

ECtHR's current jurisprudence: asylum and return decisions

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- Asylum
- Situation while waiting for decision
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ECHR and EU law

- *Bosphorus* judgment and its updates in *Avotiņš v. Latvia*, 17502/07, 23.05.2016. GC (not about migration):
 - EU supervisory mechanisms put place within the EU affords a level of protection equivalent to the Convention, even without preliminary reference ruling
- *Khlaifia and others v. Italy*, 16483/12, 15.12.2016.GC:
 - “new challenges” facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East (§ 241)
- *M.S.S.v. Belgium and Greece*, 30696/09, 21.01.2011. GC:
 - Complying with the EU obligations (international legal obligations) a MS can violate the Convention

Special protection of asylum seekers

- An asylum seeker as such is a member of a particularly underprivileged and vulnerable population group in need of special protection.
- “Special protection” of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability.

Tarakhel v. Switzerland, 29217/12, 04.11.2014.GC (returning for examination)

- §§ 93-99 recapitulation of general principles
- The possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.
- in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Court considers that the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.
- Violation of Art. 3, no violation of Art. 13 + Art.3
- Partly dissenting opinion (3 judges): without systematic failings individual in depths assurances are contrary to previous case-law.

Political opponents in Sudan

- *A.I. c. Suisse*, 23378/15, 30.05.2017. (FR) – Violation of Art. 2 and 3
 - More politically involved
- *N.A. c. Suisse*, 50364/14, 30.05.2017 (FR) – no violation
 - Less politically involved ~ mere participation
- The ECtHR undertakes full and *ex nunc* examination

Private and family life

- Family reunification: *I.A.A. and Others v. the United Kingdom*(dec.), no.25960/13, 8.03.2016., principles: §§ 38-41
- *In all decisions concerning children, their best interests must be paramount* = in cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents.

El Ghatet v. Switzerland, 56971/10, 08.11.2016. – family reunification

- decisive date for determining the age of a child in the context of family reunification – date of request or date of last domestic decision?
- considering also that he was 15 and half years at the time the request for family reunification was lodged, it was not evident that taken the second applicant out of his social, cultural and linguistic environment in Egypt to reunite him with the first applicant in Switzerland would in fact be in the best interests of the child, not least because the material living conditions of the first applicant, who lived in a one-room apartment and was unemployed at the time the request was lodged, were not ideal?

El Ghatet v. Switzerland, 56971/10, 08.11.2016. – family reunification

- The Court considers that, applying the criteria established in its case-law, no clear conclusion can be drawn whether or not the applicants' interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory. Had the domestic authorities engaged in a thorough balancing of the interests in issue, particularly taking into account the child's best interests, and put forward relevant and sufficient reasons for their decision, the Court would, in line with the principle of subsidiarity, consider that the domestic authorities neither failed to strike a fair balance between the interests of the applicants and the interest of the State, nor to have exceeded the margin of appreciation available to them under the Convention in the domain of immigration. (§ 52)

Situation in reception/ immigration detention centers

- *Khlaifia and others v. Italy*, 16483/12, 15.12.2016.GC principles: §§ 158-169, overview of previous cases: §§ 173-177
- *J.R. and others v. Greece*, 22696/16, 25.01.2018. (FR only) Violation of Art. 5.2, no violation of Art. 5.1. and 3
- *S.F. and others v. Bulgaria*, 8138/16, 7.12.2017.: video evidence, accompanied children kept in custody (conditions in breach of Art.3)

Principle of non-refoulement: absolute nature of the protection afforded by Art.3

J.K. and Others v. Sweden, 59166/12, 23.08.2016. GC, §§ 77-105,

- Iraq 2004-2010, Refugee status, need for alternative protection, standart of proof and “can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable”
- Entire burden of proof placed on the applicants without granting them the benefit of the doubt
- Danger emanating from State authorities and also where the danger emanates from persons or groups of persons
- Full, *proprio motu* and *ex nunc* evaluation of the personal circumstances (existence of a real risk)

Security risk for the country

- *X. v. Sweden*, 36417/16, 9.01.2018
- Morocco
- Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment
- No provision for exceptions and no derogation from it is permissible, even in the event of a public emergency threatening the life of the nation
- ..since the Moroccan authorities know (are informed by the Swedish authorities) that he is considered a security threat in Sweden, he will be arrested upon return and tortured as a suspected terrorist. He alleges that the type of activity he is accused of by the Swedish Security Service is a criminal offence under Moroccan terrorist legislation.

Security risks and expulsion

- *X. v. The Netherlands*, 14319/17, 10.07.2018 (not final)
- Refusal to grant asylum, but removal without specific procedures. Moroccan judicial authorities respect the principle of *ne bis in idem*.
- Applicant claimed to belong to a group systematically exposed to a practice of ill-treatment since the Moroccan authorities will regard him as a person suspected of terrorism.
- General principles: §§ 71-75... a certain degree of speculation is inherent in the preventive purpose of Article 3.
- Person risking being monitored, arrested and/or questioned, or even convicted of crimes, would not, in itself, be contrary to the Convention.

Security risk for the country

- *M.A. c. France*, 9373/15, 1.02.2018.
- Algeria
- National decisions were not appealed
- Violation of Art. 3
- Violation of Art. 34 – obligation to contact Algerian authorities about M.A.

Religious conversion

- *F.G. v. Sweden*, 43611/11, 23.03.2016. GC
- Iran
- Violation of Art. 2 and 3 not account of risks associated with his political past, but with his religious conversion to Christianity.
- Person should not be compelled to hide his or her faith solely in order to avoid persecution.
- ..applicant explained that he considered his religion to be a private matter and “did not want to exploit his valuable new-found faith as a means of buying asylum”.

Religious conversion

- *A. v. Switzerland*, 60342/16, 19.12.2017.
- Iran; religious conversion to Christianity in Switzerland
- No violation of Art. 2 and 3 - who practiced their faith discreetly, did not face a real risk of ill-treatment upon return.
- Since the applicant has not yet been deported, the question of whether he would face a real risk of persecution upon his return to Iran must be examined in the light of the present-day situation.
- The consequences of the applicant's *sur place* conversion were examined in person by the Swiss asylum authorities at two levels of jurisdiction in two sets of proceedings, and that there were no indications that the proceedings before those authorities were flawed.

Paposhvili v. Belgium, 41738/10, 13.12.2016.GC (close to death)

- §§ 172-193 recapitulation of general principles
- The information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention.
- Violation of Art. 3, no need to examine Art. 2
- Observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.
- Violation of Art. 8

Private and family life

- Criminal records:
 - *Antwi and others v. Norway*, 26940/10, 14.02.2012. no violation
 - *Hasanbasic v. Switzerland*, 52166/09, 11.06.2013. violation
- Citizenship by fraudulent means:
 - *Ramadan v. Malta*, 76136/12, 21.06.2016 (not about return or asylum):
 - An arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual
 - the Convention can not be construed as guaranteeing, as such, the right to a particular type of residence permit

Collective expulsion (Article 4 of Protocol No. 4)

- *“Collective expulsion of aliens is prohibited.”*
- similar decisions, similar wording;
- absence of any examination of the individual (specific) situation of the applicant;
- also no identification procedure by the authorities

Hirsi Jamaa and others v. Italy, 27765/09, *23.02.2012. GC*

- Articles 1., 3., 13 and P4-A4
- The fact that a number of aliens are subject to similar decisions does not in itself suffice to conclude that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis (§ 184)
- No violation of Article 4 of Protocol No. 4 where the lack of an individual expulsion decision could be attributed to the culpable conduct of the person concerned (§ 184)

N.D. and N.T. v. Spain,
8675/15 and 8697/15

3.10.2017. Judgment of the Chamber -
violation of P4-A4, violation of Art 13 + P4-A4

Referred to the GC; hearing on 26.09.2018.

Issue of jurisdiction under Art.1 – stopped
before protective structures (=interceptions on
the high seas)

P4-A4: Attempt to enter unlawfully, expulsion
without identification of a person, no asylum
application lodged, no prior administrative or
judicial decision, no procedure

Art.13: Immediate nature of *de facto* expulsion,
no access to any remedy



Harkins v. The United Kingdom (dec.), 71537/14, 15.06.2017 GC (extradition)

- The Grand Chamber had radically changed the law on Article 3, with the consequence that his extradition would violate that Article.
- As the object and purpose of Article 35 § 2 (b) is to serve the interests of legal certainty and mark out the limits of its competence, it is not open to the Court to expand the notion of “relevant new information” beyond the ordinary meaning as expressed in both the English and French texts of the Convention and thus far applied in its case-law.
- The development in its jurisprudence does not constitute “relevant new information” - the Court’s case-law is constantly evolving.

Solution

- Judicial authority is responsible for:
 - full
 - *proprio motu* (/ *ex officio*)
 - *ex nunc* evaluation of the personal circumstances and
 - *ex nunc* evaluation of the existence of a real risk
 - balancing of the interests involved
 - drafting a motivated and individual assessment based decision