

PART 4 – SELECTED CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 4.1 – Selected Case Law on Article 3

1. Introduction

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides:

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

The right protected under Article 3 of the ECHR relates directly to an individual's personal integrity and human dignity. Article 3 prohibits governments from returning an individual to a country where he or she would be subjected to torture or to inhuman or degrading treatment or punishment. The 1951 Convention Relating to the Status of Refugees (1951 Convention) similarly prohibits expulsion or return (*refoulement*) of a refugee whose life or freedom would be threatened on a Convention ground. The European Court of Human Rights (the Court) has derived a number of important consequences from the obligation enshrined in Article 3 of the ECHR.

This paper provides a summary of the most important jurisprudence of the Court relating to Article 3 of the ECHR as it pertains to refugees and asylum-seekers. The relevant Judgements and Admissibility Decisions summarised here are:

Judgements

– <i>Cruz Varas and Others v. Sweden</i>	20 March 1991	Appl. No. 15576/89
– <i>Vilvarajah and Others v. UK</i>	30 October 1991	Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87
– <i>Chahal v. United Kingdom</i>	15 November 1996	Appl. No. 22414/93
– <i>Ahmed v. Austria</i>	17 December 1996	Appl. No. 25964/94
– <i>H.L.R v. France</i>	29 April 1997	Appl. No. 24573/94
– <i>D. v. United Kingdom</i>	2 May 1997	Appl. No. 30240/96
– <i>Bahaddar v. The Netherlands</i>	19 February 1998	Appl. No. 25894/94
– <i>Jabari v. Turkey</i>	11 July 2000	Appl. No. 40035/98
– <i>Bensaid v. United Kingdom</i>	6 February 2001	Appl. No. 44599/98
– <i>Hilal v. United Kingdom</i>	6 March 2001	Appl. No. 45276/99

Admissibility Decisions

– <i>Ould Barar v. Sweden</i>	19 January 1999	Appl. No. 42367/98
– <i>Pranjko v. Sweden</i>	23 February 1999	Appl. No. 45925/99
– <i>Pančenko v. Latvia</i>	28 October 1999	Appl. No. 40772/98
– <i>S.C.C. v. Sweden</i>	15 February 2000	Appl. No. 46553/99
– <i>T.I. v. United Kingdom</i>	7 March 2000	Appl. No. 43844/98
– <i>Richard Lee Goldstein v. Sweden</i>	12 September 2000	Appl. No. 46636/99

2. Judgements

◆ Cruz Varas and Others v. Sweden, Judgement of 20 March 1991, Appl. No. 15576/89

Facts:

The first applicant, Hector Cruz Varas, was a national of Chile, who fled his country of origin and sought asylum in Sweden in January 1987. His wife and son (the second and third applicants) joined him later in June 1987. In his asylum application he explained that he was a member *inter alia* of the Socialist Party and the Revolutionary Workers' Front, both of which were opposed to the regime of Gen. Pinochet in Chile. The first applicant claimed that he had been arrested and ill-treated several times in 1973, 1974, 1976 and 1985. The Swedish National Immigration Board rejected the asylum claim in April 1988 on the grounds that he had not invoked sufficiently strong political reasons to qualify for refugee status. His appeal against this decision was rejected in September 1988. He presented new elements in favour of his case to the police authorities responsible for his expulsion, explaining that he had again been arrested in 1986 and 1987 and on the former occasion was subjected to severe ill-treatment, including being subjected to shocks by electrodes in the anus and testicles. In spite of medical reports from Swedish doctors confirming that the first applicant had been mistreated, the Swedish authorities nevertheless decided to expel the applicant in October 1989. They argued that he had had the opportunity to tell the truth and his allegations were therefore contradictory, which affected the credibility of his claim. He was expelled to Chile and his family went into hiding in Sweden.

Complaint before the Court:

The applicants alleged that the expulsion of Mr Cruz Varas to Chile constituted inhuman treatment in breach of Article 3 of the ECHR because of the risk that he would be tortured by the Chilean authorities and because of the trauma involved in being sent back to a country where he had previously been tortured. They also claimed that the return of the third applicant would be in breach of Article 3.

Legal argumentation:

In examining the merits of this case, the Court considered that Article 3 of the ECHR was also applicable to cases of expulsion – not only to cases of extradition – even if the return of the applicant had already taken place. In such situations:

... the 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, emphasis added)

In this case, the Court considered that, in light of the medical reports established in Sweden, the first applicant had indeed been subjected to inhuman or degrading treatment in the past. There was no evidence, however, that the ill-treatment had been

inflicted by the Chilean authorities. More importantly, in spite of the fact that he had been legally represented from the outset of the procedure in June 1987, the applicant had not mentioned that he was severely tortured until January 1989. Moreover, some of his clandestine opposition political activities had not been substantiated and the Court was therefore of the view that this affected the applicant's credibility.

Turning to the situation that prevailed in Chile at the time of the expulsion, the Court noted:

In any event, a democratic evolution was in the process of taking place in Chile which had led to improvements in the political situation and, indeed, to *the voluntary return of refugees* from Sweden and elsewhere. (para. 80, emphasis added).

Taking also into consideration the fact that the Swedish authorities had extensive experience in dealing with asylum-seekers from Chile and had therefore thoroughly examined the applicant's claim for asylum (para. 81), the Court concluded that

... *substantial grounds have not been shown* for believing that the first applicant's expulsion would expose him to a real risk of being subjected to inhuman or degrading treatment on his return to Chile in October 1989. Accordingly there has been no breach of Article 3 in this respect. (para. 82, emphasis added)

Concerning the trauma involved in expelling the applicant, the Court concluded that even though it appeared that he suffered from post-traumatic stress disorder, no substantial basis was shown for his fears and therefore his expulsion did not exceed the threshold set by Article 3 in this regard. As for the expulsion of the third applicant, the Court found that "the facts do not reveal a breach in this respect either" (para. 85).

♦ **Vilvarajah and Others v. United Kingdom, Judgement of 30 October 1991, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87**

Facts:

The case concerned five Tamils who fled Sri Lanka because of abuses by governmental forces and sought asylum in the United Kingdom in 1987. Their claims were rejected in first instance and subsequent judicial review proceedings were unsuccessful, the UK authorities finding them to be victims of generalised violence and not of individualised, targeted persecution in the sense of the 1951 Convention relating to the Status of Refugees. They were sent back to Sri Lanka in February 1988, but when their appeals against the rejection of their asylum applications were finally successful, all five applicants were all allowed to come back to the United Kingdom and were granted exceptional leave to remain. Shortly after their return, each made a further application for asylum which was at the time still under consideration.

Complaint before the Court:

All five applicants alleged that their removal to Sri Lanka amounted to inhuman and degrading treatment in breach of Article 3 of the ECHR because they all faced various forms of ill-treatment upon return there.

Legal argumentation:

The Court confirmed that the applicability of Article 3 to such situations and reiterated that

... the 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 expulsion*; the Court is not precluded, however, from having regard to *information which comes to light subsequent to the expulsion*. This may be of value in confirming or refuting the appreciation that has been made by the Contracting party *or the well-foundedness* or otherwise of an applicant's fears.... (para. 107, emphasis added)

Based on this, the Court found that “by February 1988 there was an improvement in the situation in the north and east of Sri Lanka” (para. 109). Moreover,

... the UNHCR voluntary repatriation programme which had begun to operate at the end of December 1987 provides a strong indication that by February 1988 the situation had improved sufficiently to enable large numbers of Tamils to be repatriated to Sri Lanka notwithstanding the continued existence of civil disturbance. (para. 110)

The Court also considered that neither the background of the applicants, nor the general situation indicated 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” (para. 111, emphasis added). For those who faced difficulties because they were returned from the United Kingdom without identification documents, the Court judged that while this was open to criticism, it cannot be said that “this fact alone exposed them to a real risk of treatment going beyond the threshold set by Article 3” (para. 113).

Accordingly, the Court concluded there was no breach of Article 3 in this case.

◆ **Chahal v. United Kingdom, Judgement of 15 November 1996, Appl. No. 22414/93**

Facts:

The first applicant, Karamjit Singh Chahal, was a Sikh from India who entered the United Kingdom illegally in 1971. The three other applicants were his Indian-born wife and their two British-born children. In 1974, Chahal applied to the Home Office

to regularise his situation and he was granted indefinite leave to remain under the terms of an amnesty for illegal entrants, after which his wife joined him and their two children were born. Chahal became a leading Sikh militant. He was arrested in 1985 on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister during a visit to the United Kingdom and again in 1986 because he was believed to be involved in a conspiracy to murder moderate Sikhs in the United Kingdom. He was finally sentenced in 1987 for his involvement in disturbances in London.

In 1990, the Home Secretary decided that Chahal constituted a threat to national security and ordered his deportation to India. He applied for asylum claiming that he had a well-founded fear of persecution in India based on his political activities. His asylum application was rejected at all stages of the UK procedure.

Complaint before the Court:

The applicant alleged that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the ECHR (in addition to alleging violations of Articles 5(1), 5(4), 8 and 13 of the ECHR).

Legal argumentation:

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 was required on national security grounds.

The Court started by reaffirming the principles applicable in cases of expulsion:

It 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)

The Court added that since Article 3 enshrined one of the most fundamental values of democratic society, “[t]he activities of the individual in question, *however undesirable or dangerous*, cannot be a material consideration” (para. 80, emphasis added).

Concerning the risk of ill-treatment in Chahal’s specific situation, the Court noted the applicant was at particular risk of ill-treatment within the Punjab region. Responding to the UK government’s argument that he could be sent to other areas of India, the Court considered that, given the attested involvement of the Punjab police in killings and abductions outside their state, the applicant did not have an internal flight alternative.

The Court concluded that the execution of the order for his deportation to India would give rise to a violation of Article 3 of the ECHR.¹

◆ **Ahmed v. Austria, Judgement of 17 December 1996, Appl. No. 25964/94**

Facts:

The applicant, a Somali national, arrived in Austria on 30 October 1990 and applied for asylum on 4 November 1990. He was granted Convention refugee status. In 1993, the applicant was sentenced by the Graz Regional Court to two-and-half years' imprisonment for attempted robbery and was served with an expulsion order. He was obliged to forfeit his refugee status. The expulsion order was declared lawful on the grounds that the applicant constituted a danger to Austrian society.

According to the various Austrian judicial authorities, the fact that he might face inhuman treatment or punishment or that his life or liberty might be at risk in Somalia did not as such constitute a ground for declaring the expulsion order unlawful. On appeal, this decision was overturned as he was found to be at risk of persecution. The expulsion was therefore stayed for a renewable period of one year.

Complaint before the Court:

The applicant alleged that his expulsion to Somalia would expose him to a serious risk of being subjected to treatment contrary to Article 3 of the ECHR.

Legal argumentation:

The Court attached particular weight to the fact that by granting refugee status in May 1992 the Austrian authorities recognised the credibility of his assertion that if returned Somalia he would be subject to persecution. After recalling the principles identified in the case of *Chahal v. United Kingdom*,² the Court started by considering whether there were exceptions to the provisions of Article 3, before looking at the prevailing situation in Somalia.

For the Court, the activities of an individual in the State of refuge, “however undesirable or dangerous, cannot be a material consideration” if return would expose him or her to treatment contrary to Article 3. The Court therefore ruled that “[t]he protection afforded by Article 3 is thus wider than that provided by Article 33 of the 1951 Convention”, since the prohibition under Article 3 is absolute (para. 41).

Turning to the factual situation in Somalia, the Court noted that Somalia was still in a state of civil war and that fighting was on-going between various clans for the control of the country. For the Court: “There was no indication that the dangers to which the

¹ For the Court's analysis of the alleged violation of Article 5, see the summary of the case in the Selected Case Law on Article 5 in this Manual.

² *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93.

applicant would have been exposed in 1992 had ceased to *exist or that any public authority would be able to protect him.*” (para. 44, emphasis added)

In conclusion, the Court found that the applicant’s deportation to Somalia would breach Article 3 of the ECHR.

◆ **H.L.R. v. France, Judgement of 29 April 1997, Appl. No. 24573/94**

Facts:

The applicant, a citizen of Colombia, was found guilty of smuggling drugs into France. The Bobigny Criminal Court sentenced him to five years’ imprisonment and made an order permanently excluding him from French territory. In the meantime, the Minister of Interior had issued a compulsory residence order “until such time as he [was] in a position to comply with the deportation order against him”.

Complaint before the Court:

The applicant complained that if he were deported to Colombia he would run a serious risk of being treated in a manner contrary to Article 3. In fact, his return to Colombia would expose him to vengeance by drug traffickers since he had denounced them to the French authorities. Moreover, the Colombian authorities would not be able to offer him adequate protection against this risk.

Legal argumentation:

The Court indicated that in the present case the risk alleged by the applicant did not emanate from the public authorities. It declared that making such a finding did not necessarily require that the receiving State be in any way responsible.

In determining whether the applicant ran a real risk, if deported to Colombia, of suffering treatment proscribed by Article 3, the Court said that strict criteria had to be applied in light of the absolute character of that provision. The danger had to be an objective one, such as the nature of the political regime or a specific situation existing in the State to which the applicant was likely to be sent.

In the present case, the risk did not emanate from the Colombian authorities but from persons or groups of persons who were not public officials. The Court adopted an approach different from that adopted in *Ahmed v. United Kingdom*,³ which concerned Somalia where there was no State structure, unlike in Colombia. The Court ruled: “It must be shown that the risk is real and the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.” (para. 40)

The Court found that the applicant had failed to demonstrate there was “relevant evidence” to show he faced a real risk of treatment contrary to Article 3 as a result of his collaboration with the French authorities. There were no documents to support the

³ *Ahmed v. Austria*, Judgement of 17 December 1996, Appl. No. 25964/94.

claim that his personal situation would be worse than that of other Colombians, were he to be deported. The Court was aware of the difficulties the Colombian authorities faced in containing the violence, but it determined that the applicant had not shown that they were incapable of affording him appropriate protection.

In conclusion, the Court found that there would be no violation of Article 3 if the order for the applicant's deportation were to be executed.

◆ **D. v. United Kingdom, Judgement of 2 May 1997, Appl. No. 30240/96**

Facts:

The applicant, a citizen of Saint Kitts and Nevis, was found to be in possession of cocaine when he flew into London in 1993. He was sentenced to six years' imprisonment and, while serving his prison sentence, was diagnosed as HIV (human immunodeficiency virus)-positive and as suffering from acquired immunodeficiency syndrome (AIDS). Upon serving half his sentence, he was due to be removed to his country of origin, which lacked the appropriate health facilities to treat his illness. His request for leave to remain on compassionate grounds was refused by the UK authorities.

Complaint before the Court:

The applicant argued before the Court that his removal from the United Kingdom would constitute a breach of Articles 2, 3 and 8 of the ECHR and that, in violation of Article 13 of the ECHR, he had no effective remedy in respect of those complaints.

Legal argumentation:

The applicant maintained that his removal to Saint Kitts would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution. He had no close relatives or friends in Saint Kitts to attend to him as he approached death, no accommodation, no financial resources and no access to any means of social support. The local hospital facilities were extremely limited in Saint Kitts and certainly not capable of preventing the development of infections provoked by the harsh physical environment in which he would find himself.

The Court started by considering that the applicant's criminal behaviour was not an element to be taken into consideration in view of the absolute nature of Article 3. It found that the applicant had been physically present in the United Kingdom and thus within its jurisdiction with the result that that State had to secure to the applicant the rights guaranteed under Article 3, irrespective of the gravity of the offence which he had committed.

The Court noted that up to that point the guarantees under Article 3 had been applied in contexts where the risk to the individual of ill-treatment emanated from public authorities or from non-State bodies where the authorities there were unable to

provide appropriate protection. Given the fundamental importance of Article 3, the Court reserved the prerogative to scrutinise situations where the source of the risk

stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. (para. 49)

The Court then looked at the medical situation prevailing in Saint Kitts and the support available to those suffering from AIDS. It concluded that there was a serious danger that the conditions of adversity, which awaited him in Saint Kitts, would reduce his limited life and subject him to acute mental and physical suffering.

Finally, the Court held that

... in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3. (para. 54)

Having regard to its finding under Article 3, the Court found his complaint under Article 2 “indissociable from the substance of his complaint under Article 3”. It found that the applicant’s complaint under Article 8 raised no separate issue and that there was no breach of Article 13.

◆ **Bahaddar v. The Netherlands, Judgement of 19 February 1998, Appl. No. 25894/94**

Facts:

The applicant, Shamssuddin Bahaddar, was a Bangladeshi national resident in the Netherlands. He claimed that since childhood he had been an active member of *Shanti Bahini* (Peace Troops), the outlawed military wing of a political organisation *Jana Samhati Samiti* (People’s Solidarity Association) seeking autonomy for the Chittagong Hill Tracts. His activities included the collection of funds on behalf of the organisation and gathering intelligence about the movement of army units.

The applicant left Bangladesh for the Netherlands in June 1990, where he applied for refugee status or alternatively for a residence permit on humanitarian grounds. His application for asylum was rejected in first instance and at the various appeal stages. Before the last instance, the application was rejected because the lawyer failed to submit grounds for appeal within the time limits set. A second application for asylum on grounds of new information was also rejected and the applicant again failed to submit grounds for appeal within the time limits set.

Complaint before the Court:

The applicant alleged that the decision by the Netherlands authorities to expel him to Bangladesh would expose him to a serious risk of being killed or ill-treated and would, therefore, constitute a violation of Articles 2 and 3 of the ECHR.

Legal argumentation:

The Government raised a preliminary objection arguing that the applicant had failed to comply with the formal requirements to submit grounds of appeal and for that reason he had not exhausted the domestic remedies available to him in accordance with Article 26 [now Article 35] of the ECHR. The applicant admitted that his lawyer did not submit any grounds when lodging his appeal, but stated that this was due to the difficulty in obtaining relevant information from Bangladesh.

The Court considered that, although the prohibition of ill-treatment contained in Article 3 is absolute in expulsion cases, it did not exempt an applicant from exhausting domestic remedies that are available and effective.

The Court considered that in refugee status determination procedures “it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if ... such evidence must be obtained from the country from which he or she claims to have fled”. The Court accordingly ruled that “time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim” (para. 45).

In the case in question, the applicant failed to comply with the time limit for submitting grounds of appeal, and failed to request an extension of the time limit. His lawyer submitted grounds of appeal nearly three months after the time limit had expired. Furthermore, nothing suggested that a request for extension of the time limit based on the fact that supporting documents were not yet available would have been refused. Moreover, after expiration of the time limit, the applicant had had the opportunity to lodge a fresh application for refugee status.

In conclusion, the Court noted that the applicant could still lodge a new application, based on new evidence, and could request the government to suspend his expulsion. Consequently, there was no imminent danger of treatment contrary to Article 3 since domestic remedies had not been exhausted. It was therefore precluded from considering the merits of the case.

◆ **Jabari v. Turkey, Judgement of 11 July 2000, Appl. No. 40035/98**

Facts:

The applicant, an Iranian national, was arrested in Iran in October 1997 on suspicion of having intimate relations with a married man. After her family had secured her release a few days later, she fled to Turkey and in February 1998 sought to travel to

Canada, through France, on a false Canadian passport. She was intercepted in France and returned to Turkey.

On her return to Turkey she was arrested for entering with a forged passport and lodged an application for asylum, which was declared inadmissible because she had applied after the five-day deadline within which applications had to be made. On 16 February 1998, she was granted refugee status by UNHCR on the basis that she had a well-founded fear of persecution if removed to Iran as she risked being subjected to inhuman punishment, such as death by stoning or being whipped or flogged. Her recourse against the deportation order before the Ankara Administrative Court was dismissed.

Complaint before the Court:

The applicant claimed that her deportation to Iran would violate Article 3 of the ECHR. She further averred a violation of Article 13 on the grounds that she did not have an effective remedy to challenge the negative asylum decision. She also asserted that her action before the Ankara Administrative Court was not an effective remedy since that court could not suspend the deportation decision with immediate effect.

Legal argumentation:

The Court examined the current law and practice in Iran concerning the punishment of adultery, and observed that rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose him or her to treatment prohibited by Article 3. It was not persuaded that the Turkish authorities had conducted "any meaningful assessment of the applicant's claim, including its arguability" (para. 40), since the applicant's failure to comply with the five-day registration requirement under the 1994 Turkish Asylum Regulation had prevented the examination of the merits of her asylum claim.

The Court criticised the five-day deadline imposed by the Turkish asylum procedure by considering that "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). The Court also took into consideration the fact that UNHCR recognised the applicant as a mandate refugee.

The Court concluded that there was a real risk of the applicant being subjected to treatment contrary to Article 3 if she were returned to Iran.

Concerning the part of the claim based on Article 13, 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 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. (para. 50)

Consequently, the Court also found a violation of Article 13 of the ECHR.

◆ **Bensaid v. United Kingdom, Judgement of 6 February 2001, Appl. No. 44599/98**

Facts:

The applicant, a schizophrenic Algerian national who first arrived in the United Kingdom in 1989, and upon marrying a British citizen, was granted indefinite leave to remain as a foreign spouse in 1995. After a visit to Algeria, the immigration authorities admitted him temporarily but then refused him leave to enter in March 1997 on the ground that the indefinite leave to remain was obtained by deception, the marriage being one of convenience. He was given notice of the intention to remove him from the United Kingdom.

The applicant applied the following month for judicial review of the proposed expulsion on the grounds that it would cause him a full relapse in his mental health problems and would amount to inhuman and degrading treatment, contrary to Article 3 of the ECHR. When the High Court refused him leave to apply for judicial review, he made further representations arguing before the Court of Appeal that his removal would entail a high risk of psychotic symptoms.

According to the applicant's psychiatrist, there was a high risk that he would suffer a relapse of psychotic symptoms on being returned to Algeria, which would be made still greater by the requirement to undertake regularly an arduous journey through a troubled region. She pointed out that when individuals with psychotic illnesses relapse, they commonly have great difficulty in being sufficiently organised to seek help for themselves or to travel (para. 16). For its part, the government argued that adequate care was available at a psychiatric hospital around 80 km from the applicant's village and that the journey to the hospital presented no danger by day.

The Court of Appeal dismissed the appeal in July 1998 on the ground that there was "no prospect whatever of the Court being persuaded that [the Secretary of State's] decision is in the circumstances so unreasonable that no reasonable Secretary of State could have reached it" (para. 18). In a further opinion sought by the immigration authorities pending the applicant's return, the psychiatrist indicated that if the applicant were unable to obtain appropriate help, should he begin to relapse, "there would be a great risk that his deterioration would be very great and he would be at risk of acting in obedience to the hallucinations telling himself to harm himself or others" (para. 21).

Complaint before the Court:

The applicant alleged that his proposed expulsion to Algeria placed him at risk of inhuman and degrading treatment, and threatened his physical and moral integrity; he also claimed that he had no effective remedy available to him in respect of these matters. He relied on Articles 3, 8 and 13 of the Convention.

Legal argumentation:

The Court examined whether there was a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present medical condition.

It considered that suffering associated with a relapse in his condition could, in principle, fall within the scope of Article 3 (para. 37), but observed that there was a risk of relapse even if he remained in the United Kingdom. The Court stated that the fact that the applicant's circumstances in Algeria would be less favourable than those he enjoyed in the United Kingdom was not decisive from the point of view of Article 3 of the ECHR. Besides, the Court found that the risk of deterioration and the alleged lack of adequate support were to a large extent speculative. In addition, the information given by the parties did not indicate that travel to the hospital was effectively prevented by the situation in the region. The Court noted that the applicant was not himself a likely target of terrorist activity.

The Court concluded that the case did not disclose the exceptional circumstances of *D. v. United Kingdom* and found therefore, that implementation of the decision to remove the applicant to Algeria would not violate Article 3 of the Convention (paras. 40–41).

The Court further noted that treatment which did not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (para. 46). In this case, the Court found that the risk of damage to the applicant's health was based on hypothetical factors and that it was not substantiated that the applicant would suffer inhuman and degrading treatment. It concluded it was not established that his moral integrity would be substantially affected to a degree incompatible with Article 8.

◆ **Hilal v. United Kingdom, Judgement of 6 March 2001, Appl. No. 45276/99**

Facts:

The applicant, a Tanzanian national from Zanzibar, was an active member of the Civic United Front (CUF), an opposition party in Zanzibar. In 1994, he was arrested and tortured in detention because of his involvement with the CUF before his release four months later. In 1995, he left Tanzania for the United Kingdom fearing for his safety. Once in the United Kingdom, he claimed asylum. The Secretary of State refused asylum, finding the applicant's account implausible. When further documentation supporting the claim was produced, the Secretary of State found this irrelevant on the grounds that the applicant could live safely on the mainland of Tanzania. The Court of Appeal refused to grant leave to apply for judicial review. In December 1998, the applicant was notified that he would be removed to Zanzibar.

Complaint before the Court:

The applicant alleged that his expulsion to Tanzania would place him at risk of torture or inhuman and degrading treatment, would place him at risk of arbitrary and unfair criminal proceedings if he were arrested, and would threaten his physical and moral integrity. He therefore invoked Articles 3, 6, 8, and 13 of the ECHR.

Legal argumentation:

The Court reiterated the principles from its jurisprudence and went on to determine whether the applicant ran a real risk, if deported to Tanzania, of suffering treatment proscribed by Article 3 of the ECHR.

The Court examined the materials provided by the applicant and the assessment of them by the various domestic authorities and found no basis to reject them as forged or fabricated. It accepted that the applicant had been arrested because he was a CUF member and had been ill-treated during detention. The Court noted that in Zanzibar CUF members had in the past suffered serious harassment, arbitrary detention, torture and ill-treatment by the authorities, which involved ordinary members of the CUF and not only its leaders or high profile activists. Even though the situation has improved to some extent, the Court concluded that the applicant would be at risk on return to Zanzibar of being arrested, detained and suffering a recurrence of ill-treatment.

Responding to the UK Government's argument that there was an internal flight alternative on mainland Tanzania, the Court considered that the situation in mainland Tanzania was far from satisfactory and disclosed a long-term, endemic situation of human rights problems. The Court referred *inter alia* to reports of police in Tanzania ill-treating and beating detainees, inhuman and degrading conditions in the prisons on the mainland, institutional links between the police in mainland Tanzania and those in Zanzibar, and to the possibility of extradition between Tanzania and Zanzibar. The Court was "not persuaded therefore that the internal flight option offers a reliable guarantee against the risk of ill-treatment" and accordingly found that the applicant's deportation to Tanzania would breach Article 3 (para. 68).

In the light of its conclusion on Article 3, the Court found that no separate issue arose under Articles 6 and 8 of the ECHR.

3. Admissibility Decisions

◆ **Ould Barar v. Sweden, Decision of 19 January 1999, Appl. No. 42367/98**

Facts:

The applicant, Mohammed Lemine Ould Barar, a Mauritanian national, arrived in Sweden in July 1997 and applied for asylum in October 1997, claiming that he left his country to escape slavery.

According to him, his father was a slave belonging to a certain clan. His father was nevertheless in a privileged position, since he managed to arrange for his children not to work as slaves, although he had to visit his father's master once a year and perform minor tasks there. The applicant stated that, if expelled to Mauritania, he would be returned to his father's master who might be angry with him as he had run away and might punish him. The Mauritanian authorities would not be able to – or would not want to – afford him protection. He also feared reprisals from his clan and the State, which supported the system of slavery in the country. Thus, he would be exposed to the risk of being tortured or killed upon return.

The Swedish Immigration Board rejected the applicant's request and ordered his deportation. The Board considered *inter alia* that he had never before expressed his opinions on slavery, that he had never been threatened, and that the general conditions prevailing in Mauritania did not constitute a reason for granting the applicant a residence permit on humanitarian grounds. His appeal was also rejected.

Complaint before the Court:

The applicant invoked Articles 2, 3 and 4 (prohibition of slavery) of the ECHR, claiming that, if returned to Mauritania, he would be punished for having escaped and for having failed to report to his owner, i.e. his father's master. He also alleged that he might be tortured and have to perform slave labour.

Legal argumentation:

The Court considered that “the expulsion of a person to a country where there is an officially recognised regime of slavery might, in certain circumstances, raise an issue under Article 3 of the Convention”.

The Court noted that slavery was forbidden by Mauritanian law, but that various international organisations reported that vestiges of slavery continued to exist, especially in the countryside, and that the Mauritanian Government had not taken sufficient measures against this practice.

As regards the applicant's personal situation, the Court took into account the fact that the applicant had apparently lived an independent life with his mother's family in the capital. He had neither taken part in any political activities, nor received any threats from government authorities, his clan or his father's master, nor had to perform slave labour. The Court found that there was no indication that, if returned, he would be subject to harsh punishment as a run-away slave. It concluded that there were “not substantial grounds for believing that the applicant face[d] a real risk of being subjected to treatment contrary to Article 3 of the Convention upon return to Mauritania”. The Court therefore found the application manifestly ill-founded on all counts and declared it inadmissible.

◆ **Pranjko v. Sweden, Decision of 23 February 1999, Appl. No. 45925/99**

Facts:

The applicant, Leonard Pranjko, an ethnic Croat from Bosnia and Herzegovina, arrived in Sweden in 1994 and requested asylum. (An earlier asylum request made in Sweden in 1992 had been withdrawn.) He said he feared that if returned to Bosnia and Herzegovina he would be put on trial for desertion, and that if returned to Croatia he would be drafted for military service, punished for desertion, and be at risk of being sent back to Bosnia and Herzegovina.

In 1994, the Swedish National Immigration Board rejected his request and ordered his deportation to Croatia. It also found that he held both Bosnian and Croatian citizenship. The Board noted that the prevailing situation in Bosnia and Herzegovina rendered deportation to that country impossible, but found that if returned to Croatia he did not risk being sent from there to Bosnia and Herzegovina. It further determined that he did not risk harassment or persecution in Croatia and would not be forced to take part in any armed conflict.

On appeal, the applicant was in 1995 granted a three-month temporary residence permit, during which time he applied for a residence permit. In 1997, the Immigration Board rejected this application and ordered his deportation to either Bosnia and Herzegovina or Croatia. The Board also found that the applicant's mental problems, his alleged integration into Swedish society and his family ties (his mother and brothers were living in Sweden) did not constitute sufficient reasons to grant him a residence permit on humanitarian grounds. In 1998, the Appeals Board upheld the ruling. His deportation was, however, suspended as he had submitted a further application for a residence permit on the basis of close family ties in Sweden.

Complaint before the Court:

The applicant invoked Article 4 of Protocol No. 4 (prohibition of collective expulsion) of the ECHR claiming that he would be collectively expelled together with other Bosnian Croats, as well as Article 8 of the ECHR. The Court also examined the case on the basis of Article 3.

Legal argumentation:

The Court rejected the applicant's complaint that expulsion to Croatia would amount to a violation of Article 4 of the Protocol No 4, finding that

collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.

In the present case, the Court found that the authorities had taken into account not only the general situation in the countries but also the applicant's statements concerning his own background, and the risks allegedly facing him upon return. In rejecting his applications, they issued individual decisions concerning his situation.

On its own motion, the Court also examined the case under Article 3 of the ECHR. It noted that the applicant held double citizenship and, having regard to his statements and the conclusions drawn by the Swedish Government and UNHCR, the Court could not find that he would be subjected to ill-treatment if returned to his home district in Bosnia and Herzegovina or to Croatia. The Court therefore considered that there were not substantial grounds for believing that he faced a real risk of being subjected to treatment contrary to Article 3 if returned to either country. It also found that his present state of health did not render him at risk of such treatment if he were deported.

Finally, the Court found that, since the Aliens Appeals Board had suspended deportation on account of the applicant's new application for residency, there was at present no risk of a violation of Article 8.

◆ **Pančenko v. Latvia, Decision of 28 October 1999, Appl. No. 40772/98**

Facts:

The applicant, Anna Pančenko, was a citizen of the former Union of Soviet Socialist Republics (USSR). She moved to Latvia in 1985 and in 1992 she was entered in the Register of Latvian Residents as an "ex-USSR citizen", at which point she had no specific citizenship. In October 1994, she adopted Russian citizenship and was then issued a temporary residence permit valid until February 1996. She tried through court proceedings to register as a permanent resident, but to no avail. In January 1996, she renounced her Russian citizenship and in May 1997 was served with an expulsion order since she had failed to renew her temporary residence permit. In November 1997, she introduced a fresh court action, asking to be re-registered, and in March 1999 took up Ukrainian citizenship. She was finally granted permanent resident status as a foreign citizen in April 1999.

Complaint:

The applicant alleged violations of Articles 6, 8 and 13 of the Convention and Article 2 of Protocol No. 4 to the Convention in connection with the loss of her status as a permanent resident of Latvia and the threat of being expelled from the country. She also complained about her socio-economic problems, and requested compensation for a violation relating to her former inability to be registered as a permanent resident of Latvia during the period 1995–99.

Legal argumentation:

The case was declared inadmissible on the basis that the deportation order against the applicant had been quashed and she now had permanent residency. As regards the second part of her complaint, the Court found that

the Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.

To the extent that this part of the application relates to Article 3 of the Convention, ... the Court observes ... that her present living conditions do not attain a minimum level of severity to amount to treatment contrary to the above provision of the Convention.

◆ **S.C.C. v. Sweden, Decision of 15 February 2000, Appl. No. 46553/99**

Facts:

The applicant, a national of Zambia, who had lived in Sweden in 1990–94 as the wife of a diplomat, returned to Sweden and in May 1996 applied for a work and residence permit there. The Swedish Immigration Board rejected her application in January 1998 and ordered her deportation to Zambia. She appealed to the Aliens Appeals Board claiming that she was infected with HIV and needed to follow complicated treatment, which required strict adherence and was not available in Zambia. The Appeals Board confirmed the first instance decision in November 1998, stating that her state of health did not give reason to grant her a residence permit. Two further applications for a residence permit were also rejected.

Complaint:

The applicant complained, *inter alia*, that her expulsion to Zambia would impair her health and lower her life expectancy in violation of Articles 2 and 3 of the ECHR.

Legal argumentation:

The Court reiterated that aliens facing expulsion cannot in principle claim any entitlement to remain in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State, except where there were compelling humanitarian considerations.

It recalled the case of *D. v. United Kingdom* (see above), as well as a Commission decision⁴ which found that the deportation to the Democratic Republic of Congo (former Zaire) of a person suffering from HIV infection would violate Article 3 if the applicant had reached the advanced stages of AIDS and if the care facilities in the receiving country were precarious.

⁴ *B.B. v. France*, Decision of 9 March 1998, Appl. No. 30930/96.

In the current case, the Court noted that AIDS treatment was available in Zambia and that the applicant's children as well as other family members lived in Zambia. It found that her situation was not such that her deportation would amount to treatment proscribed by Article 3 and therefore declared the case inadmissible.

◆ **T.I. v. United Kingdom, Decision of 7 March 2000, Appl. No. 43844/98**

Facts:

The applicant, a national of Sri Lanka, was allegedly forced to work for the Liberation Tigers of Tamil Eelam (LTTE), a Tamil organisation engaged in an armed struggle for independence, until he managed to escape from the LTTE settlement where he had been held and fled to the capital Colombo. There, he was arrested in May 1995 by the Sri Lankan army on suspicion of being an LTTE member and held in detention until September 1995, during which time he was tortured and ill-treated by government forces. He was later arrested again and held for three further months.

Shortly after his release, he left Sri Lanka and in February 1996 sought asylum in Germany, where his claim was rejected at the first and second instance, *inter alia*, on the basis that persecution by non-State agents could not be attributed to the State. He then went to the United Kingdom and claimed asylum there. The UK Government refused to examine the substance of the claim, however, and sought to remove him to Germany in accordance with the Dublin Convention determining State responsibility for examining asylum claims within the European Union.

Complaint before the Court:

The applicant complained that the United Kingdom's conduct in ordering his removal to Germany, from where he would be summarily removed to Sri Lanka, violated Articles 2, 3, 8 and 13 of the ECHR. He submitted that there were substantial grounds for believing that, if returned to Sri Lanka, there was a real risk of his facing treatment contrary to Article 3 at the hands of the security forces, the LTTE, and pro-government Tamil militant organisations. In addition, he argued that the German authorities only treated State acts as relevant, that they did not consider excesses by individual State officials as State acts, and that they would not reconsider his asylum application if he were returned to Germany.

Legal argumentation:

Concerning the responsibility of the United Kingdom, the Court recalled that, having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials.

The Court established the important principle that the responsibility of the first expelling State was engaged when that State sent someone to another State, which would be the first link in a chain *refoulement*. It found that

indirect removal in this case to an intermediary 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. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention...

In the present case, the Court considered that “the materials presented by the applicant at this stage give rise to concerns as to the risks faced by the applicant, should he be returned to Sri Lanka – both from the LTTE if he returned to his family in Jaffna, and from government forces on suspicion of previous involvement with LTTE”.

Assessing the position of the applicant as a failed asylum-seeker if returned to Germany, the Court examined whether there were effective procedural safeguards of any kind protecting him from being removed from Germany to Sri Lanka.

It noted that the applicant “could, on his return to Germany, make a fresh claim for asylum as well as claims for protection under section 53(4) and 53(6) of the Aliens Act”. The Court found, however, that there was “considerable doubt that the applicant would either be granted a follow up asylum hearing or that his second claim would be granted” and that there was “little likelihood of his claims under section 53(4) being successful”. With regard to Article 53(6) – a discretionary provision of the German Aliens’ Act – this could be used to give protection to persons facing risk to life and limb from non-State agents. The Court found that “on the basis of the assurances given by the German Government concerning its domestic law and practice”, it was “satisfied that the applicant’s claims, if accepted by the authorities, could fall within the scope of section 53(6) and attract its protection”.

It also found there was no basis to assume Germany “would fail to fulfil its obligations under Article 3 of the Convention to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he face[d] a risk of torture and ill-treatment in that country”.

The case was therefore declared inadmissible, since it was “not established that there [was] a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention”. The United Kingdom had therefore not failed in its obligations under this provision by taking the decision to remove the applicant to Germany.

◆ **Goldstein v. Sweden, Decision of 12 September 2000, Appl. No. 46636/99**

Facts:

The applicant, Richard Lee Goldstein, was a United States national who claimed asylum in Sweden in June 1997. He claimed that he had been systematically subjected to persecution by the police since 1993 because of his activities to reveal police brutality and other misconduct by the US police. He had also founded two bodies

called the Commission on Police Ethics and the Standing Committee on Law Enforcement Development as part of these activities.

The Swedish National Immigration Board rejected his claim in September 1997. In second instance, the Aliens Appeals Board upheld the decision in January 1998, finding that if the applicant had been subjected to the alleged maltreatment in the United States, it was the result of criminal acts committed by individuals and was not attributable to the State. A renewed asylum application was rejected and public legal counsel denied on a number of occasions.

Complaint before the Court:

The applicant claimed that he would be subjected to treatment contrary to Article 3 if returned to the United States. He also claimed he had been denied the right to an effective remedy contrary to Article 13 because he had not been granted public legal counsel and the asylum examination had not been conducted in a proper manner.

Legal argumentation:

Concerning the first ground of the complaint, the Court stated that “[i]t 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” (emphasis added).⁵ The Court did not, however, find it “substantiated that the remedies at [the applicant’s] disposal within the domestic legal system of that country could not provide appropriate protection”.

As to the issue of effective remedy and legal aid, the Court noted that it was not enough under Article 13 for an effective remedy to be available in the national legal system, the applicant had also be able to take effective advantage of it. The said Article did not, however, “guarantee a right to legal counsel paid by the State when availing oneself of such a remedy”. The Court found “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”. Consequently, the application was declared inadmissible on both grounds.

**UNHCR
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⁵ See *H.L.R. v. France*, Judgement of 29 April 1997, Appl. No. 24573/94, para. 40.

PART 4 – SELECTED CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 4.2 – Selected Case Law on Article 5

1. Introduction

Article 5 of the European Convention on Human Rights (ECHR) 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.

Article 5(1) of the ECHR secures to everyone the right to liberty and security of person. In the framework of the ECHR, deprivation of liberty is the exception and Article 5 provides an exhaustive list of situations in which deprivation of liberty can be resorted to. Article 5 also contains detailed procedural guarantees applicable to individuals who are arrested or detained.

Even though few cases involving asylum-seekers and refugees have been brought before the European Court of Human Rights (the Court) on the basis of Article 5, some important principles have been identified in a number of landmark Judgements and Admissibility Decisions. This paper summarises the most pertinent ones.

The relevant Judgements and Admissibility Decisions are:

Judgements

– <i>Amuur v. France</i>	25 June 1996	Appl. No. 19776/92
– <i>Chahal v. United Kingdom</i>	15 November 1996	Appl. No. 22414/93
– <i>Dougoz v. Greece</i>	6 March 2001	Appl. No. 40907/98
– <i>Čonka v. Belgium</i>	5 February 2002	Appl. No. 51564/99

Admissibility Decisions

– <i>Yavuz v. Austria</i>	18 January 2000	Appl. No. 32800/96
– <i>Aslan v. Malta</i>	3 February 2000	Appl. No. 29493/95

2. Judgements

◆ ***Amuur v. France, Judgement of 25 June 1996, Appl. No. 19776/92***

Facts:

The applicants were four Somali nationals who were brothers and sister and who arrived at Paris-Orly Airport, France, from Damascus, Syria, on 9 March 1992. They said they had fled Somalia because their lives were in danger and several members of their family had been murdered. Since they had travelled on false passports, the airport and border police refused to give them leave to enter French territory.

They were held in the Paris-Orly Airport transit zone for 20 days. During this time, their application for refugees status made to the French Office for the Protection of Refugees and Stateless Persons (OFPRA) was not considered on the grounds that

OFPRA lacked jurisdiction because the applicants had not obtained a temporary residence permit. On 29 March, after the Minister of Interior had refused to grant them leave to enter to seek asylum, they were sent back to Syria without having been able to make an effective application for refugee status to OFPRA.

Complaint before the Court:

The applicants complained that their detention in the airport transit zone constituted a deprivation of liberty contrary to Article 5(1)(f) of the ECHR. They complained about the physical conditions of their “detention” in the transit zone, that these had been aggravated by the excessive length of their “detention”, and asserted that this was a decisive factor for assessment of the “deprivation of liberty” issue.

Legal argumentation:

The Court first determined whether holding aliens in an airport transit zone could be considered a deprivation of liberty.¹ Emphasising that States’ sovereign right to control aliens’ entry into and residence in their territory, “must be exercised in accordance with the provisions of the Convention, including Article 5” (para. 41), it stated that

the starting-point must be [the individual’s] 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. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. (para. 42)

The French Government had asserted before the Commission that “the applicants’ stay in the transit zone was not comparable to detention” (para. 39). It argued that although the transit zone was “closed on the French side”, it remained “open to the outside” and that “the applicants could have returned of their own accord to Syria” (para. 46). For its part, the Commission had concluded that “the degree of physical constraint required for the measure concerned to be described as ‘deprivation of liberty’ was lacking in this case” (para. 40).

In its analysis, the Court noted that “[h]olding 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”. It found that “[s]uch confinement, accompanied by suitable safeguards ... [was] acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations” (para. 43), and noted:

Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable

¹ See also generally, Council of Europe Committee of Ministers, Recommendation No. R (94) 5 on guidelines to inspire practices of the member States of the Council of Europe concerning the arrival of asylum-seekers at airports, 21 June 1994.

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. (ibid.)

Above all, the Court affirmed that “such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status” (ibid.). The Court also found that the applicants had been placed under strict and constant police surveillance and had no legal and social assistance (para. 45).

For the Court, “[t]he 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”. It found that this possibility became “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).

The Court therefore concluded 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).

Secondly, the Court examined whether such a deprivation of liberty fulfilled the judicial guarantees of Article 5 of the ECHR, including the requirement that this deprivation have a legal basis in domestic law and be subject to judicial review. To do so, it assessed not only the legislation in force, but also the quality of the other legal rules applicable to the persons concerned. In this sense, the Court found that quality “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” (para. 50).

The Court began by noting that “even though the applicants were not [technically] in France ... holding them in the international zone of Paris-Orly Airport made them subject to French law” and that “[d]espite its name, the international zone does not have extraterritorial status” (para. 52). It further found that the domestic legislation in force at the time, which consisted of a decree and an unpublished circular, dealt only imperfectly with the issue of detention in the transit zone and did not represent a “law” of sufficient “quality”. Instead, none of the texts in force at the time allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to limit the length of time for which they were held. Nor did they provide for legal, humanitarian and social assistance.

The Court concluded that the “French legal rules in force at the time, as applied in the present case, did not sufficiently guarantee the applicants’ right to liberty”. It therefore found a violation of Article 5(1).²

² The Committee of Ministers adopted a follow up resolution, DH (98) 307, on 25 September 1998 noting that the French legislation applicable to the detention of asylum-seekers in airports transit zones had been amended.

◆ **Chahal v. United Kingdom, Judgement of 15 November 1996, Appl. No. 22414/93**

Facts:

The first applicant, Karamjit Singh Chahal, was a Sikh from India who entered the United Kingdom illegally in 1971. The three other applicants were his Indian-born wife and their two British-born children. In 1974, Chahal applied to the Home Office to regularise his situation and he was granted indefinite leave to remain under the terms of an amnesty for illegal entrants, after which his wife joined him and their two children were born. Chahal became a leading Sikh militant. He was arrested in 1985 on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister during a visit to the United Kingdom and again in 1986 because he was believed to be involved in a conspiracy to murder moderate Sikhs in the United Kingdom. He was finally sentenced in 1987 for his involvement in disturbances in London.

In 1990, the Home Secretary decided that Chahal constituted a threat to national security and ordered his deportation to India. He applied for asylum claiming that he had a well-founded fear of persecution in India based on his political activities. His asylum application was rejected at all stages of the UK procedure.

Complaint before the Court:

The applicant alleged that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment in violation of Article 3 of the ECHR (in addition to alleging violations of Articles 5(1), 5(4), 8 and 13 of the ECHR).³

Legal argumentation:

Firstly, with respect to the part of the complaint concerning Article 5(1), the Court first reviewed the question of the lawfulness of the detention both on the ground of its length and with regard to the guarantees against arbitrariness provided by the legal system in the United Kingdom.

Concerning the lawfulness of detention and its length, the Court recalled that

any deprivation of liberty under Article 5 para. 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f). (para. 113)

Having regard to the fact that the applicant's case involved serious and weighty issues, the Court considered that it required detailed and careful consideration. It was neither in the interest of the applicant nor in the general public interest for such decisions to be taken hastily, without due regard to all the relevant issues and

³ For the Court's analysis of the alleged violation of Article 3, see the summary of the case in the Selected Case Law on Article 3 in this Manual.

evidence. Therefore, the Court concluded that none of the periods complained of could be considered as excessive, taken either individually or in combination.

With regard to the issue of guarantees against arbitrariness, the Court noted that, since national security interests had been cited, “the domestic courts were not in a position effectively to control whether the decisions to keep Mr Chahal in detention were justified, because the full material on which these decisions were based was not made available to them” (para. 121). The Court observed, however, that the Advisory Panel, constituted to review the *decision to expel* the applicant, was an important safeguard since the panel was able fully to access and review the evidence relating to the national security threat. Even though the decisions of the Advisory Panel were not binding, the Court found that this device prevented the executive from acting arbitrarily. In conclusion, the Court found no violation of Article 5(1) of the ECHR (para. 123).

Secondly, with regard to the part of the complaint based on Article 5(4), the question for the Court was “whether the available proceedings to challenge the lawfulness of Mr Chahal’s detention and to seek bail provided an adequate control by the domestic courts” (para. 129). As already noted, the Court determined that because national security was involved, the domestic courts were not in a position to review all the elements of the decision to detain the applicant. It found furthermore that “although the procedure before the advisory panel undoubtedly provided some degree of control”, Chahal was not entitled to legal representation before it, he was only given an outline of the grounds for deportation, and the panel was in any case unable to issue binding decisions. The Court therefore determined that the panel could not be considered a “court” within the meaning of Article 5(4) (para. 130).

It also recognised that

the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. (para. 131)

As a result, the Court ruled that “neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5 para. 4”. It found this shortcoming “all the more significant given that Mr Chahal has undoubtedly been deprived of his liberty for a length of time which is bound to give rise to serious concern” (para. 132) and concluded that there had been a violation of Article 5(4) of the ECHR.

◆ **Dougoz v. Greece, Judgement of 6 March 2001, Appl. No. 40907/98**

Facts:

The applicant, a national of Syria, had left that country for Greece because he was accused of a national security offence in Syria, for which he said he had been found guilty and sentenced to death. In 1989, he was recognised as a refugee by UNHCR under its mandate. In 1991, his leave to remain in Greece expired, after which he was arrested for theft and bearing arms without authorisation and placed in detention on remand. In 1993, he was found guilty and in June 1994 was released from prison, having served part of his sentence. At the same time was ordered to leave Greece. He then applied to the Greek authorities for refugee status, which rejected the claim as abusive. Although expelled to a part of former Yugoslavia in September 1994, he returned to Greece and in 1995 was arrested for drug-related offences, for which he was sentenced to three years' imprisonment in 1996.

In June 1997, he asked to be released and sent back to Syria, where he said he had been granted a reprieve. At a hearing he was not allowed to attend, a domestic court decided the following month to release him and expel him to Syria. Upon his release from prison, he was placed in police detention pending expulsion. In November 1997, he asked to be sent back to another country than Syria, where he now said he faced the death penalty. In February 1998, he applied for the order for his expulsion to be lifted but this was rejected in May by the same domestic court. Further requests in July to the Ministers of Justice and Public Order were to no avail and he was expelled to Syria in December 1998, where he claimed he was detained upon arrival.

Complaint before the Court:

The applicant complained *inter alia* that the lawfulness and length of his detention and the lack of remedies under domestic law in this connection violated Article 5 of the ECHR. He claimed that his detention was neither ordered by an administrative decision nor by a court judgement and that no remedy under domestic law was available to him to challenge its lawfulness.⁴

Legal argumentation:

With regard to the lawfulness of the detention under Article 5(1)(f), the Court recalled that any arrest or detention must have a legal basis in domestic law. In addition, “where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness” (para. 55).

Greek legislation concerning the expulsion of aliens by administrative order provided for detention if the execution of an administrative order for expulsion taken by the

⁴ The applicant also alleged a violation of Article 3 of the ECHR. This was upheld by the Court which considered that “the conditions of detention of the applicant ..., in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3” (para. 48).

Minister of Public Order was pending and if the alien was considered a danger to public order or might abscond. In this case, however, the applicant's expulsion was ordered by a court and not by an administrative decision and he was not considered a danger to public order. The Court did "not consider that the opinion of a senior public prosecutor – concerning the applicability by analogy of a ministerial decision on the detention of persons facing administrative expulsion – constituted a 'law' of sufficient 'quality' within the meaning of the Court's case-law" (para. 57). It therefore found a breach of Article 5(1) of the ECHR.

Turning to the issue of review under Article 5(4) of the ECHR, the Court noted that in this case the judicial review process took the form of a request to the Ministers of Justice and Public Order. It did not consider such a mechanism an effective remedy, since the outcome was left to the "discretionary leniency" of the Ministers and found that even the domestic court's decisions "failed to rule on the applicant's claim concerning his detention" (para. 62).

The Court concluded that "the domestic legal system did not afford the applicant an opportunity to have the lawfulness of his detention pending expulsion determined by a national court, as required by Article 5(4)". There was therefore a violation of that Article.

◆ **Čonka v. Belgium, Judgement of 5 February 2002, Appl. No. 51564/99**

Facts:

The applicants were a family of four nationals of Slovakia of Roma origin. They fled Slovakia because they were victims of several attacks by skinheads. On one occasion, the head of the family had even been hospitalised. Moreover, their calls to the Slovak police authorities remained unanswered. They sought asylum in Belgium in November 1998, where their requests were rejected both in the first instance (March 1999) and in the second (June 1999) because of lack of credibility and lack of evidence that they were persecuted in Slovakia. They were therefore asked to leave the territory within five days. They applied to the *Conseil d'Etat* to reverse the negative asylum decisions and requested at the same time that the expulsion order be suspended. This recourse did not succeed either. At the end of September 1999, the applicants were called by letter to come with other Roma asylum-seekers from Slovakia to the police station in order to "complete" their asylum requests. Upon arrival at the police station, they were served with a new expulsion order dated 29 September 1999 and placed in detention in a transit centre close to Brussels airport. They were allegedly told that no recourse could be made against the deportation order. The applicants' lawyer was only informed about these developments on 1 October at 22.30 hours. While he asked the *Office des Etrangers* not to send the applicants back, he did not formally appeal against the deportation and detention orders. The applicants were sent back to Slovakia on 5 October 1999.

Complaint before the Court:

Before the Court the applicants argued *inter alia* that the trick of calling them to the police station under a false pretext constituted a violation of Article 5(1) of the ECHR (lawfulness of detention). They also complained that the conditions of detention were in violation of Article 5(2) (information as to the reasons of detention) and Article 5(4) (judicial review).

Legal argumentation:

On the issue of detention as such, the Court noted that it was not contested that the applicants had been placed in detention with a view to expulsion. Article 5(1)(f) was therefore applicable. Assessing the method whereby the applicants were tricked to secure their detention, the Court said:

Although the Court by no means excludes its being legitimate for the police to use stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of asylum seekers with a view to arresting and subsequently deporting them *may be found to contravene the general principles stated or implicit in the Convention.* (para. 41, emphasis added)

Moreover, in this case, the practice was not controlled by national Courts and the Belgian authorities themselves admitted that this was a “little ruse”. Reviewing the compatibility of such a measure with the ECHR, the Court considered that

the 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, emphasis added)

In light of this, the Court concluded that there had been a violation of Article 5(1) of the ECHR.

Concerning the alleged violation of Article 5(2) of the ECHR, the Court recalled that

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. (para. 50, emphasis added)

Upon arrival at the police station the applicants were provided with a copy of the decision ordering their arrest which stated the legal basis for the arrest and the appeal possibilities. An interpreter was also present. Consequently, the Court decided that even though such “measures by themselves were not in practice sufficient to allow the applicants to lodge an appeal” (para. 52), there was no violation of Article 5(2).

Finally, the Court dealt with the judicial guarantee provided for by Article 5(4) of the ECHR. The Court looked at this issue indirectly by responding to the Belgian Government’s preliminary objection that the applicants had not exhausted domestic remedies. On the issue of exhaustion of domestic remedies, the Court found

[A] number of factors which undoubtedly affected the accessibility of the remedy which the Government claim was not exhausted. These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Romany families who attended the police station in understanding the verbal and written communications addressed to them and although he was present at the police station, he did not stay with them at the closed centre; in those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter’s services; *despite those difficulties, the authorities did not offer any form of legal assistance* at either the police station or the centre. (para. 44, emphasis added)

The Court added:

Whatever the position – and this factor is decisive in the eyes of the Court – as the applicants’ lawyer explained at the hearing without the Government contesting the point, he was only informed of the events in issue and of his clients’ situation at 10.30 p.m. on Friday 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, a day after the applicants’ expulsion on 5 October. Thus, ... he was unable to lodge an appeal with the committals division. (para. 45, emphasis added)

Since the Court rejected the Belgian Government’s preliminary objection on the basis of the above-mentioned arguments, it also decided that there was a violation of Article 5(4) of the ECHR, insofar as the absence of domestic remedies to exhaust shows that

there was in fact no effective judicial avenue to have the lawfulness of the detention reviewed. Consequently, the Court found a violation of Article 5(4) of the ECHR.

3. Admissibility Decisions

◆ Yavuz v. Austria, Decision of 18 January 2000, Appl. No. 32800/96

Facts:

The applicant, Ayhan Yavuz, was a Turkish national who had arrived in Austria in November 1991 and married an Austrian citizen in June 1992. He was refused a residence permit and in August 1993 was issued with a deportation order on the grounds that his stay in Austria was unlawful. The Administrative Court found the deportation order lawful and the applicant was arrested in October 1994 pending expulsion. His appeal against his detention to the Independent Administrative Panel was dismissed later that month. A further complaint to the Constitutional Court was referred to the Administrative Court, which found in October 1995 that the detention had been necessary and that a hearing was unnecessary because the factual elements of the case were clear from the file.

Complaint before the Court:

The applicant alleged that the lack of an oral hearing and the lack of access to his file in the proceedings he instituted concerning the lawfulness of his detention constituted a violation of Article 5(4) of the ECHR.

Legal argumentation:

The Court noted that “proceedings for review of an arrest or a detention with a view to expulsion are urgent matters which have to be dealt with speedily”. In view of the fact that the Independent Administrative Panel had to make such decisions within a few days, it could not “be obliged to institute exchanges of documents which render it impossible to take a decision within the statutory time-limit”. The Court found, however, that “this consideration must be qualified by a right for the applicant or his counsel to have an opportunity to inspect the case-file whenever they wish”.

In this case, it appeared that neither the applicant nor his counsel had asked to inspect the file during these proceedings. In this respect, “having regard to the specific features of the review proceedings, in particular the short time-limit for a decision to be taken by the Independent Administrative Panel”, the Court found no appearance of a violation Article 5(4).

Concerning the lack of an oral hearing, the Court recalled that Article 5(4) “does not guarantee an absolute right to an oral hearing in the proceedings instituted to review the lawfulness of an arrest or a detention”. Where questions arise involving, for example, an assessment of the applicant’s character or mental state, the Court nevertheless held that “it may be essential to the fairness of the proceedings that the applicant be present at such a hearing”.

As the applicant was detained with a view to expulsion, the Court concluded that an oral hearing was not necessary and rejected the application as manifestly ill-founded.

◆ **Aslan v. Malta, Decision of 3 February 2000, Appl. No. 29493/95**

Facts:

The applicant, Mustafa Gürsel Aslan, was a Turkish national who in 1995 resided and worked in Libya. He sought to travel for a short visit to Malta, but was denied entry because of an alleged problem with his return visa to Libya. He was placed in police detention pending his return to Libya, during which time he alleged he was subjected to degrading treatment, deprived of food and drink and held incommunicado. Later the same day, he was returned to Libya on the ferry on which he had arrived.

Complaint before the Court:

The applicant complained *inter alia* that his detention by the police on arrival in Malta was unlawful and arbitrary, infringed his right to liberty and security of person and deprived him of his freedom of movement contrary to Article 5(1)(f) of the ECHR.

Legal argumentation:

The Court found that detention of inadmissible passengers was foreseen by Section 10 the Immigration Act and that such action was therefore in accordance with a procedure prescribed by law as required by Article 5(1) of the ECHR.

As to whether the detention was arbitrary, the Court observed that “the documentation produced by the applicant at the border control point raised in the minds of the port officials suspicions about the sincerity of his reasons for entering the country”. It found that it was not for the Court to impugn that assessment, given States’ well-established right, subject to their treaty obligations, to control the entry, residence and expulsion of aliens. The Court did not therefore “consider it necessary to address the applicant’s argument that the sole reason for refusing him leave to enter and detaining him ... was on account of his nationality or religion”. It also observed that the applicant had not disputed the Government’s assertion that the detention lasted only for a period of some ten hours and concluded that the application was inadmissible.

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PART 4 – SELECTED CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Part 4.3 – Selected Case Law on Article 8

1. Introduction

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (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.

The European Court of Human Rights (the Court) has adopted a dynamic interpretation of Article 8(1) of the ECHR in such a way as to protect family members of non-nationals durably established in States Parties to the ECHR against expulsion and to allow for their possible reunification.

The right to respect for family life is not absolute, however, since Article 8(2) provides explicitly for possible restrictions on the right to respect for private and family life. Contracting States are therefore able to refuse entry or residence permits to family relatives or to expel non-nationals if such action can be justified on the basis of the criteria laid down in Article 8(2). The Court's supervision therefore involves assessment of the proportionality of the measures adopted vis-à-vis the interests protected.

Most of the Judgements and Decisions of the Court relating to Article 8 concern immigrants rather than refugees or asylum-seekers. The principles progressively identified by the Court can, however, be applied *mutadis mutandis* to their situation. In particular, Article 8 may be more likely to apply to refugees and asylum-seekers in flight from persecution, bearing in mind the prohibition of return to torture, inhuman or degrading treatment in their country of origin under Article 3 of the ECHR. This paper summarises the most relevant Judgements and Decisions of the Court relating to Article 8 of the ECHR.

The relevant Judgements and Admissibility Decisions are:

Judgements

– <i>Gül v. Switzerland</i>	19 February 1996	Appl. No. 23218/94
– <i>Ahmut v. The Netherlands</i>	26 October 1996	Appl. No. 21702/93

– *Ciliz v. The Netherlands* 11 July 2000 Appl. No. 29192/95

Admissibility Decisions

– *Sarumi v. United Kingdom* 26 January 1999 Appl. No. 43279/98
– *El Khaouli v. France* 2 March 1999 Appl. No. 40266/98
– *Laarej v. France* 16 March 1999 Appl. No. 41318/98
– *Rahmouni v. France* 23 March 1999 Appl. No. 41721/98
– *Katanic v. Switzerland* 5 October 2000 Appl. No. 54271/00
– *Kwakyie-Nti and Dufie v. The Netherlands* 7 November 2000 Appl. No. 31519/96

2. Judgements

♦ ***Gül v. Switzerland, Judgement of 19 February 1996, Appl. No. 23218/94***

Facts:

The applicant, a Turkish national of Kurdish origin, fled to Switzerland in 1983 where he applied for political asylum because of his membership of a banned political party. He worked in a restaurant in Switzerland until 1990, when he fell ill, since when he had been in receipt of a partial-invalidity pension.

His wife, who had remained in Turkey with their two sons, seriously burned herself during an epileptic fit and joined him in Switzerland in 1987. She later gave birth to a third child in Switzerland but could not take care of her daughter, who was placed in a Swiss home where she had been since then. In March 1989, a medical practitioner stated in writing that return to Turkey would be impossible for Mrs Gül and might even prove fatal to her, given her serious medical condition.

Mr Gül's asylum application was rejected in February 1989, on the ground that he had not been able to establish that he personally had been a victim of persecution, and the general situation of the Kurdish population in Turkey was not in itself sufficient to justify granting political asylum. He appealed against the decision but withdrew the appeal when the aliens police offered him, his wife and daughter a residence permit on humanitarian grounds, which was granted in February 1990.

In May 1990, Mr Gül sought permission to bring his two sons from Turkey to Switzerland. This was refused on the grounds that he did not have sufficient means to provide for his family and that the older son was in any case 18 years old. Appeals as far as the Federal Court were unsuccessful.

Complaint before the Court:

The applicant complained that that the Swiss authorities' refusal to permit his younger son to join him in Switzerland infringed his right to respect for his family life under Article 8 of the ECHR.

Legal argumentation:

The first task of the Court was to determine whether the bond between the applicant and his son amounted to “family life”. In that respect, the Court reiterated that

it follows from the concept of family on which Article 8 is based that a child born of a 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 save in exceptional circumstances. (para. 32)

Noting that the applicant had applied to the authorities and through the courts for his son to join him in Switzerland and that he had visited his son in Turkey several times, the Court concluded that the bond of “family life” between them had not been broken.

Secondly, the Court examined whether the Swiss authorities had interfered with the applicant’s right to family life. Noting that the case raised immigration issues, the Court found that “the extent of a State’s obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest”. It recalled that it was a matter of well-established international law that, subject to its treaty obligations, a State had the right to control the entry of non-nationals into its territory. It added that

where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. (para. 38)

In light of these considerations, the Court saw its task as being to determine the extent to which the only way for Mr Gül to develop family life with his son was for the latter to move to Switzerland.

According to the Court, the visits that the applicant paid to his son showed that he could return to Turkey without risks to his safety. Moreover, a social convention concluded between Turkey and Switzerland would allow the applicant to continue receiving his invalidity pension in Turkey. The Court further noted that in spite of her state of health, the applicant’s wife had been able to visit Turkey in 1995. It also emphasised that Mr and Mrs Gül’s residency status in Switzerland did not give them a right to family reunion. Although the Court acknowledged that given “the length of time Mr and Mrs Gül ha[d] lived in Switzerland”, it would “not be easy for them to return to Turkey, ... there are, strictly speaking, no obstacles preventing them from developing family life in Turkey” (para. 42). In addition, their son had grown up exclusively in Turkey, in the cultural and linguistic environment of his country of origin.

The Court therefore concluded:

Having regard to all these considerations, and 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 obligations arising under Article 8(1), and there has therefore been no interference in the applicant’s family life within the meaning of that Article. (para. 43)

◆ **Ahmut v. The Netherlands, Judgement of 26 October 1996, Appl. No. 21702/93**

Facts:

The case concerns Salah Ahmut, who migrated from Morocco to the Netherlands in 1986, leaving behind his wife and five children, and who in February 1990 acquired Netherlands nationality in addition to his Moroccan nationality. The children were cared for in Morocco by their mother and after her death by their grandmother. Ahmut, who said he had divorced his first wife, married a Dutch woman and then a Moroccan woman living in the Netherlands.

In May 1990, Ahmut requested a residence permit for his minor son, Souffiane, who was visiting him in the Netherlands. His request was rejected at all instances.

Complaint before the Court:

The applicants, Salah and Souffiane Ahmut, contended that the Netherlands authorities’ refusal to grant the latter a residence permit, which would have allowed him to live in the Netherlands with his father, constituted a violation of their right to respect for their family life under Article 8 of the ECHR.

Legal argumentation:

Applying the principles set out in *Gül v. Switzerland* (see above), the Court decided that in spite of the separation the bond between the applicants amounted to “family life”. The Court adopted the same approach as in *Gül* on the questions of whether or not there was an interference with the applicant’s family life and whether there was a failure by the respondent State to comply with a positive obligation inherent in effective “respect” for family life.

Examining the facts of the case, the Court declared:

The fact of the applicants’ living apart is the result of Salah Ahmut’s conscious decision to settle in the Netherlands rather than remain in Morocco.

In addition to having had Netherlands nationality since February 1990, Salah Ahmut has retained his original Moroccan nationality. Souffiane has Moroccan nationality only.

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. Indeed, Salah Ahmut and Souffiane have visited each other on numerous occasions since the latter's return to that country.

It may well be that Salah Ahmut would prefer to maintain and intensify his family links with Souffiane in the Netherlands. However, ... Article 8 does not guarantee a right to choose the most suitable place to develop family life. (paras. 70–71)

Consequently, the Court found that in refusing to grant a residence permit to Souffiane Ahmut, the Netherlands authorities had struck a fair balance between the applicants' interests and the Netherlands' interest in controlling immigration.¹

♦ **Ciliz v. The Netherlands, Judgement of 11 July 2000, Appl. No. 29192/95**

Facts:

The applicant, a Turkish national, came to the Netherlands in 1988, married a Turkish woman later that year, and secured an indefinite residence permit on the basis of the marriage. When the couple, who by then had a son, separated and then divorced his permit was withdrawn and replaced with a one-year residence permit allowing him to work in the Netherlands. The applicant sought to gain parental access to his child and applied for a prolongation of his residence permit. While the former procedure was still ongoing, he was nonetheless expelled in November 1995.

Complaint before the Court:

The applicant complained that the refusal by the Netherlands authorities to extend his residence permit infringed Article 8 of the ECHR. He argued that his expulsion and the decisions taken subsequently by the Netherlands authorities constituted an interference with his right to respect for his family life with his son.

Legal argumentation:

The Court began by determining that the natural family relationship existing between the parents and the child born of a marriage-based relationship is not terminated by reason of the fact that the parents separate or divorce and the child ceases to live with

¹ The particular characteristic of this case lies in the fact that the father was a national of the State from which he was seeking a residence permit for his son. An earlier case of *Abdulaziz, Cabales and Balkandali v. United Kingdom* (Judgement of 28 May 1985, Appl. Nos. 9214/80; 9473/81; 9474/81), concerned three applicants who were permanently and lawfully resident in the United Kingdom, although two of them were not British citizens. They were seeking indefinite leave to remain in the United Kingdom for their husbands. In this case, the Court likewise found no violation of Article 8, ruling:

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)

one of its parents. In the particular circumstances, the Court noted that following the divorce, the relationship between the parents was not very good and the applicant did not initially try to see his son. Contact was, however, later reestablished and the applicant initiated court proceedings to have access to his son. The Court therefore found that in this case “the events subsequent to the separation of the applicant from his wife did not constitute exceptional circumstances capable of breaking the ties of ‘family life’ between the applicant and his son” (para. 60).

Next, the Court assessed whether the case involved an “interference” by the Netherlands with the exercise of the applicant’s right to respect for his “family life” or a failure to comply with a positive obligation. It found that the decision not to allow the applicant’s continued residence and his subsequent expulsion, frustrated the examination of the formal access arrangement he was seeking. It therefore viewed “the case as one involving an allegation of an ‘interference’ with the applicant’s right to respect for his ‘family life’” (para. 62).

The Court went on to find that this interference had been both “in accordance with the law” and legitimate under the terms of Article 8(2). As to whether the interference was “necessary in a democratic society”, it found that

the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance.... The authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed. (para. 71)

In sum, the Court considered that “the decision-making process concerning both the question of the applicant’s expulsion and the question of access did not afford the requisite protection of the applicant’s interests as safeguarded by Article 8” (para. 72). The interference with the applicant’s right was therefore not necessary in a democratic society and there had been a breach of that provision.

3. Admissibility Decisions

◆ Sarumi v. United Kingdom, Decision of 26 January 1999, Appl. No. 29192/95

Facts:

The applicant, Jerry Olajide Sarumi, a Nigerian national, arrived in the United Kingdom in 1984 and was granted leave to stay until July 1985 to pursue his studies. Further leave to remain was refused in December 1985 and a deportation order was signed in May 1986. The applicant alleged that he never received notice of the order and it only came to his attention in February 1995 when his solicitor contacted the Home Office to inquire about his status in the United Kingdom. In May 1995, the

applicant was arrested on suspicion of having submitted a fraudulent social security claim and issued with a second deportation order the following month.

In March 1997, he was detained with a view to expulsion and requested political asylum. He alleged for the first time that in 1984 he had been caught up in a plot to overthrow the military regime in Nigeria. The application was rejected, including at appeal, for lack of credibility. He was deported to Nigeria in November 1997, but returned to the United Kingdom the following day, the Nigerian authorities having refused him entry since he had claimed to be a Ghanaian national on arrival. He made another request for asylum claiming a well-founded fear of religious persecution if deported to Nigeria. This was rejected, including at appeal, on the grounds that the claim was frivolous and lay outside the scope of 1951 Geneva Convention relating to the Status of Refugees. An application for judicial review was rejected.

Since his arrival in the United Kingdom the applicant had had a relationship with a Nigerian woman who was reportedly an overstayer with no claim to remain in the United Kingdom. They had two minor children born in the United Kingdom. At the time of the Judgement, the applicant was detained in an Immigration Deportation Centre awaiting removal to Nigeria.

Complaint:

The applicant maintained that his expulsion to Nigeria would breach of his rights under Articles 3 and 8 of the ECHR and that he had been denied an effective remedy, in violation of Article 13. With respect to the claim under Article 8, he alleged his expulsion to Nigeria would infringe his right to respect for family life and pointed in this respect to the fact that his two children had been born in the United Kingdom

Legal argumentation:

With regard to the part of the complaint under Article 8, the Court observed that the expulsion or removal of an alien by the authorities of a Contracting State in which his or her close relatives reside or have the right to reside may give rise to issues under Article 8 of the ECHR.

In the present case, the Court noted that the applicant and his partner had both failed to comply with the immigration controls of the United Kingdom and had no claim to residence there. They had founded a family knowing their precarious status in the United Kingdom and their liability to deportation. The children born of the relationship were of a young and adaptable age and could reasonably be expected make the transition to Nigerian culture and society without undue hardship. The applicant had acquired business skills during his stay in the United Kingdom which would undoubtedly assist the well-being of the family in Nigeria. In these circumstances, the Court found that there were no elements concerning respect for family life which in this case outweighed the valid considerations relating to the proper enforcement of immigration controls.

The complaint under Article 8 was therefore declared inadmissible, as were the complaints under Articles 3 and 13.

◆ **El Khaouli v. France, Decision of 2 March 1999, Appl. No. 40266/98**

Facts:

The applicant, Ahmed El Khaouli, a Moroccan national, arrived in France in 1981 at the age of 18. He married a Moroccan national and they had three children born in France. In 1991, the applicant was sentenced to four years' imprisonment for drug trafficking and, after serving his sentence, was returned to Morocco in 1995. His request to lift an order permanently excluding him from French territory was rejected by the Court of Appeal and his appeal to the Court of Cassation was dismissed on procedural grounds.

Complaint before the Court:

The applicant alleged that the order for his permanent exclusion from French territory amounted to a violation of Article 8 of the ECHR. He also claimed that he had been denied access to the Court of Cassation contrary to Article 6(1) of the ECHR.

Legal argumentation:

The Court noted that the applicant had lived in France for more 14 years and that his wife and children lived there. Considering the applicant's family links in France, it found that the permanent exclusion order amounted to an interference in his right to family life.

The Court went on to find that the exclusion order had been issued in accordance with the law. It took into account the fact that the applicant had entered France as an adult, that his wife and children also had Moroccan nationality, and of the seriousness of the crime committed. In conclusion, it determined that the interference in his private and family life resulting from the exclusion order constituted a measure necessary for the prevention of disorder and crime and the protection of health in accordance with Article 8(2) of the ECHR.

The case was therefore declared inadmissible. (The part of the complaint concerning Article 6(1) was found inadmissible in a final Decision on 7 November 2000.)

◆ **Laarej v. France, Decision of 16 March 1999, Appl. No. 41318/98**

Facts:

The applicant, Mostapha Laarej, a Moroccan national, arrived in France in 1974 at the age of eight. His parents, brother and sisters also lived there. In 1997, the applicant was convicted by the Court of Appeal to 18 months' imprisonment for drug trafficking and was banned from French territory for five years. His appeal to the Court of Cassation was dismissed. He stated that he suffered from depression.

Complaint before the Court:

The applicant said that he had lived in France for years, that his family also lived there, that the depression he suffered from required complicated medical treatment, and that his expulsion to Morocco would throw his medical condition into complete uncertainty. He maintained that the order for his exclusion from French territory for five years amounted to a violation of his right to private and family life.

Legal argumentation:

The Court recalled that it was a matter of well-established international law that, subject to its treaty obligations, a State had the right to control the entry of non-nationals into its territory and that such decisions could also infringe the rights enshrined in Article 8 of the ECHR. Taking account of the applicant's family and personal links in France, it found his exclusion from French territory constituted an interference in his private and family life.

The Court went on to find that the interference was, however, in accordance with the law and was intended to prevent disorder and crime and protect health. Assessing whether it was necessary, the Court noted that the applicant was single, had no children, had retained his Moroccan nationality, and had apparently never shown a desire to acquire French nationality. It also noted that the exclusion order was limited to five years and that the applicant could make an application for the order to be lifted.

According to the Court, an essential element in assessing whether the French authorities' action had struck a fair balance between the interests of the individual and of the community as a whole was the seriousness of the applicants' offence. In view of the ravages caused by drugs, the Court understood the need for the authorities to be very firm when dealing with people who, like the applicant, contributed to the spread of this scourge. It followed that the interference could legitimately be regarded as being necessary in a democratic society within the meaning of Article 8(2) of the ECHR.

Consequently, the case was declared inadmissible.

◆ **Rahmouni v. France, Decision of 23 March 1999, Appl. No. 41721/98**

Facts:

The applicant, Chabane Rahmouni, an Algerian national, arrived illegally in France in 1992 at the age of 39. He said he had been a member of the Front Islamique du Salut (Islamic Salvation Front—FIS) since 1988 and had been arrested and detained several times for acts such as participating in demonstrations and distributing leaflets, during which time he had been tortured by the Algerian security forces.

In 1992, he requested political asylum, but his claim was rejected by the French Office for the Protection of Refugees (OFPRA) and at appeal. During these

proceedings, he benefited from a temporary residence permit. A later request for a residence permit was rejected at all instances, including ultimately by the Conseil d'Etat in March 1998. The applicant married a French national in September 1998.

Complaint before the Court:

The applicant alleged that the French authorities' refusal to grant him a residence permit amounted to a violation of his right to respect for his private and family life under Article 8 of the ECHR. He also alleged that if returned to Algeria he would again be tortured in contravention of Article 3 of the ECHR.

Legal argumentation:

The Court recalled that it was a matter of well-established international law that, subject to its treaty obligations, a State had the right to control the entry of non-nationals into its territory and that such decisions could also infringe the rights enshrined in Article 8 of the ECHR.

In this case, the Court recalled that the applicant had lived in Algeria until the age of 39 and his presence in France since 1992 had been on a temporary or irregular basis. It found that his marriage to a French national had taken place after his position had become irregular, that he could not have been ignorant of his precarious situation, and that this could not therefore be a deciding factor.

The case was therefore declared inadmissible. (The complaint under Article 3 was rejected on the grounds that no expulsion order had been issued and that if it were he could appeal against the order.)

◆ **Katanic v. Switzerland, Decision of 5 October 2000, Appl. No. 54271/00**

Facts:

The applicant, Vlado Katanic, was a citizen of Bosnia-Herzegovina who first came to live in Switzerland in 1987. That same year, he married a citizen of Bosnia-Herzegovina working in Switzerland, with whom he had a son in 1989. In 1995, he was sentenced to 33 months' imprisonment and five years' expulsion from Switzerland for insurance fraud and gun-running with the former Yugoslavia. The Swiss authorities consequently refused to renew his annual residence permit, even though he was released on probation in 1997. His appeals against the decision were not successful.

Complaint before the Court:

The applicant argued that the Swiss authorities' refusal to renew his residence permit constituted a violation of Article 8 of the ECHR.

Legal argumentation:

The Court recalled that a right of an alien to enter or to reside in a particular country is not as such guaranteed by the Convention. It further reiterated that the expulsion of a person from a country where close members of his family are living may amount to an infringement of Article 8.

In the present case, the Court found that obliging the applicant to return to Bosnia-Herzegovina and denying him entry to Switzerland would interfere with his right to respect for his private and family life. It found, however, that this interference was “in accordance with the law” and that the decision not to renew the residence permit had taken into account his criminal convictions and was therefore imposed “for the prevention of ... crime” within the meaning of Article 8(2).

As to whether the measure is “necessary in a democratic society”, the Court found that the Swiss authorities had carefully examined the various interests at stake, that the applicant had occasionally returned to Bosnia-Herzegovina without experiencing difficulties, and that an invalidity pension he drew could be transferred to him even after his departure from Switzerland. Although his wife was professionally established in Switzerland and their son had grown up there, she was also a citizen of Bosnia-Herzegovina and their son was still of an adaptable age.

Taking into account the margin of appreciation left to Contracting States in such situations, the Court considered that the interference with the applicant’s right to respect for his private and family life was justified under Article 8(2), in that it could reasonably be considered “necessary in a democratic society ... for the prevention of crime”.

The case was therefore declared inadmissible.

◆ **Kwakyé-Nti and Dufie v. The Netherlands, Decision of 7 November 2000, Appl. No. 31519/96**

Facts:

The applicants, Joseph William Kwakyé-Nti et Akua Dufie, were Ghanaian nationals who sought asylum in the Netherlands in March 1987. Their application was rejected at the first and second instance and in February 1991 they appealed to the Council of State (Raad van State). In May 1992, they were given a residence permit on humanitarian grounds. The following month, the first applicant requested temporary residence permits for their three sons who had remained in Ghana. When this request was rejected, he appealed. In February 1993, both applicants were granted Netherlands nationality, but further appeals against the refusal to grant residence permits for their sons were unsuccessful.

Complaint before the Court:

The applicants argued that the Netherlands authorities' refusal to allow family reunification constituted a violation Article 8 of the ECHR.

Legal argumentation:

Recalling the principles established in the case of *Gül v. Switzerland* (see above), the Court in this case differentiated between the situation of two of the three sons who had reached the age of majority at the time of the request for a residence permit and the other son who was still minor at that time. It also differentiated between immigrants who had left behind family members until their residence was established and those who had established family life in the host country.

The Court recalled that when adults were involved the protection of Article 8 of the ECHR did not necessarily apply, unless there were evidence of further elements of dependency involving more than the normal emotional ties. In the present case, the Court did not find there was such an element of dependency.

Concerning the minor child, the Court noted that he had lived all his life in Ghana, where after his parents' departure he had been taken care of by relatives, and that he could be taken care of by his brothers. The Netherlands authorities had therefore balanced appropriately the applicants' interests and those of society in general. The Court reiterated that before 1992 the applicants' had not assumed either moral or financial responsibility for their children

Finally, the Court emphasised that nothing prevented the parents from joining their children in Ghana. Article 8 of the ECHR did not guarantee the right to choose the most appropriate place to develop family life. It concluded that there was no breach of Article 8 of the ECHR.

The case was therefore declared inadmissible.

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