Implementation of the ECHR case law in national systems – The right to asylum
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Introduction

In EU the number of asylum seekers rose to 435 000 in 2013, around 100 000 more than the previous year.

70 % of those were registered in five EU MS: Germany (126 705), France (64 760), Sweden (54 270), UK (29 875) and Italy (27 930). 0,3 % or 1400 of these were applying for asylum in Estonia, Latvia, Slovenia, Lithuania and Slovakia.

The figure for the Czech republic was 695, or 0,15 %. Of these 145 asylum seekers were from Ukraine, 70 Syria, 50 Russia, 50 Vietnam and 40 from Armenia.

The Czech republic had 10 applications to the ECtHR per million inhabitants, which can be compared with Sweden, which had the highest percentage, 1 965 applicants per million inhabitants.

The five main citizenships of EU asylum applicants were Syria (50 470 = 12 %), Russia (41 270, 10 %), Afghanistan (26 290, 6 %), Serbia (22 380, 5 %), and Pakistan (20 885, 5 %).

35 % of all decisions taken within EU were positive at first instance (refugee status, subsidiary protection and humanitarian reasons). The Czech republic: 345 out of 900 = 38 %. Sweden 24 015 out of 45 005 = 53 %.

The increasing number of people seeking refuge from persecution, other forms of ill-treatment and hardship put the national decision making organs under pressure. It makes it a vital task for the international courts to assist them by i.a. setting standards through interpretation of international legislation in the migration area.

As regards the European Convention the ECtHR is continuously producing case-law on the various Convention articles that are pertinent to migration, especially as regards the protection of life and protection against ill-treatment.

The case-law of the ECtHR as regards the effects of expulsion has mainly developed in the past decade, although some of the most important principles were developed as early as 1989 when the ECtHR for the first time established that there would be a violation of Article 3 if a person were to be extradited facing the risk of death penalty in the receiving state (Soering v. UK), followed by judgments from the 1990's regarding return of Tamils to Sri Lanka (Viljavarajah and others v. UK, 1991), Sikh separatist (Chahal v. UK, 1996).

Since then and during the first years of the millennium a number of cases have dealt with various migration issues connected with Article 3, such as jurisdiction for the purposes of Article 1, extradition of suspected terrorists and war criminals and expulsion of political opponents and members of ethnic and religious minority groups.

The Court has also considered the risk of ill-treatment by third parties in cases concerning family clans, genital mutilation, unsupported women and victims of domestic violence and honour related crimes.

Not only the threat of death sentence but also unconditional life imprisonment in the receiving state have raised issues under Article 3 (recently Trabelsi v. Belgium).

Dublin refoulement has been a topic for the Court, which has already found return to Greece a problem under Article 3 and is currently assessing the situation in Italy in the Grand chamber case of Tarakhel v. Switzerland.

(In 2012, for the first time, the Court found that an expulsion could be in conflict with Article 6 where there was a risk of admission of evidence obtained by torture at a trial in the country of return.)

Conditions for people detained pending expulsion have given rise to violations under Articles 3, 5 and 8 (and for persons detained after expulsion in the receiving country under Article 3).

Articles 2 and 3: Ill-treatment in receiving state

In contrast to the EU Charter of Fundamental Rights (Article 18 - right to asylum and Article 19 principle of non-refoulement) the ECHR doesn't contain any explicit right to asylum. (And the Convention doesn't affect the states' right under international law to refuse entry by aliens on their territories (although not push-backs)).

Even though the Convention doesn't give a right to political asylum, if expulsion is imminent, it would be in breach of the protection against torture and degrading treatment and punishment under Article 3, and/or of the right to life under Article 2, if "substantial grounds have been shown for believing that the individual concerned, if extradited, would face a real risk of being subjected to" such treatment or being killed.

The right of protection under Articles 2 and 3 is absolute in the sense that if the risk for life or of ill-treatment is established, no counter-balancing factors can be taken into consideration; in other words no assessment of proportionality takes place if that stage has been reached.

Apart from political dissidents, members of vulnerable minority groups, persons risking religious persecution, and people with severe illnesses, terrorists and other dangerous people also have the right of absolute protection against extradition to a country where they would face the risk of death sentence or torture or life-long prisons sentences.

The absoluteness of the rights are illustrated by the ECtHR cases where applicants are facing such risks when they are subject to death-

sentences in the country of return or to charges there for crimes that could lead to death-sentence (*Bader and Kabnor v. Sweden* 2005; *Al-Saadoon v. UK* 2010). The behavior of the applicants or the risk they pose to the responding State are irrelevant, which is illustrated in one of the leading cases in this field; Saadi v. Italy GC 2008.

(Saadi v. Italy (2008) concerned a Tunisian, who, after having served a prison sentence in Italy for i.a. conspiracy to commit attacks with explosive devices, was to be deported to Tunisia where he faced a 20 year-prison sentence for incitement to terrorism and membership in a terrorist organization. Acknowledging the danger of terrorism today and the threat it presents to the community the Court stated that it must not call into question the absolute nature of Article 3. The "risk" a person faces if expelled will not be balanced against his or her dangerousness for the returning state and the risk assessment – "more likely than not" – will not require stronger evidence for the risk from the applicant. The Court went on to scrutinize the reports on the situation in Tunisia from various external sources, alleging that there were numerous and regular cases of torture and ill-treatment of persons accused of terrorism, which were decisive for the Court to find that there was a real risk that the applicant would be subjected to treatment contrary to Article 3.)

Currently two cases are pending against Sweden in the Grand chamber. The first – F.G. v. Sweden - deals with expulsion of an asylum seeker from Iran who was denied asylum on political grounds but after the expulsion decision but before removal claims he has converted to Christianity. The majority of the Chamber found no violation.

The other case – W.H. v. Sweden – deals with a single woman from Iraq who was considered not to be able to return to her place of origin in Iraq but the Swedish authorities as did the chamber – found that she could relocate to another part of Iraq and be safe there. Cf Y and Z v. Germany in EUC (preliminary ruling 5.9.2012) where that court found that the sending country has to accept that an asylum seeker will follow a certain religious practice upon return and that it is

irrelevant if the person can avoid the risk by abstaining from such practices.

Homosexuals: So far not case-law in ECtHR. However EUC has in the case of X,Y and Z v. Netherlands (preliminary ruling 7.11.2013) found that the sending state cannot reasonably expect a homosexual asylum seeker to avoid persecution by keeping his or her homosexuality secret or restrain him- or herself when expressing his or her sexual inclination.

Degree and causes of suffering

N. v. UK GC (2008) dealt with an HIV infected woman who had developed aids and had received medication in England for many years. Being returned to Uganda did not violate Article 3 even with the prospect that she would not receive the same quality of medical help there.

The Court took into account that the applicant was not critically ill at the time and that the rapidity of deterioration of her illness and the degree of help she might receive involved a certain degree of speculation.

The Court pointed to the Convention as primarily protecting civil and political rights and that it would be placing a too great burden on states if they had to alleviate social and economic differences between countries.

The Court noted that the alleged future harm would emanate from an illness and lack of resources in Uganda, rather than intentional acts or omissions of public and private bodies. Still certain flexibility was necessary to prevent expulsion in very exceptional cases where the humanitarian grounds were compelling.

Other illnesses have also been the subject of assessment, such as Hepatitis C and psychiatric disease.

In *M.S.S. v. Belgium and Greece* GC (2011) where the applicant alleged violation of the Convention after being sent from Belgium to Greece under the Dublin rules as first country of destination the Court found that Belgium had violated Article 3 in knowingly exposing the applicant to living conditions which amounted to degrading treatment, consisting of living in a state of the most extreme poverty, unable to cater for his most basic needs (food, hygiene, a place to live), risking being robbed and attacked and with no likelihood of improvement of his situation.

Humanitarian conditions in refugee camps can also give rise to a violation of Article 3 if a person would end up there if expelled, as held in *Sufi and Elmi v. UK* (2011), where the situation for internally displaced persons in Somalia were dire on account of i.a. draught, dependence on food aid, which was hindered by Al-Shabaab.

In the Court's case-law several principles have been developed on the procedure under Article 3 as regards asylum seekers:

- When assessing if there are "substantial grounds" for believing that there is a real risk of ill-treatment in case of expulsion the Court must assess the situation in the receiving country against the standards of Article 3, which require a certain degree of severity. If the general situation isn't severe enough – which is often the case (K.A.B. v. Sweden – Mogadishu, recent example where the situation previously has been considered to be of such severity that no expulsions were permitted but changed after recent developments) – and therefore only provides a mere possibility of ill-treatment, it is necessary to have evidence that leads to the conclusion that the applicant's individual situation is such that he or she faces a real risk of ill-treatment.

- The Court will assess the situation in the receiving country with the help of external information provided by i.a. the UN Committee against torture, UNHCR reports and reports from national migrations authorities and NGOs. Within the Council of Europe there are also sources, such as the reports from the

Human Rights Commissioner and the Committee against torture (CPT), as well as conclusions mad by the political organs of the Council: the Parliamentary Assembly and the Committee of Ministers. The Court itself has no investigatory bodies of its own capable of making external first hand observations.

- Expulsion proceedings on the national level are governed by certain procedural safeguards laid down in the Convention Protocol 7 Article 1, but these apply only for lawful alien residents (Expulsion shall not take place without a decision in accordance with law and the alien shall be allowed to submit reasons against the expulsion, have his or her case reviewed and be allowed to be represented in those proceedings.)

  Note that Article 6 of the Convention, laying down the right to a fair trial is not applicable to asylum proceedings as they don't fall under the ambit of "civil rights".

- Even though the Convention doesn't provide procedural guarantees to asylum requests the domestic proceedings play an important role for the ECtHR in the sense that they provide a basis for the assessment of the asylum seekers' stories and the facts and evidence invoked to support them.

  In this context it can be of importance whether an oral hearing has been held, as well as how the domestic authorities reason when making their assessments.

  As regards the domestic asylum proceedings, the Courts registry lawyers can be used to make comparative studies of the legal and procedural situation in the Member states of the Council, as well as compiling statistics.

- As regards statements made by the applicant, the Court has acknowledged that, owing to the special situation in which the asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the

credibility of their statements and the documents they submit to support them.

It is in principle the applicant who has to prove that an expulsion would expose him or her to a real risk of ill-treatment. If such evidence is submitted the Government it is for the Government to dispel any doubts about it.

- Rule 39 of the Court's Rules of Procedure allows the Court to "indicate to the parties any interim measure which they consider should be adopted in the interest of the parties or of the proper conduct of the proceedings".

  The large majority of cases when this possibility is used is expulsion cases; When such a measure is demanded by an asylum seeker it is granted in 1-2 % of the cases. (Article 38 of the Convention; effective conduct; the State may be in violation if not abide by request for stay on a removal) (Aspect. Sent to convention state – dimension)

- Two of the admissibility criteria applying to the Court which are relevant in expulsion cases should be highlighted.

  According to Article 35 of the Convention the Court may only deal with a matter after all domestic remedies have been exhausted. This means ordinary remedies and not extraordinary possibilities for review. Furthermore when alternative remedies exist it may be only necessary to exhaust one of them (France example).

  The applicants must also observe the six-month time limit which means that an applicant has to turn to the Court within six months after the final domestic decision was taken.

  As regards expulsion cases this rule has been given a special meaning in the Court's case-law: In two cases against Sweden, P.Z. and others and B.Z. (decisions 29 may 2012) the Court

stated that

"… the responsibility of a sending State under Article 2 or 3 … is, as a rule, incurred only at the time when the measure is taken to remove the individual concerned from its territory. Specific provisions of the Convention should be interpreted and understood in the context of other provisions as well as the issues relevant in a particular type of case. The Court therefore finds that the considerations relevant in determining the date of the State's responsibility under Article 2 or 3 corresponds to the date when the six month period under article 35 § 1 starts to run for the applicant. If a decision ordering a removal has not been enforced and the individual remains on the territory of the State wishing to remove him or her … the six-month period has not yet started to run."

The Swedish Government continues to contest this perception arguing i.a. that the Court's interpretation has the consequence that persons who don't abide by a deportation decision are given advantage over those who do.

Future

Foreseeable continuation of influx of asylum law cases, especially as regards persons who are denied asylum and coming from countries subject to increasingly suppressive Islamism, such as Iraq and certain African countries.

The Court's case-law will develop as regards minorities' rights to exercise their expressions of personality and religion.

Problems: The Court is becoming a first instance court. Will it have the resources to make correct assessments of facts? And how will it position itself in relation to subsidiarity in these cases? How far will article 3 stretch?