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Asylum[1]

1. Key notions on asylum and the ECHR

For centuries, people have travelled across vast territories to settle in Europe. Some of them come looking for international protection. They are seeking asylum.

It is not always easy to understand the difference between migrants, asylum seekers, refugees and other groups, especially when these terms tend to be misused by the media. Here are a few concepts that should not be confused.

The word “migrant” describes a person who moves from one place, region, or country to another. The term “asylum seeker” refers to a migrant who seeks international protection.

In Europe, international protection may take the form of refugee status or subsidiary protection.

Refugee status is governed by the 1951 Geneva Convention relating to the Status of Refugees. It is granted by a foreign State to a person who has a well-founded fear of persecution in his or her country of origin on the basis of race, religion, nationality, membership of a particular social group or political opinion.

If a foreign State deems that a migrant should be protected, but for reasons which are not listed in the Geneva Convention, it can decide to grant subsidiary protection instead of refugee status.

This Court – the European Court of Human Rights – is not competent to examine the application of the Geneva Convention. And the European Convention on Human Rights does not provide for a right to asylum. As a matter of principle, the right to control the entry, residence and expulsion of non-nationals rests with the States.

But the Member States of the Council of Europe are under the obligation to secure to everyone within their jurisdiction, including migrants, the respect of the rights guaranteed by the European Convention on Human Rights. And it is to this end that the Court's case-law imposes certain limitations on the right of States to turn someone away from their borders[2].

2. Barriers to removal of asylum seekers

Which are the Convention rights that may constitute barriers to removing an asylum seeker?

In the first place, they are Article 2 of the Convention, which guarantees the right to life, and Article 3, which prohibits torture, inhuman or degrading treatment or punishment. No one can be returned to a place where he or she runs a real risk of being subjected to treatment contrary to either of these provisions. This is the principle of non-refoulement. For example, in a case against the United Kingdom, the Court has found that the deportation of two applicants to Somalia would constitute a violation of Article 3 because of the humanitarian crisis and indiscriminate violence in Mogadishu[3].

Under the Convention, the prohibition provided by Article 3 is absolute. This means that the responsibility of the Council of Europe's Member States to safeguard a non-national against such treatment is always engaged in the event of expulsion. The applicant's past conduct, however undesirable or dangerous, cannot therefore be a material consideration[4].

Articles 2 and 3 of the Convention also prohibit "indirect refoulement". Indirect refoulement means an expulsion to a State from where migrants may face farther deportation without a proper assessment of their situation. This also applies in the context of the Dublin Regulation of the European Union. And so, in a case concerning expulsion from Belgium to Greece, the Court has held that where the asylum procedure of a particular EU member State is deficient and does not offer effective guarantees against arbitrary removal, other member states must refrain from returning asylum seekers to that country on the basis of the Dublin Regulation[5].

Articles 2 and 3 of the Convention may also come into play when persons at risk are refused entry at a land border[6] or when they are intercepted at sea. For example, the Court has found that a group of migrants intercepted at sea by the Italian authorities should not have been summarily returned to Libya, where they faced a real risk of treatment contrary to Article 3. Instead they should have been given an opportunity to apply for asylum in Italy[7].

Other barriers to the removal of an asylum seeker may result from the risk of a flagrant breach of Article 5 or Article 6 of the Convention in the country of destination. Article 5 guarantees the right to liberty and security, and Article 6, the right to a fair trial.

These provisions may come into play, for example, if the receiving State was to detain an applicant arbitrarily without bringing him or her to trial, or to imprison him or her for a substantial period following conviction at a flagrantly unfair trial. However, a very high threshold applies in such cases[8].

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[2] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 9214/80, 28 May 1985, § 67, Series A no. 94, and *Saadi v. Italy* [GC], 37201/06, §§ 124-125, ECHR 2008

[3] *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28 June 2011

[4] *Saadi v. Italy* [GC], 37201/06, ECHR 2008

[5] *M.S.S. v. Belgium and Greece* [GC], 30696/09, ECHR 2011

[6] *Gebremedhin [Gaberamadhien] v. France*, 25389/05, ECHR 2007-II

[7] *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, ECHR 2012

For example, in a case concerning deportation from the United Kingdom to Jordan, the Court has found that the possibility of a pre-trial detention for 50 days fell far short of the length of detention required for a flagrant breach of Article 5. On the other hand, the admission of torture evidence in a criminal re-trial would amount to a flagrant denial of justice, in breach of Article 6 of the Convention[9]

3. Assessment of the risk

To constitute a breach of Article 3 of the Convention, treatment must reach a minimum level of severity[10]. Whether this threshold is met will depend on all the circumstances, including the applicant's age, sex and state of health[11]. These elements will be examined cumulatively. Any assessment of whether an asylum seeker faces a risk of treatment contrary to Article 3 must be individualised and based on all available evidence.

Under the Convention, the risk of ill-treatment in the country of destination must be "real", "foreseeable" and "personal". This is why the Court will require the applicant migrant to show specific circumstances which would make him or her personally vulnerable to ill-treatment.

These specific circumstances may be demonstrated by information about previous ill-treatment in the country of destination, through previous grants of refugee status by foreign States or assessments made by the United Nations High Commissioner for Refugees[12].

They may be also demonstrated by the evidence of current systematic persecution of similarly situated persons, provided that this group is identifiable. For instance the Court has issued such a ruling in respect of the members of the minority Ashraf population in Somalia[13].

The Court has also recognised that exposing an individual to a situation of general violence of exceptional intensity may be sufficient to conclude that the person will face ill-treatment simply on account of his or her presence in the area in question[14].

And in certain circumstances, exposing an asylum-seeker to extreme poverty or destitute living conditions may also constitute a breach of Article 3[15]. For example, the Court has found that conditions in the main refugee camps in Kenya and Somalia, particularly severe overcrowding and very limited access to shelter, water and sanitation facilities, were so dire that they reached the minimum severity threshold[16].

It is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Council of Europe's Member State, he or she would be exposed to a real risk of ill-treatment in the receiving country.

Where such evidence is put forward, it is then for the Government to dispel any doubts about it[17].

The Court has recognised that asylum seekers are often in a special situation, which may require giving them the benefit of the doubt when assessing the credibility of their statements and supporting documents[18].

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[8] *Mamatkulov and Askarov v. Turkey* [GC], 46827/99 and 46951/99, ECHR 2005-I
[9] *Othman (Abu Qatada) v. the United Kingdom*, 8139/09, ECHR 2012 (extracts)
[10] *Soering v. the United Kingdom*, 14038/88, 7 July 1989, Series A no. 161, § 100
[11] *Ireland v. the United Kingdom*, 5310/71, 18 January 1978, Series A no. 25
[12] *Singh and Others v. Belgium*, 33210/11, 2 October 2012
[13] *Salah Sheekh v. the Netherlands*, 1948/04, 11 January 2007, and, *a contrario*, *Vilvarajah and Others v. the United Kingdom*, 13163/87 and al., 30 October 1991, Series A no. 215
[14] *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28 June 2011
[15] *M.S.S. v. Belgium and Greece* [GC], 30696/09, ECHR 2011
[16] *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28 June 2011
[17] *Saadi v. Italy* [GC], 37201/06, 28 February 2008
[18] *Salah Sheekh v. the Netherlands*, 1948/04, 11 January 2007, and *R.C. v. Sweden*, 41827/07, 9 March 2010

4. Diplomatic assurances and internal relocation

The returning country can seek from the country of destination diplomatic assurances that the person concerned will not face ill-treatment upon return. Such assurances may reduce the risk but they are not in and of themselves sufficient to guarantee protection.

What weight will the Court give to diplomatic assurances in a particular case depends on the circumstances prevailing at the material time. The Court will first examine whether the general human rights situation in the receiving State does not exclude accepting any assurances whatsoever. It will then consider the quality of any assurances given and whether – in the light of the receiving State's practice – they can be relied on[19].

A State can also propose the applicant's internal relocation to a safe area in the country of destination. Again, the Court will make a detailed assessment to determine whether the person to be expelled is in fact able to travel to the area in question, to gain admittance and to settle there[20].

This will include considering whether the point of return is safe, whether the route contains roadblocks, and whether the transit areas are safe for the individual to pass through in order to reach the destination site. An assessment of the applicant's individual circumstances will also be carried out by the Court[21].

5. Vulnerable groups

Cases brought before the Court are always examined in view of each applicant's individual situation. But some applicants may belong to inherently vulnerable groups and the Court has recognised that, for this reason, they are in need of special protection[22].

Such vulnerable groups may be minorities who have been systematically subjected to ill-treatment, or certain groups – such as children, pregnant women, disabled persons or the elderly – who are recognised as having special needs.

An applicant's status as an asylum-seeker is particularly important. It is so because a broad consensus exists at international and European level that asylum-seekers belong to a particularly underprivileged and vulnerable population group which needs special protection.

An applicant's special status as a member of a vulnerable group may have an impact on the obligations imposed on the States regarding the conditions in which such a person is received and the question of whether or not such a person can be removed from the country.

The situation of unaccompanied minors claiming asylum is particularly important. One example is the case of a 15-year old boy from Afghanistan who sought asylum in Greece[23]. The Court has found that the conditions in which this unaccompanied minor was initially detained and the authorities' subsequent failure to take care of him after his release amounted to degrading treatment, in breach of Article 3 of the Convention, especially since the teenager had been left homeless for several days before being assisted by a local NGO.

[19] *Othman (Abu Qatada) v. the United Kingdom*, 8139/09, ECHR 2012 (extracts)
[20] *Salah Sheekh v. the Netherlands*, 1948/04, 11 January 2007
[21] *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28 June 2011
[22] *M.S.S. v. Belgium and Greece* [GC], 30696/09, ECHR 2011
[23] *Rahimi v. Greece*, 8687/08, 5 April 2011

6. Conditions of reception of asylum seekers

Article 3 of the Convention requires that receiving States provide accommodation and decent material conditions to these asylum-seekers who are impoverished and wholly dependent on State support.

In its landmark judgment on the issue[24], the Court has found that Greece did not meet its obligations under Article 3 because it did not secure to the applicant adequate reception conditions when his asylum procedure was pending. What elements led the Court to such a conclusion? Firstly, it was the severe overcrowding and inadequate sanitation conditions in the migrants' reception centre where the applicant was initially detained. Secondly, it was the fact that, following his release, the man lived for many months in a park, in a state of extreme poverty, unable to cater for his most basic needs. And thirdly, it was the consideration that this situation was made even worse because the applicant lived in a constant state of fear of being attacked and robbed, and there was no likelihood of his situation getting any better.

In another case of this type[25], brought against Switzerland, the Court has found that the conditions of reception for asylum seekers in Italy were generally in no way as critical as those in Greece. They could not therefore in themselves constitute a blanket bar to all removals to that country. However, the Court has considered that the applicants were in a special situation, being a family of eight with six minor children, including an infant. It was therefore concluded that, even in the absence of systemic flaws, it was incumbent on the authorities of the removing State, to obtain assurances from the receiving State that, on their arrival, the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.

7. Detention of asylum seekers

The European Convention on Human Rights allows States to control the liberty of foreign nationals in an immigration context. Thus, in certain circumstances migrants, including asylum seekers, may be detained until a State grants them authorisation to enter or to remain in the country.

Under Article 5 § 1 (f) of the Convention, migrants may be deprived of liberty only in accordance with a procedure prescribed by law, and the measure can only be justified on two grounds: to prevent unauthorised entry onto the national territory or for the purpose of expulsion.

To avoid being considered arbitrary and contrary to the Convention, such detention must be carried out in good faith. What does this mean? That such detention must be closely connected to the purpose of preventing unauthorised entry or expulsion; that the place and conditions of detention must be appropriate; and then the length of the detention must not exceed that which is reasonably required for the purpose pursued[26]. Such detention will cease to be lawful if the proceedings are carried out without due diligence[27] or if there is no longer a realistic prospect of removal[28].

Under Article 5 § 2 of the Convention, the detained asylum seekers must be promptly informed of the reasons for their detention[29] in a language that they understand. And Article 5 § 4 requires access to a judge, who must decide speedily[30] on the legality of their detention after a thorough examination of all the facts[31], and who must carry out the periodic review of the detention if it has been prolonged.

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[24] *M.S.S. v. Belgium and Greece* [GC], 30696/09, ECHR 2011
[25] *Tarakhel v. Switzerland* [GC], 29217/12, ECHR 2014 (extracts)
[26] *Saadi v. Italy* [GC], 37201/06, ECHR 2008
[27] *Chahal v. the United Kingdom*, 22414/93, 15 November 1996, Reports of Judgments and Decisions 1996-V
[28] *Mikolenko v. Estonia*, 10664/05, 8 October 2009
[29] *Louled Massoud v. Malta*, 24340/08, 27 July 2010
[30] *Sławomir Musiał v. Poland*, 28300/06, 20 January 2009

The question of whether deprivation of liberty complies with the requirements of the Convention is assessed in the light of individual circumstances of each case. In practice, the deprivation of liberty of minors – accompanied or not – can only rarely be justified[32].

8. Asylum procedure and effective remedies

Article 6 of the Convention and its full range of procedural rights guaranteeing the right to a fair trial are not applicable to asylum or expulsion procedures. But Article 13 of the Convention, which guarantees the right to an effective remedy, is applicable. Because Article 13 is not an autonomous provision, it can only be relied upon if the applicant also has an arguable complaint under another Convention provision, such as the complaint of a risk of ill-treatment contrary to Article 3.

What then are the Convention requirements in respect of the asylum procedure?

In the first place, the Court has found that individuals need to have adequate information about the asylum procedure to be followed[33]. This requires the existence of a reliable system of communication between the authorities and the asylum seekers[34]. Moreover, individuals need to have effective access to such a procedure. This, in turn, may require the availability of interpreters and access to legal aid.

When assessing whether applicants have access to an effective remedy, the Court will normally examine the domestic system as a whole. It has held that: "Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, an aggregate of remedies provided for under domestic law may do so"[35].

An effective remedy must be available in law and in practice[36].

The competent national authority does not necessarily need to be judicial. But its power and guarantees will be taken into account when examining the effectiveness of the remedy. Such a national authority must be independent and it must conduct a close and rigorous scrutiny[37] of the asylum claim and it must examine the merits of the case[38].

Particular attention is paid to the speediness of the remedy, as its effectiveness may be undermined by long delays and excessive duration[39].

On the other hand, a speedy processing of an applicant's asylum claim should not take priority over the effectiveness of the essential procedural guarantees to protect him or her against arbitrary removal. An unreasonably short time-limit to submit a claim, such as in the context of accelerated asylum procedures, can undermine the exercise and the effectiveness of the remedy. For example, in a case concerning the deportation of a Sudanese national from France, the Court has found that a five-day time-limit for lodging an initial asylum application and a 48-hour time-limit to challenge the subsequent removal decision were far too short. Those and other elements in the case rendered the remedy practically ineffective, in breach of Article 13, taken together with Article 3 of the Convention[40].

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[31] *Nikolova v. Bulgaria* [GC], 31195/96, ECHR 1999-II
[32] *Rahimi v. Greece*, 8687/08, 5 April 2011, *Muskhadzhiyeva and Others v. Belgium*, 41442/07, 19 January 2010 and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, ECHR 2006-XI
[33] *Abdolkhani and Karimnia v. Turkey*, 30471/08, 22 September 2009
[34] *M.S.S. v. Belgium and Greece* [GC], 30696/09, § 301, ECHR 2011
[35] *Gebremedhin [Gaberamadhien] v. France*, 25389/05, ECHR 2007-II
[36] *M.S.S. v. Belgium and Greece* [GC], 30696/09, ECHR 2011
[37] *M.S.S. v. Belgium and Greece* [GC], 30696/09, § 293, ECHR 2011
[38] *Chahal v. the United Kingdom*, 22414/93, 15 November 1996, *Reports of Judgments and Decisions* 1996-V
[39] *De Souza Ribeiro v. France* [GC], 22689/07, ECHR 2012
[40] *I.M. v. France*, 9152/09, 2 February 2012

Article 13 also requires automatic suspensive effect of the remedy – in other words, that the planned expulsion must be put on hold until the final decision is taken[41]. The mere possibility of requesting suspensive effect or a remedy which has such effect "in practice" only is not sufficient[42].

9. Interim measures under Rule 39

When lodging an application with the Court, applicants can ask the Court to indicate to the respondent State an interim measure under Rule 39 of the Rules of Court to the effect that the respondent State should refrain from returning the applicants to countries where they face an imminent risk of irreparable damage. Requests for interim measures will only be granted in exceptional circumstances. But if any Rule 39 measure is indicated, the respondent State is under an obligation to comply with it. If it does not, it may be held to be in breach of Article 34 of the Convention for hindering the right to application[43].

10. Collective expulsions

Additional procedural safeguards as regards collective expulsions are provided by Article 4 of Protocol No. 4 to the Convention. An identification procedure must be carried out and the individual circumstances of each asylum seeker in a group must be properly assessed. Otherwise an expulsion will be considered to be collective and therefore in breach of this provision. In the already-mentioned case of interception at sea against Italy[44], the Court has found that Article 4 of Protocol No. 4 applied also to the removal of foreigners to a third country carried outside the national territory.

11. Final remarks on asylum and the ECHR

As shown in this presentation, member States of the Council of Europe are entitled to determine which asylum-seekers in fact qualify for international protection. And it is not the task of the European Court to decide the merits of individual asylum claims. However, in exercising control of their borders, States must act in conformity with the ECHR standards and with the principles derived from the vast body of the Court's case-law in order to guarantee the respect of asylum seekers' human rights.

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All the cases referred to in this presentation can be found in the HUDOC database[45]. Additional information is available on the Court's website[46] and in relevant training materials of HELP[47], the Council of Europe's Programme on Human Rights Education for Legal Professionals.

[41] *Čonka v. Belgium*, 51564/99, ECHR 2002-I, and *Gebremedhin [Gaberamadhien] v. France*, 25389/05, ECHR 2007-II
[42] *Gebremedhin [Gaberamadhien] v. France*, 25389/05, ECHR 2007-II
[43] *Mamatkulov and Askarov v. Turkey* [GC], 46827/99 and 46951/99, ECHR 2005-I
[44] *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, ECHR 2012
[45] http://hudoc.echr.coe.int
[46] www.echr.coe.int
[47] www.coe.int/help