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Recent Migration Case-law of the European Court of Human Rights with Focus on Socio-economic Deprivation

Branko Lubarda

ABSTRACT

The paper deals with issues of socio-economic deprivation in the broader context of the jurisprudence of the European Court of Human Rights in migration-related cases. In this respect the Strasbourg Court case-law covers a number of Convention Articles that could come into play: Articles 2, 3, 8, 13 and 14, as well as Article 4 of Protocol No. 4. The author gives a panorama of cases concerning positive obligations of the High Contracting Parties in respect of the treatment of individuals who lodge an asylum application (*M.S.S. v. Belgium and Greece*, 2011, [Grand Chamber]; *Dabroe and Camara v. Italy*, 2022) or migrants who are residing in the territory of the respondent State, in particular in respect of seriously ill persons (*Paposhvili v. Belgium*, 2016 and *Savran v. Denmark*, 2021). A brief overview of the Covid-19-related interim measure requests is included.

RÉSUMÉ

Le document aborde des questions de privation socio-économique dans le contexte plus large de la jurisprudence de la Cour européenne des droits de l'homme dans les affaires liées à l'immigration. À cet égard, la jurisprudence de la Cour de Strasbourg couvre un certain nombre d'articles de la Convention qui pourraient entrer en jeu : Articles 2, 3, 8, 13 et 14, ainsi que l'article 4 du Protocole n° 4. L'auteur dresse un panorama des affaires concernant les obligations positives des Hautes Parties contractantes en matière de traitement des personnes qui introduisent une demande d'asile (*M.S.S. c. Belgique et Grèce*, 2011, [Grand Chamber]; *Dabroe et Camara c. Italie*, 2022) ou des migrants qui résident sur le territoire de l'État défendeur, en particulier en ce qui concerne les personnes gravement malades (*Paposhvili c. Belgique*, 2016 et *Savran c. Danemark*, 2021). Un bref aperçu des demandes de mesures provisoires liées à l'affaire Covid-19 est inclus.

MOTS-CLÉS : Aliens – Migration – Asylum – Expulsion – Extradition – Non-refoulment – Socio-economic deprivation.

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Recent Migration Case-law of the European Court of Human Rights with Focus on Socio-economic Deprivation[1]

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1. GENERAL INTRODUCTION TO THE CASE-LAW IN MIGRATION-RELATED CASES

The Strasbourg Court's case-law in immigration-related cases covers a number of Convention Articles that could come into play. Few provisions of the Convention and its Protocols explicitly concern "aliens" (Article 16 of the Convention: Restrictions on political activity of aliens; Article 4 of Protocol N°4: Prohibition of collective expulsion of aliens; Article 1 of Protocol N°7: Procedural safeguards relating to expulsion of aliens); and they do not contain a right to asylum.[2] As a general rule, States have a right to control the entry, residence and expulsion of non-nationals. In a landmark judgment in the case of *Soering v. the United Kingdom*, 1989,[3] the Court ruled for the first time that an alien's extradition could engage the responsibility of the requested State under Article 3 of the Convention. Since then, the Court has consistently held that the expulsion[4] or removal of aliens by a Contracting State may also give rise to an issue under both Articles 2 (right to life) and 3 (prohibition of torture, inhuman and degrading treatment) and hence engage the responsibility of the State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to those Articles in the destination country.

The Strasbourg Court has also adjudicated cases concerning the question whether the removal of a migrant from the territory of a Contracting State (or refusal of entry), is

[1] This paper is an extended version of the author's oral presentation: "Return to socio-economic deprivation in the recent jurisprudence of the European Court of Human Rights" at the 13th World Conference of the International Association of Refugee and Migration Judges, held in the Hague, The Netherlands, 8-12 May 2023. All opinions reflect the personal views of the author. I am grateful to James Brannan for editing the original text.

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[2] In contrast, the American Convention on Human Rights guarantees a right to asylum: "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes" (Article 22,7). Also, the African Charter on Human and Peoples' Rights ("Banjul" charter) guarantees a right to asylum: "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries, in accordance with the law of those countries and international conventions" (Article 12,3).

[3] *Soering v. the United Kingdom*, Application N°14038/88, 7 July 1989.

[4] Already in the case of *Cruz Varas and Others v. Sweden*, Application N°15576/8, 20 March 1991, the Court stated: "Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion" (§ 70). In that case the Court found no violation of Article 3: "the first applicant was considered to be suffering from a post-traumatic stress disorder prior to his expulsion and his mental health appeared to deteriorate following his return to Chile. However, it results from the finding in paragraph 82 that no substantial basis has been shown for his fears. Accordingly, the Court does not consider that the first applicant's expulsion exceeded the threshold set by Article 3."

compatible with the migrant's right to respect for his or her private and/or family life as guaranteed by Article 8 of the Convention.[5] It should also be kept in mind that determining an application for a residence permit based on an applicant's HIV-positive status has been found to be in breach of Article 14 taken in conjunction with Article 8.[6]

The emphasis on human dignity could be an effective tool to enhance the quality of judicial cooperation, judicial dialogue, fostering more consistent interpretation and protection of human rights and their further development, in the field of asylum and migration law as in other areas. The protection of human dignity in law demonstrates that it has been effectively used both to enhance human rights protection in a concrete way, and to provide valuable parameters for ongoing advancement of human rights and democracy.[7]

Consideration of human dignity (as the universal value) is also a method of interpretation of the European Convention on Human Rights and its Protocols. Thus, in the case of *H.M. and Others v. Hungary*, 2022,[8] regarding confinement of an Iraqi asylum-seeker's family in the Tompa transit zone, the Court found a violation of Article 3 (substantive limb) on account of the living conditions for over four months of a vulnerable pregnant woman and her children, which attained the threshold of severity required to engage Article 3. As regards the first applicant (husband and father), the Court found that handcuffing him and attaching him to a leash (not being imposed in connection with lawful arrest or detention, and in the absence of any security risk warranting the measure) when accompanying his pregnant wife to hospital, was unjustified and diminished his human dignity.[9]

The Court reached a conclusion on the basis of human dignity in the case of *M.S.S. v. Belgium and Greece*, 2011, [Grand Chamber], concerning a transfer under the Dublin Regulation :

> "The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and

[5] See *Khachatryan and Konovalova v. Russia*, Application N°28895/14, 13 July 2021. The refusal to renew a long-term migrant's residence permit on formal procedural grounds, for failing to submit a medical certificate confirming the absence of HIV and other infectious diseases, may also breach Article 8. *Inter alia*, the Court noted that the domestic courts had failed to evaluate why the necessity of producing the missing medical certificate was so critical and decisive for the approval by the FMS of the first applicant's request for the extension of the residence permit, given his lawful residence in Russia since 2001 and his previously successful applications for the residence permit.

[6] See *Kiyutin v. Russia*, Application N°2700/10, 10 March 2011, and *Novruk and Others v. Russia*, Applications N°31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 June 2016.

[7] For further reading: Aharon Barak, *Human Dignity, The Constitutional Value and the Constitutional Rights*, (2015), in particular, Human Dignity in American, Canadian, German, South African and Israeli constitutional law; Jacob Weinrib, *Dimensions of Dignity*, The Theory and Practice of Modern Constitutional Law, Cambridge University Press, 2016; Catherine Dupré, *The Age of Dignity, Human Rights and Constitutionalism in Europe*, Oxford and Portland, 2015.

[8] *H.M. and Others v. Hungary*, Application N°38967/17, 2 October 2022.

[9] *Ibid*, §27.

> the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention".[10]

A similar conclusion to that of *M.S.S. v. Belgium and Greece*, was reached by the Court in the case of *N.H. and Others v. France*, 2020,[11] concerning asylum seekers who, due to administrative delays preventing them from receiving the support provided for by law pending their asylum application, were forced to live rough in the street for several months, without access to sanitary facilities, having no means of subsistence and constantly in fear of being attacked or robbed. The Court found that the authorities had failed to fulfil their duties towards the applicants under domestic law and had not provided an appropriate response upon being alerted to the applicants' precarious situation. Accordingly, the applicants had been victims of degrading treatment, with the authorities showing disrespect for their dignity, that had exceeded the threshold of severity for the purposes of Article 3 of the Convention (§§ 165-186). On the other hand, the Court held that the Article 3 threshold was not reached in respect of one applicant who had also lived in a tent for months but who had received documents certifying his asylum-seeker status and financial assistance within a comparatively shorter period of time (§ 187).

Human dignity thus forms part of a dynamic triangle of *rights*, together with *equality* and *liberty*.[12] Human dignity (as an interpretative concept) calls for self-respect and authenticity as R. Dworkin has written.

2. ACCESS TO TERRITORY AND PROCEDURE

Access to territory for non-nationals is not expressly regulated in the Convention, nor does it say who should receive a visa.

a) Application for a visa to enter a country in order to seek asylum

In the case of *M.N. and Others v. Belgium*, 2020,[13] the Court found that the respondent State was not exercising jurisdiction extraterritorially over the applicants, a Syrian couple and their two children, by processing their visa applications in the Belgian embassy in Lebanon and that a jurisdictional link had not been created through the applicants' appeals.

b) Access for purposes of family reunification

The substantive elements which are, in general, to be taken into consideration for determining whether a State is under a positive obligation under Article 8 of the

[10] *M.S.S. v. Belgium and Greece*, Application N°30696/09, 21 January 2011 [Grand Chamber], §263.
[11] *N.H. and Others v. France*, Application N°28820/13, 2 July 2020.
[12] Susanne Baer, 'Dignity, Liberty, Equity: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 *University of Toronto Law Journal 417*; according to: Catherine Dupré, *op. cit*., p. 197.
[13] *M.N. and Others v. Belgium*, Application N°3599/18, 5 May 2020.

Convention to grant family reunification, have been summarised in *M.A. v. Denmark*, 2021[14]: (1) status in the host country of the alien requesting family reunion; (2) whether the alien concerned had a settled or precarious immigration status in the host country when the family life was created; (3) whether there were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting reunification; (4) whether children were involved; (5) whether the person requesting reunion could demonstrate that he/she had sufficient independent and lasting income, other than welfare benefits, to provide for the basic cost of subsistence of his or her family members.

As regards the procedural requirements for the processing of family reunification requests of refugees (and equally beneficiaries of subsidiary protection), the decision-making process has to sufficiently safeguard the flexibility, speed and efficiency required to comply with the applicant's right to respect for family life.

While States enjoy a wide margin of appreciation under Article 8 of the Convention in deciding whether to impose a waiting period for family reunification requested by a person who has not been granted refugee status but who enjoys subsidiary protection or temporary protection, beyond the duration of two years, the insurmountable obstacles to enjoying family life in the country of origin progressively assume more importance in the fair balance assessment, it being borne in mind that the actual separation period would inevitably be even longer than the waiting period. In *M.A. v. Denmark* the Court found a breach of Article 8 in respect of the statutory waiting period of three years to which the applicant (who had been granted "temporary protection status") had been subjected before he could apply for family reunification with his longstanding wife.

The judgment in *B.F. and Others v. Switzerland*, 2023[15] is interesting as the Court has, for the first time, examined a case under Article 8 about a requirement of financial independence (requirement of non-reliance on social assistance) for the family reunification of (certain) 1951 Convention refugees. The Court found a violation of Article 8 in three applications, and no violation of that provision in the fourth. In two of the cases, the Court found that the gainfully employed applicants had done all that could reasonably be expected of them to earn a living and to cover their and their family members' expenses. In a third case, the Court was not satisfied that the Federal Administrative Court had sufficiently examined whether the applicant's health would enable her to work, at least to a certain extent, and had consequently considered whether the impugned requirement needed to be applied with flexibility in view of her health. By contrast, the Court found no violation as regards the fourth case, considering that the Federal Administrative Court had not overstepped its margin of appreciation when it took account of the applicant's lack of initiative in improving her financial situation when balancing the competing interests.

[14] *M.A. v. Denmark*, Application N° 6697/18, 9 July 2021 [Grand Chamber].
[15] *B.F. and Others v. Switzerland*, Application N° 13258/18 and others, 4 July 2023.

c) Interception, rescue operations and summary returns ("push-backs") at sea

Regarding the obligations of the High Contracting Parties under Article 3 of the Convention and under Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens) and under Article 13 in conjunction with Article 3 and article 4 of Protocol No. 4 to the Convention, the following two cases are of a particular relevance.

In the case of *Hirsi Jamaa and Others v. Italy*, 2012[16] (the applicants were eleven Somali nationals and thirteen Eritrean nationals) the Court found a violation of Article 3 of the Convention and of Article 4 of Protocol N°4. The violation of Article 3 was found on account of the return of migrants intercepted on the high seas to their country of departure and a violation of Article 13 for a lack of remedies available to those migrants.

The applicants were part of a group of about two hundred individuals who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility, they were intercepted by ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. While conscious of the pressure put on States by the ever-increasing influx of migrants, a particularly complex situation in the maritime environment, the Court nevertheless pointed out that that situation did not absolve them from their obligation not to remove an individual at risk of being subjected to treatment in breach of Article 3 in the destination country. Noting the deteriorating situation in Libya after April 2010, the Court, for the purposes of examining the case, referred only to the situation prevailing in Libya at the material time. In that regard, it noted that the disturbing conclusions of numerous organisations regarding the treatment of clandestine immigrants were corroborated by the report of the CPT published in 2010. No distinction was made between irregular migrants and asylum-seekers, who were systematically arrested and detained in conditions which observers had described as inhuman and, in particular, cases of torture had been reported.

Regarding Article 4 of Protocol N°4 (as to admissibility), the Court was called upon for the first time to examine whether this provision applied to a case involving the removal of aliens to a third State carried out outside national territory. The notion of "expulsion" was principally territorial, as was the notion of "jurisdiction". Where, however, the Court had found that a Contracting State had, exceptionally, exercised its jurisdiction outside its national territory (here by intercepting the migrants at sea), it could accept that the exercise of extraterritorial jurisdiction by that State had taken the form of collective expulsion. Article 4 of Protocol N°4 was therefore applicable in the instant case. On the merits the Court concluded that the transfer of the applicants to Libya had been carried out without any examination of each applicant's individual situation. The applicants had not been subjected to any identification procedure by the Italian

[16] *Hirsi Jamaa and Others v. Italy*, Application N°27765/09, 29 March 2011.

authorities, which had restricted themselves to embarking and disembarking them in Libya. The expulsion of the applicants had been of a collective nature, in breach of Article 4 of Protocol N°4.

In the case of *Safi and Others v. Greece,* 2022,[17] the Court found a violation of the procedural limb of Article 2 on account of an ineffective investigation into a fatal accident – the applicants were on board a fishing boat transporting 27 migrants in the Aegean Sea, which capsized as the Greek coastguard tried to tow it. The Court also found a violation of the substantive limb of Article 2 on account of a loss of life among refugees after specific oversights and delays by national authorities in conducting and organising their rescue from the capsized boat. The authorities had not done all they could reasonably have been expected to do to afford all the applicants and their family members the level of protection required by Article 2.

In addition, in *Safi and Others* the Court found a violation of Article 3 (degrading treatment) as the refugees brought from the capsized boat to a Greek island were body-searched after being ordered by law enforcement personnel to disrobe together as a group in front of at least thirteen people. They had been in an exceedingly vulnerable position, having just survived a sinking at sea.

3. ENTRY INTO TERRITORY OF RESPONDENT STATE

Article 5 § 1 of the Convention provides that no one shall be deprived of his liberty save in the following cases (5 § 1 (a) – (f)) and in accordance with a procedure prescribed by law; *inter alia*, under Article 5 § 1 (f), "the lawful arrest or detention of a person to prevent him effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".
Also, under Article 2 of Protocol No. 4 to the Convention: "1. 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. 2. Everyone shall be free to leave any country, including his own." Finally, under Article 4 of Protocol No. 4 to the Convention: "Collective expulsion of aliens is prohibited."

a) Summary return at the border and/or shortly after entry into territory ("push-backs")

Article 3 of the Convention alone and/or in conjunction with Article 13 of the Convention

In the case of *Ilias and Ahmed v. Hungary,* 2019[18] the Court found no violation of Article 3 of the Convention in respect of the conditions of detention at the Roszke transit zone but found a violation of Article 3 in respect of the applicants' expulsion to Serbia, as well as a violation of Article 5 § 1 and 5 § 4 of the Convention.

[17] *Safi and Others v. Greece,* Application N° 5418/15, 7 July 2022 [Grand Chamber].
[18] *Ilias and Ahmed v. Hungary,* Application N° 47287/15, 21 November 2019 [Grand Chamber].

The applicants, who had presented themselves at the border seeking to lodge an asylum application and/or communicating fear for their safety, were removed in a summary manner to the third country from which they had sought to enter the respondent State's territory, without an assessment by the authorities of the removing country of the merits of their asylum claim. Where applicants can arguably claim that there is no guarantee that their asylum applications would be seriously examined by the authorities in the neighbouring third country and that their return to the country of origin could violate Article 3 of the Convention, the respondent State is obliged to allow the applicants to remain within its jurisdiction until such time as their claims have been properly reviewed by a competent domestic authority and cannot deny access to its territory to persons presenting themselves at a border checkpoint who allege that they may be subjected to ill-treatment if they remain on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk.[19] Thus, the Court found both a violation of Article 3 and Article 4 of Protocol N°4 on account of the refusal of border guards to receive asylum applications and the summary removal to a third country, with a risk of *refoulement* to and ill-treatment in their country of origin.

In the case of *D. v. Bulgaria*, 2021,[20] concerning the return to Turkey of a Turkish journalist who had expressed his fear of ill-treatment in the context of the *coup d'état* to the border police, without prior assessment of the risks incurred by him, the Court concluded that the Bulgarian authorities, who had hastily returned the applicant to Turkey without instituting proceedings for international protection, had removed him without examining the Article 3 risks he faced and had rendered the available remedies ineffective in practice, in breach of Articles 3 and 13 of the Convention (§§ 129-137).

Article 4 of Protocol N°4

As regards summary returns and related scenarios, in the case of *N.D. and N.T. v. Spain*, 2020,[21] the Court set out a two-tier test to determine compliance with Article 4 of Protocol N°4, where individuals cross a land border in an unauthorised manner and are expelled summarily:
1 - whether the State provided genuine and effective access to means of legal entry (in particular, border procedures; location of border crossing points; modalities for lodging applications there; availability of interpreters/legal assistants) to allow all persons who face persecution to submit an application for protection, based in particular on Article 3;
2 - where the State provided such access, but an applicant did not make use of it, it has to be considered whether there were cogent reasons for not doing so, which were based on objective facts for which the State was responsible. The absence of such cogent reasons could lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification.

[19] See, also, *M.K. and Others v. Poland*, Applications N° 40503/17, 42902/17 and 43643/17, 23 July 2021, §§178-179.
[20] *D. v. Bulgaria*, Application N° 29447/17, 20 July 2021.
[21] *N.D. and N.T. v. Spain*, Applications N° 8675/15 and 8697/15, 13 February 2020 [Grand Chamber].

Applying that two-tier test, the Court found a violation of Article 4 of Protocol N°4 in the cases of *Shahzad v. Hungary*, 2021,[22] and *M.H. and Others v. Croatia*, 2021[23] but no violation in the case of *A.A. and Others v. North Macedonia*, 2022.[24]

In the case of *Shahzad v. Hungary*, 2021, concerning a migrant's summary return to a narrow strip of State territory on the external side of a border fence, the Court found a violation of Article 4 of Protocol N°4 on account of limited access to means of legal entry lacking a formal procedure and safeguards. In August 2016 a group of twelve Pakistani nationals, including the applicant, entered Hungary irregularly by cutting a hole in the border fence between Hungary and Serbia. They walked for several hours before resting in a cornfield where they were intercepted by Hungarian police officers and subjected to the "apprehension and escort" measure under section 5(1a) of the State Borders Act. They were transported in a van to the nearest border fence and then escorted by officers through the gate to the external side of the fence into Serbia. The applicant, who had been injured, went to a reception centre in Subotica, Serbia, and from there was taken to a nearby hospital.

As to the applicability, the Court found that the fact that the applicant had entered Hungary irregularly and had been apprehended within hours of crossing the border and possibly in its vicinity did not preclude the applicability of Article 4 of Protocol N°4. It found that the removal of the applicant to the external side of the border fence (even though the zone was still in Hungarian territory) amounted to expulsion within the meaning of Article 4 of Protocol N°4. In particular, the border fence had clearly been erected in order to secure the border between the two countries. The narrow strip of land with no apparent infrastructure on the external side of that fence only had a technical purpose linked to the management of the border and in order to enter Hungary, deported migrants had to go to one of the transit zones, which normally involved crossing Serbia. The CJEU in its judgment of 17 December 2020 on Hungary's compliance with Directives 2008/115/EC and 2013/32/EU had found that migrants removed pursuant to section 5(1a) of the State Borders Act had no choice but to leave Hungarian territory and further, in the instant case, it transpired that the group had been directed by the officers towards Serbia. Relying merely on the formal status of the strip of land on the external side of the border fence as part of Hungarian territory and disregarding the practical realities referred to above would lead to Article 4 of Protocol N°4 being devoid of practical effectiveness in such cases and would allow States to circumvent the obligations imposed on them by virtue of that provision. Problems with managing migratory flows could not justify an area outside the law where individuals were covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention.

On the merits, since the applicant had been removed without having been subjected to any identification procedure or examination of his situation by the Hungarian

[22] *Shahzad v. Hungary*, Application N° 12625/17, 8 July 2021.
[23] *M.H. and Others v. Croatia*, Applications N° 15670/18 and 43115/18, 18 November 2018.
[24] *A.A. and Others v. North Macedonia,* Applications N° 55798/16, 55808/16, 55817/16 et al., 5 April 2022.

authorities, the Court had to ascertain whether the lack of an individual removal decision could be justified by his own conduct:

– First, although the applicant, along with the other migrants, had crossed the Hungarian border in an unauthorised manner they had followed the officers' orders and the situation had been entirely under the officers' control. Consequently, apart from the unauthorised manner of entry, the case could not be compared to the situation in *N.D. and N.T. v. Spain*.

– Second, and as to whether the applicant, by crossing the border irregularly, had circumvented an effective procedure for legal entry, each of the two available transit zones admitted a significantly low number of applicants for international protection per day and those wishing to enter the transit zone had to first register their name on the waiting list with a potential wait of several months in Serbia before being allowed entry. Although the applicant submitted that he had asked the person managing the waiting list to add his name, he had never in fact been registered. In view ofthe informal nature of this procedure, the applicant could not be criticised for not having his name added to the waiting list.

Thus, having regard to the limited access to the transit zones and lack of any formal procedure accompanied by appropriate safeguards governing the admission of individual migrants in such circumstances, the respondent State had failed to secure the applicant an effective means of legal entry. Consequently, in view of the fact that the authorities had removed the applicant without identifying him or examining his situation and having regard to the lack of effective access to a means of legal entry, his removal had been of a collective nature.

M.H. and Others v. Croatia, 2021

In the case of *M.H. and Others v. Croatia*, 2021, the applicants were an Afghan family of fourteen. They left their home country in 2016, travelling, *inter alia*, through Serbia before coming to Croatia. Among other things, they alleged that on 21 November 2017, the first applicant and her six children entered Croatia from Serbia but were taken back to the border by police officers and ordered to go back to Serbia by following the train tracks. One of the children, MAD.H, was hit by a passing train and killed.

The Court firstly found a violation of Article 2 § 1 on account of an ineffective investigation into the child's death after the alleged denial of opportunity to seek asylum and order to return to Serbia following train tracks. A violation of Article 3 (degrading treatment) was also found because the child applicants had been kept in an immigration detention centre with prison-type elements for more than two months, but the conditions were not ill-suited to the adult applicants. A violation of Article 5 § 1 was also found on account of the failure to demonstrate the requisite assessment, vigilance and expedition in proceedings in order to limit the detention of an asylum seeker's family as far as possible.

Finally, the Court found a violation of Article 4 of Protocol N°4 on account of the summary return of the parent and six children by Croatian police outside the official border crossing and without prior notification of the Serbian authorities. Having regard to the particular circumstances of the present case, there had been *prima facie* evidence in favour of the applicants' version of events, and it had been for the authorities to prove that the applicants had not entered Croatia and had not been summarily returned to Serbia prior to the train hitting MAD.H. However, the Government had not submitted a single argument capable of refuting that *prima facie* evidence. The Court thus considered it to be truthful that on 21 November 2017 the Croatian police officers had returned the first applicant and her six children to Serbia without considering their individual situation. The fact that the first applicant and her six children had entered Croatia irregularly and had been apprehended within hours of crossing the border and possibly in its vicinity did not preclude the applicability of Article 4 of Protocol N°4. They had been subjected to "expulsion" within the meaning of this provision. The Government had been unable to establish whether at the material time the respondent State had provided any genuine and effective access to procedures for legal entry into Croatia.

A.A. and Others v. North Macedonia, 2022

The Court found no violation of Article 4 of Protocol N°4 irrespective of the lack of individual removal decisions for migrants – Afghan, Iraqi and Syrian nationals – arriving in large groups and circumventing genuine and effective legal entry procedures without cogent reasons. In spite of some shortcomings in the asylum procedure and reported "pushbacks", the Court was not convinced that the State had failed to provide genuine and effective access to procedures for legal entry into North Macedonia, in particular by putting in place international protection at the border crossing points, especially with a view to claims for protection under Article 3, or that the applicants had had cogent reasons, based on objective facts for which the respondent State had been responsible, not to make use of those procedures. It had in fact been the applicants who had placed themselves in jeopardy by participating in the illegal entry into Macedonian territory, taking advantage of the group's large numbers. The lack of individual removal decisions had been a consequence of their own conduct.

The Court also held that there had been no violation of Article 13 taken in conjunction with Article 4 of Protocol N°4 concerning the availability of an effective remedy with suspensive effect by which to challenge the summary deportation. Macedonian law had provided a possibility of appeal against removal orders. However, by deliberately attempting to enter the territory as part of a large group and at an unauthorised location, the applicants had placed themselves in an unlawful situation and had thus chosen not to use the legal procedures which had existed.

b) Access to procedure and reception conditions – Reception conditions, age-assessment procedure and freedom of movement

Article 3 of the Convention cannot be interpreted as imposing on the High Contracting Parties any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.[25] However, asylum seekers are members of a particularly vulnerable population group in need of special protection and there exists a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.[26] It may thus raise an issue under Article 3 if asylum seekers are not provided with accommodation and thus forced to live on streets for months, with no resources or access to sanitary facilities, without any means of providing for their essential needs, in fear of assault from third parties and of expulsion.

4. SUBSTANTIVE AND PROCEDURAL ASPECTS OF CASES CONCERNING EXPULSION, EXTRADITION AND RELATED SCENARIOS

The right to political asylum is not contained in either the European Convention on Human Rights or its Protocols and therefore the Court does not itself examine the actual asylum application or verify how the States honour their obligations under the 1951 Geneva Convention and the Protocol of 31 January 1967 relating to the status of refugee or under European Union law (EU Charter of Fundamental Rights, Article 18 – Right to asylum).[27] In *Sufi and Elmi* the Court found, *inter alia*, that the first applicant would be at real risk of ill-treatment if he were to remain in Mogadishu. Consequently, it was likely that he would find himself in an IDP or refugee camp where conditions were sufficiently dire to reach the Article 3 threshold and the first applicant would be particularly vulnerable on account of his psychiatric illness; in 2008 he had been diagnosed as suffering from post-traumatic stress disorder.

The expulsion of an alien by a Contracting State may give rise to an issue under Articles 2 and 3, and hence engage the responsibility of the State under the Convention, where substantive grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 and 3 in the destination country. In these circumstances, Articles 2 and 3 imply an obligation not to deport the person in question to that country.[28] In the case of *F.G. v. Sweden* the Court found, under Article 37 of the Convention, that there were special circumstances, namely procedural issues justifying continued examination of the complaint, even though the deportation order itself had expired. Moreover, under Articles 2 and 3 of the Convention, any future deportation would constitute a violation of both Articles if the applicant were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his conversion to Christianity.

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[25] *Tarakhel v. Switzerland*, Application N° 29217/12, 4 November 2014 [Grand Chamber], § 95.
[26] *M.S.S. v. Belgium and Greece*, Application N° 30696/09, 21 January 2011 [Grand Chamber], § 251.
[27] See *F.G. v. Sweden*, Application N° 43611/11, 23 March 2016, [Grand Chamber], § 117; *Sufi and Elmi v. the United Kingdom*, Applications N° 8319/07 and 11449/07, 28 June 2011, §§ 212 and 226.
[28] *Ibid*, §§ 110-111.

While the majority of removal cases examined by the Court under Articles 2 or 3 concern a return to the country from which the applicant has fled, such complaints may also arise in connection with the applicant's removal to a third country. In *Ilias and Ahmed v. Hungary*, 2019, [Grand Chamber], the Court observed that where a Contracting State sought to remove an asylum seeker to a third country without examining the asylum request on the merits, the State's duty not to expose the individual to a real risk of treatment contrary to Article 3 was discharged in a manner different from that in cases of return to the country of origin. In the former situation, the main issue would be the adequacy of the asylum procedure in the receiving third country. While a State removing asylum seekers to a third country might legitimately choose not to deal with the merits of the asylum requests, it could not therefore be known whether those persons risked treatment contrary to Article 3 in their country of origin or were simply economic migrants not in need of protection. It was the duty of the removing State to examine thoroughly whether or not there would be a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement*, namely, against being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she would face from the standpoint of Article 3. In conclusion, the Court found a violation of Article 3, on account of the respondent State's failure to assess the risk of a denial of access to asylum proceedings in the presumed safe third country and the possibility of *refoulement*.

If it is established that the existing guarantees in this regard are insufficient, Article 3 gives rise to a duty not to remove the asylum seekers to the third country concerned. To determine whether the removing State has fulfilled its procedural obligation to assess the asylum procedures of a receiving third State, it has to be examined whether the authorities of the removing State had taken into account the available general information about the receiving third country and its asylum system in an adequate manner and of their own initiative; and whether an applicant had been given a sufficient opportunity to demonstrate that the receiving State was not a safe third country in the particular case. In applying this test, the Court indicated that any presumption that a particular country was "safe", if it had been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset by the above analysis. Importantly, in cases concerning the removal to a third country based on the "safe third country" concept, where the authorities of the removing State had not dealt with the merits of the applicant's asylum claim, it was not the Court's task to assess whether there was an arguable claim about Article 3 risks in their country of origin, this question only being relevant where the expelling State had dealt with these risks. The Court added that European Union law did not impose strict legal obligations to declare another (non-EU) country to be a safe third country nor to avoid assessing asylum requests on the merits, relying on there being a safe third country, so that EU Member States were therefore fully responsible under the Convention if they removed individuals to a third country without assessing their asylum requests on the merits, relying on the "safe third country" concept. In addition to the main question whether the individual will have access to an adequate asylum procedure in the receiving third country, where the alleged risk of being subjected to treatment contrary to Article 3

concerns, for example, conditions of detention or living conditions for asylum seekers in a receiving third country, that risk is also to be assessed by the expelling State.[29] The removal of asylum seekers to a third country may be in breach of Article 3 because of inadequate reception conditions in the receiving State[30] or because they would not be guaranteed access to reception facilities adapted to their specific vulnerabilities, which may require the removing State to obtain assurances from the receiving State to that end.[31]

5. POSITIVE OBLIGATIONS OF MEMBER STATES IN RESPECT OF THE TREATMENT OF INDIVIDUALS WHO LODGE AN ASYLUM APPLICATION

a) Detained individuals

Under the Convention, while liberty[32] is the pillar-norm, Article 5 (Right to liberty and security) allows the authorities to deprive individuals of their liberty on certain, exhaustively listed grounds (*inter alia*, aliens under Article 5 § 1 (f)). If detention is indeed the measure of last resort, the authorities are under an obligation to provide premises that are suitable for specific needs of minors.[33] In that sense in the case of *M.D. and A.D. v. France*, 2021,[34] the Court found a violation of Article 3 (degrading treatment) because of the administrative detention for 11 days in a centre which was not adapted for a four-month-old infant and her mother. The domestic authorities did not verify whether the initial placement and its prolongation were measures of last resort, and whether this measure could have been replaced by another less restrictive measure (the Court found in addition a violation of Article 5).

Where individuals are not placed in a detention centre but *de facto* confined in a transit zone, the authorities need to ensure that their living conditions there comply with Article 3, including in terms of provision of food and medical care. In the case of *R.R. and Others v. Hungary*, 2021,[35] the Court found a violation of Article 3 on account of degrading treatment; the transit zone conditions for a dependent repeat asylum seeker (because of failure to secure his basic subsistence) and a vulnerable pregnant woman and minors, confined for nearly four months, exceeded the threshold of severity for a

[29] *Ilias and Ahmed v. Hungary*, Application N° 47287/15, 21 November 2019, [Grand Chamber], § 131.
[30] *M.S.S. v. Belgium and Greece*, Application N° 30696/09, 21 January 2019, [Grand Chamber], §§ 362-368.
[31] *Tarakhel v. Switzerland*, Application N° 29217/12, 4 November 2014 [Grand Chamber], §§ 100-122; *Ali and Others v. Switzerland and Italy*, Application N° 30474/14, 4 October 2016 ; *Ojei v. the Netherlands*, Application N° 64724/10, 14 March 2017.
[32] See also Mahatma K. Gandhi, *My Non-Violence*, Sailesh Kumar Bandopadhyaya, (1960) about the doctrine of nonviolent protest – satyagraha – to achieve political and social progress; Nelson Mandela, *Long Walk to Freedom*, the autobiography of Nelson Mandela, ABACUS, London (1994); Simón Bolívar, *El Libertador, Writings of Simón Bolívar* (2003); Ivo Andrić, *Simon Bolivar Oslobodilac*, Nolit, Beograd (1998).
[33] In the *Tarakhel v. Italy*-judgment the Court stated that the "requirement of 'special protection' of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability" (§ 119); See also Jolien Schukking, 'Access to Justice for Child Refugees', IARMJ 13th World Conference, The Hague, 10 May 2023, p. 2.
[34] *M.D. and A.D. v. France*, Application N° 57035/18, 22 July 2021.
[35] *R.R. and Others v. Hungary*, Application N° 36037/17, 2 March 2021.

violation of Article 3. In addition, the Court found a violation of Article 5 § 1 of the Convention.

b) Individuals who are not detained

While the Court has not so far set out a positive obligation under Article 3 to provide asylum seekers with adequate reception conditions from the outset, Article 3 is engaged if adult asylum-seekers (including those intending to lodge an asylum application) are not provided with accommodation and thus forced to live on the street for months, with no access to sanitary facilities and without any means of providing for their essential needs. In that sense, one should mention the judgment in the case of *M.S.S. v. Belgium and Greece*, 2011, and the judgment in the case of *N.H. and Others v. France*, 2020. In the latter case, asylum seekers lived rough (sleeping rough, without access to sanitary facilities, having no means of subsistence and constantly in fear of being attacked or robbed) for several months without resources due to administrative delays preventing them from receiving the support provided by law. As regards three applicants (N.H., K.T. and A.J.) the authorities had failed in their duties towards the applicants, under the domestic law which transposed the EU "Reception Directive"; thus, the Court found a violation of Article 3. It follows that States are under an obligation to provide such access to accommodation, sanitary facilities and means to provide for essential needs, at least after a certain (not too long) period of time.

In the case of *M.S.S. v. Belgium and Greece* the Court found a violation of Article 3 (degrading treatment) on account of conditions of detention and subsistence of an asylum-seeker transferred under the Dublin Regulation (in view of the obligations incumbent on the Greek authorities under the EU Reception Directive).[36] In Greece the applicant had lived for months in the most abject poverty, with no food and nowhere to live or to wash. He also lived in constant fear of being attacked or robbed, with no prospect of his situation improving. The authorities had failed to take due account of the applicant's vulnerability as an asylum seeker and were responsible for the conditions he had had to endure for many months.

In respect of Belgium, the Court also found a violation of Article 3 on account of a decision of the Belgian authorities to expose the applicant to the conditions of detention and living conditions that prevailed in Greece at that time. By removing the applicant to Greece, the Belgium authorities had knowingly (the conditions concerned had been well documented and easily verifiable in numerous sources prior to the applicant's

[36] As to the principle of equivalent protection under the European Convention of Human Rights, the European Union legal order is "presumed to offer protection of fundamental rights that is equivalent to protection under the ECHR" (by "equivalent" the ECtHR means "comparable" and not "identical" – *Avotins v. Latvia*, 2016, § 101), it is noteworthy that in the case of Dublin Regulation 604/2013 the presumption of equivalent protection under ECHR does not apply. Thus, the Belgian and Swiss authorities could have refrained from transferring the applicants in the cases of: *M.S.S. v. Belgium and Greece* (§ 340) and *Tarakhel v. Switzerland* (§ 90). See: Boštjan Zalar, "*Principle of mutual trust under EU law taken together with presumption of equivalent protection under ECHR: A Check-list for the Use of Articles 3(2) and 17(1) of the Dublin Regulation 604/2013*", 1st joint EUAA and NSJ Conference, p. 8-9; *Handbook on European law relating to asylum, borders and immigration*, eds. European Union Agency for Fundamental Rights, Council of Europe, 2020.

transfer) exposed him to detention and living conditions that amounted to degrading treatment.

As regards children, they need to be placed in child-appropriate reception facilities.[37] Thus, in the case of *Darboe and Camara v. Italy*, 2022[38] (the first time the Court had examined, under Article 8 of the Convention, a complaint about age-assessment procedures), the Court found not only a violation of positive obligations of the respondent State under Article 8 § 1 – Respect for private life, because the unaccompanied minor asylum-seeker was placed in an adult reception centre, but also a violation of Article 3 on account of the length and conditions of the applicant's stay in such a reception centre. The Court, *inter alia*, noted that difficulties deriving from the increased inflow of migrants and asylum seekers (the number of unaccompanied minors arriving in Italy had dramatically increased during the period in which the facts of the case had taken place) in particular to States on external EU borders did not exonerate member States of the Council of Europe from their obligations under Article 3, which was a provision of an absolute nature.

In the case of *Tarakhel v. Switzerland* the Court identified an obligation to seek assurances from the receiving State that a family would be placed in appropriate reception conditions prior to a transfer under the Dublin Regulation. The Court found that a proposed removal of an Afghan asylum-seeker's family under the Dublin II Regulation would constitute a violation of Article 3 (a conditional violation). Were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of children and that family would be kept together, there would be a violation of Article 3.

6. POSITIVE OBLIGATIONS OF THE STATES IN RESPECT OF MIGRANTS WHO ARE RESIDING IN THE TERRITORY

In certain circumstances States may be under a positive obligation under Article 8 to allow family members to join a foreign national residing lawfully in their territory.[39]

a) In respect of aliens who are already present in the territory of the respondent State but have never had lawful residence

In respect of aliens who are already present in the territory of the respondent State but have never had lawful residence, cases have been examined under Article 8 concerning

[37] The Strasbourg Court made it very clear that the confinement of young children should be avoided, and that only placement in suitable condition may be compatible with the Convention, on the condition that the authorities establish that they took this measure of last resort only after actually verifying that no other means less restrictive of liberty could be put in place and that the authorities act with the required expedition. The authorities are obliged in such a context to search for other means less restrictive to liberty. In *Nikoghosyan and Others v. Poland*, 2022, the Court reiterated in its judgment that "the child's best interests cannot be confined to keeping the family together and that the authorities must take all the necessary steps to limit, as far as possible, the detention of families accompanied by children [and effectively preserve the right to family life]" (§ 84).

[38] *Darboe and Camara v. Italy*, Application N°5797/17, 21 July 2022.

[39] *M.A. v. Denmark*, Application N°6697/18, 9 July 2021.

the denial of a residence permit to such individuals; the relevant principles are listed in §§ 106-109 of the judgment in *Jeunesse v. the Netherlands*, 2014.[40] The Court declared that the Netherlands decision to refuse a residence permit to the Surinamese mother with three children born in the country breached their right to family life under Article 8 of the Convention.[41]

However, in principle, the chances of success are slim if family life was formed at the time when those involved knew that the migration status of one of them was such that their family life would be precarious. Where this is the case, the principle is that the expulsion of the non-national family member will amount to an Article 8 violation "only in exceptional circumstances". The Court has been reluctant to find a violation where there are no "insurmountable obstacles" to enjoyment of family life elsewhere.

b) In respect of aliens who had lawfully resided in the territory and then committed a criminal offence (Üner/Maslov criteria)

In the case of *Üner v. the Netherlands*, 2006,[42] the Court did not find a violation of Article 8 § 1 on account of the withdrawal of a residence permit and the imposition of a 10-year expulsion order, resulting in the applicant's separation from his partner and two children, given the nature and seriousness of the applicant's offences – manslaughter and assault – and also given his previous convictions). The relevant criteria for the proportionality assessment include: the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled (this last criteria may be indirectly related to the issue of economic and social deprivation).

By contrast, in the case of *Maslov v. Austria*, 2008, [Grand Chamber], [43] the Court found a violation of Article 8 § 1 because the expulsion order was made on account of convictions for largely non-violent offences committed when the applicant was still a minor. Additional criteria in *Maslov* relate to "the solidity of social, cultural and family ties with the host country and with the country of destination", which may have impact to certain extent to the economic and social deprivation, too. Where expulsion measures against a juvenile offender were concerned, the obligation to take the best interests of the child into account included an obligation to facilitate his/her reintegration. The

[40] *Jeunesse v. the Netherlands*, Application N° 12738/10, 3 October 2014.
[41] As to the accepted approach in South African jurisprudence in respect of the constitutionality of a statute restricting the ability of a non-resident spouse who is married to a resident of South Africa to attain South African residence status, in the case of *Dawood v. Minister of Home Affairs* it was argued that the statute limits the right of human dignity and that it was disproportionate; Barak, *op. cit*., p. 258.
[42] *Üner v. the Netherlands*, Application N° 46410/99, 18 October 2006 [Grand Chamber].
[43] *Maslov v. Austria*, Application N° 1638/03, 6 February 2008 [Grand Chamber].

Committee of Ministers Recommendation Rec(2000)15 concerning the security of residence states (adopted in 2000), *inter alia*, that "long-term immigrants who are minors may in principle not be expelled" and that "long-term immigrants born on the territory of the member State or admitted to the member State before the age of ten, who have been lawfully and habitually resident, should not be expellable once they have reached the age of 18" (Article 4 (c)).

c) In respect of seriously ill persons

In respect of seriously ill persons the criteria are set out in the case of *Paposhvili v. Belgium*, 2016, [Grand Chamber];[44] and in the case of *Savran v. Denmark*, 2021.[45] In those cases, the Court clarified and summarised the relevant principles as to when humanitarian considerations will or will not outweigh other interests when considering the expulsion of seriously ill individuals. Other than the imminent death situation in *D. v. the United Kingdom*, 1997, the judgment in the case of *N. v. the United Kingdom*, 2008, [Grand Chamber], had referred to "other very exceptional cases" which could give rise to an issue under Article 3 in such context.

In the case of *N. v. the United Kingdom*, 2008, the Court stated that, in addition to situations of the kind addressed in *D. v. the United Kingdom*[46], 1997, in which death was imminent, there might be other very exceptional cases where the humanitarian considerations weighing against removal were equally compelling.[47]

The Grand Chamber found in the case of *Paposhvili v. Belgium*, 2016, that the "other very exceptional cases" which might raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds had been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. These situations corresponded to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from a serious illness.
In the case of *Paposhvili v. Belgium* the Court found, regarding the proposed deportation of persons suffering from serious illness to their country of origin in the face of doubts as to the availability of appropriate medical treatment there, that the expulsion order would have constituted a violation of Article 3. In the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of information concerning his state of health (the applicant suffered from tuberculosis, hepatitis C and chronic leukaemia (CLL)) and the existence of appropriate treatment in Georgia, the

[44] *Paposhvili v. Belgium*, Application N°41738/10, 16 September 2015 [Grand Chamber].
[45] *Savran v. Denmark*, Application N°57467/15, 7 December 2021 [Grand Chamber].
[46] *D. v. the United Kingdom*, Application N°30240/96, 2 May 1997.
[47] *N. v. the United Kingdom*, Application N°26565/05, 27 May 2008 [Grand Chamber], Joint dissenting opinions of Judges Tulkens, Bonello and Spielmann, 2008, the Court found there would be no violation of Article 3 of the Convention in the event of the applicant being removed to Uganda and that it was not necessary to examine the complaint under Article 8 of the Convention).

information available to those authorities had been 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. (The Court granted on 28 July 2010 the applicant's request for an interim measure under Rule 39 of the Rules of Court).

Post-Paposhvili cases relating to expulsion/extradition and risks connected with state of health

In the case of *K.S. v. Sweden*[48] (Rule 39 request was granted), the applicant suffered from vascular dementia, which was worsening. The Government did not dispute that. Moreover, it appeared from the medical certificate issued on 17 January 2018 that, according to a doctor specialising in dementia, there was no further medical treatment available which could improve the applicant's condition. It was thus not the alleged lack of medical care as such which was at stake in this case but rather the alleged lack of a proper long-term care facility in which the applicant could be placed in Iraq. This case differed from the case of *Paposhvili v. Belgium* in that here no substantial grounds had been shown for believing that the applicant, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in Iraq or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy. The fact that the applicant needed assistance in his daily life did not show as such that there were substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Iraq[49]. Even if the applicant's state of health might raise some doubts, it did not seem to act as a bar to removal in the applicant's case given that care institutions existed in Iraq and the applicant's transfer there could be organised in such a manner that he would be accompanied during the journey and upon arrival. As no further medical treatment capable of improving the applicant's health condition was available anywhere, the applicant's removal from Sweden was not likely to cause any rapid deterioration of his health on account of any alleged lack of medical treatment in Iraq[50]. There were thus no such personal circumstances which would prevent the applicant's deportation to Iraq. Accordingly, the Court found this complaint manifestly ill-founded and declared it inadmissible (and consequently decided to discontinue the application of Rule 39 of the Rules of Court).

In the case of *Savran v. Denmark* 2021, the Court firstly confirmed that the *Paposhvili* test offered a comprehensive standard taking account of all the considerations that were relevant for the purposes of Article 3 of the Convention in this context and that it applied to all situations involving the removal of a seriously ill person which would constitute treatment proscribed by Article 3, irrespective of the nature of the illness. It clarified that the threshold test established in *Paposhvili v. Belgium* [Grand Chamber], § 183, should systematically be applied to ascertain whether the circumstances of the alien to be expelled fell within the scope of Article 3 and that it was only after this threshold

[48] *K.S. v. Sweden*, Application N°31827/18, 16 December 2020.
[49] See *Senchishak v. Finland*, Application N°5049/12, 18 November 2014.
[50] See *A.S. v. Switzerland*, Application N°39350/13, 30 June 2015.

had been met, and thus if Article 3 was applicable, that the returning State's compliance with its obligations under Article 3 could be assessed. The returning State's obligation under Article 3 is to be fulfilled through appropriate domestic procedures:

(a) it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained off were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3;

(b) where such evidence is adduced, it is for the returning State to dispel any doubts raised by it, and to subject the alleged risk to close scrutiny by considering the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances (taking into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question); the impact of removal must be assessed by comparing the applicant's state of health prior to removal and how it would evolve after transfer to the receiving State;

(c) the returning State must verify on case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her from being exposed to treatment contrary to Article 3;

(d) the returning State must also consider the extent to which the applicant would actually have access to the treatment, including with reference to its costs, the existence of a social and family network, and the distance to be travelled in order to have access to the required care;

(e) where, after the relevant information has been examined, serious doubts persist regarding the impact of the removal on the applicant (on account of the general situation in the receiving country and/or their individual situation), the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3.

In the *Savran* judgment, the Court did not find a violation of Article 3. It concerned the expulsion of a foreign national with schizophrenia to his country of origin, without a health risk reaching the high threshold for the application of Article 3. While schizophrenia was a serious mental illness, that condition could not in itself be regarded as sufficient to bring the applicant's complaint within the scope of Article 3. The threshold test, irrespective of the nature of the illness (physical or mental) broadly referred to the "irreversibility" or the "decline in the person's state of health". Moreover, it would be wrong to dissociate the various fragments of the test from each other, given that a "decline in health" was linked to "intense suffering". It was on the basis of all those elements taken together and viewed as a whole that the assessment of a particular case should be made.

The ECtHR also pointed out that the benchmark was not the level of care existing in the returning State; it was not a question of ascertaining whether the care in the receiving

State would be equivalent or inferior to that provided by the healthcare system in the returning State. Nor was it possible to derive from Article 3 a right to receive specific treatment in the receiving State (and whether the receiving State was a contracting Party to the Convention is not decisive) which was not available to the rest of the population. Likewise, the issue was not one of any obligation for the returning State to alleviate the disparities between its healthcare system and the level of treatment existing in the receiving State through the provision of the free and unlimited healthcare to all aliens without a right to stay within its jurisdiction to all aliens.[51]

In *Savran v. Denmark*, the Court was not convinced that the applicant had shown substantial grounds for believing that, in the absence of appropriate treatment in Turkey or the lack of access to such treatment, he would be exposed to a risk of bearing the consequences set out in the *Paposhvili* judgment. The circumstances of the present case had not reached the threshold set by Article 3 to bring the applicant's complaint within its scope (it had not been demonstrated that the applicant's removal to Turkey had exposed him to a serious, rapid and irreversible decline in his state of health resulting in intense suffering, let alone to a significant reduction in life expectancy). According to some of the relevant medical statements, a relapse was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others" as a result of the worsening of psychotic symptoms. While those have been very serious and detrimental effects, they could not be described as "resulting in intense suffering" for the applicant himself. (It did not appear that any risk had ever existed of the applicant harming himself).

The threshold should remain high for this type of cases. Against that background, there was no call to address the question of the returning State's obligations under Article 3 (in the circumstances of the present case). Thus, the Court found no violation of Article 3 regarding the expulsion of a foreign national with schizophrenia to his country of origin, without health risks reaching the high threshold for the application of Article 3.

The removal of a person suffering from a serious illness may also breach Article 8[52] and a person's mental illness has to be adequately taken into account when examining the proportionality of his or her expulsion in view of a criminal offence that he or she has committed.[53] Thus, under Article 8, in the case of *Savran v. Denmark,* the Court however found a violation of the applicant's right to private life, because of the permanent expulsion order against a long-term settled migrant with schizophrenia, despite progress after years of compulsory care, on account of violent offences. The applicant, a Turkish national, entered Denmark in 1991 when he was six years old. In 2008 he was convicted of assault and exempt from punishment on account of his mental illness. He was sentenced to committal to forensic psychiatric care. In 2009 he was made subject to an expulsion order with a permanent ban on re-entry. In 2014 the City Court held that, regardless of the nature and gravity of the crime committed, the applicant's health made it conclusively inappropriate to enforce the expulsion order. In

[51] *Savran v. Denmark*, § 131.
[52] *Paposhvili v. Belgium*, §§ 221-226.
[53] *Savran v. Denmark*, §§ 184, 191-197, 201.

2015 that decision was reversed by the High Court and the applicant was subsequently refused leave to appeal and deported to Turkey.

7. ECONOMIC AND SOCIAL RIGHTS

The Court has dealt with several cases concerning the economic and social rights of migrants, asylum-seekers and refugees, primarily under the angle of Article 14 of the Convention (Prohibition of discrimination) in view of the fact that, where a Contracting State decides to provide social benefits, it must do so in a way that is compliant with Article 14.

In this respect, the Court has found that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding and that it may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory.

a) Immigration status

The Court has established that although immigration status is a status conferred by law, rather than one inherent to the individual, this fact does not preclude it from amounting to "other status" for the purposes of Article 14.[54] Indeed, a wide range of legal and other effects flow from a person's immigration status.

The case of *Hode and Abdi v. the United Kingdom*, 2012, concerned a person recognised as a refugee and granted limited leave to remain who could not be joined by his post-flight spouse. The Court reiterated that the argument in favour of refugee status amounting to "other status" was even stronger, as, unlike immigration status, refugee status did not entail an element of choice (§ 47). Consequently, the Court found a violation of Article 14 taken together with Article 8.

In *Bah v. the United Kingdom*, 2011, the Court examined the case of a person who was unintentionally homeless with a minor child and who was not granted priority assistance by the social services because her son was subject to immigration control. The applicant had entered the United Kingdom as an asylum-seeker but had not been granted refugee status. The Court noted that the nature of the status upon which differential treatment was based weighed heavily in determining the scope of the margin of appreciation to be accorded to Contracting States (§ 47). Given the element of choice involved in immigration status, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality (§ 47). The Court concluded that the differential treatment to which the applicant was subjected was reasonably and objectively justified (§ 52).

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[54] *Hode and Abdi v. the United Kingdom*, Application N°22341/09, 6 November 2012, § 47 ; *Bah v. the United Kingdom*, Application N°56328/07, 27 September 2011, § 46.

The Court has found discrimination on grounds of immigration status in several other cases. In *Ponomaryovi v. Bulgaria*, 2011,[55] the Court found the requirement for aliens without permanent residence to pay secondary-school fees discriminatory by reason of their nationality and immigration status (§ 49). It amounted to a violation of Article 14 of the Convention taken together with Article 2 of Protocol N°1 on the right to education.

In *Anakomba Yula v. Belgium*, 2009,[56] where an unlawfully resident alien had been refused legal aid for contesting the paternity of her child, the Court found a violation of Article 14 in conjunction with Article 6 (access to court).

b) National origin

According to a recurring formula used by the Court, very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention.[57]

For example, in *Andrejeva v. Latvia*, 2009, the Court found a violation of Article 14 read in conjunction with Article 1 of Protocol N°1 due to the refusal to take the applicant's years of service acquired in the former Soviet Union (on today's Latvian territory and while she was resident in Latvia) into account when calculating her entitlement to a retirement pension because she did not have Latvian citizenship.

More recently, in *Savickis and Others v. Latvia*, 2022,[58] the Court accepted that, in the context of a difference in treatment based on nationality, there may be certain situations where the element of personal choice linked with the legal status in question may be of significance, especially in so far as privileges, entitlements and financial benefits were at stake. In that case, the Court was called upon to examine whether the exclusion of employment periods of permanently resident noncitizens accrued in other States of the former Soviet Union for a state pension had been discriminatory. In doing so, the Grand Chamber held that, unlike in *Andrejeva*, the margin of appreciation had been a wide one. In the specific context of the restoration of Latvia's independence after unlawful occupation and annexation, the Court accepted that very weighty reasons had been put forward to justify the difference in treatment between the applicants and Latvian citizens in the circumstances.[59]

Other cases regarding alleged discrimination on grounds of nationality concerned, for example,

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[55] *Ponomaryovi v. Bulgaria*, Application N°5335/05, 21 June 2011.
[56] *Anakomba Yula v. Belgium*, Application N°45413/07, 10 March 2009.
[57] *Gaygusuz v. Austria*, Application N°17371/90, 16 September 1996, § 42; *Koua Poirrez v. France*, Application N°40892/98, 30 September 2003, § 46; Andrejeva v. Latvia, Application N°55707/00, 14 January 2009 [Grand Chamber], § 87.
[58] *Savickis and Others v. Latvia*, Application N°49270/11, 26 May 2021.
[59] See Joint dissenting opinion of Judges O'Leary, Grozev and Lemmens and dissenting opinion of Judge Seibert-Fohr, joined by Judges Turković, Lubarda and Chanturia.

- the authorities' refusal to grant emergency assistance to an unemployed man because he did not have Austrian nationality;[60]
- the consequences of a family's loss of nationality on the applicant's status as a mother of a large family and her related pension entitlement;[61]
- the refusal to award the applicant a disability allowance on the ground that he was not a French national and that there was no reciprocal agreement between France and his country of nationality in respect of this benefit;[62]
- the refusal of social therapy or relaxation in the conditions of preventive detention due to the applicant's foreign nationality;[63]
- the prolonged failure of the Slovenian authorities to regularise the applicants' residence status as citizens of other former Yugoslav republics following their unlawful "erasure" from the register of permanent residents;[64]
- the blanket ban applied retroactively and indiscriminately to all prospective adoptive parents from a specific foreign State;[65]
- the refusal to grant family reunion to naturalised nationals as opposed to nationals born in the country.[66] In *Biao v. Denmark*, the Court found that national law contributed to the creation of a pattern that was hampering the integration of aliens newly arrived in the country and that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment in cases of discrimination against naturalised nationals (§ 126).

8. CASE LAW REGARDING EXTRADITION

I will not give a complete overview of the extradition-related case-law but will just confine myself to the recent case of *Sanchez-Sanchez v. the United Kingdom*, 2022.[67] Here the Court declared the complaint under Article 3 of the Convention concerning the risk of a life sentence without parole admissible and held that the applicant's extradition to the United States would not be in violation of Article 3 of the Convention. The applicant could not be said to have adduced evidence capable of showing that his extradition to the US would expose him to a real risk of treatment reaching the Article 3 threshold. That being so, it was unnecessary for the Court to proceed in this case to the second stage of the analysis. This judgment departs from previous case-law (*Trabelsi v. Belgium*, 2014,[68] concerning the extradition to a non-Contracting State where the applicant faced a risk of an irreducible life sentence if convicted, where the Court had found a violation of Article 3[69]) as regards the methodology in extradition-related cases.

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[60] *Gaygusuz v. Austria*, *supra* n°53.
[61] *Zeïbek v. Greece*, Application N°46368/06, 9 July 2009.
[62] *Koua Poirrez v. France*, *supra* n°53.
[63] *Rangelov v. Germany*, Application N°5123/07, 22 March 2012.
[64] *Kurić and Others v. Slovenia*, Application N°26828/06, 26 June 2012 [Grand Chamber].
[65] *A.H. and Others v. Russia*, Application N°6033/13, 8927/13, 10549/13 and others, 17 January 2017.
[66] *Biao v. Denmark*, Application N°38590/10, 24 May 2016 [Grand Chamber].
[67] *Sanchez-Sanchez v. the United Kingdom*, Application N° 22854/20, 23 February 2022 [Grand Chamber].
[68] *Trabelsi v. Belgium*, Application N°140/10, 4 September 2014.
[69] In addition, the Court found a violation of Article 34 of the Convention because of the extradition to the United States despite a real risk of an irreducible life sentence without parole and in breach of an interim measure ordered by the European Court (as a hindrance to the exercise of the right of petition of the applicant).

It is worth noting that the applicant had initially complained that his extradition to the US would also be in breach of Article 3 of the Convention due to the pre-trial and post-conviction conditions of detention in the US, and the risk he would face in detention having regard to the Covid-19 pandemic. However, in his submissions he confirmed that he no longer wished to pursue these complaints. The Court therefore decided to strike out the complaint under Article 3 of the Convention concerning the conditions of detention and the risk the applicant would face in detention having regard to the Covid 19 pandemic, pursuant to section 37 §1(a) of the Convention.

Pandemic-related risks (Covid-19)

Hafeez v. the United Kingdom, 2023.[70]

In his application to the Court, which was introduced in March 2020, the applicant, *inter alia*, contended that he would be at real risk of exposure to Covid-19 in the US prison estate. He maintained that complaint in his observations to the Court, which were prepared in December 2020. However, in the light of the developments since then, in particular the widespread availably of vaccinations, the evolution of the virus itself, and the lifting of restrictions in both the United Kingdom and the US, the Court did not consider that any risk under this head capable of reaching the minimum level of severity required by Article 3 of the Convention had been established. The Court considered that the applicant's complaints under Article 3 of the Convention had to be rejected as manifestly ill-founded.

9. COVID-19 RELATED (AND OTHER) INTERIM MEASURE REQUESTS

Between March 2020 and 30 April 2022, the Court processed 373 interim measure requests under Rule 39 of the Rules of Court.[71] Interim measures are applied only in limited situations of imminent risk of irreparable damage/harm: the most typical cases are those in which there are fears of a threat to life (situation falling under Article 2 of the Convention) or ill-treatment prohibited by Article 3 of the Convention. The majority of interim measures indicated relate to expulsion or extradition proceedings or to the applicants' state of health in places of detention. Exceptionally, interim measures can also be applied in respect of certain requests relating to other rights enshrined in the Convention.[72] For example, in the case of *Evans v. the United Kingdom* [Grand

[70] *Hafeez v. the United-Kingdom*, Application N°14198/20, 28 March 2023.

[71] The Court may indicate interim measures to any State Party to the Convention. Interim measures are *urgent measures* which, in accordance with the established practice of the Court, apply only where there is an imminent risk of irreparable damage (see *Mamatkulov and Askarov v. Turkey*, Applications N°46827/99 and 46951/99, 4 February 2005 [Grand Chamber]; *Paladi v. Moldova*, Application N° 39806/05, 10 March 2009 [Grand Chamber]).

[72] See interim measures:

- under Article 6 of the Convention in Polish "independence of judiciary" cases: *Wrobel v. Poland*, Applications N° 6904/22, 08 February 2022; *Sterkowicz v. Poland*, Appliction N°3685/20, 13 September 2022.
- under Article 10 and 11 of the Convention: *Radio Free Europe/Radio Liberty LLC and Shary v. Russia*, Application N°19659/21, 20 April 2021; *Shkullaku and Others v. Albania*, Application N°20204/21, 21 April

Chamber], under Article 8 § 1 (Respect for private life) the Court examined the requirement of the father's consent for the continued storage and implantation of fertilised eggs, and the Court found no violation of Article 8 § 1 (Respect for private life). During the proceedings, the Court (the President of the Section) decided to indicate to the Government that it was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos were preserved until the Court had completed its examination of the case.

a) Interim measure requests from detention or reception centres and prisons

The vast majority of the COVID-19-related interim measure requests were brought by persons detained in prisons or held in reception and/or detention centres for asylum seekers and migrants. The applicants mainly relied on Articles 2 and 3 of the Convention and requested the Court to take interim measures to remove them from their place of detention and/or to indicate measures to protect their health from the risk of being infected with COVID-19. Many of these requests were lodged against Greece, Italy, Turkey and France:

1) Requests lodged against Greece

These requests were lodged by asylum seekers and migrants held in reception and identification centres. They requested to be transferred from the centres due to overcrowding, lack of infrastructure and the threat of COVID-19. Rule 39 was applied in fifteen applications and only for particularly vulnerable persons, in particular, women with advanced pregnancy, women with new-borns, old persons and unaccompanied minors with mental-health issues. In those cases, despite the fact that the applicants asked to be transferred from the reception and identification centres, the Court did not ask the Government of Greece to transfer the applicants. The interim measures applied were (1) to guarantee to the applicants living conditions compatible with their state of health, and (2) to provide the applicants with adequate healthcare compatible with their state of health. In coming to its decision, the Court took into account: the applicants' vulnerability and the general living conditions (overcrowding, lack of infrastructure etc.).

2) *Requests lodged against Italy*

These requests were mainly lodged by prisoners who wished to be released due to the alleged risk of contracting COVID-19 in prisons. In a number of cases the Court adjourned the examination of those requests and requested the parties to provide factual information. After having received information from the parties, the Court rejected those requests.

3) *Requests lodged against Turkey*

These requests were also filed by prisoners who wished to be released due to the alleged COVID-19 risks in prisons. Most of those requests were incomplete and hence the applicants were asked to complete their requests. Those interim measure requests which

2021; *ANO RID Novaya Gazeta and Others v. Russia*, Application N° 11884/22, 8 March 2022; *Ndroqi v. Albania*, Application N°51273/22, 8 November 2022.

could be examined by the Court (as they were complete) were all rejected, since the applicants failed to show that they were under a risk of contracting COVID-19 in the places where they were detained.

4) *Requests lodged against France*

Most of the interim measure requests against France were lodged by either prisoners or migrants/asylum seekers in detention centres. These requests were rejected.

5) In an application against Russia, where there was a riot in a prison against the measures taken by the prison authorities within the context of the COVID-19 pandemic, the Court applied Rule 39 for a limited period of time and asked the Government to have the applicant examined by medical doctors and to ensure that the applicant had access to his lawyers. The interim measure was subsequently lifted, and the application was declared inadmissible.

The Court also received a handful of COVID-19-related interim measure requests against Belgium, Bulgaria, Cyprus, Germany, Malta and Romania lodged by prisoners. These interim measure requests were also examined on a case-by-case basis and rejected.

b) Other interim measure requests

The Court received a number of interim measure requests concerning compulsory vaccination schemes.[73] Also, *Piperea v. Romania*,[74] where the applicant was a law professional who challenged the draft legislation concerning the vaccination scheme. These requests were lodged by medical professionals, employees working in medical facilities, firefighters and flight attendants who challenged the compulsory vaccination and/or draft legislation concerning vaccination schemes. The requests were rejected for being out of scope of application of Rule 39 of the Rules of Court.

In a number of requests, applicants challenged the use of COVID-19 certificates which stipulated that only people in possession of the certificates would be allowed to enter public places and, in some cases, to use public transport. The requests were rejected for being out of scope.[75]

There have also been a few cases where the applicants requested that their expulsion/extradition be prevented on account of the effects of the pandemic in the prisons to which they would be sent. These requests were rejected either for not being sufficiently substantiated or because the applicants were to be vaccinated before being removed or extradited.

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[73] See for example *Cohadier and 600 Others v. France*, Application N°8824/22, pending; *Abgrall and 671 Others v. France*, Application N°41950/21, 24 August 2021; *Kakaletri and Others v. Greece*, Application N°43375/21, pending; *Theofanopoulou and Others v. Greece*, Application N°43910, pending; *Concas and Others v. Italy*, Application N°18259/21, pending.

[74] *Piperea v. Romania*, Application N°24183/21, 5 July 2022.

[75] See *Mahut v. France*, Application N°55120/21; *Mensi v. Italy*, N°58126/21; *Livi and Others v. Italy*, Application N°59682/21; and *Scola v. Italy*, Application N°3002/22.