to Colombia, the matter was considered under Article 3. The case of *D. v. the United Kingdom*²⁵³ was declared admissible under Article 2 but the Court preferred to examine it on the merits under Article 3, as did the Commission in *Bahaddar*.²⁵⁴ The case of *M.A.R. v. the United Kingdom*²⁵⁵ was also declared admissible under Article 2 where the applicant alleged he could face arbitrary execution on return to Iran.²⁵⁶

A comprehensive analysis of the current approach adopted by the Court when considering the extraterritorial application of Article 2 was undertaken in *Bader v. Sweden*.²⁵⁷ Although it was recognised that state practice has yet to amend Article 2 so as to abolish the death penalty in all

249. Article 2 provides:

- i Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- ii Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection."

250. *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, §103.

251. *Y v. the Netherlands*, application no. 16531/90, 68 DR 299. *Aylor Davis v. France*, 76 DR 164.

Leong Chong v. Portugal, Series A, No. 83A, DR 88. *Alla Raidl v. Austria*, application no. 25342/94, decision of 4 November 1995.

252. *H.L.R. v. France*, application no. 24573/94, judgment of 29 April 1997.

253. *D. v. the United Kingdom*, application no. 30240/96, judgment of 2 May 1997.

254. *Bahaddar v. the Netherlands*, application no. 25894/94, decision of 22 May 1995.

255. *M.A.R. v. the United Kingdom*, application no. 28038/95, decision of 16 January 1997.

256. *Ibid.*

257. *Bader v. Sweden*, application no. 13284/04, judgment of 8 November 2005.



circumstances, it did acknowledge that a “deprivation of life pursuant to an ‘execution of a sentence of a court’²⁵⁸ would need to comply rigorously with the standards enshrined in Article 6. Relying on the judgment in *Öcalan v. Turkey*,²⁵⁹ the Court expressed the view that:

an issue may arise under Articles 2 and 3 of the Convention if a Contracting State deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving state, the outcome of which was or is likely to be the death penalty.²⁶⁰

Under this rationale the Court in *Bader* found that the real risk of a death sentence being imposed following a “flagrant denial of a fair trial”²⁶¹ prohibited the respondent state from returning the applicant to Syria. In a concurring opinion, however, this finding of a violation under Article 2 was considered inappropriate by Judge Cabral Barreto,²⁶² who expressed the view that the state’s actions would more sensibly be defined as a breach of Article 1 of Protocol No. 13.²⁶³

Article 1 of Protocol No. 6 – No one shall be condemned to the death penalty or executed

The Court has established that an individual may not be extradited or expelled to another country where there are substantial and proven grounds for believing that the individual will be subject to the death penalty. This is, however, as in *Al-Shari v. Italy*,²⁶⁴ conditional on the individual first adducing *prima facie* evidence to substantiate any such risk.

In EU states, Article 15a of the Qualification Directive 2004/83/EC requires that “subsidiary protection” including protection from return is granted to those at risk of the death penalty or execution.

258. *Ibid.*, §42, citing *Öcalan v. Turkey*, application no. 46221/99, judgment [GC] of 12 May 2005.

259. *Öcalan v. Turkey*, see above.

260. *Bader v. Sweden*, application no. 13284/04, judgment of 8 November 2005, §42.

261. *Ibid.*, §47.

262. *Ibid.*

263. See below, page 91, Article 1 of Protocol No. 13.

264. *Al-Shari and others v. Italy*, application no. 57/03, decision of 5 June 2005.



Article 1 of Protocol No. 13 – No one shall be condemned to the death penalty or executed even in times of war

Whilst the Court has yet to unanimously find a violation, the nature of this prohibition has been examined in the concurring opinion of Judge Cabral Barreto in *Bader v. Sweden*.²⁶⁵ In joining the Court's majority finding of a violation of Article 2 for an applicant who faced the death penalty if deported to Syria, the concurring opinion went on to establish that such a complaint would be more appropriately categorised as breaching Article 1 of Protocol No. 13. In making this analysis, Judge Cabral Barreto placed reliance on the intention of the signatory states to the Additional Protocol to strengthen and replace the obligation under Article 2 so that the abolition of the death penalty applied in all circumstances. In *Al-Saadoon v. the United Kingdom* the applicants alleged that their transfer from the custody of the British authorities in Iraq to the Iraqi Higher Tribunal subjected them to a real risk of being subjected to an unfair trial before the tribunal followed by execution by hanging.²⁶⁶ The Court examined the issue under Article 3. It was considered that Article 2 had now been amended to prohibit the death penalty in all circumstances, given that all but two member states had signed Protocol 13 and all but three states which had signed it had ratified it. The Court found that the death penalty, which involved the deliberate and premeditated destruction of a human being by the state authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, and could be considered inhuman and degrading and, as such, was contrary to Article 3 of the Convention.

Shortly before the physical transfer had taken place there were substantial grounds for believing that there was a real risk of the applicants' being condemned to the death penalty and executed. It was relevant that the Iraqi authorities had never given any binding assurance that they would not execute the applicants; the outcome of the Iraqi trial process

265. *Bader v. Sweden*, application no. 13284/04, judgment of 8 November 2005.

266. *Al-Saadoon and Mufdhi v. the United Kingdom*, application no. 61498/08, judgment 2 March 2010.



was impossible to predict; execution could not be ruled out; and the UK authorities had not made any real attempt to negotiate with the Iraqi authorities to prevent the risk of the death penalty. Furthermore, the Iraqi prosecutors initially had “cold feet” about bringing the case themselves, because the matter was “so high profile”. The UK authorities had the opportunity to seek to make alternative arrangements involving, for example, the applicants being tried by a UK court, either in Iraq or in the UK. However, it did not appear that any such solution was ever sought. The Court was not persuaded by the argument that the need to secure the applicants’ rights under the Convention inevitably required a breach of Iraqi sovereignty. Consequently the applicants had been subjected to inhuman and degrading treatment, in violation of Article 3.

Article 4 – Trafficking and freedom from forced labour

The case-law of the Court in relation to Article 4 is generally scarce. However, there has been a number of important decisions of relevance to asylum and trafficking cases.

In *Siliadin v. France*,²⁶⁷ the Court held that Article 4 of the ECHR gives rise to positive obligations on the part of the state to adopt measures to protect victims against the harm and suffering caused by human trafficking. Whilst *Siliadin* concerned a violation which occurred in the territory of France, the scope of Article 4 in the context of trafficking is equally important in expulsion cases where the breach would occur extraterritorially. For example, the applicant in *M. v. the United Kingdom* claimed to have been the victim of trafficking for the purposes of forced prostitution in Uganda and the United Kingdom. She complained under Articles 3 and 4 of the Convention that there was a real risk that if she were returned she would again fall into the hands of traffickers and be subjected to ill-treatment and forced sexual labour. In recognition of that risk, the government reached a friendly settlement in the case.²⁶⁸

267. *Siliadin v. France*, application no. 73316/01, judgment of 26 October 2005.

268. *M. v. the United Kingdom*, application no. 16081/08, decision of 1 December 2009 (struck out of the list).



In *Rantsev v. Cyprus and Russia*²⁶⁹ the applicant was the father of a Russian national who had arrived in Cyprus on an “artiste” visa and started work in a cabaret. Shortly after arriving, Ms Rantseva left her place of work saying she was going back to Russia but was picked up by the cabaret manager ten days later. The manager took her to the police station asking that she be detained and removed as an illegal migrant. The police instructed the cabaret manager to take Ms Rantseva away but to return later in order that further inquiries could be made in relation to her immigration status. Just over two hours after leaving the police station, Ms Rantseva was found dead below the apartment where the manager had taken her. Mr Rantsev complained that the Cypriot and Russian authorities failed to investigate his daughter’s alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking.

Two non-governmental organisations, Interights and the AIRE Centre, made submissions before the Court arguing that the modern day definition of slavery included situations such as the one arising in the present case, in which the victim was subjected to violence and coercion giving the perpetrator total control over the victim. The Court held that trafficking itself was prohibited by Article 4.

281. The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (see §§101 and 161 above). It implies close surveillance of the activities of victims, whose movements are often circumscribed (see §§85 and 101 above). It involves the use of violence and threats against victims, who live and work under poor conditions (see §§85, 87 to 88 and 101 above). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (see §§161 and 266 above). The Cypriot Ombudsman

269. *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment of 7 January 2010.



referred to sexual exploitation and trafficking taking place “under a regime of modern slavery” (see §84 above).

282. ... the Court concludes that trafficking itself, within the meaning of Article 3 (a) of the Palermo Protocol and Article 4 (a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. ...

The Court held that Cyprus was in breach of its positive obligations arising under Article 4 on the basis of its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas.²⁷⁰ Furthermore, the police had failed to take operational measures to protect Ms Rantseva from trafficking, despite there being circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking. The Court did not find it necessary to examine the investigative failings under Article 4 having In light of its findings as to the inadequacy of the Cypriot police investigation under Article 2. There had also been a violation of this Article by Russia on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in Ms Rantseva’s recruitment or the methods of recruitment used.

The Court noted the increase in trafficking in human beings as a global phenomenon and expressly referred to the Convention on Action Against Trafficking in Human Beings as a measure taken to combat it. The Council of Europe has established GRETA – the Group of Experts on Action against Trafficking in Human which has begun its work in monitoring the implementation of the 2005 Convention by its States Parties.

Article 4 and Article 9 – Freedom of thought, conscience and religion and the right of conscientious objection

The Court has still declined to accept that the refusal of ECHR states to recognise conscientious objection to military service violates the provi-

270. Notwithstanding that the Cypriot authorities made a unilateral declaration acknowledging that they had violated Articles 2, 3, 4, 5 and 6 of the Convention, the Court reiterated its role not only in deciding individual cases, but in elucidating and developing rules under the Convention. It also emphasised its scarce case-law on the question of the interpretation and application of Article 4 to trafficking in human beings.



sions of either Article 4 or Article 9.²⁷¹ What it has instead focused on is the ancillary consequences of this refusal (see, for example, *Thlimmenos v. Greece*²⁷²). In *Ülke v. Turkey*²⁷³ it took the position it had adopted in *Thlimmenos* further. In *Ülke* (not an expulsion case), the applicant faced indefinite repeated punishment for his refusal to serve: he had already been forced to serve eight sentences for failure to wear his military uniform, only to be brought back to his regiment after each release and arrested again. The fact that he was forced into hiding and “civil death” (and could not, for instance, marry the mother of his child), coupled with the absence of procedural safeguards, was sufficient to bring the consequences of his inability to enjoy the right to conscientious objection within the ambit of Article 3. Article 9 §2.e, and Article 15 of the Qualification Directive 2004/83/EC²⁷⁴ may bring the refusal to do military service within the scope of the directive.

Article 9 of the Convention has also been invoked in order to resist removal by two Christians from Pakistan who feared persecution in that country and would not be able to practise their religion openly.²⁷⁵

Article 5 – Liberty and security of the person

The Court has not to date delivered any judgment concerning the extraterritorial application of Article 5. In *Olaechea v. Spain*²⁷⁶ the applicant’s complaint included allegations that he would be subjected to arbitrary detention on extradition to Peru, but the Court’s combined admissibility decision and judgment chose not to deal with this aspect of the application. In *Tomic v. the United Kingdom*, the Court found that for

271. The Charter of Fundamental Rights of the European Union, proclaimed in December 2000, states specifically in Article 10 §2: “The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”

272. Application no. 34369/97, judgment of 6 July 2000.

273. *Ülke v. Turkey*, application no. 39437/98, judgment of 24 January 2006.

274. Article 9 §2.e, defines as persecution “prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses ...”.

275. *Z. and T. v. the United Kingdom*, application no. 27034/05, decision of 28 February 2006.

276. *Olaechea Cahuas v. Spain*, application no. 24668/03, judgment of 10 August 2006.



either Article 5 or Article 6 to apply extra-territorially “the risk must be of arbitrary detention or unfair procedures that reach the flagrant level necessary for the expulsion to raise issues under [those articles]” – mere technical imperfections will not suffice.²⁷⁷ In cases of a deprivation of liberty flowing from a flagrant breach of Article 6, the starting point is *Drozd and Janousek v. France and Spain*²⁷⁸ (considered below). The approach was followed in *Stoichkov v. Bulgaria* where a violation was found of Article 5 – again, not an expulsion case but one which sheds light on the issue. The applicant had been imprisoned by the Bulgarian authorities in 2000, based on a conviction in absentia in 1989 for charges he had not been notified of before leaving Bulgaria to settle in the United States. The authorities refused to reopen the case. Citing *Drozd and Ilaşcu v. Moldova and Russia*²⁷⁹ the Court stated that “if a “conviction” is the result of proceedings which were a “flagrant denial of justice”, i.e. were “manifestly contrary to the provisions of Article 6 or the principles embodied therein”, the resulting deprivation of liberty would not be justified under Article 5 §1.”²⁸⁰

Article 6 – The right to a fair trial

The Court held in *Soering*:

[t]he right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.²⁸¹

In *Hilal v. the United Kingdom* the Court found admissible the complaint regarding the applicant’s allegation that on expulsion he would

277. *Tomic v. the United Kingdom*, application no. 17837/03, decision (inadmissible) of 14 October 2003.

278. *Drozd and Janousek v. France and Spain*, application no. 12747/87, judgment of 26 June 1992.

279. *Ilaşcu v. Moldova and Russia*, application no. 48787/99, judgment of 8 July 2004.

280. *Stoichkov v. Bulgaria*, application no. 9808/02, judgment 24 March 2005, §51.

281. *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, §113.



face arbitrary and unfair criminal proceedings, but, having found a violation of Article 3, found that no separate issue arose.

In *Drozd and Janousek v. France and Spain* the Court noted that “the Convention does not require the contracting parties to impose its standards on third states or territories”²⁸² and referred to the importance of strengthening international co-operation in the administration of justice. It went on to state that “the contracting states are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.”²⁸³

This obligation must apply *a fortiori* in cases of threatened expulsion to face trial in a country which flagrantly abuses the most fundamental principles of fair trial,²⁸⁴ particularly where such a trial could result in the imposition of the death penalty.

The Grand Chamber judgment of *Mamatkulov and Askarov v. Turkey*²⁸⁵ considered the application of Article 6 to the fairness of criminal proceedings in Uzbekistan. The Court considered that, like the risk of treatment proscribed by Articles 2 and/or 3, “the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned.”²⁸⁶

Although, in the light of the information available, there may have been reasons for doubting, at the time, that they would receive a fair trial in the state of destination, there was not sufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of paragraph 113 of *Soering*. However, had Turkey not failed to comply with the indication given by the Court under Rule 39, the Court would have benefited from having additional information to assist it in its assessment of whether or not there was

282. Application no. 12747/87, judgment of 26 June 1992, §110.

283. *Ibid.*

284. See *M.A.R. v. the United Kingdom*, application no. 28038/95, 16 January 1997; *Hilal v. the United Kingdom*, application no. 45276/99, decision of 8 February 2000.

285. *Mamatkulov and Askarov v. Turkey*.

286. *Ibid.*, §90.



a real risk of a flagrant denial of justice. In *Stoichkov v. Bulgaria*²⁸⁷ the Court found that regarding trials *in absentia* the right of the accused is a “fundamental element of a fair trial,” and “one of the essential requirements of Article 6 and is deeply entrenched in the provision”. The Court in *Al-Moayad v. Germany*²⁸⁸ provided a list of the factors which had to be considered to determine whether a flagrant denial of the right to fair trial would occur.

One can only speculate if a violation of Article 6 §1 would have been found in such circumstances.

As will be discussed below at page 124 *ff.*, the Court has consistently held that Article 6 does not apply to the asylum determination process in the country where asylum is sought. The same is true of extradition proceedings, yet following *Ismoilov v. Russia*,²⁸⁹ Article 6 §2 may be capable of being applied where close links are shown between the criminal proceedings in the receiving state and extradition proceedings in the sending state, such that the applicants may be regarded as having been “charged with a criminal offence”.

Article 7 – Freedom from retrospective criminal offences and punishment²⁹⁰

The Court found in *Gabbari Moreno v. Spain*²⁹¹ that the failure of the Spanish domestic courts to reduce the applicant’s sentence in accordance with the relevant law on mitigating circumstances violated Article 7.²⁹²

287. *Stoichkov v. Bulgaria*, application no. 9808/02, judgment 24 March 2005.

288. *Al-Moayad v. Germany*, application no. 35863/03, decision (declared inadmissible) of 20 February 2007.

289. *Ismoilov v. Russia*, application no. 2947/06, judgment (Chamber) of 24 April 2008. The applicants also complained that their extradition from Russia to Uzbekistan to face trial for terrorism charges violated Article 6 §1 as they would not receive a fair trial. However, in light of the finding that Article 3 was violated, no further violation was found under Article 6 §1.

290. Article 7 states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

291. Application no. 68066/01, judgment of 22 July 2003.

292. In the case of *Grava v. Italy*, application no. 43522/98, judgment of 10 July 2003, in different circumstances it was held to violate Article 5 §1.a.



However, where the failure to reduce the sentence in accordance with the law of the sentencing state occurs extraterritorially the Court has taken a different approach. The cases of *Csozanski v. Sweden*²⁹³ and *Szabo v. Sweden*²⁹⁴ concerned convicted criminals who were transferred – involuntarily – under the Protocol to the Convention on the Transfer of Sentenced Persons to serve their sentences in a state where they would not benefit from the normal significant reduction in time actually spent in prison that would have been applied had they remained in the sentencing state. The Court found that this disclosed no violation of the Convention. The reasoning is difficult to follow. It would seem logical to apply the reasoning previously adduced in relation to Article 6 of the Convention to Article 7. The argument in favour of this approach is strengthened by the fact that – like Articles 2, 3, and 4 §1, but unlike Article 6 – Article 7 cannot be derogated from even in time of war or national emergency.²⁹⁵ The sentencing judge in the sentencing state, being familiar with domestic law and practice, knows exactly how much time the convicted individual is likely to spend in custody and the – often purely notional – length of the sentence imposed reflects this reality. It is difficult to see how an unanticipated non-voluntary return to face a significantly longer period of incarceration than that anticipated by the sentencing judge is compatible with the spirit if not the letter of Article 7.

Article 4 of Protocol No. 7 – Prohibition on double jeopardy

Issues relating to the prohibition on double jeopardy can arise in the context of the risk of people being prosecuted again on return to their home state for the offence of which they have already been convicted and for which they have already served a sentence in the expelling state. However, Article 4 of Protocol No. 7 only applies to repeated prosecution in the same state and not in different states. In the case of *Amrollahi v.*

293. Application no. 22318/02, decision of 26 October 2006.

294. Application no. 28578/03, decision of 27 June 2006.

295. The decision in *Xv. the Netherlands*, application no. 7512/76, 6 DR 184 (1974), should be read in the light of the cumulative later general Convention jurisprudence.



*Denmark*²⁹⁶ the Court declared inadmissible a case where an individual alleged that prosecution for the crime for which he had already been punished would await him if expelled.

The situation of an expulsion order that is imposed in addition to an ordinary penal sanction for a criminal conviction as an Article 4, Protocol No. 7, issue is discussed below at page 128.

Article 8 – The right to physical and moral integrity

This article may be engaged in two ways in the context of asylum and of expulsion or exclusion from the territory. The right to moral and physical integrity as an important aspect of private life will be considered here, and the right to respect for family life will be considered below at page 180 *et seq.*

The Convention organs have been keenly aware of the absolute nature of Article 3. It is illimitable: no limitation can be put on its application. It is unjustifiable: no argument can be advanced to exculpate the offending state. It is non-derogable: it is binding even in time of war or national emergency. Thus a stringent test is applied to all forms of treatment in order that the fundamental importance of Article 3 and the absolute nature of the right are maintained.

However, the Court has recognised that actual or threatened treatment which does not reach the high “threshold of severity” test under Article 3 is nevertheless unacceptable in a democratic society. The Court has consequently developed the notion that where there are sufficiently adverse effects on a person’s “physical and moral integrity”, this may breach Article 8 in its private life aspect. In *Costello-Roberts v. the United Kingdom*²⁹⁷ the Court considered that physical and psychological ill-treatment which fell below the threshold of Article 3 might nevertheless be in breach of Article 8.

There is no exhaustive definition of the term “private life” and Article 8 protects broad elements of the personal sphere, such as “gender identifi-

296. *Amrollahi v. Denmark*, application no. 56811/00, judgment of 11 July 2002.

297. Application no. 13134/87, judgment of 25 March 1993, pp. 60-61 §36.



cation, name and sexual orientation and sexual life”.²⁹⁸ In addition, mental health is a vital aspect of the right to private life associated with the aspect of moral and physical integrity. The preservation of mental stability is indispensable to the effective enjoyment of the right to respect for private life since Article 8 protects a “right to identity and personal development, and the right to establish and develop relationships with other human beings in the outside world”.²⁹⁹ In expulsion cases, where deportation cannot be prevented on the grounds that the applicant will be subjected to mental suffering or deterioration falling short of inhuman or degrading treatment under Article 3, it may fall within the scope of Article 8. In *D. v. the United Kingdom*³⁰⁰ the Court declined to consider the complaints under Article 8 as it found that the expulsion would amount to a violation of Article 3. The same was true in the case of *Hilal v. the United Kingdom*.³⁰¹

In *N. v. the United Kingdom*,³⁰² Article 3 was unavailable as a bar to removal to Uganda of an applicant suffering from HIV and no separate issue arose as regards the right to respect for her private life under Article 8. The dissenting opinion of Judges Tulkens, Bonello and Spielman stated that the Court was under a legal and a moral obligation to consider the applicant’s right to physical and psychological integrity given that she would be sent to “certain death”.³⁰³

The applicant in *Bensaid v. the United Kingdom*³⁰⁴ was a schizophrenic suffering from a psychotic illness therefore posing a risk of harm to others, and to himself. Despite a doctor’s report stating that the implementation

298. *Bensaid v. the United Kingdom*, application no. 44599/98, judgment of 6 February 2001. See, for example, *Dudgeon v. the United Kingdom*, application no. 7525/76, judgment of 22 October 1981, §41; *B. v. France*, application no. 13343/87, judgment of 25 March 1992, §63; *Burghartz v. Switzerland*, application no. 16213/90, decision of 22 February 1994, §24; and *Laskey, Jaggard and Brown v. the United Kingdom*, application nos. 21627/93, 21826/93 and 21974/93, judgment of 19 February 1997, §36.

299. *Bensaid v. the United Kingdom*, p. 47, citing *Burghartz v. Switzerland*, cited above, and *Friedl v. Austria*, application no. 15225/89, judgment of 31 January 1995. Followed in *Paramsothy v. the Netherlands*, application no. 14492/03, decision of 10 November 2005.

300. *D. v. the United Kingdom*, application no. 30240/96, judgment of 2 May 1997.

301. *Hilal v. the United Kingdom*, application no. 45276/99, judgment of 6 March 2001.

302. *N. v. the United Kingdom*, application no. 26565/05, judgment of 27 May 2008.

303. *Ibid.* dissenting opinion, at §26.

304. *Bensaid v. the United Kingdom*.



of a decision to deport the applicant to Algeria would result in a deterioration in his mental health, the Court held that it had not been established that the applicant's moral integrity would be "substantially affected to a degree falling within the scope of Article 8".³⁰⁵

The risk of deterioration in mental health must not be speculative or hypothetical to meet the test under Article 3, but must be "substantially affected"³⁰⁶ for the purposes of Article 8.

Asylum seekers who claim gender-related persecution, including on the basis, for example of their sexual orientation or domestic abuse, often face difficulties both as regards their refugee case and their human rights claim. In *F. v. the United Kingdom*³⁰⁷ the Court held that whilst in *Dudgeon*³⁰⁸ a ban on homosexuality could give rise to an interference with a person's moral and physical integrity, in the context of asylum and on a "purely pragmatic basis, it cannot be required that an expelling state only returns an alien to a country which is in full and effective enforcement" of all the Convention rights. This represents a hard line on this aspect of the extra-territorial application of Article 8 (and presumably other Convention rights which are not regarded as those fundamental in a democratic society).

The threshold of the severity test is not the sole distinction between the protection guaranteed by Article 8 and Article 3. As seen above, once treatment is established to fall within Article 3, the absolute nature of the right means that the level of protection afforded cannot be reduced. In contrast, an interference with Article 8 rights can be justified under the second paragraph subject to the respondent government successfully establishing that the interference was carried out in accordance with the law, pursued a legitimate aim and was proportionate to the aim pursued. The legitimate aim frequently cited is the "economic wellbeing of the country".

305. *Ibid.*, §48.

306. *Ibid.*, §3.

307. *F. v. the United Kingdom*, application no. 36812/02, decision of 31 August 2004.

308. *Dudgeon v. the United Kingdom*, application no. 7525/76, judgment of 22 October 1981.



Procedural guarantees and the right to an effective remedy where expulsion is threatened

The rights guaranteed under the Convention and set out above depend on the buttressing of procedural guarantees if they are to be practical and effective, not theoretical and illusory, as the Convention requires.³⁰⁹

In some cases the absence of procedural safeguards in the expelling country will play an important role in the Court's assessment. *Hassanpour-Omrani v. Sweden*³¹⁰ and *Jabari v. Turkey*³¹¹ both concerned women who feared stoning on return to Iran because of adultery. The Swedish case was declared inadmissible by the Commission. In contrast, the Turkish case, where there were no procedural safeguards, was declared admissible by the Court.

Access to asylum determination procedures

Since the mid-1980s western European states have consistently tightened regulations and procedures in order to reduce the incentives for asylum seekers to come to western Europe and thus to reduce the number of claims they are required to process in what are known as "mixed flows" as well as to save having to weed out those whose asylum claims are "manifestly unfounded". In particular, states have sought to stop individuals with such claims from reaching the country and gaining access to the full asylum procedure.

Some southern Mediterranean states have resorted to "push backs" to manage "mixed flows" of migrants intercepted at sea. Italy has "pushed back" boat people towards Libya. It has been alleged that the boat people were not even provided with the opportunity to express the wish to lodge an application for asylum. In a recently communicated case, 35 asylum seekers originating from Afghanistan, Eritrea and Sudan, attempted to enter Italy clandestinely and were intercepted by the Italian authorities

309. *Artico v. Italy*, application no. 6694/74, judgment of 13 May 1980.

310. *Hassanpour-Omrani v. Sweden*, application no. 36863/97, decision of 19 October 1998.

311. *Jabari v. Turkey*, application no. 40035/98, decision of 28 October 1999.



and immediately refouled to Greece. They claim that neither the Italian nor the Greek authorities permitted them to lodge a claim for international protection.³¹²

*Abdolkhani and Karimnia v. Turkey*³¹³ concerned the lack of access to the asylum determination procedure in Turkey. Turkey retains the geographical limitation pursuant to Article 1B of the Geneva Convention by which the state assumes the obligation to provide protection only to refugees originating from Europe, therefore UNHCR carries out a parallel refugee status determination procedure there. UNHCR had interviewed the applicants and recognised them as refugees under its mandate – and the Court gave their conclusions “due weight” before making its own assessment. In theory, the applicants could apply for temporary asylum however their repeated and explicit requests for asylum were denied. The applicants were former members of the People’s Mujahideen Organisation of Iran (the PMOI). When they first entered Turkey, they were deported to Iraq without their statements being taken by border officials and apparently without a formal deportation decision being taken. The Turkish authorities had on one occasion deported the applicants who were then forced to re-enter Turkey and claim asylum repeatedly by way of oral submissions and in writing - even explicitly stating that they were refugees under the UNHCR’s mandate. They explained their background, their affiliation to the PMOI in the past, the nature of their activities within that organisation and their departure from it. They also requested a residence permit on the basis of temporary asylum and explicitly asked for a lawyer. Before the magistrates’ court they explicitly stated that they were at risk on return. The European Court of Human Rights was struck by the fact that the authorities remained “totally passive” regarding the applicants’ serious allegations of a risk of ill-treatment if returned to Iraq or Iran. The lack of any response by the national authorities regarding the applicants’

312. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009 (pending).

313. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08 (in which UNHCR intervened as a third party).



allegations amounted to a lack of the “rigorous scrutiny” required by Article 13 of the Convention.³¹⁴

In *Z.N.S. v. Turkey* the Court saw no reason to depart from its conclusions in *Abdolkhani and Karimnia*. The Court found a violation of Article 3 in light of UNHCR’s assessment of the risk the applicant faced and because that the applicant was unable to have her asylum application examined by the Turkish authorities.³¹⁵

Z.N.S. concerned a PMOI member at risk in Iran and access to asylum procedures in Turkey. Further cases remain pending on this issue.

The applicant in *Moghaddas v. Turkey*³¹⁶ has already been expelled to Iraq, allegedly without the opportunity to lodge an asylum claim or to contact a lawyer. Given that Turkey is not only a destination country but a transit country from Iraq, Iran and Afghanistan and for persons travelling through Syria from Africa, the importance of access to an asylum determination procedure cannot be understated.

The case of *S.E. v. France*³¹⁷ the Court found that the applicant had no complaint under Articles 2 or 3 in respect of the risk she faced in Sierra Leone and consequently Article 13 had no role to play. However the question which fell to be examined under Article 13 concerned the lack of procedural safeguards in respect of asylum claims lodged at borders – in this case, the waiting area of the airport. A finding by the Court on the applicability of the Convention to this critical issue of asylum law and practice would be welcome (in particular as a previous opportunity to examine the issue was lost when the case of *H. v. France* was struck out of the list³¹⁸) The importance of the issue was reflected in the detailed submissions made by the third party intervener, ANAFE. Furthermore, the absence of a substantive Article 3 complaint did not necessarily preclude the Court

314. *Ibid*, §113.

315. *Z.N.S. v. Turkey*, application no. 21896/08, judgment of 19 January 2010, §§48-49.

316. *Moghaddas v. Turkey*, application no. 46134/08, communicated 15 June 2009.

317. *S.E. v. France*, application no. 10085/08, decision (inadmissible) of 15 December 2009.

318. *H. v. France*, application no. 33087/07, decision (struck out of the list) of 19 January 2010. This case specifically addressed the examination of asylum claims under the accelerated procedure but the claim was struck out because of a loss of contact between the applicant and his legal representative.



from examining the Article 13 claim in any event (see the approach in *Rantsev v. Cyprus and Russia* above in respect of Article 4³¹⁹).

It is against this backdrop that we consider the use of “accelerated” or “priority” asylum procedures. European states have introduced accelerated asylum procedures for those with “manifestly unfounded” claims and sought to speed up procedures so that the long period spent waiting for a claim to be determined does not act as an incentive for those asylum seekers who are viewed as economic migrants and whose claims will eventually be rejected. The Committee of Ministers on 1 July 2009 adopted Guidelines on human rights protection in the context of accelerated asylum procedures which recognise that an “accelerated asylum procedure” abrogates from standard procedural time scales and normally applicable procedural guarantees. Unfortunately, the Guidelines represent a missed opportunity to set out clear standards and fail to go beyond a simply re-stating of existing rules, albeit in weakened form.³²⁰

Fingerprinting and photographing of asylum seekers are also widely used to discourage multiple and fraudulent asylum applications.³²¹ The Schengen signatories have set up mechanisms to avoid having to consider applications from asylum seekers whose applications have been rejected in another state. These measures have not necessarily reduced secondary movement as intended, but given rise to an increase in phenomena such as smuggling and trafficking, illegal stay in makeshift camps near border zones (for example, Calais), and severe overcrowding in detention centres in the southern Mediterranean and elsewhere.

319. *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment of 7 January 2010 discussed above at page 89.

320. Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009.

321. See, for example, Eurodac (Council Regulation concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention, 2725/2000/EC, 11 December 2000. Entry into force 15 January 2003).



Visas

At national level, visa restrictions have the effect of limiting asylum seekers' access to the countries which impose them. The Commission found many years ago in *X v. the Federal Republic of Germany* that, in principle, the acts of visa officials in an embassy can engage the responsibility of the state concerned.³²² Later the Court in *Loizidou v. Turkey* (Preliminary Objections)³²³ upheld the view which it had adopted in *Drozd and Janousek v. France and Spain*³²⁴ that the responsibility of contracting parties can be engaged by the acts of their authorities whether performed within or outside national boundaries. This is so, even if they also produce effects outside their own territory. Several cases before the Convention organs have concerned the refusal of visas to family members.³²⁵ In most jurisdictions it is not possible to be granted a visa as an asylum seeker, and for reasons of alienage (see page 24 *et seq.* above) it is not possible to be recognised as a Geneva Convention refugee unless one is outside one's own country. In principle the Convention applies to an asylum seeker who seeks a visa from an embassy in order to flee to that embassy's country. In practice, because most diplomatic posts employ local staff in their visa sections, disclosing the basis of an asylum application before the applicant is securely outside the territory is fraught with danger. It may be relevant to the assessment of the real risk of ill-treatment whether or not an applicant is able to obtain a visa or passport (including whether or not false names and dates of birth are used) without any reported difficulties.³²⁶

The fees charged for issuing visas are often prohibitive. For instance, a group of Iraqi doctors who were being forced by Saddam Hussein's regime to carry out punitive amputations on opponents of his regime,

322. Application no. 1611/62, *Yearbook* 8 (1965), p. 158 (163).

323. Application no. 15318/89, judgment of 23 March 1995.

324. Application no. 12747/87, judgment of 26 June 1992.

325. See, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application nos. 9214/80, 9473/81 and 9474/81, judgment of 28 May 1985.

326. *Nyanzi v. the United Kingdom*, application no. 21878/09, judgment 8 April 2008, §§59-60.



wanted to seek visas to escape to western Europe but could not afford the visa fees that were being charged.

Visa requirements are used extensively by western European states, which in many instances now also require visas for passengers in transit. Persons fleeing persecution may therefore face further obstacles in accessing international protection mechanisms where border controls and pre-entry checks are “exported” to posts abroad by European states. The ECHR institutions have always held that states are accountable before the Court *ratione loci* for decisions about visas which impinge on Convention-protected rights even when they are taken at their overseas posts. This is a classic exercise of extraterritorial jurisdiction.³²⁷

Carriers’ liability

The enforcement of carriers’ liability has also been used to limit the access of asylum seekers. Carriers’ liability imposes on the airline (or less frequently, the ferry operator) responsibility for transporting someone who arrived without valid papers to another state. The airline is expected to bear the cost of returning refused passengers to their country of departure and generally also faces a fine. In the United States carriers have been fined for bringing in aliens without valid papers since the 1950s, but in Europe it is only since the late 1980s that this practice has been introduced. Earlier it was generally considered sufficient to oblige the carrier to bear the costs of returning illegal aliens. Fines were imposed from 1987 in Belgium, Germany and the United Kingdom and in Denmark from 1989, since when most of Europe has followed suit. Indeed they have been obligatory for EU member states.³²⁸

327. See, for example, *X v. Germany*, application no. 1611/62, Court decision of 25 September 1965, *W.M. v. Denmark*, application no. 17392/90, Commission decision of 14 October 1992, *Amekrane v. the United Kingdom*, application no. 5961/72, Commission decision of 11 October 1973.

328. See Directive supplementing the Convention implementing the Schengen Agreement regarding financial penalties on carriers transporting third country nationals without correct documentation, 2001/51/EC, which came into force in August 2001 and required implementation by February 2003.



Legislation on carriers' liability has differed widely from state to state and has been implemented with varying degrees of thoroughness. The situation has been summed up by the Parliamentary Assembly of the Council of Europe, as follows:

Some countries have imposed airline sanctions which undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers, and moving the responsibility away from the immigration officers.³²⁹

The European Court has not yet ruled on the application of visa regimes or carriers sanctions in asylum-related cases.

Interception on the high seas and search and rescue operations

Whilst 100 000 to 120 000 undocumented migrants attempted to cross the Mediterranean in 2008, the risk to life is high. It is estimated that over 10 000 people have drowned in those waters in the last decade.³³⁰ There have also been a number of worrying incidents where persons in distress at sea have not been immediately rescued or where states have refused to allow persons rescued to dock while they argue over state responsibility towards these persons.

Some individual European states, and now also the EU, have attempted to deflect the arrival of asylum seekers at their shores by intercepting the vessels in which they are travelling on the high seas. In this context, under the EU external asylum policy, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, FRONTEX, has taken a lead role.

The case of *Xhavara v. Italy and Albania*³³¹ concerned the interception by an Italian warship of an Albanian boat which resulted in the capsizing of the boat and the deaths of several of those on board. Since criminal pro-

329. Recommendation 1163 (1991) of the Parliament Assembly of the Council of Europe on the arrival of asylum seekers at European airports, 43rd Ordinary Session, 1991, §10.

330. According to the International Centre on Migration Policy Development, <http://www.icmpd.org>

331. Application no. 39473/98, decision of 11 January 2001.



ceedings, to which the applicants had been joined as civil parties, were still in progress in Italy the cases were rejected for failure to exhaust domestic remedies. However, the Court adopted a number of important views. It found first that Italy was accountable before the Court for the acts of its warships on the high seas; that Albania could not be held accountable by virtue of simply having signed the agreement with Italy which led to the impugned actions of the Italian warship; and, finally, that there was no issue under Article 2 of Protocol No. 4 (the right to leave any country including his own) since the Albanians were not being prevented from leaving Albania, but only from reaching Italy.

The Court recently examined the question of whether acts by the French navy whilst on the high seas fell within the jurisdiction of France for the purpose of the applicability of Article 1 of the Convention in the case of *Medvedyev and others v. France* (29 March 2010, Grand Chamber). In this case, a French flagship and a naval ship were given instructions from the naval authorities to intercept a boat several hundred kilometres from the coast of France on the high seas. The actions of the French navy on the high seas were considered to fall within the jurisdiction of France for the purpose of Article 1 of the Convention, as it was considered that France had exercised full and exclusive control over the intercepted boat and its crew from the time of its interception ‘in a continuous and uninterrupted manner’. The Court proceeded to find a violation of Article 5(1) of the Convention in respect of the deprivation of liberty the applicants in that case were subjected to between interception on the high seas to the arrival of the ship in France.

However, the Court did not find it necessary to address the question jurisdiction for the purposes of Article 1 in the case of *Women on the Waves v. Portugal* (3 February 2009). The applicant’s boat was prevented by ministerial order from entering the territorial waters of Portugal, whilst in the contiguous zone adjacent to and beyond Portugal’s territorial waters. Similarly, the Court did not address the question of jurisdiction under Article 1 in the case of *Mangouras v. Spain* (8 January 2009) as the boat in question was intercepted within the territorial waters of Spain.³³²



In both of these cases, the Court found a violation of substantive provisions of the Convention.

Proposals have been discussed at EU level³³³ to deal with the “mixed flows of economic migrants and asylum seekers in need of international protection leaving the north, north-east and west coasts of Africa and crossing the Mediterranean”. Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1850 (2008) to the Committee of Ministers on “Europe’s ‘boat-people’: mixed migration flows by sea into southern Europe” calls for responsibility-sharing and sets out minimum standards of reception.³³⁴

In examining cases concerning the interception and rescue of migrants at sea, a number of legal regimes may come into play. The international obligations arising, in particular, from the ECHR, the Geneva Convention, and EU law prohibit the *refoulement* of refugees and subsidiary protection beneficiaries. UNHCR has expressed concern that border control methods are not to be applied in an indiscriminate or disproportionate manner nor lead to *refoulement*.³³⁵ European border officials are bound by the *non-refoulement* obligation even when operating extraterritorially. Furthermore, EU member states must bring persons rescued or otherwise taken into their control at sea to an EU country in order to examine applications for international protection with adequate legal remedy.³³⁶ Twenty-three Indian applicants complained to the UNCAT that the Spanish authorities failed to do this when transferring them for off-

332. See paragraph 12 of the Intervention submitted by Human Rights Watch in the present application.

333. Communication of the Commission to the Council reinforcing the management of the European Union’s southern maritime borders, COM(2006)733 final, 1 December 2006.

334. PACE Recommendation 1850 (2008) 28/11/2008 Europe’s “boat-people”: mixed migration flows by sea into southern Europe. See also PACE Report on “The Interception and Rescue at Sea of Asylum Seekers and Irregular Migrants”, Reports under preparation in the Committees of the Parliamentary Assembly of the Council of Europe (May-September 2009), 16 July 2009, AS/Inf (2009) 11.

335. Refugee Protection and Mixed Migration: A 10-Point Plan of Action, January 2007, Rev.1.

336. German Institute for Human Rights, Border Management and Human Rights. A Study of EU Law and the Law of the Sea, December 2007, available at <http://www.unhcr.org/refworld/docid/47b1b0212.html>



shore processing in Mauritania but the complaint under UNCAT was declared inadmissible for procedural reasons.³³⁷

The United Nations Convention on the Law of the Sea (UNCLOS) obliges every state to require the master of a ship which flies its flag to render assistance to any person found at sea in danger of being lost and to proceed to the rescue of persons in distress. This Convention provides the framework, but the detailed obligations are found in the International Maritime Organisation (IMO) conventions. On 1 July 2006 amendments to two IMO conventions – the Safety of Life at Sea (SOLAS) and Search and Rescue (SAR) Conventions – entered into force, providing enhanced protection for asylum seekers and other migrants in distress.³³⁸ The amendments are intended to ensure that the ambiguities which previously surrounded the obligations of all concerned towards those who become involved in an accident at sea are clarified. States are under an obligation to “co-operate and co-ordinate” to ensure that shipmasters are permitted to deliver individuals to a “place of safety”, irrespective of their nationality or status. States are normally only responsible for the actions of state vessels (such as the Italian warship in the *Xhavara* case) but the obligation now extends to all masters of ships flying their flags. The duty to consider a claim for international protection exists regardless of whether the state agent in question is an embassy official, a border guard or an officer on a patrol vessel who is notified that such protection is sought.

Whether or not the “place of safety” referred to in the conventions can be interpreted so as to preclude landing those rescued at a port where they claim they would be exposed to a real risk of treatment prohibited under, for example, Articles 2 or 3 of the ECHR, or merely refers to safety from the threat of shipwreck and drowning, has not yet been explored by the European Convention organs.

337. *J.H.A (on behalf of P.K. et al) v. Spain*, Communication No. 323/2007, UN doc. CAT/C/41/D/323/2007, 21 November 2008.

338. See <http://www.unhcr.org/publ/PUBL/450037d34.pdf>.



In the Lampedusa cases³³⁹ the applicants were rescued or intercepted at sea by the Italian authorities and taken to the Italian island of Lampedusa, from where they were returned to Libya without having the possibility to make and have considered applications for asylum. The case has been struck out because some of the applicants were expelled and the whereabouts of others was unknown. Several other cases, including *Sharifi and Others v. Italy* and Greece concerning the interception and *refoulement* of boat people, without providing access to asylum procedures, are pending the Court.³⁴⁰

Issues relating to the interface between the ECHR and the Law of the Sea are likely to figure more significantly in the case-law of the Court in future.³⁴¹

On arrival at the port or airport

Individuals arriving at ports and airports whom the authorities wish to be able to return swiftly are often kept in the transit zones of airports. It has sometimes been argued by governments that since these people have not technically entered the country they do not fall under Article 1 of the Convention as they are still in the “international zone”. The Court in *Amuur v. France* made it clear that no such concept existed in respect of the interpretation of the term of jurisdiction under Article 1 of the Convention,³⁴² and that the responsibilities of the state in relation to expulsion under Article 3 are engaged wherever the action of the state occurs. This was confirmed in *Nolan and K. v. Russia* and in *Riad and Idiab v. Belgium*.³⁴³ In *D. v. the United Kingdom* the Court noted:

339. *Hussun and others v. Italy*, application nos. 10171/05, 10601/05, 11593/05, 17165/05, judgment of 19 January 2010 (struck out of the list).

340. *Sharifi and others v. Greece and Italy*, application no. 16643/07, communicated 13 July 2009.

341. See for example, *Hirsi and Others v. Italy*, application no. 27765/09, communicated 17 December 2009.

342. Application no. 19776/92, judgment of 25 June 1996. This is the only logical approach. Someone who committed a crime in the transit area of an airport would be liable to prosecution under the laws of that land.

343. *Nolan and K. v. Russia*, application no. 2512/04, judgment 12 February 2009 and *Riad and Idiab v. Belgium*, application nos. 29787/03, 29810/03, judgment of 24 January 2008.



“Regardless of whether he ever entered the United Kingdom in the technical sense it is to be noted that he has been physically present there and thus within the jurisdiction within the meaning of Article 1. It is for the respondent state to secure to the applicant the rights guaranteed under Article 3.”³⁴⁴

The cases referred to above at page 113 also raise issues of a failure to ensure access to the asylum procedure.

The same considerations apply to asylum seekers who lodge claims in border areas and become subject to accelerated procedures, which derogate from normally applicable safeguards and timescales.³⁴⁵

Issues relating to the expulsion procedure and decisions to expel

While positive obligations are placed on the national authorities in relation to the processing of asylum claims and treatment of asylum seekers, there also exists an obligation on the asylum seeker to provide, as far as possible, sufficient evidence to support their claims. In the cases of *Al-Shari and others v. Italy*³⁴⁶ and *Mogos v. Romania*³⁴⁷ the Court considered that the applicants had failed to provide specific information or adduce sufficient proof that would have enabled the Court to find a violation.

In *Čonka and others v. Belgium*³⁴⁸ considerable administrative and practical barriers hindered the Slovakian applicants’ ability to pursue their asylum claims. The Court concluded that there had been a violation of Article 4 of Protocol No. 4 (the collective expulsion of aliens).

The Court has stated on more than one occasion that national procedures must ensure that “an independent and rigorous scrutiny” is conducted on an individual’s claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3.³⁴⁹ In *Jabari v. Turkey* the applicant had failed to lodge her application for

344. Application no. 30240/96, judgment of 2 May 1997, §48.

345. Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009.

346. *Al-Shari and others v. Italy*, application no. 57/03, decision of 5 June 2005.

347. *Mogos v. Romania*, application no. 20420/02, judgment of 13 October 2005.

348. *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002.

349. *Jabari v. Turkey*, application no. 40035/98, judgment of 11 July 2000, §39.



asylum to the authorities within the five-day requirement, as laid down in national law, and this had denied her any scrutiny of the factual basis of her fears about being removed to Iran. The Court held that such a short time limit was incompatible with the Convention.³⁵⁰

First, as explained above, the general application of the “safe third country” concept can result in an individual being successively deported to his or her country of origin where he or she might face inhuman or degrading treatment, with the result that the first deporting state might ultimately be in breach both of Article 3 of the ECHR and Article 33 §1 of the Geneva Convention. The use of the “safe country of origin” concept carries similar risks.

Second, the European Commission of Human Rights has clearly ruled in the cases of both *Harabi v. the Netherlands* and *Giama v. Belgium*³⁵¹ that the repeated “bouncing back” (or “shuttlecocking”) of asylum seekers is in contravention of Article 3 of the ECHR.

Third, it would appear that there is a danger that the increased use of fast-track procedures, against which there is often no appeal or such an appeal has no suspensive effect on the removal order, could be found to deny asylum seekers access to an independent and impartial body capable of reviewing a decision to return them to a country in which they claim that they will be persecuted.

Fourthly, there is concern as to the quality of examinations of claims of individuals who lodge a claim for asylum once criminal proceedings are instituted against them, either by the prosecuting authorities of the host state, or in the context of an extradition request. The Court has found a violation in cases even where the respondent government implied that lodging an asylum claim was a “defence” to, or a means of frustrating extradition. In *Muminov v. Russia* the Court found a violation of Article 3 of the Convention despite the comment by the state that the applicant had only applied for asylum once criminal proceedings were in progress and

350. *Ibid.*, §40.

351. *Harabi v. the Netherlands*, application no. 10798/84, decision of 5 March 1986, p. 112 (116), and *Giama v. Belgium*, DR 21, p. 73 (84).



the fact that his request was rejected by the authorities on the basis that the fear of being prosecuted for offences could not validly give rise to the grant of asylum.³⁵²

The Court stated in *Abdolkhani and Karimnia v. Turkey* that “in the absence of a legal procedure governing the applicants’ deportation and providing procedural safeguards, even if they had sought asylum when they entered Turkey, there are reasons to believe that their requests would not have been officially recorded.” A violation of Article 13 was found.³⁵³

The EU has adopted a directive setting out minimum guarantees for asylum procedures,³⁵⁴ transposed into national legislation in EU states by 1 December 2007.

Right to appeal or review and Article 13

Article 13 of the ECHR provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Court decided in *Maaouia v. France*³⁵⁵ and reaffirmed in the decision in *Mamatkulov and Askarov v. Turkey*³⁵⁶, however, that Article 6 is not applicable to asylum and immigration proceedings. Article 13 is the only provision which can be used to strengthen the safeguards of the asylum determination process. It allows for the quality of the asylum determination procedure to be scrutinised. The respondent government in *Ramzy v. the Netherlands*³⁵⁷ (pending before the European Court at the time of writing) argues that Article 13 only applies to the asylum determination

352. *Muminov v. Russia*, application no. 42502/06, judgment of 11 December 2008, §§19 and 98.

353. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009, §111.

354. Directive 2005/85.

355. *Maaouia v. France*, application no. 39652/98, decision of 12 January 1999.

356. *Mamatkulov and Askarov v. Turkey*.

357. *Ramzy v. the Netherlands*, application no. 25424/05 (adjoined with *A. v. the Netherlands*, application no. 4900/06).



process – which engages his Article 3 rights – and not to any decision to declare the applicant an undesirable alien which the Netherlands Government claims does not engage any right which the applicant claims is being violated. Since the decision that the applicant was an undesirable alien was an essential prerequisite to the decision to return him to face a situation where he claimed his Article 3 rights would be violated, it may be artificial to make a distinction of this kind between the two sets of proceedings. The judgment of the Court on this, as on the many other issues in *Ramzy*, is awaited.

The need for an arguable claim

Article 13 requires that an individual should have a remedy before a national authority in order to have his or her claim decided and, if appropriate, to obtain redress.³⁵⁸ Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law only in respect of grievances which can be regarded as “arguable” in terms of the Convention.³⁵⁹

An individual only needs an arguable claim that he or she is at risk for the protection of Article 13 to be engaged. While there is no definition of “arguable”, the Court in the case of *Powell and Rayner v. the United Kingdom*³⁶⁰ held that a grievance could not be called unarguable even if it had been eventually adjudged by the Convention organs to be “manifestly ill-founded”. The Court recognised that “manifestly ill-founded” was a term of art “which extends further than the literal meaning of the word manifest would suggest at first reading”.³⁶¹ It recognised that some “serious claims” might ultimately be rejected as manifestly ill-founded despite their arguable character.

It follows that under the Convention an asylum claimant who has an arguable case must have access to both asylum (or other protection) determination procedures and a national remedy in the case of refusal

358. *Klass v. Germany*, application no. 5029/71, judgment of 6 September 1978, §64.

359. *Boyle and Rice v. the United Kingdom*, application nos. 9659/82 and 9658/82, judgment of 27 April 1988.

360. Application no. 9310/81, judgment of 21 February 1990.

361. *Ibid.*, §32.



and the consequent threatened expulsion. The fact that the claim may later be found to be “manifestly ill-founded” in ECHR terms (or is “clearly abusive” in UNHCR terms) is not sufficient to excuse contracting parties from satisfying this obligation. As the Court noted in *Powell and Rayner*, the concept of “manifestly ill-founded” in Strasbourg terms is a broad one. Although the expression “manifestly unfounded” is used in various European domestic legal systems, its meaning is not necessarily the same as “manifestly ill-founded” in the ECHR.

Effective remedies and the (limited) extent of domestic courts’ powers

Whether or not an available remedy against a refusal of asylum is effective was considered in the case of *Vilvarajah and others v. the United Kingdom*.³⁶² In that case the refused asylum seekers had no right of appeal on the merits before they were sent back to Sri Lanka. The sole available remedy was the administrative one of judicial review. This remedy only permits the United Kingdom courts to examine the legality of a decision and not the merits. The European Court, overturning the Commission’s findings in the same case, was, however, satisfied that the way in which judicial review had operated in the applicants’ case had permitted the United Kingdom courts to subject the decision to the “most anxious scrutiny”.³⁶³ It was therefore an effective remedy. Two judges (both familiar with the operation of the common law) dissented, holding that a remedy which could not examine the merits could not be described as effective.

In *Salah Sheekh v. the Netherlands* the Court found that the remedies which existed in Dutch administrative and judicial procedure were adequate because they were capable of providing the necessary remedy even though they had failed to do so in the applicant’s case.³⁶⁴

In *Chahal v. the United Kingdom*, however, the Court found that the judicial review was inadequate because of the restrictions which applied

362. Application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991.

363. *Ibid.*, §125.

364. *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007.



in national security cases. This was because in cases where national security issues were involved, the domestic courts, including the ones reviewing the negative asylum decision, did not have access to the information on which the governmental authorities based their decision to expel. Therefore, they had a limited power of review.³⁶⁵

In *Jabari v. Turkey* the Court considered the procedure for determining refugee status in Turkey. The applicant's asylum request was declared inadmissible because it was lodged outside the five-day deadline for such applications imposed under Turkish law. Consequently, the Turkish authorities issued an expulsion order. Despite the applicant having been recognised as a refugee by the UNHCR under its mandate, her appeal against the deportation order before the Ankara Administrative Court was dismissed. In her application to the Court, the applicant argued that she did not have an effective remedy against the refusal to consider the asylum application and against the deportation order, since the appeal procedure did not have suspensive effect. The Court considered that "there was no assessment made by the domestic authorities of the applicant's claim to be at risk if removed to Iran".³⁶⁶

It concluded that:

given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13.³⁶⁷

365. *Chahal v. the United Kingdom*, application no. 22414/93, §§145, 151 and 153.

366. *Jabari v. Turkey*, §49.

367. *Ibid.*, §50.



In line with this reasoning, the Court in *Čonka v. Belgium*³⁶⁸ has further declared that “suspensive effect” must follow automatically from an application alleging a potential violation of a Convention right rather than resting solely on the discretion of the domestic authority considering the individual’s case.

Čonka v. Belgium also found a violation of Article 13 taken together with Article 4 of Protocol No. 4 (the collective expulsion of aliens) because “ultimately, the alien has no guarantee ... that the Conseil d’État would deliver its decision, or even hear the case, before its expulsion, or that the authorities would allow a minimum reasonable period of grace.”³⁶⁹

In *Gebremedhin v. France* the Court held that when an asylum application is lodged at a border, including airports, the remedy against a decision of non-admission to the territory for the purpose of seeking asylum must have an automatic suspensive effect for it to be effective within the meaning of Article 13 ECHR.³⁷⁰ The Court referred to the Council of Europe “Twenty Guidelines on Forced Return”, in particular, Guideline 5 concerning remedies against a removal order.³⁷¹

The Court consolidated these principles in *Abdolkhani and Karimnia v. Turkey* at §108:

the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant’s expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect (see *Muminov v. Russia*, no. 42502/06, §101, 11 December 2008; *Gebremedhin [Gaberamadhien]*, cited above §66; *Jabari*, cited above, §39).³⁷²

These two requirements which flow from the premise that a remedy required by Article 13 to be “effective” in practice as well as in law. A third

368. *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002.

369. *Ibid.*, §83.

370. *Gebremedhin v. France*, application no. 25389/05, judgment of 26 April 2007.

371. Twenty guidelines on forced return adopted by the Committee of Ministers on 4 May 2005.

372. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.



requirement is that a remedy must take the form of a guarantee and not of a mere statement of intent or a practical arrangement.³⁷³

The Court in *Soldatenko v. Ukraine*³⁷⁴ and *Baysakov and others v. Ukraine*³⁷⁵ considered that there was no effective remedy, as required by Article 13 of the Convention, by which an extradition decision could be challenged on the ground of a risk of ill-treatment on return. In *Soldatenko*, no evidence was produced by the Government to show that the administrative court process provided an effective means of reviewing the merits of the case. Examples were produced in *Baysakov* in respect of the review of the extradition by the prosecutors. However, the Court held that the prosecutorial procedure did not specifically provide for a thorough and independent assessment of any complaints of a risk of ill-treatment in case of extradition. No time-limit was provided by which the person concerned was to be notified of an extradition decision or a possibility of suspending extradition pending a court's consideration of a complaint against such a decision. Furthermore, whilst judicial review proceedings could in principle effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate, an application to the administrative courts to annul the extradition decision did not have automatic suspensive effect.

Therefore, even assuming that the applicants are served with extradition decisions in due time enabling them to challenge the decisions before the administrative courts and that the latter have jurisdiction over such matters, there are no guarantees that the decisions will not actually be enforced before the courts have had an opportunity to review them. ...

The applicants were not afforded an effective and accessible remedy in relation to their complaints under Article 3 which amounted to a violation of Article 13 of the Convention.

373. *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008 citing *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002.

374. *Soldatenko v. Ukraine*, application no. 2440/07, judgment of 23 October 2008 and *Baysakov and others v. Ukraine*, application no. 54131/08, judgment of 18 February 2010.

375. *Baysakov and others v. Ukraine* cited above, § 77.



Time restrictions

On the issue of the time limit of five days in which the applicant had to lodge her asylum application in *Jabari*, the Court took the view that

the automatic and mechanical application of such short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.³⁷⁶

The Court in *K.R.S. v. the United Kingdom* made clear that this was a principle of general application and not limited to the facts of the *Jabari* case. Therefore, any procedural requirements set by states for the submission and consideration of asylum claims or the regulation of the appeals process from adverse decisions at first instance, must comply with this rule.³⁷⁷

The failure of a single domestic remedy to satisfy the requirements of Article 13

In situations where a single legal avenue is unable to provide an effective remedy for a violation of a Convention right, the Court may nevertheless consider that the “aggregate of several remedies”³⁷⁸ provided by domestic law satisfies the requirements of Article 13. However, as demonstrated in *Kudła v. Poland*,³⁷⁹ a simple assertion by the state that the individual could have raised the complaint before a number of different authorities will not suffice. Instead, the onus rests with the state to show that an “aggregate” of remedies would provide the individual with the effective relief, either compensatory or preventative, that is otherwise lacking under a single remedy.³⁸⁰

376. *Jabari v. Turkey*, application no. 40035/98, judgment of 11 July 2000, §40.

377. *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008.

378. *Kudła v. Poland*, application no. 30210/96, judgment of 26 October 2000, §157.

379. *Ibid.*

380. *Ibid.*, §159.



The definition of “national authority” and the right to appeal

At national level, recent legislation introduced in western European states has tended to reduce rights of appeal against a rejection of an asylum claim. Such measures have been seen not least as a way of dealing with an increase in the number of asylum applications (even though these have now been much reduced), but also to speeding up what can otherwise amount to a lengthy and cumbersome process.

As the *Golder and Klass*³⁸¹ cases have shown, the right set out in Article 13 of the ECHR to “an effective remedy before a national authority” for those “whose rights and freedoms as set forth in this Convention are violated” does not necessarily have in all instances to be a judicial authority in the strict sense.³⁸² However, the Court established in *Čonka* that for a non-judicial “national authority” to satisfy the requirements of Article 13, the extent of its powers and guarantees will first be relevant in determining whether it is capable of providing an effective remedy.³⁸³

Legal aid

In *Richard Lee Goldstein v. Sweden*³⁸⁴ the Court found that Article 13 does not guarantee a right to legal counsel paid by the state when availing oneself of such a remedy. In the Court’s opinion, the absence of free legal aid in this particular case did not prevent the applicant from using the remedies at his disposal in Sweden. It could be that it is only when the absence of free legal aid directly prevents the use of the available remedies that the Court would consider Article 13 violated.

The right to legal assistance and representation, free of charge, according to the relevant national rules on legal aid is set out in the Council of Europe Twenty Guidelines on Forced Return. On the other hand, Article 15 of the Procedures Directive provides that member states

381. *Golder v. the United Kingdom*, application no. 4451/70, judgment of 21 February 1975, and *Klass v. Germany*, application no. 5029/71, judgment of 6 September 1978.

382. European Court of Human Rights, Series A, No. 18 (1975), §33, and European Court of Human Rights, Series A, No. 28 (1978).

383. *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002, §75.

384. *Richard Lee Goldstein v. Sweden*, application no. 46636/99, decision of 12 September 2000.



of the EU shall allow asylum applicants the opportunity, at their own cost, to consult a legal adviser on matters relating to their asylum applications. In the event of a negative decision by a determining authority, member states shall ensure that free legal assistance and/or representation be granted on request.

Summary

To sum up, in order to be considered as an effective remedy the procedure for granting or withholding international protection should meet a number of criteria. It should allow the competent first- and second-instance bodies to consider the merits of an asylum claim, it should provide the possibility of suspending any deportation order which may be in force, and it should not be constrained by a restrictive time limit within which the application must be lodged. The procedural principles emerging from the Court's jurisprudence and its interpretation of Article 13 could eventually be used in order to tackle other problems relating to asylum procedures, such as issues of excessive length of procedure or accelerated procedures. Article 13 could therefore be instrumental in establishing or assessing minimum standards applicable to asylum procedures.

The application of Article 6 – The right to a fair trial

The Court, and the Commission before it, have been invited on innumerable occasions to find that the proceedings for the determination of an asylum application, or for the review of a refusal to grant asylum, or to accede to a request to quash a decision to expel, have failed to comply with the standards of fairness set out in Article 6. The Grand Chamber has now twice made it clear that Article 6 does not apply to expulsion cases. This is because decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 §1. Rather, it has been seen as an act of public authorities governed by public law.



The Grand Chamber declared admissible the case of *Maaouia v. France*,³⁸⁵ which concerned the application of Article 6 to deportation and exclusion orders connected to criminal proceedings. The Grand Chamber finally considered that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens, the states had clearly intimated their intention not to include such proceedings within the scope of Article 6 §1 of the Convention.

The Grand Chamber reaffirmed that position in *Mamatkulov and Askarov v. Turkey*.³⁸⁶

However, the Court in *Ismoilov v. Russia*³⁸⁷ arrived at a different finding to that of *Mamatkulov* in holding that Article 6 §2, was capable of being applied in the context of extradition. Whilst the applicants were not charged with any criminal offence within Russia and the extradition proceedings themselves did not themselves concern a criminal charge, the Court considered whether there:

was any close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicants in Uzbekistan which might be regarded as sufficient to render the applicants “charged with a criminal offence” within the meaning of Article 6 §2 of the Convention.³⁸⁸ ... The Court observes that the applicants’ extradition was ordered for the purpose of their criminal prosecution. The extradition proceedings were therefore a direct consequence, and the concomitant, of the criminal investigation pending against the applicants in Uzbekistan.³⁸⁹

The Court found a violation of Article 6 §2, on the basis that the unambiguous wording of the extradition decision sent by the Russian authorities to the Prosecutor’s General Office in Uzbekistan demonstrated that

385. *Maaouia v. France*, application no. 39652/98, decision of 12 January 1999.

386. *Mamatkulov and Askarov v. Turkey*.

387. *Ismoilov v. Russia*, application no. 2947/06, judgment (Chamber) 24 April 2008. The applicants also complained that their extradition from Russia to Uzbekistan to face trial for terrorism charges violated Article 6 §1 as they would not receive a fair trial. However, in light of the finding that Article 3 was violated, no further violation was found under Article 6 §1.

388. *Ibid.*, §163.

389. *Ibid.*, §164.



the Prosecutor regarded the applicants as “charged with a criminal offence”: it clearly amounted to a declaration of the applicants’ guilt which could encourage the public to believe them guilty and which prejudged the assessment of the facts by the competent judicial authority in Uzbekistan.³⁹⁰

Whether or not there is a “close link” between extradition proceedings and criminal proceedings for the purposes of Article 6 may give rise to further argument. The Court declared inadmissible the case of *Panjeheighalehei v. Denmark* under Article 6§1. Whilst the subject matter of the applicant’s action was pecuniary, those proceedings were so “closely connected” to the subject matter of the deportation proceedings that they could not be distinguished. In those circumstances, the applicant’s claim for compensation would, in effect, amount to a review of the merits of the deportation.³⁹¹

Article 6 §1 of the Convention may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.³⁹² It is clear that where the asylum seeker is not able to avail him or herself of this right at the very least, there is an obvious risk that the applicant’s need for international protection will fail to be properly considered. An argument could be made that the case-law of the European Court of Human Rights as regards Article 6 of the Convention should be influenced by the EC notion of fair procedures and

390. *Ibid.*, §169.

391. *Panjeheighalehei v. Denmark*, application no. 11230/07, decision of 13 October 2009. In a non-asylum case, *Micallef v. Malta*, application no. 17056/06, judgment [GC] of 15 October 2009, the Court departed from its previous case-law in finding that it was no longer justified for injunction proceedings to be automatically characterised as not involving the determination of civil rights and obligations. After noting that not all interim measures determined such rights and obligations, the Court set out the conditions which had to be satisfied for Article 6 to be applicable.

392. *Airey v. Ireland*, application no. 6289/73, 9 October 1979.



Article 47 of the EU Charter of Fundamental Rights in order to safeguard the individual “in a real and practical way”³⁹³

Article 4 of Protocol No. 4 – Prohibition on the collective expulsion of aliens³⁹⁴

The Commission found in *Becker v. Denmark*³⁹⁵ that the phrase “collective expulsion” refers to “any measure of the competent authority compelling aliens as a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien in the group”.³⁹⁶ In *Alibaks and others v. the Netherlands*³⁹⁷ the Commission found that the fact that a number of aliens from the same country had all been refused asylum in similar terms did not mean that they had been collectively expelled when there was evidence that their cases had been individually examined.

In *Čonka v. Belgium*,³⁹⁸ the Court’s first ever ruling case involving the collective expulsion of Roma, the Court found that “the procedure followed [by the state authorities] did not enable it to eliminate all doubt that the expulsion might have been collective”³⁹⁹ and thus decided that there was a violation of Article 4 of Protocol No. 4. The reasoning of the Court appeared to break new grounds in terms of burden of proof issues: a prima facie case under Article 4 of Protocol No. 4 would shift the burden to the government to prove that a violation has not taken place. Further, after reiterating its case-law, the Court specified the definition of collective expulsion and highlighted that even where the measure was taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group:

393. Ibid.

394. Article 4 of Protocol No. 4 states: “Collective expulsion of aliens is prohibited.” (Not all member states of the Council of Europe are parties to Protocol No. 4.)

395. Application no. 7011/75, decision of 3 October 1975.

396. Ibid., p. 235.

397. Application no. 14209/88, decision of 16 December 1988.

398. *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002.

399. Ibid., §63.



that did not mean, however, that ... the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.⁴⁰⁰

A similar case where the Italian Government claimed to have a different intention from that of the Belgian Government in *Čonka*, namely to improve the living conditions of legal immigrants,⁴⁰¹ was struck out of the list after reaching a settlement without the Court having the opportunity to confirm the *Čonka* judgment's orientation.

In May 2006, the Court declared admissible under this provision four complaints brought against Italy by 57 applicants who alleged that they had been expelled collectively from Lampedusa (an Italian island near the coast of Africa) to Libya. The case was struck out on the basis of concerns regarding the legal representative's power of attorney and the fact that all but one of the applicants could no longer be found.⁴⁰²

The Italian authorities have also been asked to answer whether or not the immediate deportation of 35 applicants to Greece violated Article 4 of Protocol Number 4. The applicants claimed that their collective *refoulement* was part of a policy which, by the time of their *refoulement*, had already been in practice for several months.⁴⁰³

The application of Article 4 of Protocol No. 7 to expulsion imposed as an additional penalty

Foreigners who are convicted of criminal offences are frequently subjected to expulsion measures in addition to the criminal sanction imposed on them.

In *Üner v. the Netherlands*⁴⁰⁴ the Court emphasised that such "administrative" measures were designed essentially to protect the interests of society and as such were preventive rather than punitive in nature. This

400. *Ibid.*, §59.

401. *Sulejmanovic and Sultanovic v. Italy*, application no. 57574/00, decision of 14 March 2002 (judgment struck out of the list on 8 November 2002).

402. *Hussun and others v. Italy*, application nos. 10171/05, 10601/05, 11593/05, and, 17165/05.

403. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009.

404. *Üner v. the Netherlands*, application no. 46410/99, judgment of 18 October 2006.



was deemed to be the case even where a non-national could show a strong residence status and a high degree of integration within the state.⁴⁰⁵ Criticism of this stance was, however, expressed in the joint dissenting opinion of Judges Costa, Zupančič and Tūrman, who reasoned that the simple dismissal of expulsion as preventive rather than punitive wholly ignored the view that these measures often “shatter”⁴⁰⁶ lives and can constitute “as severe a penalty as a term of imprisonment, if not more severe.”⁴⁰⁷

Forced expulsion of reluctant deportees

Article 3 and the moral and physical integrity dimension of Article 8 apply not only to the situation which awaits the expelled individual in the receiving country, but also the manner in which the expelling state carries out the expulsion. Amnesty International has documented a significant increase in the instances of life-threatening and sometimes fatal methods of restraint states have used to carry out forced expulsions. The European Committee for the Prevention of Torture (CPT) – established to complement the right of petition under the ECHR and to strengthen the protection against torture or inhuman and degrading treatment – has documented the treatment of those being expelled. In addition to monitoring the procedure followed during boarding onto aeroplanes and during the flight itself, the CPT has also investigated “the detention prior to deportation, the steps taken to prepare for the immigration detainee’s return to the country of destination, measures to ensure suitable selection and training of escort staff, internal and external systems for monitoring the conduct of staff responsible for deportation escorts, measures taken following an abortive deportation attempt, etc.”⁴⁰⁸

These investigation efforts have revealed practices used in detention and expulsion which may violate the Convention to the extent that they

405. *Ibid.*, §56.

406. *Ibid.*, §17 of the joint dissenting opinion of Judges Costa, Zupančič and Tūrman.

407. *Ibid.*

408. CPT’s 13th General Report, CPT/Inf (2003) 35, §28.



cause severe mental and physical suffering. Methods such as the cushion treatment (to stifle protests), which risk (and have actually caused) suffocation, the administration of drugs, the taping over of the mouth and nose, confinement in a straitjacket, handcuffing to a wheelchair or airline seat, and forcing adults to undertake long journeys wearing incontinence pads so that they do not have to be unshackled to use the toilet are all in regular use.⁴⁰⁹ Beating and kicking by police and immigration officers have also been reported. The CPT has expressed deep concern about these practices and has recalled that “the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible.”⁴¹⁰ The CPT has also noted that the wearing of nappies “can only lead to a degrading situation” and recommended “an absolute ban on the use of means likely to obstruct the airways (nose/mouth) partially or wholly.”⁴¹¹ More generally, it recommended that escort staff receive specific training to reduce the risk of ill-treatment to a minimum⁴¹² and that medical examination should be undertaken in order to document injuries and protect escort staff against unfounded allegations.

The Court has not yet examined any complaint about these specific practices, but the jurisprudence relating to the use of force by police officers in the context of arrest relating to criminal charges is instructive. The Commission and Court have held that inhuman treatment includes such treatment as deliberately causes severe mental and physical suffering. In addition to condemning the treatment, the Court in *Ribitsch*⁴¹³

409. See Amnesty International documents: Austria – “Concerns in Europe: January-June 1999”, AI Index EUR 01/002/1999; “Austria before the UN Committee against Torture: allegations of police ill-treatment”, EUR 13/01/2000; Belgium – “Concerns in Europe: July-December 1999”, EUR 01/001/2000; “Federal Republic of Germany: continuing pattern of police ill-treatment”, EUR 23/004/1997; Spain – “Concerns in Europe: July-December 1996”, EUR 01/001/1997; “Concerns in Europe: January-June 1998”, EUR 01/002/1998, “Concerns in Europe: January-June 1999”, EUR 01/002/1999, Switzerland, – “Concerns: July-December 1999”, EUR 01/001/2000; “UK death in police custody of Joy Gardner”, EUR 45/005/1995; “UK Amnesty International Report 1995”; “UK Cruel, inhuman and degrading treatment during forcible deportation”, EUR 45/005/1994; *Amnesty International News*, March 2000, Col. 30, No. 2.

410. CPT’s 13th General Report, CPT/Inf (2003) 35, §34.

411. *Ibid.*, §§34-36.

412. *Ibid.*, §42.

413. *Ribitsch v. Austria*, application no. 18896/91, judgment of 4 December 1995.



added a very strong statement that any recourse to physical force which has not been made “strictly necessary” by a person’s own conduct diminishes human dignity as it is in principle a violation of Article 3. In *Hurtado*⁴¹⁴ the applicant had defecated on arrest and had been unable to change his clothes until the next day. The Commission found that such treatment was humiliating and debasing and thus in violation of Article 3. In the same case, however, they found that the applicant having his ribs cracked by an officer kneeling on him whilst effecting the arrest was not a violation of Article 3 because of the circumstances surrounding the arrest. In *Selmouni v. France*⁴¹⁵ physical and psychological abuse in a police station were found to be in violation of Article 3. Reflecting the standards laid down in the UNCAT, the Court has also found that a failure by the authorities to take prompt effective measures to investigate allegations of Article 3 and to bring to justice those accused violates the “inherent procedural safeguards” of the article.⁴¹⁶

The Court has considered the use of drugs in the context of the compulsory treatment of a psychiatric patient. As it was satisfied that being strapped down and subjected to the compulsory administration of drugs constituted a “therapeutic necessity in line with current medical practice”,⁴¹⁷ it found no violation. The situation might be different where there is, as in the case of forced expulsion, no therapeutic element involved.

The Court took a decision related to the treatment of expelled asylum seekers during expulsion in *Čonka*, in which the applicants claimed they had been victims of a breach of Article 3 when the Belgian authorities forcibly wrote their aeroplane seat numbers with a ballpoint pen on their hands at the airport immediately prior to expulsion. The Court found that while writing seat numbers on the individuals’ hands was particularly sensitive, it did not cross the threshold of seriousness Article 3 requires.⁴¹⁸

414. *Hurtado v. Switzerland*, application no. 17549/90, judgment of 28 January 1994.

415. *Selmouni v. France*, application no. 25803/94, judgment of 28 July 1999.

416. *Assenov v. Bulgaria*, application no. 24760/94, judgment of 28 October 1998; and *Selmouni v. France*, application no. 25803/94, judgment of 28 July 1999.

417. *Herczegfalvy v. Austria*, application no. 10533/83, judgment of 24 September 1992.

418. *Čonka and others v. Belgium*, application no. 51564/99, decision of 13 March 2001, §3.



Cases of this kind will depend on whether the treatment has reached the requisite threshold of severity required by Article 3. In determining whether the Article 3 threshold is met, or whether the treatment falls under Article 8 (moral and physical integrity), the test will be whether the deportation could have been effected in a way which constituted less of an infringement to the dignity of the deportee. In order to determine whether there were “relevant and sufficient reasons” for the interference, the Convention demands that the state should show that other methods were investigated and rejected and that the force that was used was no more than was absolutely necessary.

As a result of resistance from the airlines, and complaints by pilots, crew and other passengers travelling with forced deportees, many states have now adopted a practice of chartering planes to return illegal immigrants, and those whose asylum applications have been rejected, to their country of origin. This is now a common practice throughout Europe and has led to concerns that factors associated with the efficient economic use of the charter planes may lead to precipitate decision making in order to fill expensive empty seats.

In May 2005 the Committee of Ministers of the Council of Europe adopted “Twenty Guidelines on Forced Returns” (CM (2005) 40), which are intended to address some of the worst excesses described above and to set standards for future forced returns.

The EU Return Directive 2008/115/EC of 16 December 2008 provides common standards and procedures in Member States for returning illegally staying third-country nationals. It is discussed in more detail in Part 3, below.⁴¹⁹

419. Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (“the Return Directive”)



Part Two – The role of the European Convention on Human Rights in situations not involving protection from expulsion

Detention under Article 5 and restrictions on freedom of movement under Article 2 of Protocol No. 4

Detention and restrictions on freedom of movement

Detention or restrictions on movement are particularly problematic in many jurisdictions.

Many of those seeking asylum in Europe now routinely face detention, often for lengthy periods, sometimes in appalling conditions, or severe restrictions on their freedom of movement. This occurs both whilst their claims are being processed and before their expulsion if their claims are rejected. The human rights community (including intergovernmental organisations and non-governmental organisations⁴²⁰) has been very concerned by these matters.

The Council of Europe's political organs have made it clear that detention should only be imposed following a careful, specific examination of the facts and the necessity to detain in each individual case.⁴²¹ Asylum seekers must be afforded safeguards (including judicial review and reme-

420. The European Committee for the Prevention of Torture, the Commissioner for Human Rights, the Parliamentary Assembly of the Council of Europe, the European Parliament and other international organisations including UNHCR and the UN Working Group on Arbitrary Detention, as well as civil society.



dies through which detention can be effectively challenged), and standards of detention which respect their rights, welfare and dignity. The Court's approach has been less robust (see *Saadi v. the United Kingdom*⁴²² discussed below).

The EU Return Directive 2008/115/EC,⁴²³ adopted in December 2008 for the first time, sets a limit of six months on detention. This period can be extended for up to a further twelve months – in cases where, for example, the individual refuses to co-operate with the authorities.

The ECJ in the case of *Kadsoev*⁴²⁴ examined Article 15 of Directive 2008/115 which forms part of the chapter on detention for the purposes of removal. The case concerned the detention by the Bulgarian authorities of a Chechen asylum seeker. A decree of deportation was issued but asylum proceedings were subsequently reopened. The first question concerned the calculation of the six-month time limit for detention pending removal under Articles 15 §5 and 15 §6 of the Directive. The Court held that there are effectively two streams of law governing detention – detention for the purpose of removal is governed by Directive 2008/115, whereas detention of an asylum seeker whose claim is under consideration falls under Directives 2003/9 and 2005/85. It would be for the national authorities to determine whether or not a period of detention as an asylum seeker complied with the provisions of Community and national law. However, where detention was based on national laws concerning removal or the Return Directive 2008/115/EC, even though an asylum procedure was under way at the same time, the duration of detention could still be taken into account for the purposes of the six-month time limit.

421. See Recommendation Rec (2003) 5 of the Committee of Ministers to member states on measures of detention of asylum seekers,⁵⁴; Committee of Ministers, Twenty Guidelines on forced return, September 2005, Guideline 6 (1); CPT General Standards 2006; Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009 Guideline 11.

422. *Saadi v. the United Kingdom*, application no. 13229/03, judgment [GC] of 29 January 2008.

423. Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals.

424. *Said Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti*, Case C-357/09, 30 November 2009.



The period of time a person continues to be detained, even though deportation may be suspended pending the outcome of judicial review proceedings, also contributes to the six months calculation.

It is clear that “in any event” where the maximum duration of detention provided for in Article 15 §6 has been reached, the person must be released immediately and the question of whether there is a “reasonable prospect of removal” under Article 15 §4 simply does not arise. Similarly, under Articles 15 §4 and 15 §6, where the maximum period of detention has expired the person must be released immediately, irrespective of any other purported justifications for detention advanced by the domestic authorities (e.g. the applicant not being in possession of valid documents, aggressive conduct, no means of supporting himself and no accommodation or means). Finally, the Court also held that a “reasonable prospect of removal” under Article 15 §4 corresponds to situations where there is “only a real prospect that removal can be carried out successfully”.

The United Kingdom and Ireland have opted out of the Directive. Other states such as Italy responded by lengthening the maximum length of detention under national law.

At the time of writing, the CPT had adopted its 19th General Report, the Parliamentary Assembly of the Council of Europe had adopted a report on “The detention of asylum seekers and irregular migrants in Europe” and the EU Commission had proposed a recast of both the Reception Conditions and Procedures Directives.⁴²⁵

Many Council of Europe member states are faced with the arrival of mixed flows comprising both asylum seekers and irregular migrants with

425. CPT, *20 years of combating torture: 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1 August 2008-31 July 2009)*, 20 October 2009; Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Doc. 12105, 11 January 2010, “The detention of asylum seekers and irregular migrants in Europe”, Report, Ms Ana Catarina Mendonça (Portugal); EU Commission Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), 3 December 2008, COM (2008) 815 final; EU Commission Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in member states for granting and withdrawing international protection (Recast), 21 October 2009, COM (2009) 554 final; 2009/0165 (COD).



no claim to international protection. The Court has acknowledged the difficulties this causes for the reception of asylum seekers at most large European airports, ports and borders, and for interception and rescue at sea. The Court has recognised that states have a sovereign right to control aliens' entry into and residence in their territory, and that detention is an adjunct of that right. However, in doing so, the Court has reminded states that the provisions of the Convention, including Article 5, must be respected. In *Amuur v. France*⁴²⁶ the Court stated that:

Holding aliens in the international zone does indeed involve a restriction upon liberty [of movement], but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable states to prevent unlawful immigration whilst complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum seekers of the protection afforded by these Conventions.

The Court has emphasised that a clear distinction should be made between asylum seekers and other migrants⁴²⁷ and has noted that the measures of detention imposed on asylum seekers are applicable not only to those who have committed criminal offences but also to aliens who, often fearing for their lives, have fled from their own country.⁴²⁸ Asylum seekers should therefore be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants.⁴²⁹ Article 31 of the 1951 Geneva Convention (the non-penalisation clause)

426. *Amuur v. France*, application no. 19776/92, judgment of 25 June 1996.

427. *S.D. v. Greece*, application no. 53541/07, decision of 11 June 2009, §65.

428. *Saadi v. the United Kingdom*, application no. 13229/03, judgment [GC] of 29 January 2008, §75, citing *Amuur v. France*, application no. 19776/92, judgment of 25 June 1996, §43.

429. Committee for the Prevention of Torture, 20 Years of Combating Torture: 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1 August 2008-31 July 2009), 20 October 2009



provides that states shall not impose penalties on refugees on account of their illegal entry or their presence in the country without authorisation.⁴³⁰ Restrictions on freedom of movement including detention must be exceptional.⁴³¹

The UNHCR has stated that the prevention of detention of asylum seekers is a priority because it is often a precursor to *refoulement*.⁴³² The precarious position of asylum seekers was at issue in *Abdolkhani and Karimnia v. Turkey*,⁴³³ a case in which the Iranian applicants had already been recognised as refugees in Iraq by the UNHCR under its mandate, but moved on to Turkey when their camp was closed. After their expulsion from Turkey and subsequent return by Iran they were held in arbitrary detention in Turkey. *Hussun and others v. Italy* concerned detention on the island of Lampedusa of those coming from Libya.⁴³⁴ The vulnerable position of asylum seekers is currently being considered by the Court in *Sharifi and others v. Italy and Greece*⁴³⁵ which concerns, *inter alia*, conditions of detention in Greek ports and the risk of summary removal.

Article 5 §1 of the Convention sets out an exhaustive list of those situations in which an individual may be deprived of his liberty. No deprivation of liberty is permitted unless it is for one of the purposes set out in Article 5 §1.

Article 2 of Protocol No. 4 governs restrictions on freedom of movement. The permitted justifications for imposing restrictions on freedom of

430. UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, Guideline 2 ("UNHCR Guidelines"); Commissioner for Human Rights, "States should not impose penalties on arriving asylum-seekers", 17 March 2008.

431. UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, Guideline 3.

432. UN High Commissioner for Refugees, *Measuring Protection By Numbers* (2005), November 2006.

433. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.

434. *Hussun and others v. Italy*, application nos. 10171/05, 10601/05, 11593/05, 17165/05, judgment of 19 January 2010 (struck out of the list).

435. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009 (pending).



movement are much wider than the permissible reasons for deprivation of liberty.

The scope of the two articles is very different.

Deprivation of liberty or restriction on freedom of movement?

In order to decide whether or not the restriction complies with Convention standards the first step is to establish whether the factual situation in question constitutes a deprivation of liberty or a restriction on freedom of movement – that is, whether the safeguards of Article 5 or those of Article 2 of Protocol No. 4 apply in a particular case.

The distinction between a deprivation of liberty and a restriction on movement will depend on several aspects of the specific situation. It is not simply a question of whether someone has been locked in a prison cell. The starting point is the concrete situation of the individual concerned and account needs to be taken of a whole range of criteria: the type, duration, effects and manner of implementation of the measures restricting the individual's liberty.⁴³⁶

The case of *Guzzardi v. Italy*⁴³⁷ (not an asylum case) is the starting point. The applicant had been arrested in connection with a criminal charge but the time for which he could lawfully be detained on remand had expired before the charges were ready to proceed. He was removed from the prison where he was being held and taken under court order to a small island off Sardinia to be kept under "special supervision". Whilst the island as a whole covered 50 square kilometres, the area reserved for persons such as Mr Guzzardi in "compulsory residence" represented an area of not more than 2.5 square kilometres. The applicant was able to move freely around this area during the day but unable to leave his dwelling between 10 p.m. and 7 a.m. He had to report twice daily to the authorities and could only leave the island with prior authorisation and under strict supervision. His contact with the outside world was also supervised and restricted. The applicant lived under these conditions for 16 months. The

436. The terms "deprivation of liberty" and "detention" are used interchangeably in this book.

437. *Guzzardi v. Italy*, application no. 7367/76, judgment of 2 October 1980.



Italian Government needed to succeed in its argument that he was not “deprived of his liberty” since it was unable to demonstrate that this could be justified under any of the provisions of Article 5 §1.a-f.

The Court stated that it was not possible to establish a deprivation of liberty on the strength of any one aspect of his regime taken individually, but taken cumulatively and in combination, in the light of the factors set out above, it considered that the applicant had been deprived of his liberty and his case was to be examined under Article 5 rather than Article 2 of Protocol No. 4.

In contrast, in the case of *Raimondo v. Italy*,⁴³⁸ “special police supervision” meant that the applicant could not leave his own home without informing the police but did not require their permission to do so. He was under an obligation to report to the police on certain days and also to stay at his home between 9 p.m. and 7 a.m. every night. The Court held that these restrictions were not a deprivation of liberty and should only be considered as a restriction on freedom of movement. Article 5 did not therefore apply.

The Court also had to examine this issue in the case of *Amuur v. France*.⁴³⁹ A group of asylum seekers from Somalia who had arrived at the Paris-Orly Airport via Syria were held for 20 days in the international transit zone and a nearby hotel specifically adapted for holding asylum seekers.

As in the *Guzzardi* case, in deciding whether there was a deprivation of liberty or a restriction of movement, the type, duration, effects and manner of the measure in question had to be examined. The Court discussed whether there had been a restriction on liberty of movement or a deprivation of liberty. It decided that this was an issue of “degree and intensity”. The applicants had been held at the airport for twenty days under constant police surveillance, and for most of the time not provided with any legal or social assistance. As in *Guzzardi*, the government had argued that there was no deprivation of liberty, only a restriction on freedom of movement. The government suggested that the applicants

438. Application no. 12954/87, judgment of 22 February 1994.

439. Application no. 19776/92, judgment of 25 June 1996.



could at any time have removed themselves from the sphere of application of the measure in question, arguing that the transit zone was “closed on the French side” but “open to the outside”.

The Court held⁴⁴⁰ that the mere fact that it was possible for asylum seekers to leave the country where they wished to seek refuge did not mean that there had not been a “restriction on liberty”. (The use of the word “restriction” rather than “deprivation” is odd, as no complaint had been made under Article 2 of Protocol No. 4.) The possibility of leaving was theoretical if no other country offered protection comparable to that which they expected in the country where they were seeking asylum. Sending the applicants back to Syria in fact only became possible following negotiations between the French and Syrian authorities, and they had not been free to leave whenever they wanted as was alleged by the government. The Court therefore concluded that the applicants’ detention in the transit zone amounted to a deprivation of liberty and that Article 5 was applicable.

In *Riad and Idiab v. Belgium* the Court found that the Belgian authorities had detained Palestinian asylum seekers unlawfully and in wholly inappropriate conditions in the transit zone of the airport. Their detention in that location had been in the hope that the applicants would leave of their own accord.⁴⁴¹

The applicant in *Nolan and K. v. Russia* was not an asylum seeker, but a US national previously resident in Russia who was refused leave to enter Russia and then locked up in a room in the transit hall of the airport overnight. The parties disagreed as to whether or not the applicant had been deprived of his liberty within the meaning of Article 5. Contrary to the government’s submissions, the Court found that it was irrelevant whether the applicant was subject to any administrative or criminal detention procedure – the question was whether the applicant was, *de facto*, deprived of his liberty. With regard to his concrete situation, the Court observed that during the overnight stay at Sheremetyevo Airport he was unable to

440. 548.

441. *Riad and Idiab v. Belgium*, application nos. 29787/03, 29810/03, judgment of 24 January 2008.



leave the room in which he had been placed because it was locked from the outside. Although he was permitted to use the toilet and bar the following morning, that could only be done under constant supervision by a border control officer. In fact, his departure only became possible on the following day when he bought a ticket to Estonia, by which time his overnight detention had already taken place. Thus, the Court found that the conditions of the applicant's overnight stay were equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty.⁴⁴²

It is clear from this case-law that an order that a person should reside in a particular place will not be enough to amount to a deprivation of liberty so as to attract the very stringent protection of Article 5. This is so even if it includes a night curfew (see *Cyprus v. Turkey*⁴⁴³) coupled with daytime reporting requirements such as those in *Raimondo*. However, the closed and cut-off nature of such a restriction, coupled with its duration, might make it a deprivation of liberty rather than a mere restriction on freedom of movement. At the same time, even a very short period of detention may lead to a finding that there has been a deprivation of liberty as opposed to a restriction on free movement. In *Foka v. Turkey* it was the element of coercion which was crucial to the decision that there had been a deprivation of liberty.⁴⁴⁴

In *H.M. v. Switzerland*⁴⁴⁵ the placing of an elderly lady who could no longer care for herself and was unwilling to co-operate with home help, in a home which she could leave in theory but not in practice was held by a majority not to be a deprivation of liberty. In *Riera Blume and others v. Spain*⁴⁴⁶ in contrast, the applicant children who were confined – with the connivance of the police – with their families in a hotel in order to debrief them from the sect they had been with, had been deprived of their liberty. In *Lavents v. Latvia*⁴⁴⁷ house arrest without the possibility to leave was held

442. *Nolan and K. v. Russia*, application no. 2512/04, judgment of 12 February 2009, §96.

443. Application nos. 6780/74 and 6950/75, Commission decision of 26 May 1975. Decision on the law found in Commission Report (1976) EHRR 482

444. *Foka v. Turkey*, application no. 28940/95, judgment of 24 June 2008.

445. *H.M. v. Switzerland*, application no. 39187/98, judgment of 26 February 2002.

446. *Riera Blume and others v. Spain*, application no. 37680/97, judgment of 14 January 2000.



to constitute a deprivation of liberty rather than a restriction on freedom of movement. Likewise in *Mancini v. Italy*⁴⁴⁸ house arrest, which required the accused to obtain the permission of the authorities to leave and not just to give notification as in *Raimondo*, was a deprivation of liberty. The distinction between a deprivation of, and a restriction upon, liberty is one of degree or intensity and not one of nature or substance.⁴⁴⁹

Great care needs to be taken in deciding whether a particular factual situation constitutes a deprivation of liberty or merely a restriction on freedom of movement since the Convention provisions which apply are fundamentally, and in some respects surprisingly, different.

Detention under Article 5 of the Convention – The right to liberty and security of the person

Article 5 of the ECHR is aimed at preventing arbitrary deprivation of liberty.

Article 5 §1 of the European Convention states that:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

447. *Lavents v. Latvia*, application no. 58442/00, judgment of 28 November 2002.

448. *Mancini v. Italy*, application no. 44955/98, judgment of 2 August 2001.

449. *Nolan and K. v. Russia*, application no. 2512/04, judgment of 12 February 2009, §§93 and 96.



- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics and drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Purpose and justification

The list set out in Article 5 §1.a to f is exhaustive. Deprivation of liberty is only lawful if it is for one of the specified purposes and these are to be interpreted restrictively. The purpose must be identified. Detention which is not for an identified purpose covered by Article 5 §1.a to f is automatically unlawful. It is the prohibition on arbitrariness which is meant by the word “security” in Article 5 §1. It requires that every arrest or detention is lawful, both substantively and procedurally. This means that it has in fact been carried out for one of the six specified reasons in Article 5 §1.a to f.

This is crucial because if the detaining authority has not directed its mind to the genuine, specific purpose of detention, it will be less likely to have appreciated other procedural rights which such detention entails.

In addition the detainee must always be informed of the purpose and justification of his detention, as well as the applicable national law which authorises it (see further below on procedural safeguards). A number of situations might justify an asylum seeker’s deprivation of liberty under Article 5 §1.a to f.

However, in many states aliens crossing or seeking to cross state borders are detained in a fairly unpredictable fashion and for a variety of purposes. They are often not informed as to why they are arrested and detained and importantly they are not informed of the legal rules authorising their detention. It is the *de facto* deprivation of liberty and the concrete legal situation of the individual which is considered.⁴⁵⁰

450. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009, §125.



People in more or less similar circumstances who may ask the reason for their detention are often given several different answers: they have not proved their identity; they have crossed the border unlawfully; they are awaiting deportation; or they are not residing at a registered address.

The legal framework needs to be clear and transparent so those detained know the precise justification being put forward for their detention.

Article 5 §1.b – Establishing identity

Article 5 §1.b provides for detention in the following case:

the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

The first part of this provision relates only to orders of a court, not of a prosecutor or any part of the executive. Immigration detainees are rarely held for non-compliance with a lawful order of a court.

It is the second limb of this provision, which provides for detention in order to secure the fulfilment of any obligation prescribed by law, that is applicable under this provision. It concerns only cases where the law both:

- (i) imposes an obligation to prove identity or meet some other specified requirement; and
- (ii) permits the detention of a person to compel him/her to fulfil this specific and concrete obligation.

Detention cannot be justified on the basis of a general duty of obedience to the law. If there is a duty under domestic law to prove identity when asked by the authorities, and a person is unwilling or unable to do so, the provisions of domestic law may make detention lawful under Article 5 §1.b. However, if it becomes clear that the person detained remains unable to prove his/her identity, there have to be procedural safeguards in place to ensure the detention is not prolonged indefinitely.

Importantly, the provisions of Article 5 §1.b do not cover situations where a person is detained as a *sanction* for failure to comply with an obligation prescribed by law; that is only lawful when there has been a court



order. It only authorises detention to secure compliance. Detention under Article 5 §1.b must be necessary to secure compliance with the obligation in question if it is to be in conformity with Article 5 (see e.g. *Foka v. Turkey* above, page 141).⁴⁵¹

Article 5 §1.c – Crossing the border unlawfully

Article 5 §1.c provides for detention in the following situation:

the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

This provision only applies in situations where the individual is detained in connection with criminal or administrative proceedings relating to the offence of irregular border crossings. Under this provision deprivation of liberty may be lawful in situations:

- (i) where the person appears to have committed the offence of illegally crossing the border into the detaining state;
- (ii) where there are reasonable fears he/she will try to do so if released;
- (iii) where there are reasonable fears he/she appears to have committed the offence and will flee before a criminal or administrative prosecution can be brought.

Detention under this provision must – both initially and continuously – remain linked to one of the three specified factors and the relevant factor must be specified to the detainee. It must also be “for the purpose of bringing him before a competent authority” and must therefore be linked to the prosecution of the relevant criminal law or administrative offence.

If the detainee is released without charge, the arrest on reasonable suspicion of having committed the offence will not necessarily violate Article 5 provided that the arrest had genuinely been made for that purpose. However, this is only true for the initial period of the detention. The

451. *Foka v. Turkey*, application no. 28940/95, judgment of 24 June 2008.



legality of continued detention depends on whether the reasonable suspicion persists and, much more importantly, whether prosecution for the criminal or administrative offence is actually underway. The detention will cease to be lawful if the link to the reason why the person was arrested is not kept alive by the diligent pursuit of the relevant criminal or administrative proceedings. In *Ciulla v. Italy*⁴⁵² the applicant was detained in order that a compulsory residence order of the kind which featured in the *Guzzardi* and *Raimondo* cases, described above, could be made. The Court found there was no link with intended criminal proceedings so as to justify the detention under Article 5 §1.c. Pre-trial detention under Article 5 §1.c is sometimes imposed or prolonged in the context of the prosecution of foreign nationals because they have no status or fixed residence, (see below for a discussion of status). The Grand Chamber is currently examining the compatibility of this approach to the pre-trial detention of foreigners in the case of *Mangouras v. Spain*⁴⁵³ (not an asylum case).

In *Rusu v. Austria*⁴⁵⁴ and *Nolan and K. v. Russia*⁴⁵⁵ detentions following unlawful border crossings according to national law were considered to be breaches of Article 5 §1.f, not Article 5 §1.c.

Detention ordered to prevent the commission of the offence or to prevent absconding under Article 5 §1.c must always be shown to be necessary.

Article 5 §1.e – Vagrants

Article 5 §1.e allows for detention in the following cases:

the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

452. *Ciulla v. Italy*, application no. 1152/84, judgment of 22 February 1989.

453. *Mangouras v. Spain*, application no. 12050/04, judgment of 8 January 2009. Referred to the Grand Chamber on 8 June 2009. See also *Shannon v. Latvia*, application no. 32214/03, judgment of 24 November 2009.

454. *Rusu v. Austria*, application no. 34082/02, judgment of 2 October 2008.

455. *Nolan and K. v. Russia*, application no. 2512/04, judgment of 12 February 2009.



Asylum seekers and other migrants who have no visible means of support might fall into the category of “vagrants”. They may even give themselves up voluntarily to the authorities because of this. The case of *De Wilde, Ooms and Versyp v. Belgium*⁴⁵⁶ made it clear that whilst vagrancy may justify a short proportionate detention, even such voluntary surrender will not absolve states from their requirement to observe the procedural safeguards of Article 5.

The Court made it clear in the case of *Litwa v. Poland*⁴⁵⁷ that the detention (under Article 5 §1.e) in a sobering-up centre of someone found apparently drunk must not only be for the purpose of sobering up, but it must also be necessary – that is, that a less invasive interference would not suffice.

All detention ordered for one of the purposes set out in Article 5 §1.b to e must meet the test of necessity. The state must show that the stated purpose could not be met without the deprivation of liberty.

Article 5 §1.f – Detention in order to prevent unauthorised entry or pending deportation

The one immigration situation which is expressly provided for in Article 5 is in Article 5 §1.f:

the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

This provision applies in two situations:

- (i) detention to prevent a person entering a country unlawfully; and
- (ii) detention whilst a person is awaiting the execution of a decision to deport or extradite him/her.

The European Court has now held that unlike detention under Article 5 §1.b, c, d and e detention under either limb of Article 5 §1.f is not subject to a necessity test, with the important proviso that if necessity is required under the relevant domestic law, failure to meet the necessity test will

456. Application nos. 2832/66, 2865/66 and 2899/66, judgment of 18 June 1971.

457. Application no. 26629/95, judgment of 4 April 2000.



render the detention unlawful (see *Rusu v. Austria*⁴⁵⁸). This paradoxical position has been reached by an interesting route.

The Court held in *Chahal v. the United Kingdom*⁴⁵⁹ that detention under the second limb of Article 5 §1.f does not have to meet the test of necessity as long as the detention is linked to an imminent expulsion.

Detention under the second limb is permitted where deportation or extradition is a practical reality capable of being enforced and is “imminent”. There must be a “realistic prospect” of expulsion. The authorities may be required to provide evidence of steps taken to secure travel documents and arrange for the person to be readmitted with the receiving authorities. If this is no longer feasible, it cannot constitute action taken with a view to removal.⁴⁶⁰

In *Quinn v. France*,⁴⁶¹ on the other hand, the Court found Article 5 to have been violated because the detention lacked proportionality and the state had not conducted the relevant proceedings with due diligence. In *Singh v. the Czech Republic*⁴⁶² the detention was held to violate Article 5 §1.f because the Czech authorities had failed to exercise due diligence in pursuing the necessary documentation from the Indian authorities to effect the return to that country.

In *Ali v. Switzerland*⁴⁶³ the Swiss similarly wanted to extradite the applicant to Somalia, but could not as he had no travel document. Since the extradition was thus impossible, the detention could no longer be regarded as being with a view to extradition.⁴⁶⁴

In *Abdolkhani and Karimnia v. Turkey*,⁴⁶⁵ following the Court’s application of Rule 39 by the European Court (see page 217), the government could not have removed the applicants without being in breach of their obligation under Article 34 of the Convention. Therefore, any deportation

458. *Rusu v. Austria*, application no. 34082/02, judgment of 2 October 2008.

459. *Chahal v. the United Kingdom*, application no. 22414/93, report of 27 June 1995.

460. *Mikolenko v. Estonia*, application no. 10664/05, judgment of 8 October 2009.

461. Application no. 18680/91, judgment of 22 March 1995.

462. Application no. 60538/00, judgment of 25 January 2005.

463. Application no. 24881/94, judgment of 5 August 1998.

464. See also *Singh v. the Czech Republic*, application no. 60538/00, judgment of 25 January 2005.

465. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.



proceedings carried out in respect of the applicants would have had to be suspended with the attendant consequences for the continued deprivation of the applicants' liberty for that purpose. The Court followed the approach in *Gebremedhin v. France* – after Rule 39 has been applied to prohibit removal the authorities can no longer claim to be detaining a person with a view to deportation.⁴⁶⁶

In *A. and others v. the United Kingdom* foreign nationals were suspected of, but not charged with, terrorist related offences. They could not be removed to their countries of origin as it was acknowledged that they would be at risk of prohibited treatment. They were detained. The government argued that the possibility of removing them was being kept “under active review” in case the circumstances changed so that their removal would be legal. The Court found that this could not be considered sufficiently certain or determinative to amount to “action ... being taken with a view to deportation”.⁴⁶⁷ The Grand Chamber distinguished *Chahal v. the United Kingdom* on the basis that in *Chahal* action was being taken with a view to deportation although the deportation was delayed because of repeated challenges in the national courts, whereas the subject matter of the challenges in *A.* was only the ongoing detention (because it had been accepted that they could not be removed on human rights grounds).

Detention to prevent an unauthorised entry

Saadi v. the United Kingdom was the first case in which the Court had to consider the first limb of Article 5 §1.f – detention to prevent an unauthorised entry. The majority (11) of the Grand Chamber did not accept the applicant and interveners' arguments that as soon as an asylum seeker has presented himself to the immigration authorities, he is seeking to effect an “authorised” rather than unauthorised entry. Instead, the Court held that first limb under Article 5 §1.f was to be interpreted widely: entry is “unauthorised” until it is authorised and detention may be applied to

466. *Gebremedhin v. France*, application no. 25389/05, judgment of 26 April 2007.

467. *A and others v. the United Kingdom*, application no. 3455/05, judgment [GC] of 19 February 2009, §167.



prevent an unauthorised entry.⁴⁶⁸ The Court considered its approach to be consistent with Conclusion No. 44 of the Executive Committee of the UNHCR Programme,⁴⁶⁹ the UNHCR's Guidelines on detention⁴⁷⁰ and the Council of Europe's Committee of Ministers' Recommendation on detention.⁴⁷¹ Whilst the Court adopted a narrow (and not necessarily faithful) interpretation of these instruments, they do nevertheless envisage the detention of asylum seekers in certain circumstances, namely in order to:

- verify identity;
- determine the elements on which the claim to refugee status or asylum is based;⁴⁷²
- deal with cases where asylum seekers have destroyed their travel and/or identity documents, or have used fraudulent documents to mislead the authorities of the country in which they intend to claim asylum;
- or protect national security and public order.⁴⁷³

In *Saadi v. the United Kingdom*, the asylum seeker was an Iraqi Kurd doctor who had acted entirely properly and diligently in making his asylum claim immediately on arrival in the United Kingdom. In the words of one judge, he displayed “no intention to effect an unauthorised entry”. He had shown no risk of absconding, surrendered himself to the immigration authorities, and had already been granted temporary residence whilst his asylum claim was being processed. He had complied with all restrictions and had co-operated fully with the authorities. The Court nevertheless found that, he could still be considered to be a person who could be prevented from effecting an unauthorised entry and thus could

468. *Saadi v. the United Kingdom*, application no. 13229/03, judgment [GC] of 29 January 2008, §65.

469. UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) – 1986.

470. UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999.

471. Recommendation Rec (2003) 5 of the Committee of Ministers to member states on measures of detention of asylum seekers.

472. *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993.

473. The CPT standards. “Substantive” sections of the CPT's general reports, 1 January 2004, CPT/Inf/E (2002) 1.



be detained under Article 5 §1.f. Six judges dissented, relying heavily on the case-law on Article 9 ICCPR of the UN HRC to support their approach.

However a different approach was taken in *Rusu v. Austria* (a Chamber judgment delivered by seven judges, four of whom had been dissenters in *Saadi v. the United Kingdom*, and two of whom had voted with the majority in *Saadi*). Ms Rusu (a Romanian citizen) had lost her passport and luggage whilst in France. She had reported the theft to the police and was travelling back to Romania on the document confirming this had been given to her by the French police. She passed into Austria from Italy and then attempted to enter Hungary but was refused by the Hungarian border guards who returned her to Austria where she was detained. In particular, she was detained for more than a week after the Romanian authorities had issued her with a new travel document. The Court (at paragraphs 57 and 58 of the judgment) was concerned that it was clear that she had no desire to remain in Austria. On the contrary, she had been trying to leave when forced back by the Hungarian authorities. The Court found Article 5 §1.f had been violated because of this element of arbitrariness.

Rusu is an important judgment for asylum law and practice for several reasons, some of which will be discussed below under “Prescribed by law”, p. 152. But the Court’s view that the detention was arbitrary because she was actually trying to leave, not to enter, Austria is interesting. Many asylum seekers find themselves detained in one European country because they have been returned there when trying to make an asylum claim in another country – for example, as a consequence of the operation of the EU Dublin Regulation (see below, page 240 ff). If their aim is to leave the country to seek asylum in another state the approach taken in *Rusu* would suggest that detention under the first limb of Article 5 §1.f would be unlawful for arbitrariness.

In the *Saadi v. the United Kingdom* case, the European Court of Human Rights accepted that the purpose of the fast track detention was speedy processing of claims. The dissenting judges saw this as pure administrative convenience and thus arbitrary:



In the interests of rigour... the authorities must satisfy themselves *in concreto* that [detention] has been ordered exclusively in pursuit of one of the aims referred to in the Convention.

Prescribed by law

Detention must be lawful according to domestic and European law and in that sense too cannot be arbitrary.

As can be seen from the first sentence of Article 5, any deprivation of liberty must not only be for a purpose authorised by Article 5 §1.a to f, it must also be in accordance with a procedure prescribed by law in order to be lawful under the Convention. As the Court stated in the case of *Amuur v. France*,⁴⁷⁴ this primarily requires any arrest or detention to have a legal basis in domestic law. However, the domestic law must meet Convention standards. The Court went on to state:

10. However, these words do not merely refer back to domestic law; like the expressions 'in accordance with the law' and 'prescribed by law' in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.

Quality of law, in this context, means that a law which authorises deprivation of liberty must be sufficiently precise and accessible to avoid all risk of arbitrariness.

The Court emphasised in *Amuur v. France*⁴⁷⁵ that this is especially the case in respect of a vulnerable foreign asylum seeker. This, the Court said, was of fundamental importance with regard to asylum seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of states' immigration policies. It can be assumed that the Court would consider the situation at other important ports of entry into a state in a similar manner.

In *Amuur*, the detainees were not being held under a clearly identifiable legal regime. Although there were French regulations in force at the

474. *Amuur v. France*, application no. 19776/92, judgment of 25 June 1996.

475. *Ibid.*



time, these did not treat the detainees either as having entered France or as having been deprived of their liberty. None of the applicable rules allowed ordinary courts to review the conditions under which they were held or if necessary to impose a limit on the administrative authorities as regards the length of time for which they were held. In particular, the rules did not provide for legal, humanitarian and social assistance. The Court therefore found that the rules did not sufficiently guarantee the applicants' right to liberty, and there had been a violation of the requirement of Article 5 §1 that any deprivation of liberty must be in accordance with a procedure prescribed by law.

In *Soldatenko v. Ukraine* there were general rules regarding the right to have detention reviewed by a court in criminal or psychiatric treatment cases, but there were no legal provisions, in any Code or any other legislative instrument, that provided, even by reference, a procedure for detention with a view to extradition.⁴⁷⁶ The Court reiterated that:

Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness (see *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, §50).

The Court stressed that it is particularly important that the general principle of legal certainty be satisfied.

In *Nasrulloev v. Russia*⁴⁷⁷ the Court found that the law on extradition referred to the procedure of arrest and detention on remand in criminal proceedings and that this created confusion among the national authorities as to its application. Therefore the provisions were neither precise nor foreseeable in their application and fell short of the "quality of law" standard required under the Convention. (The Court has held that extradi-

476. *Soldatenko v. Ukraine*, application no. 2440/07, judgment of 23 October 2008, §111, confirmed in *Svetlorusov v. Ukraine*, application no. 2929/05, judgment of 12 March 2009.

477. *Nasrulloev v. Russia*, application no. 656/06, judgment of 11 October 2007, §§72-77.



tion proceedings are not criminal proceedings for the purpose of attracting the fair trial safeguards of Article 6, *Mamatkulov and Askarov v. Turkey*.)⁴⁷⁸

In *Shamsa v. Poland*⁴⁷⁹ the Court found a violation precisely because the national law under which the applicants were held pending the execution of the expulsion decision was unclear. In *Nolan* the detention of a foreign national at the Russian border with Finland on the basis of Border Crossing Guidelines which were not found in national law, and not available to the public, was found to be arbitrary.⁴⁸⁰

The Court also found a violation of Article 5 §1.f in *Abdolkhani and Karimnia v. Turkey* because of the absence of clear legal provisions establishing the procedure for ordering and extending detention and setting time-limits for such detention. The deprivation of liberty to which the applicants were subjected was therefore not circumscribed by adequate safeguards against arbitrariness. The national system failed to protect the applicants from arbitrary detention and, was declared “unlawful” under Article 5.⁴⁸¹

The Court saw no reason to depart from this finding when examining the factually similar situation in *Z.N.S. v. Turkey*.⁴⁸²

Detention has been found arbitrary where there was an absence of a clear legal procedure for ordering and extending detention and setting time limits (*Muminov v. Russia*).⁴⁸³ In that case it was not simply the length of detention – for almost 8 months – which rendered the detention unlawful but the fact that there were inadequate safeguards in national law protecting the individual from arbitrariness.

The requirement of substantive and procedural lawfulness inherent in Article 5 §1.f is closely related to the procedural safeguards of Articles 5 §2 to 5 §4 discussed below. The Court in *Galliani v. Romania*⁴⁸⁴ found that, in

478. *Mamatkulov and Askarov v. Turkey*.

479. *Shamsa v. Poland*, application no. 45355/99, judgment of 27 November 2003.

480. *Nolan and K. v. Russia*, application no. 2512/04, judgment of 12 February 2009, §98.

481. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.

482. *Z.N.S. v. Turkey*, application no. 21896/08, judgment of 19 January 2010, §§56 and 63.

483. *Muminov v. Russia*.



addition to the procedural safeguards provided under Article 5 §4, the procedure under which an individual is detained under Article 5 §1.f must provide for a remedy, which must relate to the breach alleged. The remedy must be sufficiently certain and accessible in practice and be effective. The domestic courts must be called to assess the regularity of detention – either before the measure was taken or after – and an appeal must be provided by law. In *Garabayev v. Russia*⁴⁸⁵ the procedural flaws in an order for detention were so fundamental that it was rendered invalid. In particular, as a matter of Russian law detention pending extradition had to be ordered by a judge and this had not been done. The Court found this conclusion was strengthened by the absence of judicial review of detention. The cases of *Rusu v. Austria* and *Nolan and K. v. Russia* discussed above are also recent illustrations of this principle.⁴⁸⁶

Inadequate record-keeping of matters, such as the date, time and location of detention, name of the detainee, reasons for detention, name of the person effecting it, features in many detention regimes. This was found to be incompatible with the requirement of lawfulness and the very purpose of Article 5 in *Shchebet v. Russia*.⁴⁸⁷

A systematised approach to these Convention requirements is found in *Al-Agha v. Romania*.⁴⁸⁸ The applicant was a refugee (originally from the Gaza strip) who had been a businessman in Romania. Due to the historical situation of travel documents in respect of Palestinians, he was unable to obtain an extension to his passport from any one of several embassies to which he applied. The Romanian authorities declared him “undesirable” and ordered that he be detained pending removal as he was a national security risk. The details of the order and the alleged security risk were never disclosed, yet he was detained on this basis, in the detention centre of the Bucharest-Otopeni airport for 3 years and 5 months. Firstly, the

484. *Galliani v. Romania*, application no. 69273/01, judgment of 20 June 2008.

485. *Garabayev v. Russia*, application no. 38411/02, judgment of 7 June 2007, §89

486. *Rusu v. Austria*, application no. 34082/02, judgment of 2 October 2008 and *Nolan and K. v. Russia*, application no. 2512/04, judgment of 12 February 2009.

487. *Shchebet v. Russia*, application no. 16074/07, judgment of 12 June 2008.

488. *Al-Agha v. Romania*, application no. 40933/02, judgment of 12 January 2010.



Court looks to the “concrete situation” of the applicant and assessed his detention under the first paragraph of Article 5 (rather than under Article 5§1.f which specifically addresses detention pending removal). Secondly, the Court considered the “lawfulness” of detention (i) according to national law, (ii) in substantive and procedural terms, and (iii) in terms of whether or not the period of detention is consistent with the purpose of Article 5 § 1, namely protecting the individual against arbitrary deprivation of liberty.⁴⁸⁹ Thirdly, to be “prescribed by law”, not only must detention have some basis in domestic law, it must possess the requisite “quality” in order to be compatible with the rule of law. The elements of the “quality of law” were not satisfied in Mr Al-Agha’s case: whilst the measure had a basis in domestic law and it was accessible on the basis that it appeared in the official journal, it was not foreseeable. Whilst the criterion of foreseeability may vary in the context of national security, in this case no prosecutions had been instituted against the applicant, he was not given details of the alleged risk that he posed, and the national courts exercised only a formal review of his undesirable status which resulted in his continued detention. Therefore the measure complained of had failed to afford the applicant the “minimum degree of protection against the risk of arbitrariness” because it had not been prescribed by a law which met the requirements of the Convention. Therefore there was a violation of Article 5 § 1.

“Arbitrary” detention

The protection afforded by Article 5 is available to prevent detention being “arbitrary”, however there is no single universal definition of what arbitrariness entails. The ECHR is not unique in this respect and the Working Group on Arbitrary Detention (established by the UN Commission on Human Rights) has recognised that the UDHR and ICCPR do not definitively answer the question of what constitutes arbitrary detention either.⁴⁹⁰

489. *Ibid.*, § 84, citing *A. and others v. United Kingdom*, application no. 3455/05, judgment [GC] of 19 February 2009, § 164.



The UN HRC has also confirmed that “arbitrary” means something more than merely “against the law” and the term must be “interpreted more broadly to include such elements as inappropriateness and injustice”.⁴⁹¹

In this context, the Grand Chamber in *A. and others v. the United Kingdom* repeated its finding in *Saadi v. the United Kingdom* that detention must be consistent with the overall purpose of Article 5, namely protecting the individual against arbitrary deprivation of liberty:

Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (*Saadi v. the United Kingdom*, cited above, § 67). To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see, *mutatis mutandis*, *Saadi v. the United Kingdom*, cited above, § 74).⁴⁹²

What is arbitrary will depend on the facts of the case. It may simply be that detention of an unreasonable length will render detention arbitrary. In other cases, the duration of detention in combination with other factors (such as the place and conditions of detention, e.g. in temporary holding

490. See E/CN.4/1998/44 and E/CN.4/2000/4. For reports and more information on working groups, see <http://www.ohchr.org/english/issues/detention/>.

491. See *A. v. Australia*, Communication No. 560/1993, which was reaffirmed in *Danyal Shafiq v. Australia*, Communication No. 1324/2004, §7.2. More on the jurisprudence of the UN HRC below at page 159.

492. *A. and others v. United Kingdom*, application no. 3455/05, judgment [GC] of 19 February 2009, §164.



facilities, or the airport transit zone) will render detention arbitrary (*Gebremedhin v. France*).⁴⁹³ The detention of vulnerable individuals or children is also considered arbitrary (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*).⁴⁹⁴

The Court in *John v. Greece* found that where an individual had been released from detention and remanded in custody ten minutes after release, the re-arrest was an action designed to circumvent the legal provisions in place and to give an “appearance of legality” and as such, was arbitrary.⁴⁹⁵

In *Garabayev v. Russia*⁴⁹⁶ the applicant, a Russian citizen, was ostensibly detained pending extradition, but Russian law prohibits the extradition of its own citizens. This rendered the whole extradition process, and *a fortiori* the detention associated with it, arbitrary.

In *Al-Agha v. Romania* the applicant’s prolonged detention on the basis of national security concerns were not the subject of any prosecution and the details were not disclosed to the applicant. Not only was it deemed important that national security measures be accompanied by adequate and effective safeguards against arbitrariness and abuse - procedures for effective control by the judiciary were necessary because, under the guise of defending democracy, national security measures were likely to undermine or even destroy it.⁴⁹⁷

Necessity

The Committee of Ministers has agreed that measures of detention should only be applied to asylum seekers after a careful examination of their “necessity” in each individual case.⁴⁹⁸ This has been reiterated by the

493. *Gebremedhin v. France*, application no. 25389/05, judgment of 26 April 2007.

494. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, judgment of 12 October 2006. See also *Muskhadzhiyeva and others v. Belgium*, application no. 41442/07, judgment of 19 January 2010, considered below at page 171.

495. *John v. Greece*, application no. 199/05, decision of 10 May 2007.

496. *Garabayev v. Russia*, application no. 38411/02, judgment of 7 June 2007.

497. *Al-Agha v. Romania*, application no. 40933/02, judgment of 12 January 2010, §§91-93, citing *mutatis mutandis*, *Rotaru v. Romania*, application no. 28341/95, judgment [GC] of 4 May 2000, §§55 and 59.



Council of Europe Commissioner for Human Rights, the CPT, UNHCR, the UN HRC (which is the treaty body responsible for the interpretation of the ICCPR), the UN Working Group on Arbitrary Detention, the EU⁴⁹⁹ and civil society groups. Article 31 of the Geneva Convention stipulates that any restriction on free movement of asylum seekers must be necessary.

The UN HRC has considered the question of necessity and the detention of asylum seekers under the corresponding provisions of the ICCPR. Their approach is relevant to any interpretation or application of the ECHR under Article 53 (see Introduction, page 7). The UN HRC has examined a number of complaints against Australia,⁵⁰⁰ where the relevant legislation foresaw the arrest and detention of everyone who fell within a specified sub-group of unlawful non-citizens without examination of their individual and specific personal circumstances. The committee emphasised that the concept of arbitrariness could not simply be equated with “against the law” but must also include such elements as “inappropriateness and injustice” and, importantly, that custody could be considered arbitrary “if not necessary in all the circumstances of the case”. In *Van Alphen v. the Netherlands*⁵⁰¹ the UN HRC expressly found that administrative convenience could not justify the deprivation of liberty.

The Court has always held that compliance with Article 5 §1.b (*Vasileva v. Denmark*⁵⁰²), §1.c (*Jėčius v. Lithuania*⁵⁰³ and *Mansur v. Turkey*⁵⁰⁴) and §1.e

498. Recommendation Rec (2003) 5 of the Committee of Ministers to member states on measures of detention of asylum seekers; Committee of Ministers, Twenty Guidelines on forced return, Guideline 6 (1), September 2005; Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, most recently on 18 June 2009.

499. Return Directive 2008/115/EC Article 3 (7) states that any restrictions to movement or confinement to a particular place must be “necessary”. Furthermore, the Directive requires that detention considerations must go beyond pure reasons of illegal stay.

500. *A. v. Australia*, Communication No. 560/1993, *C. v. Australia*, Communication No. 900/1999, *Baban v. Australia*, Communication No. 1014/2001, *Bakhtiyari v. Australia*, Communication No. 1069/2002. The principles in *A.*, adopted in 1997, have been subsequently reaffirmed in *Danyal Shafiq v. Australia*, Communication No.1324/2004, adopted on 13 November 2006.

501. *Hugo van Alphen v. the Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990).

502. *Vasileva v. Denmark*, application no. 52792/99, judgment of 25 September 2003.

503. *Jėčius v. Lithuania*, application no. 34578/97, judgment of 31 July 2000.

504. *Mansur v. Turkey*, application no. 16026/90, judgment of 8 June 1995.



(*Litwa v. Poland*⁵⁰⁵) that an individual assessment of the necessity of the detention must be made, and the necessity demonstrated.

In *Saadi v. the United Kingdom* the Court found that whereas under Article 5 §1.b, d and e the notion of arbitrariness included the test of reasonable necessity, a “different approach” would be applied to Article 5 §1.f. The Court stated that:

Since states enjoy the right to control equally an alien’s entry into and residence in their country (see the cases cited in paragraph 63 above), it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country.

Having adopted that position of principle, the Court declined to consider that it was necessary to examine whether the kind of restriction on freedom of movement that was imposed in *Raimondo* might have sufficed to meet the administrative needs of the United Kingdom authorities. Such restrictions need not have involved a deprivation of liberty as defined by the Court.

As noted above in the case of *Chahal v. the United Kingdom*⁵⁰⁶ the Court held that the test of necessity does not have to be applied to those detained after a decision to refuse the entry or to deport them has been taken. However, detention under this provision requires expulsion proceedings to be in progress and to be prosecuted with due diligence. *Chahal* concerned the proposed deportation on national security grounds of a Sikh activist. The Court found no violation as a result of the extended detention as the United Kingdom was able to demonstrate that its courts had acted with due diligence in dealing with the many proceedings which the applicant himself had initiated to challenge his expulsion.

Since *Saadi v. the United Kingdom* the Court has come back to this question in the case of *Rusu v. Austria*⁵⁰⁷ where it found that Article 5 would be violated if the necessity test was included in the domestic law

505. *Litwa v. Poland*, application no. 26629/95, judgment of 4 April 2000.

506. Application no. 22414/93, judgment of 15 November 1996.

507. *Rusu v. Austria*, application no. 34082/02, judgment of 2 October 2008.



but was not respected, even though it was not a requirement of Article 5 §1.f itself.

Article 18 of the EU Procedures Directive (which was to be transposed by all 27 EU member states by 1 December 2007) stipulates that member states may not hold a person in detention for the sole reason that he/she is an applicant for asylum. The automatic detention of asylum seekers in any EU member state will therefore violate the Convention because it violates the binding provisions of EU law.

The Grand Chamber's conclusion in *Saadi* was reached after the consideration of the approach taken by other international bodies under the above-mentioned instruments.⁵⁰⁸

The joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä was concerned that the Court in *Saadi* had provided a lower level of protection than that which is recognised and accepted in the other organisations (including that afforded under Article 9 ICCPR by the UN HRC,⁵⁰⁹ the EU⁵¹⁰ and the Council of Europe).⁵¹¹ They were unable to accept that Article 5, "which has played a major role in ensuring controls of *arbitrary* detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come" (emphasis added).

UNHCR has made clear that detention for the four purposes (set out above at page 150) would be for the preliminary interview only and not for the entire status determination procedure. An asylum seeker may be detained in order to determine *within the context of a preliminary interview* the elements on which his application for asylum is based which *in the*

508. UNHCR, Liberty, ECRE and the AIRE Centre.

509. See *Van Alphen v. the Netherlands*, Communication No. 305/1988, UN doc. CCPR/C/39/D/305/1988 (1990) and *A. v. Australia*, Communication No. 560/1993, UN doc. CCPR/C/59/D/560/1993 (1997) and *Bakhtiyari v. Australia*, Communication No. 1069/2002, UN doc. CCPR/C/79/D/1069/2002 (2003).

510. Article 18 of the European Union Charter of Fundamental Rights, which recognises the right to asylum of refugees within the meaning of the Geneva Convention.

511. Article 18 §1 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status and Recommendation Rec (2003) 5 of 16 April 2003 on measures of detention of asylum seekers.



absence of detention could be lost. In other words, unless the four tasks mentioned above are impossible to carry out without detaining someone, then a person should not be detained.⁵¹²

However the Court in *Saadi* chose to avoid adverting to the fact that the UNHCR guidelines also expressly require that detention for the four specified circumstances must be necessary, exceptional and applied only within the context of a preliminary interview and not for the entire determination procedure. A report on detention published by the Parliamentary Assembly took the view that the *Saadi* judgment was based on a flawed appreciation of UNHCR's guidelines on detention which require necessity and exceptionality.⁵¹³

Bad faith

In *Saadi* the Court found that the authorities had acted in good faith in detaining the applicant for seven days in suitable conditions, in order to process his claim speedily, during a period when the Respondent Government faced a mass flow of asylum-seekers.⁵¹⁴

The six dissenting judges found it to be an "exceedingly dangerous stance" to maintain that fast track detention was "in the interests not merely of the asylum seekers themselves "but those increasingly in the queue". "In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end". In *Čonka*, the European Court of Human Rights found that detention had not been carried out in good faith where there had been an element of deception;⁵¹⁵ or where there had been a disregard for orders which would have secured the applicants' release.⁵¹⁶

512. UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008), 13 March 2009.

513. Council of Europe Parliamentary Assembly, "Detention of asylum seekers and irregular migrants in Europe", Ms Mendonça (Portugal, Socialist Group), AS/Mig (2009) 17, Amdoc17_2009.

514. Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.

515. *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002.

516. *Riad and Idiab v. Belgium*, application nos. 29787/03, 29810/03, judgment of 24 January 2008.



Procedural guarantees under Article 5 of the Convention

Article 5 §§2 to 5 set out the procedural rights that detainees must be afforded, once it has been established that they have lawfully been deprived of their liberty. The Court's established case-law states that the more specific guarantees of Article 5 are *lex specialis* in relation to Article 13 and absorb its requirements.⁵¹⁷

Being informed of the reasons for detention

Article 5 §2 stipulates:

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

The Court has interpreted this provision as meaning that any arrested person must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so that he/she can, if necessary, apply to a court to challenge its lawfulness.⁵¹⁸

However in *Eminbeyli v. Russia*⁵¹⁹ the Court made it clear that as expulsion or extradition proceedings do not fall within the ambit of Article 6 the information which a detainee under Article 5 §1.f has to be given need not be as detailed as that which must be provided to those who are subject to criminal charges in the country where they are detained.

In the *Saadi* case referred to above, although the Court found no violation of Article 5 §1.f, it did find a violation of Article 5 §2 on the ground that the reason for detention was not given sufficiently "promptly". The reason for the applicant's detention was administrative convenience for the processing of fast-track claims, but he was given no reasons at all for 76 hours after he was detained. The Grand Chamber agreed with the Chamber that "general statements – such as the parliamentary announcements in the present case – could not replace the need ... for the individual to be informed of the reasons for his arrest or detention."⁵²⁰

517. *Garabayev v. Russia*, application no. 38411/02, judgment of 7 June 2007, citing *Dimitrov v. Bulgaria*, application no. 55861/00, decision of 9 May 2006.

518. *Fox, Campbell and Hartley v. the United Kingdom*, application nos. 12244/86, 12245/86 and 12383/86, judgment of 30 August 1990.

519. *Eminbeyli v. Russia*, application no. 42443/02, judgment of 26 February 2009.



In *Shamayev and others v. Georgia and Russia*⁵²¹ the Court found a violation of Article 5 §2 in an extradition case where the applicants were given no reasons for their detention for four days.

Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. In *Abdolkhani and Karimnia v. Turkey* the Court stated there was no distinction in terms of the procedural safeguards afforded to those deprived of their liberty by arrest and those deprived of it by detention.⁵²²

Being brought “promptly” before a judge or other judicial authority

Article 5 §3 states:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appeal for trial.

This provision only applies to those who are detained under Article 5 §1.c in connection with criminal proceedings being taken against them.

Extradition proceedings are not criminal proceedings for the purpose of attracting the protection of Article 6, so Article 5 §1.c only applies to criminal proceedings in the detaining state. (The term criminal proceedings can include prosecution for what are often called administrative offences; see *Öztürk v. Germany*.⁵²³) The Court has recently declared partially inadmissible the case of *Protzenko v. Bulgaria, Ukraine, and Russia* concerning complaints under Article 5 §1.f about an arrest and detention in Ukraine and Russia which were alleged to have violated Article 5 §1.f and the subsequent extradition to Bulgaria.⁵²⁴

520. *Saadi v. the United Kingdom*, application no. 13229/03, §§84 and 85.

521. Application no. 36378/02, judgment of 12 April 2005.

522. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009, §136.

523. *Öztürk v. Germany*, application no. 8544/79, judgment of 21 February 1984.

524. *Protzenko v. Bulgaria, Ukraine and Russia*, application no. 8462/05, decision (partly admissible) of 30 June 2009.



Those detained under other procedures do not have to have their detention ordered by a judge but they must have access to a judge unless national law requires this (see e.g. *Garabayev v. Russia*⁵²⁵), in which case the “prescribed by law” requirement of Article 5 §1 will apply. However, all detainees must have access to a judge to challenge the lawfulness of the detention. If challenged in this way, the prolongation of immigration detention must be ordered by a court, a judge, or any other body authorised to exercise judicial power.

In *Garabayev v. Russia*, the detention order pending extradition was defective for a number of reasons but the court to which the applicant applied refused to review the lawfulness of his detention.⁵²⁶

Access to court and periodic reviews

Article 5 §4 states:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 5 §4 not only requires access to a judge to have the initial lawfulness of the detention decided but also requires access to regular periodic reviews, by a court, of the need for continued detention.

In *Garabayev v. Russia*⁵²⁷ the applicant’s detention pending extradition had never been reviewed by a court, despite his complaints. The review which eventually occurred after the extradition had taken place could not be considered effective because the question of the lawfulness of the detention had been resolved only in the context of the review of the extradition procedure. He had thus been unable to obtain judicial review of his detention prior to extradition, in violation of Article 5 §4.

94. The Court reiterates that the purpose of Article 5 §4 is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected (see *De Wilde*,

525. *Garabayev v. Russia*, application no. 38411/02, judgment of 7 June 2007.

526. *Ibid.*

527. *Ibid.*



Ooms and Versyp v. Belgium, judgment of 18 June 1971, Series A no. 12, §76).

The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see *Čonka v. Belgium*, nos. 51564/99, §46 and 55, ECHR 2002-I).

Accessible and effective remedies are particularly important procedural safeguards where applicants like asylum seekers are in a precarious position. In *Abdolkhani and Karimnia v. Turkey*,⁵²⁸ the applicants had already been removed once before, and the letters they had written challenging their detention and the conditions in which they were held had been repeatedly ignored by the authorities.

The Court saw no reason to depart from this finding in *Z.N.S. v. Turkey*, holding that the applicant had no access to a remedy whereby she could obtain speedy judicial review of the lawfulness of her detention within the meaning of Article 5 §4.⁵²⁹

The Court in *S.D. v. Greece* found a violation of Article 5 §4 on the grounds that the applicant was also unable to have the lawfulness of his detention reviewed by the Greek courts and there was no possibility in Greek law to obtain a decision on the matter. The Court found that in Greece people who, like S.D., could not be expelled pending a decision about their application for asylum but wished to challenge the lawfulness of their detention found themselves in a "legal vacuum". Greek law did not permit direct review of the lawfulness of the detention of an alien being held with a view to expulsion.⁵³⁰

These cases highlight the precarious position in which detainees find themselves and the corresponding importance of effective access to lawyers and to UNHCR – including allowing visits to the place of detention

528. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.

529. *Z.N.S. v. Turkey*, application no. 21896/08, judgment of 19 January 2010, §§56 and 63.

530. *S.D. v. Greece*, application no. 53541/07, decision of 11 June 2009.



and the means for those detained to contact those outside (e.g. providing telephone access and phone cards, etc.).

In *Embenyeli v. Russia* the Court noted that the issues submitted to a domestic court in the context of challenges to the “lawfulness” of immigration detention are often of a more complex nature than those which have to be decided when a person detained on remand in accordance with Article 5 §1.c. The period of approximately five months from the lodging of the application for release to the final judgment was, *prima facie*, difficult to reconcile with the notion of “speedily”.⁵³¹

Article 18 §2 of the EU Procedures Directive provides that all detainees must have the possibility of speedy judicial review of their detention.

An enforceable right to compensation

Article 5 §5 stipulates:

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

The importance the Convention attaches to the right of liberty is demonstrated by the fact that this is one of only two provisions of the Convention which provides a direct express right to compensation by national authorities for Convention violations.⁵³² For the European Court to find a violation of Article 5 §5 there must be a finding of a violation of one or more other elements of Article 5 (i.e. in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4).

Lawyers and NGOs working in this field should be vigilant in holding states accountable for violations of Article 5 and be aware that there is a right for compensation to be awarded if they have occurred.⁵³³

531. *Embenyeli v. Russia*, application no. 42443/02, judgment of 26 February 2009, §66.

532. The other is Article 3 of Protocol No. 7 relating to miscarriages of justice.

533. Under EU law the right to compensation is not limited in this way. Failure to transpose any directive or to implement it correctly can give rise to an action in damages against the state brought by individuals who are adversely affected by the failure. See *Francovich and Bonifaci v. Italy*, C-6 and 9/90 [1991] ECR I-5357.



Detention conditions

The prohibition of arbitrariness under Article 5 further requires that the place, regime and conditions of detention must be “appropriate”.

In addition, the Court has now held in a number of cases that the conditions in which detainees are held or the severity of the regimes to which they are subjected may violate Article 3. The first judgments on this point, *Dougoz v. Greece*⁵³⁴ and *Peers v. Greece*, both related to immigration detention. In the case of *Dougoz v. Greece* the applicant was detained whilst awaiting expulsion to Syria. He complained to the European Court about the conditions of his detention. He alleged, *inter alia*, that he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. It was even impossible for him to read a book because his cell was so overcrowded.

When assessing conditions of detention, account had to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. It was noted that the applicant’s allegations were corroborated by reports from the European Committee for the Prevention of Torture.⁵³⁵ The Court considered that the conditions of the applicant’s detention, in combination with the fact that he had been detained in these conditions for 18 months, amounted to a violation of Article 3 of the Convention.

The case of *Kalashnikov v. the Russian Federation*⁵³⁶ concerned an applicant who had been held in appalling conditions for five years, mainly in pre-trial detention. His cell measured 17 square metres and contained eight bunk beds. It nearly always held 24 inmates – there were three men to every bunk and the inmates had to sleep in turn. There was a toilet in the cell, and the person using the toilet was in view of both his cell mates and the prison guard. The cell had no ventilation and was overrun with

534. Application no. 40907/98, judgment of 6 March 2001.

535. More on the work of this committee below, see page 173.

536. Application no. 47095/99, judgment of 15 July 2002.



cockroaches and ants. The applicant contracted a variety of skin diseases and fungal infections, losing his toenails and some of his fingernails.

Not surprisingly, the Court found these conditions to clearly violate Article 3 of the Convention. It accepted that there was no indication that there was a positive intention of humiliating or debasing the applicant, but the absence of any such purpose could not exclude a finding of a breach of the Convention. The Court has since on a number of occasions made similar findings in relation to conditions of detention or prison regimes.⁵³⁷

In July 2006 in the context of its examination of the complaint in *Kaja v. Greece* the Court made a rare fact-finding visit to the detention centre where the applicant had been held for three months pending expulsion. Having noted that the physical conditions appeared to be acceptable at the time of their visit (however it was noted that the cells in question had been cleaned and freshly painted just prior to the Court's visit). The Court nevertheless considered that the general conditions – for example, cramped space, absence of exercise facilities, no TV or radio – were unsuitable for anything more than the shortest of detention. The judgment referred to the CPT recommendations on police detention. A violation of Article 3 was found.⁵³⁸

The applicant in *S.D. v. Greece* was held in a different centre from the one visited by the Court in the *Kaja* case. He received no medical treatment, despite being a survivor of past torture, had no access to the open air, and the centre was overcrowded. He submitted several reports from international bodies, including the CPT, UNHCR, the Commissioner for Human Rights and some of the major NGOs regarding the deplorable conditions in the specific centres where he was detained. The Court found that the detention of an asylum seeker for over two months in such conditions amounted to degrading treatment and was therefore in violation of

537. See, for example, *Peers v. Greece*, application no. 28524/95, judgment of 19 April 2001, and *Van der Ven v. the Netherlands*, application no. 50901/99, judgment of 4 February 2003.

538. *Kaja v. Greece*, application no. 32927/03, judgment of 27 July 2006, citing CPT General Report, 3 September 2002.



Article 3. Despite it being clear that from all these reports and the judgment of the Court in *S.D. v. Greece* that detention conditions for asylum seekers in Greece are unacceptable, several EU states continue to attempt to transfer asylum seekers to Greece under the EU Dublin Regulation or even without the formalities which the Regulation requires.

Detention conditions in Greece have formed the basis of many complaints challenging transfers under the EU Dublin II Regulation (see page 240 ff) and the Court has applied Rule 39 in several cases to prevent such returns.

However, the Court took the view in one case, *K.R.S. v. the United Kingdom*,⁵³⁹ that conditions of detention in Greece are not the responsibility of the sending state and declared the case inadmissible without communicating it to the United Kingdom Government. Neither UNHCR nor concerned NGOs were therefore able to intervene as third parties (see Part 3 below). Several other cases are pending before the Court on this important issue including one *MSS v. Belgium* pending before the Grand Chamber.⁵⁴⁰

Conditions of detention in airport holding centres were examined in *Riad and Idiab v. Belgium* and in *Al-Agha v. Romania*. In *Riad and Idiab v. Belgium*, more than ten days spent in detention in the transit zone of the airport were found to breach Article 3. The airport zone, by its nature, was a place intended to receive people for extremely short periods of time and had in no way been adapted for the purpose of detention. The humiliation felt by the applicants had been exacerbated by the fact that, having obtained a decision ordering their release, they had been deprived of liberty in other premises. The Court found that the applicants must also have felt humiliated by the obligation to live in a public place, without support.⁵⁴¹

539. *K.R.S. v. the United Kingdom*, application no. 32733/08, decision (inadmissible) of 2 December 2008.

540. See for more details the list of over twenty communicated cases concerning the operation of the Dublin II Regulation and details of the third party intervention by the Council of Europe Commissioner for Human Rights, at page 80.

541. *Riad and Idiab v. Belgium*, application nos. 29787/03, 29810/03, judgment of 24 January 2008.



Conditions of detention in the centre at the airport in *Al-Agha v. Romania*, where the applicant had been detained for three years and five months, also violated Article 3, but not in respect of the full period of detention. The Court considered that conditions in the centre prior to a visit by the CPT in September 2002, which included poor hygiene and food, lack of physical activity, lack of medical care (including when on hunger strikes), breached Article 3. However, the Court found no evidence that conditions after September 2002 gave rise to a violation of the Convention as the CPT had been satisfied by improvements made to the facility made as a result of their previous visit. Importance was attached to the fact that the applicant had refused medical treatment during this time. This approach is weak in comparison to the more robust approach in *Riad and Idiad*, in particular, considering the length of time spent in detention by Mr Al-Agha even after September 2002 and the fact that this was not a centre designed for long stays.⁵⁴²

In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*⁵⁴³ a five-year-old child was held without any accompanying family in an adult detention centre. The Court had no difficulty in finding a violation of Article 3. It noted that the child's very young age, the vulnerable position in which she was placed (which resulted in considerable distress) and the circumstances of her deportation would have caused her extreme anxiety. Leaving this five-year-old girl in an adult detention centre and failing to take steps for the child to receive childcare during and after the deportation displayed a complete lack of humanity towards a child of her age and situation and, as such, amounted to inhuman treatment within Article 3. It was further noted that there were other practical alternatives which were not utilised but would have been more beneficial for the higher interest of the child, as protected in the 1989 United Nations Convention on the Rights of the Child (CRC).

The Court reached the same conclusion in *Muskhadzhiyeva and others v. Belgium* in respect of four Chechen children detained in the same deten-

542. *Al-Agha v. Romania*, application no. 40933/02, judgment of 12 January 2010.

543. Application no. 13178/03, judgment of 12 October 2006.



tion centre in Belgium pending their transfer to Poland under the Dublin II Regulation. The children were aged seven months, three-and-a-half years, five and seven years at the material time and were held for over a month in a closed centre which was not designed to house children, as confirmed by several reports cited by the Court. The Court also referred to the concern expressed by independent doctors about the children's state of health. Whilst in this case, the four children were not separated from their mother, the authorities were not exempt from their obligation to protect the children. It found that there had been a violation of Article 3 in respect of the four children. In contrast, there had been no violation of Article 3 in respect of the mother. Rather than reaching the conclusion that her emotional suffering as a parent made her a victim of ill-treatment inflicted on her children (which might have been the obvious conclusion), the Court found that their constant presence must have somewhat appeased the distress and frustration of their detention in the transit centre so that it did not reach the level of severity required to constitute inhuman treatment.⁵⁴⁴

Even very short periods of detention can breach Article 3 if the conditions are incompatible with the requirements of that Article. While the length of a detention period may be a relevant factor in assessing the gravity of suffering or humiliation caused to a detainee by the inadequate conditions of his detention the relative brevity of such a period alone will not automatically exclude the treatment complained of from the scope of Article 3 if all other elements are sufficient to bring it within the scope of that provision. For example, the Court has found a violation in respect of detention of 15 and 11 days in a facility only meant for short-term holding (*Riad and Idiab v. Belgium*),⁵⁴⁵ 22 hours without food, water or access to a toilet (*Fedotov v. Russia*);⁵⁴⁶ and of 10 days in several cases against Armenia concerning the same detention centre (*Karapetyan, Kirakosyan, Mkhitaryan and Tadevosyan*).⁵⁴⁷

544. *Muskhadzhieva and others v. Belgium*, application no. 41442/07, judgment of 19 January 2010.

545. *Riad and Idiab v. Belgium*, application no. 29787/03, judgment of 24 January 2008.

546. *Fedotov v. Russia*, application no. 5140/02, 25 October 2005, §§66-70



The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Concerns that violations of Article 3 should be prevented, and not merely condemned after they have occurred, inspired the drafting, in 1987, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Convention provides for non-judicial preventive machinery to protect detainees. It is based on a system of visits by the CPT. The CPT's members are independent and impartial experts from a variety of backgrounds, for example lawyers, medical doctors and specialists in prison or police matters. The CPT visits places of detention (for example, prisons and juvenile detention centres, police stations, holding centres for immigration detainees and psychiatric hospitals) to see how persons deprived of their liberty are treated and, if necessary, to recommend improvements to states.

CPT delegations visit contracting states periodically, but additional "ad hoc" visits can also be arranged if necessary. The committee must notify the state concerned of its presence on the territory but does not have to specify the exact time of the visit or give advance notice of the establishments it will visit.

The CPT delegations must be given unlimited access to places of detention and the right to move inside such places without restriction. They interview persons deprived of their liberty in private and communicate freely with anyone who can provide information. The recommendations which the CPT draws up on the basis of the visits are included in a report which is sent to the state concerned. These reports are confidential unless the state agrees to their publication. However, if a country fails to co-operate or refuses to improve the situation in the light of the committee's recommendations, the CPT may decide to make a public state-

547. *Karapetyan v. Armenia*, application no. 22387/05, judgment of 27 October 2009; *Kirakosyan v. Armenia*, application no. 31237/03, judgment of 2 December 2008. *Mkhitaryan v. Armenia*, application no. 22390/05, judgment of 2 December 2008; and *Tadevosyan v. Armenia*, application no. 41698/04, judgment of 2 December 2008.



ment. In addition, the CPT draws up a general report on its activities every year, which is made public.

Individuals, lawyers, NGOs and other persons who are concerned about suspected ill-treatment or detention conditions can approach the CPT and bring their concerns to the committee's attention. As explained above, the CPT can arrange ad hoc visits and relies on information received from the public in planning its work. The role of those representing asylum seekers and in particular of NGOs in alerting the CPT to unacceptable conditions cannot be over-emphasised.

The CPT has commented extensively and critically not only on the physical conditions, but also on the arbitrariness of the detention and on the absence of legal safeguards and restrictive regimes under which immigration detainees are frequently held. It noted in many cases that those conditions and regimes are significantly worse than those which exist within the mainstream criminal justice system.

The CPT has gradually developed a body of standards on safeguards against ill-treatment and conditions of detention, as regards both persons deprived of their liberty in general and detained persons belonging to particularly vulnerable groups. These standards have in large part been made public through substantive sections in the Committee's General Reports and have been published in a Report of the "Substantive" Sections,⁵⁴⁸ all of which can be found on the committee's website.⁵⁴⁹ These standards have had an influence on various Council of Europe instruments, such as the Twenty Guidelines on forced return of 2005, the revised European Prison Rules (2006), the European Rules for juvenile offenders (2008) and the Guidelines on human rights protection in the context of accelerated asylum procedures (2009). The case-law of the Court has also been influenced by the CPT's findings. As noted above the Court regularly draws on the information contained in CPT reports when considering

548. The CPT Standards. "Substantive" sections of the CPT's general reports, 1 January 2004, CPT/Inf/E (2002) 1.

549. <http://www.cpt.coe.int/>



whether there has been a violation of Article 3 of the Convention in relation to detention conditions.

Restrictions on freedom of movement

Many of those who are either seeking asylum or whose claims have been rejected and who are awaiting expulsion are not detained in the sense that they are deprived of their liberty so as to attract the protection of Article 5. They are, however, often subject to severe restrictions on their freedom of movement.

The right to freedom of movement is contained in Article 2 §1 of Protocol No. 4: “Everyone lawfully within the territory of a state shall within that territory have the right to liberty of movement and freedom to choose his residence.”

As can be seen from the text of this provision, freedom of movement applies only to persons lawfully within the territory. Those unlawfully within the territory have no such right. There appears, therefore, to be a lacuna in the law. Restrictions – not amounting to deprivation of liberty – can be imposed at will on those who are not lawfully within the territory under this provision, though issues might arise in relation to Article 8. Respect for personal autonomy is guaranteed under the private life rubric of that article. The protection of Article 8 is not restricted to those lawfully within the territory but applies, under Article 1, to everyone within the jurisdiction.

This requirement of lawfulness primarily refers to domestic law, which may lay down certain criteria that have to be fulfilled. So an alien who has had his/her residence permit revoked or who has not complied with certain conditions of admission, may not be able to rely on this provision. In the case of *Sulejmanovic and others v. Italy*⁵⁵⁰ the applicants were unable to benefit from the comparable provisions relating to lawful residence found in Protocol No. 7 as they had not made a request for refugee status to be recognised.

550. Application nos. 57574/00 and 57575/00, judgment of 8 November 2002.



States are, however, prohibited from classifying as unlawful in their domestic law the exercise of any Convention right. Since the right to seek and enjoy asylum from persecution is a right enshrined in international law and the right to have access to the protection determination procedures is expressly guaranteed in the Convention jurisprudence (see above), those who have made an asylum application are “lawfully” on the territory until such time as that application has been definitively rejected.

This is certainly the case for all EU member states. Article 7 of the EU Procedures Directive,⁵⁵¹ which had to be transposed into all member states’ national law by 1 December 2007, provides for an EU law right to remain on the territory pending the examination of the application (although it states that this right shall not constitute a residence permit).

In a very old case, *Paramanathan v. Germany*,⁵⁵² the Commission considered that a breach of residence conditions meant that the asylum seeker’s presence in the territory was unlawful therefore taking him outside the scope of Article 1 §2 of Protocol Number 4. However, in Germany’s fifth periodic report,⁵⁵³ submitted for consideration by the UN HRC, the state party noted that in Germany, although an asylum seeker’s right to reside does not constitute a residence permit, it does, for the duration of the asylum procedure, provide “lawful residence” and that such persons are thus brought within the scope of Article 12 §1 of the covenant (the relevant provision of which is identically worded to that of Article 2 of Protocol No. 4 of the ECHR).⁵⁵⁴

*Omwenyeye v. Germany*⁵⁵⁵ similarly concerned the very restrictive residence regime which still existed in Germany in the first decade of the 21st

551. Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status. See below, “Asylum and the European Union”, p. 238.

552. Application no. 12068/86, decision of 1 December 1986, 51 DR 237.

553. CCPR/C/DEU/2002/5, 4 December 2002.

554. Article 7 of the EU Procedures Directive, which must be transposed into all member states’ national law by 1 December 2007, provides for an EU law right to remain on the territory pending the examination of the application, but states that this right shall not constitute a residence permit.

555. *Omwenyeye v. Germany*, application no. 44294/04, inadmissibility decision of 20 November 2007.



century. A Nigerian asylum seeker was issued with the usual German residence order requiring him not only to reside within a designated place but not to leave the town even for a few hours. He was required to obtain the permission of the authorities travel outside the town. Despite the fact that the German Government had acknowledged before the UNHRC that asylum seekers are lawfully resident for the duration of the asylum procedure, the Court held that he had left the town without the permission of the authorities. He was therefore not within the scope of Article 2 of Protocol No. 4 and could not rely on the right to freedom of movement which it guaranteed. The application was declared manifestly ill-founded.

The Chamber in *Omwenyike* simply followed the decision in *Paramathan*. It took a decision of principle on this question just two weeks in advance of the important ruling of the Grand Chamber in *Saadi v. the United Kingdom*.⁵⁵⁶ *Saadi* concerned an asylum seeker's liability to be detained under Article 5 §1.f in the territory of the state where asylum was sought, not a restriction on movement under Article 2 of Protocol No. 4. The Court held that those whose asylum claim had not yet been determined could be detained to prevent "unauthorised entry" and deprived them of the safeguard that such detention must be necessary and proportionate. The decision in *Omwenyike* has placed many asylum seekers who are subject to disproportionate restrictions on freedom of movement in a situation where they too have no safeguards guaranteed by the Convention against the imposition of unnecessary and disproportionate restrictions of freedom of movement. If they breach even manifestly disproportionate and unnecessary restrictions they fall outside the scope of the provision. It is difficult to see how a breach of technical conditions, which might otherwise be found to be disproportionate or unnecessary (and thus unlawful) can render unlawful presence on the territory which is recognised as a lawful right under both international and EU law and accepted as such by the state in question before the UN HRC.

Article 2 of Protocol No. 4 is a qualified right.

556. *Saadi v. the United Kingdom*, application no. 13229/03, judgment [GC] of 29 January 2008.



Paragraphs 3 and 4 of this provision read:

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security and public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

For those whose presence is recognised as lawful and who thus fall within the ambit of Article 2 of Protocol 4, the Grand Chamber judgment in *Saadi* has led to a paradoxical result. Restrictions on freedom of movement imposed on asylum seekers do have to meet the test of being necessary in a democratic society but the much more serious measure of the deprivation of liberty does not.

As with all qualified rights in the Convention, the Court examines issues under this provision by asking a number of questions.

First, the Court examines the nature of the right, that is, if the provision is applicable to the present situation.

Second, it considers whether there has been interference with that right.

Third, if there has been an interference, the Court moves on to examine whether this interference can be justified under paragraphs 3 and 4. In order for the interference to be justified, it has to be in accordance with the law. As has been discussed above under the section on Article 5, this does not only mean that there has to be national law allowing the interference, but there also has to be a certain quality to this law. The law has to be precise and ascertainable, so that an individual can regulate his/her conduct by it (if need be with legal advice).

Fourth, the interference has to pursue a legitimate aim, that is, has to be for one of the reasons set out in paragraphs 3 and 4.

Fifth and finally, the interference – the restriction on freedom of movement – must be necessary in a democratic society. This means it has to



correspond to a pressing social need and, most importantly, be proportionate to the legitimate aim pursued. The concept of proportionality has been mentioned above and is one that lies at the heart of the Convention. Whether or not interference is proportionate will depend on all the circumstances of the case. It needs to be examined if relevant and sufficient reasons have been advanced for the interference, if procedural safeguards were in place and if the interference impaired the very essence of the right.

In its General Comment No. 27 on Freedom of Movement the UN HRC stated that “the application of restriction in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality”⁵⁵⁷

In the case of *Raimondo v. Italy*, referred to above, special supervision measures were imposed on the applicant, who was suspected of mafia crimes. The Court held that in view of the threat posed by the mafia to a democratic society, there were legitimate aims to maintain *ordre public* and prevent crime. The supervision measures were considered as necessary until they were revoked by the national courts. However, there was a violation of Article 2 of Protocol No. 4 since the authorities had not acted with due diligence in implementing the decision to revoke the measures.

In *Hajibeyli v. Azerbaijan* the Court found that it was charged with the task of assessing whether a fair balance was struck by the measure in question between the general interest and the applicant’s personal interest, by looking at a range of factors (e.g. comparative duration of the restriction, plausible justification for the continued restriction, whether there was a possibility of review) “The restriction may be justified in a given case only if there are clear indications of a genuine public interest which outweigh the individual’s right to freedom of movement.”⁵⁵⁸

The EU Reception Conditions Directive 2003/9/EC (Article 7) regulates the conditions which are to apply to restrictions imposed on freedom of movement. It specifically provides that applicants cannot be required to

557. CCPR/C/21Rev/Add9, §§15-16.

558. *Hajibeyli v. Azerbaijan*, application no. 16528/05, judgment of 10 July 2008, §63.



obtain permission to keep appointments with authorities and courts if their appearance is necessary. This was one of the problems which gave rise to the unsuccessful complaint in *Omwenyeye v. Germany*.⁵⁵⁹

Family life and private life

Article 8 §1 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

The relevance of Article 8's private life rubric (the right to respect for moral and physical integrity) has already been looked at in the context of protection from expulsion to face a situation which would breach that right (see Part 1, page 129). Because of the protracted duration of asylum determination procedures, many asylum seekers will have formed personal and even family relationships falling within the scope of Article 8 in the state where protection was sought by the time their claims are finally rejected.

The second situation in which Article 8 may be relevant therefore concerns the interference with family or private life relationships which can occur when the state seeks to implement a decision to expel an individual whose claim to be in need of international protection has been rejected.

Article 8 may also be relevant in situations where one family member's need for international protection has been recognised and other family members – who may not have such a need in their own right – either seek to remain with, or to join, the protected individual on the basis of their relationship to that person.⁵⁶⁰

The notion of “family life”

The Court has repeatedly asserted that the Convention does not guarantee aliens a right of entry or residence in a particular country, and whilst

559. *Omwenyeye v. Germany*, application no. 44294/04, inadmissibility decision of 20 November 2007.

560. In 2003 the EU adopted Directive 2003/86/EC on the right to family reunification, Articles 9-12 expressly regulate the family reunification of refugees.



expulsion cases concern family life, they also concern immigration and states retain the right under international law to regulate such matters.⁵⁶¹ However, where an individual has close family ties or an established family unit in one country, the removal of that individual may amount to a violation of Article 8.⁵⁶² Likewise, the refusal to permit family members overseas to join an individual who has been granted international protection will also raise issues under Article 8. The Geneva Convention does not contain any express provision entitling those recognised as refugees to family reunion but most Council of Europe states have provisions which facilitate some degree of family reunion for recognised refugees.

Personal relationships can fall within either the private life or family life rubric of Article 8.

The establishment of “family life” is essentially a question of fact depending upon the reality of close personal ties.⁵⁶³ A parent-child relationship where the child is born of a marriage will give rise to *de jure* family life which is only severed in exceptional circumstances. However, relationships which give rise to *de facto* family life are also brought within the protection of Article 8. Thus the notion extends beyond mere blood ties⁵⁶⁴ and has also encompassed a relationship between a minor child and a “non-related” caring adult.⁵⁶⁵ An assessment of whether family life exists requires pragmatic and detailed consideration (e.g. as to whether the couple lives together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means).⁵⁶⁶ Same sex relationships are considered as an aspect of private life not family life. Legal recognition of such relationships is possible in most Council of Europe states.⁵⁶⁷

561. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.

562. *Moustaquim v. Belgium*, application no. 12313/86, judgment of 18 February 1991.

563. *K. and T. v. Finland*, application no. 25702/94, judgment of 12 July 2001.

564. *Ibid.*

565. *X, Y and Z v. the United Kingdom*, application no. 21830/93, judgment [GC] of 22 April 1997.

566. *Al-Nashif and others v. Bulgaria*, application no. 50963/99, judgment of 20 June 2002.

567. See generally, Hathaway, *The rights of Refugees under International law*, Cambridge University Press 2005 p. 533 et seq.



The notion of “private life” includes broad elements of the personal sphere such as “gender identification, name and sexual orientation and sexual life”.⁵⁶⁸ Private life governs relations between individuals who are not family members.⁵⁶⁹ The Court has distinguished between core family and non-core family e.g. between adult dependents, elderly parents and adult children or adult siblings.⁵⁷⁰ “Family life” could be relied on in the former but not the latter, in relation to which the right to “private life” would be of more assistance.⁵⁷¹ In *Üner v. the Netherlands* the concept of private life was held to be constituted by a network of personal, social and economic relations or ties between the settled migrants and their community.⁵⁷²

The Court does not always separate family from private life – however, in the *Joseph Grant v. the United Kingdom* case, the applicant had family life with his daughter and private life on the basis of the totality of social ties between himself as a settled migrant and his community.⁵⁷³

Adult applicants relying on a private life claim may need to show an “additional degree of dependence” going beyond normal ties. Applicants need not produce evidence to suggest that their family “would not be able to cope without them”, only that “removal would likely cause greater difficulties than would otherwise be the case”. It was on this basis that the Court found a violation of Article 8 in its private life aspect in *A.W. Khan v. the United Kingdom*.⁵⁷⁴

568. *Bensaid v. the United Kingdom*, application no. 44599/98, judgment of 6 February 2001, §47; *Üner v. the Netherlands*, op. cit., judgment of 5 July 2005, §59, citing *Mikulić v. Croatia*, application no. 53176/99, judgment of 7 February 2002, §53.

569. *Odièvre v. France*, application no. 42326/98, judgment [GC] of 13 February 2003.

570. *Maslov v. Austria*.

571. *Slivenko v. Latvia*, application no. 48321/99, judgment of 9 October 2003.

572. *Üner v. the Netherlands*, op. cit., §59; and *Slivenko v. Latvia*, application no. 48321/99, judgment of 9 October 2003.

573. *Joseph Grant v. the United Kingdom*, application no. 10606/07, judgment of 8 January 2009.

574. *A.W. Khan v. the United Kingdom*, application no. 47486/06, judgment of 12 January 2010. Note that the applicant was unable to substantiate the claim that his life would be at risk in Pakistan under Article 3, but the Court held that his deportation, if enforced, would breach Article 8 on the basis that it would interfere with his private life with his adult family in the United Kingdom.



The Court adjudges on whether family or private life (or both) would be ended, maintained or affected in the future.⁵⁷⁵ Applicants must be given a fair opportunity to present family claims in the absence of bad faith by the authorities⁵⁷⁶ or deceit perpetuated by the parties.⁵⁷⁷

In *Ciliz v. the Netherlands* the decision-making process did not safeguard the applicant's family interests as required by the procedural guarantees of Article 8.⁵⁷⁸ *Al-Nashif and Others v. Bulgaria* highlighted the importance of the procedural aspects of Article 8 in protecting family members facing expulsion in national security cases from arbitrary interferences by the authorities.⁵⁷⁹ The Court repeated this finding in *C.G. v. Bulgaria*, emphasising that the executive does not have an unfettered power to expel individuals in breach of Article 8. In some cases, a separate violation of Article 13 may also be found⁵⁸⁰ and it is clear that an effective remedy requires a "meaningful" assessment of proportionality under Article 8.⁵⁸¹

In *Bulus v. Sweden*, the Commission declared admissible a case concerning Syrian adolescents threatened with expulsion when their mother and sister were permitted to remain.⁵⁸² However, in *Aksar v. the United Kingdom*, the Commission declared inadmissible a complaint concerning the refusal to admit the extended family of a person with refugee status.⁵⁸³ A friendly settlement has been reached (and visas

575. *Lupsa v. Romania*, application no. 10337/04, judgment of 8 June 2006.

576. *Kamal v. the United Kingdom*, application no. 8378/78, decision of 14 May 1980, 20 DR 168, and *Miah, Islam v. the United Kingdom*, application no. 19546/92, decision of 13 March 1992.

577. See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, judgment of 12 October 2006.

578. *Ciliz v. the Netherlands*, application no. 29192/95, judgment of 11 July 2000.

579. *Al-Nashif and others v. Bulgaria*, application no. 50963/99, judgment of 20 June 2002. In *Al-Nashif* the Court found separate violations of Articles 8 and 13, but in other cases the violation of a substantive provision on the basis of a lack of procedural safeguards may not give rise to a separate issue under Art 13, see e.g., in *Hokkanen v. Finland*, application no. 19823/92, judgment of 23 September 1994.

580. *C.G. and others v. Bulgaria*, application no. 1365/07, judgment of 24 April 2008.

581. *Raza v. Bulgaria*, application no. 31465/08, judgment of 11 February 2010.

582. *Bulus v. Sweden*, 35 DR 57.

583. *Askar v. the United Kingdom*, application no. 26373/95, decision of 16 October 1995 (declared inadmissible).



issued) in the case of *Osman* involving the siblings of a Somali granted international protection in the United Kingdom whose family was living in conditions of squalor in Kenya.⁵⁸⁴

The case of *Jomanday v. the Netherlands*⁵⁸⁵ concerned two Liberian brothers, born in 1987 and 1991, who had been in the Netherlands since 1998 with their mother who had been granted asylum by the Dutch authorities. The Dutch authorities required the boys return to Liberia in order to apply for provisional visas. Once the complaint was lodged with the Court the Government granted them residence permits. The case was withdrawn and struck off the Court's list of cases.

Interference with the right to family life

Article 8 §2 provides:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Under Article 8 the Convention organs must first decide whether there has been an "interference" with the right to respect for family life. It is important to note that it is only respect for family life that is guaranteed under Article 8 and not choice of residence. If it is reasonable to expect the family unit to conduct their family life elsewhere there will be no interference (and thus no need to justify it). Clearly if individuals have been given international protection on the basis that they cannot safely return to their country of origin, it would seem axiomatic that it is not reasonable to expect them to conduct their family life in that state.

584. *Osman and others v. the United Kingdom*, application no. 12698/06, decision of 4 September 2007 (struck off the list).

585. *Jomanday v. the Netherlands*, application no. 31893/05, decision (struck out of the list) of 20 October 2009.



Under Article 8 §1, the restriction of the right must be carried out “in accordance with the law”. As with Article 5 the law in question must be of a certain quality – namely accessible, foreseeable and precise.⁵⁸⁶

Under Article 8 §2, a fair balance must be struck between the interest of the individual and the interest of the community. States are also afforded a wide margin of appreciation in their immigration decision-making procedures.

The Court found in *Gül* that the refusal to allow the child to join his parents did not constitute an interference under Article 8 §1 – consequently, there was no need to determine whether the interference was justified under Article 8 §2. The Court noted that the Swiss authorities had found that the mother could not return to Turkey because of ill-health. The Court found that the father had left Turkey “voluntarily” (he was a Kurdish asylum seeker, who had been obliged to withdraw his asylum claim when given a humanitarian permit in line with his wife). The Court found that older child had grown up in the “cultural and linguistic environment”⁵⁸⁷ of Turkey (he was Kurdish, did not speak Turkish and had never been educated in Turkey). The Court found there were no obstacles preventing the family from conducting their family life in Turkey.⁵⁸⁸ The younger sibling was temporarily in foster care but this was not addressed by the Court. A strongly worded dissenting opinion warned against the Court relying on fact which had not been properly established.

*Darren Omoregie and others v. Norway*⁵⁸⁹ concerned a Nigerian national who married his Norwegian wife while his asylum claim was pending. They had a daughter together. When his asylum claim failed he was told to leave the country but instead he stayed and worked for a year without a permit, which constituted a breach of the immigration rules. His application for family reunification was rejected and he was expelled to Nigeria with a prohibition on re-entry for 5 years. The Court noted that his links in

586. *Lupsa v. Romania*, application no. 10337/04, judgment of 8 June 2006.

587. *Gül v. Switzerland*, application no. 23218/94, judgment of 19 February 1996.

588. *Maslov v. Austria*, application no. 1638/03, judgment [GC] of 23 June 2008.

589. *Darren Omoregie and others v. Norway*, application no. 265/07, judgment of 31 July 2008.



Norway where he had only been for 3 years despite having formed a nuclear family there were weaker than those in Nigeria where he had grown up. Whilst never disputing that family life was genuine, the Court found that it had been formed when the applicant's stay in the country had been precarious and that the applicants would not suffer insurmountable obstacles in moving to Nigeria. This is a sad decision which reflects the often inflexible nature of immigration control once a claim for asylum has failed.

Children and asylum

Refugee and migrant children are “among the world’s most vulnerable populations” and face “particular risk when ... separated from their parents and carers”.⁵⁹⁰ The phenomenon of separated or “unaccompanied” children seeking international protection exists in all member states. Some are victims of trafficking for economic or sexual exploitation, fleeing from persecutors and war zones, or even family members or associates.⁵⁹¹

The 1989 Convention on the Rights of the Child (CRC) is the main legal instrument on the protection of children. It embodies four general principles:

- The best interests of the child shall be a primary consideration in all actions affecting children (Article 3).
- Non-discrimination (Article 2).
- The obligation to protect the right to life and to the maximum extent possible the survival and development of the child (Article 6).
- The right to express their views freely in all matters affecting them, their views being given due weight in accordance with the child’s age and level of maturity (Article 12).

590. “Human Rights Watch World Report 2002: children’s rights”. Accessible from <http://www.hrw.org/wr2k2/children.html>

591. See Babha, J. and Finch, N., “Seeking asylum alone”, http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=281. See also the Save the Children Separated Children in Europe Programme, “Save the Children response to the ‘Green Paper on a Community return policy on illegal immigrants’”, COM (2002) 175. Accessible from: http://ec.europa.eu/justice_home/news/consulting_public/return_policy/save_children_en.pdf.



Guidance is provided by the Committee on the Rights of the Child in its 2005 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin. The UNHCR *Guidelines on Determining the Best Interests of the Child* also provide advice on the appropriate steps to take in order to protect the best interests of child asylum seekers and refugees.⁵⁹²

The Court, on the other hand, is very slowly developing this principle through its case-law; an increasing number of cases concerning unaccompanied minors are now being brought. The case of *Maslov v. Austria*⁵⁹³ concerned the expulsion of a minor on the basis of criminal offences he had committed. The Grand Chamber underlined the importance of recognising the best interests and well-being of the children.

Inhumane detention of a 5-year-old unaccompanied minor (*Mubilanza Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*) and of four children aged 7 and below, albeit with their mother (*Muskhadzhiyeva and others v. Belgium*),⁵⁹⁴ the complete absence of childcare or the fact that a boy lived on the run for two years in order to avoid expulsion to Syria (*Bulus v. Sweden*)⁵⁹⁵ were situations falling within the ambit of Article 3.⁵⁹⁶ The CRC obliges states to provide the equivalent level of childcare and schooling to asylum seeking or refugee children as that afforded to national children.

Under Article 8, in cases of family reunification, where children apply to join family members in a member state, the Court considers factors such as the child's linguistic and cultural links to his/her country of origin; whether he/she had been brought up by relatives and lived at a distance

592. CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6; UNHCR *Guidelines on Determining the Best Interests of the Child*, May 2008, both available at <http://www.unhcr.org/refworld>.

593. *Maslov v. Austria*, application no. 1638/03, judgment [GC] 23 June 2008.

594. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, judgment of 12 October 2006; and *Muskhadzhiyeva and others v. Belgium*, application no. 41442/07, judgment of 19 January 2010. These cases are discussed above at pages 172 ff.

595. Application No. 9330/81, judgment of 19 January 1984, 35 DR 35 and (Rep) 39 DR 57.

596. *Ibid.*



from his/her family for some time; and whether his/her family freely chose to leave their child in the country of origin. It is not enough that the parents prefer to develop family life with their children in a member state as opposed to their country of origin.⁵⁹⁷ In some cases, it appears that parents may be expected to return to their country of origin to re-join their children.⁵⁹⁸

Article 8 may not be relied on where children reach an age where they no longer require the degree of care expected by young children but are increasingly able to fend for themselves. However in *Tuquabo-Tekle and others v. the Netherlands*⁵⁹⁹ although the child was 15 she was “still a minor” and was threatened with being taken out of school and married off. The Court found the refusal to allow her to join her family in the Netherlands violated Article 8.⁶⁰⁰

The case of *Osman and others v. the United Kingdom*⁶⁰¹ concerned the family of a Somali granted international protection in the United Kingdom. The family had fled to Kenya and were living in appalling conditions of abject poverty. They were refused permission to join the parent in the United Kingdom. All appeals were unsuccessful and the government maintained its refusal. However, once the case was communicated to the United Kingdom Government by the European Court, the government agreed to issue the necessary visas.

The Court’s analysis is slightly different where a non-national parent faces expulsion and the children are in the custody of a parent with citizenship or residence rights, after a divorce or separation. The Court

597. *Ahmut v. the Netherlands*, application no. 21702/93, decision of 12 October 1994.

598. *Tuquabo-Tekle and others v. the Netherlands*, application no. 60665/00, judgment of 1 December 2005, §49. See also *Benamar v. the Netherlands*, application no. 43786/04, decision of 5 April 2005; *I.M. v. the Netherlands*, application no. 41266/98, decision of 25 March 2003; and *Chandra and others v. the Netherlands*, application no. 53102/99, decision of 13 May 2003.

599. Application no. 60665/00, judgment of 1 December 2005.

600. Application no. 60665/00, judgment of 1 December 2005, §51.

601. Application no. 12698/06, decision (struck out of the list) of 4 September 2007. Friendly settlement reached - entry clearance was granted together with an ex gratia payment for costs and expenses.



appears to place more emphasis on the personal links to the child in such cases rather than the personal links to the territory.⁶⁰²

Two further problems specifically affect child asylum seekers. First, there may be an absence of or inadequate legal representation for child asylum seekers.⁶⁰³ The second problem relates to the inability of domestic courts to place children in an appropriate legal framework.⁶⁰⁴ A third problem concerns inaccurate age assessments of minors carried out by the domestic authorities which can in some cases lead to refusal of an asylum claim. The question for the Court is whether or not the legal principles developed in relation to adult asylum seekers are satisfactorily applied to child asylum seekers in view of their age and vulnerability.

Access to the European Court of Human Rights (see below, page 214) is also available to very young children even if there is no parent able to bring the case on their behalf. The Court's jurisprudence makes it clear that complaints under the Convention may be brought before the Court on a child's behalf – for example by an NGO or a lawyer where the children are not in a position to do so themselves or their parents cannot act. The Court will ensure that they are not prevented from bringing their complaint for such reasons.⁶⁰⁵

Article 12 – The right to marry and found a family

Article 12 of the ECHR guarantees the right to marry and found a family. The provision was expressly included in response to the restrictions which had been imposed under the Nazi regime on marrying foreigners. Some states have attempted to place restrictions on the possibility of asylum seekers and refugees marrying. These restrictions impede or pre-

602. See *Berrehab v. the Netherlands*, application no. 10730/84, judgment of 21 June 1988.

603. "Seeking asylum alone".

604. *Ibid.*

605. See *Scozzari and Giunta v. Italy*, application nos. 39221/98 and 41963/98, judgment of 13 July 2000, and *P. C. and S. v. the United Kingdom*, application no. 56547/00, judgment of 16 July 2002, *Covezzi and Morselli v. Italy*, application no. 52763/99, judgment of 9 May 2003. Also see Mole, N., "Litigating children's rights affected by armed conflict before the European Court of Human Rights", pp. 167-81, in Arts, K. and Popovski, V. (eds.), *International criminal accountability and the rights of children*, Cambridge, Cambridge University Press.



vent marriage and are quite independent of the question of granting immigration status after a marriage has taken place. At the time of writing the Court has proposed adopting a pilot judgment on this issue in the case of *O'Donoghue v. the United Kingdom*.⁶⁰⁶

Status of those whose claims are being examined or have been rejected

Status and related issues

Whilst the prime concern of those seeking international protection is not to be returned to a situation where they will be at risk of prohibited treatment, recent years have seen a sharp increase in a number of issues surrounding the situation in which they find themselves on arrival and during their stay, as well as in those cases where individuals have been granted status and there is no immediate threat of return.

People in many states find themselves in a legal limbo, with uncertain status and more importantly no proper documentation setting out their position. Their entitlement to seek employment, housing, welfare benefits, education and health care is also precarious. Amnesty International has expressed concern that such abject poverty is undignified and blocks “all avenues to a normal life”. It believes that rejected asylum seekers are forced into destitution in order to compel their return home.⁶⁰⁷ Such treatment meted out to asylum seekers or those with irregular status, which is different from that afforded to citizens, may amount to discrimination (discussed below).

The situation of those seeking international protection

In some member states of the Council of Europe those who seek international protection encounter serious obstacles in accessing asylum

606. *O'Donoghue v. the United Kingdom*, application no. 34848/07.

607. See Amnesty Action Campaign, “UK: the road to destitution for rejected asylum seekers”. Available at: www.amnesty.org.uk/actions_details.asp?ActionID=226.



determination procedures (see e.g. *Abdolkhani and Karimnia v. Turkey*,⁶⁰⁸ *S.D. v. Greece*⁶⁰⁹ and *Sharifi and others v. Italy and Greece*).⁶¹⁰

For those claiming asylum within the EU, the Reception Conditions Directive 2003/9/EC,⁶¹¹ Article 6, stipulates that everyone who lodges an application for asylum must be given within three days a document testifying that he or she is allowed to stay in the territory of the member state whilst the asylum claim is being examined.

But this provision only assists those who are able to lodge an application (see *S.D. v. Greece*, above). If unable to access asylum procedures people are unable to justify their continued presence on the territory and remain vulnerable to ill-treatment or even expulsion as they are unable to demonstrate that they are trying to seek international protection. Status and the lack of documents evidencing status are issues falling within the private life rubric of Article 8 (see *Smirnova v. Russia*⁶¹² and *Sisojeva v. Latvia*,⁶¹³ below, pages 191 and 195). Other human rights issues often arise as a consequence of lack of status. The resulting level of destitution may reach the threshold of severity required for Article 3 to be engaged, or may result in a loss of the dignity protected under the private life rubric of Article 8. This may in turn be exacerbated by discriminatory treatment contrary to Article 14.

The situation of those recognised as in need of international protection

“Geneva Convention refugees” are those who are found to require international protection due to a well-founded fear of persecution in their country of origin. Those who are recognised as refugees under the

608. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.

See also *Z.N.S. v. Turkey*, application no. 21896/08, judgment of 19 January 2010.

609. *S.D. v. Greece*, application no. 53541/07, judgment of 11 June 2009.

610. *Sharifi and others v. Italy and Greece*, application no. 16643/09, communicated 13 July 2009 (pending). See also cases listed above, page 75, note 201.

611. Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. EU measures are discussed in more detail below, page 238 ff.

612. *Smirnova v. Russia*, application nos. 46133/99 and 48183/99, judgment of 24 July 2003.

613. *Sisojeva and others v. Latvia*, application no. 60654/00, judgment [GC] of 15 January 2007.



Geneva Convention will be granted that status and all the benefits that flow from it, including for example, family reunion rights.

Those who do not qualify under the Geneva Convention may be afforded “humanitarian” or “subsidiary” protection (under national law or the EU Qualification Directive 2004/83/EC).⁶¹⁴

Within the EU those who are recognised under the Qualification Directive 2004/83/EC as needing subsidiary protection must also be granted both residence permits and the other benefits conferred by Chapter VII of the Directive. The re-cast Qualification Directive under discussion at the time of writing provides for a much closer approximation of the status of refugees and of those benefiting from subsidiary protection

Those who do not qualify for any kind of humanitarian protection provided by national law or who fall outside the scope of the Geneva Convention or the directive, and are protected from return only by the ECHR, are more vulnerable. Their status is determined by whatever provisions national law has made for them.

The situation of those refused international protection

Since the criteria under the Geneva Convention, EU law and the ECHR, for being granted international protection from return are very stringent, very few of those who apply are granted it. However, even if there is no legal impediment to their return, in many member states significant numbers of those refused both kinds of international protection cannot be returned to their country of origin for various reasons: their citizenship is uncertain or they lack the necessary documentation; often the host states have no resident diplomatic presence from the country of origin; the transportation costs of returning them to their country of origin are prohibitive; or the host states lack the resources (or the will) to locate and remove them.

614. Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.



The approach taken by the European Court of Human Rights to status and documentation

Status of those who cannot be expelled

Article 8 ECHR also governs the status (in relation to the right to residence documents, access to welfare and health care, and employment) of those who cannot be expelled. A separate opinion annexed to the Commission's report in *H.L.R. v. France* is on this point. Mr Cabral Barreto (now the Portuguese judge in the Court) considered that a finding by the Strasbourg organs that an expulsion would constitute a violation of Article 3 of the ECHR implied not only that no expulsion should take place but also that any extant expulsion order must be cancelled. He also considered that if a breach of Article 8 of the ECHR were to be avoided, some kind of residence permit must be granted which would allow the individual access to employment and the social welfare system.⁶¹⁵ The point was not expressly taken up by the Court in *B.B. v. France*⁶¹⁶ where the Court considered that the complaint could be struck off once the threat of immediate expulsion had been lifted even though this meant that a very sick man was left in an uncertain status requiring "safe conduct" to attend hospital appointments and reporting at regular intervals to the gendarmerie and the police. In *Ahmed v. Austria*,⁶¹⁷ the Court had found that it would be a violation of the Convention to expel the applicant to Somalia, but had no jurisdiction to rule on whether or not he had been rightfully stripped of his status as a refugee under the Geneva Convention. His entitlement to social, medical and welfare benefits was dependent on his refugee status. Ironically and tragically, although prevented from being expelled to Somalia by the ruling of the European Court, he was left in such isolation and destitution as a result of the loss of refugee status that he committed suicide some months later. Individuals whose asylum applications were initially refused by the domestic authorities and who had exhausted all

615. Separate opinion of Mr Cabral Barreto, *H.L.R. v. France*, application no. 24573/94, report of 7 December 1995.

616. Application no. 30930/96, judgment of 7 September 1998.

617. Application no. 25964/94, judgment of 17 December 1996.



appeal rights and applied to the Strasbourg Court complaining that their removal would violate Article 3, are frequently granted status once the case is communicated to the government. Cases are regularly struck off the Court's list as being "resolved" under Article 37 §1.b in such circumstances, e.g. *T.B. v. Sweden*⁶¹⁸ and *Sisojeva v. Latvia*.⁶¹⁹

Residence permits

The Court has frequently stated that Article 8 does not normally go as far as guaranteeing an individual the right to a particular kind of residence permit so long as the solution proposed by the authorities permits him to enjoy his right to respect for family and private life – see, for example, *Dremlyuga v. Latvia*.⁶²⁰

However, in some situations a particular permit may be required. For those recognised as refugees or those in the EU who are entitled to subsidiary protection under the Qualification Directive 2004/83/EC are entitled to a residence permit. The case of *Aristimuno Mendizabal v. France* is relevant by analogy.⁶²¹ The case concerned the repeated issue of temporary permits but also the failure to issue the long-term permit to which the applicant was entitled as an EU citizen. The Court examined the compatibility with Article 8 of the Convention of the failure of the French authorities to grant a long-term residence permit to a person who had a right to reside in France under both EU law and certain provisions of French domestic law. Focusing on the EU law aspects of the case, they found that the interference with the applicant's right to respect for private (and family) life, occasioned by the failure to issue the requisite long-term residence permit, was not in accordance with the law – both EU and national law – and that it was therefore unnecessary to determine whether it would otherwise have been justified. The Qualification Directive 2004/83/EC requires states to issue those entitled to subsidiary protection with residence permits. The Court in *Aristimuno* found no violation of Article 13

618. *T.B. v. Sweden*, application no. 62034/08, decision of 20 October 2009.

619. *Sisojeva and others v. Latvia*, application no. 60654/00, judgment [GC] of 15 January 2007.

620. Application no. 66729/01, decision of 29 April 2003.

621. Application no. 51431/99, judgment of 17 January 2006.



(the right to an effective remedy) and, in awarding the applicant 50 000 euros compensation for the violation of Article 8, made no mention of the right to compensation which she had as a matter of EU law for the failure of the French authorities to give proper effect to the directive.⁶²²

The case of *Sisojeva v. Latvia* is instructive for many of those whose need for international protection has not been recognised but who are not being removed.⁶²³ It concerns a family of ethnic Russians whose presence in Latvia remained unregularised although the authorities were not taking active steps to remove them. The Chamber of the Court found that there were positive obligations under Article 8 which had not been observed:

It is not enough for the host state to refrain from deporting the person concerned; it must also by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference.

The Chamber had concluded that the prolonged failure to regularise the applicants' status constituted a violation of Article 8; the Grand Chamber struck out this claim because the situation has now been "resolved" by the Latvian authorities (after almost a decade of prevarication).

In *Jomanday v. the Netherlands*⁶²⁴ the mother who had been granted refugee status in the Netherlands applied for residence on behalf of her two young sons. The application was refused and all appeals were unsuccessful. Once the case had been communicated, the Dutch authorities granted them residence permits. The Court therefore struck the case off the list alleging that the applicants no longer wished to pursue the case rather than that the matter had been resolved and so there was no ruling on several important ancillary issues which the case had raised.

622. See decision of the ECJ in *Francovich and Bonifaci v. Italy* (Cases C-6 and 9/90) [1991] ECR I-5357.

623. Application no. 60654/00, Chamber judgment of 16 June 2006, Grand Chamber judgment of 15 January 2007.

624. *Jomanday v. the Netherlands*, application no. 31893/05, decision of 20 October 2009 (struck out of the list).



In contrast to the *Jomanday* case, the applicant in *Ibrahim Mohamed v. the Netherlands*,⁶²⁵ a Somali had been refused asylum but had formed a family unit with a lawful resident. Once the case was communicated the Dutch authorities granted him protection from return to Somalia but refused to issue him with the family residence permit he had sought. He made clear that he wished to continue to pursue his application to the Court. The Court held (at paragraph 21):

The Court reaffirms that Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone (see *Sisojeva and others*, cited above, §91).

The Court took the same approach to the question of striking out a claim in *Said Botan v. the Netherlands*.⁶²⁶ The applicant was granted a temporary residence permit for the purpose of asylum, similar to the permit given in the *Ibrahim Mohamed* case above. The Court found that this permit although not issued for that purpose, nevertheless enabled her to enjoy her right to family life with her husband and three children in the Netherlands.

In *Sisojeva* and in *Ibrahim Mohamed*⁶²⁷ the Court did not consider it necessary to adjudicate on alleged past violations of the right to private

625. *Ibrahim Mohamed v. the Netherlands*, application no. 1872/04, judgment of 10 March 2009 (struck out of the list).

626. *Said Botan v. the Netherlands*, application no. 1869/04, judgment of 10 March 2009 (struck out of the list).

627. *Sisojeva and others v. Latvia*, application no. 60654/00, judgment [GC] of 15 January 2007 (struck out of the list); and *Ibrahim Mohamed v. the Netherlands*, application no. 1872/04, judgment of 10 March 2009 (struck out of the list).



life under Article 8. The applicants in *Sisojeva* had applied without success for residence permits over a prolonged period of time but only when the case was before the Grand Chamber did the state concede that it had a duty to regularise their situation. The Court did not find it necessary to rule on the past violations of their rights since status had been “resolved”. Complaints that an expulsion which is threatened would if carried out violate Article 3 may well be resolved by the withdrawal of the threat. However it is difficult to see how complaints that the past prolonged violation of Article 8 occasioned by lack of status has been “resolved” by status being granted. Past breaches of Article 8 are regularly adjudicated and compensated by the Court, for example, in cases involving child care proceedings even after the children have been returned to the parents from whom they were wrongly separated. (See e.g. *T.P. and K.M. v. the United Kingdom*.)⁶²⁸

The absence of documentation

The mere absence of proper documentation may in itself constitute a violation. In *Smirnova v. Russia*⁶²⁹ the Court considered a complaint relating to the confiscation of the applicant’s internal passport which left her without an identity document. The Court found that the interference with her Article 8 rights flowed “not from an instantaneous act, but from a number of everyday inconveniences”. It found that in their everyday life Russian citizens have to prove their identity unusually often, such as when buying train tickets or changing money and that the internal passport was required for more crucial needs such as finding employment or receiving medical care. “The deprivation of a passport therefore represented a continuing interference with the applicant’s private life.”⁶³⁰ In this case there was no strike out even though by the time the Court considered the case the passport had been returned to Ms Smirnova.

628. *T.P. and K.M. v. the United Kingdom*, application no. 28945/95, judgment [GC] of 10 May 2001.

629. Application nos. 46133/99 and 48183/99, judgment of 24 July 2003.

630. *Ibid.*, §97.



Housing and welfare

As with the right to a residence permit, the Qualification Directive 2004/83/EC obliges EU states to provide those entitled to refugee status or subsidiary protection with specified access to employment, accommodation, health care, education and social welfare. The Reception Conditions Directive 2003/9/EC makes similar provision for those whose claims for protection are still being processed. Any interference with either the positive or negative obligations contained in Article 8 of the ECHR, protected rights in states where the Qualification Directive 2003/9/EC applies, will automatically violate the Convention, as not being in accordance with the law. As a matter of EU law it will found an action in damages.

Although there is no right to a home to be found in the Convention – Article 8 only provides for respect for the home which one already has – it is arguable that the right to life under Article 2, the prohibition on degrading treatment under Article 3, or the right to “moral and physical integrity” under the private life rubric of Article 8 would prohibit a state from leaving anyone within its jurisdiction in conditions of complete destitution in the same way that expulsion to face destitution was found to violate Article 3 in *D. v. the United Kingdom*. In *O’Rourke v. the United Kingdom*⁶³¹ the Court declared the case inadmissible because it found that the applicant had brought his homelessness upon himself, but it did not exclude the possibility that his Convention rights could have been engaged had the state been responsible for his plight.⁶³²

The same principles apply to Article 1 of Protocol No. 1 (the peaceful enjoyment of possessions). The Court has looked at the entitlement of foreigners to social assistance under Article 1 of Protocol No. 1 in a number of cases. It considers that the right to emergency assistance is a pecuniary right falling within the ambit of that provision without the need for it to be linked to the payment of taxes and other contributions. In *Gaygusuz v. Aus-*

631. Application no. 39022/97, decision of 26 June 2001.

632. For a detailed examination of the Convention rights at issue for destitute asylum seekers, see the judgment of the United Kingdom, House of Lords, in the case of *Limbuela and others* [2005] UKHL 66, 3 November 2005.



*tria*⁶³³ and *Koua Poirrez v. France*⁶³⁴ the Court found that the denial of access to welfare benefits to which the applicants would otherwise have been entitled, simply because they were foreigners, violated that article taken together with Article 14 which prohibits discrimination (see below, page 201).

In *Andrejeva v. Latvia*⁶³⁵ the applicant had lived in Latvia for 54 years and complained of the refusal to grant her a state pension in respect of years of employment in the former Soviet Union prior to 1991 on the basis that she did not have Latvian citizenship. The Grand Chamber found that there was a difference in treatment based exclusively on the basis of nationality and that there had been a violation of Article 14 in combination with Article 1 of Protocol No. 1. Analogies may be drawn with numerous cases previously decided by the Court in relation to Roma and other related groups and its findings under the Convention on destitution, poor living conditions, and lack of access to housing and education.

The Qualification Directive's provisions on welfare benefits are also relevant for EU states. However, in *Ahmed v. the United Kingdom*⁶³⁶ the authorities refused the applicant's claim for asylum and his appeal rights were exhausted. Following his complaint to the Court the threat of removal to Somalia was lifted. He sought just satisfaction, *inter alia*, on the basis that he had been deprived of the benefits of access to employment, welfare payments and accommodation to which he would have been entitled if his claim under the Qualification Directive 2004/83/EC had been recognised. The Court shared the government's view that it was not necessary to provide redress for any pecuniary or non-pecuniary damage incurred by the applicant while he was under threat of removal to Somalia. Nor was it the Court's task to apply directly the level of protection offered in other international instruments. It held that the applicant's sub-

633. Application no. 17371/90, judgment of 16 September 1996.

634. Application no. 40892/98, judgment of 30 September 2003.

635. *Jomanday v. the Netherlands*, application no. 31893/05, decision (struck out of the list) 20 October 2009.

636. *Ahmed v. the United Kingdom*, application no. 31668/05, decision (inadmissible) of 14 October 2008.



missions based on the Directive were outside the scope of its examination of the present application (see also *N.A. v. the United Kingdom*).⁶³⁷ If the EU accedes to the Convention, as is foreseen in Protocol No. 14 and the Lisbon Treaty, this approach may have to change.

Access to the labour market

A central issue, over which western European states adopt differing positions, is whether or not asylum seekers awaiting consideration of their claim should be permitted to work. In earlier years, some states required asylum seekers to undertake “community work”, raising the question as to whether such work was effectively “forced or compulsory labour” as defined by the International Labour Organization,⁶³⁸ and thus raising issues under Article 4 of the ECHR. The separate opinion in the report in *H.L.R. v. France* expressed the view that the refusal to accord the means of subsistence to a person whose expulsion had been ruled to be in violation of the Convention raised issues under Article 8 of the ECHR.⁶³⁹ The same must apply to those who cannot be expelled whilst their applications to remain are being determined. For EU states the Reception Conditions Directive 2003/9/EC applies and gives those who have duly applied for asylum enforceable rights. The provisions under the Directive

637. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §107.

638. For instance, in the *Iversen* case a majority of the Commission concluded: “The concept of compulsory or forced labour cannot be understood solely in terms of the literal meaning of the words, and has in fact come to be regarded in international law and practice, as evidenced in part by the provisions and application of the ILO conventions and resolutions on forced labour, as having certain elements ... these elements of forced or compulsory labour are, first, that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive or the work or service itself involves avoidable hardship” (*Iversen v. Norway*, application no. 1468/62, *Yearbook* 6 (1963) 278, p. 328). The Commission appears to take the view that service is capable of constituting “forced or compulsory labour” within the meaning of the Convention, even when it has been undertaken by the consent of a person who was in fact incapable of exercising a free choice (*W., X., Y. and Z. v. the United Kingdom*, application nos. 3435, 3436, 3437 and 3438/67, *Yearbook II* (1968) 562, p. 594). The Court has further added that remunerated work may also qualify as forced or compulsory labour and a lack of remuneration and of reimbursement of expenses may constitute a relevant factor in considering what is proportionate (*Van der Mussel* case, judgment of 23 November 1983, Series A, No. 70).

639. Separate opinion of Mr Cabral Barreto, report of the Commission in *H.L.R. v. France*, application no. 24573/94, report of 7 December 1995.



guaranteeing the right to work twelve months after the asylum claim is lodged and the practice adopted in some EU states of detaining persons for periods in excess of twelve months reveals some inconsistency.⁶⁴⁰ The Return Directive 2008/115/EC prohibits detention for more than a total maximum of eighteen months.

It should also be noted that fewer and fewer asylum seekers are now formally recognised as Geneva Convention refugees. Instead they tend to be given chunks of time of discretionary leave to remain (in the United Kingdom), or are otherwise permitted to remain temporarily on humanitarian grounds. Such *de facto* refugees are more susceptible to arbitrary decisions by competent authorities and do not automatically enjoy the same rights as “Convention refugees”. These rights are spelt out in the Geneva Convention and include, for instance, the right to public relief and assistance, and the right to engage in wage-earning employment. Other organs of the Council of Europe have sought to improve the condition of *de facto* refugees. In particular, Recommendation No. R (84) 1 of the Committee of Ministers reaffirms that the principle of *non-refoulement* applies to both Convention and *de facto* refugees.⁶⁴¹ The ECHR, however, does not include any right to work,⁶⁴² so any complaint made on that basis would be inadmissible *ratione materiae*. For EU states the Reception Conditions and Qualification Directives apply.

Non-discrimination: Article 14 and Protocol No. 12

Article 14 of the ECHR prohibits discrimination on the grounds of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Article 14 is not a free-standing right and the protection from discrimination may only be invoked in relation to the enjoyment of other Conven-

640. See generally, James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005.

641. Committee of Ministers, 25 January 1984.

642. See, for example, *Neigel v. France*, application no. 18725/91, judgment of 17 March 1997.



tion rights. There must be a difference in treatment which falls within the ambit of another Convention right⁶⁴³ irrespective of the level of severity of the discrimination suffered. (There need not necessarily be a breach of a Convention right.)⁶⁴⁴ Furthermore, the state must show a reasonable and objective justification for the treatment, namely that it pursued a legitimate aim and was proportionate to that aim.⁶⁴⁵

Article 14 contains both negative and positive elements. In particular, the Court has held that where different situations require different treatment there will be a violation of Article 14 if no different treatment is accorded (see *Thlimmenos v. Greece*).⁶⁴⁶ This principle means that, for example, asylum seekers must be treated differently from other migrants, that children must be treated differently from adults and that those who are survivors of torture must be treated differently from those who have not suffered in this way.

The Court's jurisprudence under Article 14 specifically in the context of asylum is sparse.

The Court has declared inadmissible a complaint under Article 14, taken together with Article 6, concerning the failure of the state to provide, in domestic law, a right to appeal against the decision of a regional court refusing refugee status.⁶⁴⁷ The Commission has also declared inadmissible a claim under Article 14 read together with Article 3 as to whether the state must provide, as a matter of domestic law, a declaratory decision as to whether the applicant is thought to be endangered within the meaning of Article 33 §1 of the Geneva Convention – the Article 3 claim was unsubstantiated.⁶⁴⁸ In the case of *Saadi v. the United Kingdom* the applicant complained that the compilation of a list of nationalities

643. See, for example, *Gaygusuz v. Austria*, application no. 17371/90, judgment of 16 September 1996, §36.

644. See, for example, *Botta v. Italy*, application no. 21439/93, judgment of 24 February 1998 and *Van der Musselle v. Belgium*, application no. 8919/80, Series A, No. 70, judgment of 23 November 1983.

645. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, §72.

646. *Thlimmenos v. Greece*, application no. 34369/97, judgment of 6 April 2000.

647. *S.N. v. the Netherlands*, application no. 38088/97, decision of 4 May 1999.

648. *Hasan Gündoğdu v. Austria*, application no. 33052/96, decision of 6 March 1997.



liable to detention in the United Kingdom was discriminatory under Article 14. The Chamber found unanimously that there was no separate issue under Article 5 read together with Article 14 and the issue was not determined by the Grand Chamber when it came to examine the case.⁶⁴⁹

A. and others v. the United Kingdom concerned the indefinite detention of foreign nationals who could not be expelled as they would have been exposed to prohibited ill treatment. They were suspected of terrorist offences. The Grand Chamber found that their detention was a breach of Article 5 of the Convention as it was disproportionate and discriminated unjustifiably between nationals and non-nationals, the former being as likely to be involved in terrorism as the latter. But the Court did not consider it necessary to examine whether or not there was a separate breach of Article 14 taken in conjunction with Article 5.⁶⁵⁰

However, complaints are usually made in relation to distinctions based on nationality in relation to certain entitlements or benefits.⁶⁵¹ These complaints may be relevant, by analogy, to other marginalised groups, including refugees and asylum seekers. The reports on country visits by Council of Europe bodies, and in particular, the European Commission against Racism and Intolerance (ECRI) have also expressed concern on this matter. In *D.H. v. the Czech Republic* forcing Roma children to attend special schools amounted to discriminatory treatment and a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1 (the right to education). The Court pointed out that Roma were a specific type of disadvantaged and vulnerable minority and therefore required special protection, including in the sphere of education.⁶⁵²

In recent years ECRI, the Steering Committee for Equality between Women and Men (CDEG) and the Steering Committee for Human Rights

649. Application no. 13229/03, judgment of 11 July 2006.

650. *A and others v. the United Kingdom*, application no. 3455/05, judgment [GC] of 19 February 2009.

651. Explanatory Report on Protocol No. 12 to the ECHR, §19. Accessed from: <http://www.human-rights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>.

652. *D.H. and others v. the Czech Republic*, application no. 57325/00, judgment [GC] of 13 November 2007.



(CDDH) have taken steps to reinforce the protection afforded under the ECHR in these areas.

Protocol No. 12 creates a free-standing equality right. Its Article 1 provides:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

“Any right set forth by law” primarily refers to national law, but in EU states will also refer to the relevant EU regulations and directives.⁶⁵³ The new protection is thus similar to that of Article 26 of the ICCPR.⁶⁵⁴

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is also relevant in the context of non-discrimination and asylum. CERD specifically prohibits discrimination on the grounds of “race, colour, descent, or national or ethnic origin” and applies to distinction and exclusion. The Convention is built around the principle stated in the preamble to the UDHR: “all human beings are born free and equal in dignity and rights”. CERD, as well as the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW), will be relevant to the approach taken by the Court as a consequence of the application of Article 53 ECHR.

Article 16 – Restrictions on the political activity of aliens

Article 16 states: “Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens.”⁶⁵⁵ The ECHR stands alone in expressly permitting restrictions on the political activities of aliens.

653. Protocol No. 12 was opened for signature in November 2000, and entered into force on 1 April 2005, upon being ratified by 10 states. As at 4 March 2010, 17 member states have both signed and ratified, 20 have signed but not ratified, and 10 have neither signed nor ratified.

654. Explanatory report on Protocol No. 12 to the ECHR, §19.

655. Article 10 relates to freedom of expression, Article 11 to freedom of association and assembly, and Article 14 to non-discrimination in the enjoyment of Convention rights.



As long ago as 1977 the Parliamentary Assembly of the Council of Europe recommended its deletion from the Convention.⁶⁵⁶

There has been very little jurisprudence of either the Commission or Court on this article. The case of *Piermont v. France*,⁶⁵⁷ concerned the rights of a German MEP in a French territory. The Court held that the French Government could not rely on Article 16 as the applicant was not only a European Union citizen but also an MEP, and the relevant territory participated in the European elections.

The political activity of aliens raises issues under Articles 10 and 11. States can legitimately restrict the political rights of foreigners under those Articles if this is deemed necessary in a democratic society without having to have recourse to Article 16.

Racism, xenophobia and the media

Many of those who seek asylum in Europe do not meet the very stringent criteria for being granted international protection, however genuine their requests may be. Many resort to deception. This has led some parts of the media to label as “bogus” all those who are not eventually admitted to the very exclusive category of Geneva Convention refugees and may have contributed to negative attitudes by the public. This has had a significant impact on the ability of asylum seekers, refugees and migrants to access durable solutions, and to integrate into their host communities. It is also clear that dealing with mixed flows of economic migrants and those entitled to international protection has led to the emergence of a “culture of disbelief” in some decision makers which has sometimes undermined the quality and consistency of asylum decision-making.

There have been a number of important steps taken at a European level to combat racism and intolerance, in recognition of this increasingly serious phenomenon. The Parliamentary Assembly has passed several recommendations and resolutions. ECRI has also expressed its concerns

656. Recommendation 799 (1977) on the political rights of aliens, Council of Europe Parliamentary Assembly, 28th Ordinary Session.

657. Application nos. 15773/89 and 15774/89, judgment of 27 April 1995.



about attitudes towards asylum seekers, as has the Council of Europe Commissioner for Human Rights.

The Framework Convention for the Protection of National Minorities also includes a monitoring mechanism requiring state parties to report to an Advisory Committee on measures taken to promote integration of asylum seekers within member states.

Governments have tended to find it in their interest not to discourage the negative portrayal of asylum seekers in the media. However, the Danish Government took action against a journalist who had made a television programme which reported but did not criticise racist views. In *Jerstild v. Denmark*⁶⁵⁸ the Court found that the sanctions violated Article 10 (the right to freedom of expression) because the film was a serious news programme and its presentation showed that it was not designed to be racist. A minority of the Court considered that the fight against racism was so fundamental to a democratic society that the journalist could have been required to make a more active criticism of racial discrimination without compromising his right to freedom of expression. It is important to note that there was no suggestion that the journalist shared the racist views he was reporting.

The number of racist attacks in Europe including attacks on asylum seekers and their hostels is disturbing. "Islamophobia" has now emerged as a specific form of racist attack being manifested also in threats and harassment.⁶⁵⁹

As noted in *Osman v. the United Kingdom*,⁶⁶⁰ states are under a duty to take all the steps which they could reasonably be expected to take to prevent harm of which they knew or ought to have known. They are also under an obligation to investigate such attacks which occur, in a thorough

658. Application no. 15890/89, judgment of 23 September 1994.

659. See Report of the European Union Monitoring Centre on Racism and Xenophobia (EUMC) on discrimination and Islamophobia in the EU available from: http://eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4582d9f4345ad. See also report of 28 November 2006, available at: http://eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=4491243f59ed9.

660. *Osman v. the United Kingdom*, application no. 23452/94, judgment of 28 October 1998.



and non-discriminatory manner (see e.g. *Nachova and others v. Bulgaria*,⁶⁶¹ *Ouranio Toxo v. Greece*⁶⁶²).

Terrorism

This section concludes with a few words on the present attempts⁶⁶³ by governments to persuade the Court that diluting the protection guaranteed under Article 3 of the ECHR is a necessary response to terrorism.

Terrorism itself is not a new issue in Europe, nor is it a new issue for the Convention organs. More than 350 cases involving state responses to the danger alleged to be posed by terrorists have been decided by the European institutions since the ECHR was adopted in 1950.⁶⁶⁴ In the criminal justice system of some member states, members of particular ethnic groups (e.g. Chechens, Tamils) or of a particular religious groups (e.g. Muslims) who seek international protection are themselves fleeing from terrorism or counter-terrorism but their international protection needs are sometimes overlooked.

In relation to Article 3 of the Convention, whilst empathising with the difficulties that terrorism poses for states, the approach of the Convention organs has been consistent: combating terrorism cannot justify violations of the very human rights which the terrorists are seeking to destroy, and in particular cannot be invoked to justify a dilution of the absolute prohibition on torture and inhuman and degrading treatment.

The general principles relating to the responsibility of contracting states in the context of the expulsion of suspected or convicted terrorists

661. *Nachova and others v. Bulgaria*, application nos. 43577/98 and 43579/98, judgment [GC] of 6 July 2005.

662. *Ouranio Toxo v. Greece*, application no. 74989/01, judgment of 22 October 2005.

663. *Ramzy v. the Netherlands*, application no. 25424/05, decision of 27 May 2008 (admissible); and *A. v. the Netherlands*, application no. 4900/06, decision of 17 November 2009 (admissible).

664. See, for example: *Ireland v. the United Kingdom*, 1978, Series A, No. 25, 2 EHRR 2; *Tomasi v. France*, application no. 12850/87, judgment of 27 August 1992; *Hugh Jordan v. the United Kingdom*, application no. 24746/94, judgment of 4 May 2001; *Shamayev and others v. Georgia and Russia*, application no. 36378/02, judgment of 12 April 2005; *Öcalan v. Turkey*, application no. 46221/99, judgment of 12 May 2005.



and the elements for assessing the an absolute standard are set out in *Saadi v. Italy* discussed above in Part 1.⁶⁶⁵

Security considerations have never been found by the Court to justify a dilution of the prohibition on torture and inhuman and degrading treatment even “in the most difficult circumstances, such as the fight against terrorism and organised crime.”⁶⁶⁶

Although some terrorist acts have been committed by those who are not citizens of any Council of Europe member state, some of the worst atrocities – including the London bombings on 7 July 2005 – have been the work of the affected state’s own citizens. The clear duty under Article 1 of the ECHR, taken together with Articles 2 and 3 of the ECHR,⁶⁶⁷ to protect the public from terrorism requires states to adopt effective polices for dissuading disaffected young Europeans from embracing violence and not just sanctioning it when it occurs. Indeed, given the weakness of the procedural safeguards in place to ensure that the individuals concerned have been rightly identified as being terrorists, the suspicions may subsequently turn out to be unfounded and entirely innocent individuals may be subjected to torture. Such errors could even exacerbate the underlying problem.

In relation to detention of foreign nationals suspected of terrorism, the Grand Chamber in *A. and others v. the United Kingdom* accepted that it was for each government, as the guardian of its people’s safety, to make its own assessment on the basis of the facts known to it. It held that whilst there had been a public emergency threatening the life of the nation. The derogating measures (taken under Article 15 in respect of Article 5) had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals. It followed that there had been a

665. *Saadi v. Italy*, application no. 37201/06, [GC] judgment of 28 February 2008. See also *Daoudi v. France*, application no. 19576/08, judgment of 3 December 2009.

666. *Khashiyev and Akayeva v. Russia*, application nos. 57942/00 and 57945/00, judgment of 24 February 2005, §17.

667. See, for example, *Mastromatteo v. Italy*, application no. 377703/97, judgment of 24 October 2002.



violation of Article 5 §1 in respect of all but the Moroccan and French applicants.⁶⁶⁸

The situation of the entitlement to international protection from return of those who are suspected of involvement in terrorism is discussed in detail above Part 1, pages 17 ff.

On 11 July 2002 the Committee of Ministers of the Council of Europe adopted *Guidelines on human rights and the fight against terrorism*.⁶⁶⁹ Guideline XII deals with asylum, return (*refoulement*) and expulsion and Guideline XIII with extradition. Both are reproduced in Appendix III, page 261.

The transfer of prisoners to foreign states may only be legally effected via deportation, extradition,⁶⁷⁰ or transit and transfer of sentenced persons to serve their sentence elsewhere where legal guarantees exist. As discussed above, extradition and deportation are prohibited where the person faces Article 3 treatment in the receiving state⁶⁷¹ and applies to situations where the transfer of detainees is made through a Council of Europe member state.⁶⁷² The Court will no doubt be required to rule on related issues in the future.

The Venice Commission was asked to prepare an opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and interstate transport of prisoners.⁶⁷³ In its conclusion, the Venice Commission stressed the responsibility of the Council of Europe's member states to secure that all persons within their

668. *A. and others v. the United Kingdom*, application no. 3455/05, judgment [GC] of 19 February 2009.

669. Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies.

670. See, for example, *Öcalan v. Turkey*, application no. 46221/95, judgment [GC] of 12 May 2005.

671. See *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989.

672. See PACE, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states", doc. 10957, 12 June 2006; Second report, doc. 11302, 11 June 2007. See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3, UN Human Rights Council, 10th Session, 4 February 2009.

673. Opinion No. 363/2005, CDL-AD (2006) 009, Strasbourg, 17 March 2006. Available at: [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp).



jurisdiction enjoy internationally agreed fundamental rights (including the right to security of the person, freedom from torture and right to life).

If a Council of Europe state has reason to believe that an aeroplane crossing its airspace is carrying prisoners with the intention of transferring them to countries where they would face ill-treatment in violation of Article 3, it must take all necessary measures to prevent this and refuse the transit of persons where such a risk exists.

If a Council of Europe member state is informed or has a reasonable suspicion that any persons are being held incommunicado on foreign military bases on its territory, its responsibility under the ECHR is engaged unless it takes all measures within its power to bring this irregular situation to an end.

The Venice Commission also confirmed that the obligations arising out of the numerous bilateral and multilateral treaties in different fields such as collective self-defence, international civil aviation and military bases “do not prevent states from complying with their human rights obligations”.

Findings of the Venice Commission

The responsibility of Council of Europe member states may be engaged under the Convention in the following situations arising from arrest and secret detention:

- (a) failure to prevent arrest when in receipt of information prior to arrest by foreign agents within their jurisdiction;
- (b) active or passive co-operation in secret detentions or failure to safeguard against the risk of disappearance or investigate substantiated claims that a person has been taken into unacknowledged custody;⁶⁷⁴
- (c) where state agents act *ultra vires* in co-operating with foreign states without the knowledge of their government;⁶⁷⁵

674. *Kurt v. Turkey*, application no. 24276/94, judgment of 25 May 2001. The investigation must be efficient, effective and impartial – see *Caloc v. France*, application no. 33951/96, judgment of 20 July 2000.



- (d) failure to bring to an end suspected situations of irregular or incommunicado detention on its territory;
- (e) failure to comply with the duty to inform the CPT of detention facilities on its territory and afford the committee access.

The transfer of prisoners to foreign states may only be legally effected via deportation, extradition,⁶⁷⁶ or transit and transfer of sentenced persons to serve their sentence elsewhere where legal guarantees exist. Extradition and deportation are prohibited where the person faces Article 3 treatment in the receiving state⁶⁷⁷ and applies to situations where the transfer is made through a Council of Europe member state. Diplomatic assurances⁶⁷⁸ must be unequivocal and legally binding⁶⁷⁹ but should not be accepted where there is substantial evidence that torture is practised in the receiving state.

Member states must take “all the necessary measures” to prevent aeroplanes crossing their airspace where they have serious reasons to believe they are transferring prisoners to countries where they face torture. This includes landing and searching civil planes or obtaining the consent of the flight captain to do so in respect of state planes.⁶⁸⁰ All treaty obligations dealing with over flight permissions should ensure respect for human rights.

675. The opinion states at §120 that member states are accountable for all exercises of public power and are required to exercise effective oversight and control over the actions of security and intelligence agencies – see *Klass and others v. Germany*, Series A, No. 28, judgment of 6 September 1978 in connection with *Leander v. Sweden*, application no. 9248/81, judgment of 26 March 1987.

676. See, for example, *Öcalan v. Turkey*, application no. 46221/95, judgment [GC] of 12 May 2005.

677. See *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989.

678. See *Mamatkulov and Askеров v. Turkey*, application nos. 46827/99 and 46951/99, judgment [GC] of 4 February 2005.

679. Decision of the CAT Committee, *Agiza v. Sweden*, decision CAT/C/34/D/233/2003, 20 May 2005.

680. The opinion notes at §146 that member states are obliged to “secure the most elementary rights” in aircraft in their airspace or military bases for foreign forces “regardless of acquiescence or connivance”. See *Ilaşcu and others v. Moldova and Russia*, application no. 48787/99, judgment of 8 July 2004, *Riera Blume and others v. Spain*, application no. 37680/97, judgment of 14 January 2000, *Gongadze v. Ukraine*, application no. 34056/02, judgment of 8 November 2005.



On 27 June 2006, in a resolution⁶⁸¹ and recommendation,⁶⁸² the Parliamentary Assembly of the Council of Europe called for oversight of foreign intelligence agencies operating in Europe and has even gone so far as to demand “human rights clauses” in military base agreements with the US.

681. Resolution 1507 (2006).

682. Recommendation 1754 (2006).



Part Three – The subsidiary protection of the European Court of Human Rights

Part 3 looks at the procedure and practice of the European Court of Human Rights in relation to those substantive asylum matters falling within the scope of the Convention (which have been considered above).

Unfortunately, national remedies will not always be effective. In those cases the subsidiary protection of the European Court is there.

Article 19 ECHR states:

To ensure the observance of the engagements undertaken by the High Contracting Parties ... there shall be set up a European Court of Human Rights....

In order make the Court's role under Article 19 "practical and effective not theoretical and illusory" a right of individual petition was included in the Convention under Article 34 (see below).

Individuals who wish to petition the Court – in other words to complain about a breach of their Convention rights – are advised, not only to consult those parts of the Convention dealing with the Court's procedure, but also the Court's Rules of Procedure and any relevant Practice Directions. All of these texts are available on the Court's website.⁶⁸³ The information provided deals with the responsibilities of applicants (for example, how and when to submit applications and requests for legal aid) and the procedure of the Court in dealing with complaints (for example, expediting the examination of a case, declaring a complaint admissible or inad-

683. See <http://www.echr.coe.int/> and the sections headed "Basic Texts" and "Other Texts".



missible or striking it from the Court's list of cases). The Rules of Procedure and Practice Directions may be subject to amendment from time to time therefore it is imperative that applicants consult the most up to date version. The substance of these Rules is considered in more detail in this section.

The right of individual petition

Article 1 of the Convention requires all States Parties to the Convention to "secure to everyone within their jurisdiction the rights and freedoms" contained in the ECHR. Article 13 requires the states to give effect to Convention rights by providing victims of violations with "an effective remedy before a national authority". States thus have an obligation to refrain from violating the rights of individuals and to provide remedies for all violations of Convention rights.

Article 34 states:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Those who are victims of violations (including those at risk of violations of their Convention rights if expelled) must look first and foremost to the state concerned to remedy the violation. If a state fails, or arguably fails, to meet its Convention obligation under Article 1 to secure the right at issue it is required under Article 13 to provide an effective remedy at national level for this failure. If the state then additionally fails to remedy the wrong which has occurred (or which it is alleged will occur) the individual can then have recourse to the European Court and must be able to do so without hindrance.

The admissibility criteria for bringing complaints to the Strasbourg Court are set out in Article 35.⁶⁸⁴

The European Court is not, however, a court of appeal from national authorities' or courts' refusal to grant asylum. The Court made this clear



very early in its judgments in *Cruz Varas v. Sweden*⁶⁸⁵ and *Vilvarajah and others v. the United Kingdom*.⁶⁸⁶ However, where the national courts have proved unable or unwilling to offer the necessary protection or remedies to meet the state's convention obligations, the subsidiary protection of the European Court is available under Article 34 of the Convention.

A comprehensive coverage of the exercise of the right of individual petition is beyond the scope of this book and what follows highlights only briefly those aspects of the Court's subsidiary protection which are of practical relevance to those who work with asylum issues either as public authorities or as those seeking international protection or their representatives.

It was previously the case that in the context of asylum, recourse to the European Court was most frequently had by those at risk of being returned to face treatment prohibited by Article 3. However, as the composition of the Council of Europe and the nature of refugee flows have changed, new issues have arisen under the Convention in many states where the imminent risk of expulsion is not the only or even the most important issue (see Part 2, page 133 ff). Lack of access to the asylum determination procedure, prolonged and sometimes unlawful detention, destitution, and lack of status or documentation are just a few of the pressing problems which exist in addition to the risk of expulsion to face

684. Article 35 – Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
 - a. is anonymous; or
 - b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

685. *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991.

686. *Vilvarajah and others v. the United Kingdom*, application nos. 13163/87, 13164/87 and 13165/87, judgment of 30 October 1991.



prohibited treatment or conditions in another state. Returns (and in particular, “transfers” under the EU Dublin Regulation⁶⁸⁷) to other European states with inadequate systems for handling asylum claims are a serious problem now frequently brought to the Strasbourg Court.⁶⁸⁸

As the last sentence of Article 34 makes clear, states are under an obligation to refrain from hindering the exercise of the right of individual petition. In *Shamayev and others v. Georgia and Russia* (concerning extradition of terrorist suspects to Russia) the Court stated that:

471. It is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants are able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. The expression “any form of pressure” must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or potential applicants or their families or legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy.⁶⁸⁹

Serious issues are therefore raised under Article 34 where individuals are detained without access to the outside world or lack of access to lawyers (who can apply to the Court on their behalf), or where the rapidity of an expulsion order precludes the exercise of the right, or where undue pressure is exerted on individuals to withdraw their cases from the Court.

The Court can also order interim measures under Rule 39 of its Rules of Procedure. In particular, it can order the expulsion of an individual to be halted until the case has been heard by the European Court. Failure to comply with such measures is a violation of Article 34.⁶⁹⁰

687. See below, page 238, on the application of EU measures.

688. See e.g. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009 (pending). See also cases listed above, page 75, note 201.

689. *Shamayev and others v. Georgia and Russia*, application no. 36378/02, judgment of 12 April 2005.

690. This was the conclusion in *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, judgment of 4 February 2005. See the discussion of Rule 39 below.



The Court is currently overwhelmed by the large numbers of applications it receives under Article 34⁶⁹¹ and has implemented a number of initiatives in order to deal with cases more efficiently. These include, *inter alia*, making decisions on admissibility and the merits at the same time, encouraging friendly settlements and adopting lead judgments or pilot judgments which resolve a large number of similar cases, for example, *N.A. v. the United Kingdom*⁶⁹² concerning the return of Tamils to Sri Lanka.

Interim measures – Rule 39

Perhaps the most important mechanism for the protection of those at risk of expulsion is the Court's power to indicate interim measures under Rule 39 of the Rules of Procedure.

Rule 39 (previously Rule 36) provides:

The Chamber, or where appropriate its President, may at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or the proper conduct of the proceedings before it.

In the majority of cases, this power is invoked in urgent cases to prevent an imminent expulsion or extradition pending the Court's substantive consideration of the complaint that the return would violate Articles 2 or 3.⁶⁹³ However, the Court retains sufficient flexibility to be able to indicate Rule 39 measures in relation to other Convention articles, including Article 4 of the Convention (the prohibition of slavery and forced labour) which could play an increasingly important role in the context of expulsions cases concerning sexual exploitation or trafficking.⁶⁹⁴ There may also be those exceptional cases where enforcement of the removal measure

691. Protocols Nos. 14 and 14 bis were drawn up to reform the Court's procedures in the interests of efficiency. Protocol No. 14 received its last ratification in February 2010 and is due to enter into force on 1 June 2010. At that date Protocol No. 14 bis (dealing with a new single judge procedure), in force since 25 May 2009 for those states having accepted it, will cease to be effective.

692. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.

693. *Mamatkulov and Askarov v. Turkey*, application no. 46827/99 and 46951/99, judgment [GC] of 4 February 2005, §104.



would result in a “flagrant” violation of another right (e.g. Articles 5, 6, 8 or 9).

A threefold test must be satisfied in order for the Court to grant an interim measure. First, there must be a threat of irreparable harm of a very serious nature. Second, the harm must be imminent and irremediable, and third, *prima facie*, there must be an arguable case that removal will violate the Convention. These requirements are not found in the text of Rule 39 itself, but have been established by the Court through its case-law.

Where a Rule 39 indication is sought, a real and personal risk of harm in the country of return must be shown. However, where individuals can demonstrate this risk, it is not necessary to show that they are more at risk than other members of the group:

where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the information contained in recent reports from independent international human-rights-protection associations or governmental sources, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned. In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3 (see *N.A. v. the United Kingdom*, no. 25904/07, §116, 17 July 2008).⁶⁹⁵

This principle applies also to the application of Rule 39.

Rule 39 is not applied lightly by the Court. Legal representatives who wish to have recourse to it should not underestimate the diligent preparation that is required for a Rule 39 application to succeed. Applicants for

694. Article 4 of the ECHR gives rise to positive obligations on the part of the state to adopt measures to protect victims against the harm and suffering caused by human trafficking. See above, pages 92 ff. Whilst the application of Rule 39 in this context was in its early stages the Court indicated under this measure that the United Kingdom authorities could not remove a woman to Uganda where she would face sexual exploitation in *M. v. the United Kingdom*, application no. 16081/08, decision of 1 December 2009 (struck out of the list).

695. *Muminov v. Russia*, §95.



Rule 39 measures should comply with the Court's Practice Direction on Rule 39 applications available on the Court's website.⁶⁹⁶ The guidance includes that a request should bear the words in bold at the top, "**Rule 39 – Urgent/Article 39 – Urgent**". The Court asks that applications should be *made* in good time, but paradoxically they will not normally be *granted* unless the removal is imminent. This approach can place individuals in very precarious situations. In *Ignaoua v. Italy*⁶⁹⁷ the Court applied Rule 39 to prevent the Italian authorities from removing Tunisian citizens charged with terrorist offences without possibility of challenge and without notice. Several of their compatriots had been summarily removed in this way. Once the Italian authorities had stated that there were at present no removal directions in place, the Rule 39 measure was lifted, leaving the applicants as exposed to sudden removal as their compatriots had been.

Supporting documents (including all relevant decisions of the domestic authorities) can be sent in advance with a cover letter saying that the request will follow if development make this necessary. They can, in urgent cases, accompany the request itself. Rule 39 requests should be sent by fax not by post and can even be sent by email. The applicant or representative can telephone the Court to find the name and email address of the appropriate Registry lawyer dealing with the request.

The Court has applied Rule 39 indications to prevent the expulsion or extradition of individuals or families⁶⁹⁸ or groups of individuals, e.g. in the case of Somalis,⁶⁹⁹ or in the case of ethnic Tamils facing return to Sri Lanka. In light of an increasing number of Rule 39 applications on behalf of ethnic Tamils, the Court wrote to the United Kingdom Government stating

696. Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003.

697. *Ignaoua v. Italy* is pending the Court. At the time of writing, only the Rule 39 had been indicated to the Italian authorities.

698. *Gharibzadeh and others v. Belgium*, application no. 7295/09, communicated 21 September 2009, concerns the proposed transfer from Belgium to Greece under Dublin II of a family of Afghans.

699. Lawyers acting for several Somalis refused asylum in the Netherlands succeeded in obtaining the application of Rule 39 to a whole group of their clients. The judgment in *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, was the lead judgment on the merits for that group of cases.



that “pending the adoption of a lead judgment in one or more of the applications already communicated, Rule 39 should continue to be applied in any case brought by a Tamil seeking to prevent his removal”. The Court went on to apply Rule 39 in respect of 342 Tamil applicants who claimed that their return to Sri Lanka from the United Kingdom would expose them to ill-treatment in violation of Article 3 of the Convention.⁷⁰⁰

Rule 39 has also been applied to order the release from detention, access to lawyers, access to hospital, and the provision of medical treatment.⁷⁰¹

Once the Chamber is seized of a case it can request information from the parties connected with the implementation of any interim measure indicated (Rule 39 §2). This might include, for example, further information relating to the individual’s person circumstances, or information about the location where or conditions in which the applicant is being held or the country to which deportation is proposed.

Interim measures have been sought and granted in many cases:

- *Soering* in 1988, when it was used to prevent extradition to the USA;
- *D. v. the United Kingdom*⁷⁰² to prevent the removal of a terminal Aids patient to St Kitts;
- *Kheel v. Netherlands*,⁷⁰³ a question of expulsion to Afghanistan;
- *F.H. v. Sweden*,⁷⁰⁴ expulsion to Iraq;
- *Abdolkhani and Karimnia v. Turkey*,⁷⁰⁵ where the applicants were subject to onward expulsion to Iraq or Iran;
- *Ben Khemais v. Italy*,⁷⁰⁶ expulsion to Tunisia of an
- individual convicted of membership of a terrorist organisation;

700. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008, §§21-22.

701. *Shtukurov v. Russia*, application no. 44009/06, judgment of 27 March 2008; *Paladi v. Moldova*, application no. 39806/05, judgment [GC] of 10 March 2009; *Groni v. Albania*, application no. 25336/04, judgment of 7 July 2009.

702. *D. v. the United Kingdom*, application no. 30240/96, judgment of 2 May 1997.

703. *Kheel v. the Netherlands*, application no. 34583/08, decision of 16 December 2008 (struck out of the list). The applicant was granted a residence permit.

704. *F.H. v. Sweden*, application no. 32621/06, judgment of 20 January 2009.

705. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.

706. *Ben Khemais v. Italy*, application no. 246/07, judgment 24 February 2009.



- *Shamayev and others v. Georgia and Russia*,⁷⁰⁷ extradition of Chechens to Russia;
- *Ismoilov and others v. Russia*,⁷⁰⁸ extradition of twelve Uzbek nationals to Uzbekistan; and
- *Al-Moayad v. Germany*,⁷⁰⁹ where a Yemeni national suspected of terrorist offences was extradited to the US.

However, it is important to realise that the granting of a Rule 39 indication should not be understood as leading automatically to a substantive finding by the Court that the expulsion which has been stopped will breach Article 3.⁷¹⁰ The number of requests for Rule 39 indications received by the Court has risen exponentially in recent years. In 2008 the Court dealt with an unprecedented number of requests for Rule 39 – over 3 000 in total.⁷¹¹

The binding nature of Rule 39 indications

Most governments concerned co-operate fully with the Court and respect and comply with Rule 39 indications. However, there have been cases where governments have failed to give effect to the interim measures granted in the applicant's favour. Historically, this occurred if serious obstacles existed in domestic law and for many years was held not to constitute a violation the Convention

In the case of *Cruz Varas v. Sweden*⁷¹² a Chilean had been refused asylum in Sweden and was the subject of removal directions. Rule 39 was applied but the Swedish authorities did not comply. The Court held that states should as a matter of good practice respect and comply with Rule 39 indications. However, these were not binding in law.

707. *Shamayev and others v. Georgia and Russia*, application no. 36378/02, judgment of 12 April 2005.

708. *Ismoilov and others v. Russia*, application no. 2947/06, judgment 24 April 2008.

709. *Al-Moayad v. Germany*, application no.35865/03, decision (inadmissible) of 20 February 2007.

710. See, for example, *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, judgment of 4 February 2005; and *Olaechea Cahuas v. Spain*, application no. 24668/03, judgment of 10 August 2006.

711. European Court of Human Rights Annual Report 2008, Registry of the Court 2009.

712. *Cruz Varas and others v. Sweden*, application no. 15576/89, judgment of 20 March 1991.



This same issue arose some years later in the case of *Čonka v. Belgium*,⁷¹³ where the applicants and 74 other Roma Gypsy refugees who had been refused asylum were put on board a plane to Slovakia, notwithstanding the fact that the Court had applied Rule 39 to indicate to the Belgian Government that they should not be expelled. The Court followed its decision in *Cruz Varas*.

This unsatisfactory situation has now been resolved by the judgment of the Grand Chamber in *Mamatkulov and Askarov v. Turkey*⁷¹⁴ in 2005. The Grand Chamber found that the Turkish Government's failure to comply with the Rule 39 violated the exercise of the right of individual petition contained in Article 34. The indication had asked the Turkish authorities not to extradite the applicants to Uzbekistan where they were wanted for an alleged terrorist attack on the President, and where they alleged they were at risk of torture and the death penalty. The Court stated:

Any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment.⁷¹⁵

The violation of Article 34 can be twofold. In *Mamatkulov* the failure to comply not only resulted in the applicants' removal to the state where they claimed to be at risk, but also impeded their ability to continue to instruct their lawyers in the conduct of their complaint before the European Court. The situation was the same in *Aoulmi v. France*,⁷¹⁶ which affirmed the approach taken in *Mamatkulov*.

In *Olaechea Cahuas v. Spain*⁷¹⁷ the Court found the failure to comply with a Rule 39 indication was a violation of Article 34 even when the

713. *Čonka and others v. Belgium*, application no. 51564/99, judgment of 5 February 2002.

714. *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, judgment of 4 February 2005.

715. *Ibid.*, §110.

716. *Aoulmi v. France*, application no. 50278/99, judgment of 17 January 2006.

717. *Olaechea Cahuas v. Spain*, application no. 24668/03, judgment of 10 August 2006.



expulsion of the applicant did not prevent him from keeping in contact with his lawyers to pursue his application before the Court.

In none of the above cases did the Court (or at least its majority) find a substantive violation of Article 3. The free-standing nature of the requirement under Article 34 to comply with Rule 39 indications is thus affirmed.

In *Ben Khemais v. Italy*⁷¹⁸ the Italian Government argued that the requirement of complying with Rule 39 indications would be satisfied if the applicant was not removed until there had been an exchange of observations between him and the government and the case was ready for the Court's judgment, since he could not then have been said to have been hindered in the exercise of his Article 34 rights. The Court totally rejected this argument and noted in particular that the Italian Government had not asked the Court to lift the interim measures which were still in force. In *Paladi v. Moldova*⁷¹⁹ (not an expulsion case) the Grand Chamber held that it was not:

... open to a Contracting State to substitute its own judgment for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated. Neither is it for the domestic authorities to decide on the time-limits for complying with an interim measure or on the extent to which it should be complied with.⁷²⁰

Rather:

It is for the Court to verify compliance with the interim measure, while a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly.

Assurances by the state of destination that the applicants will come to no harm upon their return will not absolve contracting states from the duty to comply with any Rule 39 indications.

Before those two important judgments had been delivered the Court considered the case of *Sivanathan v. the United Kingdom*,⁷²¹ in which the

718. See e.g. *Ben Khemais v. Italy*, application no. 246/07, judgment of 24 February 2009.

719. *Paladi v. Moldova*, application no. 39896/05, judgment [GC] of 10 March 2009.

720. *Ibid.*, §90.



applicant (who was unrepresented) had applied for and been granted interim measures to prevent his return to Sri Lanka. Despite the authorities having been duly notified of this, his removal went ahead as planned. Some months later, in the context of the Court's enquiries, the government informed the Court that the applicant had made a "voluntary departure" on the same flight as the forced departure had been planned. No evidence was provided to support this assertion. The Court nevertheless struck out the case under Article 37 §1.a on the basis that the applicant did not intend to pursue his application. A request, relying on the judgments in *Ben Khemais* and *Paladi* for the case to be restored to the list, has now been made.

After *Paladi* and *Ben Khemais* the Court examined the cases of *Al Saadoon and Mufdhi v. the United Kingdom*. Two Iraqi prisoners who faced capital charges in the Iraqi courts were transferred to the authorities from the custody of United Kingdom forces. A Rule 39 indication to the contrary had been made by the Court. The government failed to inform either the Court or the applicants' representatives that they did not intend to comply with the interim measures ordered (principally because the UN Mandate, which authorised the detention by British forces in Iraq, was due to expire at midnight on 31 December 2008) until after the transfer into Iraqi custody had taken place. The Court was not satisfied that the Government had taken all reasonable steps, or indeed any steps, to seek to comply with the Rule 39 indication. They had not informed the Court, for example, of any attempt to explain the situation to the Iraqi authorities and to reach a temporary solution which would have safeguarded the applicants' rights until the Court had completed its examination. There was no objective justification for the transfer in connection with Article 34, and as a result of the transfer itself, the effectiveness of any appeal to the House of Lords (the highest domestic court at the time) was unjustifiably nullified. The case has been referred to the Grand Chamber.⁷²²

721. Application no. 38108/07, decision of 3 February 2009.



The Court will discontinue the application of Rule 39 before the case has been resolved only in very limited circumstances, for example where applicants withdraw their application upon the grant of a residence permit⁷²³ or on the basis of an undertaking by a government not to remove individuals pending the outcome of freshly instituted domestic proceedings.⁷²⁴

UNHCR, the Council of Europe Commissioner for Human Rights and many NGOs are concerned by the implementation of certain EU asylum measures, in particular transfers to other EU member states under the Dublin II Regulation. Many of these have involved intra EU transfers particularly to Greece, Italy and Malta (over 150 in relation to returns to Greece), although the practice of the Court in this respect has not been entirely consistent.⁷²⁵ The measure could also play a role in relation to the European Arrest Warrant and readmission agreements.

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The Parliamentary Assembly will soon produce a report on the use of Rule 39 in preventing harm to individuals facing expulsion and extradition. The motion for the report stresses the importance, in relation to Rule

722. *Al-Saadoon and Mufdhi v. the United Kingdom*, application no. 61498/08, judgment of 2 March 2010, §§160 -166. The applicants' representatives also asked the Court to order measures under Article 46 (concerning the execution of judgments) which might assist in mitigating the damage caused by the transfer. Given the failure to comply with the interim measure and the finding that the applicants had been subjected to mental suffering caused by the fear of execution amounting to treatment prohibited by Article 3, the Court required the Government to take "all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty."

723. *Ibrahim Mohamed v. the Netherlands*, application no. 1872/04, judgment of 10 March 2009.

724. Undertakings were made by the United Kingdom not to remove a number of ethnic Tamils to Sri Lanka who had previously obtained Rule 39 indications from the Court which were lifted when the individuals were invited to make a fresh claim for asylum in the domestic courts following the pilot judgment by the Court in *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.

725. See above page 80. See also ECRE Information Note 2009. European Court of Human Rights Interim Measures (Rule 39) to stop Dublin transfers, <http://cmr.jur.ru.nl/cmr/docs/ecre.rule39.pdf>.



39, of good faith, member state compliance and that a consistent coherent practice is ensured by the Court.⁷²⁶

Expediting cases

In cases where the stringent criteria for the application of interim measures under Rule 39 are not met, applicants can ask the Court to apply Rule 40 (urgent notification of an application to the respondent government) or Rule 41 (prioritising cases), both of which provide an additional mechanism for the speedy resolution of the case. In other cases, the Court can apply Rules 40 and 41 on its own initiative, either alone or in combination with Rule 39 (where there are issues which require the Court to rule quickly in an expulsion case – for example, if the individual is suicidal or in detention).

Time can be of the essence. Complaints brought to the European Court can typically take more than five years to reach judgment. Applying the urgent criteria, in *Soering v. the United Kingdom*, the time from lodging the application to judgment was a mere 12 months, and in *D. v. the United Kingdom*, the case was concluded within 15 months.

A case that exemplifies how and when Rule 39 might be applied is *Abdolkhani and Karimnia v. Turkey*.⁷²⁷ On 30 June 2008, the applicants, who were former members of the People's Mojahedin Organisation in Iran (PMOI), applied for Rule 39 to suspend removal to Iran or Iraq. On the same day the President of the Chamber indicated to the Government of Turkey under Rule 39 that the applicants should not be deported to Iran or Iraq until 4 August 2008. On 22 July 2008 the Rule 39 was extended until further notice. On 24 September 2008 the case was communicated. It was also decided that the admissibility and merits of the application would be examined together (under Article 29 §3) and that the case would be given priority (pursuant to Rule 41). Even under the prioritised procedure, judg-

726. Rule 39 indications by the European Court of Human Rights to prevent harm to refugees and migrants in extradition and expulsion cases, Motion for a recommendation, presented by Ms Corien Jonker (Netherlands, PPE/DC), 19 June 2009.

727. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009.



ment on admissibility and merits was reached on 22 September 2009 – 15 months after the Rule 39 request was lodged. The applicants were detained initially in a police station and the Court ruled that this was a violation of Article 5. The judgment is silent on the question of their detention in sub-standard conditions in a “guest-house” which formed the basis of a separate complaint lodged on 21 October 2008 and communicated on 15 December 2008. The Court has yet to rule on this separate complaint.⁷²⁸

The applicant in *N.A. v. the United Kingdom*,⁷²⁹ an ethnic Tamil, was issued with removal directions by the United Kingdom authorities on 25 June 2007. On the same day the President of the Court indicated to the United Kingdom authorities under Rule 39 that he should not be removed until further notice and the case was prioritised under Rule 41. The applicant was not detained whilst proceedings before the Court were ongoing and it took just over twelve months for the Court to reach judgment, which was delivered on 17 July 2008.

However, there are no hard and fast rules and it has been known for other cases, even where both Rule 39 and Rule 41 have been applied and the applicant has been detained, to take considerably longer.

Conditions to be fulfilled

The admissibility criteria are set out in Articles 34 and 35 of the Convention.

Victim status (Article 34) and representation

Applications can be received not only from those who have already become victims of violations, but also from those who are at risk of violations (such as expulsions) which have not yet occurred or indirect victims

728. *Abdolkhani and Karminia v. Turkey*, application no. 30471/08, communicated on 15 December 2008.

729. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.



(such as the family members of the principal victim).⁷³⁰ However, the criterion is not to be applied in a rigid, mechanical and inflexible way.⁷³¹

NGOs can only bring applications to the European Court of Human Rights in their own right if the organisation itself is the victim of the violation. They cannot bring a complaint which is an *actio popularis*, that is where they are seeking to complain, in the abstract, about a law or practice which violates the human rights of people who are of concern to them.

NGOs can, however, act as the representatives of an individual applicant or a group of applicants (Rule 36 §1). Applicants can also bring complaints unrepresented but would be ill-advised to do so unless they have no possibility of obtaining advice and representation from a lawyer or NGO familiar with the Convention's case-law and its procedural mechanisms. Under Rule 36 of the Court's Rules of Procedure, once the case has been "communicated" to the respondent government, applicants must be represented either by a lawyer authorised to practise in any Council of Europe member state (not necessarily the one against whom the complaint is brought). Anyone else who wishes to represent an applicant must, exceptionally, apply for and obtain the specific approval of the Court.

A victim of an expulsion order, or an individual with uncertain status, will lose victim status if the order is revoked or a residence permit is granted.⁷³²

Those persons whose applications for refugee status have been refused by a member state cannot be considered "victims" for the purpose of Article 34 unless they have come to the "end of a process which had nothing automatic about it" – in other words, unless they had received a final decision from a final court or tribunal which is immediately enforceable and not appealable.⁷³³

730. *Burden v. the United Kingdom*, application no. 13378/05, judgment [GC] of 29 April 2008.

731. See general principles set out by the Grand Chamber in a non-expulsion case, *Micallef v. Malta*, application no. 17056/06, judgment [GC] of 15 October 2009, §§44-48.

732. See, for example, *Sisojeva and others v. Latvia*, application no. 60654/00, judgment [GC] of 15 January 2007.



Conditions of admissibility (Article 35)

The admissibility criteria for complaints are set out in Article 35. Article 35 §1 provides that:

The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Exhaustion of domestic remedies

Applicants must exhaust all avenues of domestic remedy before they can lodge an application with the Court.⁷³⁴ The failure to exhaust domestic remedies is also a frequent reason for cases being declared inadmissible – for example, *Bahaddar v. the Netherlands* – but the only remedies which have to be exhausted are those which are effective. In expulsion cases this means the remedy must have suspensive effect (see the section on Article 13 above).

Six-month rule

Applicants must lodge their application within six months of the date of the final domestic decision.⁷³⁵ The first day of a time-limit is considered to be the day following the final decision.⁷³⁶ This rule is very strictly applied, but might theoretically be waived if the applicant was held in complete incommunicado detention at the relevant time. Neither ill-health nor ignorance of the rule have been accepted as justifying the failure to comply.

Anonymity

Under Article 35 §2.a, the application cannot be anonymous, but applicants who fear for themselves or their families can ask for their

733. *Vijayanathan and Pusparajah v. France*, application nos. 17550/90 and 17825/90, judgment of 27 August 1992.

734. *Mogos and Krifka v. Germany*, application no. 78084/01, decision of 27 March 2003.

735. *Alzery v. Sweden*, application no. 10786/04, decision of 26 October 2004.

736. *Fleri Soler and Camilleri v. Malta*, application no. 35349/05, judgment of 26 September 2006, §31.



names to be withheld from the public. It is not uncommon for applicants to request anonymity in expulsion cases where they fear ill-treatment in their country of origin on return. In some countries, such as Sri Lanka or Zimbabwe, being a failed asylum seeker can carry a risk on return (usually in combination with other factors). Therefore, individuals seeking judgment from the Court would understandably fear that its publication would attract the adverse interest of the authorities.

Application brought before several international bodies

Under Article 35 §2.b, the application must not be substantially the same as a matter which has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. Representatives who are seeking to bring their client's situation to the attention of as many human rights bodies as possible in order to minimise the risk to the client of being expelled and maximise the publicity given to the case should be particularly wary of this provision.⁷³⁷ An application made to the UNCAT Committee therefore cannot also be brought to the European Court. Many asylum-related issues are now a matter of both EU and ECHR law. A reference by a national court for a preliminary ruling from the Court of Justice of the European Union (CJEU, formerly the ECJ) in Luxembourg is unlikely to fall foul of this rule since it is technically a stage in the domestic proceedings. In the case of *Kadsoev v. Bulgaria*,⁷³⁸ which was already pending before the ECHR, the Bulgarian Court considering ongoing complaints about an asylum seeker's prolonged detention, referred the matter to the ECJ for clarification of Bulgaria's obligations under the EU Returns Directive (see below, page 243). The ECJ found the detention unlawful.⁷³⁹ The Strasbourg Court has yet to rule on either the legality of detention under Article 5 §1.f of the Convention or the interface between EU law and the ECHR.

737. See *Folgero and others v. Norway*, application no. 15472/02, judgment [GC] of 29 June 2007.

738. *Kadsoev v. Bulgaria*, application no. 56437/07, communicated 2 February 2009.

739. *Said Shamilovich Kadzoev v. Direktsia "Migratsia" pri Ministerstvo na vatrehinite raboti*, case C-357/09, 30 November 2009.



Complaint concerns a Convention right

Applicants must ensure that they complain about a matter which is regulated by the Convention. The Court has frequently pointed out that it has no jurisdiction to determine whether recognition as a refugee under the Geneva Convention has been rightly granted or withheld or discontinued (see, for example, *Ahmed v. Austria*).⁷⁴⁰ It can only decide whether an expulsion will violate Article 3 or whether another Convention article is being or has been violated. The Court's jurisdiction under Article 19 is confined to supervising compliance with the ECHR but not other international instruments such as the Geneva Convention or the EU asylum acquis.⁷⁴¹

Changes introduced by Protocol No. 14

Protocol No. 14 adds a new admissibility criterion to those previously contained in Article 35 of the ECHR.⁷⁴² The Court may declare an application inadmissible if it considers that the applicant has not suffered a significant disadvantage. This new criterion is unlikely to have any adverse effect on applications related to expulsion to face prohibited treatment. In expulsion cases the applicants will always be alleging a significant disadvantage, such as threat to their lives and/or inhuman or degrading treatment, and it is hard to see how any complaint that was not "manifestly ill-founded" under the present criteria would be excluded by the amended Article 35. It remains to be seen whether cases involving a more technical breach of the provisions on, for example freedom of movement, might be susceptible to rejection under this new provision.

Inadmissible cases

Article 35 §3 states that:

740. *Ahmed v. Austria*, application no. 25964/94, judgment of 17 December 1996.

741. See *N.A. v. the United Kingdom*, application no. 25904/07 judgment of 17 July 2008; and *Ahmed v. the United Kingdom*, application no. 31668/05, decision (inadmissible) of 14 October 2008; and *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008.

742. Article 12 of Protocol No. 14 to the ECHR amending the control system of the Convention, CETS No. 194 and Explanatory Report. See note 691, page 217.



The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse or the right of application.

It is often a matter of determining whether the applicant's account of events is credible. Inconsistencies in the applicant's evidence concerning the description of certain events or the date on which certain events occurred, factual inaccuracies, and conflicting versions of events between their application to the Court and their statements to national authorities, combined with a lack of supporting documentary evidence, often stand in the way of such applicants and prevent them from crossing the admissibility hurdle. The sections in this book on the jurisprudence of both the ECHR and of the UNCAT (above) are instructive.

The preceding sections are designed to assist NGOs and the legal representatives acting on behalf of people in need of international protection, as well as decision makers within government and the judiciary to reach a better understanding of the protection that the ECHR is able to offer and so reduce the number of applications, including inadmissible applications, to the Strasbourg Court.

Striking out applications

Striking out is seen as a mechanism for reducing the Court's overburdened caseload. It may, however, be counterproductive to this aim if issues are not dealt with by the Court in communicated cases, with the result that neither applicants nor governments know whether the Court considers that the matters raised were compatible with the Convention.

Article 37 §1 of the Convention states that the "Court may at any stage of the proceedings decide to strike an application out of its list of cases". The Court is using the strike-out procedure in an increasing number of cases concerning asylum related issues under the Convention. This may be where the individual has already been removed and the Court concludes that the individual no longer intends to pursue his application (under 37 §1.a). This is more common in Article 8 deportation cases where



there is no Article 3 issue. In other cases, the Court may determine that “the matter has been resolved”, under Article 37 §1.b which has been applied in cases where individuals seeking protection or status are granted a residence permit, as in *Sisojeva and others v. Latvia*.⁷⁴³ In the *Jomanday v. the Netherlands* case the Court granted the two sons of a recognised refugee a residence permit of a limited duration. The Court struck the case out of its list, not on the basis of Article 37 §1b that the case had been “resolved”, but under Article 37 §1.a that they no longer wished to pursue the case.⁷⁴⁴ A third category exists under Article 37 §1.c, where the Court may to strike out a case “for any other reason established by the Court, it is no longer justified to continue the examination of the application”.

Before a decision to strike out is made, the applicant should be invited by the Court to make representations on the issue. In *Sisojeva and others v. Latvia* the applicants did not consider that their grant of status resolved the issues raised in the case and there was no question of the applicants’ intention not to pursue the case. In other cases in which Article 37 §1.a, b or c do apply, individuals may be able to make representations for the Court *not* to strike out their case relying on the rule, expressed in mandatory terms, that:

... the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

Execution of judgments – the Committee of Ministers

If the Court holds that a violation of the Convention has occurred (or would occur if the applicant were to be expelled or extradited), the case is then transmitted to the Committee of Ministers under Article 46 §2, which provides that “the final judgment shall be transmitted to the Committee of Ministers, which shall supervise its execution”. The Committee meets for

743. *Sisojeva and others v. Latvia*, application no. 60654/00, judgment [GC] of 15 January 2007.

744. *Jomanday v. the Netherlands*, application no. 31893/05, decision (struck out of the list) of 20 October 2009.



two days six times a year for this express purpose. This involves the government paying any compensation or legal costs awarded by the Court, but also doing whatever may be necessary to put right the wrong which has occurred to the individual applicant. Where a systemic defect has been identified, the government may also be required to adopt general measures to ensure that such violations do not occur in the future.

The Committee of Ministers has the power to impose individual measures. These concern the specific applicant in a case and the obligation on the state to erase the consequence of the violation suffered by them.⁷⁴⁵ This might include the payment of just satisfaction awarded by the Court under Article 41 or the reopening of domestic proceedings⁷⁴⁶ and, for example, in the case of *D. v. the United Kingdom*, the revocation of a decision to expel⁷⁴⁷ or even facilitating the return of an individual who has been expelled.

The Committee of Ministers will also supervise any general measures intended to prevent further similar violations. This is an effective way to combat systemic, repeat violations of the Convention by the contracting parties. Such measures may entail constitutional, legislative, administrative or policy changes. Specific examples include instructions to relevant domestic authorities and education and/or training of public officials, the refurbishment of a detention centre or improvement in administrative procedures (which dovetails with the activities of the CPT and the Commissioner for Human Rights).

In order for the Committee to make a practical assessment of whether or not the states' obligations under the judgment have been fulfilled, the respondent state is required to provide information on the measures taken to ensure the execution of the case and can be invited formally to present an "action plan".

745. Recommendation (2000) 2 of the Committee of Ministers invites states to ensure the possibility at national level of re-examination of cases, including reopening proceedings in instances where the Court has found a violation, in order to ensure "as far as possible, restitutio in integrum".

746. *Jersild v. Denmark*, ResDH (95) 212, 11 September 1995.

747. *D. v. the United Kingdom*, ResDH (98) 10, 18 February 1998.



The competent authorities might also be required to take interim measures to limit the consequences of violations as regards individual applicants pending the adoption of more comprehensive or definitive measures (see Recommendation (2004) 6 on the improvement of domestic remedies).

In 2008, the Committee of Ministers considered measures to remedy, *inter alia*, violations of the applicants' right to respect for their family life due to their expulsion on national security grounds in 1999 and 2000 (*Al-Nashif, Bashir and others v. Bulgaria*⁷⁴⁸), the withdrawal of residence permits as a consequence of an obligation to leave the territory (*Musa and Hasan v. Bulgaria*⁷⁴⁹), the non-renewal of the residence permit following a criminal conviction of an Algerian national married to a Swiss national (*Boultif v. Switzerland*⁷⁵⁰), the unlawful detention of two Palestinian nationals at the Brussels-National Airport in December 2002 (*Riad and Idiab v. Belgium*⁷⁵¹) and the unlawful detention of Libyan nationals in the transit zone of Warsaw airport between August and October 1997 (*Shamsa v. Poland*⁷⁵²).

Where an applicant has already been expelled and is in the hands of a state which has no wish to return him, the adoption of individual measures is more problematic. No interim or final resolution has as yet been adopted in the case of *Mamatkulov and Askarov v. Turkey*.⁷⁵³

When conducting its preliminary examination of the case of *Ben Khe-mais v. Italy*, the Committee noted the fundamental importance of complying with interim measures indicated by the Court under Rule 39 of the

748. *Al-Nashif and others v. Bulgaria*, application no. 50963/99, judgment of 20 June 2002, final on 20 September 2002.

749. *Musa and Hasan v. Bulgaria*, application no. 61259/00, judgment of 11 January 2007, final on 9 July 2007.

750. *Boultif v. Switzerland*, application no. 54273/00, judgment of 2 August 2001, final on 2 November 2001.

751. *Riad and Idiab v. Belgium*, application no. 29787/03, judgment of 24 January 2008, final on 24 April 2008.

752. *Shamsa v. Poland*, application nos. 45355/99 and 45357/99, judgment of 27/11/2003, final on 27 February 2004.

753. *Mamatkulov and Askarov v. Turkey*, application nos. 46827/99 and 46951/99, judgment of 4 February 2005.



Rules of Court. Therefore the Ministers Deputies invited the Italian authorities to provide the Committee with an action plan on how they will prevent similar violations in the future and asked the government to indicate what steps it was taking in relation to *Ben Khemais*.⁷⁵⁴

Applicants can submit in writing to the Committee their comments concerning the payment of just satisfaction or relating to any negative consequences of the violation that they might be suffering. In addition, the Committee of Ministers can also take into account any other source of information, if relevant.

However, non-enforcement of judgments remains a problem, and without strict supervision and the ability to impose sanctions, state inaction would effectively create a mockery of the European human rights judicial machinery. The Council of Europe's Parliamentary Assembly, in Resolution 1516 (2006), stated that major structural deficiencies in judicial systems in Italy, Russia and Ukraine causing repeated violations of the ECHR represented a "serious danger to the rule of law".⁷⁵⁵ While the resolution did praise measures adopted in some states,⁷⁵⁶ it still expressed grave concern in many areas. In particular, and in relation to domestic asylum processing procedures, the resolution highlighted that in Greece no comprehensive plan has been presented to resolve the systemic problem of overcrowding of detention facilities (see the judgments in *Dougoz v. Greece*⁷⁵⁷ and *Peers v. Greece*⁷⁵⁸; and also Committee of Ministers' Interim

754. *Ben Khemais v. Italy*, application no. 246/07, judgment of 24 February 2009.

755. Resolution 1516 (2006) on implementation of judgments of the European Court of Human Rights. See §10.

756. In Italy the Azzolini law of 2006 has created a legislative basis for a special procedure for the supervision of the implementation of judgments by the government and parliament; in Ukraine the adoption of a law in 2006 provides for a co-ordinated approach, under the supervision of the government agent before the Court, to ensure the proper implementation of the Court's judgments. In the United Kingdom, a new practice was introduced in March 2006 consisting of progress reports on the implementation of Court judgments presented by the Joint Human Rights Committee of the British Parliament. In the case of *Slivenko v. Latvia* (application no. 48321/99, judgment of 9 October 2003) the applicants' rights of permanent residence in Latvia have recently been restored, in line with the Committee requests. Latvia thus erased the effects of the applicants' expulsion to Russia found by the Court to be in violation of the ECHR.

757. Application no. 40907/98, judgment of 6 March 2001.

758. Application no. 28524/95, judgment of 19 April 2001.



Resolution DH (2005) 2), which has been highlighted in another judgment (*Kaja v. Greece*⁷⁵⁹).

Parliamentary Assembly Recommendation 1764 (2006) talks in terms of “increasing pressure and taking firmer measures” in cases of continuous non-compliance with a judgment by a member state due to either refusal, negligence or incapacity to take appropriate measures. The Assembly urged the Committee of Ministers to reserve “special treatment” for the most important problems in the implementation of judgments, as detailed in Resolution 1516 (2006). Exactly what this special treatment will be remains to be seen.⁷⁶⁰

The review of the execution of judgments is therefore a long, slow process, even when the government is co-operative, and it is often not until years after a judgment that a final resolution closing the case is adopted.

Protocol No. 14 includes a provision relating to the refusal by a contracting party to abide by a final judgment of the Court. Article 16 of the Protocol (amending Article 46 of the Convention) enables the Committee of Ministers, by a majority of two-thirds, to refer the question to the Court as to whether that state has failed to fulfil its obligations under Article 46 §1 of the Convention. However, while this provision would allow the Court to scrutinise the execution of its judgment, it does not provide the Court with any power to lay down sanctions if it finds a failure by the state to abide by Article 46 §1 of the ECHR.

A further development is the setting up, in 2008, of the new Human Rights Trust Fund whose mission, *inter alia*, is to assist in ensuring the full and timely execution of judgments of the European Court of Human Rights. At the time of writing, the fund had been used to assist the execution of judgments in six countries, including those in Chechnya.⁷⁶¹

759. Application no. 32927/03, judgment of 27 July 2006.

760. Application no. 40907/98, judgment of 6 March 2001.

761. See Committee of Ministers of the Council of Europe, *Supervision of the Execution of Judgments of the European Court of Human Rights*, Second Annual Report, 2008, published April 2009.



Asylum and the European Union

ECHR approach to EU law

Reference has been made throughout this book to the provisions of EU law which regulate the disposal of asylum-related issues in the 27 of the 47 Council of Europe states which are also member states of the EU. Some member states have exercised the option not to participate in or be bound by these measures.

Background

Member states began co-operation in the field of asylum outside the formal structures of the Community. The Schengen and Dublin Conventions were among the results of this early intergovernmental co-operation. Later, the Treaty on European Union formally recognised immigration and asylum as “matters of common interest of the European Union Member States in the Third Pillar”.

Since the early 1990s the flow of persons seeking international protection in the European Union has been such that the member states decided to find common solutions to the challenge. In a Europe without internal borders, it made sense to aim for an approximation of conditions for asylum seekers, so that one country would not seem more attractive a destination than another. The entry into force of the Treaty of Amsterdam in May 1999 marked a new stage in European Union asylum policy. Title IV of the Treaty provides for “an area of freedom, security and justice” and provides the legal basis for the European Union to develop new powers to develop legislation on immigration and asylum matters. Since the major principles and aims were agreed at Tampere in 1999, numerous legal instruments on asylum have been produced.

The adoption of the Hague Programme in November 2004 set up the second phase instruments of the Common European Asylum System (CEAS) with a view to completion by 2010.

Beyond 2010, the future of the CEAS includes the Policy Plan on Asylum adopted by the Commission in June 2008 proposing an ambitious



extension and overhaul of European legislation on asylum. The European Commission proposed that the Procedures Directive and the Reception Conditions Directive 2003/9/EC be recast. UNHCR and civil-society proposals on the recast only reflect the international obligations of the EU 27, including those under the CAT, ICCPR and the CRC. Accordingly the proposals represent a codification of current obligations rather than a change in applicable standards.

At the time of writing the Asylum Support Office was anticipated to be up and running by 2010. The Stockholm Programme was adopted by the European Council in December 2009.

The Lisbon Treaty was finally ratified and entered into force in December 2009. The Treaty provides for the establishment of a “uniform status of asylum”, a “uniform status of subsidiary protection”, as well as a “common procedure” throughout the EU. The Lisbon Treaty makes the EU Charter of Fundamental Rights legally binding. The Charter includes important provisions including Article 18 on the right to asylum and Article 19 on the principle of *non-refoulement*.⁷⁶²

On 1 January 2008 the European Refugee Fund (ERF) was set up with the objective of improving both the fairness and efficiency of asylum procedures and the reception conditions afforded to refugees, displaced persons and beneficiaries of subsidiary protection. Six hundred and twenty-eight million euros for the period 2008-2013 is available to member states, and 10% of the total annual resources is available for Community actions which emphasise practical co-operation with member states. All member states participate, except Denmark. The United Kingdom and Ireland have opted in to the scheme.

762. Three countries have opted out respectively of those parts of the Charter dealing with labour rights (the United Kingdom), family rights and morality (e.g. abortion) (Poland), and post-World War II property issues (Czech Republic). The Irish Republic and the United Kingdom currently have an opt-out from European policies concerning asylum, visas and immigration. Under the new treaty they have the right to opt in or out of any policies in the entire field of justice and home affairs. Denmark will continue with its existing opt-out of justice and home affairs, but has the right under the new treaty to opt for the pick-and-choose system.



The key EU instruments

EU law now regulates many aspects of asylum in more than half the states which are party to the ECHR. The various measures adopted at EU level and referred to here are directly applicable in all member states (except those which have opted out).

Five main EU legal instruments on asylum are of particular relevance to the ECHR and are already, or shortly will become, binding in all participating member states. A full list of the EU measures can be found in Appendix II on page 257.

Dublin II Regulation (Council Regulation 343/2003)

The Regulation establishes the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third country national.

The Dublin Regulation replaced the earlier Dublin Convention, and did not originally apply to Denmark, but since 1 April 2006 an additional agreement has been in force extending its application (and that of the EURODAC Regulation) to Denmark.

The ECJ ruled on the case of *Migrationsverket v. Petrosian and others* (Case C-19/08 29 January 2009) concerning the taking back under Dublin II by a member state of an asylum seeker whose application has been refused and who is in another member state where he has submitted a fresh asylum application. Several cases are pending before the European Court of Human Rights on the question of whether or not Dublin II transfers to (principally Greece) are Convention compliant.⁷⁶³

Reception Conditions Directive 2003/9/EC

The Directive requires member states to provide basic support needs to asylum seekers whilst they are awaiting the determination of their claims. It requires states to provide a “dignified standard of living and comparable living conditions in all member states” and covers issues such as the right to information and documentation, provision of accommoda-

763. See above at page 80.



tion and financial support, access to employment and freedom of movement. It also includes standards for the treatment of persons with special needs, minors, unaccompanied children and survivors of torture.

Ireland and Denmark have opted out of the Directive.

The *Commission v. Greece* (Case C-72/06) case concerned the failure by Greece to transpose and implement this Directive. Whilst Greece is now said to have transposed the Directive, the European Parliament and civil society have taken the strong view that this has not been done satisfactorily. For example, the Strasbourg Court found that the length and conditions of detention of an asylum seeker in a pre-fabricated hut in Greece engaged Article 3 of the Convention (*S.D. v. Greece*⁷⁶⁴). The case of *Sharifi and others v. Italy and Greece* concerns the treatment a group of undocumented migrants, including asylum seekers, received in both Italy and Greece. It has recently been communicated by the Court to both respondent governments and UNHCR. Some NGOs have also intervened.

Qualification Directive 2004/83/EC

The Qualification Directive 2004/83/EC provides legally binding criteria for the identification of Geneva Convention refugees and for those entitled to “subsidiary protection”. It also establishes a legal entitlement for those who fall within its ambit to significant substantive and procedural benefits. It excludes from its ambit certain persons who are entitled to protection under international human rights law, although recital 6 of its preamble states “the main objective of this Directive is ... to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection”.

Denmark has opted out of the Directive.

In 2009 the ECJ was called upon to decide the following questions in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* (Case C-465/07) (2008/C8/08):

Is Article 15 (c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of

764. *S.D. v. Greece*, application no. 53541/07, judgment of 11 June 2009.



the European Court of Human Rights, also has a bearing, or does Article 15 (c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?

If Article 15 (c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15 (c) of the Directive, read in conjunction with Article 2 (e) thereof?

Elgafaji is discussed in more detail above.

There are currently a number of references to the ECJ concerning the meaning of the criteria for subsidiary protection under Article 15 (c). In *Elgafaji*, the ECJ ensured that their approach was fully consistent with the judgment by the European Court of Human Rights in *N.A. v. the United Kingdom* in relation to Article 3. There are a number of other cases pending the ECJ concerning the meaning of humanitarian protection under the same provision.

Asylum Procedures Directive (2005/85)

The Asylum Procedures Directive was to be transposed by 1 December 2007. It includes provisions on the first asylum country, safe third country and safe country of origin. Many have criticised the Directive as a means to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the European Union. The UNHCR has particularly criticised the Directive in relation to the provisions on safe third country and non-suspensory appeals, neither of which appear to reflect the standards of the ECHR set out elsewhere in this book.

Denmark has opted out of the Directive.



Return Directive 2008/115/EC

The Return Directive (Directive 2008/115/EC)⁷⁶⁵ was formally adopted by the Council on 9 December 2008 and must be transposed by 24 December 2010, except for legislation concerning Article 13 (4) on legal assistance and representation, which must be in place by 24 December 2011.⁷⁶⁶

The Directive aims to set out common standards and procedures in the member states for returning irregularly staying third-country nationals. Arguably, the most controversial aspect of this Directive is the fixing, for the first time, of a maximum period of detention at 18 months (6 months extendable by a further 12). The immediate response by some member states was to lengthen their maximum detention periods.

The ECJ in *Saïd Shamilovich Kadzoev v. Direktsia "Migratsia" pri Ministerstvo na vatrešnite raboti*⁷⁶⁷ examined the detention of a Chechen asylum seeker in Bulgaria under Articles 15 (4) to 15 (6) of the Return Directive 2008/115/EC, which forms part of the chapter on detention for the purposes of removal. It is discussed in more detail above, page 134. Mr Kadzoev's case before the European Court of Human Rights has now been pending for two years.⁷⁶⁸

The approach of the European Court of Human Rights to the EU law

At the time of writing, as far as the author is aware, there is no case before the European Court of Human Rights where the applicant has successfully argued a breach of a provision of the ECHR resulting from the application of an EU asylum measure. At the same time, the Court of Justice of the European Union (as it became on 1 December 2009 following

765. Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals (The Return Directive).

766. The Directive applies to all EU member states except the United Kingdom, Ireland and Denmark. It also covers Iceland, Norway, Switzerland and Liechtenstein within the meaning of the agreements concluded between the EU and those countries as regards their association with the Schengen acquis.

767. Case C-357/09, 30 November 2009.

768. *Kadzoev v. Bulgaria*, application no. 56437/07, communicated 2 February 2009.



the entry into force of the Lisbon Treaty) will examine an increasing number of cases under the asylum *acquis*.

The European Court of Human Rights is now being called upon to consider two types of EU-related complaints in the context of asylum: first, where a state relies on the provisions of the relevant EU law to justify the violations of the ECHR which are alleged; and second where the acts or omissions in question are in themselves in violation of the provisions of the EU asylum regime and thus not in accordance with the law as required by many provisions of the Convention.

The Court has already examined the relationship between EU law and the ECHR on a number of occasions. A number of important principles are derived from cases not dealing with asylum. In *Matthews v. the United Kingdom*⁷⁶⁹ the Court held that where the breach of a Convention right stemmed from the provisions of the primary EC treaties, member states would remain responsible for securing those rights. The Court noted that measures adopted by the EC could not themselves be challenged before the Court as the EC was not itself a Contracting Party to the Convention. The Court has also recently considered a case where the violation of the Convention derived from the state's failure to implement EU law. In *Aristimuño Mendizabal v. France*,⁷⁷⁰ the failure to issue the Spanish applicant with a residence permit as a citizen of another member state for over fourteen years amounted to a breach of her Community law rights. The interference with her Article 8 rights was therefore not "in accordance with the law", as required by Article 8 §2 irrespective of whether it was domestic law or Community law.

In *Bosphorus Airways v. Ireland*⁷⁷¹ the Court had to consider whether Ireland could be held accountable under the ECHR for actions it was required to carry out in order to comply with EU law. The Grand Chamber formulated the principle of "equivalent" protection under ECHR and EU

769. *Matthews v. the United Kingdom*, application no. 24833/94, judgment of 18 February 1999. A case brought under Article 3 of Protocol No. 1 to the ECHR concerning the inability of the citizens of Gibraltar to participate in elections to the European Parliament.

770. Application no. 51431/99, judgment of 17 January 2006.

771. Application no. 45036/98, judgment of 30 June 2005.



law. States would be presumed not to have departed from their Convention obligations when fulfilling their obligations under EU law. This presumption would be rebutted if the protection was manifestly deficient. As such, the *ordre public* mission of the Convention would be found to outweigh international, EU interests. This approach ensured a compromise between the protection of Convention rights and the freedom of member states to transfer sovereignty to international organisations such as the EU.

In the context of asylum, in *N.A. v. the United Kingdom*, the Court stated that its supervisory role under Article 19 was confined to examining alleged breaches of provisions of the ECHR (e.g. in that case, Article 3) and therefore any submissions on EU asylum law (concerning the Qualification Directive 2004/83/EC) would remain outside the scope of examination.⁷⁷²

In *Ahmed v. the United Kingdom*⁷⁷³ the applicant was granted refugee status and leave to remain in the United Kingdom for five years after he had petitioned the Court and subsequently been invited to make a fresh claim for asylum, which was ultimately successful. In his application to the Court he relied on the Qualification Directive 2004/83/EC claiming that he had been deprived of benefits accruing under the Directive, including access to employment, welfare payments and accommodation. The Court reiterated the point that “it is not its task to apply directly the level of protection offered in other international instruments. The applicant’s submissions on the basis of Directive 2004/83/EC are outside the scope of its examination of the present application”.

The Court in *K.R.S. v. the United Kingdom* recalled its judgment in *T.I.* to the effect that it would not be acceptable to place automatic reliance on the arrangements made under the Dublin Convention, now the Dublin II Regulation. In *K.R.S.* it stated:

Where States established international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities,

772. *N.A. v. the United Kingdom*, application no. 25904/07 judgment of 17 July 2008, §103.

773. *Ahmed v. the United Kingdom*, application no. 31668/05, decision (inadmissible) of 14 October 2008.



there could be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (*Waite and Kennedy v. Germany* [GC], no. 26083/94, §67, ECHR 1999-I) ... Returning an asylum seeker to another European Union member state, Norway or Iceland according to the criteria set out in the Dublin Regulation, as is proposed in the present case, is the implementation of a legal obligation on the State in question which flows from its participation in the asylum regime created by that Regulation. The Court observes, though, that the asylum regime so created protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance.

On the substantive Article 3 issue in *K.R.S. v. the United Kingdom*, the Court found that the Dublin transfer of the applicant to Greece would not expose him to a real risk of onward expulsion to Iran. In any event, should the applicant once returned to Greece, find himself faced with this risk, his remedy would lie against Greece not the United Kingdom. Furthermore the United Kingdom could not be held responsible for Greece's failure to ensure appropriate reception conditions. The inadmissibility decision in *K.R.S* was taken without the case being formally publicly communicated to the government so that there was no possibility for third parties to intervene to inform the court about the situation in Greece. The case of *Quraishi v. Belgium* concerning a Dublin transfer to Greece of three Afghan nationals was declared inadmissible for non-exhaustion of domestic remedies.⁷⁷⁴ The case of *Sharifi and others v. Italy and Greece*⁷⁷⁵ raises issues of compliance of both respondent states with a number of measures under the EU asylum acquis. Judgment is awaited in that case.

Analogous substantive and procedural rights exist in EU law under the Dublin II Regulation and the four directives mentioned above. Decisions,

774. *Quraishi v. Belgium*, application no. 6130/08, decision (inadmissible) of 12 May 2009.

775. *Sharifi and others v. Greece and Italy*, application no. 16643/09, communicated 13 July 2009.



acts or omissions which are not in accordance with those measures may *ipso facto* violate the Convention.

In this context, it is thought that the Court's approach to matters of EU asylum law is misguided in that once transposed, the Directive becomes a matter of domestic law; for example, in the United Kingdom, in the form of statutory instruments (secondary legislation) prepared by the Home Office and laid before Parliament.⁷⁷⁶

A further concern regarding the relationship of the jurisdictions of both European courts relates to cases falling under the European Arrest Warrant (EAW).⁷⁷⁷ Where a member state has "opted out" of the jurisdiction of the European Court of Justice – now the Court of Justice of the European Union – under Article 35, individuals surrendered from the opting-out state to another may face onward return to a third state where they will suffer prohibited treatment, with no possibility for the ECJ to examine whether the impugned measure complies with human rights or the rule of law. This is the precise concern in a number of cases pending the European Court regarding surrenders under the EAW from the United Kingdom (which has opted out under Article 35) to Italy, which has accepted the Court's jurisdiction as regards the EAW Framework Decision.⁷⁷⁸

The Court glossed over the issue of the EU-Russia readmission agreement in the case of *Mikolenko v. Estonia*, focusing instead on the concrete situation of the applicant in detention and finding a violation of Article 5.⁷⁷⁹

Protocol No. 14 to the Convention (not in force at the time of writing) foresees in Article 17 the possibility of the EU becoming a party to the

776. Eg. the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, which together with amendments to the Immigration Rules (HC 395) in part implement Council Directive 2004/83/EC of 29 April 2004, the Qualification Directive.

777. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA).

778. The cases of *Ignaoua and others v. the United Kingdom* and *Ognaoua and others v. Italy* concern the return of Tunisians to Italy under an EAW where they would be at risk of onward expulsion to Tunisia, as has occurred in the case of several other Tunisians.

779. *Mikolenko v. Estonia*, application no. 10664/05, judgment of 8 October 2009.



ECHR in the future. The coming into force of the Lisbon Treaty has made this possible from the EU's perspective.



Conclusion

In many European countries a right of individual petition to an international tribunal exists only under the ECHR. The protection which the Convention organs offer to asylum seekers and refugees is consequently the most important safeguard against the interests of the state eclipsing the human rights of individuals. The last decade of the millennium saw important developments in the Convention jurisprudence in this field and the robust statements of principle made by the Court have made an important contribution to safeguarding the rights of those who are at risk from prohibited treatment in their country of origin. How the Court will continue to respond to the needs of those at risk not only in their countries of origin, but exposed to racism and xenophobia, destitution, or limbo situations through lack of status in the host countries, remains to be seen.



Appendix I – Selected Council of Europe instruments relating to asylum

- **Resolution 28 (1953)** on the promotion of a European policy for assisting refugees, Parliamentary Assembly
- **European Agreement on the Abolition of Visas for Refugees**, 1959
- **Recommendation 434** (1965) on the granting of the right of asylum to European refugees, Parliamentary Assembly
- **Protocol** to the European Convention on Consular Functions concerning the Protection of Refugees, 1967
- **Resolution 14 (1967)** on asylum to persons in danger of persecution, Committee of Ministers
- **Recommendation 564** (1969) on the acquisition by refugees of the nationality of their country of residence, Parliamentary Assembly
- **Recommendation 773** (1976) on *de facto* refugees, Parliamentary Assembly
- **Recommendation 775** (1976) on the preparation of an agreement concerning the transfer of responsibility for refugees who move lawfully from one member state of the Council of Europe to another, Parliamentary Assembly
- **Recommendation 787** (1976) on harmonisation of eligibility practice, Parliamentary Assembly
- **Recommendation 817** (1977) on the right of asylum, Parliamentary Assembly
- **Declaration** on Territorial Asylum, 1977, Committee of Ministers



- **European Agreement** on Transfer of Responsibility for Refugees, 1980
- **Recommendation No. R (81) 16** on the harmonisation of national procedures relating to asylum, 1981, Committee of Ministers
- **Recommendation No. R (84) 1** on the protection of persons not formally recognised as refugees, 1984, Committee of Ministers
- **Recommendation No. R (84) 21** on the acquisition by refugees of the nationality of the host country, 1984, Committee of Ministers
- **Recommendation 984** (1984) on the acquisition by refugees of the nationality of the receiving country, Parliamentary Assembly
- **Recommendation 1016** (1985) on living and working conditions of refugees and asylum seekers, Parliamentary Assembly
- **Recommendation 1088** (1988) on the right to territorial asylum, Parliamentary Assembly
- **Order No. 442** (1988) on the right to asylum, Parliamentary Assembly
- **Recommendation 1081** (1988) on the problems of nationality in mixed marriages, Parliamentary Assembly
- **Recommendation 1149** (1991) on Europe of 1992 and refugee policies, Parliamentary Assembly
- **Recommendation 1163** (1991) on the arrival of asylum seekers at European airports, Parliamentary Assembly
- **Recommendation 1144** (1991) on the situation of frontier populations and workers, Parliamentary Assembly
- **Recommendation 1211** (1993) on clandestine migration: traffickers and employers of clandestine migrants, Parliamentary Assembly
- **Recommendation 1236** (1994) on the right of asylum, Parliamentary Assembly
- **Recommendation 1237** (1994) on the situation of asylum seekers whose asylum applications have been rejected, Parliamentary Assembly
- **Recommendation No. R (94) 5** on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum seekers at European airports, 1994, Committee of Ministers



- **Recommendation 1261** (1995) on the situation of immigrant women in Europe, Parliamentary Assembly
- **Recommendation 1277** (1995) on migrants, ethnic minorities and media, Parliamentary Assembly
- **Recommendation 1309** (1996) on the training of officials receiving asylum seekers at border points, Parliamentary Assembly
- **Recommendation 1327** (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe, Parliamentary Assembly
- **Recommendation No. R (98) 13** on the right to an effective remedy by rejected asylum seekers against decisions on expulsion in the context of Article 3 of the ECHR, 1998, Committee of Ministers
- **Recommendation No. R (98) 15** on the training of officials who first come into contact with asylum seekers, in particular at border points, 1998, Committee of Ministers
- **Recommendation No. R (99) 12** on the return of rejected asylum seekers, 1999, Committee of Ministers
- **Recommendation 1440** (2000) on restrictions on asylum in the member states of the Council of Europe and the European Union, Parliamentary Assembly
- **Recommendation 1470** (2000) on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, Parliamentary Assembly
- **Recommendation 1475** (2000) on the arrival of asylum seekers at European airports, Parliamentary Assembly
- **Resolution 1247 (2001)** on female genital mutilation, Parliamentary Assembly
- **Recommendation 1525** (2001) on the United Nations High Commissioner for Refugees and the 50th anniversary of the Geneva Convention, Parliamentary Assembly
- **Recommendation 1544** (2001) on the *propiska* system applied to migrants, asylum seekers and refugees in Council of Europe member states: effects and remedies, Parliamentary Assembly



- **Recommendation 1547** (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, Parliamentary Assembly
- **Recommendation 1552** (2002) on vocational training of young asylum seekers in host countries, Parliamentary Assembly
- **Recommendation 1569** (2002) on the situation of refugees and internally displaced persons in the Federal Republic of Yugoslavia
- **Recommendation Rec (2003) 5** to member states on measures of detention of asylum seekers, 2003, Committee of Ministers
- **Resolution 1327 (2003)** on so-called “honour crimes”, Parliamentary Assembly
- **Recommendation 1612** (2003) on the situation of Palestinian refugees, Parliamentary Assembly
- **Recommendation 1633** (2003) on the forced returns of Roma from the former Federal Republic of Yugoslavia, including Kosovo, to Serbia and Montenegro from Council of Europe member states, Parliamentary Assembly
- **Recommendation 1645** (2004) on access to assistance and protection for asylum seekers at European seaports and coastal areas, Parliamentary Assembly
- **Recommendation 1667** (2004) on the situation of refugees and displaced persons in the Russian Federation and some other CIS countries, Parliamentary Assembly
- **Recommendation Rec** (2004)9E on the concept of “membership of a particular social group” (MPSG) in the context of the 1951 Convention relating to the status of refugees.
- **Twenty guidelines on forced return**, 4 May 2005, adopted by the Committee of Ministers
- **Resolution 1471 (2005)** on accelerated asylum procedures in Council of Europe member states
- **Recommendation Rec (2005)6** to member states on exclusion from refugee status in the context of Article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, 2005, Committee of Ministers



- **Convention** on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197
- **Convention** on the Avoidance of Statelessness in Relation to State Succession, 15 March 2006, CETS 200
- **Convention** on the Avoidance of Statelessness in relation to State Succession, 2006, Committee of Ministers
- **Recommendation Rec (2006) 6** to member states on internally displaced persons, 2006, Committee of Ministers
- **Resolution 1483 (2006)** on the policy of return for failed asylum seekers in the Netherlands, Parliamentary Assembly
- **Recommendation 1755** (2006) on the human rights of irregular migrants, Parliamentary Assembly
- **Guidelines** on human rights and the fight against terrorism, adopted by the Committee of Ministers of the Council of Europe at the 804th meeting of the Ministers' Deputies. (See Guideline XII. Asylum, return (*refoulement*) and expulsion).
- **Recommendation 1768** (2006), The image of asylum-seekers, migrants and refugees in the media
- **Recommendation 1802** (2007), Situation of longstanding refugees and displaced persons in South East Europe
- **Recommendation 1808** (2007), Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers
- **Recommendation 1850** (2008), Europe's "boat-people": mixed migration flows by sea into southern Europe
- **Guidelines** on human rights protection in the context of accelerated asylum procedures, 1 July 2009
- **Recommendation 1889** (2009), Improving the quality and consistency of asylum decisions in the Council of Europe member states
- **Recommendation 1891** (2009), Migrant women: at particular risk from domestic violence
- **Resolution 1707** (2010), Detention of asylum seekers and irregular migrants in Europe



Appendix II – Key European Union texts relating to asylum

- **Dublin Convention** determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities and measures for implementation (15 June 1990)
- **Resolution** on manifestly unfounded applications for asylum (30 November 1992)
- **Resolution** on a harmonised approach to questions concerning host third countries (30 November 1992)
- **Conclusions** on countries in which there is generally no serious risk of persecution (30 November 1992)
- **Decision** establishing a clearing house (CIREA) (30 November 1992)
- **Decision** setting up a centre for Information Discussion and Exchange on the Crossing of Borders and Immigration (CIREFI) (30 November 1992)
- **Recommendation** regarding practices followed by Member States on expulsion (30 November 1992)
- **Recommendation** regarding transit for the purposes of expulsion (30 November 1992)
- **Resolution** on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia (1 June 1993)



- **Resolution** on minimum guarantees for asylum procedures (20 June 1995)
- **Joint Position** on the harmonised application of the definition of the term “refugee” in Article 1 of the Geneva Convention relating to the Status of Refugees (4 March 1996)
- **Regulation 2725/2000** of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention
- **Regulation 539/2001** of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement
- **Decision 258/2001** of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or Iceland or Norway
- **Directive 2001/40** of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals
- **Directive 2001/51** of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985
- **Directive 2001/55** of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
- **Council Framework Decision** of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
- **Council Framework Decision** of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence



- **Directive 2002/90** of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence
- **Directive 2003/9** of 27 January 2003 laying down minimum standards for the reception of asylum seekers
- **Regulation 343/2003** of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
- **Regulation 1560/2003** of 2 September 2003 laying down detailed rules for the application of Council Regulation 343/2003 of 18 February 2003
- **Directive 2003/86** of 22 September 2003 on the right to family reunification filed by the European Parliament in the Court of Justice of the European Communities
- **Directive 2003/109** of 25 November 2003 on the status of third-country nationals who are long-term residents
- **Directive 2004/38** on the right of citizens of the Union and their family members to move and reside freely within the territory of the European Union
- **Directive 2004/83** of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
- **Directive 2005/85** of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (to be transposed by EU Member States by 1 December 2007)
- **Directive 2008/115/EC** of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
- **Directive 2008/115/EC** of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals



In response to problems associated with certain of the above documents, the European Commission has proposed a recast of certain documents:

- European Commission, **Proposal** for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), 3 December 2008, COM (2008) 815 final
- European Commission, **Proposal** for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), 21 October 2009, COM(2009) 554 final; 2009/0165 (COD)



Appendix III – Guidelines on human rights and the fight against terrorism (extract)

**Adopted by the Committee of Ministers on 11 July 2002
at the 804th meeting of the Ministers' Deputies**

XII. Asylum, return ("refoulement") and expulsion

1. All requests for asylum must be dealt with on an individual basis. An effective remedy must lie against the decision taken. However, when the State has serious grounds to believe that the person who seeks to be granted asylum has participated in terrorist activities, refugee status must be refused to that person.

2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("refoulement") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment.

3. Collective expulsion of aliens is prohibited.

4. In all cases, the enforcement of the expulsion or return ("refoulement") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII. Extradition

1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.



2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

(i) the person whose extradition has been requested will not be sentenced to death;

or

(ii) in the event of such a sentence being imposed, it will not be carried out.

3. Extradition may not be granted when there is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;

(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.



Appendix IV – Dates of ratification of the ECHR and its protocols by simplified chart of signatures and ratifications

Status as of 1 March 2010

State	ECHR	Protocol No. 1	Protocol No. 4	Protocol No. 6	Protocol No. 7	Protocol No. 12	Protocol No. 13	Protocol No. 14
Albania	02.10.96	02.10.96	02.10.96	21.09.00	02.10.96	26.11.04	06.02.07	03.02.06
Andorra	22.01.96			22.01.96			26.03.03	17.07.06
Armenia	26.04.02	26.04.02	26.04.02	29.09.03	26.04.02	17.12.04		07.01.05
Austria	03.09.58	03.09.58	18.09.69	05.01.84	14.05.86		12.01.04	23.01.06
Azerbaijan	15.04.02	15.04.02	15.04.02	15.04.02	15.04.02			19.05.06
Belgium	14.06.55	14.06.55	21.09.70	10.12.98			23.06.03	14.09.06
Bosnia and Herzegovina	12.07.02	12.07.02	12.07.02	12.07.02	12.07.02	29.07.03	29.07.03	19.05.06
Bulgaria	07.09.92	07.09.92	04.11.00	29.09.99	04.11.00		13.02.03	17.11.05
Croatia	05.11.97	05.11.97	05.11.97	05.11.97	05.11.97	03.02.03	03.02.03	30.01.06
Cyprus	06.10.62	06.10.62	03.10.89	19.01.00	15.09.00	30.04.02	12.03.03	17.11.05
Czech Republic	18.03.92	18.03.92	18.03.92	18.03.92	18.03.92		02.07.04	19.05.06
Denmark	13.04.53	13.04.53	30.09.64	01.12.83	18.08.88		28.11.02	10.11.04
Estonia	16.04.96	16.04.96	16.04.96	17.04.98	16.04.96		25.02.04	26.01.06
Finland	10.05.90	10.05.90	10.05.90	10.05.90	10.05.90	17.12.04	29.11.04	07.03.06
France	03.05.74	03.05.74	03.05.74	17.02.86	17.02.86			07.06.06
Georgia	20.05.99	07.06.02	13.04.00	13.04.00	13.04.00	15.06.01	22.05.03	10.11.04
Germany	05.12.52	13.02.57	01.06.68	05.07.89			11.10.04	11.04.06
Greece	28.11.74	28.11.74		08.09.98	29.10.87		01.02.05	05.08.05
Hungary	05.11.92	05.11.92	05.11.92	05.11.92	05.11.92		16.07.03	21.12.05
Iceland	29.06.53	29.06.53	16.11.67	22.05.87	22.05.87		10.11.04	16.05.05
Ireland	25.02.53	25.02.53	29.10.68	24.06.94	03.08.01		03.05.02	10.11.04
Italy	26.10.55	26.10.55	27.05.82	29.12.88	07.11.91			07.03.06
Latvia	27.06.97	27.06.97	27.06.97	07.05.99	27.06.97			28.03.06



State	ECHR	Protocol No. 1	Protocol No. 4	Protocol No. 6	Protocol No. 7	Protocol No. 12	Protocol No. 13	Protocol No. 14
Liechtenstein	08.09.82	14.11.95	08.02.05	15.11.90	08.02.05		05.12.02	07.09.05
Lithuania	20.06.95	24.05.96	20.06.95	08.07.99	20.06.95		29.01.04	01.07.05
Luxembourg	03.09.53	03.09.53	02.05.68	19.02.85	19.04.89	21.03.06	21.03.06	21.03.06
Malta	23.01.67	23.01.67	05.06.02	26.03.91	15.01.03		03.05.02	04.10.04
Moldova	12.09.97	12.09.97	12.09.97	12.09.97	12.09.97		18.10.06	22.08.05
Monaco	30.11.05		30.11.05	30.11.05	30.11.05		30.11.05	10.03.06
Montenegro	03.03.04	03.03.04	03.03.04	03.03.04	03.03.04	03.03.04	03.03.04	06.09.05
Netherlands	31.08.54	31.08.54	23.06.82	25.04.86		28.07.04	10.02.06	02.02.06
Norway	15.01.52	18.12.52	12.06.64	25.10.88	25.10.88		16.08.05	10.11.04
Poland	19.01.93	10.10.94	10.10.94	30.10.00	04.12.02			12.10.06
Portugal	09.11.78	09.11.78	09.11.78	02.10.86	20.12.04		03.10.03	19.05.06
Romania	20.06.94	20.06.94	20.06.94	20.06.94	20.06.94	17.07.06	07.04.03	16.05.05
Russia	05.05.98	05.05.98	05.05.98		05.05.98			18.02.10
San Marino	22.03.89	22.03.89	22.03.89	22.03.89	22.03.89	25.04.03	25.04.03	02.02.06
Serbia	03.03.04	03.03.04	03.03.04	03.03.04	03.03.04	03.03.04	03.03.04	06.09.05
Slovakia	18.03.92	18.03.92	18.03.92	18.03.92	18.03.92		18.08.05	16.05.05
Slovenia	28.06.94	28.06.94	28.06.94	28.06.94	28.06.94		04.12.03	29.06.05
Spain	04.10.79	27.11.90		14.01.85				15.03.06
Sweden	04.02.52	22.06.53	13.06.64	09.02.84	08.11.85		22.04.03	17.11.05
Switzerland	28.11.74			13.10.87	24.02.88		03.05.02	25.04.06
“The former Yugoslav Republic of Macedonia”	10.04.97	10.04.97	10.04.97	10.04.97	10.04.97	13.07.04	13.07.04	15.06.05
Turkey	18.05.54	18.05.54		12.11.03			20.02.06	02.10.06
Ukraine	11.09.97	11.09.97	11.09.97	04.04.00	11.09.97	27.03.06	11.03.03	27.03.06
United Kingdom	08.03.51	03.11.52		20.05.99			10.10.03	28.01.05

- **CETS No.: 005:** Convention for the Protection of Human Rights and Fundamental Freedoms
- **CETS No.: 009:** Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms
- **CETS No.: 046:** Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto
- **CETS No.: 114:** Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty



- **CETS No.: 117:** Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
- **CETS No.: 177:** Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms
- **CETS No.: 187:** Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances
- **CETS No.: 194:** Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention
- **CETS No.: 204:** Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms



Appendix V – Countries which have accepted the right of individual petition under the United Nations Convention against Torture

Status as at 7 May 2010⁷⁸⁰

Algeria	Finland	Norway
Andorra	France	Paraguay
Argentina	Georgia	Peru
Australia	Germany	Poland
Austria	Ghana	Portugal
Azerbaijan	Greece	Russian Federation
Belgium	Guatemala	Senegal
Bolivia	Hungary	Serbia
Bosnia and Herzegovina	Iceland	Seychelles
Brazil	Ireland	Slovakia
Bulgaria	Italy	Slovenia
Burundi	Kazakhstan	South Africa
Cameroon	Liechtenstein	Spain
Canada	Luxembourg	Sweden
Chile	Malta	Switzerland
Costa Rica	Mexico	Togo
Croatia	Monaco	Tunisia
Cyprus	Montenegro	Turkey
Czech Republic	Morocco	Ukraine
Denmark	Netherlands	Uruguay
Ecuador	New Zealand	Venezuela

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