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The European Convention on Human Rights

The Human Rights of Irregular Migrants

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1. Admission

2. The principle of *non-refoulement*

3. Protection of family life in cases of
expulsion

4. A right to regularise one's status

Irregular migrants... who and how?

An irregular migrant may, in most simple terms, be described as a third-country national present in a particular country without valid leave

- ❑ Clandestine entry
- ❑ Absconding from a mandatory residential address
- ❑ Failure to successfully renew a residence permit
- ❑ Curtailment of otherwise valid leave
- ❑ Asylum seekers



Which Convention Article?

- ❑ The ECHR contains very few provisions expressly mentioning third country nationals or limiting certain rights to nationals or those individuals legally present in a particular territory
- ❑ Migrant issues most frequently concern Article 2 (right to life); Article 3 (Prohibition of torture); Article 5 (Right to liberty and security); Article 8 (Right to respect for private and family life); and Article 13 (Right to an effective remedy)

1. Admission to a State territory

- ❑ It is recognised that States have the right to control the entry, residence and expulsion of non-nationals

(a) Access

- ❑ Access to a State's territory is not expressly regulated by the Convention however the Court's case-law imposes certain limitations on the rights of States to turn someone away from their borders
- ❑ A State may however be required to allow entry of an individual where such is a necessity to fulfil the exercise of a particular Convention right, notably Article 8, the respect for family life

(b) Push-backs at sea

- ❑ The Convention applies to all those who are “within the jurisdiction” of a member state. This may also include a situation when a state exercises control over them on the high seas
- ❑ *Hirsi Jamaa and others v. Italy* [GC], no 27765/09, 23 February 2012
Violation of Articles 3, 13 & P4-4

(c) Access to territory in order to make an asylum claim

- ❑ *Gebremedhin v. France*

Bulgaria's containment plan, 6 November 2013

- ❑ It is estimated that Bulgaria hosts approximately 7,400 asylum seekers
- ❑ Numbers of irregular migrants entering Bulgaria began to rise sharply mid-2013. In September 2,332 arrivals were recorded, that number rising to 3,626 in October.
- ❑ On 6 November the Bulgarian government implemented a new policy to reduce the number of irregular crossings into its territory
 - (a) Reducing the number of illegal immigrants entering and residing illegally in Bulgaria
 - (b) Contain the risks of terrorism and radical extremism, pandemics, ethnic, religious and political conflict, and criminality
 - (c) Maintaining order, security and humane conditions at reception centres
 - (d) Reducing the number of persons seeking protection in Bulgaria
 - (e) Fast and efficient integration of refugees and beneficiaries of humanitarian status
 - (f) Ensuring additional external resources
 - (g) Efficient communication with society
- (Bulgarian Council of Ministers “Plan for the Containment of the Crisis Resulting from Stronger Migration Pressure on the Bulgarian Border”, Sofia, p.2)
- ❑ Subsequent entry numbers recorded were 290 in December 2013, 106 in January 2014 and 108 in February.

(d) *Entry bans*

- ❑ *Dalea v. France* (dec.) no. 964/07, 2 February 2010
 - ❑ entry ban under the Schengen Information System (SIS)
 - inadmissible
- ❑ *Nada v. Switzerland* [GC], no. 10593/08, EHCR 2012
 - violation of Articles 8 & 13
- ❑ *Stamose v. Bulgaria*, no. 29713/05, 27 November 2012
 - violation of Article 2 of Protocol No. 4 & of Article 13.
Didn't consider complaint under Article 8



(e) Border Checks

- ❑ In order to obtain access, the Court has found that the requirement for a Muslim woman to remove her headscarf for an identity check at a consulate building, or for a Sikh male to remove his turban at an airport security check was found not to violate their right to freedom of religion under Article 9 (see, *Phull v France* (dec.) no 35753/03, 11 January 2005; *El Morsli v France* (dec.) no 15585/06, 4 March 2008)

(f) Transit zones

- ❑ *Amuur v. France*, 25 June 1996, § 52-54, *Reports of Judgments and Decisions 1996-III*

(g) Family Reunification

- ❑ Access to State territory: a positive obligation under Article 8?

Entry clearance for children:

- ❑ *Tuquabo-Tekle v. the Netherlands*
- ❑ *Sen v. the Netherlands*
- ❑ *Osman v. Denmark*

- ❑ Main principles & additional specific issues to be considered when dealing with entry clearance for children:
 - ❑ Age
 - ❑ Situation in the country of origin
 - ❑ Level of dependency on parents
 - ❑ Existence of other relatives who could provide care
 - ❑ Whether parents could be expected to return to country of origin

- ❑ Even if there is no right to enter under Article 8 of the Convention, States must not operate discriminatory entry clearance policies: *Abdulaziz, Cabales and Balkandali v. the United Kingdom*; *Hode and Abdi v. the United Kingdom*

2. The principle of *non-refoulement*

- The Convention does not provide for the right to asylum. However, returning an individual to a country where they face a real risk of death or ill-treatment would be in violation of that State's obligations under Articles 2 & 3.

Saadi v. Italy – the relevance of an individual's conduct

1. Systemic ill-treatment of a particular group in the country of return (eg. *Salah Sheekh v. the Netherlands*)
2. General country violence (eg. *NA. v. the United Kingdom*; and *Sufi and Elmi v. the United Kingdom*)
3. Harm emanating from non-state actors (*H.L.R. v. France*; *Auad v. Bulgaria*);
4. Ill health (*D. v. the United Kingdom*; *B.B. v. France* ; *S.C.C. v. Sweden* ; *Bensaid v. the United Kingdom* ; *Ndangoya v. Sweden*; *Amegnigan v. the Netherlands*; *N. v. the United Kingdom*)
5. Other humanitarian conditions (*Salah Sheekh v. the Netherlands*; *M.S.S. v. Belgium and Greece*; *Sufi and Elmi v. the United Kingdom*; *S.H.H. v. the United Kingdom*)

Dublin returns

- ❑ *T.I. v. the United Kingdom*
- ❑ *MSS v. Belgium and Greece*
- ❑ *Mohammed Hussein v. the Netherlands and Italy*
- ❑ *Tarakhel v. Switzerland*

UNHCR and Bulgaria

- ❑ UNHCR call in January 2014 to suspend removals to Bulgaria
- ❑ April 2014 update noted improvements made but expressed particular concern over:
 - the lack of assessment and referral mechanisms for vulnerable persons nor specific support for them; and
 - the absence of a system to adequately respond to the needs of unaccompanied asylum seeking children
- ❑ At the present time, a general suspension of all Dublin transfers to Bulgaria was not justified

Collective expulsion

Article 4 of Protocol 4

Collective expulsion = 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 in the group

- ❑ *Hirsi Jamaa and Others v. Italy*
- ❑ *Čonka v. Belgium*



Boultif v. Switzerland; Üner v. the Netherlands [GC]; Maslov v. Austria

- ❑ the nature and seriousness of the offence committed by the applicant; (*Omojudi v. the United Kingdom; and Joseph Grant v. the United Kingdom*)
- ❑ the length of the applicant's stay in the country from which he or she is to be expelled;
- ❑ the time elapsed since the offence was committed and the applicant's conduct during that period; (*A. A. v. the United Kingdom*)
- ❑ the nationalities of the various persons concerned;
- ❑ the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- ❑ whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- ❑ whether there are children of the marriage, and if so, their age; and
- ❑ the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
- ❑ the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- ❑ the solidity of social, cultural and family ties with the host country and with the country of destination (*Antwi and Others v. Norway; and Amrollahi v. Denmark*)

3. Protection of family life in cases of expulsion

Article 8: Right to respect for private and family life

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.

Recent Article 8 case concerning Bulgaria:

Amie and Others v. Bulgaria (no. 58149/08, 12 February 2013)

Cases concerning the deportation of aliens in the absence of adequate safeguards against arbitrariness

- ❑ *Raza v. Bulgaria* (no 31465/08, 11 February 2010)
- ❑ *C.G. And Others v. Bulgaria* (no. 1365/07, 24 April 2008)
- ❑ *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002)



4. A right to regularise one's status; to documentation; social and economic rights?

- ❑ There is no Convention right to be granted specific status or related documentation
- ❑ Where the person concerned is already on the territory of the State often the key issue is that of proportionality
 - *Darren Omoregie and Others v. Norway; Nunez v. Norway*
- ❑ Situations where child family members are citizens of the member State
 - *Sorabjee v. the United Kingdom (cf. Ruiz Zambrano); Rodrigues da Silva and Hoogkamer v. the Netherlands*
- ❑ There can even be a violation where there is no outright refusal to stay
 - *G.R. v. the Netherlands*
- ❑ There may also be a violation if a refusal to grant status/documentation is based on discriminatory grounds
- ❑ *Kiyutin v. Russia*
- ❑ Social and economic rights

