

## **PART 2: FACT SHEETS**

### **Part 2.1 – Fact Sheet on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

#### **1. Introduction**

1.1 This fact sheet is one of several forming part of the “UNHCR Manual on Refugee Protection and the European Convention on Human Rights”. These fact sheets examine those Articles of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are of particular relevance to the international protection mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). They do not pretend to present an exhaustive analysis of the relevant ECHR Articles or to provide a substitute for specialised commentaries. They nevertheless describe in some detail the jurisprudence developed by the European Court of Human Rights (the Court) on these Articles from the viewpoint of international refugee protection and show how this jurisprudence can be of relevance to the protection of refugees.

1.2 Article 3 of the ECHR stipulates:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

1.3 It is significant that the Court considers that Article 3 of the ECHR can be used by those in need of international refugee protection. While the ECHR is not an international instrument concerned with the protection of refugees *per se*, Article 3 has been interpreted by the Court as providing an effective means of protection against all forms of return to places where there is a risk that an individual would be subjected to torture, or to inhuman or degrading treatment or punishment. In many respects, the scope of protection provided by Article 3 is wider than that provided by the 1951 Convention, though in others it is more limited.

#### **2. The protection of Article 3 of the ECHR**

2.1 The Court’s jurisprudence on Article 3 was first established in 1989 in connection with an extradition case against the United Kingdom involving a German national accused of a capital offence in the United States.<sup>1</sup> The Court found there would be a breach of Article 3 if he were to be extradited and ruled:

In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, *where substantial grounds* have been shown for believing that the person concerned, if

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<sup>1</sup> *Soering v. United Kingdom*, Judgement of 7 July 1989, Appl. No. 14038/88, Series A, No. 161.

extradited, *faces a real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. (para. 91, emphasis added)

2.2 Two years later, the Court confirmed in two separate Judgements that the expulsion of an asylum-seeker may also give rise to an issue under Article 3.<sup>2</sup> This was reaffirmed in *Chahal v. United Kingdom* which found that the deportation of Mr Chahal, a rejected asylum-seeker, would give rise to a violation of Article 3. The Court ruled:<sup>3</sup>

[I]t is well-established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, *Article 3 implies the obligation not to expel the person in question to that country.* (para. 74, emphasis added)

2.3 It must be pointed out that Article 3 of the ECHR has been construed as providing protection against indirect, as well as direct, return to one's place of origin. In an Admissibility Decision<sup>4</sup> involving the operation of the 1990 Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community, the Court indicated that:

*The indirect removal* in this case to an intermediate country, which is also a Contracting State, *does not affect* the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. (page 15, emphasis added)

2.4 In this decision, the Court clearly showed that multilateral international agreements regulating the allocation of asylum claims between two or more States cannot absolve them from their responsibilities under the ECHR when it added:

*Nor can the United Kingdom rely automatically ... on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims.* (ibid., emphasis added)

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<sup>2</sup> *Cruz Varas and Others v. Sweden*, Judgement of 20 March 1991, Appl. No. 15576/89, Series A, No. 201, paras. 69–70; *Vilvarajah and Others v. United Kingdom*, Judgement of 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Series A, No. 215, reaffirming the *Cruz Varas* Judgement and setting out criteria for assessing the risk of ill-treatment in paras. 107–8. In both these cases, the Court nevertheless found no breach of Article 3 in the particular circumstances.

<sup>3</sup> *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93, Reports of Judgments and Decisions 1996-V.

<sup>4</sup> *T.I. v. United Kingdom*, Admissibility Decision of 7 March 2000, Appl. No. 43844/98.

2.5 The same principle can be applied by analogy to bilateral or multilateral readmission agreements since it appears that, for the Court, the obligations under Article 3 of the ECHR prevail over any obligation to return, expel or extradite arising from other international treaties.

### **3. Proscribed forms of treatment**

3.1 Article 33 of the 1951 Convention prohibits *refoulement* to the frontiers of territories where a refugee's "life or freedom would be threatened" on account of his/her race, religion, nationality, membership of a particular social group or political opinion. By contrast, Article 3 of the ECHR prohibits "torture, inhuman or degrading treatment or punishment" of anyone, irrespective of their immigration status.

3.2 According to the Court:

[I]ll-treatment must attain *a minimum level of severity* if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; *it depends on all the circumstances of the case*, such as duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.<sup>5</sup>

3.3 In the *Greek case*,<sup>6</sup> the European Commission of Human Rights described the concepts of torture, inhuman or degrading treatment or punishment as follows:

The notion of inhuman treatment covers at least such treatment as *deliberately causing* severe suffering, mental or physical, which, in a particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally *an aggravated form of inhuman treatment*. Treatment or punishment of an individual may be said to be degrading if it *grossly humiliates* him before others or drives him to act against his will or conscience.

3.4 In the case of *Selmouni v. France*,<sup>7</sup> the Court lowered the threshold necessary to qualify certain treatments as "torture". In light of the nature of the treatments inflicted on the applicant in this case, the Court considered that even though only specific acts can be categorised as torture "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be *classified differently* in future" (para. 101, emphasis added). In the Court's opinion:

... the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly

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<sup>5</sup> *Ireland v. United Kingdom*, Judgement of 18 January 1978, Series A, No. 25, para. 162, emphasis added.

<sup>6</sup> *Greek Case*, Judgement of 18 November 1969, Yearbook of the European Convention on Human Rights, No. 12, emphasis added.

<sup>7</sup> *Selmouni v. France*, Judgement of 28 July 1999, Appl. No. 25803/94.

and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. (ibid.)

3.5 To determine whether a person faces a real risk of ill-treatment, the Court has often taken into consideration whether or not they were granted refugee status, either by UNHCR or by governmental authorities. In the case of *Ahmed v. Austria*, for instance, the Court declared that it attaches particular weight to the fact that ... the Austrian Minister of the Interior granted the applicant refugee status within the meaning of the Geneva Convention.<sup>8</sup>

3.6 In *Jabari v. Turkey*, it reaffirmed: “The Court must give due weight to the UNHCR’s conclusion on the applicant’s claim in making its own assessment of the risk which the applicant would face if her deportation were to be implemented.”<sup>9</sup>

3.7 This shows that the factual assessment made by State authorities or UNHCR when considering whether a person faces persecution in the sense of the 1951 Convention is, *mutatis mutandis*, similar to the one made by the Court in order to determine whether a person has a real risk of being exposed to ill-treatment in the sense of Article 3 of the ECHR. It is therefore likely that a risk of persecution on one of the grounds set out in Article 1A(2) of the 1951 Convention would be considered as being covered by Article 3 of the ECHR.

3.8 The application of Article 3 of the ECHR is not limited to cases involving inflicted ill-treatment. The Court has also considered that harsh medical conditions can lead to the protection of Article 3.

3.9 In the case of *D. v. United Kingdom*,<sup>10</sup> the Court extended the application of Article 3 to a national of St Kitts and Nevis who was suffering from AIDS. The applicant argued that the medical facilities and treatment in St Kitts were inadequate for persons suffering from AIDS. After considering that the quality and availability of treatment and the moral support received in the United Kingdom were incomparably better than those the applicant would benefit from in St Kitts, the Court decided:

In view of these exceptional circumstances and bearing in mind the *critical stage now reached* in the applicant’s fatal illness, the implementation of the decision to remove him to St Kitts would *amount to inhuman treatment* by the respondent State in violation of Article 3. (para. 53, emphasis added)

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<sup>8</sup> *Ahmed v. Austria*, Judgement of 17 December 1996, Appl. No. 25964/94, para. 42, (emphasis added).

<sup>9</sup> *Jabari v. Turkey*, Admissibility Decision of 11 July 2000, Appl. No. 40035/98, para. 41 (emphasis added).

<sup>10</sup> *D. v. United Kingdom*, Judgement of 2 May 1997, Appl. No. 30240/96.

3.10 Refining its reasoning, the Court ruled:

Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him *to a real risk of dying under the most distressing circumstances* and would thus amount to inhuman treatment. (ibid., emphasis added)

3.11 To date there are no positive Judgements or Decisions finding a violation of Article 3 of the ECHR because of harsh social and economic circumstances more generally. In a case before the Commission of Human Rights,<sup>11</sup> an applicant argued that the threat or actual disconnection from electricity distribution constituted a violation of Article 3. In another case before the Court,<sup>12</sup> an applicant claimed that the denial of residence registration created significant socio-economic problems for her, which amounted to a violation of Article 3. In both cases, it was found that the situation the applicants were in did not attain the minimum level of severity to fall within the scope of Article 3.

3.12 One could, however, argue, for instance, that persons under temporary protection or other statuses (e.g. tolerated status, *Duldung*) have a claim under Article 3 if their conditions are severe enough in the country of asylum. This would be the case when the protection status afforded by the asylum State did not give them access to basic assistance such as medical care or social welfare, or if the persons concerned were left without any form of protection or residence status.<sup>13</sup>

3.13 The Court's general jurisprudence on Article 3 could, therefore, prove very useful in lobbying for an improvement of legal and material reception arrangements. It could also prove useful when arguing against the return, repatriation or deportation of medical cases or of persons who would find themselves in extreme social and economic circumstances in their country of origin.

#### **4. Absolute and unconditional character of Article 3**

4.1 The force of Article 3 of the ECHR comes from the fact that in the Court's own opinion it

enshrines *one of the fundamental values* of the democratic societies making up the Council of Europe.<sup>14</sup>

4.2 Article 3 is listed in Article 15(2) of the ECHR as a non-derogable provision of the Convention. Therefore, it must be upheld even "in time of war or other public emergency threatening the life of a nation" (Article 15(1) ECHR). Moreover, unlike other rights and freedoms included in the ECHR, Article 3 leaves no scope for

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<sup>11</sup> *Francine Van Volsem v. Belgium*, Report of 9 May 1990, Appl. No. 14641/89.

<sup>12</sup> *Anna Pančenko v. Latvia*, Admissibility Decision of 28 October 1999, Appl. No. 40772/98.

<sup>13</sup> As in the case of *Ahmed v. Austria*, above note 8, para. 8.3.

<sup>14</sup> See *Soering v. United Kingdom*, above note 1, para. 88, emphasis added.

limitations by law under any circumstances, whether they be safety, public order or other grounds.

4.3 In the case of *Ireland v. United Kingdom*, the Commission stated:

It follows that the prohibition under Article 3 of the Convention is *an absolute one* and that there can never be under the Convention, or under international law, a justification for acts in breach of that provision.<sup>15</sup>

4.4 The Court reiterated this position in its Judgement in the same case, when it ruled:

The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15 para. 2, there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.<sup>16</sup>

4.5 The absolute and unconditional character of Article 3 can have implications for the merits of a case, as well as for the procedure.

#### **a. Implications as to the merits**

4.6 In the case of *Chahal v. United Kingdom*,<sup>17</sup> the UK government decided to expel the applicant, who was a political activist, on grounds of national security and for other political reasons because of his conviction for assault and affray and his alleged involvement in terrorist activities. The UK government argued that there was an implied limitation to Article 3 entitling a Contracting State to expel an individual even where a real risk of ill-treatment existed, if such removal were required on national security grounds.

4.7 The Court stated that it was well aware of

... the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, *even in these circumstances*, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, *irrespective of the victim's conduct...*

Thus whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is

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<sup>15</sup> See above note 5 (emphasis added).

<sup>16</sup> *Ireland v. United Kingdom*, above note 5, para. 163.

<sup>17</sup> See above note 3.

engaged in the event of expulsion. In these circumstances, *the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.* (paras. 79–80, emphasis added)

4.8 By contrast, the 1951 Convention contains explicit exceptions to the prohibition of expulsion and *non-refoulement* of recognised refugees and asylum-seekers, although these only apply in exceptional circumstances. The result is, as pointed out by the Court, that

[t]he protection afforded by Article 3 is thus *wider* than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees” (para. 80, emphasis added).

4.9 This interpretation of Article 3 of the ECHR can serve as a useful “safety net” for refugees or asylum-seekers considered by UNHCR to be wrongly denied or deprived of international protection. It must also be noted that by adopting this position the Court consequently provides protection from expulsion or extradition in situations where the exclusion clauses of Article 1F of the 1951 Convention would apply to deny refugee status. The ECHR has no such limitations and the Contracting parties must then always secure the rights guaranteed under Article 3 “however heinous the crime allegedly committed”.<sup>18</sup> By extension, Article 3 ECHR is also potentially relevant in cases raising issues under Articles 1C or 1D of the 1951 Convention.

4.10 Moreover, whereas Article 1A(2) of the 1951 Convention qualifies the nature of the well-founded fear of persecution an individual must have in order to benefit from international protection, the absolute nature of Article 3 does not require the consideration of any reasons for ill-treatment.

4.11 In light of the above, it can be said that the protection afforded by Article 3 of the ECHR can sometimes extend to persons who might be excludable under the provisions of the 1951 Convention and who might, therefore, not be of concern to UNHCR. UNHCR’s involvement in these cases would be justified only if it was considered that the person had been “wrongly” excluded, or their status had been wrongly cancelled or revoked.

### **b. Procedural consequences**

4.12 In the case of *Jabari v. Turkey*,<sup>19</sup> the Court has derived two important procedural consequences from the absolute nature of Article 3. This case concerned an Iranian national who lodged an application for asylum in Turkey. The latter was declared inadmissible because she missed the five-day time limit within which such an application must be made and she was therefore issued with a deportation order. Her recourse against the deportation order before the Ankara Administrative Court was also dismissed.

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<sup>18</sup> *Soering v. United Kingdom*, above note 1, para. 88.

<sup>19</sup> *Jabari v. Turkey*, above note 9.

- 4.13 Concerning the issue of the time limit, the Court stated that  
... the automatic and mechanical application of *such a short time-limit* for submitting an asylum application *must be considered at variance* with the protection of the fundamental value embodied in Article 3 of the Convention. (para. 40, emphasis added)
- 4.14 On the appeal against the deportation order the Court noted that  
... the applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this course of action *entitled her neither to suspend its implementation, nor to have an examination of the merits of her claim* to be at risk. (para. 49, emphasis added)
- 4.15 It concluded that  
... given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, *the notion of an effective remedy under Article 13 requires independent rigorous scrutiny of a claim* that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 *and the possibility of suspending the implementation of the measure impugned*. (para. 50, emphasis added)
- 4.16 This Judgement of the Court reinforces UNHCR’s view that appeals against negative asylum decisions must in principle have suspensive effect.

## **5. Agents of persecution**

5.1 Another effect of the absolute nature of Article 3 is that the Court considers those provisions to apply

where the danger emanates from *persons or groups of persons who are not public officials*. However, it must be shown that the risk is real and that the authorities of the receiving State *are not able* to obviate the risk by providing appropriate protection.<sup>20</sup>

5.2 In the case of *Ahmed v. Austria*, where the Austrian authorities were planning to return the applicant to Somalia, the Court considered that the absence of public authority was a factor preventing such a return. The Court held: “There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or *that any public authority would be able to protect him*”.<sup>21</sup>

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<sup>20</sup> *H.L.R. v. France*, Judgement of 29 April 1997, Appl. No. 24573/94, para. 40, emphasis added.

<sup>21</sup> See above, note 8, para. 44 (emphasis added).



5.3 In the case of *D. v. United Kingdom*, the Court went as far as to state:

[G]iven the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself *sufficient flexibility* to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant’s claim under Article 3 where the source of the risk of proscribed treatment in the receiving country *stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country*.<sup>22</sup>

## **6. Internal flight or relocation alternative**

6.1 The Court had until recently not explicitly addressed this issue in its Judgements concerning Article 3. In the case of *Chahal v. United Kingdom*,<sup>23</sup> the UK government argued that the applicant, a Sikh from Punjab, could be returned to another part of India where he would not be at risk. The Court indicated in its Judgement:

In view of the Government’s proposal to return Mr Chahal to the airport of his choice in India, it is necessary for the Court *to evaluate the risk of his being ill-treated with reference to conditions throughout India* rather than in Punjab alone. (para. 98, emphasis added)

6.2 This statement indicates that the Court takes into account the notion of internal flight or relocation alternative and considers that there would be a violation of Article 3 if the individual were returned to an area of his country of origin where he were at risk. The Court further found in this case that “elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets *into areas of India far away from Punjab*” (para. 100, emphasis added).

6.3 In 2001, the Court addressed the issue directly in the case of *Hilal v. United Kingdom*,<sup>24</sup> which concerned an opposition party member in Zanzibar (Tanzania), whom the UK government asserted had an internal flight possibility in mainland Tanzania on the grounds that there was “no basis on which to infer that the applicant was of interest to the Zanzibar or mainland authorities” (para. 58). The Court, however, found that a “long-term, endemic situation of human rights problems” persisted in mainland Tanzania and was “not persuaded therefore that the internal flight option offers a reliable guarantee against the risk of ill-treatment” (paras. 67–68). The Court referred to other relevant factors including: (i) reports of general ill-treatment and beating of detainees by the police in Tanzania; (ii) inhuman and degrading conditions in the prisons on the mainland which led to life-threatening conditions; (iii) institutional links between the police in mainland Tanzania and police in Zanzibar which meant that they could not “be relied on as a safeguard against

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<sup>22</sup> See above, note 10 (para. 49, emphasis added).

<sup>23</sup> See above, note 3.

<sup>24</sup> *Hilal v. United Kingdom*, Judgement of 6 March 2001, Appl. No. 45276/99.

arbitrary action”; and (iv) the possibility of extradition between Tanzania and Zanzibar.

### **7. Evidential requirements of Article 3**

7.1 The traditional formula used by the Court in expulsion or extradition cases gives an indication as to the evidence required to establish that an expulsion or extradition would be in violation of Article 3. It must be demonstrated that there are “substantial grounds” for believing that the individual faces a “real risk” of being subjected to treatment contrary to Article 3 in the country to which the applicant is to be returned.<sup>25</sup>

7.2 Before the reform of the ECHR supervisory mechanism in November 1998, the Court also indicated, as stated in *Chahal v. United Kingdom*, that

... the establishment and verification of the facts *is primarily a matter for the [then] Commission*. Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area.

However, the Court is not bound by the Commission’s findings of fact *and is free to make its own assessment*. Indeed, in cases such as the present the Court’s examination of the existence of a real risk of ill-treatment must *necessarily be a rigorous one*... (paras. 95–6, emphasis added)

7.3 More broadly, the Judgement in *Vilvarajah* likewise found:

The Court’s examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe. (para. 108).

7.4 Therefore, in all cases the Court assesses the material placed before it and, if necessary, material obtained of its own motion. The Court determines the risk of ill-treatment at the time of the Judgement.

7.5 The *Chahal* Judgement thus states that “although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive” (para. 86). Where an expulsion has not yet taken place, the Court has reiterated in a number of cases that in order to assess these risks “the material point in time must be that of the Court’s consideration of the case”.<sup>26</sup>

7.6 Where an expulsion may already have taken place, the Court ruled in *Cruz Varas*:

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<sup>25</sup> *Soering v. United Kingdom*, above note 1, paras. 88, 91.

<sup>26</sup> *Ahmed v. Austria*, above note 8, para. 43.

[T]he existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. (para. 76)

7.7 In *Vilvarajah and Others v. United Kingdom*,<sup>27</sup> which concerned the case of five Tamils removed from the United Kingdom to Sri Lanka, the Court gave useful indications as to the nature of evidence to be provided. The Court stated that

The evidence ..., as well as the general situation, does not establish that *their personal position was any worse* than the generality of other members of the Tamil community or other young male Tamils who were returning to their country... *A mere possibility of ill-treatment*, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3. (para. 111, emphasis added)

7.8 One can conclude from the above that for an applicant to be able to claim successfully that their return would violate the provisions of Article 3, the Court is of the view that, in a general situation of insecurity, there must be enough evidence to show the individual is particularly at risk.

### **8. Status afforded those protected under Article 3**

8.1 Unlike the 1951 Convention, the purpose of which is to provide a legal status to persons in need of international protection, the ECHR does not contain provisions on this matter. The only obligation which flows from Article 3 is not to send the individual back and it is only the execution of an expulsion order as such which could give rise to a violation of the ECHR. Therefore, in several cases involving expulsion, the Court has consistently held that “the order for his deportation to India would, if executed, give rise to a violation of Article 3”,<sup>28</sup> that “[i]t follows that the applicant’s deportation to Somalia would breach Article 3”,<sup>29</sup> and that “it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3”.<sup>30</sup>

8.2 Where the Court has found, however, that “no substantial grounds have been established for believing that the applicant, if deported, would be exposed to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 3”, it has accordingly ruled: “[I]t follows that there would be no violation of Article 3 if the order for the applicant’s deportation were to be executed.”<sup>31</sup>

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<sup>27</sup> See above note 2.

<sup>28</sup> *Chahal v. United Kingdom*, above note 3, para. 107.

<sup>29</sup> *Ahmed v. Austria*, above note 8, para. 47.

<sup>30</sup> *D. v. United Kingdom*, above note 10, para. 54.

<sup>31</sup> *H.L.R. v. France*, above note 20, para. 44.

8.3 There is no basis in the ECHR for the Court to extend its control to the issue of status. This is the main drawback of Article 3. In the Admissibility Decision of *T.I. v. United Kingdom*,<sup>32</sup> the Court said:

*It is not relevant* for the purposes of this application that any permission to remain ... would initially be for a three month period and subject to review by the authorities. (emphasis added)

8.4 Rather, the Court leaves to States the choice of the means used in their domestic systems to fulfil their obligations.<sup>33</sup> This may be unsatisfactory since the failure to afford a successful applicant any form of status can be very detrimental and prevent him/her from enjoying basic social and economic rights. The absence of an adequate status can as such constitute a violation of Article 3 if the consequences of this situation reach the threshold of inhumane and degrading treatment.<sup>34</sup>

## **9. Conditions for lodging a complaint before the Court**

9.1 In order to lodge a complaint before the Court, the ECHR requires that a number of admissibility requirements be met. Article 35 of the ECHR contains the traditional admissibility criteria which state that all effective domestic remedies must have been exhausted and that a claim must be brought before the Court within six months of the final domestic decision. The second and third subparagraphs set out additional admissibility criteria. These relate to anonymous applications, those where substantially the same matter has already been examined or submitted to another procedure of international investigation or settlement and contains no relevant new information, and to applications which the Court considers are incompatible with the provisions of the Convention or the protocols thereto, are manifestly ill-founded, or an abuse of the right of application.

9.2 In the context of Article 3, the Court has indicated that for a case to be brought by a person facing expulsion or deportation there should be an enforceable decision against such a person. In the case of two asylum-seekers from Sri Lanka whose applications before the French authorities were rejected, *Vijayanathan and Pusparajah v. France*,<sup>35</sup> the Court decided that

... despite the direction to leave French territory, *not enforceable in itself*, and the rejection of the application for exceptional leave to

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<sup>32</sup> See above note 4, page 18.

<sup>33</sup> *Marckx v. Belgium*, Judgement of 27 April 1979, Series A, No. 31, para. 58.

<sup>34</sup> The case of *Ahmed v. Austria*, above note 8, is particularly telling. The successful applicant was left without status in Austria and he consequently committed suicide 15 months after the ruling. See Council of Europe, Committee of Ministers, Resolution ResDH(2002)99, concerning the Judgement of the European Court of Human Rights of 17 December 1996 in the case of Ahmed against Austria. The Resolution noted amendments to the Austrian Aliens Act providing: "Refusal of entry, expulsion or deportation of an alien to another state are unlawful if they would lead to a violation of Articles 2 or 3 of the European Convention Human Rights or of its Protocol No. 6 on the abolition of the death penalty."

<sup>35</sup> *Vijayanathan and Pusparajah v. France*, Judgement of 27 August 1992, Appl. Nos. 17550/90–17825/91.

remain brought by Mr Pusparajah, *no expulsion order has been made* with respect to the applicants. (para. 46, emphasis added)

9.3 The absence of an enforceable expulsion order and the non-exhaustion of domestic remedies in this case led the Court to conclude that

... Mr Vijayanathan and Mr Pusparajah *cannot, as matters stand, claim “to be the victim[s] of a violation”* within the meaning of Article 25 para. 1 [now Article 34] of the Convention. (para. 46, emphasis added)<sup>36</sup>

## **10. Conclusion**

10.1 Article 3 of the ECHR can be an effective means of protection for those whose claim for refugee status has been “wrongly” rejected, cancelled or revoked or for those who, while not meeting the refugee definition of the 1951 Convention, are nevertheless in need of international protection. It can be used before the Court and, where the ECHR has been incorporated into domestic law, before domestic jurisdictions in situations of *refoulement*, expulsion, deportation, extradition or any other type of return. It may be a useful legal mechanism, particularly in case of emergency where the procedural interim measures of Rule 39 of the Court’s Rules<sup>37</sup> can suspend an expulsion whilst a case is being reviewed. From UNHCR’s perspective, however, Article 3 offers a lesser form of protection because it does not guarantee any concomitant rights other than the basic – but nevertheless critical – right of *non-refoulement*.

**UNHCR  
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<sup>36</sup> Since the Court’s reform, the provisions of the former Article 25(1) have been embodied in Article 34 ECHR.

<sup>37</sup> See, *UNHCR Fact Sheet on Rule 39 of the Rules of the European Court of Human Rights*, March 2003.

## **PART 2 – FACT SHEETS**

### **Part 2.2 – Fact Sheet on Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

#### **1. Introduction**

1.1 This fact sheet is one of several forming part of the “UNHCR Manual on Refugee Protection and the European Convention on Human Rights”. These fact sheets examine those Articles of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are of particular relevance to the international protection mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). They do not pretend to present an exhaustive analysis of the relevant ECHR Articles or to provide a substitute for specialised commentaries. They nevertheless describe in some detail the jurisprudence developed by the European Court of Human Rights (the Court) on these Articles from the viewpoint of international refugee protection and show how this jurisprudence can be of relevance to the protection of refugees.

1.2 Article 5 of the Convention provides:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a) the lawful detention of a person after conviction by a competent court;
- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

1.3 Article 5 does not prohibit detention as such but it comprises an exhaustive list of situations in which detention can be resorted to, as well as procedural guarantees. The situation of asylum-seekers detained upon entry in a country of refuge has been considered as coming under the purview of Article 5(1)(f) of the ECHR. While UNHCR's position is that the detention of asylum-seekers is inherently undesirable under normal circumstances,<sup>1</sup> Article 5 provides essential guarantees, which could be useful in States where asylum-seekers are detained.

1.4 This fact sheet therefore covers the various elements of Article 5 as defined by the Court's jurisprudence, starting with the definition of detention. It then considers what constitutes "lawful detention" in the sense of the ECHR, before turning to the issues of the length of detention and procedural guarantees.

## **2. Detention in the context of Article 5(1)(f) of the ECHR**

### **a. Definition**

2.1 Article 5 of the ECHR proclaims the right to liberty and security and does not give a definition of detention. The only indication is that detention is a deprivation of liberty. It is therefore the Court, through its jurisprudence, which has brought the necessary precision. As opposed to UNHCR, which in its Guidelines defines detention as a "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave

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<sup>1</sup> See UNHCR, "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-seekers", 3 February 1999.

this limited area is to leave the territory”, the Court has no fixed definition. It uses a number of criteria which presence in a particular situation determine whether there is deprivation of liberty.

2.2 In the case of *Guzzardi v. Italy*,<sup>2</sup> which concerned the case of an individual placed under compulsory residence on an island, the Court stated:

In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. (para. 92)

The Court went on to state: “The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance” (para. 93). It considered a number of elements, such as the extent of the area to which the individual was confined, the extent of the social contact he was able to have, his inability to leave his dwelling without first notifying the authorities, the reporting requirements imposed on him, and the sanctions applied for violation of these obligations. In this case, it concluded that there was deprivation of liberty.<sup>3</sup>

2.3 In the case of *Amuur v. France*,<sup>4</sup> involving Somali asylum-seekers held in the transit zone at Paris-Orly airport, the Court noted that while the applicants were hosted in a hotel which formed part of the transit zone, they “were placed under strict and constant police surveillance” (para. 45). Responding to the argument of the French government, which said that the applicants were not detained since they could at any time have removed themselves from the transit zone by returning to the country they came from, the Court decided:

The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one’s own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. (para. 48)

It was therefore decided that “holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty” (para. 49).

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<sup>2</sup> *Guzzardi v. Italy*, Judgement of 6 November 1980, Appl. No. 7367/76.

<sup>3</sup> See para. 95 of the Judgement.

<sup>4</sup> *Amuur v. France*, Judgement of 25 June 1996, Appl. No. 19776/92.



2.4 It must be pointed out that the definition of the Court is less precise than that of UNHCR. It is, however, more flexible and adaptable to new situations. The two definitions are nonetheless compatible and overlap with each other.

### **b. Conditions of detention**

2.5 Article 5 of the ECHR does not deal with conditions of detention and does not give any indications as to the facilities where deprivation of liberty can lawfully be carried out.

2.6 The Court has, however, made reference to the nature of the detention facility in an Admissibility Decision concerning the case of *Ha You Zhu v. United Kingdom*.<sup>5</sup> In this case, the applicant, a Chinese asylum-seeker, was detained in a prison facility in Scotland pending the determination of his asylum claim and, after rejection, pending his deportation. He lodged a complaint before the Court arguing that the detention conditions were contrary to Article 3 of the ECHR. While the case was declared inadmissible, the Court made an *obiter dictum* where it said that “it agree[d] with HM Inspector of Prisons that *it is undesirable* for prisoners awaiting deportation to be held in the same location as convicted prisoners” (emphasis added).

2.7 The Court is thus still far from considering that detention of asylum-seekers in prison facilities is contrary to the Article 5 of the ECHR. Complaints on conditions of detention and treatment of asylum-seekers could nevertheless be argued on the basis of other articles of the ECHR, notably Article 3, but also Article 8 (right to private and family life).

## **3. Lawful detention**

3.1 Article 5(1) requires that any deprivation of liberty must be effected “in accordance with a procedure prescribed by law”. In addition to this, each sub-paragraph, including Article 5(1)(f), supposes that the detention is lawful. In practice, the Court sometimes merges its consideration of the two requirements, i.e. treating procedural as well as substantive requirements with a view to the single condition that a deprivation of liberty be lawful.

3.2 In the case of *Bozano v. France*,<sup>6</sup> the Court stated:

The main issue to be determined is whether the disputed detention was “lawful”, including whether it was in accordance with “a procedure prescribed by law”. The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any

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<sup>5</sup> *Ha You Zhu v. United Kingdom*, Admissibility Decision of 12 September 2000, Appl. No. 36790/97.

<sup>6</sup> *Bozano v. France*, Judgement of 2 December 1986, Appl. No. 5/1985/91/138.

measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness. What is at stake here is not only the “right to liberty” but also the “right to security of person”. (para. 54)

3.3 The case in question concerned an Italian national tried *in absentia* by an Italian court and sentenced to life imprisonment, who was arrested in France but whose extradition to Italy had been refused. He had been apprehended by French police, transferred to Switzerland, and handed over to the Swiss authorities, which extradited him to Italy. The Court concluded that the applicant’s deprivation of liberty “was neither ‘lawful’, within the meaning of Article 5(1)(f), nor compatible with the ‘right to security of person’” (para. 60). In sum, it found that the actions of the French police “amounted in fact to a disguised form of extradition designed to circumvent the negative [extradition] ruling ... and not to ‘detention’ necessary in the ordinary course of ‘action ... taken with a view to deportation’”.<sup>7</sup>

3.4 The Court’s position was set out in greater detail in the case of *Amuur v. France*,<sup>8</sup> where it ruled:

In laying down that any deprivation of liberty must be effected “in accordance with a procedure prescribed by law”, Article 5 para. 1 primarily requires any arrest or detention *to have a legal basis in domestic law*. However, these words do not merely refer back to domestic law ..., *they also relate to the quality of the law*, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. (para. 50, emphasis added)

3.5 Elaborating on the meaning of these latter words, the Court said:

Quality in this sense implies that where a national law authorises deprivation of liberty – especially in respect of a foreign asylum-seeker – *it must be sufficiently accessible and precise*, in order to avoid all risk of arbitrariness. *These characteristics are of fundamental importance with regard to asylum-seekers at airports*, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States’ immigration policies. (para. 50, emphasis added)

3.6 This interpretation of Article 5(1) of the ECHR requires that States at least provide, or have provided, the applicant with information as to the reasons for their detention as set out in Article 5(2). In *Amuur v. France*, the applicants mentioned that they did not

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<sup>7</sup> Ibid., para. 60.

<sup>8</sup> See above note 4.

have access to a lawyer or to information about their situation. Analysing the applicable French legislation at the time of the events, the Court concluded:

At the material time *none of these texts allowed the ordinary courts to review the conditions under which aliens were held* or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. *They did not provide for legal, humanitarian and social assistance*, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps. (para. 53, emphasis added)

3.7 The Court established through this case some relevant legislative standards concerning the detention of asylum-seekers upon arrival to which States must adhere.

3.8 With regard to situations involving persons “against whom action is being taken with a view of deportation”, the case of *Ali v. Switzerland* concerned a rejected Somali asylum-seeker without travel documents whom the Swiss authorities detained because they wished to expel him on account of a series of criminal convictions. In this case, the European Commission on Human Rights found that his detention contravened Article 5(1)(f) since his lack of travel documents meant that the detention was not “with a view to expulsion”.<sup>9</sup>

#### **4. Length of detention**

4.1 Whilst Article 5(1)(f) of the ECHR does not lay down any specific time limit concerning the duration of detention, the Court has implied from the wording of sub-paragraph f, which provides that action should be taken *with a view* to deportation, that such a time limit exists for cases of deportation or extradition. Concerning cases of asylum-seekers, who fall under the first-half sentence of sub-paragraph f, persons effecting an unauthorised entry into the country, no such explicit determination has been made by the Court.

##### **a. Detention of asylum-seekers upon arrival**

4.2 There has been only one case of detention of asylum-seekers brought before the Court so far – the case of *Amuur v. France*.<sup>10</sup> In its Judgement, the Court tried to conciliate both the States’ concerns with regard to immigration issues and the right of persons in need of protection to seek asylum. The Court did not, however, make any

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<sup>9</sup> See, Commission report of 26 February 1997 referred to in the Judgement which unanimously found a violation of Article 5(1)(f), and also *Ali v. Switzerland*, Appl. No. 69/1997/853/1060, European Court of Human Rights, Judgement of 5 August 1998, which declared the case inadmissible on the grounds that the applicant was now in Somalia and could not be contacted.

<sup>10</sup> See above note 4.

determination as to the whether detention of asylum-seekers throughout the status determination procedure was contrary to Article 5 of the ECHR.

4.3 The Court first legitimised the recourse to detention, by saying that

many member States of the Council of Europe have been confronted for a number of years now with an increasing flow of asylum-seekers. It is aware of the difficulties involved in the reception of asylum-seekers at most large European airports and in the processing of their applications.... Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. (para. 41)

4.4 The Court recognised that there was a difference between this situation and the deportation of aliens, when it ruled: "Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation" (para. 43).

4.5 Taking into account the particular situation of asylum-seekers detained in transit zones, the Court said:

Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration *while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees* and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get round immigration *restrictions must not deprive asylum-seekers of the protection afforded by these Conventions.* (para. 43, emphasis added)

Making a further reference to the situation of asylum-seekers, the Court said that "account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (para. 43).

4.6 It is unclear whether the Court considered that the detention of asylum-seekers was subject to a time limit. More cases involving detention of asylum-seekers upon arrival in a country of refuge would have to be brought before the Court in order to be able to draw such a conclusion. In *Amuur v. France*, however, the Court did indicate that the excessive prolongation of a mere *restriction* of liberty could result in a *deprivation* of liberty, although it did not state that depriving asylum-seekers of their liberty was contrary to Article 5. It considered:

Such holding *should not be prolonged excessively*, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, *where he has requested asylum, while his application for leave to enter the territory*

*for that purpose is considered* – into a deprivation of liberty. (para. 43, emphasis added)

4.7 While acknowledging that force of circumstance meant the decision to detain was necessarily taken by the administrative or police authorities, the Court noted that

its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.” (para. 43)

#### **b. Detention pending deportation or extradition**

4.8 The Court has addressed the question of the length of detention in situations of deportation or extradition in a number of cases. It has done so by assessing the basis of the “due diligence” with which action is taken with a view to deportation or extradition. In the Judgement of *Quinn v. France*,<sup>11</sup> the Court stated:

It is clear from the wording of both the French and the English versions of Article 5 para. 1 (f) that deprivation of liberty under this sub-paragraph *will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified* under Article 5 para. 1 (f). (para. 48, emphasis added)

The Court did not explain what it meant by “due diligence”. In assessing whether a State has conducted the deportation or extradition procedure with due diligence, it nevertheless takes into account the complexity of the case, the conduct of the applicant, and the remedies to which the individual may have recourse.

4.9 In *Kolompar v. Belgium*,<sup>12</sup> the Court also noted that “[t]he limitations on the right guaranteed under Article 5 were to be interpreted strictly” and that the State should accordingly “have taken positive measures to expedite the proceedings and thereby shorten Mr Kolompar’s detention” (para. 39). In this case, it decided:

The detention was continued as a result of the successive applications for a stay of execution or for release which Mr Kolompar lodged ..., as well as the time which the Belgian authorities required to verify the applicant’s alibi in Denmark.

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<sup>11</sup> *Quinn v. France*, Judgement of 22 February 1995, Appl. No. 18580/91.

<sup>12</sup> *Kolompar v. Belgium*, Judgement of 27 August 1992, Appl. No. 11613/85.

Mr Kolompar waited nearly three months before replying to the submissions of the Belgian State; then on appeal, he requested that the hearing of the case be postponed and failed to notify the authorities that he was unable to pay a lawyer. (paras. 40 and 42)

The Court therefore concluded that “[w]hatever the case may be, the Belgian State cannot be held responsible for the delays to which the applicant’s conduct gave rise” (para. 42).

4.10 The Court’s Judgement in the case of *Chahal v. United Kingdom*<sup>13</sup> provides information directly relevant to the deportation of asylum-seekers. In this case, the applicant was arrested on the ground that his terrorist activities in the UK represented a threat to the national security. He was detained with a view to deportation to India and applied at the same time for asylum. This claim was rejected before all instances of the domestic procedure and he lodged an application before the Court, arguing that his deportation to India would violate Article 3 of the ECHR, that the length of his detention was contrary to Article 5(1)(f) of the ECHR, and that there was a breach of Article 5(4).

4.11 In order to assess this latter part of the claim, the Court reviewed the refugee status determination procedure to see whether the national authorities acted with due diligence. The Court came to the conclusion:

As regards the decisions taken by the Secretary of State to refuse asylum, *it does not consider that the periods ... were excessive, bearing in mind the detailed and careful consideration required for the applicant’s request for political asylum and the opportunities afforded to the latter to make representations and submit information.*

...

As the Court has observed in the context of Article 3, Mr Chahal’s case involves considerations of an *extremely serious and weighty nature*. It is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence.

Against this background, and bearing in mind what was at stake for the applicant and *the interest that he had in his claims being thoroughly examined* by the courts, none of the periods complained of can be regarded as excessive, taken either individually or in combination. *Accordingly, there has been no violation of Article 5 para. 1 (f) of the Convention on account of the diligence, or lack of it, with which the domestic procedures were conducted.* (paras. 115 and 117, emphasis added)

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<sup>13</sup> *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93.

4.12 One possible conclusion that can be drawn from this Judgement is that if a person who is to be deported introduces an asylum claim, the refugee status determination procedure as such would be considered as forming part of the “action ... being taken with a view to deportation”. It would therefore need to be scrutinised by the Court in order to see whether it has been conducted with due diligence.

4.13 More recently, in *Čonka v. Belgium*,<sup>14</sup> the Court found a breach of Article 5(1)(f) as the authorities had called upon the applicants, who were rejected asylum-seekers, to come to the police station to “enable the file concerning their application for asylum to be completed”, but had instead arrested, detained and expelled them to Slovakia. The Court ruled:

[T]he list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision. In the Court’s view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5. (para. 42)

## **5. Procedural guarantees**

### **a. The obligation to inform, Article 5(2)**

5.1 Article 5(2) provides: “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest...”

5.2 For the Court, this obligation to inform, which applies to all categories of persons detained under Article 5(1), is a direct consequence of the right to challenge the lawfulness of the detention. Such challenge would be impossible if the person did not know the grounds for their detention. This obligation is therefore important to persons detained upon entry and those detained pending deportation or extradition.

5.3 In the case of *Fox, Campbell and Hartley v. United Kingdom*,<sup>15</sup> which concerned the arrest of three individuals suspected of involvement with the Irish Republican Army (IRA), the Court emphasised:

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<sup>14</sup> *Čonka v. Belgium*, Judgement of 5 February 2002, Appl. No. 51564/99.

<sup>15</sup> *Fox, Campbell and Hartley v. United Kingdom*, Judgement of 26 June 1990, Applications Nos. 12244/86, 12245/86, and 12383/86. See also, the Admissibility Decision of the Court in *Kerr v. United Kingdom*, Appl. No. 40451/98, 7 Dec. 1999, which defines Article 5(2) as representing an

Paragraph 2 of Article 5 contains the elementary safeguard that *any person arrested should know why he is being deprived of his liberty*. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, *in simple, non-technical language that he can understand, the essential legal and factual grounds* for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed “promptly” (in French: “dans le plus court délai”), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. (para. 40)

5.4 The information provided to the individual must have three essential qualities:

- it must be delivered promptly
- it must provide the reasons for detention
- it must be understandable by the individual

5.5 The first requirement is appreciated on a case by case basis and there is therefore no jurisprudential definition of the notion of “promptness”. In *Fox Campbell and Hartley v. the United Kingdom*, the Court noted that the suspected terrorists were informed of the reasons for their arrest only during the first questioning by the police. The Court looked at the time difference between the arrest and the first questioning by the police and concluded: “In the context of the present case these intervals of a few hours cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 para. 2” (para. 42).

5.6 Concerning the second requirement, the Court pointed out in the same case that the “bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purpose of Article 5 para. 2” (para. 41). The detained person should receive at least the legal and factual grounds for detention. This information could be given in writing, or even orally, to the individual himself/herself or to his/her lawyer. The information could also be of a general nature, provided it is enough to challenge the lawfulness of the detention on the basis of Article 5(4) of the ECHR.

5.7 As to the last element of comprehensibility, this implies that the information must be communicated in non-technical terms and in the language, or one of the languages, understood by the applicant if he/she is a foreigner. There is therefore an obligation to provide a translation or an interpreter, depending on whether the information is conveyed in written or verbal terms.

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“elementary safeguard” and as forming “an integral part of the scheme of protection afforded by Article 5”.



**b. The obligation to review the lawfulness of detention, Article 5(4)**

5.8 Article 5(4) of the ECHR provides: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which *the lawfulness of his detention shall be decided speedily by a court* and his release ordered if the detention is not lawful.” (emphasis added)

5.9 This obligation applies to all categories of persons detained under Article 5(1). In its jurisprudence, the Court has given more precise information on the nature of the “court” which is supposed to operate the review; the procedural elements of such a remedy; and what should be the extent of the domestic court’s control over the detention. The time element introduced by the term “speedily” has also been further clarified in the jurisprudence.

5.10 With regard to the definition of the term “court”, the Court has distinguished between a decision to detain taken by a court or one taken by an administrative authority. In the *De Wilde, Ooms and Versyp v. Belgium*<sup>16</sup> case, the Court indicated:

Where the decision depriving a person of his liberty is one taken *by an administrative body*, there is no doubt that Article 5(4) *obliges the Contracting States to make available to the person detained a right of recourse to a court*; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case *the supervision required by Article 5(4) is incorporated in the decision....* It may therefore be concluded that Article 5 (4) is observed if the arrest or detention ... is ordered by a “court” within the meaning of paragraph (4). (para. 76, emphasis added)

This is particularly important where asylum-seekers are detained upon arrival, since most of the time the decision to detain is taken by administrative authorities.

5.11 In the case of *Weeks v. United Kingdom*,<sup>17</sup> the Court gave its interpretation of the word “court”:

The “court” referred to in Article 5 para. 4 does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. The term “court” serves to denote “bodies which exhibit not only common fundamental features, of which the most important *is independence of the executive and of the parties to the case, ... but also guarantees*” – “*appropriate to the kind of deprivation of liberty in question*” – “*of [a] judicial procedure*”, the forms of which may vary from one domain to another. In addition, as the text of Article 5 para. 4 makes clear, the body in question must not have merely advisory

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<sup>16</sup> *De Wilde, Ooms and Versyp v. Belgium*, Judgement of 18 June 1971, Series A, No. 12, 1971.

<sup>17</sup> *Weeks v. United Kingdom*, Judgement of 27 January 1987, 2 March 1987, Appl. No. 9787/82.

functions *but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful.* (para. 61, emphasis added)

5.12 It is essential to note that the Court does not consider that the procedural guarantees must be identical in all cases of detention. It noted in the case of *De Wilde, Ooms and Versyp v. Belgium*:<sup>18</sup>

*The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place.* (para. 78, emphasis added)

5.13 Certain guarantees are nonetheless considered essential in the context of detention pending deportation or upon entry. According to the jurisprudence, these are: at least written and adversarial proceedings; legal assistance when the applicant is a foreigner who does not understand the procedure; the necessary time and facilities to prepare the case, and the possibility of reasserting the remedy at regular intervals if release is initially refused.

5.14 Concerning the extent of the domestic court’s control, the Court said in *Chahal v. United Kingdom*:<sup>19</sup>

*The scope of the obligations under Article 5 para. 4 is not identical for every kind of deprivation of liberty; this applies notably to the extent of the judicial review afforded.* Nonetheless, it is clear that Article 5 para. 4 does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision making authority. *The review should, however, be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5 para. 1.* (para. 127, emphasis added)

In this case, since the decisions to detain and to expel the applicant were based on national security grounds, UK law prevented the domestic courts from reviewing them. The Court decided that such a procedure did not comply with the obligation under Article 5(4) to provide a remedy for review of the lawfulness of the detention.

5.15 A remedy to detention must also be accessible. As noted by the Court in *Čonka v. Belgium*:

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<sup>18</sup> *De Wilde, Ooms and Versyp v. Belgium*, above note 16.

<sup>19</sup> See above note 12.

The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. As regards the accessibility of a remedy invoked under Article 35 § 1 of the Convention, this implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.<sup>20</sup>

In this case, it determined that this had not happened, since the applicants' lawyer was only informed that his clients were to be expelled at a stage where an appeal against the detention order could only have been heard after their expulsion, thus preventing them "from making any meaningful appeal" as provide for under Article 5(4) of the ECHR (para. 55).

5.16 Article 5(4) also requires that a decision be taken "speedily". In the case of *Sanchez-Reisse v. Switzerland*,<sup>21</sup> the Court stated that "this concept cannot be defined in the abstract; the matter must ... be determined in the light of the circumstances of each case" (para. 55).

5.17 While it may be difficult to provide a standard time limit for review, The Court nevertheless considers that the word "speedily" contains two separate requirements. Firstly, a detained person must have access to a remedy immediately upon detention or speedily thereafter and secondly, a remedy, once availed of, must proceed speedily.

### **c. The obligation to compensate, Article 5(5)**

5.18 Article 5(5) of the ECHR provides: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

5.19 In the case of *Fox, Campbell and Hartley v. United Kingdom*,<sup>22</sup> the Court gave the extent of this obligation. It stated that the arrest and detention of the applicants

... have been held to be in breach of paragraph 1 of Article 5. This violation could not give rise, either before or after the findings made by this Court in the present judgement, *to an enforceable claim for compensation by the victims before the Northern Ireland courts*. There has therefore been a violation of paragraph 5 of Article 5 in respect of all the three applicants. (para. 46, emphasis added)

From this it can be concluded that Article 5(5) requires such a procedure for compensation to exist at the national level.

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<sup>20</sup> *Čonka v. Belgium*, above note 14, para. 46.

<sup>21</sup> *Sanchez-Reisse v. Switzerland*, Judgement of 19 September 1986, Appl. No. 9862/82.

<sup>22</sup> See above note 15.

5.20 Moreover, for the Court “there can be no question of compensation where there is no pecuniary or non-pecuniary damage”.<sup>23</sup> The compensation, which should be of a financial nature, is due when an individual’s detention is found not to fall under one of the exceptions of Article 5(1), or when procedural guarantees of Article 5 paragraphs 2–4 have not been respected.

## **6. Conclusion**

6.1 The right to liberty and security of person is one of the essential rights protected by the ECHR. That is the reason why detention, which is seen as an exception to the right to liberty, has been limited to a number of situations and surrounded by procedural guarantees.

6.2 At a time when States party to the 1951 Convention relating to the Status of Refugees are increasingly resorting to the detention of asylum-seekers, the protection afforded by Article 5 of the ECHR can be an effective tool to enhance some of UNHCR’s protection objectives in relation to the detention of asylum-seekers and ensuring access to fair asylum procedures. In this respect, the jurisprudence developed on Article 5 can prove useful, either when advising governments on national legislation or administrative practice affecting asylum-seekers and refugees or when offering, where appropriate, support to legal challenges before national courts or before the European Court of Human Rights.

**UNHCR**  
**March 2003**

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<sup>23</sup> *Wassink v. The Netherlands*, Judgement of 27 August 1990, Appl. No. 12535/86.

## **PART 2: FACT SHEETS**

### **Part 2.3 – Fact Sheet on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

#### **1. Introduction**

1.1 This fact sheet is one of several forming part of the “UNHCR Manual on Refugee Protection and the European Convention on Human Rights”. These fact sheets examine those Articles of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are of particular relevance to the international protection mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). They do not pretend to present an exhaustive analysis of the relevant ECHR Articles or to provide a substitute for specialised commentaries. They nevertheless describe in some detail the jurisprudence developed by the European Court of Human Rights (the Court) on these Articles from the viewpoint of international refugee protection and show how this jurisprudence can be of relevance to the protection of refugees and those otherwise in need of international protection.

1.2 Article 8 of the ECHR stipulates:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

1.3 From UNHCR’s perspective, the interest of this provision lies in the fact that the Court has interpreted Article 8 in a way that protects family members of non-nationals durably established in State parties to the ECHR against expulsion and allows for their possible reunification. This interpretation of Article 8 may in some cases prove useful to UNHCR in the achievement of its policy goals in the field of family reunification,<sup>1</sup> since it is potentially applicable to recognised refugees, and to persons enjoying temporary protection or other forms of complementary protection. It must be noted, however, that insofar as family reunification involves immigration issues, the Court has adopted a rather restrictive interpretation of the provisions of Article 8. Finally, Article 8 belongs to the category of qualified rights, that is, rights which can be limited under the conditions spelt out in Article 8(2). States party to the ECHR have therefore a margin of appreciation as to the manner in which they implement Article 8.

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<sup>1</sup> See in UNHCR Executive Committee, Conclusion No. 24 (XXXII), 32<sup>nd</sup> Session, 1981.

1.4 This fact sheet examines the two different situations involving the use of Article 8 which are potentially relevant to refugees and those in need of international protection: expulsion and family reunification. First of all, however, it is necessary to explain how the Court defines private and family life.

## **2. The notions of private and family life**

### **a. Family life**

2.1 Like UNHCR, the Court recognises the “broader” family unit. Article 8(1) protects the nuclear family structure (parents, children, spouses), but also other forms of family ties. In the Court’s opinion:

Whatever else the word “family” may mean, it must *at any rate* include the relationship that arises from a *lawful and genuine marriage* ... even if a family life ... has not yet been fully established.<sup>2</sup>

2.2 Concerning the relationship between parents and children, the Court has ruled that

... a child born of marital union is *ipso jure part of that relationship*; hence from the moment of the child’s birth and by the very fact of it, there exists between him and his parents *a bond amounting to “family life”* which subsequent events cannot break...<sup>3</sup>

2.3 The Court also considers that non-cohabitation of the parents does not end the family life between them and their children. In *Berrehab v. The Netherlands*, the parents were divorced but the Court held that family life between them and their child existed “even if the parents are not living together”.<sup>4</sup>

2.4 Besides the traditional family structure, Article 8 has been interpreted in a way that allows the protection of individuals with other family links. In the case of *Marckx v. Belgium*,<sup>5</sup> the Court found that

... family life, within the meaning of Article 8, includes at least the *ties between near relatives*, for instance those between grandparents and grandchildren, *since such relatives may play a considerable part in family life*. (para. 45, emphasis added)

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<sup>2</sup> *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgement of 28 May 1985, Appl. Nos. 9214/80; 9473/81; 9474/81, Series A No. 94, para. 62, emphasis added.

<sup>3</sup> *Gül v. Switzerland*, Judgement of 19 February 1996, Appl. No. 23218/94, para. 32, emphasis added.

<sup>4</sup> *Berrehab v. The Netherlands*, Judgement of 21 June 1988, Appl. No. 10730/84, para. 21.

<sup>5</sup> *Marckx v. Belgium*, Judgement of 27 April 1979, Series A No. 31.

2.5 In the same Judgement, the Court added that “Article 8 makes no distinction between the ‘legitimate’ and the ‘illegitimate’ family” (para. 31). The case concerned the Belgian legislation applicable to children born out of wedlock and extended considerably the notion of family life in the sense of Article 8 of the ECHR. Indeed, this interpretation opens the notion of family life to non-married cohabitants who have a stable relationship, brothers and sisters, as well as uncles/aunts and nieces/nephews. In these latter situations, the question of the existence or non-existence of a family life is essentially a question of facts. The ties between relatives must be real and effective and in order to determine whether a family life exists. The Court will, among other things, look into whether the individuals live together and/or whether there is financial or effective dependency.

### **b. Private life**

2.6 The notion of private life has so far not been well-defined by the Court but its practice has shown that this concept can alternatively be used in situations where there is no family life. In the Judgement of *Niemietz v. Germany*,<sup>6</sup> the Court indicated that it

... does not consider it possible or necessary to attempt an exhaustive definition of the notion of “private life”. However, *it would be too restrictive* to limit the notion to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. *Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.* (para. 29, emphasis added)

2.7 The notion was used in the context of an expulsion in the case of *C. v. Belgium*,<sup>7</sup> where the Court said that private life “encompasses the right for an individual to form and develop relationships with other human beings, including *relationships of a professional or business nature*” (para. 25, emphasis added).

2.8 Finally, concerning homosexual relationships, the then European Commission of Human Rights decided in the case of *X. and Y. v. United Kingdom*<sup>8</sup> that they fell within the scope of the right to respect for private life, but not that of family life. The Commission found that “[d]espite the modern evolution of attitudes towards homosexuality ... the applicant’s relationship does not fall within the scope of the right to respect for family life ensured by Article 8”. Such relationships are also subject to the test of “returnability” referred to in Section 3.a below.

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<sup>6</sup> *Niemietz v. Germany*, Judgement of 16 December 1992, Appl. No. 13710/88.

<sup>7</sup> *C. v. Belgium*, Judgement of 7 August 1996, Appl. No. 21794/93.

<sup>8</sup> *X. and Y. v. United Kingdom*, Admissibility Decision of 3 May 1983, Appl. No. 9369/81.

### **3. The applicability of Article 8**

3.1 Two types of situations have to be clearly distinguished when considering the provisions of Article 8(1):

- situations in which a person established in one of the contracting parties wishes to bring in a family member living abroad.
- situations in which a person established in one of the contracting parties is facing expulsion or return to his/her country of origin,

#### **a. Family reunion under Article 8 of the ECHR**

3.2 The possibility of invoking Article 8 of the ECHR in family reunion cases can be very useful to refugees and other persons of concern to UNHCR. In States where family reunion of these categories of aliens is restrictively regulated, the refusal to allow such reunion may be considered an interference with the right to family life.

3.3 Cases falling into this category are difficult to argue, since they involve immigration issues. The Court constantly reminds that “as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory”.<sup>9</sup>

3.4 As a result, the Court has set stringent conditions to the applicability of Article 8 in such situations. Essentially, the Court will seek to determine whether there is anything preventing the family from returning to live in the country of origin with the other elements of the family who are trying to come in the State party to the ECHR. This “returnability” test is systematically applied. If it is established that the whole family can indeed reunite in the country of origin, the Court will not find a violation of Article 8.

3.5 Again in the case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*, the Court stated:

The duty imposed by Article 8 *cannot be considered* as extending to a general obligation on the part of a Contracting State *to respect the choice by married couples* of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. (para. 68, emphasis added)

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<sup>9</sup> *Abdulaziz, Cabales and Balkandali v. United Kingdom*, above note 2, para. 67. See also for example, *Berrehab v. The Netherlands*, judgment of 21 June 1988, Series A no. 138, pp. 15–16, paras. 28–29; *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A No. 193, p. 19, para. 43; *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A No. 201, para. 70; *Vilvarajah and Others v. United Kingdom*, judgment of 30 October 1991, Series A No. 215, p. 34, para. 102; *Beldjoudi v. France*, judgment of 26 March 1992, Series A No. 234-A, p. 27, para. 74; *Nasri v. France*, judgment of 13 July 1995, Series A No. 320-B, p. 25, para. 41.



3.6 The Court has also applied the test to applicants who held the citizenship of the State party concerned. In the case of *Ahmut v. The Netherlands*,<sup>10</sup> where a dual national (Moroccan/Netherlands) was trying to bring his child from Morocco, the Court held:

... In addition to having had Netherlands nationality since February 1990, Salah Ahmut has retained his original Moroccan nationality... It therefore appears that Salah Ahmut *is not prevented* from maintaining the degree of family life which he himself had opted for when moving to the Netherlands in the first place, *nor is there any obstacle to his returning to Morocco...* (para. 70, emphasis added)

3.7 This jurisprudence was also applied in a case where the applicants had only the nationality of the State party concerned. In the case of *Joseph William Kwakye-Nti and Akua Dufie v. The Netherlands*,<sup>11</sup> which involved Netherlands nationals seeking to bring their children from Ghana, the Court agreed with the defending party that even though the applicants had obtained Dutch citizenship and consequently lost their citizenship of Ghana, nothing prevented them from continuing their family life in Ghana.

3.8 The situation of persons with humanitarian status or other types of temporary or complementary protection status also poses some difficulties in light of the Court's jurisprudence. In the case of *Gül v. The Netherlands*,<sup>12</sup> concerning a Turkish national living in Switzerland with a residence permit delivered on humanitarian grounds, the Court found that the refusal to grant family reunification for the child who remained in Turkey did not constitute a violation of Article 8. It ruled that

... although Mr and Mrs Gül are lawfully resident in Switzerland, they do not have a permanent right of abode, *as they do not have a settlement permit* but merely a residence permit on humanitarian grounds, which could be withdrawn, and which under Swiss law *does not give them a right to family reunion*. (para. 41, emphasis added)

3.9 The facts of the case reveal, however, that the applicant's asylum application was rejected in first instance by the Swiss authorities and that following the issuance of the residence permit on humanitarian grounds, he went at least twice to Turkey to visit his son. Consequently, the Court decided that

... while acknowledging that the Gül family's situation is very difficult from the human point of view, the Court finds that Switzerland has not failed to fulfil the obligation arising under Article 8 para. 1, and there has therefore been no interference in the applicant's family life within the meaning of that Article. (para. 43)

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<sup>10</sup> *Ahmut v. The Netherlands*, Judgement of 26 October 1996, Appl. No. 21702/93.

<sup>11</sup> *Joseph William Kwakye-Nti and Akua Dufie v. The Netherlands*, Admissibility Decision of 7 November 2000, Appl. No. 31519/96.

<sup>12</sup> *Gül v. Switzerland*, above note 3.

3.10 It can, however, be argued that refugees, as well as other persons in need of international protection living in a State party to the ECHR will certainly fail the test of “returnability” to the country of origin applied by the Court in such cases. If a demand for family reunion is turned down by the national authorities, they could initiate proceedings before the Court, demonstrating that the return to the country of origin is impossible.

3.11 This restrictive jurisprudence was somewhat softened in the case of *Sen v. The Netherlands*,<sup>13</sup> where the Court decided that the refusal to allow a Turkish minor child to join her Turkish parents residing legally in the Netherlands constituted a violation of Article 8 of the ECHR. Before the Court, the position of the Netherlands authorities was that while there was a family life between the child and the parents, the family was not prevented from reuniting in the country of origin. Moreover, the defending government held that it had no positive obligations in this case, since the child did not depend on her parents for her care and education.

3.12 In this case, the Court saw major obstacles to the return of the whole family to Turkey. It considered that in addition to having a long-term resident permit, the parents lived in the Netherlands for a long period of time. Moreover, they had two other children who were born in the Netherlands and grew up in a Dutch cultural environment. Under these circumstances, the Court concluded that allowing the third child to come to the Netherlands was the only way to develop a family life, especially since she was young and needed to integrate into the natural family unit. For the Court, the Netherlands authorities had failed to strike a balance between the interest of the applicants and their own interests in controlling immigration.

3.13 This Judgement shows that for the Court to pronounce a violation of Article 8, it must carry out a very fine analysis of the situation of the applicant. In this case, to determine whether or not the family could return to the country of origin to reunite with the member wishing to join them, it looked at the length of stay in the host country, the age and cultural attachment of the children, the age of the child who remained in the country of origin, the type of residence permit the family had, etc. This Judgement also coincides with the more liberal jurisprudence of the then European Commission of Human Rights on the issue.<sup>14</sup>

### **b. Expulsion and Article 8 of the ECHR**

3.14 Article 8 was initially used in the context of expulsion of long-term immigrants and second-generation foreigners. The Court has long decided that the expulsion of long-term immigrants and second-generation foreigners constitutes an interference with their family life. In the case of *Moustaquim v. Belgium*,<sup>15</sup> where the

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<sup>13</sup> *Sen v. The Netherlands*, Judgement of 21 December 2001, Appl. No. 31465/96 (available in French only).

<sup>14</sup> See Report of the then European Commission of Human Rights in the case of *Jagmail Singh Cheema v. France*, adopted on 21 April 1999, Appl. No. 33639/96. The Commission did not, however, rely at all on the “returnability” test.

<sup>15</sup> *Moustaquim v. Belgium*, Judgement of 25 January 1991, Appl. No. 12313/86.

applicant was expelled from Belgium after several criminal convictions, the Court stated:

Mr Moustaquim lived in Belgium, where his parents and his seven brothers and sisters also resided. He had never broken off relations with them. The measure complained of resulted in his being separated from them for more than five years, although he tried to remain in touch by correspondence. There was accordingly interference by a public authority with the right to respect for family life guaranteed in paragraph 1 of Article 8. (para. 36)

3.15 The Court has adopted a three-pronged approach to Article 8(2):

- it first decides whether the adopted measure is based on and adopted in accordance with the law;
- it then determines whether the aim pursued by the measure falls within one of the categories listed in Article 8(2), that is, national security, public safety, economic well-being, prevention of disorder or crime, protection of health or morals, protection of the rights and freedoms of others;
- finally, it assesses whether the measure adopted for one of the above-mentioned purposes is necessary in a democratic society.

3.16 The two first steps are not so problematic, but the last one is more delicate, particularly since the assessment of the Court takes into account the *margin of appreciation* of States in the determination of what is proportionate. It has proved difficult to identify proportionality criteria as these will vary depending on the facts of the case. For instance, in *Moustaquim v. Belgium*, the Court indicated that

... in cases where the relevant decisions would constitute an interference with the rights protected by paragraph 1 of Article 8, they must be shown to be “necessary in a democratic society”, that is to say *justified by a pressing social need* and, in particular, *proportionate to the legitimate aim pursued*.<sup>16</sup>

3.17 In a Judgement concerning the expulsion of a refugee, *Amrollahi v. Denmark*,<sup>17</sup> the Court gave a list of the criteria that it takes into consideration to determine whether an expulsion is necessary in a democratic society, that is, proportionate. The relevant paragraph states:

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the

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<sup>16</sup> *Moustaquim v. Belgium*, above note 15, para. 43.

<sup>17</sup> *Amrollahi v. Denmark*, Judgement of 11 July 2002, Appl. No. 56811/00. The facts are as follows: the applicant, an Iranian national, obtained first a temporary and then a permanent residence permit in Denmark, after he had deserted the army during the Iran-Iraq war and fled to Denmark to seek asylum. He settled with a Danish woman, whom he subsequently married and with whom he had two children. He was later sentenced to three years’ imprisonment for drug trafficking and the courts sought to expel him permanently from Denmark.

applicant; the length of the applicant's stay in the country from which he is going 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, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion. (para. 35)

3.18 In this case, the Court recognised on the one hand that drug trafficking was indeed a serious offence and that the applicant maintained strong links with his country of origin. On the other hand, it also determined that the relationship he had with his wife was effective, that it would be difficult for her to settle in Iran and impossible for them to settle elsewhere. The Court concluded:

In the light of the above elements, the Court considers that the expulsion of the applicant to Iran would be disproportionate to the aims pursued. The implementation of the expulsion would accordingly be in breach of Article 8 of the Convention. (para. 44)

#### **4. Conclusion**

4.1 The distinction between cases of expulsion and cases of family reunion is essential, since the Court approaches these two situations differently. Cases of family reunion have first to fail the test of "returnability" before being assessed against the conditions set out in Article 8(2). Cases of expulsion are assessed against a variety of criteria, including the possibility of the family members following the expellee to the country of destination.

4.2 For Article 8 to apply, an expulsion case involving a refugee or a person in need of international protection would have to be argued on the basis of the consequences of the expulsion measure on the individual's private or family life *on the territory of the contracting party*, if he or she has been there long enough to develop a private or a family life. It must be borne in mind, however, that if harmful consequences are feared *in the country of origin*, it would be better to base the application before the Court on Article 3 of the ECHR.<sup>18</sup> Note that generally if the Court judges that an expulsion measure violates Article 3, it will not review the part of the claim potentially based on Article 8.

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<sup>18</sup> See UNHCR, Fact Sheet on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4.3 In the absence of cases concerning family reunion of refugees or other persons in need of international protection, it is difficult to predict how the Court will conduct the assessment of Article 8(2) of the ECHR in such cases. The legal arguments that can nevertheless be found in the Court's latest jurisprudence and this, together with more general principles relevant to the protection of refugees accepted by the Court, should mean that some already established principles can be relied upon whether in domestic courts or before the Court itself.

4.4 As in cases involving Article 3 of the ECHR, a positive Judgement in an Article 8 case, will not automatically solve the issue of the status of the person allowed to remain or allowed to enter. In such a case, the Court will simply judge whether the contested measure constitutes an illegitimate interference with the right to family life. It does not require the provision of a durable solution for the applicant, such as a residence permit.

**UNHCR**  
**March 2003**

## **PART 2: FACT SHEETS**

### **Part 2.4 – Fact Sheet on Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

#### **1. Introduction**

1.1 This fact sheet is one of several forming part of the “UNHCR Manual on Refugee Protection and the European Convention on Human Rights”. These fact sheets examine those Articles of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are of particular relevance to the international protection mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). They do not pretend to present an exhaustive analysis of the relevant ECHR Articles or to provide a substitute for specialised commentaries. They nevertheless describe in some detail the jurisprudence developed by the European Court of Human Rights (the Court) on these Articles from the viewpoint of international refugee protection and show how this jurisprudence can be of relevance to the protection of refugees and those otherwise in need of international protection.

1.2 Article 13 of the ECHR provides:

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

1.3 From UNHCR’s perspective the right to an effective domestic remedy set forth in Article 13 of the ECHR is pertinent in so far as a refugee status determination procedure can be considered to constitute such a remedy. Since the Court decided that Article 6 of the ECHR, which guarantees the right to a fair trial, was not applicable to immigration and asylum issues, Article 13 is the only provision which can be used to strengthen the safeguards of refugee status determination procedures.<sup>1</sup>

1.4 Before considering how the Court’s jurisprudence on Article 13 could be used in refugee law, it is necessary first to review the interpretation that the Court has given to the various elements of Article 13.

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<sup>1</sup> Article 6 of the ECHR is applicable only to procedures concerning the determination of a *civil right* and of a *criminal charge*. In the Court’s opinion, decisions relating to the entry and stay of foreigners, including the granting of asylum, do not involve civil rights or criminal charges and therefore the procedures whereby such decisions are taken cannot be scrutinised on the basis of Article 6. See *Maaouia v. France*, Judgement of 5 October 2000, Appl. No. 39652/98.

## **2. Elements of the definition**

2.1 Article 13 of the ECHR illustrates the subsidiary role of the Court. It requires a State party to the ECHR to establish domestic mechanisms to redress violations of the ECHR that may occur within its jurisdiction. If the State party fails to do so, or if the existing mechanisms are not efficient, an individual may invoke Article 13 before the Court. Since Article 13 provides that the violations to be complained of must relate to *rights and freedoms set forth in the Convention*, it appears, however, that Article 13 of the ECHR is not an autonomous provision. It should therefore be used in conjunction with another provision of the ECHR.

2.2 In *Klass and Others v. Germany*,<sup>2</sup> the Court stated:

Article 13 requires that where an individual considers himself to have been prejudiced by *a measure allegedly in breach of the Convention*, he should have *a remedy before a national authority* in order both to have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an “effective remedy before a national authority” to everyone who claims that *his rights and freedoms under the Convention have been violated*. (para. 64, emphasis added)

2.3 The Court has defined further, through its jurisprudence, the conditions in which an effective remedy should be made available in the domestic legal system, as well as the content of the right to an effective domestic remedy.

### **a. The right to an effective domestic remedy**

2.4 The Court does not consider that an effective domestic remedy should exist whenever an individual claims to be the victim of a violation under the ECHR. It has taken the position that State parties to the ECHR should set up such mechanisms or open existing ones only with regard to *arguable claims*. In the case of *Boyle and Rice v. United Kingdom*<sup>3</sup>, the Court said:

... Article 13 *cannot reasonably be interpreted as to require a remedy in domestic law in respect of any supposed grievance* under the Convention that an individual may have, no matter how unmeritorious his complaint may be: *the grievance must be an arguable one in terms of the Convention*. (para. 52, emphasis added)

2.5 There is no definition of the notion of an “arguable” claim, although the Court has in its jurisprudence drawn a parallel between that notion and the notion of “well-foundedness”. In the aforementioned case, it added that

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<sup>2</sup> *Klass and Others v. Germany*, Judgement of 6 September 1978, Appl. No. 5029/71.

<sup>3</sup> *Boyle and Rice v. United Kingdom*, Judgement of 27 April 1988, Appl. No. 9659/82 - 9658/82.

... rejection of a complaint as *manifestly ill-founded* amounts to a decision that *there is not even a prima facie case against the respondent State*. On the ordinary meaning of the words, it is difficult to conceive how a claim that is manifestly ill-founded can nevertheless be arguable, and vice versa. (para. 57, emphasis added)

2.6 In the case of *Powell and Rayner v. United Kingdom*<sup>4</sup> the Court argued:

Whatever threshold the Commission has set out in its caselaw for declaring claims manifestly ill-founded ..., *in principle it should set the same threshold in regard to the parallel notion of arguability* under Article 13. (para. 33, emphasis added)

2.7 Quoting the Commission, the Court noted that “the term ‘manifestly ill-founded’ extends further than the literal meaning of the word ‘manifest’ would suggest at first reading”. It found that “some serious claims might give rise to a *prima facie* issue but, after ‘full examination’ at the admissibility stage, ultimately be rejected as manifestly ill-founded notwithstanding their arguable character” (para. 32). In this respect, it should be noted that the term “manifestly unfounded” used in legislation and jurisprudence on asylum matters in various European States is not necessarily synonymous with the term “manifestly ill-founded” in the jurisprudence of the European Court of Human Rights.

2.8 More generally, the reasoning of the Court leads to the conclusion that an arguable claim is a claim which could have some merit and which is based on an alleged violation of a right protected by the ECHR.

#### **b. The content of the right to an effective domestic remedy**

2.9 The Court considers that an effective domestic remedy must allow a competent authority to deal with both the substance of a complaint and to grant appropriate relief. It does not, however, have to ensure a favourable outcome for the applicant. In the case of *Silver and Others v. United Kingdom*,<sup>5</sup> the Court indicated:

Where an individual has an *arguable claim* to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both *to have his claim decided* and, if appropriate, *to obtain redress*. (para. 113, emphasis added)

2.10 Article 13 does not require any particular form of remedy. The Court mentioned in the case of *Klass and Others v. Germany*<sup>6</sup> that

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<sup>4</sup> *Powell and Rayner v. United Kingdom*, Judgement of 24 January 1990, Appl. No. 9310/81.

<sup>5</sup> *Silver and Others v. United Kingdom*, Judgement of 26 March 1987, Appl. No. 9310/81.

<sup>6</sup> *Klass and Others v. Germany*, above note 2.



... the authority referred to in Article 13 *may not necessarily in all instances be a judicial authority* in the strict sense. Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective. (para. 67, emphasis added)

2.11 A variety of non-judicial authorities have been accepted as satisfying the requirements of Article 13 of the ECHR. What matters for the Court is not so much the formal position of the national authority, but rather its capacity to provide an effective remedy. The Court expects

- (i) the authority in question to be sufficiently independent of the body responsible for the violation;
- (ii) it will be possible to present before it in substance the arguments that could be made before the Court;
- (iii) it will be in a position to deliver a binding decision, and
- (iv) the applicant will be able to take effective advantage of it.

The Court also accepted that “although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so”.<sup>7</sup>

2.12 The Court’s position with regard to Article 13 has recently been usefully summarised in the case of *Keenan v. United Kingdom*, as follows:

... Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law. In particular its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.<sup>8</sup>

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<sup>7</sup> See both *Silver and Others v. United Kingdom*, above note 5, para. 113, and *Leander v. Sweden*, Judgement of 26 March 1987, Appl. No. 9248/81, para. 77.

<sup>8</sup> *Keenan v. United Kingdom*, Judgement of 3 April 2001, Appl. No. 27229/95, para. 122. The case concerned a mentally-ill prison inmate who committed suicide. The Court found a violation of Articles 3 and 13, ruling *inter alia*: “Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and

2.13 The trend in recent Court Judgements concerning Article 13 has been to determine not simply whether remedies are theoretically available at the national level but whether such remedies are practically available in order to deal with alleged violations of ECHR rights. This offers a potentially useful avenue to secure relief in cases where a violation of a substantive provision can be established.

### **3. Article 13 of the ECHR and refugee status determination procedures**

3.1 In so far as the negative outcome of a refugee status determination procedure could lead to the return of an individual to a place where he/she may still face treatment contrary to Article 3 of the ECHR, the quality of such a procedure can be assessed against the provisions of Article 13. The Court has done so in a number of cases considering that the content of an asylum claim was in substance similar to an application for non-return based on Article 3 of the ECHR.

3.2 Issues it has raised, which are outlined below, include (i) the need for “independent and rigorous scrutiny” of decisions; (ii) the effectiveness of judicial review proceedings; (iii) the imposition of time limits after which applications for asylum will not be admitted; (iv) the availability of an effective remedy in expulsion cases raising national security issues; (v) the need “to deal with the substance of the relevant Convention complaint”; (vi) the suspensive effect of measures designed to stay deportation; and (vii) access to legal aid in domestic refugee status determination.

3.3 In the case of *Jabari v. Turkey*,<sup>9</sup> which concerned an Iranian national who sought asylum in Turkey, the Court made interesting determinations concerning the Turkish refugee status determination procedure. The application for asylum was declared inadmissible because it was lodged outside of the five-day deadline, leading the Turkish authorities to issue an expulsion order. Even though the applicant was granted refugee status by UNHCR, the recourse against the deportation order before the Ankara Administrative Court was dismissed. In the part of the complaint based on Article 13 of the ECHR, the applicant argued that she did not have an effective remedy against the refusal to consider the asylum application and against the deportation order, since the appeal procedure did not have suspensive effect.

3.4 After considering that “there was no assessment made by the domestic authorities of the applicant’s claim to be at risk if removed to Iran” (para. 49), the Court concluded that

... given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it

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punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure” (para. 122).

<sup>9</sup> *Jabari v. Turkey*, Admissibility Decision of 11 July 2000, Appl. No. 40035/98.

attaches to Article 3, the notion of an effective remedy under Article 13 requires *independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned*. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that *the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13*. (para. 50, emphasis added)

3.5 Considering the issue of the time limit under the part of the complaint based on Article 3 of the ECHR, the Court took the view that

the automatic and mechanical application of *such short time-limit* for submitting an asylum application *must be considered at variance* with the protection of the fundamental value embodied in Article 3 of the Convention. (para. 40, emphasis added)

3.6 One can conclude from that in order to be considered as an effective remedy a refugee status procedure must meet a number of criteria. It should allow the competent first and second instance bodies to consider the merits of an asylum claim, it should provide for the possibility of suspending any deportation order which may be in force, and it should not be constrained by a too short a time limit.

3.7 In the case of *Chahal v. United Kingdom*,<sup>10</sup> the Court has made other relevant determinations concerning the quality of a refugee status determination procedure. In this case, the UK government decided to expel the applicant, who was an Indian Sikh political activist, on grounds of national security. His asylum claim was rejected on the grounds that it was not established he would face ill-treatment in his country of origin and that in any case he was not entitled to protection under the terms of the 1951 Convention Relating the Status of Refugees because of the threat he posed to national security. Since national security issues were involved, however, the domestic courts, including the ones reviewing the negative asylum decision, did not have access to the information on which the governmental authorities based their decision to expel. They therefore had only a limited power of review in considering the Home Secretary's decision to refuse to grant asylum.

3.8 The Court reiterated its jurisprudence by mentioning that

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<sup>10</sup> *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93. By contrast, the Court found no violation of Article 13 in the case of *Vilvarajah and Others v. United Kingdom*, 30 October 1991, Applications Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Series A, No. 215.

... Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority *both to deal with the substance of the relevant Convention complaint and to grant appropriate relief...*<sup>11</sup>

3.9 Addressing the extent of the domestic courts' review powers, the Court considered that

... given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 *requires independent scrutiny of the claim* that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. *This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.*' (para. 151, emphasis added)

3.10 It concluded:

In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security. It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 of the Convention. (para. 153, emphasis added)

3.11 Therefore, the Court blamed the UK authorities for the fact that the national security element prevented the domestic courts from focusing their analysis on the risk faced by the applicant in his country of origin. The domestic courts decided to take into consideration the national security issue, which limited their authority to review the Home Secretary's decision to refuse asylum and to return the applicant to his country of origin. This case reveals that for a court, or another organ, to be considered effective it should have sufficient power to review the substance of a claim, access to all material and evidence and be able if necessary to reverse the decision of the authorities.

3.12 The question of whether measures requesting a stay of deportation which do not have suspensive effect constitute an "effective remedy" under Article 13 was examined in

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<sup>11</sup> *Chahal v. United Kingdom*, above note 10, para. 145, emphasis added.

*Conka v. Belgium*.<sup>12</sup> The Court noted that such measures, whether taken under “ordinary” or “extremely urgent” procedures provided for under Belgian law, did not have suspensive effect. It ruled as follows:

Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.

Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention... (paras. 82–83)

3.13 In this case, the Court found that the fact that (1) the Belgian authorities were not required to defer execution of the deportation order while an application under the extremely urgent procedure was pending; (2) there was no obligation the part of the *Conseil d’État* to ascertain the authorities’ intentions regarding the proposed expulsions and to act accordingly; (3) the procedure to be followed was merely on the basis of internal directions, and (4) there was no indication of what the consequences for failure to follow these. The Court found:

Ultimately, the alien has no guarantee that the *Conseil d’État* and the authorities will comply in every case with that practice, that the *Conseil d’État* will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace. (para. 83)

It therefore ruled that each of those factors made “the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied” (para. 83).

3.14 Touching upon the issue of legal aid before domestic refugee status determination bodies, the Court mentioned in the case of *Richard Lee Goldstein v. Sweden*<sup>13</sup> that

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<sup>12</sup> *Conka v. Belgium*, Judgement of 5 February 2002, Appl. No. 51564/99.

<sup>13</sup> *Richard Lee Goldstein v. Sweden*, Admissibility Decision of 12 September 2000, Appl. No. 46636/99.

... it is true that it is not enough under Article 13 of the Convention that an effective remedy is available in the national legal system; *the applicant must also be able to take effective advantage of it*. However, the said Article does not guarantee a right to legal counsel paid by the State when availing oneself of such a remedy. *The Court finds no indication of any special reason calling for the granting of free legal aid* in order for the applicant to take effective advantage of the available remedy. (p. 4, emphasis added)

3.15 In the Court’s opinion, the absence of free legal aid in this particular case did not prevent the applicant from using the remedies at his disposal in Sweden. Conversely, one could argue that it is only when the absence of free legal aid directly prevents the use of the available remedies that the Court would consider Article 13 violated.

#### **4. Conclusion**

4.1 Since the Court decided that the “right to a fair trial” provisions of Article 6 were not applicable to asylum and other immigration proceedings, the potential of Article 13 of the ECHR should be exploited as much as possible in order to improve domestic refugee status procedures. The Court has already made determinations concerning suspensive effect, the issue of time limits, the extent of a domestic court’s powers, and legal aid. The procedural principles emerging from the Court’s jurisprudence and its interpretation of Article 13 could eventually be used in order to tackle other problems relating to refugee status determination procedures, such as issues of excessive length of procedure or accelerated procedures.

4.2 Article 13 can therefore be instrumental in establishing or assessing minimum standards applicable to refugee status procedures. This Article could either be used to advise governments on national legislation or administrative practice affecting asylum-seekers and refugees or to offer support as appropriate to legal challenges before national courts or the European Court of Human Rights.

**UNHCR**  
**1 March 2003**

## **PART 2 – FACT SHEETS**

### **Part 2.5 – Fact Sheet on Rule 39 of the Rules of the European Court of Human Rights (interim measures)**

#### **1. Introduction**

1.1 This fact sheet is one of several forming part of the “UNHCR Manual on Refugee Protection and the European Convention on Human Rights”. These fact sheets examine those Articles of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are of particular relevance to the international protection mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR). They do not pretend to present an exhaustive analysis of the relevant ECHR Articles or to provide a substitute for specialised commentaries. They nevertheless describe in some detail the jurisprudence developed by the European Court of Human Rights (the Court) on these Articles from the viewpoint of international refugee protection and show how this jurisprudence can be of relevance to the protection of refugees and those otherwise in need of international protection.

1.2 Rule 39 of the Rules of the Court can be an essential component of a complaint lodged before the Court, especially when there is a pending deportation, expulsion or extradition order against the applicant. In applications based on Article 2 or 3 and concerning a person in need of international protection who is about to be returned, the interim measure would involve asking the State concerned not to enforce the order until a determination on the admissibility and the merits is made.<sup>1</sup>

1.3 Rule 39 of the Rules of the Court, which replaced the former Rule 36 when the reform of the ECHR supervisory mechanism under Protocol No. 11 to the ECHR came into force in November 1998, provides:

1. The Chamber or, where appropriate, its President may, *at the request of a party or of any other person concerned*, or of its own motion, indicate to the parties any *interim measure* which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated. (emphasis added)

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<sup>1</sup> This fact sheet should be read in conjunction with Part 2.1 of this Manual “Fact sheet on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

1.4 When lodging an application before the Court, a demand for interim measures can be introduced to prevent a possible violation of the ECHR. A Rule 39 request is therefore the initial step of the procedure before the Court. The practice of the Court has been to resort to Rule 39 only in cases where irreversible damage would occur, that is, usually in cases based on Article 2 and/or Article 3 of the ECHR.

## **2. The role and scope of Rule 39 interim measures**

2.1 Until recently, the jurisprudence of the Court indicated that a Rule 39 request by the Court did not have the legal force of a Judgement or a Decision issued by the Court. Rule 39 was viewed as a provision of the Rules of the Court and not of the ECHR as such. This position was set out in *Cruz Varas and Others v. Sweden*,<sup>2</sup> a case concerning a rejected asylum-seeker whose return to Chile was pending, in which the Commission asked the Swedish Government not to return the applicant, but the latter did not comply. The Court found no breach of either Article 3 or Article 25(1) (now Article 34) of the ECHR as a result of Sweden's failure to comply with the interim measures. It ruled:

It must be observed that [the then] Rule 36 *has only the status of a rule of procedure*.... In the absence of a provision in the Convention for interim measures an indication given under Rule 36 *cannot be considered to give rise to a binding obligation* on Contracting Parties. (para. 98, emphasis added)

2.2 This Judgement defined the role and scope of what were then Rule 36 (now Rule 39) measures, as follows:

Rule 36 [now Rule 39] indications are given ... *only in exceptional circumstances*. They serve the purpose in expulsion (or extradition) cases putting the Contracting States on notice that ... *irreversible harm may be done to the applicant* if he is expelled and, further, that there is good reason to believe that his expulsion may give rise to a breach of Article 3 of the Convention. (para. 103, emphasis added)

2.3 The question of the relationship between Rule 39 and what is now Article 34, which states that “[t]he High Contracting Parties undertake not to hinder in any way the effective exercise of this right”, has now been considered on a number of occasions by the Court. The case of *Čonka v. Belgium*<sup>3</sup> concerned four rejected asylum-seekers who were deported to their country of origin despite interim measures under Rule 39 issued by the Court shortly before the deportation. In its Admissibility Decision, the Court confirmed the non-binding nature of requests under Rule 39 and reiterated the position set out in *Cruz Varas*. The Court nevertheless concluded:

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<sup>2</sup> *Cruz Varas and Others v. Sweden*, Judgement of 20 March 1991, Appl. No. 15576/89.

<sup>3</sup> *Čonka v. Belgium*, Admissibility Decision of 13 March 2001, Appl. No. 51564/99 (available only in French, unofficial translation here by UNHCR); see also, Judgement of 5 February 2002.



Taking account of the consistent practice of respecting such suggested measures, which are only issued in exceptional circumstances, acting in such a way hardly appears compatible with it being “a matter of good faith co-operation with the Court in cases where this was considered reasonable and practicable”.<sup>4</sup>

2.4 Most recently, the Court has indirectly given binding force to interim measures through Article 34 of the ECHR, in the case of *Mamatkulov and Abdurasulovic v. Turkey*.<sup>5</sup> The case concerned two applicants who were extradited to Uzbekistan from Turkey before their case had been fully considered by the Court, even though the Court had invoked Rule 39 interim measures. The Court examined the instruments and case law on interim measures in other areas of international law and the practice of the Court on Rule 39. Examining also the circumstances of the case, it found that the applicants’ extradition meant that they “were unable to take part in the proceedings before the Court or to speak to their lawyers” and that this had “hindered them in contesting the Government’s arguments on the factual issues and in obtaining evidence” (para. 108). The Court found that

any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation *must comply with those measures* and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment.<sup>6</sup>

The Court concluded that by failing to comply with the interim measures indicated under Rule 39, Turkey was in breach of its obligations under Article 34.

### **3. Individuals who can initiate a Rule 39 request**

3.1 A Rule 39 request can be made by all persons who, in accordance with Article 34 of the ECHR, are allowed to lodge a complaint before the Court. As indicated above, Article 34 allows the Court to receive applications “from any *person, non-governmental organisations or group of individuals* claiming to be the victim of a violation ... of the rights set forth in the Convention or the protocols thereto” (emphasis added).

3.2 The Rule 39 request can be presented by the applicant him/herself or through a lawyer. According to the Rule 36(4) of the Court: “The representative of the applicant shall be an *advocate authorised to practise* in any of the Contracting Parties and resident in the territory of one of them, or any *other person approved* by the President of the Chamber.”

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<sup>4</sup> Para. 11 (unofficial translation). The French text reads: « Eu égard à l’usage consistant à respecter de telles indications, lesquelles ne sont communiquées que dans des circonstances exceptionnelles, pareille façon de procéder paraît peu compatible avec « le souci de coopérer loyalement avec la Cour quand l’Etat en cause le juge possible et raisonnable ».

<sup>5</sup> *Mamatkulov and Abdurasulovic v. Turkey*, Judgement of 6 February 2003, Appl. No. 46827/99 - 46951/99

<sup>6</sup> *Mamatkulov and Abdurasulovic v. Turkey*, above note 6, para. 110 (emphasis added).

3.3 Rule 39 nevertheless states that the Chamber or President of the Court “may, at the request of a party *or of any other person concerned*, or of its own motion, indicate to the parties any interim measure which it considers should be adopted” (emphasis added).

#### **4. Modalities for introducing a Rule 39 request**

##### **a. Exhaustion of domestic remedies**

4.1 Article 35(1) of the ECHR stipulates that “[t]he Court may only deal with the matter after all domestic remedies have been exhausted”.

4.2 Since a Rule 39 request forms an integral part of the procedure before the Court, applicants must have gone through all available national legal remedies before turning to the Court. There are nevertheless limits and exceptions to this requirement. One can distinguish four situations where there is no need to exhaust domestic remedies before lodging a complaint before the Court:

- when there is in fact no remedy;
- when there is a remedy, but it is not accessible to the applicant;<sup>7</sup>
- when there is an accessible remedy, but it is ineffective because it cannot reasonably be successful;<sup>8</sup> or
- when exceptional circumstances make it impossible or useless to exhaust domestic remedies.<sup>9</sup>

4.3 In addition, even if domestic remedies are exhausted, the risk must be imminent for the Court to indicate interim measures. In cases of deportation, expulsion or extradition, this means that there should be a deportation, expulsion or extradition order pending against the applicant.

##### **b. Evidence**

4.4 At this stage of the procedure the Court will not usually look into the full merits of the case, but it is still essential to submit as much factual material as possible in order to demonstrate that there is a *prima facie* case. The burden of proof is fairly high and all relevant information should be included.<sup>10</sup> Also, the evidence submitted should be as specific as possible to the applicant’s situation. It is of course,

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<sup>7</sup> In the Court’s jurisprudence, a remedy is considered “accessible” when it can be exercised directly by the individual. In other words, no intermediary authority should be authorising or allowing the individual to exercise such a remedy.

<sup>8</sup> This is the case when, for instance, a certain interpretation of the law or the jurisprudence by domestic courts makes it impossible for the appeal/recourse to be successful or when there is no suspensive effect.

<sup>9</sup> This covers situations when the individual has no material access to the remedy, when he is in prison, for instance, with no contacts with the outside world.

<sup>10</sup> See in the check list annexed to this fact sheet.

necessary to mention which Article(s) of ECHR are invoked and to refer to pertinent case law of the Court.

### **5. Lodging the request**

5.1 The request must be addressed to the Registry of the Court. The Registry will then forward the request to one of the Chambers or one of the Presidents, competent to approve the Rule 39 request and indicate interim measures.

5.2 If, as in most of the cases, the request is urgent and needs to be faxed, ensure that the object of the demand and its urgency are clearly indicated. The request does not need to be longer than three or four pages. It can be written in the national language.

5.3 The Court Registry's fax number is +33 3 88 41 27 30. The postal address is:

The Registrar  
European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex  
France

### **6. Next steps**

6.1 If the Court considers the Rule 39 request favourably, it will notify the government concerned<sup>11</sup> and the applicant of its decision. The interim measure will consist of a request to the government asking it not to enforce the deportation, expulsion or extradition order until a decision on the admissibility and the merits is made. The Rule 39 measure can be extended at the initiative of the Court if necessary.

6.2 If the Court rejects the Rule 39 request, the government concerned can enforce the deportation, expulsion or extradition order. This does not prevent the applicant from pursuing his or her case before the Court, but he or she would not benefit from the suspensive effect of the interim measure.

**UNHCR**  
**31 March 2003**

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<sup>11</sup> The notification is usually communicated to the government through its agent at the Court.

## **Check List of Information and Documentation to Include in a Rule 39 Request**

### **1. The applicant's biographical data**

- Name
- Age
- Sex
- Citizenship/nationality/ethnic background (if relevant)
- Religion (if relevant)
- Present location/address
- Profession

### **2. The facts of the applicant's case**

- Reasons for flight from the country of origin
- Nature of treatment feared upon return

### **3. Details of the domestic procedures**

- Date on which applicant is due to be expelled and reasons for expulsion
- Summary and copy of domestic decisions related to the applicant's case (first instance decision, appeal, expulsion order, etc.)

### **4. Articles of the ECHR invoked**

- Mention of all the Articles of the ECHR that would be violated if the expulsion were to take place and those that may have already been violated.
- Refer to the most relevant case law of the European Court of Human Rights if possible.

### **5. Additional evidence to be submitted with the request**

- Relevant UNHCR document related to the case (recognition of refugee status under UNHCR's mandate, etc.).
- Country of origin information.<sup>12</sup>
- Documents specific to the applicant such as membership cards of political parties, medical reports, official documentation from country of origin relating to any detentions or arrests or court cases against the applicant.

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<sup>12</sup> Note that all material submitted to the Court is accessible to the public (Article 40 of the ECHR). If non-public country of origin information is submitted, this must be indicated to the Registry for appropriate measures to be taken.