HANDBOOK
ON INTERNATIONAL
AND EUROPEAN STANDARDS
IN THE FIELD OF ASYLUM AND MIGRATION –
A CLOSER EXAMINATION OF SPECIFIC ISSUES

ПРИРУЧНИК
О МЕЂУНАРОДНИМ
И ЕВРОПСКИМ СТАНДАРДИМА
У ОБЛАСТИ АЗИЛА И МИГРАЦИЈА –
ПОГЛЕД ИЗБЛИЗА НА НЕКА КОНКРЕТНА ПИТАЊА

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"Штампање ове публикације је финансирала Влада Уједињеног Краљевства кроз пројекат Подршка јачању система управљања миграцијама и азилом у Србији – фаза 2, коју спроводи Међународна организација за миграције (ИОМ). Ставови изнесени у овој публикацији, међутим, не одражавају нужно став ИОМ-а, нити званичну политику Владе Уједињеног Краљевства."

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Детаљније разматрање конкретних питања представља значајан допринос даљем унапређивању система азила у Србији. У њему се разматрају стандарди 3 законска оквира у области азила и миграција у Европи: оквир успостављен у државама чланицама Савета Европе, Европска конвенција о људским правима и основним слободама, која је пак оквир правних тековина ЕУ у области азила, односно скупа правила ЕУ која утврђују заједничке високе стандарде држава чланица ЕУ, и коначно, национални правни оквир који је недавно ревидиран и приближен стандардима правних тековина ЕУ у области азила. Заштита избеглица је и даље утемељена на Конвенцији о статусу избеглица из 1951. године, којом се утврђују главни међународни стандарди заштите избеглица и стога је она саставни део законодавства ЕУ као и домаћег правног оквира Србије.

Приручник даје добар преглед закона и праксе Европског суда за људска права, чија је судска пракса директно примењива на Србију као државу потписницу Европске конвенције о људским правима и основним слободама и стога је релевантна за све правне стручњаке који у свом раду примењују законе којимс се регулишу питања азила и избеглица. Осим тога, у Приручнику се дају објашњења правних тековина ЕУ у области азила. Иако ова регулатива још увек није примењива у Србији, изузетно је релевантна, јер ће српско законодавство везано за азил морати да буде у потпуности усклађено са нормама ЕУ законодавства о азилу пре уласка Србије у ЕУ. Због тога је даљи развој система азила интегрални део процеса приступања Србије ЕУ и укључен је у Акциони план за преговоре Србије и ЕУ у оквиру поглавља 24. Сходно томе, неопходно је да правни стручњаци који раде у овој области поседују солидно познавање релевантног права ЕУ, као и трендова за даљи развој стандарда ЕУ у овој области. У том смислу, Приручник обрађује и праксу Суда правде ЕУ, што осигурава уједначену примену права ЕУ.

Овај приручник представља правовремено и релевантно средство за све правнике у Србији који се баве питањима азила и миграција у Србији, тиме што добро повезује локални контекст с релевантним стандардима Европске уније и Савета Европе у овим областима.

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INTRODUCTION

In the past few years the 'refugee crisis' has put countries in the European region to test on many levels, challenging their ability to provide adequate assistance to large number of individuals with varied protection needs. As a result of the rapidly changing picture of migration routes in Europe, countries in the Balkan region increasingly face challenges linked to mass migration.

This Handbook, which follows a first publication on the same issue, is aimed at assisting and training decision makers and practitioners in the Republic of Serbia to assess international protection cases in a manner consistent with prevailing international and European human rights standards, as developed under relevant instruments and case law of specialised bodies, with special focus on the European Convention on Human Rights (ECHR) and its judicial authority (the European Court of Human Rights, ECtHR).

The previous version of this Handbook, accompanied by an online course, introduced the main instruments and standards regulating international protection, exploring core issues and safeguards. These included asylum seekers' right to be free from torture and inhuman and degrading treatment, the prohibition of return to face risk of harm (*refoulement*), 'safe country' concept and the prohibition of collective expulsion.

Building on the foundations of the previous publication, this Handbook delves into specific issues within the asylum and migration realm, providing a detailed analysis of areas of particular relevance to the Serbian context. These include the rules and standards applying in accelerated and border asylum procedures, the special safeguards afforded to vulnerable categories of asylum seekers (children and unaccompanied children, victims of torture, victims of gender based violence, LGBTI people among others), detention, expulsion and family reunification. The final section of each chapter provides an overview of Serbian legislation and domestic standards applying to the issue.

As with the first publication, this Handbook too is complemented by an online course, presenting the content of the chapters of the Handbook in a user-friendly manner and including end-of-chapter tests.

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CHAPTER

GUARANTEES IN ACCESS TO THE TERRITORY WITH SPECIAL FOCUS ON BORDER AND ACCELERATED PROCEDURES

FOREWORD

Ensuring asylum seekers' access to the territory of the State is essential to give effectiveness to their right to seek protection and be granted the rights and safeguards to which they are entitled in law.

Regrettably, the ability of asylum seekers and people with international protection needs to access the State's territory is sometimes hindered by **physical, administrative or legal obstacles**. These include the establishment of transit zones, border-crossing points, fences and other geographical obstacles on the one hand and repressive push-back, return and non-admission policies and practices on the other. These restrictions derive their justification **from States' right to control people's entry** on their territory, which is often stretched beyond its permitted boundaries to prevent and control migration influxes at the expense of individual protection needs. This chapter explores the principles and safeguards applying to migrants who wish to access the territory of the State as well as the limits and positive obligations existing upon States.

1. THE FOUNDATIONS OF THE RIGHT TO ACCESS THE TERRITORY OF THE STATE TO SEEK PROTECTION IN EU LAW AND ECHR CASE LAW

The possibility to physically access the territory of a State, and consequently benefit from the procedures in place to claim international protection is essential to ensure the practical and effective nature of the guarantees afforded to asylum seekers under national, European and international law. Access to the territory of the State enables those who seek international protection to approach and make representations to the State's competent authorities and facilitates their ability to make representations in support of their case.

However, in the presence of an ever-growing tendency to adopt a defensive approach to migration movements, individuals' ability to effectively access to the territory is often obstructed by material, administrative and practical obstacles. ECRE's view on the issue is worth noting in this respect: obstacles faced by those who seek international protection can include '*border controls, construction of fences and transit zones, denial of entry at States' borders or territorial waters, immediate detention upon arrival, delays or even suspension of registering asylum applications*'.[1] As migration routes and trends evolve, and States feel an ever-increasing need to enforce their sovereign right to protect their borders, the

1 ECRE/ELENA Case Law Note on Access to the Territory and the Asylum Procedure, at: http://www.asylumlaw-database.eu/en/content/ecreelena-case-law-note-access-territory-and-asylum-procedure

impediments to effective access to asylum also mutate and multiply, with the result that the above list is not exhaustive.

Measures impeding or restricting access to territory are just one of many possible obstacles that can be imposed on the right to access asylum procedures in the country. Even when the asylum seeker is given access the territory of the State, the absence or inadequacy of procedural guarantees, as well as the lack of services providing information about asylum procedures, the absence of adequate interpretation services or legal assistance can also have the effect of hampering individuals' effective access to protection.

Access to territory can further be rendered problematic by are the so-called **'special' asylum procedures**, which include, among others, **accelerated** and **border procedures** or **asylum procedures triggered by applications made in detention**.

Accelerated and border procedures are normally carried out within tighter timeframes and should be employed under exceptional conditions only, such as during peaks in migratory pressure. While these procedures differ from the ordinary ones by reason of their shorter duration or reduced level of analysis of the claim, they must not deprive protection seekers of the safeguards to which they are entitled.

International and regional human rights and asylum law and jurisprudence address the concepts of accelerated and/or border asylum procedures. The European Convention of Human Rights (ECHR) is a general human rights instrument, not an asylum-specific instrument. The Convention itself does not as such contain any dedicated provisions regulating such procedures. However its associated supervisory body (the European Court of Human rights – the ECtHR) has assessed the compliance of these procedures with the Convention in a number of cases, when considering specific migration and asylum cases and has thus established certain standards.

EU law in contrast has introduced a Common European Asylum System (CEAS) as a wide-ranging and multidisciplinary legal system, including a complex body of Asylum and Migration specific instruments, **EU Law** defines in more detail the content of the safeguards stipulated in the context of accelerated and border procedures. Border and accelerated asylum procedures are explicitly dealt with under the Recast Asylum Procedures Directive, rAPD, which will be presented below. However, the rights and principles underlying such procedures have their basis in primary EU law instruments and are also found in other separate but connected areas of law, such as those governing border management or the return of migrants irregularly present on the territory of the state.[2] The relevant standards and case law in this area will also be detailed below.

The standards of EU law are relevant to all candidate countries endeavouring to bring their law and practice in line with EU standards In view of the greater level of detail and specialty afforded to this area by EU law, this regime will be dealt with first, so as to

2 For a detailed discipline of returns of irregular migrants in the context of the EU see Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

provide a more complete overview of the issues and rights which arise when limits are placed on access to the State's territory.

ECHR law and case law on the issue will be considered in section 1.2, so as to clarify the degree to which the two legal orders are aligned.

1.1 Introduction to relevant principles and instruments of EU law

1.1.1 Introduction to the sources of EU law on International Protection

EU Law provides a very detailed description of procedural rules and standards on international protection, articulated into an autonomous body of law. The first volume of this Handbook provided a detailed introduction to the hierarchy of EU law instruments. For ease of reference, it is however worth recalling the main elements here. EU law is essentially built around a 3-level normative architecture, comprising: **Primary law, Secondary law and Supplementary law**.[3]

Primary EU Law includes the Treaties at the basis of the creation of the EU, namely the Treaty on the EU (TEU) and the Treaty on the Functioning of the EU (TFEU) and, since the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights (CFR)).

Secondary EU law builds on the Treaties to regulate specific policy areas. It does so through two main sources of law: **Regulations** (legislative instruments that bind Member States directly) and **Directives** (which impose an obligation to achieve a certain result but must be transposed into domestic legislation in order to produce effects). Other sources of secondary law (decisions, opinions and recommendations) lack comparable legal force and tend to only have consultative value. **Supplementary sources of law** include the case-law of the Court of Justice of the EU (CJEU) as well as international law, which informs the application and development of EU law and general principles of law[4] in particular ECHR standards and case law.

By virtue of the Treaty of Lisbon, entered into force on 1 December 2009, the **EU Charter of Fundamental Rights** has to be considered. EU institutions (as well as EU Member States) are bound to comply with the Charter "when implementing EU law" (Article 51 of the Charter).

The situation of people seeking international protection in the EU is governed by the **EU asylum *acquis*** (**or Common European Asylum System, 'CEAS'**), which is the term used to describe the body of laws dealing with the issue of international protection under EU law. The asylum *acquis* applies – with some notable exceptions –[5] to all EU Mem-

3 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534

4 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534

5 The UK, Ireland and Denmark have a particular status vis a vis some of the instruments.

ber States (EU 'MS') and to those non-EU Member States, which have entered into agreements with the EU to participate in some parts of the asylum acquis.[6] The instruments forming the CEAS include:

i. The **Dublin III Regulation**,[7] on the criteria to determine the MS responsible for the asylum claim;

ii. The **Recast Qualification Directive** (QD), on the criteria determining entitlement to protection and the content of the protection granted through asylum procedures;[8]

iii. The **Recast Asylum Procedures Directive** (rAPD)[9], on procedural rules and safeguards which must be observed when processing asylum claims;

iv. The **Reception Conditions Directive** (RCD)[10], on minimum standards for the reception of applicants for international protection;

v. The Regulations establishing a European Asylum Support Office (**EASO**)[11] and the EU asylum fingerprint database (**EURODAC)**[12] on a centralised registration of asylum seekers' fingerprints

In this Chapter we will primarily refer to the provisions of the **Recast Asylum Procedures Directive** (rAPD), as it specifically deals with the procedural safeguards and requirements which play a crucial role in facilitating access to the territory of the MS for the purposes of claiming International Protection.

1.1.2 Summary of the main EU law (primary and secondary) principles relevant to the right to access the territory of a MS with a view to claiming international protection

i. The **EU Charter of Fundamental Rights** - equally binding on states as the primary treaty provisions - provides for the right to seek asylum under Art 18 and the protection from *refoulement* and collective expulsion under Art 19.

6 For instance, Norway, Iceland, Liechtenstein, and Switzerland are part of the Dublin system.

7 REGULATION (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection […](recast)

8 COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

9 DIRECTIVE 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

10 DIRECTIVE 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

11 REGULATION (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office

12 REGULATION (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ·Eurodac [….] (recast)

ii. **EU Secondary legislation** sets out various principles ensuring that access to asylum procedures is effective:

a. Asylum seekers are considered to be on the territory of the state even if they are '**at the border, in the territorial waters or in the transit zones of the Member States'** (EU Asylum Procedures Directive 2013/32 [EU APD], Recital 25 and Article 3 and 43

b. Authorities dealing with people in need of international protection **need to be adequately trained** *'on how to recognise and deal with applications [and] provide […] relevant information' to applicants'* [EU APD Recital (26) and Article 6]

c. Compliance with the rules on international protection justifies derogating from the limits imposed by the **EU Schengen regime**, in that EU limits on the movement of people do not affect '*the rights of refugees […] in particular as regards non-refoulement*. [Schengen Border Code – Art. 3]

d. **Special protection for people at in territorial waters**: '*persons [who] are present in the territorial waters, […] should be disembarked […] and have their applications examined*' (EU APD Recital no. (26))

e. **Protection measures for people at border crossing points and in detention facilities**: asylum seekers who are in these precarious settings, where they risk non-recognition of their rights, should receive information '*on the possibility to apply for international protection*', they should be provided with interpretation arrangements when necessary […](EU))

f. **Vulnerable categories' access to the territory and to asylum procedures** shall be made effective through dedicated guarantees and support (EU APD 2013/32 – Recital (29) and 24.3)

g. **People apprehended or intercepted in connection with irregular border crossing** must be granted minimum safeguards [Article 4 - Return Directive, 2008/115/EC]

h. **Right to remain in the Member State temporarily pending the examination of the application**: under Art.9 rAPD '1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision…'

i. **Right to a set of procedural safeguards in the context of the asylum application including**: 1. Right to be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations; 2. Right to receive interpretation services; 3. Right to communicate with the UNHCR and other protection actors, 4. If applicable, right to communicate with legal advisers or other counsellors; right to receive notice in reasonable time regarding their application and be informed of the decision, and on the avenues in place to challenge it, in a language they understand or are reasonably supposed to understand [Art. 12 rAPD]

1.2 Introduction to main issues in access to the territory, access to asylum and related safeguards in accelerated and border procedures under European law and case law

As noted above, the ECHR is not an asylum-specific instrument but a wide-ranging human rights instrument, not concerned -as such- with any specific field of rights. Despite its non-sectorial approach, numerous standards and findings on the rights of those who seek international protection have been developed through the jurisprudence of the European Court of Human Rights [ECtHR], the supervisory body of the Convention.

Asylum seekers' access [or lack thereof] to the territory of a State is liable to give rise –and has in fact given rise to a number of issues under the ECHR. When assessing the compatibility of States' policies and/or actions resulting in interferences with the right to access the territory for the purpose of seeking international protection, in both its established and more recent jurisprudence the Court identified different aspects deemed incompatible with the Convention.

Under the ECHR, the right of aliens to access a State's territory with a view to seek and receive protection is considered against the background of State's right to control migration, which is explicitly recognised by the ECtHR,[13] albeit within the limits of non-refoulement, under Article 2 and 3, and other human rights obligations (Amuur, § 41; *Mahdid and Haddar v. Austria*, no. 74762/01). States restrict aliens' liberty and/or freedom of movement until a decision on their right to access the territory is made or they take action that results in aliens' being returned and exposed to risks *inter alia* for their lives or serious harm. Under the ECtHR jurisprudence, practices limiting aliens' access to territory, and specifically with regard to the impact of their right to access protection, include:

i. **Issues of jurisdiction in relation to migrants finding themselves at sea/land/air borders and transit zones**: Under Art 1 the ECHR applies to all those within the state's 'jurisdiction'. The ECHR understands this concept as including individuals not yet either on the geographical territory of the state or its territorial waters but over whom it exercises effective control or authority [Among others: *Hirsi Jamaa and Others v. Italy [GC], No. 27765/09*];

ii. **Use of migration detention for preventing unauthorised entry** – Under Article Art. 5§1(f) the Convention explicitly provides for the possibility to use detention with a view to preventing aliens' unauthorised entry into the territory. Such possibility is only permissible if the detention is ordered '*within a procedure prescribed by law, ii. In a setting offering adequate living conditions; with due regard to individual needs, iii. For a limited time, iv. With the possibility to ask for its review* [More in Chapter II];

iii. **Restriction of movements of individuals trying to access the territory** – in cases where there are no grounds for detention, aliens trying to access in an irregular man-

13 Amuur v. France, no. 19776/92, § 41, Mahdid and Haddar v. Austria (dec.), no. 74762/01.

ner, can have their freedom of movement restricted. The unwarranted or excessive use of restrictions under this provision can also raise issues. (See Chapter II);

iv. **Push backs, non-admission and return of people at the border and the principle non-*refoulement***: in a number of cases, the Court has considered, and often positively concluded that non-admissions, push backs or other actions resulting in the return of people who are yet to cross into the territory of the State [or who are intercepted in the act of trying to access it] without consideration of their circumstances and in disregard of potential risks upon return raise issues under Article 3 and 2, substantive and procedural aspects, and Article 4 of Protocol no. 4. [*Hirsi, ND and NT, Sharifi*] (which may not necessarily involve violations of Articles 2 and 3 ECHR);

v. **Refusal of entry to the territory that hampers aliens' rights to family reunification**,[14] thereby affecting their family rights under Article 8 ECHR. This issue is very broad and will be analysed in Chapter 3 of this Handbook.

2. FRAMEWORK OF PROCEDURAL AND SUBSTANTIVE GUARANTEES APPLYING TO ASYLUM SEEKERS IN THE CONTEXT OF BORDER OR ACCELERATED PROCEDURES AND IN OTHER CIRCUMSTANCES INVOLVING THE CROSSING OF BORDERS

2.1 ECHR Standards and guarantees as developed through case law

As explained, the ECHR is not an asylum-specialised instrument and as such does not specifically address rules on the processing of asylum applications at the border or in ordinary circumstances. The ECtHR however has encountered and addressed issues involving border/accelerated procedures in a variety of cases under its established and developing case law.

For ease of reference, border and accelerated procedures under the ECHR framework will not be dealt with as a stand alone issue here but in their various forms (**interceptions at the border, push back, procedures at land and sea borders, procedures in transit zones, procedures on board of rescue vessels** etc.), in relation to which the Court expressed itself in practice. For the specific standards and guarantees applying to the above circumstances reference should hence be made to **Section 3** of this Chapter.

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14 EU FRA , Handbook on European law relating to asylum, borders and immigration - 2014 edition, footnote 18 referring to ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, Nos. 9214/80, 9473/81 and 9474/81, paras. 82-83.

2.2. EU law standards and guarantees

2.2.1 The EU Recast Asylum Procedures Directive (rAPD)

Of all instruments described above, issues relating to the effective access to asylum procedures in EU MS are addressed in the **Recast EU Asylum Procedures Directive [rAPD].** The rAPD provides a comprehensive legally binding catalogue of the substantive and procedural guarantees that must be in place for the effective handling of international protection claims. To this end, the rAPD enshrines the importance of providing asylum procedures that are accessible to applicants.

The concept of '**access to asylum procedures'** is connected to but is distinct from that of '**access to the territory**' of the MS. While the ability to access to the territory is clearly an important component of individuals' right to effectively invoke protection needs before State's authorities, lack of access to the territory is not the only obstacle to the exercise of this right. When considering access to procedures, rAPD recognises and gives significant weight to other, often merely administrative, barriers. States are under a positive obligation to ensure the accessibility and quality of their procedures in particular:

1. **Effective communication with the authorities:** Ensuring that asylum seekers are given an 'opportunity to cooperate and properly communicate with the competent authorities' (Recital 25), enabling them to provide 'relevant facts' on their cases;
2. **Access to assistance and protection services:** ensuring that asylum seekers have 'access to the services of an interpreter' in the context of interviews in order to ensure the effective submission of claims (Art. 15 rAPD), ensuring effective communication and that he/she is given the 'opportunity to communicate with a representative of the […] UNHCR' or other specialised protection organisations and the 'opportunity to consult a legal adviser';
3. '**Opportunity to communicate with a representative of the […] UNHCR**' or other specialised protection organisations and the 'opportunity to consult a legal adviser' (Art. 22 rAPD);
4. **Right to be notified decisions and be informed of the reasons in fact and law:** granting 'sufficient procedural guarantees' for the applicant to 'pursue his or her case throughout all stages of the procedure' (Recital 25);
5. **Provisional right to stay on the territory:** Providing the asylum seeker who has lodged an application for international protection with a conditional right to stay 'pending a decision by the determining authority' .(Art. 9 rAPD).

It has been already clarified that the application of EU asylum law is not limited to the geographical territory of the State, but extends to **borders, territorial waters and transit zones**. In view of the changing migration routes and modalities of migration in Europe, this broad scope of application of the CEAS is particularly relevant and contemporary as it imposes a duty to provide procedural and substantive safeguards to those in need of international protection, from a point in time preceding their entry into the territory of the State.[15]

In some cases, international protection claims are made in adverse circumstances, such as at **border crossing points or in detention**. In these situations, **objective difficulties** in granting the above safeguards are considered to impose additional requirements on MS in order to ensure compliance with their obligations. Access to asylum procedures from these premises is hampered by isolation and absence of specialised protection actors and authorities capable of receiving applications. These circumstances are explicitly recognised by the CEAS, which highlights the essential role of the **provision of information** on the possibility to claim asylum, as well as **interpretation arrangements** to facilitate communication (Recital 28).

Along similar considerations, the rAPD recognises additional guarantees – and hence heightened positive obligations on the MS – in presence of applicants in need of **'special procedural guarantees'**, due to 'their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence' among other things. These conditions create **subjective obstacles** in the effective access to asylum procedures for these categories. Subjective vulnerabilities can well co-exist with a situation of objective difficulty, as explained above, further entrenching the needs of those concerned. For instance, a **minor in detention** or **a pregnant woman at a border crossing point** will be by definition in a condition of heightened protection need. In order for the MS to ensure their right to access procedures on equal terms with applicants who are not in vulnerable conditions, MS are hence under an obligation to provide additional or tailored guarantees. In order to do so, the rAPD places great emphasis on the **enabling role** of **identification** of such needs, which considered essential to address them adequately (Recital 29).

The specific needs and associated guarantees accorded to vulnerable categories will be discussed in detail in **Chapter IV**.

2.2.2 The EU Return Directive

The 'Return Directive', 115/2008, is not part of the core legal instruments comprising CEAS. It was adopted to regulate (and enforce) the return of those who have been given a final decision refusing them the right to stay in a Member State.[16]

As it is outside the scope of the CEAS, the Directive is not an asylum-specialised tool and applies to all aliens without a valid leave to enter or stay. However, it is especially relevant due to the procedural safeguards against a decision to remove contained. The Directive

15 FRA - The EU asylum *acquis* only applies from the moment an individual has arrived at the border, including territorial waters and transit zones

16 COUNCIL DIRECTIVE 2008/115 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Returns Directive)

grants aliens subjected to a return measure the right to be heard and raise arguments against it, on account of the risks that would derive from its implementation.

3. SITUATIONS IN WHICH ASYLUM SEEKERS' RIGHT TO ACCESS THE TERRITORY OF THE STATE TO CLAIM PROTECTION MAY BE INFRINGED AND THE LEGITIMACY UNDER THE ECHR AND EU LAW INSTRUMENTS OF SUCH INFRINGEMENTS

3.1 Interceptions at Border crossing points and access to asylum procedures

3.1.1 Border Control Measures and access to the territory for asylum seekers[17]

3.1.1.1 Provisions under the Schengen Borders Code ('the Code')

Alongside the instruments forming the **CEAS**, other EU legal instruments can have an impact on asylum seekers' ability to access the territory and access asylum procedures.

Amongst these, key relevance should be given to the **Schengen Borders Code ('the Code')**,[18] which regulates the management of EU borders, including control, monitoring and protection activities. As such it provides for the rules governing the conduct of border guards when interacting with those who attempt to access the territory, are intercepted at the borders or refused entry. The application of the Code has hence a particular impact on the effectiveness of asylum seekers' access to the territory.

Article 7 of the Code, (**Control of external borders and refusal of entry),** stipulates that border checks and control activities must be carried out '*in full respect for human dignity'* and in a non-discriminatory manner:[19]

'1. *Border guards shall, in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.*

17 Reference is made to EU FRA, Handbook on European law relating to asylum, borders and immigration - 2014 edition, §1.4. Border checks

18 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

19 See chapter I ('Access to Territory') of EU FRA, Handbook on European law relating to asylum, borders and immigration - 2014 edition

2. *While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'*

Article 14 of the Code specifically deals with **refusals of entry into the territory of the MS**, upon verification that the conditions under Article 6(1) and (5) are not met. Irrespective of the cases listed under these provisions, the article specifies that refusals '*shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection […]'*.

Due to their migratory routes, asylum seekers are often intercepted by border control checks; it is hence essential that the treatment received in this context does not prevent or diminish their chances to express their protection needs in an effective manner.

Articles 3 and 4 explicitly recognise the exceptional nature of asylum and international protection. The application of the Code to persons crossing the internal or external borders of MS is without prejudice to: ' *[…] (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'* (**Article 3**)[20] and in conformity with the provisions of the CFR and relevant principles of EU and international asylum standards, with special regard to the principle of non-*refoulement* and the 1951 Geneva Convention on the status of refugees and '*[...] without prejudice to […] to their international protection obligations'* (**Article 4**). Importantly, this provision specifies that decisions adopted under the Code must be taken on an individual basis, thereby excluding the possibility of collective/group decision making. [The concept of 'collective expulsions' and their relation to access to the territory will be examined further below].

3.1.1.1.1 Border guards' role in the identification of protection needs

As part of their responsibilities under the Code, border guards and other competent authorities appointed by the MS to exercise border control functions are under an obligation to carry out checks on those crossing the borders (**Article 8).** This obligation involves increasing responsibilities of the border guards, who shall as a minimum perform 'a minimum check' to establish the identity of all individuals crossing the borders, and more thorough checks on third-country nationals (**Article 8.3).**

On account of their responsibilities in this respect, border guards find themselves interacting and being approached by individuals with international protection needs, and often play a critical role in ensuring that – when such needs are manifestly present or strongly suspected – those affected have access to the tools and guarantees suited to express their protection needs and gain access to the relevant procedures and safeguards.

It should be noted that, in order not to limit the ways in which protection needs are expressed, EU law requires that any '**expression of fear of suffering serious harm if**

20 EU FRA – HANDBOOK ASYLUM – 2014; Fundamental rights at airports: border checks at five international airports in the European Union

returned to the country of origin'[21], is considered on par with an "application for international protection" mentioned in Article 2 (b) of the Asylum Procedures Directive (2013/32/EU. Therefore, the explicit use of words and phrases like **asylum, refugee status or international protection** is not a necessary pre-condition for humanitarian and protection needs to be taken into account (EU FRA: '*There is no need for the passenger to utter the word 'asylum'; what counts is the expression of fear of what might happen upon return*').[22] Informal or non-technical expressions giving cause for considering that a person could be at risk must be given equal weight. The EU Agency for Fundamental Rights (FRA) refers to these expressions as '**implicit requests for international protection'**.[23]

Addressing protection needs in the context of border checks is essential to ensure that the individual accesses the procedures to formally lodge an application for international protection. In this respect, the EU FRA observes that during **border procedures**, border guards are under a duty to provide information on asylum and how to claim protection. According to the EU FRA: '[…] *Identifying an asylum request hinges on the initiative of and information available to officers, effective communication, including proactive and sufficient probing, and the training provided to officers'*.[24]

The ability to provide such information in an effective manner presupposes that border guards receive qualifying **training on techniques** for the **identification** of vulnerabilities and protection needs. (Article 16.1) Ensuring that appropriate numbers of staff and resources are deployed in border control operations (Article 15) and that border guards are qualified to carry out identification is an obligation for all MS, who should, in the performance of their duties, make use of the targeted curricula developed by the EU Agency for the Management of Operational Cooperation at the External Borders of the Member States (FRONTEX).

This need is re-stated (or re-iterated) by the EU FRA '**Ten suggestions for practical measures in border management situations**' which calls on MS to ' […] 4. Provide fundamental rights training to staff deployed in third countries' as well as '5. […] Human rights training to third-country officials […] who act as a contact point or support operationally integrated border management measures carried out in third countries', especially when they '*operate on board of EU Member State assets deployed to enhance third countries' border surveillance capacity'*.

21 EU FRA – HANDBOOK, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law

22 EU FRA Handbook, Fundamental rights at airports: border checks at five international airports in the European Union

23 EU FRA – HANDBOOK ASYLUM – 2014; Fundamental rights at airports: border checks at five international airports in the European Union, P.10 'While the person concerned must request asylum (see the definition of 'application' in Article 2 b of the Asylum Procedures Directive), any expression of fear of serious harm if returned qualifies as such a request'

24 For the whole para see: 3.1.1. - EU FRA Handbook, Fundamental rights at airports: border checks at five international airports in the European Union

The indications contained in the EU FRA Handbook on Fundamental rights at airports,[25] considered in isolation from their particular field of application, recommend that instructions given to border guards in order to identify protection needs '*should include a duty to enquire proactively about the reasons for leaving the home country'* and *'clearly state the duty to verify protection needs even if a passenger tried to enter with false or forged documents'*.

The requirements and obligations in terms of identification of protection needs and information provision incumbent on Border Guards incorporate the corresponding obligations entrusted to Competent Authorities dealing with asylum claims under the EU Recast Asylum Procedures Directive (rAPD). As attempts to cross MS's borders and interactions with border guards in the performance of their duties often precede the formal submission of an asylum application with the competent authorities of the MS, up to here we have only dealt with the overlap between border guards patrolling duties and their responsibilities under human rights and asylum law. In the next section we will address the issue of access to the territory of the MS for people seeking international protection from the angle of EU-Asylum specific instruments.

3.1.2 Standards under the ECHR

The Convention does not expressly address or regulate the human rights aspects of border operations. However their compliance with the rights set out therein has been considered in the case law of the ECtHR. In most respects, the following findings closely reflect the standards already identified by the EU law instruments considered above.

3.1.2.1 Border control operations at land

In *N.D. and N.T. v Spain,* which will be examined below in the context of 'push-backs at the border', the Court examined the actions of the Spanish Border Police (the 'Guardia Civil'), resulting in the apprehension at the border and immediate return of migrants attempting to reach the Spanish enclave of Melilla by scaling the border fences in 2014. The case raises several issues with regard to exercise of jurisdiction in areas - such as border crossing points - which are alleged not to form part of the geographical territory of the State and the responsibility of the State for actions occurring there is alleged to be excluded. These issues will be discussed below, together with the substantive and procedural guarantees owed to those affected by the summary returns at stake.

Symmetrically, the Court also addressed positive obligations of authorities in this context, the border police, and as such, the case allows us to identify principles of general application for the conduct of border guards in similar cases, which present comparable facts.

25 EU FRA Handbook, Fundamental rights at airports: border checks at five international airports in the European Union.

The case explicitly recalls the relevant **EU standards from the Return and Asylum Procedures Directives and from the Schengen Border Code,** already outlined above, with specific reference to the specific procedural guarantees owed to asylum seekers at the border and the corresponding duties of border guards.

The complaint essentially concerned the apprehension and immediate return of the applicants, as well as other similarly situated aliens, by the Guardia Civil, [§12] without prior identification or any chance to raise claims concerning their personal circumstances or to receive legal assistance, interpretation or medical assistance, despite the applicants' express requests to receive these. The claims where analysed through the prism of the prohibition of 'collective expulsions', under Article 4 of Protocol No. 4 (See Chapter V of previous Handbook).

In its assessment the Court considered the conduct of the Spanish authorities, and notably that of the Border Police, as liable to raise issues under Article 13 (effective remedy) in conjunction with Article 4 of Protocol No.4 in several respects. The Court observed that the failure to carry out any identification of the applicants, and, *a fortiori*, any examination of their personal circumstances, effectively deprived them of a chance to put forward their arguments or access asylum or other protection routes in the country. Also, the Court noted the failure to refer the applicants into formalised administrative or judicial procedures before their removal was carried out. It should be noted that the findings quoted above belong to the Chamber judgment in the case. At present, the case is under consideration by the Grand Chamber.

3.1.2.2 Border control operations on vessels / at sea borders

In *Kebe And Others v. Ukraine* (No. 12552/12), the Court examined whether the Ukrainian authorities' decision could be regarded as complying with the Convention when a vessel that had rescued asylum seekers was refused permission to dock and disembark those rescued thereby denying the applicants the possibility to enter the territory of the State. In this instance, the applicants' complaints were explicitly based on the Ukrainian authorities' failure '**to comply with the Convention when carrying out border control'** [§75], bringing the authorities under the scope of the Convention, as they were considered unable to 'provide adequate safeguards capable of protecting the first applicant from arbitrary removal in a situation where the risk [of return presenting risks under Article 3] was real, imminent and foreseeable [§104]. The case allows us to establish principles regarding border control operations and the ECHR:

i. **On jurisdiction:** Ukraine was considered to have jurisdiction 'from the moment the […] border guards embarked the vessel and met with the applicants' [§75]. Such jurisdiction concerned the Applicant's 'possible entry to Ukraine and the exercise of related rights and freedoms set forth in the Convention'.
ii. **On the implications for risks under Article 3 ECHR of the refusal to allow disembarkation:** the Applicant in this case alleged that by reason of Ukraine's re-

fusal to allow him to disembark, he had been prevented in practice from accessing the asylum procedure and was hence deprived of the possibility to raise his concerns about the risks he would have been facing upon return [non-*refoulement*] [§78].

iii. **On the right to an effective remedy (Article 13 in conjunction with Article 3) to challenge the decision to refuse disembarking:** Under Article 3, the Applicant claimed that the decision denying him disembarking on the territory had prevented his access to 'domestic procedure to challenge the actions of the border guards' and that he had not been provided with a set of procedural safeguards, including 'legal assistance, interpretation or explanation of the asylum procedures in Ukraine', thereby hampering his real chances to have his protection needs examined [§79].

3.1.2.3 Border Guards' conduct and positive obligations

In the *Kebe And Others v. Ukraine* case above the Court examined how the conduct of the Border Guards, their failure to comply with their positive obligations and their actively obstructive attitude, had affected the Applicant's rights under the Convention, with specific regard to his right to assert his protection needs in a practical and effective manner. The following findings are of special interest:

i. The Court addressed the issue from the angle of Border Guards' responsibilities in terms of **risk assessment**, concluding that 'at the material time [they] were or should have been aware that the first applicant was an asylum-seeker who might have needed international protection' [§104] and criticising the fact that in spite of this, they had even 'arguably tried to discourage him from applying for such protection'. This was although the Applicant voiced his protection needs explicitly with the authorities.

ii. Failure to provide **procedural guarantees:** the Court placed great emphasis on the border guards' failure to provide 'information about asylum procedures' or to duly consider the Applicant's protection needs. This was found to be decisive in eliminating any 'realistic and practical opportunity [for him] to submit an asylum application' to the border guards before they took their decision on his entry to the territory of the State.

iii. Access to a remedy with suspensive effect in presence of a risk of return engaging Article 3. Finally, [§106 onwards], the Court examined how, independently of the shortcomings in the conduct of Border Guards, Ukrainian domestic law would have not offered the Applicant a remedy with automatic suspensive effect, where he had been able to request it in practice, as the decision not to allow him entry was immediately enforceable.

3.2 Asylum Applications at the border and accelerated procedures

In the introductory section of this Chapter we outlined the concept of '**border**' and '**accelerated**' **asylum procedures** (rAPD Article 31.8) as being variations of the ordinary asylum procedure. Such variations are justified under particular conditions related to the size of the migratory influx or the peculiar nature of its dynamics. For the purposes of EU law, an asylum seeker is considered to be on the territory of the State even if he/she is '**at the border, in the territorial waters or in the transit zones of the Member States'** (recast Asylum Procedures Directive 2013/32 [rAPD], Recital 25). This broad understanding of what constitutes 'territory' for the purposes of EU asylum law justifies the adoption and application of such routes.

As 'special' asylum processes, border and accelerated procedures are normally characterised by **shorter time limits** (4-weeks time limit for the processing of the application from its submission) and a **more cursory assessment of protection needs**, which tend to impinge on individual procedural safeguards.

In their original conceptualisation, accelerated procedures were intended for a speedier examination of 'manifestly unfounded applications' or 'abusive applications', which were not considered in need of a "full examination at every level of the procedure", due to a lack of merit or a misleading intent.[26]

In their current understanding, border and accelerated procedures allow for both the **admissibility and/or substantive examination** (rAPD Recital (38) and Article 43 and 31.8) of asylum applications made at the border and in comparably unfavourable locations, under special rules that ensure their swifter determination.

The possibility of adopting decisions in this context has to be read in conjunction with the greater ease in issuing return decisions as a result of a negative outcome of an asylum claim, avoiding aliens' entry on the geographical territory altogether during the examination of their case. However, where the authorities fail to adopt a decision within the timeframe allowed to them under the rAPD (4 weeks), the State must grant entry to the territory and must process the application under the ordinary procedures (Article 43.2).

The UNHCR adopts a cautionary position with respect to the risks of such procedures, especially insofar as the non-*refoulement* principle is concerned (Samba Diouf C-69/10),[27] highlighting how the summary consideration given to claims under this route may result in overlooking individual risk factors.

In order to prevent abuses and risks inherent in such procedures, EU law foresees specific guarantees and rules applying in this context, recognising – to an extent – the peculiar

26 European Union, Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution"), 30 Nov 1992

27 UNHCR, Statement on the right to an effective remedy in relation to accelerated asylum procedures Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Article 39, Asylum Procedures Directive (APD); and Articles 6 and 13 ECHR, February 2010 § 5: "the need to process asylum applications in a rapid and efficient manner cannot prevail over the effective exercise of the prohibition of refoulment"

difficulties that they might entail. The instrument that contains the most detailed discussion of such standards is the rAPD.

3.2.1 Accelerated procedures (Article 31.8 rAPD)

The 'accelerated' processing of asylum claims by MS is an explicit possibility recognised in specific circumstances, under Article 31.8 rAPD. The 'accelerated' procedure is not necessarily an alternative to the 'border procedure' as paragraph 8 clarifies that MS can provide for the asylum application to be '**accelerated and/or conducted at the border or in transit zones**'. Therefore, border procedures can also exist in an 'accelerated' form.

As outlined above, these procedures are normally used to deal in a time-efficient manner with applications that are manifestly unfounded, are the product of an attempt to abuse/circumvent the system in its various facets (Article 31.8(a) and (b) to (g)) or are otherwise submitted by an individual whose personal circumstances suggest a non-cooperative or actively dangerous conduct on his/her side (Article 31.8(h) to (j)).

3.2.2 Border Procedures (Article 43 rAPD)

One significant aspect in relation to which asylum seekers at the border tend to be in a position of disadvantage is their **access to information, advice and assistance** in relation to asylum and protection procedures in the country which they hope to enter. Border crossing points are normally characterised by significant overcrowding and by inadequate presence of protection and asylum-specialised actors. Aware of this limitation, EU law provides for specific rules to ensure that, notwithstanding the material conditions of border crossing points, information and counselling are provided in a satisfactory manner.

A similar approach and specific protection measures exist with regard to the similarly adverse scenario involving '*persons [who] are present in the territorial waters of a Member State*', who '[…] *should be disembarked on land and have their applications examined* […] (rAPD – Recital (26)).

Right to information and counselling at border crossing points and other atypical settings: Under Article 8 the rAPD provides that in presence of **indications that** '*… third-country nationals or stateless persons held in detention facilities or present at border crossing points,* including transit zones*, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so* [and] *make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure*'.

It should be noted that asylum applications in **transit zones** are explicitly covered by rules on these provisions.

Right of access for legal advisers, UNHCR and other protection actors: In addition to official channels of information and counselling, the rAPD clarifies that '2. …*Organisations and persons providing advice and counselling to applicants'* must be granted *'effective access to applicants'* in this setting, with limitations to such access being admissible only in well-defined circumstances.

Exclusion of vulnerable categories: the rAPD explicitly stipulates that those in need of special procedural guarantees, who cannot be adequately assisted in the context of accelerated or border procedures, should be exempted from such procedures (Recital 30 rAPD).

Adequate training of border guards and their duties: The rAPD also recognises the need for '*officials carrying out the surveillance of land or maritime borders or conducting border checks*' to be trained to identify protection needs (Recital (26) rAPD) and provide information on how to lodge asylum applications. Such need has been identified and discussed in the section on 'Border Guards', above.

3.3 International Transit Zones (TZs)[28]

3.3.1 Under the EU Asylum Procedures Directive

EU law considers asylum applications made in Transit Zones as falling under the situations covered by 'border procedures' (Article 8 rAPD). Reference should hence be made to the standards outlined in sub-section 3.2.2 above.

3.3.2 Under the ECHR

The placement and protracted holding of migrants in **transit zones** raises several issues under the Convention.

To start with, in order to assess the treatment of migrants in transit zones, the Court applies the same test used in the context of detention, generally acknowledging that while '*holding third country nationals in international zones involved restrictions upon liberty*' a restriction could have been '*acceptable if it was accompanied by the appropriate safeguards for the person concerned*', if not prolonged excessively and if accompanied by an effective remedy to challenge the lawfulness. In *Amuur v France* the Court explicitly clarified that ECHR safeguards apply equally to those held in international transit zones in the airports of Contracting States.

28 Reference is made to EU FRA, Handbook on European law relating to asylum, borders and immigration - 2014 edition, §1.5. Transit zones

Amuur v. France

In the case of ***Amuur v. France***[29],four Somali nationals, who had reached France by airplane, applied for asylum before the OFPRA (French Asylum Office) at **Paris Airport Transit Zone**. They were **refused entry into the territory of the State** and held in the Transit Zone. On account of the treatment suffered, the Applicants claimed a violation of their rights under Art. 5.1 ECHR. In upholding the Applicants' claim, the Court gave weight to the fact that **restrictions of liberty** through confinement in a Transit Zone are not excluded by the existence for the Applicant of an8 abstract possibility to leave voluntarily.

In ***Riad and Idiab v Belgium*** (nos. 29787/03 and 29810/03) and In ***Ilias and Ahmed v Hungary*** (no. 47287/15), the Court dealt with the human rights aspect of prolonged holding of asylum seekers in transit zones.

In *Ilias and Ahmed,*[30] the placement was carried out in the Röszke transit zone, at the Serbian land border, which prevented the Applicants' entry on the territory, maintaining them in a prolonged state of uncertainty and depriving them of effective possibilities to access protection, among other things. The case has been analysed in depth in the previous version of this book (in relation to the use of the 'Safe Third Country' rule) and will be further examined from the perspective of its findings in the area of asylum seekers' detention and reception conditions under **Chapter II**. The case of ***Ilias and Ahmed v Hungary*** was heard in the Grand Chamber of the ECtHR in April 2018 and the Grand Chamber's judgment is at present expected in January 2019.

Ilias and Ahmed v Hungary

In **Ilias and Ahmed v Hungary** (no. 47287/15), two Bangladeshi nationals who had applied for asylum in Hungary in the Röszke transit zone between Hungary and Serbia, complained about various aspects of the country's' practice from a substantive and procedural angle. The violations alleged included the absence of effective remedies to challenge and halt the decision to return the applicants to Serbia (under Article 13 and 3). On a substantive level, reference was made to the inadequate conditions and length of the detention (23 days) in the transit zone, the virtual prohibition to leave the area without renouncing to the asylum claim (Article 3 and 5), and the risks of chain-*refoulement* upon return to Serbia, raising issues under Article 3.

In this case too, the ECtHR explicitly refers to relevant EU instruments in the area of border procedures and return, with particular reference to the EU Asylum Procedures Directive 2013/32, which acknowledges and regulates the use of accelerated or border procedures (Article 43 and 31.8) in defined circumstances and provided that basic guarantees and safeguards are in place. Of particular relevance to the case are (i) the right for applicants in such a procedure to be granted temporary entry into the territory where the application failed to be processed in a 4-week timeframe and (ii) the permitted grounds for asylum seekers detention under Article 8 ECHR.

29 Amuur v. France, no. 19776/92.

30 This only refers to the findings of the Chamber judgment. This judgment was referred to the Grand Chamber and heard in April 2018. The findings of the Chambers are hence not final pending the Grand Chamber determination on the case.

3.3.2.1 Placements in the transit zone as detention under Article 5 ECHR

The holding of aliens in transit zones, at border crossing points or at airports has in a number of cases been considered by the Court to give rise to issues under Article 5 of the Convention. The finding of a violation depends on the material conditions and length of the measure, on the remedies available to challenge the situation and on the subjective circumstances of those subjected to it. A detailed assessment of the requirements applying to the different forms of detention and confinement employed by States when controlling migration will be provided in Chapter II of this Handbook.

In ***Riad and Idiab v Belgium*** (nos. 29787/03 and 29810/03) the Court found that the placement of 2 Palestinian asylum seekers in the Transit Zones TZs of Brussels National airport constituted detention for the purposes of Article 5 ECHR (§98)

- **Confinement in transfer zones** '*is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty*' (***Riad and Idiab v Belgium*** (nos. 03/29787 and 68§ ,(03/29810; *Amuur v. France*, § 43).
- The **abstract possibility for Applicants to leave the transit zone voluntarily** '*cannot rule out an infringement of the right to liberty*' (***Riad and Idiab v Belgium*** (nos. 03/29787 and 68§ ,(03/29810; *Amuur v. France*, § 48).
- **Failure to provide information or the provision of insufficient/inadequate information about the grounds** for the decision to order confinement in a transit zone can impact the legality of the use of this measure under the Convention.

In ***Ilias and Ahmed v Hungary*** (no. 47287/15) the Court examined a rather different context, considering transit zones established at the land borders of the State, rather than international transit zones at airports. The Court expressed its position regarding the use of transit zones as processing places for asylum applications, examining whether the containment of asylum seekers in such places could be considered detention pursuant to **Article 5.1**, despite of its formal characterisation under national law.

Finding a violation of that provision, the Court observed that the substantive conditions in the transit zone were such to give rise to an unlawful '*deprivation of liberty irrespective of its domestic characterisation*' (§66).

This was primarily due to the **lack of legal basis** for the detention itself, which was '*not incarnated by a formal decision of legal relevance, complete with reasoning*' and to the absence of justifying grounds, giving way to a risk of arbitrariness on the side of the authorities (§68).

In addition, the Court also concluded that lacking any decisions on the applicant's personal liberty in support of the measure, it was inevitably '*quite inconceivable how the applicants could have pursued any judicial review of their committal to, and detention in, the transit zone*', thereby finding a violation of **Article 5.4** due to the absence of remedies to challenge its lawfulness.

3.3.2.2 Issues under Article 3

In ***Riad and Idiab v Belgium*** (nos. 29787/03 and 29810/03) the Court considered the compliance with Article 3 of the placement in the TZ of Brussels National Airport of two Palestinian asylum seekers, held in the TZ for periods between 1-2 weeks respectively and were not provided with '*legal or social assistance, […] means of subsistence, accommodation or washing or sleeping facilities, [a] place to enjoy a private life, […] access to means of communication, […] any possibility of having the conditions of their detention reviewed by external independent authorities*'. They had further submitted being the victims of physical and psychological mistreatment.

In finding a violation of Article 3 the Court gives relevance to:

1. **The declared grounds for the placement**

In ***Riad and Idiab v Belgium*** (nos. 29787/03 and 29810/03) the Court noted the fact that the only reason for the Applicants' placement in the TZ was their <u>lack of a lawful residence permit</u> (§100) and found this relevant to reviewing the manner in which the detention order was implemented.

2. **The length of the stay**

In ***Riad and Idiab v Belgium*** (above) – the TZ in Brussels Airport was described as a facility designed for short stays and as such it was '*not an appropriate place in which to detain the applicants*'. The Court considered **10-days** as the benchmark for considering his stay acceptable, stating that such placement was '*wholly inappropriate to the needs of a [longer] stay*' (§104);

3. **The material conditions in the TZ**

In ***Riad and Idiab v Belgium*** (above) – the conditions in the zone were considered to cause the Applicants '*a feeling of solitude, with no access outside to take a walk or have physical exercise, without internal catering arrangements or contact with the outside world*'.

In the same case, **the living conditions, position and modalities of placement** in the TZ, as described in the Applicants' claims and other credible reports had been used instrumentally 'in order to bring psychological pressure to bear on those concerned with the aim of encouraging them to leave' (§88)

4. **The conduct of the responsible authorities**

In ***Riad and Idiab v Belgium*** (above) - The authorities responsible for the Applicants' transfer (the Aliens' Office) '*showed no concern as to whether they would have adequate support there*' (§101) nor did those responsible for internal checks in the TZ show any concern (§101)

Riad and Idiab v Belgium

In ***Riad and Idiab v Belgium*** (nos. 29787/03 and 29810/03) two Palestinian refugees, were refused entry into Belgium due to lack of visa (§7 and 14). Both applicants declared their **international protection needs** and requested to be recognised refugee status, explicitly stating that they would have faced risks upon return to Lebanon. Further to their claim, pursuant to domestic law, **the Applicants were ordered to remain in the Transit Centre no. 127, situated within Brussels National Airport** (§9 and 15). The Applicants' applications for asylum were refused and subsequently upheld despite attempts to legally challenge them (§10-§12 & §16-17).

Further to their stay in the TZ, the Applicants were placed in **Merksplas closed centre**, pending return.

The Court considered the compliance with the Convention of the conditions in the TZ of Brussels National Airport, as denounced by different Belgian associations and by the Applicants, held in such TZ for periods between 11 and 15 days respectively. The Applicants complained that, in view of the materials conditions and length of detention, the placement in the Centre had been contrary to their rights under Articles 3, 5 and 8 ECHR.

3.3.2.3 Risks under Article 3 and Article 13 and 3 on account of lack of procedural remedies to challenge the placement in the transit zone or the material conditions endured

In its case law on the holding of asylum seekers in transit zones to process applications before they can access the physical territory of the State, the Court gives significant attention to the adequacy of the procedural guarantees provided therein. Adequate access to information, interpretation, legal advice and assistance is essential to give full effect to asylum seekers' rights to access protection. In the absence of such guarantees, they find themselves deprived of the means to access domestic procedures or raise their protection needs effectively.

In ***Riad and Idiab v Belgium*** (above) the Second Applicant had not been given any details about the **existence, functioning and location of an alternative and more adequate placement option** for him, the "INADS Centre" (§101), which had effectively hampered his chances to gain access to it.

In ***Ilias and Ahmed v Hungary****, (NB Grand Chamber judgement awaited)* while not finding a violation on the merits of the Applicants' claims under Article 3 (based on the length of the detention, the living conditions and overall inadequacy of the services provided), the Court found that such claims were not manifestly ill founded and needed examination. The Court observed that the absence of a remedy to this end substantiated the Applicants' claim, and it therefore found a violation under Article 13 in conjunction with Article 3. The standards and requirement for **asylum seekers detention** to be in line with the ECHR and other international instruments will be examined in **Chapter II**.

3.4 Push-backs at the border (land, air and sea borders) and refusals of entry

States often refuse aliens entry to the territory of the state or in any case prevent it through different means

3.4.1 Under the ECHR

Two separate provisions of the ECHR regulate pushbacks – (i) the prohibition of the collective expulsion of aliens (now including collective rejection at the border) which applies irrespective of any risk of ill-treatment on the return the migrants may face and (ii) the prohibition on returns to face ill-treatment (the principle of non-refoulement). They are separate provisions but sometimes overlap. The ECtHR has considered a range of circumstances where the actions of the State prevented aliens' entry to the territory of the State, either through direct public force actions aimed at pushing back migrants beyond the border of the State or through administrative procedures resulting in a denial of entry into the territory and in the *de facto* forcing aliens to return to their country of origin or to intermediary/transit countries.

The relevance under the Convention of acts producing such outcome is understood in light of the evolving understanding of the principle of non-*refoulement* in international law. In view of the changing face of migration routes and dynamics, the Convention, and hence the activity of the Court, an evolving implementation of the Convention, is emerging giving effect to the principle whereby it must be used as a 'living instrument' 'interpreted in the light of present-day conditions'. Accordingly, in its most recent jurisprudence the Court has made clear that the nature of conduct considered as giving rise or contributing to create a risk of *refoulement* must be reconsidered.

In *Khodzhamberdiyev v. Russia,* the Court acknowledges the Advisory Opinion issued by the UNHCR [§67] on the *Extraterritorial Application of Non-Refoulement Obligations*, broadly defining acts of *refoulement* as 'any form of forcible removal, including […] **informal transfer or "renditions", and non-admission at the border**'. Accordingly, various forms of prevention of entry into the territory of the State are relevant under the Convention. In its case law, the Court considered the following as measures preventing aliens' access into the territory.

3.4.1.1 Push backs at land borders

In the case of *N.D. and N.T. v Spain* the ECtHR examined the push backs operated at the border fence between Morocco and the Spanish enclave of Melilla in 2014. The Court examined whether by preventing the applicants from physically entering Spanish territory, Spain had exercised jurisdiction and was liable under Art.4 Prot.4 [**See Chapter 5 of Previous Handbook, 'Collective Expulsions'**].

N.D. and N.T. v. Spain

In *N.D. and N.T. v. Spain,* the two applicants were part of a group of migrants trying to reach Spain by climbing the three sets of fences separating Morocco from Melilla. Upon climbing down the fences the Applicants were apprehended by the Spanish Guardia Civil (border police) and returned to Morocco with no examinations of their protection needs and without access to procedural guarantees, including access to a lawyer or to an interpreter.

In this case Chamber of the Court found that whether or not the Applicants had formally entered the territory was immaterial to the question of jurisdiction, as the Spanish Guardia Civil had intercepted, physically apprehended and returned the applicants to Morocco, thereby exercising **effective control** over them and determining Spain's *de facto* jurisdiction on the matter.[31] After resolving the issue of jurisdiction, the Court moved to consider whether in practice the acts of the Spanish authorities had violated the applicants' rights, observing:

i. **The failure to ensure the applicants' right to be informed** of the procedure they were undergoing, considered decisive to the effectiveness of the remedies available to them.[32]
ii. **The lack of access to an interpreter**: deemed to undermine significantly the applicants' concrete access to the asylum procedure and/or to an effective remedy to challenge the return decision.[33]
iii. **The impossibility to communicate their situation effectively**, as a result of the above.[34]

3.4.1.2 Push backs at sea

In *Hirsi Jamaa and Others v. Italy*[35] the ECtHR explicitly recognised that - provided that certain conditions are met - pushbacks carried out in the high seas may constitute collective expulsion for the purposes of the ECHR. This is the case when the State is deemed to exercise **jurisdiction**[36] over aliens, i.e. where it exercises **continuous and exclusive *de jure* and *de facto* control** over them. In *Hirsi*, the ECtHR found that such control had been in place '*in the period between boarding the ships and being handed over to the Libyan authorities*'.[37]

In *Sharifi and Others v. Italy and Greece*[38] the Court followed the same approach in *Hirsi* in a situation involving the **immediate return by the border police** of 47 migrants who had just arrived in an Italian port from Greece, considering it as **collective expulsion.** The Court rejected the Government's objection that Art.4 of Prot.4 was not applicable to cases of refusal to allow entry to the national territory to persons who arrived illegally.

31 It should be noted that also this case was decided at the Chamber level only and has since been referred to the Grand Chamber of the Court. A hearing before the Court took place in September 2018. The findings of the chamber judgments on the case will only become final once the Grand Chamber also rules on it and provided that the same conclusions are maintained.

32 *N.D. and N.T. v. Spain*, no. 8675/15 and no. 8697/15, §120

33 *N.D. and N.T. v. Spain*, no. 8675/15 and no. 8697/15, §120

34 *ND and NT,* previously cited in full, §109

35 *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, §185.

36 The ECtHR has already found in the *Medvedyev and Others v. France* case that people detained on a boat which was taken over by the French authorities on the high seas during a police operation fell within France's 'jurisdiction'.

37 ECtHR Factsheet on Art.4 Prot.4

38 *Sharifi and Others v. Italy and Greece*, no. 16643/09

The Court did not consider it necessary to determine whether the applicants had been returned after reaching the Italian territory or before, as Article 4 of Protocol No. 4 would be applicable to both situations.

3.4.1.3 Refusals of entry through confinement

In *Khlaifia and Others v. Italy,*[39] the Court dealt with a '*procedure of "refusal of entry with removal"'*, as a result of which the applicants had first been held in a reception centre and later transferred to boats moored in Palermo harbour and returned to Tunisia without consideration of their individual circumstances.

In order to be compliant with Convention requirements, refusals of entry must satisfy certain conditions. In its case law the Court found the following elements to be of particular relevance:

With regard to the **possibility to challenge a decision to refuse entry on the territory** of the State, in *Khlaifia* the Court examined such decision and the subsequent confinement of the applicants in a detention centre first and then on vessels under Article 5 § 4 of the Convention. It is an accepted ECHR principle that decisions potentially affecting individual rights must respect the principle of legal certainty and show a clear and accessible legal basis, enabling the victim to take action against it. In this case the Court noted that the orders refusing the Applicants' entry into the territory of the State and confining them on board of vessels in the Palermo harbour '*did not mention the legal or factual basis for [such] confinement'* [*Khlaifia*, §97], finding a violation of the above provision.

Khlaifia and ors. v Italy

In *Khlaifia and ors. v Italy* the Court found that the confinement of the applicants in two vessels accommodating 190 and 150 other migrants, enacted pursuant to a decision to refuse their entry on the territory for a duration of 6 and 8 days was liable to raise issues under the Convention. While dismissing the Applicant's claim that the containment on the ships had given rise to an autonomous violation under Article 3, the Court found a violation of Article 13 taken together with Article 3 of the Convention. It also observed that the shortcomings in terms of procedural guarantees, namely the **failure to provide the applicants with information as to their deprivation of liberty** [§95] had deprived them with an effective remedy to challenge or review of the measure.

3.4.1.4 Prohibition to disembark

In the more recent case of *Kebe And Others v. Ukraine* **(No. 12552/12)** the Court again addressed the human rights aspects of decisions to refuse the disembarking of aliens with declared international protection needs. In this case, the applicants had been allowed to eventually meet with their lawyer, in the presence of border guards, and were informed of the procedure to claim asylum in Ukraine [§20] and had in fact expressed their intention to apply for asylum and started filling in the relevant application.

39 *Khlaifia and Others v. Italy* [GC], no. 16483/12

In this case however, the **asylum application** was refused by the border guard themselves on grounds that, as the applicants were on board of a foreign vessel, Ukrainian authorities were not responsible for receiving asylum applications, which had to be presented to the captain of the ship. As a result the lawyer was asked to leave the ship and disembarking was refused.

In its assessment, the Court took into consideration specialist international instruments on the issue, including the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), the International Maritime Organization Convention on Facilitation of International Maritime Traffic (Fal), 1965 as well the **UNHCR note on Stowaway Asylum-seekers** [§52] providing *inter alia* that '***Foreign ships in port cannot grant asylum on board to local or alien fugitives***. […] *In other words, the principle of extra-territoriality does not apply in this situation and it may accordingly be argued that the stowaway asylum-seeker should be considered, for the purposes of international protection, as present on the territory of the Port State*'.

In conclusion, it is evident that the first, and perhaps the most difficult hurdle for applicants for international protection is access to the territory, often the precondition for having access to asylum determination procedures. The case of *Nahhas and Others v. Belgium* (No. 3599/18) currently pending before the Grand Chamber of the ECtHR raised the question of whether states may in some circumstances have an obligation to issue individuals with a visa to permit them to access the territory of a State for the purpose of seeking international protection. The parameters of access to territory are constantly evolving, as the following chapters will demonstrate.

4. ACCESS TO THE TERRITORY AND PROCEDURES OF THE REPUBLIC OF SERBIA

Access to and crossing of Serbia's state borders are governed by the **Border Control Act**,[40] pursuant to the procedures and principles set out in the national 2017-2020 **Integrated Border Management Strategy**.[41] The Strategy emphasises that the Act on Ministries and Police Act designate the Ministry of Internal Affairs (MIA) as the state administrative body, in charge of, inter alia, safeguarding the state borders and performing border checks. State border control, border checks and compensatory measures in the Republic of Serbia are within the remit of the Border Police Administration, a sector operating within the Police Directorate, which is also in charge of asylum-related affairs.

4.1 Crossing the State Borders

Under Article 12(2) of the Border Control Act, an individual with a valid travel document or another border crossing document prescribed by law may cross the state border at a border crossing point, during the working hours of the border crossing point and in accordance with international treaties. The **Aliens Act**[42] also lays down that an alien may enter the Republic of Serbia only with a valid travel document with a visa or residence permit, unless prescribed otherwise by law or an international treaty (Article 6).

The Border Control Act specifies that border control tasks shall be carried out by the border police (Article 27(2)). Police officers shall exercise their powers pursuant to this and other laws (primarily the Police Act), whilst always ensuring that they achieve their goals with the least negative consequences (Article 28(1)).

Article 30 of the Act lays down that police officers shall comply with the following principles in the exercise of their powers:

- impartiality;
- equality and non-discrimination;
- humaneness;
- respect for human dignity and reputation;
- respect for human rights and freedoms; and,
- precedence of the rights of a jeopardised individual over the rights of the individual jeopardising them and mindfulness of the rights of third parties.

40 Official Gazette of the Republic of Serbia No. 24/18.

41 Official Gazette of the Republic of Serbia No. 9/17.

42 Official Gazette of the Republic of Serbia No. 24/18.

The Police Act[43] also emphasises the principle of equality and prohibition of discrimination. In Article 67, this law also recognises the other principles enumerated above and lays down that police officers are under the duty to ensure that professional medical care is provided to individuals with regard to whom they are exercising their police powers.

These principles should ensure equal and humane treatment of all migrants who wish to access the territory of the Republic of Serbia.

Crossing the Border at Border Crossing Points

The Border Control Act defines border crossing points as places designated for crossing the state border by all modes of transport – road, rail, air and water (Article 15(1)). Border crossings may be 1) permanent – open all year, 2) seasonal – open only during a specific part of the year, or 3) temporary – temporarily designated as border crossing points.

The border may be crossed at places other than the border crossing points, at times other than the fixed working hours or under another procedure with a border permit and the approval of the relevant authority of the neighbouring state, but only where there is a justified interest for such crossing or it is prescribed by an international treaty (Article 13(1)).

Border permits shall not be issued in the event the crossing of the state borders would impinge on the implementation of border control or the security of the state borders (Article 13(3)).

Border permits shall be valid for one year and may be revoked in case of abuse or when the reasons for their issuance cease to exist (Article 13 (4 and 5)).

Crossing the Border at Places Other Than the Border Crossing Points

State borders may be crossed at places other than the border crossing points and at times other than the fixed working hours in case of a natural disaster (fire, flood, earthquake or another unforeseeable disaster). In such cases, the border may be crossed at any time and any place, but the individuals who crossed it are under the duty to notify the police thereof without delay (Article 14(2)).

4.2 Border Checks

Police officers performing border checks at border crossing points are, inter alia, authorised to inspect the travel documents of the individuals crossing the border, check or establish their identity, take their finger and palm prints and other biometric data, and check whether they fulfil the requirements for entering the Republic of Serbia (Article 40). At the same time, they may subject persons reasonably suspected of posing a risk to the security of the state border, public safety, public order and public health, to a thorough border check, but have to notify them of the reasons, purpose and procedure

43 Official Gazette of the Republic of Serbia No. 6/16, 24/18.

(Article 41). The Border Control Act lays down that police officers shall perform thorough border checks at places other than the border crossing points in the territory of the Republic of Serbia, based on the analysis of the border security risks and with a view to identifying and shedding light on criminal and misdemeanour offences in the fields of transborder crime and irregular migration (Article 66).

The **Aliens Act** also deals with border control, which it defines as checks of the individuals' identity and travel documents and inspection of their modes of transportation and possessions performed at the border crossing points with regard to the individuals' intended crossing of the state border or immediately after they cross the state border and other control-related tasks (Article 3(1(7))).

4.3 Entry into the Territory

Article 3(1(5)) of the **Aliens Act** defines "entry" into the territory of the Republic of Serbia as "the arrival of an alien in the territory of the Republic of Serbia approved by the border police and effected by crossing the state border, i.e. a border crossing point at which border control is performed." Importantly, the Act goes on to specify that the holding of an alien in the transit area of an international airport, port anchorage or harbour, shall not be regarded as entry into the Republic of Serbia. However, depending on how they apply this in practice, the Serbian authorities may find themselves deviating from the relevant international practice, as aliens in airport transit zones are definitely under the jurisdiction of the State, which is responsible for the way they are treated. This simultaneously means that the State will be held accountable if it does not provide access to the asylum procedure to aliens, subsequently found to have merited international protection. This issue is particularly important given the registered cases of restrictions of access to the asylum procedure to aliens detained in the airport transit zone.[44]

Illegal Entry

Article 14 of the Aliens Act also defines illegal entry into the territory of the Republic of Serbia, which denotes entry: 1) at a place other than the one designed for crossing the state border; 2) by avoiding border control; 3) without a travel document or another border crossing document; 4) with another person's, invalid or forged travel or other document; 5) by providing untrue information to the border police; 6) during the validity of a removal, expulsion or entry ban measure. Paragraph 2 of this Article is the first provision in Serbian law that explicitly prohibits aiding and abetting the aliens' unlawful entry into the Republic of Serbia. Such aiding and abetting shall be unlawful unless effected to save lives, prevent physical harm, extend urgent medical assistance or humanitarian aid, for humanitarian reasons, without the intention of preventing or delaying the forced removal of the aliens.

44 See the Belgrade Centre of Human Rights 2016 Right to Asylum in the Republic of Serbia annual report, pp. 31-33; its 2017 Right to Asylum in the Republic of Serbia annual report, pp. 33-35; and its April-June 2018 Right to Asylum in the Republic of Serbia periodic report, pp. 6-7, available athttp://azil.rs/en/reports/.

Denial of Entry

Article 15 of the Aliens Act enumerates the grounds for denying aliens entry into Serbia. Aliens shall not be allowed to enter the country in the event: 1) they do not have a valid travel document or visa, where applicable; 2) lack funds to support themselves whlst in Serbia, to return to their country of origin or transit to another country, or are not provided with sustenance while in Serbia in another manner; 3) are in transit but do not fulfil the requirements for entry into another transit or destination country; 4) a measure ordering their removal or expulsion from or prohibiting their entry into Serbia is in force; 5) lack confirmation of vaccination or other evidence that they are not infected by a contagious disease in the event they are coming from a country with an epidemic of the disease; 6) they do not have health insurance covering the period they plan on spending in the Republic of Serbia; 7) to protect the security of the Republic of Serbia or its citizens; 8) it is ascertained that their entry or residence in the Republic of Serbia would compromise the security of the Republic of Serbia or its citizens; 9) denial of entry amounts to an obligation of the Republic of Serbia related to the implementation of international restrictive measures; 10) it is established they are using forged documents; 11) they already spent 90 days over a 180-day period in the Republic of Serbia, unless otherwise provided for in an international treaty or they have longer residence permits (visa D) or temporary residence permits; 12) there are reasonable grounds to believe they shall use their time in Serbia for reasons other than those they declared; 13) there are reasonable grounds to believe they will not leave the Republic of Serbia before their visas expire or there is a risk of their irregular migration after they enter the Republic of Serbia.

Entry is denied in a decision issued in the prescribed form and specifying the grounds for denial of entry and registered in the alien's travel document. Exceptionally, aliens may be allowed entry into the Republic of Serbia on humanitarian grounds despite the existence of one of the above obstacles, if their entry is in the interest of the Republic of Serbia or constitutes an international obligation binding on the Republic of Serbia. Entry is granted in a decision issued in the prescribed form and specifying the reason for entry, place and address of residence in the Republic of Serbia, the maximum duration of stay in the Republic of Serbia and the border crossing point via which the alien must exit the Republic of Serbia. Article 9 of the Aliens Act governs checks of the aliens' fulfilment of entry requirements and risk assessments.

The Asylum and Temporary Protection Act[45] does not govern entry of aliens into Serbian territory. This new law, however, clearly lays down in Article 4 that aliens are entitled to express the intention to apply for asylum and to apply for asylum in the Republic of Serbia only if they are in the territory of the Republic of Serbia. In the light of this formulation, it needs to be emphasised that aliens in the transit zone of a Serbian airport are considered to be in the territory of the Republic of Serbia, i.e. in the jurisdiction of the State and that an interpretation to the contrary would result in the violation of the relevant international standards.

45 Official Gazette of the Republic of Serbia No. 24/18.

The Act lays down several principles relevant to implementing the asylum procedure, notably the *principle of non-discrimination* (Article 7) and the *principle of non-punishment for illegal entry or stay* (Article 8).

Article 8 of the Asylum and Temporary Protection Act reads:

"Aliens shall not be punished for illegally entering or staying in the Republic of Serbia in the event they express the intention to apply for asylum without delay and provide a reasonable explanation for their illegal entry or stay."

This Article purports that misdemeanour judges shall not punish asylum seekers detained for illegally entering the territory of the Republic of Serbia and that they shall enable such aliens access to the asylum procedure when they assess that the latter merit international protection or when the latter express the intention to seek asylum in the Republic of Serbia.[46]

The new Act clearly lays down that aliens shall express the intention to seek asylum already during a border check or in the territory of Serbia, and only exceptionally in a facility designated for the accommodation of aliens. Therefore, aliens are required to express their intention to seek asylum during the border check, whereby they qualify for the status of asylum seeker in order to gain access to State territory and the asylum procedure.

Article 35 of the Asylum and Temporary Protection Act reads:

"Aliens may express the intention to apply for asylum to an authorised police officer of the Ministry of Internal Affairs either orally or in writing during a border check when entering the Republic of Serbia or in its territory.

Exceptionally, aliens may express the intention to seek asylum in an asylum centre or another facility designated for the accommodation of asylum seekers referred to in Article 51 of the Act and in the Aliens Shelter."

As soon as they express the intention to apply for asylum, the aliens are referred to an asylum centre or another facility designated for the accommodation of asylum seekers; they are under the obligation to report to the designated centre within 72 hours from the moment they are issued their certificate of registration. Under the Act, the aliens acquire the status of asylum seeker at the moment they submit their asylum applications in the territory of the Republic of Serbia and enjoy it until a final decision on their application is rendered (Article 4(1(4))). The Act lays down that aliens held in the Aliens Shelter must be provided with access to the asylum procedure as well.[47]

Article 41 of the Asulum and Temporary Protection Act introduces the possibility of implementing the asylum procedure at the border or in a transit area.

46 More on the provision of access to the asylum procedure in misdemeanor proceedings in the BCHR 2016 and 2017 Right to Asylum in the Republic of Serbia annual reports, pp. 34-35 and p. 27 respectively.

47 More on the practice of providing aliens detained in the Aliens Shelter with access to the asylum procedure in the BCHR 2016 and 2017 Right to Asylum in the Republic of Serbia annual reports, pp. 33-34 and p.35 respectively, available at: http://azil.rs/en/annual-reports/.

Article 41 of the Asylum and Temporary Protection Act reads:

"The entire asylum procedure, in compliance with all the basic principles prescribed by this law, shall be conducted at a border crossing point or an airport or inland water port transit zone provided that:

1) The asylum seeker is provided with adequate accommodation and food;
2) The asylum application or subsequent asylum application may be dismissed as ill-founded pursuant to Article 38(1(5)) of this law;
3) The asylum application or subsequent asylum application may be dismissed under Article 42 of this law.

Representatives of associations extending legal aid to asylum seekers and aliens granted asylum shall be provided with efficient access to border crossing points and airport or inland water port transit zones pursuant to regulations governing the protection of state borders.

Access by legal and other representatives of associations extending legal aid to asylum seekers and aliens granted asylum, with the exception of UNHCR, may be temporarily limited if necessary to protect the national security or public order of the Republic of Serbia.

Asylum applications by unaccompanied minors may not be reviewed at the border or in a transit zone.

The Asylum Office shall render decisions on asylum applications in cases referred to in paragraph 1 of this Article no later than 28 days from the day of their submission.

In the event the Asylum Office fails to render a decision within the deadline referred to in paragraph 5 of this Article, the alien shall be allowed to enter the Republic of Serbia to pursue his/her asylum application.

An appeal of the decision referred to in paragraph 5 of this Article may be filed with the Asylum Commission within five days from the day of service of the decision."

In other words, Article 41 of the Asylum and Temporary Protection Act allows the implementation of the entire asylum procedure at a border crossing point or an airport or inland water port, wherefore the asylum procedure is in compliance with EU Directive 2013/32/EU.

II

CHAPTER

DEPRIVATION OF LIBERTY AND RESTRICTIONS ON FREEDOM OF MOVEMENT UNDER THE ECHR AND OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

INTRODUCTION

Restricting the movement of asylum seekers or individuals in need of protection or depriving them of their liberty altogether under different forms of detention is a profoundly problematic aspect of migration management. As was introduced at the beginning of this Handbook, detention is only one of the many measures States can adopt in order to control migration influxes and prevent the entry of aliens on the territory of the States pending the determination of their status and their grounds for wanting to enter the country. As such, the detention or the temporary restriction of movement of asylum seekers and migrants is not prohibited in absolute terms but, in view of the vulnerability and protection needs that characterise these migration movements, their use is strictly regulated under international, regional and domestic human rights and migration law instruments.

This Chapter will look at the standards regulating the use on the part of the State's authorities of measures resulting in the deprivation of migrants' liberty or in restrictions of their freedom of movement. Due to the differences in the practical arrangements existing at the State level in this field, these measures can be carried out in formal detention centres or in other locations that are either converted or used as detention centres in order to meet specific needs. Similarly, **police stations, ships, harbours, disembarkation points, border-crossing points and transit zones** can be used in a way that may give rise to issues under the right to freedom of movement and the right to liberty and security.

Article 5 and Article 2 of Protocol 4 ECHR regulate the rights engaged by the above-described measures in detail, providing essential guarantees against behaviour that interferes with such rights. The ECtHR has considered restrictions affecting asylum seekers and migrants under these two provisions in several of the cases before it and elaborated important standards on the issue. Various instruments of regional and international law also provide important insights into the topic, of their freedom of movement or liberty, which often end up informing the jurisprudence of the ECtHR itself.

This chapter will give separate treatment to the two measures described above, outlining the defining elements and distinguishing features between **restrictions of freedom of movement** and **deprivations of liberty**, examining them in various contexts and under different instruments.

1. DEPRIVATION OF LIBERTY AND RESTRICTION OF FREEDOM OF MOVEMENT

1.1 General Principles under the ECHR – deprivation of liberty vs. restrictions of movement

Art. 5 ECHR protects the liberty and security of the person and sets out the guarantees applying to individuals in detention. The Article makes an explicit reference to the particular conditions under which the detention of aliens can be ordered and what safeguards apply to it. The list set out in Art. 5(1)(a) to (f) is exhaustive. Deprivation of liberty is only lawful if it is imposed for one of the specified purposes and these are to be interpreted restrictively. The purpose must be identified. Detention that is not imposed for an identified purpose covered by **Art. 5 (1) a to f** is automatically unlawful.[48]

ART. 5 - Right to liberty and security:

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**… (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 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.*

Connected with, but importantly separate, from the provision under Article 5 is the rule under Article 2 of Protocol 4 which provides for guarantees for the rights of the individual who is subjected to **a restriction of his freedom of movement.** The relevant Article provides as follows:

1. *Everyone **lawfully within the territory** of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime,*

48 Mole, Nuala; Meredith, Catherine, Asylum and the [ECHR], p.143

for the protection of health or morals, or for the protection of the rights and freedoms of others.

4 *The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society*

It is an accepted principle in the ECtHR jurisprudence (*Khlaifia and Others v Italy*[49], §64) that the fundamental distinction between the two provisions '***is merely one of degree or intensity, and not one of nature or substance',*** with the result that the Court will examine the situation presented before it under one or the other on the basis of the particular circumstances of the case taking into account a set of established criteria which include '*the type, duration, effects and manner of implementation of the measure in question'* (*Khlaifia citing Amuur v. France, § 42)*. The case of ***Guzzardi v Italy*** provides the leading example of the Court's approach to what differentiates a restriction of movement from a deprivation of liberty:

Guzzardi v Italy

In ***Guzzardi v Italy***, an Italian national was charged with a crime in 1972 and not convicted until 1979. In the intervening period, he was detained on remand under a 'compulsory residence' scheme on the island of Asinara. The island had a permanent population of 200 people, was principally the site of a large prison comprising most of the island. The applicant was restricted to a tiny fraction of the island. There were several important factors in the case: the applicant spent most of his time in the company of fellow 'residents', the permanent population lived in a town the applicant was not permitted to visit, there were few opportunities for social contacts other than with his near family or residents, he was subject to a strict curfew, had to report to the police station twice per day, and needed the consent of authorities to communicate/visit the outside world etc. As such, even though he was not a prison inmate, the measure could not be regarded as a simple restriction of movement but was held to constitute a deprivation of his liberty, and as such, without the required justification, breached article 5(1).

More recently the Court considered the case of **de Tommaso v Italy.**[50]

In ***de Tommaso v Italy***, an Italian national was placed under special supervision for two years by virtue of a decision of the Bari District Court due to past convictions and the alleged threat that at the moment of the case Mr. de Tommaso posed. The Applicant relied *inter alia* on Article 5 and Article 2 of Protocol No. 4, complaining that the preventive measure imposed on him had been arbitrary and its duration was excessive. The Grand Chamber firstly found that the obligations imposed on Mr de Tommaso had not amounted to a deprivation of liberty within the meaning of Article 5(1) of the Convention, but merely to restrictions on his freedom of movement. To this end the Grand chamber held unanimously, that there had been a violation of Article 2 of Protocol No. 4 on account of the lack of foreseeability of the relevant Act. The Act had afforded the courts a wide discretion without providing a sufficiently clear indication of the limits or manner of exer-

49 *Khlaifia and Others v Italy,* no. 16483/12

50 *De Tommaso v Italy*, no. 43395/09

cise of such discretion. The imposition of preventive measures had not been sufficiently foreseeable and had not been accompanied by adequate safeguards against the various possible abuses therefore not satisfying the foreseeability requirements established in the Court's case-law.

It should however be noted that in contrast to the provisions of Article 5(1)(f), the Protocol imposes an additional condition for the applicability of the guarantees in the area of restriction of the freedom of movement, namely that these shall be granted to those who are '**lawfully**' present**.** This has been seen to cause issues with regard to asylum seekers and migrants who have entered the territory of the State irregularly and hence may lack a valid immigration status. In the particular case of refugees, this difficulty is explicitly acknowledged by the UNHCR, which in its Revised Guidelines holds that '[…] asylum-seekers are often forced to arrive at or enter a territory illegally'.[51]

There is no consensus as to whether 'asylum seekers' who have not formally made a formal application for asylum can be held to be lawfully on the territory although it seems to be accepted that those who have made such an application may be considered to be lawfully for some purposes.[52] However in *Saadi v the UK* it was held that a person who had not yet been given the right to enter could be detained in order to prevent him effecting an unauthorised entry.[53]

Asylum seekers can find themselves in detention or under severe restrictions of movement in many circumstances, especially in the context of mass influxes and mixed migration flows. Measures depriving migrants of their liberty and/or freedom of movement, on the grounds deemed permissible by the ECHR, are used by States in the exercise of their rights relating to migration management and control and can be employed at various stages of the individual migrant's experience and in a wide range of different physical locations.

The Court explicitly recognises such State rights, under the broader right to control the entry of aliens into the territory of State and 'prevent unlawful immigration.[54] The use of measures depriving aliens of their liberty and/or freedom of movement is expressly permitted by the Court as a means to assist States in the exercise of this right. However, the Court also provides for limits to the exercise of such right, i.e. those resulting from their obligations to respect the fundamental rights and liberties of those who may be negatively affected by the exercise of migration control and management.[55] Turning to immigration detention and restrictions of aliens' freedom of movement, the Court recognises

51 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999

52 Wolfe, Tara. "The Detention of Asylum Seekers in Europe." International Law LLM Thesis, University of Bristol 41 (2012) citing Hathaway J., The Rights of Refugees under International Law, Cambridge University Press 2005, p. 417 and UN High Commissioner for Refugees (2011b), Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, April 2011, PPLA/2011/01.Rev.1

53 *Saadi v. United Kingdom*, no. 13229/03, §§ 65-66

54 *M.S.S. v. Belgium and Greece,* no. 30696/09, Grand Chamber judgment of 21 January 2011, §§ 216-218

55 *Amuur v. France*, no 19776/92, § 41; UNHCR Manual on Refugee Protection and the ECHR

that these are permissible insofar as they are 'accompanied by suitable safeguards for the persons concerned' and adopted in compliance 'with their international obligations'. When individuals with international protection needs are concerned, regard should be paid to the obligations under the '1951 Geneva Convention relating to the Status of Refugees' among other instruments, to ensure that the execution of detention and other measures limiting aliens' freedom of movement do not deprive asylum seekers of their protection rights under those instruments.[56]

Article 5 and Article 2 of Protocol no 4 do not expressly distinguish between the sub-categories of migrants affected by these measures. The safeguards and requirements concretely applying to particular affected groups must be derived from these two provisions considered in conjunction with the ECtHR approach to the particular situation of those groups, as developed in the relevant case law. Insofar as **asylum seekers and individuals with international protection needs** are concerned, the Court has established in its settled jurisprudence that they qualify as members of a vulnerable group for the purpose of the Convention and are hence afforded particular safeguards. When asylum seekers present additional vulnerabilities owing to their personal circumstances, such as, *inter alia*, their age, sex, psychological or physical condition, their vulnerability is compounded and they are afforded further guarantees.

The Court considered the situation of asylum seekers in detention in several cases, highlighting the guarantees owed to them in view of their inherent vulnerability and differentiating their situation from that of irregular migrants in detention. The specific standards applying to asylum seekers in detention will be considered in detail below, examining the different aspects regulated by the Convention.

1.2 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Within the realm of Council of Europe instruments and bodies, the specialised European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has to be considered. The CPT has its legal basis in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in February 1989. It allows the CPT to visit all "places of detention" in any of the Member States of the Council of Europe. The CPT does not make findings of violations of Art 3 ECHR but just reports on what it is recorded during its visits. The CPT also adopts general standards, which are very important, but not legally binding.

The CPT has dealt extensively with the emergence of the practice of migration detention, drawing standards and observations against the background of both its analysis of ex-

56 ECHR Factsheet – Migrants in detention - April 2018, *M.S.S. v. Belgium and Greece*, no. 30696/09, Grand Chamber judgment of 21 January 2011, §§ 216-218

isting standards and principles and its field visits to places of detention around the State parties to the Council of Europe.

The legal form of migration detention

The Committee defines migration detention as a measure depriving an alien of his/her liberty in the context of 'a(n) (alleged) violation of the legislation related to aliens, such as illegal entry, illegal residence'. As was mentioned in the introduction to this chapter, the Committee notes that migration detention is imposed as an **administrative** measure 'in most Council of Europe member States'.

The aim of migration detention

This observation reinforces the fact that migration detention fundamentally differs from criminal detention, as its purpose is the **control of irregular movement**.

Migrants who are in detention or have their freedom of movement temporarily restricted fall normally under a legal regime separate from the one regulating post conviction criminal detention. This is due to the fact that migration detention does not purport to produce a dissuasive or punitive effect, but is only imposed to facilitate determining individuals' migration status prior to authorising their entry or pending the execution of a decision to deport. In this sense, the Committee explicitly states:

"[…] immigration detention **must not be punitive in character:** it is not a sanction or a punishment. Therefore, immigration detainees should be afforded both a regime and material conditions appropriate to their legal situation."

Migration detention as a 'last resort'

In view of the purpose it serves and in consideration of its recognised negative effects, the use of migration detention must comply with the principle of 'last resort', whereby recourse to migration detention should only be employed once it has been verified that no alternative less intrusive measures are available that would achieve the same aim. In this sense the Committee observes that:

"[…] Deprivation of liberty of irregular migrants **shall be neither arbitrary nor the automatic consequence of an (alleged) violation of aliens legislation"** but its employment should be "**exceptional, proportionate** and, by consequence, **an individual measure** necessary in order to prevent unlawful immigration".

In stating so, the Committee expresses the *prima facie* non-compliance with basic human rights standards of the **automatic or blanket employment** of migration detention.

1.3 International Standards set by the bodies of the United Nations

The protection of individuals' liberty and security from arbitrary and undue interference is one of the pillars of Human Rights protection in several international and regional instruments and applies to citizens and non-citizens alike. The **International Covenant on Civil and Political Rights (ICCPR)**, at Article 9(1) provides that: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention". [57]

In its General Comment no.8 on the 'humane treatment of persons deprived of their liberty', the UN Human Rights Committee (HRC) - the body in charge of monitoring the application of the Covenant and of interpreting its meaning - stated its applicability to immigration detention.

Similar provisions can be found in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (Articles 16 and 17) and in the UN Convention on the Rights of the Child (Article 37). With regard to the human rights of children in the context of international migration the Joint General Comments No. 3 and 4 published by the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in 2017 must also be considered.[58]

The rules and safeguards surrounding deprivation of liberty can also be found under the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**[59], Articles 10 and 11, and **Optional Protocol** (Article 4, 12, 14, 19, 20)[60], whereby the Committee monitoring the implementation of the Convention should, amongst its other powers, be allowed to carry out visits to places of detention and given access to all relevant information.

The International Covenant on Civil and Political Rights gives separate protection to the right to freedom of movement, regulated under Article 12, and recognised upon those who are "lawfully within the territory" of the State.[61] As noted by the ECtHR itself, the Human Rights Committee explicitly recognises those who have lodged an asylum applica-

57 The Covenant and related jurisprudence of the Committee in A and C v Australia is explicitly mentioned §31 of *Saadi v UK*

58 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,]

59 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

60 UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199

61 Art. 12(1) ICCPR: *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*

tion as falling under this category.[62] In its case law on the issue, the HRC issued different decisions and views on the arbitrary detention of asylum-seekers.

C. v. Australia

In ***C. v. Australia,* Communication**,[63] the Human Rights Committee was faced with the question of whether the detention pending deportation of an Iranian national in Australia breached the protection against arbitrary detention in the International Covenant on Civil and Political Rights. The national was detained from 1992 until 1998. He had developed severe mental health problems - a paranoid schizophrenic - as a cause of his detention and was eventually released due to this. Prior to this release, he was informed that the minister had no power to release him otherwise under the relevant legislation. The Committee found that the complete lack of discretion on the part of the authorities to review the national's detention and its continued justification necessarily meant that it violated this protection. A detainee ought to be able to bring proceedings before a court to challenge the lawfulness of his detention. Equally, the Committee also found that the state had not demonstrated that, in the light of the national's severe mental health issues, there was not a less invasive means of pursuing the national's deportation. This too was considered to be an arbitrary and unlawful interference with the national's right to liberty.

A v Australia

In ***A v Australia,***[64] the Human Rights Committee held that the detention of a Cambodian asylum seeker pending deportation was arbitrary. He had been detained originally in New South Wales, and then following rejection of his first asylum appeal he was moved to the Northern Territories. Thereafter he was moved 2,000km to Western Australia. In total he was detained for 4 years. The Committee disagreed with the lack of justification for his detention. Indeed, they found that the State Party had not advanced any grounds specific to the applicants' case that could justify his detention for a period of 4 years, during which he was shifted around between different detention centres. Additionally, the domestic legislation did not permit the release from detention pending deportation of a 'designated person' - of which the applicant was one. The Committee noted that this feature of the domestic law limited the court's ability to decide whether the applicant was indeed a 'designated person', hence depriving the court's control of any practical effectiveness. As such, the Committee concluded that the applicant's right to challenge his detention before a court had also been violated.

62 *Saadi v. UK,* Application No. 13229/03, § 32: "a person who has duly presented an application for asylum is considered to be "lawfully within the territory" (see *Celepi v. Sweden*, Communication no. 456/1991, CCPR/C/51/D/456/1991)"

63 *C. v. Australia*, Communication no. 900/1999, CCPR/C/76/D/900/1999

64 *A. v. Australia*, Communication no. 560/1993

2. ASYLUM SEEKERS IN DETENTION

Asylum seekers and people with international protection needs can find themselves subjected to restrictions on their liberty and freedom of movement in different circumstances. Migrants with such protection needs can be placed under such measures due to being considered as irregular migrants and not having their specific needs and vulnerabilities properly assessed.[65] Asylum seekers may be placed in detention upon their **entry into the country** or later into their migration experience.

This can be due to the circumstances of their apprehension by the State's authorities, which often occurs in the disorderly context of border crossing, short time-limits and with inadequate procedural guarantees and information being provided. The summary treatment of migrant groups in this context can result in asylum seekers not being given the tools or time to express their protection needs at the earliest opportunity. The difficulties faced upon crossing the border and entering a country should however not prejudice asylum seekers' right to express their protection needs; such rights must also be secured to those detained.

In its consideration of this category of migrants the CPT (See Section 1.2) has stated that '"asylum seekers" **are not "immigration detainees"**, although the persons concerned may become so, should their asylum application be rejected and their leave to stay in a country rescinded. Accordingly, another circumstance where people who have sought asylum may be subjected to detention is after a negative asylum decision on their application.

Due to the absence or scarcity of **legal avenues** for asylum seekers to reach countries, their entry will often be illegal, with the result that, irrespective of their protection needs, these individuals can be treated as *prima facie* irregular aliens and hence be subjected to measures – such as detention – aimed at preventing or controlling irregular migration, for instance, detention.

2.1 The Geneva Convention and the UNHCR

The vulnerability and particular situation of asylum seekers as compared with that of irregular migrants is recognised under international and European instruments, whose observations and position on the issue also inform the development of the ECtHR's jurisprudence. In some cases, such instruments adopt additional and/or stronger guarantees for the protection of this category,

The **'Geneva Convention'** ('GC') (Convention relating to the Status of Refugees) of 1951 and its Protocol of 1967 does not explicitly provide for a generalised prohibition on the

65 Mole, Nuala; Meredith, Catherine, Asylum and the [ECHR], p. 133

detention of asylum seekers, but includes a broader principle against the imposition of **penalties (principle of non-penalisations of refugees)** on refugees 'on account of their illegal entry or presence […] in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence' (Article 31). The GC is explicit in opposing measures resulting in a limitation of the freedom of movement of refugees, which is prohibited under Article 26 and 31(2). While the first provision only applies to 'refugees lawfully in [the] territory', who have hence already lodged and possibly been granted protection, Article 31(2) addresses 'refugees' at large, supposedly including those who have not been able to express their protection needs to the authorities of the State. In this case, the Article allows some room for restrictions of freedom of movement of refugees that are considered 'necessary', maintaining that these 'shall only be applied until their status in the country is regularised or they obtain admission into another country'.

The GC's position with respect to the detention of asylum seekers and people with international protection needs has been developed and detailed through the work of the United Nations High Commissioner for Refugees and its Executive Committee. In addition to its fieldwork, as the body in charge of monitoring the implementation and interpretation of the Geneva Convention, the UNHCR is in fact responsible to clarify the protective scope of the Convention in presence of ever evolving migration scenarios, specifying its applicability to present-day conditions.

The Executive Committee (ExCom) of the UNHCR does so through the adoption of 'Conclusions', which are authoritative positions of the agency on selected topics. In 1986, the ExCom expressed itself more or less explicitly on asylum seekers in situations of detention or restrictions of their freedom of movement in the following Conclusions:

- On the **detention of asylum seekers** (no. 44 (XXXVII) – 1986)
- On the **treatment of asylum-seekers in situations of large-scale influx**, (no. 22 (XXXII)
- On the **question of custody or detention** in relation to the expulsion of refugees lawfully in a country (no. 7 (XXVIII)
- On the determination of refugee status (no. 8 (XXVIII)

The UNHCR complemented the above documents with its **guidelines**[66], one of which – revised in 1999 – specifically addresses the detention of asylum seekers defining it as "inherently undesirable" and permissible only in 'exceptional' and well defined circumstances and in any case provided that respect with human rights standards is ensured. Importantly, the same guidelines explicitly acknowledge as significant circumstances in the assessment of their cases that in order to access protection, 'asylum-seekers are often forced to arrive at, or enter a territory illegally' and due to the conditions of the journey they 'may not be in a position to comply with the legal formalities for entry' (Guideline 2).

66 UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999

In its **guidelines and conclusions**[67] documents the UNHCR established a set of general principles on the detention of asylum seekers, including:

1. The principle whereby 'in view of the hardship which it involves, **detention should normally be avoided**' and '[i]f necessary […] may be resorted to only on grounds prescribed by law' to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order';
2. That even in presence of the above grounds 'detention for the entire status determination procedure, or for an unlimited period of time' is not justified.
3. That the **failure to show valid documentation** on the part of asylum seekers should not be the 'sole reason' for their detention, where the lack of such documents is due to the inability 'to obtain any in their country of origin'.
4. The obligation to consider **alternatives to detention** where these are viable and effective to achieve the intended aim, save in cases where there is 'evidence to suggest that such an alternative will not be effective in the individual case'.[68]
5. The **expeditiousness of asylum procedures** is key to ensure that refugees and asylum seekers are protected 'from unjustified or unduly prolonged detention'.
6. The need for asylum seekers and refugees to be afforded a distinct treatment than that afforded to 'other aliens' under national legislation.
7. The need to ensure: that a **judicial or administrative review** of detention is available to those subjected to it; that **conditions of detention are humane** and that whenever possible asylum seekers and refugees are not accommodated 'with persons detained as common criminals' and/or in unsafe areas; that an opportunity to contact the UNHCR or other protective agencies is made available.
8. The use of detention **for deterring, dissuasive, punitive or disciplinary purposes** (Guideline 3 (Guidelines of 1999) is contrary to the norms of refugee law.

2.2 The position under the ECHR as elaborated by the ECtHR

The ECtHR has considered the specific guarantees owed to asylum seekers in detention in several cases. In ***S.D. v. Greece***,[69] the Court has emphasised that a clear distinction should be made between asylum seekers and other migrants noting that the measures of detention imposed on asylum seekers are applicable not to those who have commit-

67 UN High Commissioner for Refugees (UNHCR), *Thematic Compilation of Executive Committee Conclusions*, June 2014, Seventh edition, available at: http://www.refworld.org/docid/5538cfa34.html

68 Developed in UN High Commissioner for Refugees (UNHCR), ExCom Comittee, *Alternatives to detention*, 3 June 2015

69 *S.D. v. Greece*, no. 53541/07, §65

ted criminal offences but to aliens who, often fearing for their lives, have fled from their own country. Asylum seekers should therefore be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants.[70] This is in line with the principle of non-penalisation of asylum seekers and refugees under the GC and with the rule whereby detention should only be resorted to on an exceptional basis when asylum seekers are involved.[71]

In ***M.S.S. v. Belgium and Greece*** (no. 30696/09) the Court stated: *"…[T]he confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 [GC and the ECHR]'.*[72]

In various cases the Court considered the standards applying to **asylum applications made from detention facilities**. In ***S.K. v. Russia*** (no. 52722/15) a Syrian national convicted of a criminal offence made an application for temporary asylum while detained pending removal, relying on the risks he would have suffered upon return to Aleppo. In the latter case, amongst other things the Court observed that '*in the context of Article 5 § 1 [….] a successful application for temporary asylum could have bearing on the removal measure by way of impeding its enforcement for the duration of the temporary asylum' (§114)*. However, in the particular circumstances of the case, which saw the exacerbation of the Syrian crisis, '*it should have been sufficiently evident for the national authorities […] that the applicant's removal was not practicable and would remain unlikely'* and it was hence **incumbent upon them** '*to consider alternative measures'*.

S.K. v. Russia

In ***S.K. v. Russia*** the Applicant -a Syrian national in possession of a valid business visa in the country- had been convicted for a criminal offence and, a result of this, the judicial authorities had decided to impose a fine on him and to order his administrative removal from the country. This was done with a view to safeguarding "*national security, to avoid the spread of various infectious diseases such as HIV, tuberculosis and leprosy, and to ensure the optimal balance of labour resources and in order to support, as a matter of priority, the employment of Russian nationals...".* While placed in a pre-removal detention facility the Applicant made an application for temporary asylum, on the grounds of the ongoing crisis in Aleppo and of the risk that he would have been forcibly conscribed in the military if returned. In 2015 pending the consideration of his asylum claim, the ECtHR indicated Rule 39 measures in the case to halt removal and in 2017 the judgement was delivered. The Court found a violation *inter alia* of Articles 5(1) and 5(4), since the removal of the Applicant was not foreseeable due to the continuation of the conflict in Syria and due to the lack of a procedure allowing for a review of his detention.

70 *Saadi v. the United Kingdom*, no. 13229/03, §75, citing *Amuur v. France*, no. 19776/92, §43.

71 UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, Guideline 2 and 3; Commissioner for Human Rights, "States should not impose penalties on arriving asylum-seekers", 17 March 2008

72 ECHR Factsheet on Migrants in Detention, at: http://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf

2.3 The position of the Committee of Ministers of the Council of Europe

A Recommendation (Rec (2003)5) of the Committee of Ministers of the Council of Europe upheld the principles established by the UNHCR and other international instruments, confirming the non-punitive nature of the detention of asylum seekers and recalling the limited grounds on which it can be legitimately employed. The Recommendation also makes reference to the need for less invasive alternatives to be evaluated for each case where detention is ordered and highlights the importance of assessing whether detention is suitable in the individual case, having due regard to the length and material conditions surrounding the measure.

2.4 The position of the EU

The EU provides safeguards against unlawful detention and restrictions on freedom of movement in several of its legislative instruments. Under Article 6 of the Charter of Fundamental Rights (CFR), EU primary law protects individuals' right to liberty and security against undue interferences. Freedom of movement is however, guaranteed in the section on Citizens' Rights (Article 45 (2) CFR) making the granting of freedom of movement and residence 'to nationals of third countries legally resident in the territory of a Member State discretionary.

2.4.1 The use of detention in cases involving asylum seekers and individuals with declared international protection needs

Given the fundamental diversity of the objectives pursued through it, detention of asylum seekers under the **Reception Conditions Directive** (RCD) is guided by the principle whereby Member States 'shall not hold a person in detention for the sole reason that he or she is an applicant' (Article 8).

As was explained above, the use of detention in cases involving asylum seekers is ordered on different grounds and pursues aims other than the ones used in the context of return procedures: namely, while the latter is employed to secure the execution of the return decision, the former is intended to ascertain the needs of the individual pending his/her referral into ordinary asylum procedures (Recital no. 15, 16). Specifically, the RCD provides that the permissible reasons to order the detention of asylum seekers are in order to: "(a) […] determine or verify his or her identity or nationality; (b)[…] determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant; (c) […] decide […] on the applicant's right to enter the territory; (e) in presence of reasons of 'national security or public order'; (f) with a view to carry out a transfer under Article 28 of the Dublin Regulation '[73](Article 8(3)).

73 See previous Handbook, Chapter 4, p.176

A distinction should be made for the case under **Article 8(3)(d)**, whereby the RCD recognises explicitly the possibility for asylum seekers to be subjected to detention 'subject to a return procedure under [the Return Directive]', irrespective of their declared needs. This can occur in cases where the asylum application presents elements of manifest inadmissibility, such as where the State can provide evidence to demonstrate that the applicant 'already had the opportunity to access the asylum procedure' and that there are 'reasonable grounds' to believe that the new application is made 'merely in order to delay or frustrate the enforcement of the return decision'.

The RCD also regulates the guarantees afforded to asylum seekers in detention (Article 8-9), both in terms of material safeguards and procedural remedies, as well as the special protection recognised to **vulnerable asylum seekers** (Article 11), which will be examined further below in the dedicated thematic sections.

2.4.2 The Returns Directive

With regard to the position of migrants and asylum seekers specifically, the EU regulates the cases where detention can be used in the '**Returns Directive**' ('Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals') and in the **'Reception Conditions Directive'** (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection). While the Returns Directive applies to migrants in a variety of removal procedures and hence does not limit itself to asylum seekers and migrants with international protection needs, the Reception Conditions Directive regulates the use of detention in respect of this particular category, specifying the higher protection standards applying to them.

Under the **Returns Directive,** the use of detention is only permissible "in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process." Pre-return detention comes with guarantees that apply to all migrants irrespective of their international protection needs, including the right to receive a dignified treatment, the obligation existing upon authorities to assess alternatives to detention, the obligation not to only maintain detention insofar as removal arrangements are in progress and for the shortest period possible (Recital 17; Article 15 and 16). It should however be noted that in presence of objective obstacles to the execution of the return decision, detention under the Returns Directive can exceptionally be extended up to **18 months** (an initial period of maximum six months and a further extension of up to a further 12 months) (Article 15(5) and 6). Special guarantees apply to minors and families in detention (Article 17), which will be examined below in the dedicated section.

3. WHAT CONSTITUTES UNLAWFUL DETENTION OF MIGRANTS AND ASYLUM SEEKERS FOR THE PURPOSES OF THE ECHR?

3.1 Places and types of detention and restrictions of movement in international migration

Asylum seekers can find themselves deprived of their liberty or subjected to restrictions of movement in many circumstances:

As was mentioned in the introduction, detention and restrictions on movement can be employed at different stages of asylum seekers' migratory experience. For the purposes of this handbook we will consider:

I. Pre-deportation

II. Identification

III. Preventing entry

IV. Reception / Holding centres

Depending on the circumstances in any given country, the location, premises and methods of implementation of detention measures varies largely. Countries bordered by the sea often restrict the freedom of movement or liberty of asylum seekers preventing their disembarkation from **vessels** or preventing their entry to the rest of the territory of the State confining them to dedicated areas and temporary reception centres normally built in the vicinity of harbours (e.g. hotspots).

In contrast to criminal detention which is normally carried out in specific premises, due to the nature of the migration phenomenon, detention of aliens can sometimes take place in informal premises, facilities temporarily converted to host them or even in places not formally designed to be places of detention.

Countries that are only bordered by land, pursue the same purpose by using confinement in dedicated premises built on land, such as **border crossing points, transit zones**, **international transit zones at airports** used to temporarily receive asylum seekers for the purposes of identification [...] [see in the international legal realm, UNHCR ExCom Conclusion No. 22 (XXXII) – 1981, Protection of Asylum Seekers in Situations of Large-Scale Influx] as well as **police custody.**

As a means of introduction, in its Guidelines, the UNHCR acknowledges this particular nature of migration detention, stating how it can occur in the context of: "*confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave this limited area is to leave the territory*".[74]

74 UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers

While the existence of provisions explicitly identifying certain premises as **detention centres**, the **lack of explicit qualification/classification** of a measure as 'detention' under domestic law is not decisive for the purposes of finding that there was a deprivation of liberty in the particular case. As the Court stated in its case of *Khlaifia and others v. Italy* (§71)*:*

'The classification of the applicants' confinement in domestic law ***cannot alter the nature of the constraining measures imposed on them*** *(see, mutatis mutandis, Abdolkhani and Karimnia […] §§ 126-27) […] the applicability of Article 5 of the Convention cannot be excluded by the fact […] that the authorities' aim had been to assist the applicants and ensure their safety…Even measures intended for protection….may be regarded as a deprivation of liberty'.*

Based on the Court's current jurisprudence, places of migration detention can include:

I. Holding centres in the context of mass influxes
II. Hotspots
III. Reception centres with limited possibility to go outdoors or/and inadequate conditions
IV. Border/Transit Zones
V. Airports
VI. Vessels
VII. Police Stations

Last but not least, a short mention of EU should be made despite the fact that it does not belong to the legal realm of the Council of Europe. In EU law, in conditions of high migration pressure or in presence of public order concerns or other identified needs, asylum seekers may have their freedom of movement or liberty restricted for longer periods. Where this is the case, the **adequacy of living conditions and services** provided becomes more significant.

Given the evolving dimension of migration movements, the above examples are in no way exhaustive. Where measures result in a deprivation of liberty or a restriction of movement within the terms of the ECHR or other applicable instruments, the use of atypical places of detention should not be considered decisive for the purposes of establishing the finding that there has been a deprivation of liberty or a restriction on freedom of movement.

3.2. Types of detention

3.2.1. Detention to prevent unauthorised entry and detention to assess of the status of aliens

Detention imposed to prevent the irregular entry of aliens into the territory of the State is explicitly recognised as an option available to States in the exercise of their right to control migration. Under the ECHR this possibility is provided for by Art 5 (1)(f), which allows the detention of aliens to prevent them from carrying out **"an unauthorised entry"** into the country.

The same possibility is included under relevant instruments of EU law,[75] including the **Schengen Borders Code**[76] referred to in the previous chapter. Insofar as asylum seekers are concerned, **Article 8.3(c) of the Reception Conditions Directive,** states that applicants may be detained '(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory'.

Given the circumstances of its use and its usual brevity, detention upon arrival is often carried out in locations such as **international transit zones established at airports, purpose-built transit zones at the State's border and police stations**, among others, in addition to established detention and reception centres. At sea, the practice of holding migrants on board the rescue vessels transporting them – preventing their disembarkation on land – is also increasingly recorded.

Under the jurisprudence of the ECtHR, detention under art 5(1)(f) can be applied to **asylum seekers** (see *Saadi v the UK* §64). It is in fact accepted that "until a State has "authorised" entry to the country, any entry is "unauthorised" for the purposes of the Convention. The concept of unauthorised entry is interpreted broadly under the Court's jurisprudence and goes beyond cases where there is an active attempt on the part of the alien '*to evade entry restrictions'*. The application of this provision is hence unaffected by the fact that the alien in question is an asylum seeker who presented himself/herself to the authorities promptly upon arrival and declared his desire to '*effect an "authorised" entry*'. This circumstance does not place asylum seekers outside the scope of Article 5 § 1 (f) (*Saadi* §65).

3.2.1.1. Detention in Transit Zones

3.2.1.1.1. State Jurisdiction in Transit Zones

One of the main contentious aspects of the placement of aliens in transit zones (be it in airports or at the land border of the State) is the often-contested legal nature of such places. In many cases, especially in the case law of the ECtHR, States have raised objections to the assumption that their jurisdiction extends to transit zones, arguing that acts in such areas are 'extraterritorial'. The Court has so far not accepted such objections relying instead on the concept of control (*Amuur v France*).

75 EU FRA, Handbook on European law relating to asylum, borders and immigration - 2014 edition , p. 150

76 REGULATION (EC) No 562/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Repealed and replaced by Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

Despite this objection, cases like *Hirsi* (examined in detail elsewhere in this Handbook), have long confirmed the applicability of the Convention to cases involving migrants outside of the geographical territory of the State, if the State's authorities exercised effective authority or control over them (the *Hirsi* case concerned the high seas).

In the case of Hungary, two of its Transit Zones with Serbia have been at the core of legal cases: for instance, the Global Detention Project addressed the 'Roske' Transit Zone (see below *Ilias and Ahmed* case) explicitly mentioning that '*Hungarian authorities claim that the transit zone is located outside the Hungarian soil*'.

This claim was made in the ECtHR case of ***Ilias and Ahmed v Hungary***[77], decided at the Chamber level and currently awaiting the judgment of the Grand Chamber, following its referral. In this case, the Government indeed alleged that '*since the applicants had been free to leave the territory of the transit zone in the direction of Serbia, they in fact had not been deprived of their personal liberty. Article 5 of the Convention was therefore inapplicable*' (§ 49). The Chamber judgment reiterates that it '*has already found that holding aliens in an international zone involves a restriction upon liberty which is not in every respect comparable to that obtained in detention centres. However, such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively*'.

Where state jurisdiction is established, the state in question is obliged to comply with the legal standards regulating the use detention that it has undertaken.

3.2.1.1.2. At Airports

Amuur v. France, no. 19776/92, is one of the first cases where the Court considered the protracted holding of migrants in the international transit zone of an airport, finding that such measure had violated Article 5(1) ECHR in the circumstances of the case. This judgement explicitly clarifies that ECHR safeguards apply equally to those held in international transit zones in the airports of Contracting States.

The applicants complained in particular that the combined effect of the inadequate conditions of "detention" in the transit zone (§38) and the excessive length of the measure had been liable to raise issues under Article 5(1), also in view of the fact that 'as asylum-seekers [they should] have enjoyed special protection and more favourable treatment than unlawful immigrants'.

Amuur v. France[78]

The applicants, four Somali nationals, arrived in France, Paris airport, from Damascus, Syria, by plane after fleeing the regime in Somalia due to fear for their lives. They were part of a larger group of migrants reaching France at the time. They were prevented entry into the country due to their documents having been falsified and held in the transit zone for up to **20 days,** under continued police surveillance and with no legal and social assistance For an extended period 'neither the length nor the necessity of their confinement were reviewed by a

77 *Ilias and Ahmed v. Hungary*, no. 47287/15

78 *Amuur v. France*, no. 19776/92

court'**.** The Minister of Interior refused them the right to enter the territory and eventually decided to send them back to Syria,(in breach of interim measures ordered by the European Commission) thereby depriving them of the possibility 'to make an effective application to the authority having jurisdiction to rule on their refugee status'.

The other 18 Somali nationals who travelled with them were granted refugee status. The applicants appealed unsuccessfully to the Refugee Appeals Board against their detention, complaining that the measure endured had been in violation of **Art. 5 paragraph 1 of the Convention.**

The case clarifies that irrespective of the formal nature of the premises used to hold migrants, the Court places decisive importance on the substance of the treatment endured, taking in consideration the material conditions afforded to those restricted, with due regard to their individual circumstances, as well as the length of the overall detention. The case also supports the approach consistently upheld by the Court whereby – on account of their disadvantaged initial condition - **asylum seekers** in detention have enhanced vulnerabilities and should be afforded additional safeguards to those granted to irregular migrants in detention.

Without prejudice to the above, the Court however in *Amuur* took the opportunity to make an important statement of principle concerning the **holding of migrants in international zones at airports. It considered that this would normally amount to a "restriction" rather than a "deprivation" of liberty and would only become a deprivation**, if prolonged excessively. It differentiated such restrictions from detention in dedicated centres, which is formally recognised as 'migration detention' (§43). The Court states that:

'43. Holding aliens in the international zone ***does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres*** *[…]'.*

At the same time however, and because of the fundamental difference between these measures, the Court gave a restrictive interpretation of permissible types of confinement in transit zones, which must abide by the following criteria in order to be in conformity with the Convention (§43):

- Some requirements for confinement in Transit Zones to be compliant with the Convention
    1. It is acceptable only if '**accompanied by safeguards for the persons concerned**' (*Amuur*, § 43);
    2. It shall not 'be **prolonged excessively'** and where an extension of its use is ordered it should provide for a 'speedy review by the courts';
    3. It should have due consideration to the circumstances of asylum seekers as people 'who, often fearing for their lives, have fled from their own country';
    4. It shall only be employed 'in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly [the Gene-

va Convention and the ECHR]'. The use of confinement to this effect **'must not deprive asylum-seekers of the protection afforded by these conventions'**. From the angle of State's responsibilities, this should be read as requiring that the possibility to express protection needs while in the transit zone should be made effective: it 'must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status'.

The applicants in the case of *Amuur* were held for a period **of 20 days**, kept under continued **police surveillance** and for an extended period were not given 'legal and social assistance - particularly with a view to completing the formalities relating to an application for political refugee status' (§45), until they were eventually approached by a humanitarian organisation (that facilitated their contact with a lawyer) and allowed entry in the transit zone. The applicants' confinement lacked all forms of **review**, as for an extended period – effectively until they started receiving external assistance, '**neither the length nor the necessity** of their confinement were reviewed by a court'

In ***Riad and Idiab v. Belgium*** **(**nos. 29787/03 and 29810/03) the Court examined again the issue of confinement in transit zones in airports, considering the conditions faced by two Palestinian nationals in the transit zone of Brussels National Airport. In this case the applicants' confinement was solely based on their irregular entry and on their lack of a lawful residence permit [§100]. In contrast to the situation addressed in ***Amuur***, in this case the Court had to deal with significantly different temporal circumstances, as the placement in the Transit Zone occurred '**not upon [the Applicants'] arriva**l in the country **but more than one month later,** after decisions had been given ordering their release' (§67).

Further to what it had found in ***Amuur***, the Court attached importance to the fact that detention had been ordered for an '**indefinite period** and eventually lasted fifteen days and eleven days respectively'.

The Applicants' complaints concerned both the **unlawfulness of detention** under Article 5(1) and the **material living conditions** and the **length** of detention (more than 10 days), raising issues under Articles 3 and 8.

⇒ See a more detailed analysis of ***Riad and Idiab v. Belgium*** in Chapter I (Access to Territory)

⇒ See more on ***Riad and Idiab v. Belgium*** below in the sections on '**Lawfulness of detention**' and '**Conditions of detention**' of this Chapter.

Riad and Idiab v Belgium

In ***Riad and Idiab v Belgium*** (nos. 29787/03 and 29810/03) two Palestinian refugees reached Belgium by plane from Sierra Leone, with Lebanese travel documents. They were refused entry into Belgium at their arrival at the airport, on grounds of their lack of a valid visa (§7 and 14), despite declaring their **international protection needs on the same day of their arrival** and explicitly expressing that they would have faced risks upon return to Lebanon (§7-8). A decision to confine the applicants in the transit zone was taken on the same day (§9) and a negative decision on the asylum application of the first applicant was taken only 4 days later (§10).

While in the transit zone, the Applicants were directed to a separate area 'the INADS Centre', in order to obtain food and something to drink, but were allegedly returned to the transit zone, maintained there for 3 days and advised 'to fend for themselves' as far as their basic needs were concerned (§29).

An extended summary of this case can be found in **Chapter I.**

In the more recent case of ***Z.A. and Others v. Russia*** (nos. 61411/15, 61420/15, 61427/15, and 3028/16), currently awaiting the judgment of the Grand Chamber of the ECtHR, the Court has addressed once more the problematic issues raised by the prolonged confinement of aliens in the transit zone of airports, examining the specific case where asylum claims submitted during this time halt the execution of a return decision.

Z.A. and Others v. Russia

In ***Z.A. and Others v. Russia*** the applicants complained about their detention while in the transit zone of Sheremetyevo Airport and about the inadequate conditions sustained therein. The applicants are nationals of different countries, including Iraq, Palestine, Somalia and Syria. The applicants were confined in the transit zones for different lengths of time. Their accounts were however consistent in denouncing the **inadequate conditions in the transit zones**, including the lack of dignified sleeping facilities and showers, the overall unsavoury environment and the lack of a structured services providing food. While in the transit zone, the applicants lodged asylum applications raising different personal factors of risk in the event of return but their claims were either not adequately processed or were summarily rejected.

In its assessment of whether the treatment suffered by the applicants in the transit zone was liable to give rise to a violation under Articles 3 and 5 of the Convention, with regard to detention conditions and the material and procedural aspects of the measure, the Court (in the Chamber judgement) noted some issues differentiating the *Z.A.* case referred to above from its previous jurisprudence:

1. It noted that the **periods of detention** in the transit zone went from 5 months and 22 days to 1 year and 11 months and were hence **of significant duration**.
2. It remarked that, as far as the **determination of whether there had been a deprivation of liberty was concerned,** the situation of the applicants in *Z.A* was significantly different from to the one in ***Mahdid and Haddar v. Austria*** (no. 74762/01). While the applicants in the Austrian case – failed asylum seekers – refused '*to go to another country in respect of which they had valid visas and destroyed their passports in an attempt to force the Austrian authorities to accept them'*, in the Z.A. case the Applicants' asylum claims were still pending and they did '*not have the option of entering a State other than that which they had left'*. In the absence of such alternative, the Court observed that '*the applicants did not choose to stay in the transit zone [...] and thus cannot be said to have validly consented to being deprived of their liberty'* (§89). The existence of a degree of choice, on the side of the alien subjected to confinement, as to

the possibility of moving to a different country – other than the one where he fears return – plays a role in determining whether there has been a deprivation of liberty in the particular case. This aspect is further discussed below on '**the possibility to leave** the transit zone

3.2.1.1.3. The possibility to leave the transit zone

One key feature distinguishing the holding in transit zones and other atypical confinement places from detention in purpose-built centres is the **theoretical possibility for those held to leave the premises of the transit zone.** The Court has addressed this contentious issue at various points in its case law, rejecting the effectiveness and feasibility in practice of leaving the transit zone and considering the risks entailed by such a decision.

In ***Amuur***, the Government had relied in part on the semi-closed nature of the transit zone – declaredly only 'closed on the French side' but 'open to the outside' – as decisive for the purposes of determining whether there had been a deprivation of liberty in the case at hand. Admittedly, the only option open to the Applicants at the time was to return to Syria, where – in the Government's view – their safety would not have been at risk, given that the country's authorities had provided guarantees and the applicants themselves had not raised any risk factor in their cases. The Court however noted that:

'(§48)*…[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****, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4)*'

Furthermore, the **alternatives concretely available** to the person deciding to leave the transit zones were also regarded as relevant. In ***Amuur*** the fact that 'no other country offering protection comparable' to that expected in France was 'inclined or prepared' to receive the applicants was considered to render the possibility to leave the transit zone **a theoretical one**.

Amuur v. France

In ***Amuur v. France*** the effectiveness of the applicants' ability to enter and receive adequate protection in Syria 'were dependent on the vagaries of diplomatic relations, in view of the fact that **Syria was not bound by the Geneva Convention relating to the Status of Refugees'**.

3.2.1.1.4. In purpose-built Transit Zones at the border of the State

In view of the increased recourse to migration via land routes, particularly in the 'Balkans route', there has been an increased use of **Transit Zones and centres** established at the land borders of the State.[79]

79 For an overview of existing and operating transit zones currently established at airports, land and sea borders see: https://www.globaldetentionproject.org/c-search?search=transit+zones

The transit zones established between Hungary and Serbia have been subject to considerable criticism in this respect. Hungary established transit zones at the border with Serbia in 2015, in conjunction with the institutional introduction of speedier 'border' asylum procedures, to deal with the increased migratory pressure on the Balkan route. Once admitted in the transit zones, 'asylum seekers cannot leave […] **unless they withdraw their asylum application** and return to Serbia'; they can be held in detention for up to 28 days.[80] Figures from the **Global Detention Project** report that in September 2015 new transit zones were established at the Hungarian border with Croatia (**Beremend** and **Letenye**).[81]

The ECtHR case of ***Ilias and Ahmed v Hungary*** was already decided at Chamber level and currently awaits the judgment of the Grand Chamber. It addressed the issue of transit zones, specifically examining the compatibility with the Convention of the prolonged confinement of asylum seekers in the *Roszke* transit zone on the border with Serbia

Ilias and Ahmed v Hungary

In ***Ilias and Ahmed v Hungary***, two Bangladeshi nationals had fled their country of origin and eventually arrived in Serbia and had then spent 23 days in the Roszke transit zone, which they could not leave in the direction of Hungary.

The Chamber found that holding them in the transit zone by the Hungarian authorities amounted a *de facto* detention, i.e that for all practical purposes, if not according to Hungarian law , they were being detained in the transit zone. This detention was being carried out in the absence of any formal or legal decision to that effect. Therefore, the applicant's detention could not be considered 'lawful' for the purposes of Article 5(1). In turn, this also meant that, in the absence of a formal decision, it was not materially possible for the applicants to challenge their detention and as such the requirement - under article 5(4) - that one have access to a speedy and effective judicial remedy to challenge their detention was also violated.

See more on ***Ilias and Ahmed v Hungary*** in the sections on '**Lawfulness of detention**' and '**Conditions of detention**'

3.2.1.2. In Police custody

In the context of measures to curb irregular entries, deprivations of aliens' liberty or restrictions of their freedom of movement can often take place in police stations. By reason of the particular designated use of these premises, the holding of migrants in police stations can be characterised by insufficient and/or inadequate procedural and material safeguards. This is particularly the case in situations involving migrants with special protection needs such as asylum seekers, and especially **children.** Some cases currently pending before the Court raise some problematic aspects of this practice.

80 See: https://www.globaldetentionproject.org/countries/europe/hungary

81 https://www.globaldetentionproject.org/countries/europe/hungary

HA and Others v Greece

In ***HA and Others v Greece***[82], a communicated case, still pending the court was faced with the plight of **9 asylum seeking children** who arrived in Greece and were detained in various police cells for around a month in total. The applicants allege that during their period in detention they were victims of mistreatment at the hands of the police, experiencing several episodes of panic attacks for which appropriate medical assistance was not available. The fact that the children were detained along with adults and others, is alleged to breach the requirement that their detention be lawful within the meaning of article 5(1).In addition to that, the fact that at no point were they provided with interpretative or legal assistance, the applicants allege, meant that they were not able to effectively challenge their detention before the domestic courts. The applicants also allege that as they were at no point informed in a language that they could understand of the grounds of their detention, this also violated Art 5(2).

Abdolkhani and Karimina v Turkey

In ***Abdolkhani and Karimina v Turkey***[83], the ECtHR was faced with a situation of two Iranian nationals and former members of an Iranian militant political organisation. They were detained upon arriving in Turkey from Iraq, having previously been resident in a refugee camp there. Upon arrival, they were detained in the **foreigners department of the police headquarters**. They were then convicted of illegal entry into Turkey and given a deferred sentence, and so remained in the police headquarters. Following assistance from UNHCR, the two applicants were transferred to a 'Foreigners' Admission and Accommodation Centre'. Further information on the Court findings in this case can be found in the dedicated section below.

Sh. D. and Others v. Greece

In the case of ***Sh. D. and Others v. Greece* (no. 14165/16),** currently pending before the ECtHR, one of the 5 applicants - all unaccompanied Afghan minors – complained to the ECtHR about the conditions of detention faced while in police custody in Greece. Such measure was adopted upon the apprehension of the applicant at the border at the hands of the Greek police, who placed him under a 'child protection' order ('*garde de protection pour mineurs*'), before his transfer to a juvenile shelter.

More recently the Court restated its position with regard to the use of police custody as a detention measure in cases involving asylum seekers in the case of ***S.Z. v Greece***[84] involving the placement in custody and subsequent pre-deportation detention of a Syrian national, where it accepted that '*the applicant's placement in a police station in September 2013 amounted to "deprivation of liberty"*' (§52). In that case, the Applicant had argued that his placement in a detention facility established in the basement of a police station, for a total of 52 days, without adequate material conditions and for an excessive time length had in itself given rise to issues under Article 3 ECHR. The Court moreover observed that when considering the conditions of aliens confined in police station**,** the **prolonged use**

82 *HA and Others v Greece*, no.19951/16

83 *Abdolkhani and Karimina v Turkey*, no. 30471/08

84 *S.Z. v Greece*, no.66702/13

of such premises as detention centres has in itself relevance for the purposes of Article 3, on account of its inherent inconsistency with the '*nature of police stations per se, which are places designed to accommodate people for a short time only*' (§40).

3.2.1.3. Detention on board vessels

In ***Khlaifia and others v Italy*** the Court considered the compatibility with Article 5 of the confinement of asylum seekers on two ships harboured in Palermo, accommodating 190 and 150 people. The measure was ordered and maintained in execution of a decision to refuse their entry on the territory of the State. The confinement lasted 6 and 8 days in the case of each applicant.

While the applicants in this case, Tunisian nationals, were initially placed in a temporary reception centre and were only after transferred onto the vessels, the Court considered that the vessels "[….] *according to the Government themselves, were to be regarded as the "natural extension of the CSPA*".

Insofar as the concrete restrictions imposed on the applicants, were concerned there was "*no evidence in the file to suggest that the applicants could have left the ships, not even when they were moored in Palermo harbour'* (§69), and the duration of the treatment itself was considered '*not insignificant'* (§70).

In ***Medvedyev v France*** (no. 3394/03) the Court considered the alleged violation of Art. 5(1) and (3) by the French authorities in the context of detention at sea of the applicants and the consequent delay in bringing them before a court. The applicants were on board a Cambodian vessel when they were intercepted by French authorities on suspicion of drug smuggling. Those aboard were confined on the vessel for a 13 days period until they reached a French port. The Grand Chamber in *Medvedyev* held that the applicants were within French jurisdiction and found a violation of Article 5(1). Moreover, the Grand Chamber stressed the need of affording individuals the rights and guarantees protected by the ECHR because "the special nature of the maritime environment relied upon by the Government in the instant case **cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction**, any more than it can provide offenders with a "safe haven." (§81)

The case will be examined from the angle of **conditions of detention** in the section below.

3.2.1.4. Confinement of asylum seeker in fast track detention centres upon entry into the territory

In some cases detention can be employed at a later stage, after the Applicant has reached the territory of the State, for purposes of verifying the validity of the grounds on which he/she requests leave to enter. In cases involving asylum seekers, such measure is normally employed to prevent that they abscond while their status has not yet been assessed. Detention for this purpose technically falls under Article 5(1)(f), whereby the detention of aliens can be employed to prevent '*unauthorised entry*' into the territory. However, in view of the recognised invasive effects of detention and having regard in particular to asylum seekers' inherent vulnerability, the use of this type of detention should – as a rule – be strictly limited, especially when less invasive alternatives could be explored.

The leading case of ***Saadi v the UK*** **(**no. 13229/03) gave rise to the Court's now established approach to detention of asylum seekers for the purposes of assessing their status. The case constitutes the Court's very first interpretation of the provision under Article 5(1)(f), whereby the Convention regulates detention 'to prevent [...] an unauthorised entry into the country'.

Saadi

In ***Saadi***, the applicant – an Iraqi national of Kurdish origin – had tried to claim asylum directly at the airport, upon reaching the UK. Following a short time under a temporary admission scheme, the Applicant had shortly been transferred to a Detention Centre (Oakington Centre). Overall the Applicant was detained for a total of **7 days** (§42) and was released the day after the negative outcome of his asylum claim at the first instance.

In this case the Court did not contest the nature of the measure endured by the applicant, which was straightforwardly accepted as a deprivation of liberty.

As to whether such deprivation had been **justified** on the basis of the Convention and compliant with its requirements, the Court concluded that given the overall limited length of the detention, the prompt release of the applicant and the adequate material living conditions ensured throughout the Applicant's experience did not give rise to a violation under Article 5(1)(f). However, in spite of the objective conditions of detention – examined above – the Applicant was found not to have been provided with adequate **procedural guarantees**, including information '*on genuine reason for his detention*', which were given to him days (76 hours) after the arrest and upon his legal representative's explicit request. The UK was thereby found to have failed to meet the requirement of **promptness** in the provision of information to detainees, as provided under Article 5(2).

⇒ The **provision of information** under Article 5(2) will be examined in more detail when considering procedural guarantees in migration detention at large.

3.2.1.5. Detention of Asylum Seekers in 'closed' reception centres

In recent times, the Court was confronted with cases challenging the legality of the use of closed reception centres for asylum seekers and migrants claiming to have international protection needs.

In the aftermath of the EU-Turkey 'deal' of 18 March 2016, the use of such closed centres became an ordinary practice in the Greek islands of Chios, Lesvos and Samos, among others.

The protracted confinement of asylum seekers and vulnerable migrants in such centres, often in appalling living conditions and without access to material or procedural remedies to obtain information as to their status or challenge the measure ended in creating the conditions of *de facto* detention.

J.R. and Others v Greece

In the case of ***J.R. and Others v Greece* (no. 22696/16)** the ECtHR examined specifically the conditions of confinement in the Greek hotspots in the aftermath of the EU-Turkey deal, examining their compatibility with Article 3, insofar as living conditions are concerned, as well as with Article 5.

The findings of the UNHCR on the situation in question, as cited by the Court itself at §§ 80,81 and 82, described the measures adopted as weeks-long confinement in 'closed structures', without providing migrants with information on the grounds or duration of the measure nor of the available remedies to challenge it.

On account of the peculiar situation generated by the EU-Turkey deal, sealed at a time of particularly high migration pressure, the UNHCR reported that confinement ordered at such point in time in the Greek islands was virtually **automatically applied** to all those reaching Greece after the 'deal' and was not accompanied by an individualised assessment of migrants' circumstances nor access to remedies (§82).

The growing use of closed-centres for asylum seekers and migrants contributes to blurring the line between 'reception' and 'detention' of migrants, with obvious implications on the rights of those involved. As places intended to accommodate and temporarily host migrants with protection needs, reception centres and camps are normally characterised by certain features, which distinguish them from detention centres.

Broadly, these reception facilities should be characterised by the relative freedom and autonomy of those accommodated to temporarily leave the premises, which should reflect the fact that migrants in the centre are not subjected to a punitive measure but are merely temporarily restricted for the purpose of determining their status.

It has been examined above that the **form and legal definition of the measure** is not decisive for the purpose of finding whether there has been a deprivation of liberty or an arbitrary restriction of the freedom of movement of the individual concerned. The reasoning of the Court is in fact one based on the **substantive aspects and the 'essence'** of the measure rather than on its mere name. Accordingly, to determine whether there has been a deprivation of liberty, the Court takes into account different criteria, which include 'the nature, duration, effects and implementing rules for the measure in question' (§83, ***J.R. and Others v Greece*).**

For the same considerations, and as explained above in the section dedicated to restrictions on freedom of movements, where a measure does not reach the threshold required to find that it falls within the scope of Article 5, it can still give rise to an undue restriction of the freedom of movement under Article 2 of Protocol 4, as the difference between the two forms of violations is one 'of degree or intensity, not of nature or of essence ((§83, ***J.R. and Others v Greece***, cross referencing ***Amuur c. France, § 42***) Accordingly, the placement in facilities intended for 'reception' under national law of the country cannot be ruled out as a measure of deprivation of liberty just by virtue of the formal classification; regard must be paid to its substantive aspects. Accordingly, in some circumstances reception measures can be in violation of Art 5 and/ or Art 2 of Protocol 4.

3.2.2. Detention with a view to deportation or return

Following their apprehension at the border, aliens placed in custody or detention on the grounds of their irregular entry can be subjected to different treatments. In cases involving potential asylum seekers, detention at the border is normally intended to make a preliminary assessment of their situation. Restrictions of movements at the border should normally be followed by the prompt release of the individual once ascertained that he/ she intends to claim asylum or seek other forms of protection in the country.

The Court makes it explicit in the case of *Saadi v the United Kingdom* by stating that: " *[…] States are permitted to detain would-be immigrants who have applied for permission to enter,* ***whether by way of asylum or not****. It is evident from the tenor of the judgment in Amuur that the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5* § 1 (f)".[85]

In other cases however, once the status of the individuals concerned has been verified and the authorities have reached a negative conclusion on the possibility of allowing them into the territory, detention can be sometimes prolonged. In such cases, the underlying reason for detention will convert from detention for preventing irregular entry to detention with a view to executing a decision to return.

3.2.2.1. Asylum Seekers and people with special needs in pre-deportation detention

Pre-deportation detention is often used to restrict aliens' freedom of movement or liberty. Recognised asylum seekers, who have lodged an application for international protection, should not be subjected to such deportation measure prior to the processing of their asylum applications and in view of the risks that they would face upon return to their country of origin and on account of their vulnerability as asylum seekers.[86]

Migrants who are on the territory of the State after the validity of their visa/permit become **overstayers** and hence have no formal title to remain in the country. In such circumstances, where the said individuals are picked up by the police or other public authority and their lack of status is noted measures could be taken with a view to deport them and can include their placement in migration detention.

85 *Saadi v. United Kingdom,* no. 13229/03, § 64

86 *M.S.S. v Belgium and Greece* [GC], no. 30696/09, § 251

As far as **overstayers placed in pre-deportation detention** are concerned, removals from the EU area are regulated by the Return Directive (Dir 2008/115). In the CJEU case of ***Achughbabian*** (C-329/11) the applicant – not an asylum seeker - who was alleged to be a national of Armenia - was arrested in France and a deportation order was issued against him. As he was resident on French soil having outstayed the length of his visa - a criminal offence under the French code - the French authorities ordered that he be placed in police custody and then in detention for an unlawful stay. The Paris Court of Appeal, referred this dispute to the CJEU and asked whether Directive 2008/115 would preclude national legislation from imposing a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in national territory. The CJEU found that EU law precludes national legislation permitting the imprisonment of a third country national staying illegally who has not been subject to the coercive measures referred to in the Directive. MS may nevertheless adopt criminal provisions, in compliance with the Return Directive, with regard to situations where the coercive measures have not enabled the removal of an illegally staying third-country national to take place.

In other circumstances migration detention and deportation may come as an **additional or alternative penalty** to the sanctions deriving from a criminal conviction. When a criminal offence of certain severity is committed by an alien – depending on the circumstances of the case and the domestic legislation of the country – a decision may be taken to withdraw his/her residence status and to issue a decision to return him/her, as an alternative to (or on top of) imposing a criminal sanction.

In such cases, the aliens affected by the measures have normally not previously drawn attention to their protection needs or relied on them in any way during their stay in the country. This can be due to the fact that they have not relied upon them for the purposes of obtaining residence or because such needs **did not yet exist** at the time of their entry into the country and only emerged at a later stage due to changes in the alien's personal circumstances or in his/her country of origin/ previous residence.

While it is a generally recommended principle for aliens to express their protection needs at their earliest convenience, the failure to do so should not prejudice their right to a careful scrutiny of such instances once they are expressed, especially when a failure to do so may result in a decision to return the person to face irremediable risks. As a consequence, the **right to claim asylum / international protection from within places of detention** should be protected both by providing a careful assessment of the alien's circumstances and by creating the conditions for such claims to be adequately received in this setting. This often requires a positive effort on the side of the State, who has to ensure that the detention facility personnel is adequately trained to receive protection requests, that the premises of the facility are adequate to host people with special needs and that adequate medical, social and legal assistance services are able to enter the premises and meet with detainees.

3.2.2.2. Standards and guarantees in pre-deportation under the ECHR

Detention to carry out a decision to return is explicitly provided for under Article 5 § 1 (f), which envisages the possibility to use detention in relation to **(f) […] a person against whom action is being taken with a view to deportation or extradition'**. Accordingly, detention will only be justified *'as long as extradition or expulsion proceedings are in progress'*. The scope of this formula will be further explained below.

Under the ECHR, the conditions under which it is permissible to use detention against aliens are exhausted by the wording of Article 5(1)(f), with the result that there is **no need to prove further elements**, such as whether this particular measure should be *'reasonably considered necessary, for example to prevent his committing an offence or absconding'* (*Yemifova v Russia*, no 39786/09 §254). The Court hence places no weight on whether at the domestic level, '*the underlying decision to expel can be justified under national or Convention law'* (*Yemifova v Russia* citing *Čonka v. Belgium*, no. 51564/99, § 38 and *Chahal*, § 112).

Through its jurisprudence on the issue, the Court has identified various standards that apply to pre-deportation detention, which must be respected in order for the measure itself to be ECHR-compliant. Some of the main elements and standards developed by the Court when dealing with the compliance of migration detention with the safeguards under the ECHR will be outlined below:

1. **The lawfulness of pre-deportation detention:** as all forms of detention under Article 5, pre-deportation detention must have a clear basis in the domestic law of the State and shall not be arbitrary. The exact scope and meaning of these terms will be examined in detail in the dedicated section on '*lawfulness'* and '*arbitrariness'* in migration detention below. However, at this stage it is helpful to recall that in the specific context of pre-deportation, the provision regulating the ordering and extending of detention must be '***precise and foreseeable'*** and must set '***time-limits for such detention'* (*Ismoilov and others v Russia*, 2947/06, §140).** The re-assessment of the justifiability and necessity of pre-deportation detention is also crucial.

   ⇒ *More on the lawfulness and non-arbitrariness of detention in the dedicated section below.*

2. **The persistence of deportation procedures:** a key element of the legitimacy of pre-deportation detention under Article 5(1)(f) lies in the continued implementation on the side of the State of actions aimed at carrying out the decision to return the detainee. The Court talks in this sense of whether, in the specific case where detention is employed, "**action is being taken with a view to deportation**". The leading case where this test was employed in the context of detention with a view to return is the ***Chahal v. the United Kingdom*** (§ 112), whereby '[a]ny deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified only for as long as deportation or extradition proceedings are in progress' (see *S.Z. v. Greece* no. 66702/13, citing *Chahal*).

Where this condition no longer exists, the decision to detain can also lose its underlying justification. In this sense the Court argued that where '[*detention] proceedings are not prosecuted with due diligence, the detention will cease to be permissible*' (see *S.Z. v. Greece* (66702/13), citing *A. and ors v. the UK* [GC], no. 3455/05, § 170). To determine what can be counted towards the finding that "**action is being taken with a view to deportation**" the Court has given weight to different circumstances:

- Whether the removal, as the intended objective of detention, is '**a realistic prospect'** in the case under consideration *(Ahmed v The UK no. 13/59727; Louled Massoud v. Malta, no. 69 § ,08/24340, A. and ors v. the UK [GC], no. 167 § ,05/3455, Amie and ors v. Bulgaria, no. 144 § ,08/58149, and Mikolenko, no. 68 § 05/10664).* On the concept of realistic prospect of deportation see *Mikolenko,* below:

Mikolenko v Estonia

In ***Mikolenko v Estonia***, a former Soviet army officer had been residing in Estonia from 1983. The Court found that his detention pending deportation to Russia for around 3 years and 11 months breached the protection against arbitrary detention in Article 5(1). Detention for the purposes of deportation is conditional upon the deportation being 'prosecuted with due diligence'. If this is not carried out, then the detention is considered arbitrary. […] Therefore, as his deportation had not been pursued with 'due diligence' - in particular the Court noted no evidence of any steps taken for around 1 and a half years with a view to his deportation - his detention was arbitrary and therefore breached article 5(1).

- To this end, in cases involving individuals claiming risks upon return, developments in the conditions of the country have been given weight in the assessment. In the case of ***S.Z. v Greece*****(66702/13)**, examined above in connection with the particular situation of asylum seekers in detention, the applicant claimed that his return to Syria was not feasible as it would have posed risks to his life and limb on account of the unfolding circumstances of the military conflict, among other things. In this sense, the importance of **reassessments of the necessity of detention** is heightened (*S.Z. v Greece*). In *S.Z.*, while the applicant had initially been unable to provide his passport as proof of his nationality, his detention had been maintained even after such document had been submitted and objections had been voiced, to the effect that the Applicant's detention was only discontinued once a positive decision was taken on his refugee status (21 more days) (*S.Z. v Greece* §57). The Court considered the provision of the above evidence and information as to making it '*incumbent on the domestic authorities [….] to consider* ***alternative measures***'.

S.Z. v. Greece

In ***S.Z. v. Greece*** the Applicant, a Syrian national was arrested and convicted on charges of having relied on a false passport for his stay in Greece, the Applicant was placed in pre-deportation detention in **the basement of a police station**. A decision to return was issued on the basis of the Applicant's illegal entry and lack of a valid residence permit and of his conviction for using false documents, considered to substantiate the conviction that his presence posed a danger to the public order (§7-8). The ECtHR found violations of the Applicant's rights under various provisions of the Convention. It found a violation of Article 3 owing to the conditions suffered by the Applicant in the Police station. This was both with a view to the objective characteristics of his detention and in light of its impact on the Applicant's personal situation.

As far as the deprivation of liberty is concerned, the Court found a violation of Article 5(1)f and 5(4), as a consequence of the failure to provide the Applicant with adequate procedural guarantees and of the absence of a realistic prospect of his actual return, which had ended the justification for his detention.

- **Causes of delay in executing deportation decisions.** Reasons for failing to execute a decision to return within a reasonable timeframe can stem from different factors and may be connected to the conduct of the detainee, delays on the part of the national authorities, lack of cooperation on the part of the authorities of the country of return or objective reasons, such as the lack of available means or resources to practically return the person.

Mikolenko v Estonia

In ***Mikolenko v Estonia***, the Court noted that it had become clear by the end of the first year of his detention that there was no realistic prospect of his deportation **due to the applicant's lack of cooperation,** which was realistically required, **and the unwillingness of the Russian government to issue travel documents** or to accept temporary travel documents issued by the Estonian government.

In the CJEU case of ***Kadzoev*** (c-357/09) the Court was faced with a Chechen national who had been detained by Bulgarian authorities before the coming into effect of the Returns Directive. He had been placed in detention in October 2006, and was still in detention in August 2009 when the case was heard and decided. Attempts to deport him to Russia had failed on account of i**nvalid travel documents, and no other countries were willing to receive him.**

The case of ***Singh v Czech Republic*** (no. 60538/00), below, provides an example of failings on the part of the authorities in the returning country combined with a lack of cooperation on the part of the country of return

Singh v Czech Republic

In **Singh v Czech Republic**, the ECtHR dealt with a case involving two Indian nationals who had been sentenced to 21 months imprisonment for facilitating irregular migration. As they were illegally residing themselves, an order to deport the applicants was issued at the end of this prison sentence. However, it was not until **2 years after their prison sentence had ended** they were released from detention pending deportation. The authorities had failed to secure the relevant travel documents from the Indian ambassador, who *inter alia* stated that there was no proof that they were Indian nationals. The Court found that the applicant's detention had been arbitrary - as well as excessive in length - as the authorities had failed to prosecute with due diligence the deportation proceedings as they had been unable to provide them with the relevant travel documents. The Court found that the courts had not dealt with the applicants' challenges to their detention promptly, as the challenges brought had taken 3 and 8 months respectively.

Even in cases where the causes preventing deportation are claimed to be 'objective' ones, the Court has sometimes found that the action or inaction of the sending State and the efforts made to overcome such obstacles may still have a bearing on the process. In ***M. and others v. Bulgaria*** (no. 41416/08) the Court noted that '*the obstacle to immediate deportation […] was the absence of direct flights from Bulgaria to Afghanistan*' together with difficulties in securing a valid identity document allowing the Applicant to be returned. Such difficulties were read in the light of the failure on the part of the state to take adequate steps or to show that sufficient efforts had been made to ensure the applicant's readmission (§74).

- Where **Rule 39 Measures**[87] are indicated by the Court to halt removal, the State cannot maintain the individual in pre-deportation detention indefinitely 'without resolving their legal status' (*Ryabikin v. Russia*, no. 132 § ,04/8320). Where **detention is extended past the indication of Rule 39 measures**, the Court observed that while the fact '*that expulsion proceedings are provisionally suspended […] does not in itself render the detention of the person concerned unlawful',* in order for it to remain justified it is necessary that *'authorities still envisage expulsion at a later stage'* and that the measure is not *'unreasonably prolonged'* (*Ahmed v The UK* no. 44§ ,13/59727; *Keshmiri v. Turkey, no. 34 § ,10/22426, K. v. Russia, no. 92-91 § ,11/69235).* In ***L.M. and Others v. Russia***,[88] the continued detention of aliens after Rule 39 measures had been indicated was found to violate Article 5. The domestic courts failed to verify the persistence of the intention to deport, considered in conjunction with the absence, under domestic law, of remedies to request judicial review of detention pending expulsion or obtain its automatic review at regular intervals (§50).

Suso Musa v Malta

In ***Suso Musa v Malta***, the Court found that an irregular migrant, who was detained for 2 years pending his deportation, which ultimately did not happen, breached the requirements of article 5(1) and (4). The challenge before a tribunal to this detention took around 1 year, and was held to be, along with a lack of other effective remedies, a breach of the requirement that detainees are able to challenge effectively and speedily their detention.

His detention lasted around 6 months for the first period - with another 5 months spent in a correctional facility due to a riot at the detention centre - and a second period of around 1 year, after which he was released, as his nationality was still unverified. The detention, under article 5(1), was only justifiable for as long as deportation proceedings were ongoing. As proceedings did not begin until January 2013, and it became clear in February that it would not be possible to deport him, this was also found to violate article 5(1).

The clear identification of the country of return: In the case of ***M. and others v. Bulgaria***, no. 41416/08, the Court considered that the lack of clarity regarding the coun-

87 The European Court of Human Rights may, under Rule 39 of its Rules of Court, indicate interim measures where there is an imminent risk of irreparable harm. For more detail see: ECHR Factsheet-Interim measures available at https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

88 *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, §§ 148-149

try of return could be considered '*problematic with regard to the requirement of legal certainty, inherent in all Convention provisions*' as it was liable to '*hamper effective control of the authorities' diligence in handling the deportation' (§69).*, The same judgement notes that while it is possible to face obstacles in carrying out a decision to deport to a given country, where '*other destinations are in principle possible, detention pending active efforts by the authorities to organise removal to a third country'* can fall under Article 5(1)(f) (*M.* and ors v. Bulgaria quoting Čonka v. Belgium, no. 51564/99, § 38 and *Chahal*, § 112).

4. LAWFULNESS AND NON-ARBITRARINESS OF DETENTION UNDER THE ECHR

In the previous section we have examined the permissible reasons for States to resort to migration detention, identifying them in the 2 permissible hypotheses under Article 5(1)(f), i.e. the prevention of irregular entry and the carrying out of a return decision. While compliance with this purpose is a pre-requisite for migration detention under Art 5(1)(f) to be ECHR compliant, it is not the only condition that it must satisfy. As will be examined in the coming sections, in order not to be in violation of the detainee's rights, detention under Article 5 must be **lawful, non-arbitrary and must offer adequate procedural guarantees and remedies allowing the person subjected to it to challenge it.**

Under Article 5(1), the Convention provides for the requirement of the **lawfulness** of detention by stipulating that deprivation of liberty must not only fall under one of the permissible grounds,but shall also be '*in accordance with a procedure prescribed by law'*. The interpretation of the exact scope and meaning of this provision has been at the core of different cases before the Court and it is hence possible to identify some of the main principles governing the issue.

4.1 Clear basis in national law

A minimum requirement for detention to be ECHR-compliant is that the possibility to resort to such measure must have a **legal basis** in law. In *Khlaifia,* the Court clarifies that for the purposes of this provision reference should be made to '*substantive and procedural rules'* of '*national law'* (§93). In order to qualify as 'law' within the meaning of Article 5, however, the legal instrument whereby detention is authorised and monitored must also satisfy the Court's criteria on the '*quality of the law'*, which requires it to be '*compatible with **the rule of law**' (Khlaifia, §93, cross referencing Amuur, § 50, and Abdolkhani and Karimnia,* § 130).

As far as the concrete conditions for the law regulating detention to be 'sufficiently clear', the Court resorts to its general understanding of lawfulness in other areas of its jurisprudence, stating that: the law should be '*sufficiently precise to allow the person […] to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail' (Khlaifia, §92, citing Baranowski v. Poland, no. 28358/95, §§ 50-52,* among others).

A bilateral agreement between the receiving country and the country of proposed return (relied upon by the Government in *Khlaifia)*, for instance, was not regarded as a 'clear legal basis' for detention, insofar as 'the full text of that agreement had not been made public' and it was hence not 'accessible to the applicants' (§102). On similar considerations, in ***Khudyakova v Russia***, no. 13476/04, the apparent disagreement between the authorities concerned with the detention of people awaiting extradition, which had manifested itself in 'inconsistent and mutually exclusive positions' as to which legal instrument regulated the measure (§73), led the Court to find 'that the deprivation of liberty to which the applicant was subjected was not circumscribed by adequate safeguards against arbitrariness' (§73).

Again in ***Khlaifia*** (cited above), the legality of the Applicant's detention was contested on account of the fact that it had occurred firstly in a temporary reception centre and later aboard ships harboured in the local port -without the guarantees afforded in pre-deportation detention and on the strength of a mere registration by the police. As it was lacking a legal basis, the measure had not been followed - as in pre-deportation detention- by a formal detention order requiring subsequent 'validation' by the judicial authorities (§105). The Court hence observed that the measure endured by the Applicants had lacked '*a clear and accessible legal basis*'.

4.2 Non-arbitrariness

Importantly connected to the requirement for the measure to be lawful is the condition that it is also free of arbitrariness. While the lawfulness of a measure is primarily based in its adherence to the letter of the law, its non-arbitrariness depends on a complex list of factors that are not always identifiable *a priori*. In its case law, the Court sets out the conditions that detention must meet so as not to be considered arbitrary: It '*must be* ***carried out in good faith****, [] **be closely connected to the grounds of detention** relied on by the Government, the **place and conditions of detention must be appropriate,** and the **length of the detention** must not exceed that reasonably required for the purpose pursued* (*S.K. v. Russia* (no. 52722/15), *Saadi v. the UK* [GC], no. 13229/03, § 74, *Rustamov v. Russia*, no. 11209/10, § 150 among others).

This range of requirements, not strictly related to the domestic legal term for detention but focused on its substantive aspects, prevents States from claiming to have fulfilled their responsibilities under the Convention by solely relying upon the existence of a legal provision regulating migration detention at the domestic level.

The different aspects of relevance for the purposes of ensuring non-arbitrariness – especially conditions and length of detention - will be examined in detail below.

4.2.1 "Carried out in good faith"

Various cases have contributed to define what constitutes 'bad faith' on the part of the authorities in ordering detention.

In ***Suso Musa v Malta***, the International Commission of Jurists (ICJ), third party intervener in the case, presented the argument whereby '*good faith in the imposition of detention **implied a measure of openness and due process** so that the procedures under national law which allowed for alternatives to detention or for release from detention, such as a period of voluntary departure, were not circumvented or manipulated so as to deprive them of meaning*' (§84). While not fully upholding this interpretation in its finding, the Court's examination of the arbitrariness of detention took into account the existence of '*a series of odd practices on the part of the domestic authorities, such as the **by-passing of the voluntary departure procedure** […] and the across-the-board decisions to detain, which the Government considered did not require individual assessment'.* In the light of this it expressed '***reservations as to the Government's good faith** in applying an across-the-board detention policy (save for specific vulnerable categories) with a maximum duration of eighteen months' (§100).*

In ***Longa Yonkeu v. Latvia* (no 57229/09)**, the Court addressed the issue of 'good faith' in a case of deportation of an asylum seeker, carried out in spite of the existence of an order to suspend it. In this case the Court rejected the Government's argument that this had been due to the Border Guard becoming aware of the suspension order only after the deportation was executed. The Court argued that the conduct of the Government disclosed bad faith, in that that irrespective of the suspension, the Applicant's status as an asylum seeker, of which the authorities were aware, made him in any event non-deportable (§143).

4.2.2. Length of Detention

Together with the issues around its basis in law and the procedural guarantees afforded to the detainee, the length of detention has an important role in determining whether detention can be considered 'arbitrary' under Article 5 and whether issues may potentially arise under Article 3 of the Convention. As a general rule, the ECtHR states that *"to avoid being branded as arbitrary […] the length of the detention should not exceed that reasonably required for the purpose pursued" (see A. and Others v. the United Kingdom, § 164, and Saadi, § 74).* There is, however, no explicit definition of what reasonable shall mean nor are there indications of what length of time the Court considers unreasonable or excessive. The appreciation of the length of detention depends on all circumstances of the case, including the conditions of the person subjected to it and the substantive and procedural guarantees afforded. While it is not possible to have a predefined rule, some parameters can be drawn from concrete examples in the existing jurisprudence.

In ***Khlaifia***, the Court considered the treatment faced by the applicants in 2 different situations of confinement: 1. While on board ships harboured in the local port and 2. While in a temporary reception centre. For both experiences, the Applicant claimed that the length of their detention had been excessive (§142). As it was mentioned, even when considerable, the length of detention is rarely considered to cause a violation under the Convention on its own; the significance and impact of an extended period in detention is measured in the light of the surrounding conditions of detention, taking into account 'the **cumulative effects** of these conditions, as well as of specific allegations made by the applicant (see ***Dougoz v. Greece***, no. 40907/98, § 46, ECHR 2001-II).

It is intuitive that the prolonged duration of detention is all the more serious where other factors of discomfort and distress - such as the overcrowding of the premises, the inadequacy of sanitary and hygienic services - are also present, in that the harm caused will exacerbate as time passes. In view of the above consideration, the Court has come to similar conclusions (often finding the measure as 'degrading treatment', (in violation under Article 3) in the context of significantly different detention periods. In ***M.S.S. v. Belgium and Greece (§§ 223-34)*** the applicant's detention in Athens airport had lasted only **11 days overall**. However, in view of the severity of the conditions suffered by the Applicant, which included allegations of police brutality and widely reported '**unacceptable**' living conditions, (§171, *Khlaifia* citing *MSS*), the Court still concluded that the threshold required to find a treatment contrary to Article 3 had been reached.

Applying similar considerations, in ***S.D. v. Greece*** (no. 53541/07, §§ 49-54, see *Khlaifia citation of the judgement §174*) the Court reached the same conclusion (a violation of Article 3) both with regard to the 2-months of confinement of the Applicant in a pre-fabricated unit offering inadequate living conditions (§ 51) and with regard to a **6-day period in detention**. (*S.D. v. Greece* §§ 53, 54)

On the other hand in the case of ***Saadi v The UK*** the Court considered that the **7-day detention** of an asylum seeker, followed by his release upon the adoption of a negative decision on his asylum application could not '*be said to have exceeded that reasonably required for the purpose pursued' (*§79).

4.2.3. Existence of viable and less restrictive alternatives to achieve the purpose

In examining whether the ordering of detention has been exempted from arbitrariness, consideration is given by the Court to whether **alternative and less invasive measures** existed and were viable at the relevant time, which could have achieved the aims pursued through detention, and whether the **authorities considered them** before resorting to detention.

The general non-desirability of asylum seekers' detention and the limits on migration detention have been outlined in the previous section of this chapter. In view of its invasiveness, the requirement to treat detention of migrants as a last resort and the obligation to establish whether alternative measures to it exist follows naturally from this premise. In the Court's case law, measures such as *'electronic tagging, monitoring by telephone and/or regular reporting to an immigration officer'* are considered under this category.

The Court identified different cases where the authorities were faced with this assessment, with varying results. In ***Ahmed v The UK*** (no. 59727/13), for instance, the authorities justified their choice to use detention in the particular case on the grounds of the applicant's previous conduct, with reference to the '*number and seriousness of the offences he had committed in the past and the substantial likelihood of his re-offending, which was characterised as "high"'* as well as his 6 previous attempts to abscond (§56). Regard for these factors made, in the UK's view, alternatives 'ineffective' in the particular case.

The Court reached different conclusions in the cases of ***S.Z. v. Greece*** (no. 66702/13) and ***S.K. v. Russia*** (no. 52722/15), where the authorities had tolerated unreasonable delays in releasing the Applicant from detention, despite being aware of the impracticability of deportation in his case. This state of things made it, in the Court's view '*incumbent on the domestic authorities […] to consider alternative measures'*.

Rusu v Austria

In ***Rusu v Austria***, the Court was faced with the situation of a Romanian national whose travel documents had been stolen in France and who was attempting to return to Romania. She was later arrested trying to leave Austria by Hungarian border police, returned to Austria and placed in detention pending deportation. Among other considerations, her detention - for reasons that she would likely abscond and that she was an illegal immigrant into Austria - was not justified having regard to her personal situation. She had, in particular, been arrested trying to leave Austria. **Less severe measures could have been used** to ensure her compliance with the deportation proceedings, and therefore, there was an element of arbitrariness in her detention and so there was a violation of Article 5(1).

4.2.4. Adequacy of conditions of detention under the ECHR

In addition to Article 5(1)(f), the detention of migrants and asylum seekers can raise issues under other limbs of the prohibition of the deprivation of liberty, as well as under separate provisions of the ECHR. The **material conditions** in which migrants are kept while confined for one of the purposes explained above has a prominent role in this sense. The inadequacy of such conditions can be liable, by itself, to constitute breaches of Article 3. Inadequate conditions of detention can also disqualify the measure from being 'lawful' and non-arbitrary under Article 5(1).

As a general principle the Court stipulates that States '*must ensure that a person is detained in conditions which are **compatible with respect for human dignity,** that the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, giv-*

en the practical demands of imprisonment, his or her health and well-being are adequately secured' (§105 *Z.A. and others v. Russia*, Grand Chamber judgment pending).

When **asylum seekers** and **other vulnerable migrants** are concerned, the importance of adequate conditions of detention/reception is enhanced due to their status of members of a 'particularly underprivileged and vulnerable population group in need of special protection'.

The duty to provide dignified reception conditions has been analysed by the ECtHR in a number of cases.[89] In ***M.S.S. v. Belgium and Greece***, benchmark for the Court's jurisprudence on 'Dublin cases', the applicant had complained that due to *'deliberate actions or omissions'* of the Greek authorities he had been left in a status of destitution and had been unable to cater for his basic needs.

The conditions of detention in some premises can be inherently more prone to cause a violation of the Applicant's rights, due to their structural inadequacy. For instance, the Court described **Airport transit zones**, which are recognised as fundamentally unsuitable for long confinements, as 'by definition ill-equipped' in this sense, in that they lack 'such basic amenities as beds, showers, and areas designated for cooking' (See 107 of *Z.A. and others v Russia*, nos. 61411/15- Grand Chamber judgment pending).

4.2.4.1 Insufficiency and inadequacy of reception measures

Importantly, in *M.S.S.* the issue of reception conditions was analysed from the standpoint of the insufficiency of facilities designed to accommodate asylum seekers at the material time, which compelled asylum seekers to survive homelessness. The Court noted that the Greek authorities' failure to comply with their obligations under EU law in this sense had created a situation whereby the applicant was prolongedly '*forced…into living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs* (§263)'. The situation was considered such to cause the applicant to have '*feelings of fear, anguish or inferiority capable of inducing desperation'* which, combined with 't*he prolonged uncertainty…and the total lack of any prospects of [the applicant's] situation improvin*g' reached the level of severity required to cause a violation of Art.3 ECHR.

4.2.4.2. Need for the reception measures to be adapted to the individual circumstances of asylum seekers

In ***Tarakhel v. Switzerland***,[90] the Court observed that the State of the Italian reception system for asylum seekers, 'a*lthough […] not comparable to the situation in Greece […] in*

89 N. *v. the UK* [GC], no. 26565/05; *Tabesh v. Greece*, no. 8256/07; *Louled Massoud v. Malta*, no. 24340/08; *Rahimi v. Greece,* no. 8687/08; *I.M. v. France*, no. 9152/09; *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, no. 27725/10; *Shari and Others v. Italy and Greece*, no. 16643/09; *Tarakhel v. Switzerland [GC],* no. 29217/12

90 *Tarakhel v. Switzerland*, [Grand Chamber] judgment of 4 November 2014, no. 29217/12

M.S.S' (§121), was not such to eliminate doubts as to the availability of adapted facilities for families with children. The Court considered as decisive the inability of the Italian government to provide individual assurances that in the event of the applicants' transfer from Switzerland they would been offered conditions adapted to the young age of the children and that the principle of family unity would have been respected. So, although not reaching a level of disruption comparable to the one in *M.S.S.* (**systematic deficiencies**), the situation in Italy was nonetheless inadequate to meet the heightened needs of the applicants: a family with 6 small children.

Importantly, the judgment clarifies that the fact that 'the structure and overall situation of the reception arrangements in Italy cannot [..] act as a bar to all removals of asylum seekers to that country'[91](*M.S.S.* test) is not a conclusive indication of the country's suitability to receive asylum seekers, but such standard must be verified **in conjunction** with an individual assessment of the individual circumstances of those affected by the measure.

In the specific context of detention of asylum seekers, inadequate living conditions of detention of asylum seekers and migrants are equally able to give rise to issues under Art.3.[92] For the purposes of the assessment of such adequacy, the Court has given relevance to a number of elements including:

I. The place used for detention: '*where the individual is detained (airport, police cell, prison);*

II. The features of the premises: '*…the size of the containment area; whether it is shared and with how many other people; availability and access to washing and hygiene facilities; ventilation and access to open air; access to the outside world; and whether the detainees suffer from illnesses and have access to medical facilities*'.[93] This can include the lack of adequate bedding facilities (See §105 of *Z.A. and others v Russia*, nos. 61411/15-Grand Chamber judgment pending).

III. The availability of less coercive alternatives

4.2.4.3. Detention as Degrading Treatment

As examined in the previous handbook, a measure is liable to fall under one or more limbs of Art.3 based on its level of severity and the type of its effects on the person. In view of its impact on human dignity and on the quality of the person's life, detention of asylum seekers has been often categorised as '**degrading'** treatment.

91 *M.S.S. v Belgium and Greece* [GC], no. 30696/09, §115

92 *M.S.S. v Belgium and Greece* [GC], no. 30696/09

93 European Union: European Agency for Fundamental Rights, Handbook on European law relating to asylum, borders and immigration, June 2013, ISBN 978-92-9239-105-8 (FRA), p.167, at: http://www.refworld.org/docid/51b6eb394.html– citing *Sharifi and others v. Italy and Greece, No. 16643/09* – where over one hundred people shared two toilets and inmates had to share mattresses or sleep on the floor. The Court noted in particular flooded toilets, poor ventilation and a general unhealthy environment

For this purpose the Court considered the effect of objective circumstances including: the **length** of the detention, the *'extreme lack of space in a prison cell'*[94], the lack of *'access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements…'*, in conjunction with the suitability of the measure to the particular circumstances of the person/s affected.

In *S.D. v Greece* the Court based its findings on the applicant's confinement to *'a prefabricated cabin for two months without [access to] the outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products'* [95] and on its *'detention of six days, in a confined space, with …no leisure area, sleeping on dirty mattresses and with no free access to a toilet'.* [96]

Similarly, in *A.A. v. Greece*,[97] the Court ruled on the incompatibility with Art.3 of conditions of **overcrowding and poor hygiene and cleanliness of asylum facilities**. Similar findings can be found in the cases of *M.S.S.* and *Tabesh v. Greece*.[98]

Extracts from cases where the Court considered material conditions of detention of migrants and asylum seekers 'unacceptable'

o Conditions undermining the detainees' dignity and welfare

In the case of ***M.S.S. v Greece*** (as quoted in *Khlaifia*), the severity of the circumstances was established having regard to the fact that those detained *'had been obliged to drink water from the toilets; […]* ***there was a lack of sufficient ventilation and the cells were unbearably hot;*** *detainees' access to the toilets was severely restricted and they had to urinate in plastic bottles; there was no soap or toilet paper in any sector; sanitary facilities were dirty and had no doors; and detainees were deprived of outdoor exercise'*. In ***A.A. v. Greece*** (no. 12186/08, §§ 57-65), *'the cleanliness and* ***conditions of hygiene were atrocious****, […] the poor state of repair of the bathrooms made them virtually unusable and […] detainees had to sleep in dirty and cramped conditions'.*

Other conditions liable to interfere with detainees' Convention rights include (as listed in *Khlaifia*):

- *'Lack of ventilation and light (Torreggiani and Others v. Italy,* nos 43517/09, 46882/09, 55400/09 et al., § 69);
- *Limited access to outdoor exercise (István Gábor Kovács v. Hungary,* no. 15707/10 § 26)
- *A total lack of privacy in the cell (Novoselov v. Russia,* no. 66460/01, §§ 32 and 40-43)

o Overcrowding

In the case of *M.S.S. v Greece '****145 detainees [were held] in a 110 sq. m space; there was only one bed for fourteen to seventeen people'.*** In the jurisprudence of the Court, severe overcrowding can by itself raise issues under Article 3. In various cases against Russia it was observed that while **'***the space considered desirable by the CPT for collective cells is 4 sq. m, the personal space available to the applicants in the relevant cases* ***was less than 3 sq. m*** *(Khlaifia* citing*: Kadikis v. Latvia, no. 62393/00, §*

94 *Aden Ahmed v. Malta,* no. 55352/12, §87

95 *S.D. v. Greece*, no. 53541/07, §§ 49 to 54

96 *Ibid.* §222

97 A.*A. v. Greece,* no. 12186/08, §§ 57 to 65

98 *Tabesh v. Greece*, no. 8256/07, §§ 38 to 44

55; Andrey Frolov v. Russia, no. 205/02, §§ 47-49; Kantyrev v. Russia, no. 37213/02, §§ 50-51, 21 June 2007; Sulejmanovic v. Italy, no. 22635/03, § 43 among others).

Since, the Court maintains the '**3 sq. m of floor surface per detainee'** as the minimum space to be allowed in 'multi-occupancy accommodation' (*Khlaifia §166 citing Mursič*, §§ 110 and 114).

4.2.4.4. Reception needs of migrants and asylum seekers with specific vulnerabilities

While the Court's assessment of the conditions of detention is largely based on factual elements, examined above, decisive weight is also given to the existence of circumstances or vulnerabilities on the side of the individual, in consideration of which he/she may require dedicated safeguards, spanning from the full exemption from a measure as severe as detention to a range of special treatments. This is the case particularly where the individual subjected to the measure belongs to a category recognised as vulnerable by the court, such as a '*child, a survivor of torture, a pregnant woman, a victim of trafficking, an older person or a person with disabilities*'.[99]

Zontul v Greece

In the gruesome case of ***Zontul v Greece*** (no 12294/07) the ECtHR examined the treatment suffered by a gay asylum seeker held in an inadequate detention facility with other migrants and subjected to physical and sexual assault at the hands of the border guards in charge of the premises. Similar treatment was experienced by 16 other migrants situated in the centre.

The Court examined the treatment and conditions endured by the applicant from the prism of the prohibition of torture under Article 3, finding that the physical abuse – and particularly the sexual abuse – suffered raised particularly serious issues, in view of the Court's recognised stance on the rape of prisoners by State agents as a '*particularly serious and heinous form of ill-treatment'* (unofficial translation from the French version of the judgement §88), in view of the power imbalance between the victim and the abuser in the particular case and considering the 'deep psychological wounds' caused by sexual violence more generally (§88 above – unofficial translation from the French version – citing Aydin v. Turkey, 25 September 1997, § 83).

4.2.4.5. The particular situation of asylum seeking children and families

In its jurisprudence, the ECtHR recognises children as '*vulnerable members of society*'[100], and they, as such are entitled to specific guarantees. Children who are also asylum seekers find themselves in even greater vulnerability due to their concurrent belonging to two recognised vulnerable categories. This condition of enhanced vulnerability is not just the sum of these two statuses but gives rise to specific needs, arising from the combined effect of having a child's intrinsic vulnerability and being additionally exposed to the distress, fatigue and deprivation faced by asylum seekers. The ECtHR has observed in various occasions that when migrant children in detention are concerned, States must

99 EU FRA, Handbook on European law relating to asylum, borders and immigration, above, p.167

100 *A. v. the United Kingdom*, no. 25599/94, §22

provide them with targeted and enhanced guarantees. In view of migrant children's 'extreme vulnerability', the obligation to meet these needs **takes precedence on the child's irregular migration status** (see *Mubilanzila Mayeka and Kaniki Mitunga* § 55).[101]

In its jurisprudence, (See *Popov* §90 and below), the ECtHR relies heavily on principles and standards from specialised instruments. With respect to migrant children in detention, reference is often made to Article 37 of the UNCRC, (the UN Convention on the Rights of the Child) whereby "[e]*very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age*".

Popov v France

In *Popov v France*, Nos. 39472/07 and 39474/07 the ECtHR condemned the placing of children – who accompanied their parents - in detention as being in violation of article 5(1) and (4). The Applicants were Kazakh nationals placed in detention pending removal for 15 days. The Court took issue with the fact that the authorities failed to consider the specific situation of the children and their detention - by virtue of accompanying their parents - was not considered as a last resort measure. Therefore, their detention could not be considered 'lawful'. The Court noted that there was no basis in domestic law for placing children in such detention, and as such the legal routes to challenge their detention available to their parents were not open to the children. As such, the judge was unable to review the lawfulness of their presence in the detention centre.

In its examination of children cases the Court noted that the use of detention must be conditional on the consideration of the particular circumstances of the applicant, having regard for his/her best interest, as provided under Art 3 of the UNCRC and Art 24 of the EU Charter. As a general rule, the use of such measures should be one of **last resort**, once other less coercive measures have been considered. Furthermore, children **shall not be placed in the same facilities as adults** (See *Rahimi v Greece*). Apart from its implications in terms of adequacy of the conditions of detention, the placement of children in facilities with adults can give rise to issues with regard to the very lawfulness of the measure.

HA and Others v Greece

See above the summary of the communicated case ***HA and Others v Greece***, dealing with the situation of 9 children asylum seekers detained in police cells for around a month.

In the case of ***Bilalova v Poland* (no. 23685/14)** currently pending before the ECtHR, the applicant and her five children, aged between four and ten, were held in detention for three months in a supervised centre for foreigners in Poland pending their expulsion to Russia. The case was communicated to the parties in October 2014.

For the purposes of determining the adequacy of situations where children are placed in detention, the ECtHR has looked at various factors, including, *inter alia* whether

101 *Mubilanzila* and *Muskhadzhiyeva*, above.

counselling and educational assistance from qualified personnel is provided[102] and whether a **guardian** representing the unaccompanied minor is appointed to help him/her challenge detention (as in *Rahimi v. Greece*).[103]

Detention facilities and conditions inadequate to meet the children's special needs were deemed to raise issues under Art.3.[104]

Popov

In ***Popov***, findings of relevance in the above sense included the inadequacy of '*facilities available in the "families" area of the centre […] ill-adapted to the presence of children:* ***no children's beds*** *and adult beds with pointed metal corners****, no activities for children****, a very* ***basic play area on a small piece of carpet****, a concreted courtyard of 20 sq.m. with a view of the sky through wire netting, a tight grill over the bedroom windows obscuring the view outside, and automatically closing bedroom doors with consequent danger for children* (§96).

In ***Mubilanzila*** the compounded effect of the applicant's condition as a 5-year old unaccompanied asylum seeking child in a detention centre was considered to place her '*in an extremely vulnerable situation'*.

Mubilinanzila Mayeka and Kaniki Mitunga v. Belgium

In ***Mubilinanzila Mayeka and Kaniki Mitunga v. Belgium***, the placement of a 5-year old unaccompanied asylum seeker in a detention centre with unrelated adults was deemed to be in breach of Art.3.[105] The provision of 'legal assistance' and daily telephone contacts with her mother were not considered sufficient to meet the special needs of a child of such young age.[106]

Muskhadzhieyeva v. Belgium

In ***Muskhadzhieyeva v. Belgium***, the detention of four Chechen children pending a Dublin transfer in a facility not equipped to deal with their specific needs was considered in breach Art.3. Although the children had not suffered separation from their mother, the Court placed decisive focus on the psychological impact of the prolonged detention on their mental well being, with particular regard to the youngest of them (5 year old at the relevant time), considering that it has been such to amount to a violation of Art.3.

In view of their particularly vulnerable status, a violation of children's rights under the ECHR can also be found in cases where the same treatment would not give rise to a violation if an adult had been affected by it. This due to the fact that – as explained above – the personal circumstances of the person suffering a measure or treatment can have a decisive impact in the way it concretely affects the individual. In some cases, for instance, **detention for periods shorter** than what is normally considered significant by

102 *Mubilanzila*, §50

103 *Rahimi v. Greece,* no. 8687/08

104 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03 and *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07; *Kanagaratnam and Others v. Belgium*, no. 15297/09; *Popov v. France*, nos. 39472/07 and 39474/07; *M.S. v. the United Kingdom*, no. 24527/08; *Price v. the United Kingdom*, no. 33394/96

105 *Mubilanzila,* §50

106 *Ibid,* §52

the ECtHR can be regarded as significant when they affect children. This had to do with children's particular perception of the passing of time and with their inherent propensity to easily become distressed or frustrated. In the case of ***Popov*** (§100) the Court acknowledges this aspect explicitly, noting that '*the length of detention of the children, over a period of fifteen days,* ***whilst not excessive per se, could be perceived by them as never-ending****, bearing in mind that the facilities were ill-adapted to their accommodation and age*'.

Similarly, when considering the severity of the material detention conditions, their impact is all the more severe when a child is involved (Again see *Popov §90*).

S.F. and others v. Bulgaria

As an example of the above, in ***S.F. and others v. Bulgaria*** (no. 8138/16) an Iraqi family was detained at a border police's detention facility in Bulgaria, after being intercepted while trying to cross the Bulgarian-Serbian border. The applicants, who were later granted international protection in Switzerland, complained that the detention conditions in Bulgaria were to be considered as inhuman and degrading treatment with regard to their 3 children. The Applicants argued that they were not given any food or water from the moment of their arrest until the late afternoon of the day after when an ambulance was called because a 10-month old child touched an electrical wire in one of the cells and a nurse discovered they had not been fed. The Court acknowledged that **the detention period under consideration** (32 hours according to the Bulgarian government and 41 hours according to the Applicants) **was considerably shorter than the periods at issue in the ECtHR's previous jurisprudence** (e.g. *Popov v. France*). However, the Court placed particular focus in the present case on the conditions of the detention facility, which were found to be **not suitable for children,** even for such a short period of time. The ECtHR found a violation of Article 3 ECHR.

In terms of **psychological effects** of detention, the Court observed that important conclusions could be drawn from the very finding that detention conditions were inadequate. In particular, in *Popov* (§101), the Court observed that the ill-adapted conditions in the centre, suffered by the children and their parents, had undoubtedly created '*anxiety, psychological disturbance and degradation of the parental image in the eyes of the children*'.

4.2.4.6. Physical and Mental health issues

The applicant's **mental health** condition and needs also constitute an important element considered in the ECtHR's assessment of detention under Art.3. In ***Aden Ahmed v. Malta*** the insufficient number of female officers assisting female detainees, was considered to cause the latter 'a *degree of discomfort'*. This was all the more relevant in view of the fact that in the particular case, the applicant's health situation as resulting from her miscarriage, which led her to have episodes of '*insomnia, recurrent physical pain and… depression*'. The applicant's 'past and her personal emotional circumstances' together and her fragile health condition compounded her vulnerability as resulting from her irregular migration status.[107] In view of the cumulative effect of these circumstances the applicant's detention had amounted to degrading treatment under Art.3.

107 *Aden Ahmed v. Malta*, no. 55352/12, §97

Other cases concerning inadequate conditions of detention in the asylum context include: ***SD V Greece***, where a Turkish asylum seeker complained about his more than 2-year detention, the lack of adequate basic facilities and services. Conversely, amongst the features considered as making a detention facility suited to the needs of asylum seekers, in ***Saadi v UK*** the Court found the 'Oakington' Centre, where the applicant had been confined, was adapted to asylum seekers' needs in terms of the facilities offered 'for recreation, religious observance, medical care and, importantly, legal assistance'

The information reported by reputable NGOs and international bodies is often given relevance by the Court when assessing the conditions of detention (*Suso Musa v Malta*).[108]

5. PROCEDURAL GUARANTEES IN THE CONTEXT OF DETENTION – RIGHT TO INFORMATION AND RIGHT TO HAVE PROCEEDINGS INITIATED TO REVIEW THE LAWFULNESS OF THE MEASURE UNDER ARTICLE 5(2) AND 5(4) ECHR

Under paragraph 2 and 4, Article 5 provides for essential procedural guarantees that must be in place and effectively implemented in order for the detention of aliens to be compliant with the Convention. Under Article **5.2**, the Convention provides for the widely accepted principle whereby: '*2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him'*.

To this end the Grand Chamber found a violation of Article 5.2 in ***Saadi v UK*** (no. 13229/03) considering the 76 hours delay in informing the Applicant via his representative of the real reason for his detention to be incompatible with the promptness requirement of Article 5. The Court also noted how general statements – such as parliamentary announcements – could not replace the need for the individual being directly informed (*Saadi v UK* §§ 84, 85).

In addition to being a key indicator of the transparency of the measure and hence of the clarity of the procedures in place, the safeguard under paragraph 2 is instrumental in giving effectiveness to the separate provisions under **Article 5(4)**, whereby:

'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.'

It is in fact evident that the concrete ability to challenge a detention measure on the part of the detainee is fundamentally tied to the provision of detailed and clear information as to the grounds on which it has been ordered and of the remedies in place to challenge

108 *Suso Musa v Malta*, no. 42337/12

it. The Court recognises such '*close link'* between the two provisions explicitly in its case law (*Rusu v Austria*, §41 among others).

In ***Rusu****,* the Applicant had objected that due to the failure of the authorities to provide her with adequate information under Article 5.2 she had ''*not been in a position to exhaust the available remedies'* (§34).

As such, the Court defines that under paragraph 2, as an 'elementary safeguard' and 'integral part of the scheme of protection afforded by Article 5 (*Rusu* §36, among others).

In its case law, the Court has clarified the **scope of the review** that should be made available to the detainee in the context of detention, to the effect that it should be possible to request for a review of the 'lawfulness' of the measure both with regard to ' *[…] the requirements of domestic law [and] the text of the Convention' (Popov §122).* This is due to the fact that for the purposes of this provision '*lawfulness'* is understood widely as in the same terms of Article 5(1), examined above, and hence goes beyond the mere formal compliance with domestic provisions (*Aden Ahmed v Malta***)**

5.1 Article 5(2)

In substantive terms, in order to be compliant with the principle and spirit of the Convention, the information provided to the Applicant must abide by certain requirements of format and content. In terms of **procedural requirements**, the information provided under Article 5.2 must be referred '*in simple, non-technical language that [the detainee] can understand'* and must be '***conveyed promptly'*** so as to ensure timely recourse to the remedies available. Not in all cases the **'arresting officer'** will however be in the position to provide such information '*at the very moment of the arrest*' (among others *Khlaifia §115, Rusu v Austria, no. 34082/02*).

Abdolkhani and Karimnina v Turkey

In ***Abdolkhani and Karimnina v Turkey***, two Iranian nationals were detained upon arriving in Turkey from Iraq, having previously been resident in a Refugee camp there. Upon arrival, they were detained in the foreigners department of the police headquarters. They were then convicted of illegal entry into Turkey and given a deferred sentence, and so remained in the police headquarters. Following assistance from UNHCR, the two applicants were transferred to a 'Foreigners' Admission and Accommodation Centre', where they remained. As their sentence was deferred, the applicants' detention was on the basis of immigration controls, not of their illegal entry conviction. As such, the court noted that there is no record of them being informed of the reasons for their detention on the basis of immigration controls. Therefore, on this basis, and as they were denied legal assistance during their detention in the police headquarters, the applicants' right of appeal was deprived of all effective substance and could not provide him with the remedy required under article 5(4). Therefore, there was a violation.

In terms of content, the information must include *'the essential legal and factual grounds for his arrest, so as to be able, if he[/she] sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph' (Rusu v Austria, no. 34082/02)*. However, as in other areas of its case law, the Court does not set out pre-defined parameter under which the information provided is in all cases adequate, but the assessment of sufficiency and promptness in the provision of information must *'be assessed in each case according to its special features (Rusu v Austria, no. 34082/02, §36; Čonka v. Belgium, no. 51564/99, § 50)*.

Some examples can be provided from different scenarios:

1. In *Saadi v. the United Kingdom* (no. 13229/03, § 84), '*a delay of 76 hours was considered to be incompatible*' with the requirement of 'promptness' under Article 5.2 (*Rusu v Austria, §43)*.
2. In *Rusu v Austria,* the information provided to the Applicant, arrested for failing to report to the Border Control Office upon entry in Austria, failed to spell out the reasons why detention had been necessary or mention '*her specific situation, namely that she had tried to leave Austria and had been arrested after the Hungarian border police had returned her to the Austrian border police because she did not have a valid travel document',* which was of relevance to the assessment of her conduct in the case (§38-39). Detailed reasons were only provided **10 days later** and had hence failed to meet the test of "promptness".
3. In *Khlaifia, examined above in connection with other limbs of Article 5, the failure to provide the applicants with information on their confinement was considered to have 'deprived of all effective substance' their appeal rights (Khlaifia §132, Shamayev and Others*, § 432), with regard to the 2 separate measures of their placement in a temporary reception centre and their detention on rescue vessels at the Palermo harbour. In this case the **failure to provide information was considered of such significance that the very assessment of Article 5(4) became redundant (§133).**

5.2 Article 5(4)

Article 5(4) is considered by the Court as 'a *lex specialis* in relation to the more general requirements of Article 13 (*Ismoilov and others v Russia*, 2947/06, §142). As far as the proceedings to review the lawfulness of detention and, where conditions are met, obtain release, in its jurisprudence the Court refers to '**domestic remedies that are sufficiently certain'** to meet the requirements of '**accessibility and effectiveness**' (*Suso Musa v Malta, §51* and *Aden Ahmed v. Malta*, §114-115 citing *Kadem v Malta*, no. 55263/00, § 41; *Raza v. Bulgaria*, no. 31465/08, § 76). In order to meet the 'accessibility test', the circumstances surrounding the remedy in question must be '*such as to afford applicants a realistic possibility of using [it]*' (*Ismoilov and others v Russia*, 2947/06, §145, *Čonka*, §§ 46 and 55, cited above).

A **necessary feature** of remedies under Article 5(4) is that such proceedings are able to achieve a '*speedy judicial decision*' on the lawfulness of detention (*Aden Ahmed v. Malta, §114*). In view of the **sensitive nature of the rights concerned**, the requirement of '**speediness'** (*Khlaifia* citing *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79) in this sense has been interpreted restrictively by the Court, considering periods of '*seventeen and twenty-six days excessive for deciding on the lawfulness of the applicant's detention*' (*Suso Musa v Malta, §52, Aden Ahmed v. Malta, §115 on Kadem* §§ 44-45; *Rehbock v. Slovenia*, no. 29462/95, § 82-86).

Bail applications, which ensure temporary release but do not involve a review of the lawfulness of detention, have been found to fail to meet the conditions of (*Suso Musa v Malta, §56, Aden Ahmed v. Malta, §119*).

Similarly, rules providing for the **release from detention on grounds of its unreasonableness due to 'excessive duration'** or the **absence of 'prospects of deportation**' also fail to meet the requirements of Article 5(4), in that they only refer to well-defined circumstances and are '*not applicable to a person in the initial stages of detention, pending a decision on an asylum application' (Suso Musa v Malta, §56)*.

In the context of **detention to prevent entry into the territory**, the Government's arguments whereby the remedies in place to challenge the 'refusal-of-entry' decision constituted an adequate means to have the lawfulness of detention also reviewed was rejected by the Court arguing that the 'legal or factual reasons' for detention were not within the scope of such review and the remedy itself was hence unfit to achieve their release (*Khlaifia §134).*

6. DEPRIVATION OF LIBERTY UNDER ARTICLE 5 OF THE ECHR AND RESTRICTION OF FREEDOM OF MOVEMENT UNDER ARTICLE 2 OF PROTOCOL NO. 4 TO THE ECHR

6.1. Deprivation of Liberty vs. Restriction of Freedom of Movement and the Importance of Classification in Serbian Law

Deprivation of liberty and restriction of freedom of movement are two different legal instruments, which, however, are not always easy to distinguish. This is why the view of the European Court of Human Rights on the classification of a measure as deprivation of liberty or restriction of freedom of movement is extremely important for the application of the relevant standards in proceedings before Serbian authorities. Pursuant to the Court's well-established case law,[109] whenever it is unclear whether an individual has been deprived of liberty under Article 5 of the ECHR or subjected to a restriction of freedom of movement under Article 2 of Protocol No. 4 to the ECHR, the classification of the measure should be made by taking into account the actual restrictions imposed on the individual at issue rather than by reference to its classification in domestic law. Pursuant to international standards, in order to determine whether someone has been deprived of liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question, the area to which movement is restricted, the scope of permitted social contacts, the possibility of leaving the area without notifying the authorities, the reporting obligation, sanctions in case of non-compliance, the character of the institution the person is held in, existence of the elements of coercion, the specific effects the measure has on the individual, etc. Therefore, even individuals accommodated in reception or asylum centres may be subject to deprivation of liberty rather than restriction of movement, which depends not only on the duration and scope of the imposed restrictions, but on the specific circumstances of the individuals at issue and the effects the measures have on them as well.[110]

109 *De Tommaso v. Italy*, Application No. 43395/09, judgment of 23 February 2017 [GC], paragraph 80; *Guzzardi v. Italy,* Application No. 7367/76, judgment of 6 November 1980, paragraph 93; *Rantsev v. Cyprus and Russia,* Application No. 25965/04, judgment of 7 January 2010, paragraph 314; *Stanev v. Bulgaria*, Application No. 36760/06, judgment of 17 January 2012, [GC], paragraph 115

110 In the Republic of Serbia, migrants are accommodated in asylum and reception centres. There are five Asylum Centres, in Banja Koviljača, Bogovađa, Krnjača, Sjednica and Tutin and 14 Reception Centres. As opposed to centres in most other European countries, the ones in Serbia are open-type centres. Although accommodation in these centres should be reserved only for aliens with certificates of intent to seek asylum, they have also been admitting migrants without such certificates i.e. whose status in Serbia is not regulated. See BCHR's *2017 Right to Asylum in the Republic of Serbia* annual report, p. 79, available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf

6.2. Constitutional Guarantees

6.2.1. Constitutional Guarantees Regarding Deprivation of Liberty

The Constitution of the Republic of Serbia[111] contains several provisions protecting the right to liberty and security of person and the rights of persons deprived of liberty. Under Article 27 of the Constitution, everyone is entitled to liberty and security of person. This article of the Serbian Constitution does not provide grounds for depriving migrants of liberty like Article 5(1(f)) of the ECHR; it specifies that the reasons for deprivation of liberty shall be prescribed by law. The Constitution guarantees liberty and security to "everyone", which means that migrants and asylum seekers enjoy all the constitutional safeguards applicable in the context of deprivation of liberty. The Constitution, inter alia, guarantees the right of persons deprived of liberty to be informed, in a language they understand, of the reasons for their deprivation of liberty and other rights and the right to inform a person of their choosing about their deprivation of liberty.

The Constitution also guarantees the right of persons deprived of liberty to appeal the orders depriving them of liberty with the competent courts and obligates the courts to rule on the lawfulness of their deprivation of liberty forthwith. The Constitution also includes substantive guarantees provided persons deprived of liberty: Article 28(1) lays down that they shall be treated humanely and that their human dignity shall be respected. The main guarantees protecting persons held in custody on suspicion of having committed a crime are enshrined in Articles 30 and 31 of the Constitution.

Article 27 of the Constitution of the Republic of Serbia reads:

"Everyone has the right to personal freedom and security. Depriving of liberty shall be allowed only on the grounds and in a procedure stipulated by the law.

Any person deprived of liberty by a state body shall be informed promptly in a language they understand about the grounds for arrest or detention, charges brought against them, and their rights to inform any person of their choice about their arrest or detention without delay.

Any person deprived of liberty shall have the right to initiate proceedings where the court shall review the lawfulness of arrest or detention and order the release if the arrest or detention was against the law.

Any sentence which includes deprivation of liberty may be proclaimed solely by the court."

111 Official Gazette of the Republic of Serbia No. 98/2006

6.2.2. Constitutional Guarantees Regarding Restriction of Freedom of Movement

Article 39 of the Constitution guarantees everyone the freedom of movement. The Constitution guarantees everyone both the freedom of movement and residence in the Republic of Serbia and the right to leave the country and return to it. It lays down that freedom of movement and residence may be restricted only by law and if necessary to conduct criminal proceedings, protect public law and order, prevent the spreading of contagious diseases or for the defence of the Republic of Serbia. As opposed to the constitutional provisions guaranteeing everyone liberty and security of person, the provision guaranteeing the freedom of movement to aliens lays down that their entry into and presence in the Republic of Serbia shall be governed by a law. It also provides additional safeguards in case of their expulsion from Serbia.

Article 39 of the Constitution of the Republic of Serbia reads:

"Everyone shall have the right to free movement and residence in the Republic of Serbia, as well as the right to leave and return.

Freedom of movement and residence, as well as the right to leave the Republic of Serbia may be restricted by the law if necessary for the purpose of conducting criminal proceedings, protection of public order, prevention of spreading contagious diseases or defence of the Republic of Serbia.

Entry and stay of foreign nationals in the Republic of Serbia shall be regulated by the law. A foreign national may be expelled only under a decision of the competent body, in a procedure stipulated by the law and if time to appeal has been provided for him and only when there is no threat of persecution based on his race, sex, religion, national origin, citizenship, association with a social group, political opinions, or when there is no threat of serious violation of rights guaranteed by this Constitution."

6.3. Restriction of Freedom of Movement and Deprivation of Liberty under Regulations on Aliens and Asylum Seekers

Asylum seekers and other categories of migrants may be deprived or liberty or subjected to restrictions of their freedom of movement in various situations and circumstances. Aliens are most often deprived of liberty for two reasons: to prevent their illegal entry into Serbia and to ensure they are available to the competent authorities pending their extradition. The relevant authorities also have other less intrusive measures at their disposal, which can, in principle be qualified as restrictions of movement: they are entitled to order the detention of the aliens in the Aliens Shelter, to order them to live in a specific place or hold them in an international transit zone and at the airport. It, however, needs to be borne in mind that the classification of a measure as deprivation of liberty or as a restriction of freedom of movement is relative and that the same measure can be classified either as the former or the latter, depending on the objective circumstances and the personal circumstances of the individual at issue.

6.3.1. Restriction of freedom of Movement of Migrants and Asylum Seekers

6.3.1.1. Restriction of freedom of Movement of Migrants

Article 93 of the **Aliens Act** introduces **mandatory residence in a specific place** as a less intrusive measure aimed at ensuring the availability of aliens to the competent authorities pending their forced removal. Mandatory residence entails the obligation of the aliens to live at a specific address and report to the competent authority. It is imposed by a ruling of the competent authority for a period of one year; its validity may be extended for another year, if the reasons why it was imposed still exist. Aliens may appeal mandatory residence rulings within eight days from the day of service. The appeals, which do not have suspensive effect, are reviewed by the Ministry of Internal Affairs. The aliens are entitled to contest the Ministry's decisions on their appeals by initiating an administrative dispute.

6.3.1.2. Restriction of Freedom of Movement of Asylum Seekers

The Asylum and Temporary Protection Act explicitly guarantees the freedom of movement both to successful asylum seekers and those whose applications are still under review. Asylum seekers are guaranteed the freedom of movement from the moment they are admitted to an asylum centre or another facility designated for the accommodation of asylum seekers.

Article 49 of the Asylum and Temporary Protection Act reads:

"Upon their admission to an Asylum Centre or another facility designated for the accommodation of asylum seekers, asylum seekers are entitled to reside in the Republic of Serbia and freely move in its territory unless there are reasons for restricting their movement set out in Article 77 of this law."

Article 62 of the Asylum and Temporary Protection Act reads:

"Persons granted asylum may move freely in the territory of the Republic of Serbia, and outside the territory of the Republic of Serbia, in accordance with the provisions of this law."

The asylum seekers' freedom of movement may be restricted in two cases: first, in the event they are not fulfilling an obligation under Article 58 of the Act, not complying with the House Rules of the asylum centre or another facility accommodating asylum seekers, or not cooperating with the authorised officers during their health examinations.

Second, under Article 77 of the Act, the asylum seekers' freedom of movement may be restricted for the following reasons:

- To establish their identity or nationality;
- To establish material facts, evidence and circumstances on which their asylum applications are based, which cannot be established without restricting their movement, especially in case they pose a flight risk;
- To ensure their presence during the asylum procedure where there are reasonable grounds to believe that they had applied for asylum to avoid deportation;
- To protect the security of the Republic of Serbia and public order in accordance with the law;
- To render a decision on their right to enter the territory of the Republic of Serbia.

The Asylum Office issues rulings ordering these measures restricting the freedom of movement.

Article 78 of the Asylum and Temporary Protection Act provides for the following measures restricting the freedom of movement of asylum seekers:

- Ban on leaving the asylum centre;
- Ban on leaving a specific address or area;
- Obligation to regularly report to the police station near their place of residence;
- Placement in a social protection institution for minors under enhanced supervision; and,
- Temporary seizure of travel documents.

Asylum seekers, who do not comply with the ban on leaving the asylum centre or a specific address, may be referred to the Aliens Shelter.

Restrictions of freedom of movement may last as long as the grounds under Article 77 of the Act apply, but not longer than three months. These measures may exceptionally be extended another three months, in the event freedom of movement was restricted on grounds specified in Article 77(1(2-4)). Asylum seekers subject to such measures may appeal the decisions imposing the restrictions with the relevant higher court within eight days from the day of service. Appeal, however, does not have suspensive effect.

Article 77 of the Asylum and Temporary Protection Law reads:

"The movement of asylum seekers may be restricted under an Asylum Office decision in the event it is necessary to:

1) Establish their identity or nationality;
2) Establish material facts, evidence and circumstances on which their asylum applications are based, which cannot be established without restricting their movement, especially if there is a risk of them absconding;

3) Ensure their presence during the asylum procedure where there are reasonable grounds to believe that they had applied for asylum to avoid deportation;
4) Protect the security of the Republic of Serbia and public order in accordance with the law;
5) Render a decision on the asylum seekers' right to enter the territory of the Republic of Serbia.

The Asylum Office may issue a ruling restricting the movement of asylum seekers and aliens, whose intention to apply for asylum has been registered, also in the event of their non-compliance with their obligations under Article 58(1(3-7)) of this law.

The risk of absconding shall be assessed on the basis of all the facts, evidence and circumstances in each individual case, with particular consideration being given to the asylum seekers' prior attempts to leave the Republic of Serbia of their own accord, their refusal to allow a check or establishment of their identity, and their concealment of information or provision of false information about their identity or nationality."

Article 78 Asylum and Temporary Protection Act reads:

"Movement shall be restricted by:

1) Imposition of a ban on leaving an asylum centre, a specific address or area;
2) Imposition of the obligation to regularly report to the regional police administration or police station near the place of residence;
3) Detention in the Aliens Shelter established in accordance with the law on aliens, under enhanced police supervision;
4) Placement in a social protection institution for minors under enhanced supervision;
5) Temporary seizure of travel documents.

The measure referred to in paragraph 1(3) of this Article may be imposed if it has been established, based on an individual assessment, that the purpose of the restriction of movement cannot be achieved by other measures. Restriction of movement may last as long as the grounds under Article 77 of the Act apply, but not longer than three months.

Restriction of movement may exceptionally be extended another three months, in the event it was restricted on grounds specified in Article 77(1(2-4)).

Asylum seekers may appeal decisions restricting their movement with the relevant higher court within eight days from the day of service.

The appeal shall not have suspensive effect."

Article 79 of the Asylum and Temporary Protection Act reads:

"Asylum seekers, who violate the bans referred to in paragraph 1 (1 and 2) of this Article, may be detained in the Aliens Shelter."

6.3.2. Deprivation of Liberty of Migrants and Asylum Seekers

6.3.2.1. General Criminal and Misdemeanour Law Guarantees

Migrants, who commit a criminal or misdemeanour offence in the territory of the Republic of Serbia, may be subject to the general criminal and misdemeanour legal regime. However, such a regime will be applied against migrants if they commit a misdemeanour or criminal offence related to illegal entry into the country only if the principle of non-punishment for illegal entry into the Republic of Serbia is not applied, i.e. if they are subject to a measure restricting their movement or depriving them of liberty on the grounds laid down in the Aliens Act and the Asylum and Temporary Protection Act. In such situations, individual provisions of criminal or misdemeanour law are applied to them, in addition to laws on aliens.

6.3.2.1.1. Deprivation of Liberty Due to Illegal Crossing of Serbia's Borders

The provisions of Serbian criminal and misdemeanour laws governing prohibited and illegal entry into Serbia shall not apply to asylum seekers, as a particularly vulnerable category of migrants. Namely, Article 8 of the **Asylum and Temporary Protection Act** introduced into Serbian law one of the most important international law principles regarding the deprivation of liberty of migrants and asylum seekers – the principle of non-punishment of asylum seekers for illegal entry into the country. Under Article 8, aliens shall not be prosecuted for a misdemeanour or deprived of liberty for illegally entering the country provided the following two conditions are met: 1) they must express the intention to seek asylum without delay, and 2) they must, also without delay, provide an explanation why they entered the country illegally.

Other aliens, who have entered the country illegally, may be punished and deprived of liberty. The **Border Control Act** qualifies as a misdemeanour the crossing of or attempt to cross the state border at places other than the border crossing points, and at times other than the fixed working hours of the border crossing points, or in contravention of the purpose of the border crossing points, as well as the crossing of or attempts to cross the border without a valid travel or other document (Article 71(1)). Illegal entry governed by Article 14 of the **Aliens Act** constitutes a misdemeanour as well. However, as opposed to the Border Control Act, which lays down both fines and deprivation of liberty as the penalties for violating the regulations on entry, the Aliens Act exclusively lays down fines as the penalty for this offence. In the event the individual was carrying weapons or resorted to violence while unlawfully crossing the border, the offence may be qualified as an act of crime incriminated in Article 350(1) of the **Criminal Code of the Republic of Serbia**[112] and carrying a sentence of imprisonment of up to one year.

112 Official Gazette of the Republic of Serbia Nos. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016

6.3.2.1.2. Minimal Procedural and Substantive Guarantees under the Criminal Procedure Code and the Misdemeanour Act

Under Article 2(23) of the **Criminal Procedure Code of the Republic of Serbia,**[113] deprivation of liberty shall denote not only arrest and pre-trial detention, but also custody, house arrest and confinement in an institution reckoned as detention under this Code. Article 188 of the Code enumerates a number of measures for ensuring the presence of a defendant and unimpeded conduct of proceedings, including measures involving the deprivation of liberty or restriction of freedom of movement (taking into custody, restraining order, ban on leaving one's place of residence, house arrest and pre-trial detention). Article 189 lays down the general requirement that the authorities shall endeavour not to impose a harsher measure if the purpose can achieved by a more lenient measure. The minimal individual procedural guarantees are laid down in Article 69 of the Code.[114] Pre-trial detention - the strictest measure - is governed by Articles 210-223 of the Criminal Procedure Code. Of particular relevance are Article 211, which enumerates the grounds for ordering pre-trial detention, and Articles 217-220, which lay down substantive guarantees provided detainees (prohibition of insulting the personality or dignity of the detainees, the rights and duties of detainees, visits to detainees and correspondence with the detainees).

The Serbian Misdemeanour Act[115] also provides for the imposition of measures to ensure the unimpeded conduct of misdemeanour proceedings, as well as a number of procedural and substantive guarantees relevant to situations in which the imposed measures amount to deprivation of liberty or restriction of freedom of movement. The general requirement that a harsher measure shall not be imposed if the purpose can be achieved by a more lenient measure applies in misdemeanour proceedings as well (Article 186). Grounds for taking suspects into custody and keeping them in custody, as well as regulations applicable in such cases, are set out in Articles 190 and 191 of the Act respectively. Apart from the right to appeal a detention order, the Misdemeanour Act provides for other individual guarantees, such as the right to compensation of damages for unlawful detention (Article 97) and the arrestees' right to have a member of their family or another person close to them, a consular-diplomatic representative of the country they are nationals of or a representative of an international public-law organisation in the event they are refugees or stateless, notified of their arrest.

113 Official Gazette of the Republic of Serbia Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014

114 The following rights are guaranteed to arrestees: to be informed of the reasons for their arrest in a language they understand; to a confidential conversation with their defence counsel before their interrogation; to have a member of their family or another person close to them, a consular-diplomatic representative of the country they are nationals of or a representative of an international public-law organisation in the event they are refugees or stateless, notified of their arrest without delay; to request a medical examination without delay; and to be brought before a preliminary proceedings judge without delay, within 48 hours at most, or be released

115 Official Gazette of the Republic of Serbia Nos. 65/2013, 13/2016 and 98/2016 – Constitutional Court Decision

6.3.2.2. Grounds for Depriving Migrants of Liberty

6.3.2.2.1. Deprivation of Liberty to Prevent Illegal Entry into the Country

Serbian laws do not have specific regulations on deprivation of liberty to prevent illegal entry into the country. Criminal or misdemeanour law applies in such cases, depending on the circumstances. The **Aliens Act** merely lays down that the Aliens Shelter shall denote a facility where, inter alia, aliens not allowed to enter the country shall be held under enhanced police supervision.

Article 3(28) of the Aliens Act reads:

"28) The Aliens Shelter denotes a facility, in which aliens not allowed to enter the country and aliens, whose expulsion, removal from the country or return has been ordered but cannot be immediately effected, are detained under enhanced police supervision pursuant to the law;"

6.3.2.2.2. Deprivation of Liberty Pending Extradition

Deprivation of liberty pending extradition, so-called extradition custody, is governed by the **Act on International Legal Assistance in Criminal Matters**.[116] Under Article 22 of the Act, an investigating judge may order the custody of the person whose extradition is requested before the examination of the fulfilment of the extradition requirements and before the requesting state requests such custody. In such cases, the judge may order custody for the following two reasons: 1) circumstances indicate that the person will go into hiding or abscond in order to obstruct the extradition request review procedure or extradition, or 2) circumstances indicate that the person will interfere in the collection of evidence in the extradition procedure or criminal proceedings before a court of the requesting state. Custody ordered in both cases may last until the enforcement of the decision on extradition but not longer than one year from the day the person was remanded in custody. The Act provides for reviews of the lawfulness of custody every two months. In urgent cases, the competent authority of the requesting state may file a request for custody before it submits its letter rogatory. Articles 24-26 of the Act deal with the review of such a request and custody.

Problems have arisen in situations when the extradition procedure was conducted at the same time as the asylum procedure. There were two cases of asylum seekers in extradition custody in 2017.[117] These asylum seekers were extradited to the requesting states

116 Official Gazette of the Republic of Serbia No. 20/2009. The provisions of this law apply when the Republic of Serbia and the state requesting extradition have not signed a ratified international treaty or the treaty does not regulate specific issues. Reviews of requests for the extradition of accused or convicted individuals are conducted by Higher Courts, while the appeals of their decisions are reviewed by the Appeals Courts. The Minister of Justice renders the final decision on whether the individual will be extradited after the competent court delivers a final decision in the extradition procedure and ascertains that the extradition requirements have been fulfilled

117 BCHR, 2017 Right to Asylum in the Republic of Serbia annual report, 2018, pp. 37-39, available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf

upon the final completion of the extradition procedures although final decisions on their asylum applications had not been delivered. The asylum authorities had dismissed their applications without reviewing them on the merits because they had passed through countries on the list of safe third countries before entering Serbia. Therefore, the authorities did not examine any risks of their persecution in their countries of origin, which were requesting their extradition. When reviewing requests for the extradition of aliens who have sought asylum in the Republic of Serbia, the authorities need to take into consideration both Article 39 of the Serbian Constitution, enshrining the *non-refoulement* principle, and the provisions of relevant international treaties binding on the Republic of Serbia. Consequently, authorities ruling on extradition requests must, inter alia, examine whether the asylum seekers would be exposed to any risks in case of their *refoulement* to their country of origin, and whether they would be exposed to the risk of persecution or a grave violation of their rights enshrined in the Constitution and international conventions the Republic of Serbia is party to. Moreover, one of the two cases in which extradition and asylum proceedings were conducted concurrently ended with the Republic of Serbia extraditing the asylum seeker to Turkey despite the interim measure indicated by the UN Committee against Torture.[118]

6.3.2.2.3. Custody in the Premises of a Competent Authority for the Purpose of Establishing an Alien's Identity

Under Article 86(1) of the **Aliens Act,** competent authorities may hold aliens in custody in their premises in the event they need to establish their identity or the lawfulness of their presence in the Republic of Serbia.

Article 86 of the Aliens Act reads:

"(1) Aliens may be held in custody in the premises of the competent authorities in accordance with the law and other regulations in order to establish their identity or the lawfulness of their residence in the territory of the Republic of Serbia."

6.3.2.2.4. Custody of Aliens in the Premises of a Competent Authority to Facilitate Their Forced Removal

Under Article 86(2) of the **Aliens Act**, competent authorities may hold aliens in custody in the event they need to escort them to the border to effect their forced removal ordered in a ruling.

Article 86(2) of the Aliens Act reads:

"(2) Aliens, whose forced removal has been ordered, may be held in custody in the premises of the competent authorities that will escort them to the border crossing point in order to ensure their forced removal."

118 UN Committee against Torture Decision No. 857/2017 of 11 December 2017

6.3.2.2.5. Detention in the Aliens Shelter

Under Article 87 of the **Aliens Act**, aliens shall be referred to the Shelter only in the event the measure ordering them to reside at a specific address would not be sufficient to ensure their availability for the purpose of preparing their return or their forced removal. The competent authority or border police issue rulings ordering the aliens' detention in the Shelter when there is a risk that they will not be available to the competent authority in charge of their forced removal or when the aliens are avoiding or undermining preparations for their return or forced removal. Article 88 of the Aliens Act lays down that aliens shall be held in the Shelter as short as possible, but not more than 90 days. Upon the expiry of the 90-day time period, the alien's detention in the Shelter may be extended for a maximum of 90 days but only if s/he is intentionally obstructing his/her forced removal. In any case, aliens may not be detained in the Shelter for more than 180 days. Aliens are not entitled to appeal rulings referring them to or extending their detention in the Shelter. Article 90 of the Aliens Act only provides them with the possibility of filing a complaint with the Administrative Court, within eight days from the day they are served the ruling. The complaint, however, does not stay the enforcement of the ruling. This Article also imposes an obligation on the court to rule on the complaint within 15 days from the day it is filed.

Given that, under Article 91 of the Aliens Act, aliens cannot leave the Shelter of their own accord, the question arises whether the measure amounts to their deprivation of liberty or restriction of their movement. Furthermore, the Act does not provide for appeals of the rulings referring aliens to the Shelter, whereas it does allow them to appeal decisions ordering their mandatory residence in a specific place although a less intrusive measure is at issue.

Under Article 89(4) of the Aliens Act, aliens shall be immediately released from the Shelter in the event they apply for asylum in the Republic of Serbia, unless grounds for restricting their movement under the Asylum and Temporary Protection Act exist.

Article 87 of the Aliens Act reads:

"(1) Aliens, whose return or forced removal has been ordered, shall be detained to the Shelter pursuant to a ruling by the competent authority or the border police during preparations for their return or pending their forced removal.

(2) The competent authority or border police shall order the detention of an alien in the Shelter referred to in paragraph (1) of this Article in the event the provisions on the mandatory residence of aliens under Article 93 of this law cannot be enforced efficiently, especially if:

1) there is a risk that the alien shall not be available to the competent authority to enforce his/her forced removal;

2) the alien is avoiding or obstructing the preparations for his/her return or forced removal.

(3) The risk that the alien shall not be available to the competent authority to enforce his/her forced removal denotes the existence of reasonable grounds to believe that the foreign national will not voluntarily leave the Republic of Serbia and act in accordance with the ruling ordering his/her return. Reasonable grounds referred to in this paragraph exist in the event the alien:

1) lacks an identity document;
2) is not cooperating in or obstructs the return procedure;
3) has not voluntarily left the territory of the Republic of Serbia;
4) is not cooperating in the procedure for establishing his/her identity or nationality or has given false or contradictory information about him/herself;
5) has used fake or forged documents;
6) has attempted to or succeeded in entering the Republic of Serbia in an unlawful manner;
7) has not complied with his/her obligations under the ruling ordering his/her mandatory residence in a specific place;
8) has no relatives or social contacts in the Republic of Serbia;
9) lacks funds to cover accommodation and sustenance expenses.

(4) An alien shall be deemed to be avoiding or obstructing preparations for his/her return or forced removal in the event his/her identity cannot be established, i.e. s/he lacks a travel document.

(5) Exceptionally from paragraph (1) of this Article, an alien with health or other special needs shall be provided with other adequate accommodation.

(6) An alien, whose detention in the Shelter has been ordered, shall be notified forthwith of the reasons therefor, in writing and in a language s/he understands or is reasonably presumed to understand."

Article 88 of the Aliens Act reads:

"(1) Aliens shall be detained in the Shelter as short as possible but not longer than 90 days, provided that there are sufficient prospects of their forced removal.

(2) The detention of an alien in the Shelter may be extended by a maximum of 90 days upon the expiry of the time period referred to in paragraph (1) of this Article in the event:

1) his/her identity has not been established yet;
2) s/he is intentionally obstructing his/her forced removal.

(3) The Ministry of Internal Affairs shall adopt a ruling extending the detention of the alien in the Shelter at least 15 days before the day of expiry of the detention period.

(4) The alien may not be detained in the Shelter more than 180 days altogether.

(5) The time the alien spent serving a prison sentence or remanded in custody shall not be reckoned as time spent in the Shelter."

Article 90 of the Aliens Act reads:

"(1) A ruling of the competent authority or border police ordering or extending the detention of an alien in the Shelter may not be appealed.

(2) An administrative dispute may be initiated to contest the decision within eight days from the day of service.

(3) The complaint shall not stay the enforcement of the ruling.

(4) The court shall rule on the complaint within 15 days from the day it was filed."

Article 91 of the Aliens Act reads:

"(1) Aliens shall comply with the House Rules and regulations of the Shelter, which they may not leave without consent.

(2) The Shelter House Rules and regulations shall be prescribed by the Minister of Internal Affairs. The House Rules shall, in particular, regulate:

1) The obligation of the aliens not to leave the Shelter without consent;
2) The obligation of the aliens to cooperate in the return procedure and comply with the Shelter House Rules and regulations;
3) The right of the aliens to establish contact with their lawyers, family members and relevant consular services;
4) The right of aliens to emergency medical assistance;
5) The right of aliens to spend a specific period of time during the day in open air and have the opportunity to exercise;
6) The right of aliens to express their dissatisfaction with the living conditions in the Shelter in accordance with the prescribed procedure;
7) The obligations of the relevant authorities to take into consideration the needs of particularly vulnerable persons;
8) The right of the relevant and competent national, international and non-government organisations to visit the Shelter;
9) The obligation to provide aliens with access to information on the Shelter House Rules and regulations in a language they understand or are presumed to understand;
10) Response by the police in the Shelter in the event an alien is violating the Shelter House Rules and regulations."

6.3.2.3. Reasons for Depriving Asylum Seekers of Liberty

The Asylum and Temporary Protection Act contains only provisions specifying the grounds for restricting the aliens' freedom of movement but none laying down the grounds for depriving them of liberty. However, as noted on a number of occasions, whether relevant international standards on the deprivation of liberty apply depends on the intensity and scope of the imposed restriction and the particular circumstances of the person at issue, as well as the effects such a measure has on that person, rather than on the classification of the measure under national law. Therefore, mandatory detention of aliens in the Aliens Shelter under enhanced police supervision, described as a measure restricting their freedom of movement in Article 78 of the Asylum and Temporary Protection Act, can essentially be qualified as deprivation of liberty of asylum seekers. Such a conclusion may be drawn on the basis of the living conditions in the Shelter governed by Article 91 of the Aliens Act, especially the prohibition to leave the Shelter without consent, the aliens' right to maintain contacts only with their lawyers, family and relevant consular services, as well as the fact that they may be detained in it up to six months. Therefore, Article 5 ECHR standards on the right to liberty and security of person, rather than the standards under Article 2 of Protocol No. 4 on the restriction of freedom of movement, need to be applied.

This measure may be imposed only in exceptional circumstances, when the purpose of restricting an alien's movement cannot be achieved by other measures. The Act explicitly lays down that these assessments shall be performed on a case to case basis, by taking into account all the circumstances of the asylum seekers. Asylum seekers may be detained in the Shelter for a maximum of three months. Exceptionally, their detention may be extended another three months, if necessary to establish material facts, evidence and circumstances on which their asylum applications are based and which cannot be established without restricting their movement, especially if there is a risk of them absconding, to ensure their presence in the asylum procedure where there are reasonable grounds to believe that they had applied for asylum to avoid deportation and in order to protect the security of the Republic of Serbia and public order in accordance with the law. The Act allows the asylum seeker to file a complaint contesting the decision with the competent higher court within eight days from the day of service; the complaint does not have suspensive effect. Furthermore, the Act also provides for the detention of asylum seekers in the Shelter in the event they do not comply with the less intrusive measures restricting their freedom of movement, such as a ban on leaving the asylum centre, a specific address or area or the obligation to regularly report to the nearest police station at a fixed time (Article 79).

The Asylum Office has rarely ordered the detention of asylum seekers in the Shelter.[119] However, criticisms of Article 78 of the Asylum and Temporary Protection Act are fully justified given that asylum seekers are a vulnerable category per se and are entitled to a higher level of safeguards than those ordinarily provided in the context of deprivation of liberty.[120] Namely, the Act does not envisage mandatory judicial reviews of the

119 BCHR, Right to Asylum in the Republic of Serbia January-March 2018 report, p. 27, available at http://azil.rs/en/wp-content/uploads/2018/06/Periodic-report-January-March-2018.pdf According to 2017 data, the Asylum Office issued three rulings ordering the detention of asylum seekers in the Aliens Shelter to ensure unimpeded conduct of the asylum procedure, BCHR, 2017 Right to Asylum in the Republic of Serbia annual report, p. 35, available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf

120 *Ibid*., pp. 27-28

detention decisions issued in administrative proceedings; it allows asylum seekers to file complaints contesting the decisions with the competent higher court within eight days of service. Furthermore, it is unclear why the Asylum and Temporary Protection Act does not lay down a deadline by which the court is to rule on the complaint, although the Aliens Act does in case of aliens detained in the Shelter. It appears that, instead of offering a higher level of guarantees, the Act demotes the status of asylum seekers, not only vis-à-vis aliens subject to the Aliens Act, but also vis-a-vis others enjoying minimum safeguards regarding deprivation of liberty that are laid down in criminal and misdemeanour law. Moreover, the Asylum and Temporary Protection Act does not include the obligation laid down in Article 87 of the Aliens Act, to inform an alien ordered detention in the Shelter of the grounds for his/her detention in the Shelter forthwith, in writing and in a language s/he understands or is reasonably presumed to understand.

6.4. Vulnerable Categories

The Aliens Act and the Asylum and Temporary Protection Act include a number of provisions providing special guarantees to vulnerable categories of persons who have been deprived of liberty or whose freedom of movement has been restricted. Under Article 92 of the Asylum Act, the detention of underage aliens in the Shelter shall be a measure of last resort, which may not last more than necessary; in the Shelter and minors must be accommodated there together with their parents, guardians or legal representatives. Families awaiting removal must be provided with separate accommodation guaranteeing them privacy. That Article also lays down that consideration shall be given to the best interests of the minors detained in the Shelter. As per unaccompanied minors, the relevant Social Work Centres refer them to social protection institutions or specialised reception centres designated for accommodating unaccompanied underage aliens. The obligation to take into account the needs of other particularly vulnerable categories of people referred to the Shelter is also explicitly set out in Article 91(2(7)) of the Act. Furthermore, the Aliens Act lays down an exception with respect to the detention of aliens in the Shelter for the purpose of preparing their return or effecting their forced removal: the competent authorities must provide aliens with health or other special needs with other adequate accommodation (Article 87(5)).

Placement in a social protection institution for minors under enhanced supervision (Article 78(1(4))) is the only measure laid down in the **Asylum and Temporary Protection Act** involving the restriction of freedom of movement of underage asylum seekers if necessary. This law also imposes the obligation of providing a higher level of protection regarding the restriction of movement of persons requiring special procedural or reception guarantees, such as minors, unaccompanied minors, persons with disabilities, the elderly, pregnant women, single parents with underage children, victims of human trafficking, seriously ill persons, persons suffering from mental disorders and victims of torture, rape, or other grave forms of psychological, physical or sexual abuse, such as women victims of female genital mutilation. These categories of asylum seekers may be referred to the Aliens Shelter, only in the event the authorities perform an individual assessment and establish that such accommodation is adequate given their personal circumstances and needs, especially their state of health (Article 80(1)). Unaccompanied minors are an exception; as a particularly vulnerable category, they may not be referred to the Shelter, only to a social protection institution for minors under enhanced supervision, and only if alternative measures cannot be effectively applied (Article 80(2)).

Article 80 of the Asylum and Temporary Protection Act reads:

"A person referred to in Article 17 of this law may be detained in the Aliens Shelter only in the event it has been established, based on an individual assessment, that such accommodation is appropriate given his/her personal circumstances and needs, particularly his/her health condition.

Unaccompanied minors may be referred to a social protection institution for minors under enhanced supervision in the event alternative measures cannot be applied effectively."

6.5. Detention in an International Transit Zone and at the Airport

As explained in Chapter 1 of this Manual, Article 41 of the **Asylum and Temporary Protection Act** introduces the possibility of implementing the entire asylum procedure at the border, or in an airport transit zone. The Act, however, sets out the requirements that must be fulfilled to conduct the procedure in such places, including, inter alia, the state's obligation to provide the asylum seekers with adequate accommodation and food. A number of cases had been registered even before the adoption of the new Act where aliens and asylum seekers were detained in the airport transit zone after they had been denied entry into the country and with a view to returning them to their airport of departure. The views on whether such detention constitutes deprivation of liberty varied.[121] The opinion of the Special UN Special Rapporteur on Torture is extremely important in this context; he stated that the material conditions in the room at Belgrade Nikola Tesla Airport "are not adequate for the purposes of detention, the main shortcomings being the absence of beds and heating, deplorable hygienic and sanitary conditions and constant artificial lighting."[122] The same remarks about the transit zone of the Belgrade

121 BCHR, 2017 Right to Asylum in the Republic of Serbia annual report, pp. 35, available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf

122 The Rapporteur also said that "the tap water was not running, that the premises visibly had not been cleaned for an extended period of time, and that the all seven persons who were held there were obliged to spend the night sitting in armchairs". Preliminary observations and recommendations of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Nils Melzer on the official visit to Serbia and Kosovo – 13 to 24 November 2017, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22453&LangID=E

airport were made by the Protector of Citizens, after the National Preventive Mechanism visited it in October 2017.[123]

123 The Protector of Citizens also noted that aliens held in the airport transit zone were not provided with the opportunity to spend time outdoors. National Preventive Mechanism, Report on the Visit to the Belgrade Border Police Station at Airport "Nikola Tesla", Ref. No. 37664, 13 October 2017, available in Serbian at https://www.npm.rs/attachments/article/734/37664.pdf

III

CHAPTER

FAMILY REUNIFICATION UNDER ART 8 ECHR AND OTHER INSTRUMENTS

INTRODUCTION

The separation of families is a common phenomenon in international migration and can arise for many reasons depending on the root causes of the movement and the circumstances of the journey. While in labour migration, economic obstacles or unfavourable visa-policies often prevent family units from relocating cohesively, in humanitarian migration of individuals in need of international protection, separation is prompted by conflict and other risks factors threatening the life or freedom in the country of origin or by disruptive events in transit countries. The external nature of these events often deprives refugees of any control of their circumstances, worsening their distress. When these events result in refugee family separation, the hardship faced by individuals is increased due to the uncertainty of their circumstances. In view of the above, the concept and purpose of **family reunification** as a legally recognised concept, is to restore family links where these are disrupted by the migration experience. As it will be examined below, the protection afforded to the family unity will vary depending on the type of migration movement considered and the individual circumstances of those concerned. Human rights law protects the family (as a legal entity and through the individual right to respect for family life) from separation and seeks to maintain or restore family unity, balancing family life rights with the State's legitimate interest in regulating migration. The sections below will examine the main instruments and standards applying to migrants in conditions of separation from their family members, for humanitarian or other reasons, as well as the remedies available to rectify this situation.

1. GENERAL PRINCIPLES UNDERPINNING THE RIGHT TO FAMILY REUNIFICATION IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

1.1 The protection of the Family as an entity

Different instruments under international law recognise the value of family ties as an important factor in the context of migration, acknowledging the role of migrants' family links in ensuring the preservation of their identity, in cultural, social and emotional terms. Maintaining or restoring family unity in migrants' cases is considered conducive to their smooth integration in the receiving country.

In general terms, the value of family and the protection of its unity from undue interferences is recognised under human rights Treaties, both in the context of migration and in domestic matters. While this Chapter will be primarily focusing on the standards and jurisprudence of the ECtHR, which will be explored in detail in Section 1.3.2, the text of the Convention in itself does not expressly address the issue of family reunification or the situation of migrants. While the ECtHR jurisprudence has significantly elaborated the Convention's approach to the issue, it is also worth recalling other international and regional instruments that offer a more detailed reflection on this topic, as they often end up informing the Court's judgment.

The protection from interferences with one's family has its roots in the basic recognition of the value of family as a social entity. On account of its role in shaping the structure of society, the family is universally recognised as a social actor that is worthy of protection on the part of the state.

As the main human rights instrument in the UN human rights legislative environment, the **International Covenant on Civil and Political Rights** (hereinafter also I**CCPR**),[124] protects the family as an autonomous entity and rights-holder under Art 23.1, stating that: '*[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'*. The ICCPR protects individuals from **arbitrary and unlawful interferences** in their family life (Art.17.1), recognising this as an individual right, granted to '*everyone'* (§2) irrespective of migration status. While the ICCPR is not a migration-specialised tool, its applicability to all individuals without distinction as to their migration status, makes it relevant to situations involving migrants and asylum seekers.

Similar principles as the above are replicated almost verbatim in many other human rights instruments in the UN framework and in regional and domestic legislation.

The **UN Convention on the Rights of the Child (CRC)**, for instance, affords the same protection to the family, focusing on the impact on children of events causing interferences with the family or disrupting its unity. In its preamble the CRC defines family 'as the fundamental group of society', but places emphasis on its role as '*the natural environment for the growth and well-being of all its members and particularly children*'. The particular dimension of family unity in migrant children's rights will be examined below.

As far as migration-specialised legislation is concerned, the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** (**ICRMW**)[125] is one of the instruments that explicitly recognises the significance of family life in migration. In its preamble, the ICRMW stipulates: '*migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family'*. This should be read in conjunction with Art 44, whereby States are under an obligation to **facilitate** the **reunification** of families separated as a result of migration movements, through '*measures that they deem appropriate and that fall within their competence'*. While the ICRMW

124 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Art 49

125 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - Adopted by General Assembly resolution 45/158 of 18 December 1990 c

does not formally apply to the situation of refugees and stateless persons,[126] the general principles that can be derived from it are relevant for individuals in most migration circumstances and can be seen echoed in other international instruments.

Below, we will outline the particular safeguards applying to **asylum seekers**, as a vulnerable migrant group, in terms of family reunification, as set out in specialised legislation and soft law instruments.

1.2. Who qualifies a 'family member' for the purposes of reunification and some procedural and substantive standards governing the restoration of family links in the context of migration

The definition of who qualifies as a 'family member' for the purposes of reunification varies between the different instruments applying to countries of the European Region.

1.2.1 International Standards

At the international level, different instruments identify who is considered as a 'family member' for purposes of reunification. Depending on the focus of the instrument, the composition of this group varies.

As an instrument that is not concerned with humanitarian migration, the **ICRMW**, for instance, adopts a minimal definition, limiting itself to consider eligible for purposes of reunification with the migrant worker the '***spouses** or persons who have with [him/her] a relationship that […] produces effects equivalent to marriage [and] their **minor dependent unmarried children'***. A weaker obligation exists on the state to '*favourably consider*' admitting '*other family members'* on humanitarian grounds (Art 44.2).

While the **Geneva Convention on the status of refugees (GC)** does not expressly provide for a right to family reunification, in its guidelines and Executive Committee (EXCOM) conclusions, the **UNHCR** (whose mandate has been explained in previous chapters) had the opportunity to clarify the GC's stance to family reunification in a number of occasions, paying special focus to children who are affected by the disruption of family ties.[127] It should however be noted that, while these observations and positions, outlined

126 Art 3 (d)

127 Furthermore, in the comprehensive analysis: '*The 'Essential Right' to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*', authored by Frances Nicholson for the UNHCR in January 2018, 2nd edition (available at: http://www.refworld.org/docid/5a902a9b4.html) it is recalled that while family reunification is not provided for by the GC the '*Final Act of the Conference of Plenipotentiaries at which it was adopted affirms that 'the unity of the family ... is an essential right of the refugee' and recommends that governments 'take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the family is maintained ... [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption*' (citing: UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act […], 25 July 1951, A/CONF.2/108/Rev.1)

below, provide important guidance for States in the implementation of their obligations *vis-à-vis* refugees, their applicability to situations other than those involving GC refugees and asylum seekers (by definition the target group of UNHCR) is inevitably very limited.

The EXCOM conclusions No. 15, of 1979 laid the foundations of the UNHCR'S approach to the issues, providing for an obligation for States to **facilitate** the reunification of '*at least the **spouse and minor or dependent children** of any person to whom temporary refuge or durable asylum has been granted'*. Since then, the UNHCR's position was elaborated further, with dedicated guidelines on family reunification being adopted to identify the '**types of family reunification'** which are eligible to receive support by the agency. It should be noted that, contrary to the explicit definition of family members under the ICRMW and other instruments, not all the scenarios identified below are granted the same level of protection. As soft-law sources, the UNHCR guidelines simply clarify the scope of the agency's remit in terms of assistance to reunification attempts. As such they tend to grant more generous protection standards than other instruments examined above, as UNHCR favours '*the adoption by States of **broad and flexible criteria of 'family reunification''***. While UNHCR views are not legally binding, they should inform the exercise of States' discretion. Types of reunification recognised by UNHCR include:

1. '*The '**nuclear family**', consisting of husband and wife and their dependent children*', including not only '*legally married spouses'* but those '*actually engaged to be married, …entered into a customary marriage, or … have lived together as husband and wife for a substantial period*' as well as '*spouses in a polygamous marriage if it was validly contracted in the country of origin'*.
2. Reunification between '***Parents and children***', including at least '*those dependent, unmarried children, regardless of age, who were living with the parents in the country of origin*.
3. '*Reunification of **unaccompanied minor children with their parents and siblings***', in line with the principle whereby it should be for the next-of-kin to join the child where the child is, save where '*it is reasonable under the circumstances for the minor to join them*

The Guidelines place importance on the reunification '***of other dependent members***', such as:

4. '***Dependent parents** of adult refugees*'
5. '***Other dependent relatives** […] single brothers, sisters, aunts, cousins, etc. [who] were living with the family unit as dependents in the country of origin'* or whose circumstances have changed to the fact that they are '*dependent upon refugee family members […]'*.
6. '***Unattached persons**, such as friends or foster children, to whom they are not actually related by blood*' when they '*are in the same situation as the relatives'* above.
7. Based on the culture of origin, the reunification of '*[o]ther relatives [such as] grandparents, grandchildren, married brothers and sisters, their spouses and children'* can be

considered, but is not '**actively promoted'** by the UNHCR, save where they qualify under the groups above.

1.2.2 Regional Standards

1.2.2.1. Council of Europe (CoE)

As far as the **CoE** instruments are concerned, the Parliamentary Assembly (PACE) and the Human Rights Commissioner's recommendations, among others, provide important guidance.[128] While acknowledging the heterogeneity of domestic practices and calling for the harmonisation of this concept across Member States, PACE's recommendations state that for the purposes of reunification, 'family members' should be understood to include 'the ***natural family***, ***non-married partners****, including* ***same-sex partners, children born out of wedlock, children in joint custody****, as well as* ***dependent adult children*** *and* ***dependent parents*** *on the basis of the principle of dependency*'.[129] In doing so, the CoE effectively embraces the UNHCR's wide understanding of this concept, as outlined above. Events causing the disruption of the relations between the parents, such as divorce or separation or the dissolution of an unmarried partnership, should also not prejudice the child's relationship with each parent.[130]

The **Recommendations of the CoE Commissioner for Human Rights** also support the above, echoing the UNHCR's initial position on the issue. The Recommendations embrace a 'broad' interpretation of what constitutes family, specifying that the category of 'spouses' should extend beyond married couples and civil partners and include '*individuals who are engaged to be married, who have entered a customary marriage […] or who have established long-term partnerships (including same-sex partners)*'.[131]

As far as **ECHR** standards are concerned, as is noted by the UNHCR 2018 study on the issue: *'the ECtHR […] Accept[s] that same-sex couples in a relationship can constitute family life, including if they do not cohabit, and a family unit'* (reference made to *Schalk and Kopf v. Austria and Pajic v. Croatia).* In *Pajic,* particularly, the Court considered the differential treatment given to LGBT couples as giving rise to questions of discrimination, in that the applicants' *'request for a residence permit for family reunification in Croatia had been*

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128 Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons, Position paper on family reunification, AS/Mig (2012) 01, 2 February 2012, available at: http://www.refworld.org/docid/583ed4ef7.html

129 Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons,Position paper on family reunification, AS/Mig (2012) 01, 2 February 2012, at: http://www.refworld.org/docid/583ed4ef7.html; cited in: UNHCR Legal and Protection Policy Research, The 'Essential Right' to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, January 2018 PPLA/2018/02

130 The Committee of Ministers, Recommendation on the legal status of persons admitted for family reunification, Rec (2002)4, Protection, also confirms this approach, indicating as 'family members' 'the spouse, dependent minor children and, according to domestic legislation or practice, other relatives'.

131 See UNHCR, *The 'Essential Right' to Family Unity of Refugees* (multiple citations)

denied, since the Aliens Act excluded persons living in a same-sex relationship from the possibility of obtaining family reunification'. Similar considerations were made in *Taddeucci et McCall c. Italy.*[132]

Due to its centrality to this chapter, detailed information about the position of the ECtHR on family reunification, as the decision-making body of the CoE's primary human rights instrument, the ECHR, will be provided below.

1.2.2.2. EU Law Standards

At EU level, family reunification is regulated under partially different instruments depending on the category of migrant involved. While 'family reunification' is understood restrictively in EU legislation, which dedicated a Directive to this topic, issues relating to family reunification are transversal to asylum instruments, insofar as refugee families are concerned and their unity must be maintained or restored. Some of the general principles enshrined in the EU Charter of fundamental Rights are also of relevance. The principles and jurisprudence elaborated by the CJEU on the issue is also crucial to understanding the EU's position vis-à-vis family reunification of different categories of migrants.[133]

- **The EU Charter of fundamental rights (CFR)**. The CFR constitutes the principal human rights instrument of the European Union's legal system. Having been accepted as forming part of EU's primary legislation, the CFR is recognised the same legal power as the EU founding treaties. Its provisions hence bind Member States (MS) in the interpretation and application of all EU legislation. This includes, for the purposes of this chapter, EU migration and asylum instruments. When considering the issues surrounding family reunification discussed above, which are given comparable importance across international and European law, the provisions of the CFR that should be recalled include '*the right to family life (Art 7); to non-discrimination (Art 21); the principle of best interests of the child (Art 2)24)); the right to good administration (Art 41); and to effective judicial protection (Art 47).*'[134] Art 9 on the **right to marry and right to found a family** should also be taken into account.
- **The Council Directive 2003/86/EC**.[135] The scope of the Directive is restricted to: 'migrants lawfully on the territory of the State', and '*holding* **EU 'Family Reunification Directive,** *a residence permit issued by a Member State for a period of validity* ***of one year or more*** *who has* ***reasonable prospects of obtaining the right of permanent residence*** (Art. 3). Partly echoing the general principles established by other

132 For the whole para see: UNHCR, *The 'Essential Right' to Family Unity of Refugees*(multiple citations)

133 For an informative analysis in this sense see: Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, June 2017, available at: http://www.refworld.org/docid/5a0d5eae4.html]

134 UN High Commissioner for Refugees (UNHCR), The 'Essential Right' to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, Jan 2018, 2nd edition, www.refworld.org/docid/5a902a9b4.html

135 For detailed examination of the Directive also see UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

international instruments on the matter, this directive defines family reunification as a *'necessary way of making family life possible'* and a measure that *'helps to create sociocultural stability facilitating the integration of third country nationals'* and '*to promote economic and social cohesion*' (recital 4). The directive applies to different stages of the migratory journey and importantly also covers those cases where 'the family enters together' (recital 7).

As such the Directive applies both to migrants who are regularly on the territory of the strength of work-related visa or other leave to remain and to those with recognised international humanitarian needs, be it refugees or holders of subsidiary protection, albeit to different degrees. Those who lack a stable migration status in the country are excluded from its scope. This excluded group includes, explicitly, those whose application for refugee status or other form of protection '*has not yet given rise to a final decision'* or who are just temporarily admitted on the territory of the MS. The directive is not an "asylum specific" instrument but has a more general nature. However it covers the situation of regular migrants in MS, including those having been granted international protection.

Under the Directive the right to reunification is afforded to the **members of the nuclear family**, understood to mean: the migrant's spouse and minor children (Art. 4). Polygamous marriages are expressly excluded from the scope of this provision, to the effect that where the sponsor is already married in the country of residence, the other spouse should not be granted reunification (Art. 4.4).

This is understood to include **children adopted** through recognised adoption procedures, and dependent children who are under the sole custody of the sponsor or of his/her sponsor's spouse, or under shared custody provided that the '*party sharing custody has given his or her agreement'*. Whether other family members are also allowed reunification – including registered partners – falls within the MS's discretion (Art 4.2).

The '**other family members'** falling within this category include dependent '***first-degree relatives*** *in the direct ascending line of the sponsor or his or her spouse*', the '*adult unmarried children of the sponsor or his or her spouse',* of proved incapability to support themselves due to their state of health. Debatably, at Art 4.3 the Directive also includes '**unmarried partners** […] **in a duly attested stable long-term relationship'** or '**registered partnership**' with the sponsor, who can be treated on a par with spouses in terms of reunification at the option of MS. However, as far as reaching a decision as to this matter is concerned, MS' discretion is limited by an obligation to consider certain factors as relevant, including the existence of a '*common child, previous cohabitation, registration of the partnership and any other reliable means of proof*' (Art 5.3).

In addition to falling under the **personal scope** identified by the directive, above, family reunification applications must be backed up by admissible evidence proving the sponsor's ability to support the family member seeking to join him/her in the country. Relevant elements include proof of adequate accommodation, sickness insurance and '*stable and regular resources […] sufficient to maintain himself/herself and the members of his/her family, without recourse to social assistance*' (Art.7).

The **limitations** to family reunification permitted under the Directive are partly in line with those provided for under the ECHR examined below, and include: 'grounds of public policy, public security or public health' (Art.6). Similar considerations can be the basis for a decision not to renew a permit granted on family reunification grounds.

Finally, asylum seekers benefit of more favourable provisions in terms of **documentation** requirements to (Art 11 Namely, where official documents fail to be submitted '*other evidence…of the existence of such relationship'* should also be assessed in line with the MS national law and, in any case, refusals cannot be solely based '*on the fact that documentary evidence is lacking'*. In the same vein, the requirements in terms of maintenance and duration of stay in the MS are also partly waived (Art 12).

As a separate, but connected issue, reference should finally be made to the **principles elaborated by the CJEU** around the interpretation of the EU **free movement Directive** (2004/38/EC)**.** While this instrument is relevant to reunification only when EEA citizens are involved, the recent CJEU ruling in *Coman* (C-736/16) addressed whether EU free movement law understands 'spouses' to also include same-sex marriages, and hence allows the latter to benefit from free movement rights. In his analysis of the case, Steve Peers cites the judgements passage whereby the terms spouse under the Directive: *"is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned"* noting how *'While the Directive expressly permits host Member States to apply their own law when admitting registered partners, it makes no such provision regarding spouses, so such a possibility was implicitly ruled out'*.[136] While this instrument is not directly relevant for asylum seekers, the Court's position of the issue can and arguably should inform the approach of other EU law instruments to the rights of same-sex spouses, including for the purpose of family reunification. In practice, studies note that at the point of implementation, the lack of specificity when defining who qualifies as a spouse for purposes of refugees reunification, does not prejudice individuals in countries where same-sex marriage is recognised, as '*Member States with registered partnership laws that include same-sex couples […]* ***generally provide for similar recognition in immigration matters for same-sex married partners and registered partners*** *(e.g. Netherlands, Sweden, Denmark, Finland, UK) […] However, this provision* ***generally leaves family members unprotected in Member States that do not recognise same-sex couples*** *[….]'*. [137]

1.2.2.2.1. Family reunification in other EU instruments

As mentioned, while the Family Reunification Directive deals with the substantive and procedural aspects of this issue for different categories of **migrants** residing regularly in the MS, the main principles and standards at the basis of the very institution of family reunification inform other EU instruments, especially those in the area of asylum. These will be listed below, only insofar as sections relevant to the issue of reunification are concerned.

136 http://eulawanalysis.blogspot.com/2018/06/love-wins-in-cjeu-same-sex-marriages.html

137 https://www.ilga-europe.org/sites/default/files/directive_transposition_web.pdf, see p. 12

I. The Asylum Qualification Directive (AQD):[138] The AQD does not, as such, regulate the reunification of refugees' family members. However, it refers in its body to a number of principles that are relevant to that effect. Specifically, the AQD remarks how, where asylum seekers are involved, it is *necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and […] the best interests of the child'.* In line with main human rights treaties, under Art.23 the AQD provides that the unity of asylum seekers' family shall be maintained, providing for a series of different routes through which this can be achieved. The concrete scope of this provision has been subject to criticism insofar as it would seem to only be designed to protect the family from expulsion and, in any case, to exclude '**post-flight**' families (issue examined below), in spite of '*the fact that refugees* ***may form genuine and lasting family relationships during or after flight,*** *ties which are also protected by [Art.8 ECHR]'*.[139]

II. Reception Conditions Directive (RCD): the RCD, which regulates the quality of the living conditions and associated access to services granted to asylum seekers in MS, directly deals with family reunification when addressing the situation of **migrant children**. Under Art 23.2, the Directive requires MS to take into account '*family reunification possibilities*' when assessing the child's best interest. The existence of family links must also be considered in **family tracing efforts** (Art.24), which shall be undertaken '*as soon as possible after an application for international protection'*.

III. Dublin Regulation:[140] the Dublin regulation essentially governs the rules on the attribution of responsibility for asylum applications made across EU MS; it does not, as such, deal with family regulation, especially if this is understood in the sense of the 'Family reunification' Directive, which essentially regards this measure as a way for family members to join a migrant who has – for various purposes – a relatively stable migration status in the MS. If family reunification is however regarded simply as a measure aiming to bring separated families back together, irrespective of the stability (or lack thereof) of the migration status of its members, the Dublin Regulation provides valuable insights. In its criteria to determine **MS responsibility for asylum applications**, the Dublin Regulation provides for a series of criteria that are liable to shift such responsibility from one MS to another, for the purposes of ensuring the protection of certain overriding interests. These criteria (and interests) include:

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138 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

139 CoE, Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe, June 2017, citing: S. Peers, and ors, EU immigration and asylum law: a commentary (Rev 2nd edn, Brill Nijho , 2015), pp. 86-87. The CoE study notes that the 2016 Proposal to reform the AQD turning it into a regulation includes, amongst its positive aspects '*an extended definition of family members, taking into account the different circumstances of dependency, and…post flight family members'*

140 Reference for this section should be made to the CoE Study cited above, which acknowledges that the proper application of some Dublin Regulation provision can '*even result in bringing about family reunification for asylum seekers'.*

a. **The protection of minors** (Art.6 and 8) to the effect that the MS '*where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members'*. Where applications from **unaccompanied minors** are made (Art.8) the MS *'responsible shall be that where [his/her] family member or a sibling'…is legally present'* or a **relative** who is provably able to care for him/her and *'provided that it is in the best interests of the minor'*. Finally, where no family members or relatives can be relied upon, responsibility for the application lies with the MS 'where the unaccompanied minor has lodged his or her application […] provided that it is in the best interests of the minor' (Art.6.4).
b. The restoration of family links where **family members of the applicant are themselves asylum seekers or recognised refugees in other MS** (Art 9 and 10). Under these provisions, the responsibility for an asylum application should be attributed to the MS where the family member/s of the applicant have either lodged an asylum application that is still pending (Art.9) or are recognised refugees (Art.10).
c. Family links are also safeguarded by the protection of **dependent persons (Art.16)** (including cases of pregnancy, new-born children, serious illness, severe disability or old age), whereby MS 'shall normally' ensure the reunification of such individuals with the family members or relatives on whom they depend upon and who are legally resident in a MS. Even in the absence of the above conditions, MS have discretion to take responsibility for asylum applications that do not fall under their competence (Art.17), for the purposes of bringing '*together any family relations, on humanitarian grounds based in particular on family or cultural considerations'*, provided that the person concerned agrees to this in writing.

Where the above conditions are present in a particular case, the two or more MS concerned with the initial application, must go through well-defined procedural rules that govern **the transfer** of asylum seekers from the MS where they are present to the one that – based on the above criteria – should or simply wants (in the case of Art.17) to take responsibility for their application based on the presence in that country of family links or for other humanitarian considerations. Those concerned by the transfers – on both sides – are normally asylum seekers whose application is yet to be determined, and as such their status will not be as stable as would be required under the Family Reunification directive. Nonetheless, the Dublin Regulation practically makes possible their reunification with family members and relatives present across the MS. While Dublin transfers do not formally qualify as relocations for reunification purposes, in their substance they pursue the same objective.

Besides the rules on **Dublin transfers**, other procedural and substantial provisions laid out under the Regulation have been described as potentially conductive to the protection of family unity. In a 2017 Study on Family Reunification, for instance, the CoE Commissioner for Human Rights refers to Recital 15, on the joint processing of applications from family members by a single MS, ensures that *'the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated'*.[141]

It should be remarked however, as recalled by the CoE in its study, that MS's failure to duly apply the criteria under the Dublin Regulation irreparably undermined its effectiveness in practice, especially insofar as the restoration of family links is concerned, with procedures being characterised by '*lengthy family tracing procedures, delays in conducting age assessments, and different documentary and evidential requirements for establishing family links among member states*'[142]. The way in which the above groups (unaccompanied minors, dependent persons, family members) are treated in practice will be explored in the next sections, when examining the decision-making activity of the bodies in charge of monitoring compliance with human rights instruments**: the ECtHR, the CJEU and the UN Human Rights Committee, examined in detail in Section 1.3.2, 3 and 4 of this Chapter.**

1.3. General Principles on the protection of the right to family reunion for refugees

As their migration movements are prompted by humanitarian reasons, including risks of persecution or serious harm in the country of origin, asylum seekers' flight is often unpredictable and disorderly, with the result that the element of 'voluntariness' behind their journey is virtually absent. The coerced nature of their movements and the dangerousness of the journey often make the separation of refugee families unavoidable. Asylum seekers' unaccountability for their choices in terms of relocation enhances their protection needs in terms of reunification with their families, as – contrary to what often happens in other migration contexts explored below - they normally have no control on the circumstances leading to it.[143] In its long-standing guidelines, the **UNHCR**[144] explicitly acknowledges the above, stating that refugees' families' separation, which frequently results from the circumstances of their flight, *'invariably leads to hardship and sometimes to tragic consequences'* and may *'create serious obstacles to a refugee's integration in a new homeland'*. With reference to the risks prolonged separation can entail, the UNHCR requires for '*family unity issues*' to be **prioritised** '*at an early stage in all refugee operations*'.[145]

These considerations led the UNHCR to identify a series of '**practical difficulties**' often encountered as part of refugees reunification, to assist States in adopting adequate ac-

141 See CoE Study above

142 See CoE Study above

143 Similarly in *Mugenzi v France, §53, and Tuquabo-Tekle and Others, § 47*

144 UNHCR GUIDELINES ON REUNIFICATION OF REFUGEE FAMILIES (July 1983), at: http://www.unhcr.org/3bd0378f4.pdf

145 No. 88 (L) – 1999 – Conclusion on the Protection of the Refugee's Family

tions to ensure that these are duly confronted and refugees' situation of disadvantage is rectified (§9)[146]:

Some common scenarios in refugees' families' separation:

'(a) *One part of the family has reached a country of permanent settlement, while the rest […] is still in the country of origin [….]*

(b) One part of the family is in a country of temporary asylum - and is therefore not yet definitively settled - while the rest of the family still resides in the country of origin; […]

(c) One part of the family has reached a country of permanent settlement while the other cart of the family is in a country of temporary asylum […]

(d) Members of the same family have reached different countries of temporary asylum [or in] (e) […] Different parts of the same country of temporary asylum […]

(f) Members of the family find themselves in different countries of permanent settlement'.

In order to address the above difficulties, the UNHCR recommendations to States[147] include promoting '*liberal admission policies in countries of asylum*'[148] as well as – whenever possible – granting the '***same legal status and** facilities as the refugee*' to his/her family member/s. The particular protection of accompanied and unaccompanied refugee children, addressed by the UNHCR, will be dealt with separately.

In terms of **procedural guarantees**, mindful of the particular features of their journey and the associated distress, the UNHCR recommends that States facilitate refugees' reunification by:

- Refraining from considering '*the **absence of documentary proof** of the formal validity of a marriage or of the filiation of children*' as an impediment *per se*;[149]
- Avoiding 'undue delays' in the admission of family members;
- Facilitating the adoption of '*special measures of assistance*' to address '*economic and housing difficulties in the country of asylum*'.

1.3.1. The particular situation of separated migrant children in situations of separation

1.3.1.1 International Standards

Children separated from their families by migration are in a particularly vulnerable situation and require commensurate protection. This section looks at the applicable international standards.

146 *Ibid.*

147 UNHCR's Executive Committee Conclusion No. 24 §10

148 UNHCR's Executive Committee Conclusion No. 24 §10

149 EXCOM – Conclusions no. 24, §6

→ For details on the rights of migrant children in detention and expulsion see Chapter I and II

→ For details on the needs and rights of migrant children in general see Chapter IV.

Migrant children's vulnerability, their age, maturity and needs play a key role in determining the necessity of family reunification in a particular case. When migrant families experiencing separation include minor children, the need for their reunification to be ensured will be more pressing, owing to the overriding need to protect the migrant child from a prolonged situation of uncertainty and distress.

On a normative level, while the child generally benefits from the protection from arbitrary or unlawful interferences with his/her family life (Article 16 UN CRC), common to all individuals, children's special situation, their inherent dependency and vulnerability, entitles them to a series of dedicated safeguards in so far as the protection of their family life is concerned. These include:

- **Children's right to benefit from a family environment**, which is considered instrumental to the '*full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'* (UN CRC Preamble).
- **Children's right to preserve their identity**, which is importantly understood to include '***nationality, name and family relations'*** (Article 8.1 UN CRCR) from '*unlawful interference'* and have it protected and restored when such interferences occur.
- **Children's right not to be subjected to prolonged psychological and emotional distress.** As a rule, children – irrespective of their migration status – are protected against separation from their families on account of the psychological and emotional distress caused by the severance of family ties, which affects both the child and his/her family members. The degree of that distress will depend on their age and level of maturity, his/her bond with the family member/s concerned and the social ties in the country where he/she is present.

In view of children's special needs, family reunification in cases involving them (Article 10 UNCRC) must be pursued with specific precautions and is accompanied by higher safeguards. The UNCRC provides that:

'1. *[…] Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner […]'.*

The Convention also stipulates children's rights to '*to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents'* when the latter reside in different States (Article 10), which should be protected – *inter alia* – through States' consideration of '*the right of the child and his or her parents to leave any country, including their own, and to enter their own country'*. The above considerations should underlie States' assessment of family reunification requests involving children.

When children are unaccompanied and **seeking asylum,** specific considerations and rules apply. In cases involving child asylum seekers, their vulnerability *qua* asylum seekers and *qua* children requires States to adopt specific measures, especially insofar as their Article 9 and 10 obligations are concerned.

In its general comment No. 6, on unaccompanied and separated children outside the country of origin, the UN CRC specifies that, in the context of international migration, the protection from separation under Article 9 UNCRC requires States to undertake '*all efforts …. to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views*'.[150]

The UNCRC stresses the State's obligations to engage in **'family-tracing'**[151] efforts for the purposes of restoring the family unity (Article 22.2), save where there are reasons to believe that this would not be in the child's best interest.[152]

Reunification with the family should be pursued with due regard to the country to which the child would effectively be relocated and the risks existing there; the UNHCR notes for instance that in the asylum context '***family reunification in the country of origin is not in the best interests of the child*** *and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights*'. Where the child is recognised as a refugee, the UNHCR argues, this should be regarded as '*indisputable documentation*' of such risk.[153]

Reunification of children (refugee and non-refugee)

Special attention to **children separated from their parents** or responsible adult :

- **Explicit protection from separation** (Arts 9 and 10 UN CRC**)**
- **Expeditious processing of reunification applications** (Art. 1)10) UN CRC)
- **Right to family life/family unity** (Arts 16 and 22 UN CRC) and cooperation in family tracing

1.3.2. Family reunification of migrants and asylum seekers: ECHR protection standards and jurisprudence of the ECtHR

1.3.2.1. Introductory concepts and family life under the ECHR

As already stated, the ECHR is not a migration or asylum specific legal instrument and, as such, does not address the situation of migrants explicitly, save under certain Articles. In

150 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

151 UNHCR EXCOM - No. 74 (XLV) – 1994

152 *"68. For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members"*

153 For the whole para see: UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

order to understand the position of the ECHR on particular issues, it is essential to focus on the principles elaborated through the jurisprudence of its monitoring judicial body, the European Court of Human Rights (ECtHR).

While not addressing the issue of family reunification explicitly,[154] the ECtHR has found the Convention to cover situations where migrants, including asylum seekers and refugees, suffered separation from their family members and as a result, their fundamental rights were violated. The jurisprudence of the Court in this area mainly hinges on the protection afforded by the Convention to the family as an entity and individuals' right to respect for family life, under **Art 8**, although **Art 14** (on discrimination) is sometimes also engaged.

Article 8 states:

Right to respect for private and family life *'1. Everyone has the right to respect for his […] family life […] 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.*

In view of the broad scope of the Convention, which applies to 'everyone' within a state's jurisdiction and not only to those regularly residing by way of citizenship or other status, this Art also applies to irregular migrants, asylum seekers and refugees. Respect for the rights under this Art is primarily ensured through **negative** obligations to the State, informed by the individual's right to be free from '*arbitrary action by the public authorities*'. The Court however also recognises the corresponding necessity for this provision to also impose **positive obligations** upon the State, that can be *'inherent in effective 'respect' for family life'* (*Kaplan v Norway,* no. 32504/11*, §69* citing *Antwi and Others v. Norway*, no. 26940/10, § 89). Depending on the circumstances, respect for Art 8 can require the State to take such steps that are considered reasonably necessary to ensure protection of the rights under this provision.

Unlike Art 2 or 3 of the ECHR (See detailed examination in the previous version of this Handbook), which protect individuals' rights in absolute terms and don't allow for derogations in any circumstances and irrespective of the subject's conduct, Art 8 is treated as a **qualified right** under the ECHR and, as such, allows for limitations in set circumstances and for well-identified purposes. This is illustrated by paragraph 2, whereby permissible interferences under this right are only possible if the following conditions are met:

1. The interference is '*in accordance with the law and [] necessary in a democratic society';*

154 See: Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons, Position paper on family reunification, AS/Mig (2012) 01, 2 February 2012, http://www.refworld.org/docid/583ed4ef7.html: '*Although [Art 8] does not contain a right to family reunification, the [ECtHR] provides for a limitation of states' discretionary powers to interfere in a person's private and family life, firstly in the event of entry of foreign nationals onto the territory of a state for the purpose of family reunification'*

2. The interference pursues a permitted, legitimate aim: '*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.*'

Situations of separation which have occurred before, during or after the migration experience have been considered liable to affect migrants' rights and, as such, the ECtHR has considered itself competent to examine these situations under Art 8 in a variety of cases involving migrants. Some examples of the situations considered by the Court through time include:

1. Situations involving family reunification avenues available to **third country nationals who are regularly in the territory of the State** (see *Biao v Denmark,* no. 38590/10; *Jeunesse v Netherlands,* no. 12738/10; *KA and Others v Belgium,* C-82/16; *Senigo Longue and Others v France*, no. 19113/09) and seek to be joined by their family members or to have the situation of their family members regularised
2. Situations involving recognised **refugees** and **applicants for international protection** who have made an application on the territory of the State and are awaiting a decision (among others *Hode and Abdi v The UK,* no. 22341/09; *Jeu, Mugenzi* and *Tanda-Muzinga v France, Tuquabo-Tekle v The Netherlands,* no. 60665/00*) Please note that all cases mentioned above involve different factual situations.*

In a series of cases the Court explicitly considered the situation of **migrant children** in situations of separation and their particular position, in terms of substantive and procedural rights, with respect to family reunification. The Court has examined the situation of children both where they would be **indirectly affected** as a result of a decision refusing a family member (parent or other responsible adult) to join them in the country where they are resident or where they are the **direct recipients** of a decision denying them the opportunity to join their family members in the requested country (see *KA and Others v Belgium,* C-82/16; *Mugenzi v France,* no. 52701/09; *Senigo Longue and Others v France,* no. 19113/09; *Tanda - Muzinga v France,* no. 2260/10*; Tuquabo-Tekle v The Netherlands* no. 60665/00).

Jeunesse v Netherlands

While not being specifically a family reunification case, the leading case of ***Jeunesse v Netherlands***, no. 12738/10, provided a comprehensive outline of the Court's considerations in cases involving the proposed return of long-term migrants with established links in the country, including young children. The Court held that the refusal to provide the applicant with a residence permit was contrary to Art 8. The applicant, of Suriname nationality, had lived in the Netherlands for over 16 years, and had three children and a husband of Dutch nationality. She had entered the country on a visitor's visa in order to live with her husband, and had remained as an overstayer. Several factors were relevant to the balancing exercise: all members of her immediate family except her are of Dutch nationality; she has been peacefully resident for more than 16 years, enabling her to create strong family links; removal of her and her family would cause them a degree of hardship; the applicant was the children's primary carer; the children's interests weighed against her being removed and their interests was a paramount consideration. As a result, the court found that, even having regard to the member state's margin of appreciation, the authorities had failed to strike a fair balance between the interests of the state in deporting the applicant and the right to family life of the applicant and, importantly, her children.

1.3.2.2. General principles and the test applied by the Court in reunification cases

In the context of cases involving migrants trying to join their family members, the individuals' rights under Art 8 are balanced against the State's competing assertions in relation to migration control (*Abdulaziz* among others) and other societal interests (corresponding to the reasons of '*national security, public safety or the economic well-being of the country [etc.]'*, in paragraph 2 of Art 8). Interferences with the rights under Art 8 are, as such, only allowed in presence of permitted reasons and provided that the State's action meets the ECHR requirements.

As with other qualified rights under the Convention, the possibility to depart from its general obligations under Art 8, albeit only in well-defined cases, effectively allows States to have some room for manoeuvre when striking a balance between individual protection needs and broader societal concerns. The degree of **discretion** States are entitled to when considering limiting their obligations under the Convention is described by the Court as their '**margin of appreciation**'.[155]

The ECtHR **does not therefore recognise an absolute right to enter or reside** in a particular country (*Jeunesse v Netherlands*); this extends to both migrants trying to enter a country, as was examined in the first chapter of this Handbook, and to the family members of migrants trying to join them in the country where they reside. As a corollary to the above rule, Art.8, alone, is not considered to place a general obligation upon States to authorise family reunification (*Jeunesse v. the Netherlands; Biao v. Denmark*). The decision on an application for reunification will always be based on a careful balance of interests, taking into account the **particular circumstances** of case and the State's legitimate societal interest.[156]

In the Court's own words: a '*fair balance […] has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation* (*Konstatinov v. the Netherlands*, no. 16351/03, § 46; *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 42).

155 ECHR Guide on Art 8, above, §217

156 ECHR Guide on Art 8 - §293. *Where immigration is concerned, Art 8, taken alone, cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory (Jeunesse v. the Netherlands [GC], § 107; Biao v. Denmark [GC], § 117)…the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (Abdulaziz, Cabales and Balkandali v. the United Kingdom, §§ 67-68; Gül v. Switzerland, § 38; Ahmut v. the Netherlands, § 63; Sen v. the Netherlands; Osman v. Denmark, § 54; Berisha v. Switzerland, § 60).*

The **presence of children,** the condition of the applicant as an **asylum seeker or recognised refugee** – and hence as a vulnerable person – as well as other **substantial circumstances of the case** all play an important role and must be given due weight in the State's balancing exercise.

In the case of ***El Ghatet v Switwerland*** (no. 56971/10), the ECtHR found appropriate to recall some of the governing principles in Art 8 cases regarding the issue of family reunification, recalling its established findings. These partly resonate with and partly expand upon the rules already outlined above (§44):

a. *'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;*

b. *As a matter of well-established international law and subject to its treaty obligations**, a State has the right to control the entry of non-nationals** into its territory;*

c. *[…] Art 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 authorize family reunification in its territory'.*

Through its case law, the ECtHR has further provided additional elements specifying the scope of the above rules, giving weight to a series of factors that should be taken into account in the different circumstances where family reunification is sought. Some of these include:

1. The extent of disruption to family life in the concrete case (among others *Kaplan v Norway* no. 32504/11 §70);
2. The temporal collocation of the creation of family ties – particularly whether '*family life was created at a time when the persons involved were aware that the immigration status of one of them'* made family life in that country 'precarious' from the outset;[157]
3. The existence and quality of the family and personal ties the concerned person has in the Contracting State (among others *Kaplan v Norway* §70);
4. The existence **'**of any **'insurmountable obstacles'** or **'major impediments'** to establishing or re-establishing life in the country of origin (*see Tuquabo-Tekle and Others, § 48)*
5. The existence of **obstacles** to the establishment of family life elsewhere[158]
6. The existence of '*factors of immigration control ([e.g.] a history of breaches of immigration law)'*[159]

157 ECHR Guide on Art 8, above, § 295

158 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*: the Court '*generally finds that where family members can enjoy family life elsewhere, there is not an obligation to admit family members – an approach sometimes called the 'elsewhere approach''.*

159 See UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

7. The presence of **children** and the consideration of whether being reunited with the parent/s or other responsible adult in the requested country is in their best interest (*Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135). [160]
8. The availability of **sufficient and adequate resources** to support the family members being relocated[161]
9. The justifiability of a difference in treatment between categories of migrants and non-migrants for the purposes of family reunification (**non-discrimination**).

Refugees

Refugees: stronger rights to the protection of family life - the 'elsewhere' approach cannot be applied given the predicament of refugees – *de facto* 'insurmountable obstacles 'to establishing family life in the country of origin, **third states:** careful individual analysis of the human rights implications of the transfer.

In contrast, in cases involving asylum seekers, their vulnerability also plays a role to the assessment of whether it would be possible for them to enjoy family life elsewhere. Their inability to be returned to a country where they would face persecution is usually presumed.

Below, we will examine some of the topics outlined here in greater detail, focussing on the Court's approach to recurring issues faced in family reunification cases.

1.3.2.2.1 The voluntary establishment of a new family in the country and the quality of the intentions to pursue family reunification

In some instances, the ECtHR had to consider family whether, behind the case concerned, the parents '*irrevocably decided to leave their children in the country of origin, and thereby abandoned any idea of a future family reunion' (El Ghatet v Switwerland,* no. 56971/10, §45, Şen, § 40*).*

Children: consideration of whether parents had voluntarily left children in their country of origin as a factor potentially weighing against family reunification (even though the refugees and asylum seekers are generally protected from return). In the case of refugees, the Court acknowledges that they are often also compelled by circumstances to leave family members behind.

In cases involving refugees and migrants fleeing situations of humanitarian risk, the Court's appreciation of the parents' 'voluntary' choice to relocate is informed by different

160 The case of *Neuliger* cited here is not an immigration control case but an abduction case pursuant to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. It is mentioned here for the sake of completeness and due to the fact that, because it provides practitioners with very important principles, it could be deployed in a "thinking outside the box" approach to address relevant immigration legal questions

161 See UN High Commissioner for Refugees (UNHCR), The 'Essential Right' to Family Unity of Refugees […] citing: *Konstatinov v. The Netherlands 'In principle, the Court does not consider unreasonable a requirement that an alien having achieved a settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought.')*

considerations, as refugee movements are by definition prompted by humanitarian risks, which are impossible to control or predict. The case of ***Tuquabo-Tekle and Others v The Netherlands***, (no. 60665/00) examined below in greater detail, provides a clear example.

The Court has given weight to the **conduct** of those seeking family reunification, both before and after their arrival in the country of destination, treating it as an indication of the long-standing nature of their intentions to effectively be reunited with their family members and hence as evidence of their seriousness. While findings suggesting that the person seeking reunification has not acted with promptness when making the relevant application have a bearing in the Court's scrutiny, they are not *per se* conclusive.

El Ghatet v Switwerland

In ***El Ghatet v Switwerland***, § 48, the Court attached importance to the fact that '*the first applicant left behind the second applicant, when he left Egypt to seek asylum in Switzerland in 1997'*, noting that *'Even though his application for asylum was rejected […],* ***caution is called when determining whether he left his child behind of 'his own free will'***. While the Court did not find the conduct of the Applicant to offer sufficient elements to conclude whether he '*had always planned to live with his son'*, the Applicant's other family links in Switzerland (i.e. the daughter he had from his second wife in the country) made it 'unreasonable' for him to be forced to relocate to Egypt.

The Court's jurisprudence has dealt with the right to family unity of people in different circumstances in different ways. Taking as an example the case of *Ahmut v Netherlands* and the above-mentioned *El Ghatet v Switzerland*, the approach of the Court to the issue of family unity in relation to the different situations of migrants and force migrants is apparent.

In the case of **Ahmut v the Netherlands (**§70) the Applicant's separation from his youngest child, in Morocco, was described as **'the result of [his] conscious decision to settle in the Netherlands rather than remain in Morocco'.** As the Applicant himself maintained both Dutch and Moroccan nationality (while his child only had Moroccan nationality) the Court concluded that he was not '*prevented from maintaining the degree of family life which he himself had opted for when moving to the Netherland'* and there wasn't' '*any obstacle to his returning to Morocco'*.

In similar situations the **voluntariness** of the individual's choice to relocate in another country, considered in conjunction with the absence of significant obstacles hindering the return to the country of origin, can thus have a decisive role in the Court's balancing exercise in Art 8 cases. This is in line with the general principle whereby Art 8 does not as such protect the individual's right to move and reside in a country of one's choice. As stipulated by the Court in the above case (§71) while *'[i]t may well be that [the Applicant] would prefer to maintain and intensify his family links with [his youngest child] in the Netherlands. However […] Art 8 (art. 8)* ***does not guarantee a right to choose the most suitable place to develop family life'***.

Ahmut v the Netherlands

In ***Ahmut v the Netherlands***, the Applicant, who held both Dutch and Moroccan nationality sought reunification with his son who was living back in Morocco. The Applicant had left his wife and children in Morocco years before and had remarried twice in the Netherlands. As his first spouse in Morocco died, the Applicant remained the sole guardian of his children. Two of the children were able to enter the Netherlands to attend a University degree there, while the eldest established himself professionally in Morocco, where their grandmother, of 80 years of age, was caring for the applicants' youngest son, who eventually attempted to establish himself in the Netherlands and reside with the Applicant. Their applications in this sense were however rejected on several grounds. The Court's concluded that the domestic Court choice to refuse the Applicants' request to be reunited with his son in the Netherlands had been justified on several considerations, including the child's strong **linguistic, cultural and family links in Morocco** on one side, and the father's ultimately voluntary choice to relocate in the Netherlands, which did was not considered to prevent him from returning to Morocco to enjoy his family life there.

Relevance is also given to the circumstance of whether the persons **establishing new family links** in the country of destination '*were aware that the immigration status of one of them was such that* ***the persistence of that family life within the host State would from the outset be precarious***'. The Court has examined such scenarios in ***Kaplan* v *Norway*,** where the applicants' residence in the country had been prolonged despite their lack of migration status.

In the Court's view, the individual's awareness of his/her precarious migration status in the country is liable to make the Court's assessment stricter, to the effect that a failure to ensure reunification in the above cases will only be considered in breach of Art 8 '***in exceptional circumstances'*** *(Kaplan §70, Abdulaziz, Cabales and Balkandali,* nos. 9214/80; 9473/81; 9474/81 *§ 68 and ors).*

The case of ***Darren Omoregie and others v. Norway***, no. 265/07, shows the application of the above rule, as the expulsion of the Applicant in this case, a failed asylum seeker of Nigerian origin, was not considered to give rise to a violation of Art 8, owing to the fact that his 6-year stay in Norway had been without a valid migration status in the country. Irrespective of the long time spent in the country, and the links established therein, the applicants' status as an overstayer was considered to make him aware of the precariousness of his predicament. While it was not contested that the decision to expel him would give rise to an interference with the relationship to his wife and child in Norway (§56), the Court concluded that such interference was not unlawful in the present case. The Applicant could in fact not reasonably expect to pursue his family life in Norway, given his unlawful status and repeated failures to be granted leave to remain on different grounds. The Applicant's strong links with Nigeria and the absence of '**insurmountable obstacles**' for his wife and child's relocation in the latter country were also considered decisive.

Darren Omoregie and others v. Norway, no. 265/07

Summary from: Nuala Mole and Catherine Meredith – Asylum and the ECHR, Council of Europe Publication.

The case of *Darren Omoregie and others v. Norway* concerned a Nigerian national who married his Norwegian wife while his asylum claim was pending. They had a daughter together. When his asylum claim failed he was told to leave the country but instead he stayed and worked for a year without a permit, which constituted a breach of the immigration rules. His application for family reunification was rejected and he was expelled to Nigeria with a prohibition on re-entry for 5 years. The Court noted that his links in Norway where he had only been for 3 years despite having formed a nuclear family there were weaker than those in Nigeria where he had grown up. Whilst never disputing that family life was genuine, the Court found that it had been formed when the applicant's stay in the country had been precarious and that the applicants would not suffer insurmountable obstacles in moving to Nigeria. This is a sad decision that reflects the often inflexible nature of immigration control once a claim for asylum has failed.

In a similarly situated case, *Kaplan and ors v Norway,* summarised in detail below, the Court reached an opposite conclusion based on an important difference. While in this case too the first applicant was expelled on public interest grounds, due to his criminal record and prolonged unlawful stay, his separation from his wife and 3 children – whose stay in Norway had been regularised – was considered to breach Art 8 in so far as his youngest daughter was affected by severe child autism and was in need of special care.

1.3.2.2.2. Obstacles to enjoying family life elsewhere – the Court's evolving approach

As was introduced above, in order to prove that a decision refusing their request for re-unification will be in breach of their Art 8, migrants seeking to be joined by their family members need to prove that **family life cannot be enjoyed 'elsewhere**' ('life elsewhere test'). With respect to this test, in its case-law the ECtHR had initially adopted a rather strict approach, requiring applicants to show that in their case family reunification was **the only way to (re-) establish family life**, (*Gu¨l v. Switzerland*). The rather high threshold was significantly lowered with the Court's ruling in the case of *Sen,* cited above, where '*it found rather that admission was the* ***most appropriate*** *means of developing family life'*.[162]

Gül v Switzerland

In the leading case of ***Gu¨l v Switzerland*** (no. 23218/94) the Applicant, a Turkish national fled the country to seek asylum in Switzerland, leaving behind his wife and 2 children. The Applicant's asylum claim was based on his Kurdish ethnicity and political affiliation. After some time, the Applicant's wife, who suffered of epilepsy, experienced a severe injury as a result of her condition and, not being able to access adequate treatment in Turkey, she joined the Applicant in Switzerland. Once in the country she was promptly hospitalised 'as an emergency case' and had two fingers amputated as a result of the injury suffered. Shortly after, the Applicant's wife gave birth to the couple's third child.

162 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

While the Applicant's asylum request was rejected on the lack of sufficient elements in support of his individual risks of persecution in Turkey, the Police advised the couple that there were the conditions for them to be granted a permit on humanitarian grounds, on the basis of the Applicant's wife health and his own lengthy stay in the country.

After the granting of their humanitarian visa, the Applicant attempted to request that his two children join them in Switzerland; such request was however rejected on grounds that the family did not meet the relevant criteria, the Applicant did not have sufficient resources to provide for them and one of the children had reached the age of majority. Further attempts to obtain the admission of the Applicant's younger child, of 8-years of age at the time, in the country through other routes also failed.

Reasoning and findings: in its judgement the Court considered that the separation of the family had essentially been the result of the Applicant's fleeing Turkey to seek asylum in Switzerland, albeit with unsuccessful results. The Applicant's and his wife's stay in the country had indeed been justified on the latter's precarious health, which had given them title for a humanitarian permit. Conversely, the Applicant had been voluntarily visiting the couple's minor son in Turkey, which confirmed the absence of persecution risks for him in the country. The Applicant's wife's status also evolved through time and she also joined the Applicant in one of the visits to Turkey. This suggested in the Court's view, that her health needs were no longer urgent and she could receive adequate care in Turkey. The above, combined with the couple's child linguistic and cultural ties in Turkey, and lack of similar connections in the Switzerland militated in favour of finding that the domestic authorities had not acted in violation of Art 8 when refusing the Applicant's reunification request.

1.3.2.2.3. The presence of children

As was mentioned above, the voluntary choice on the part of the parents to leave the children behind when moving to a different country can be considered significant when assessing the opportunity to grant family reunification, insofar as such choice can be understood to suggest an intention not to seek family reunion in the future (above). However, especially where children are concerned, the above consideration can never exhaust the assessment of the situation but other factors must be taken in due account.

In particular, in presence of children, the Court has placed emphasis '***age***, *their* ***situation in their country of origin*** *and the* ***extent to which they are dependent on their parents***' are all factors to be weighed against the competing considerations on the parents' intentions (*Tuquabo-Tekle and Others, § 44*).

In its compilation on the issue, the UNHCR also recalls as factors of relevance in the Court's appreciation of children cases the existence of: '*any* ***custody proceedings****, any* ***disruption and stress already experienced****, any* ***special needs and care requirements***'.[163] While these observations have been made by the Court in cases where separation is the result of the expulsion of a parent, rather than the refusal of an application for family reunification, they should be regarded as equally applying to this context.

163 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

The existence of **delays** in the procedures to decide on reunification requests, are also liable to have an impact in children's cases, in view of the fact that the passage of time is perceived differently between children and adults and the former tend to suffer greater distress as a result of long procedural times.[164]

The best interest of the child in family reunification scenarios

In its case law, the Court's takes due note of the specific vulnerability of asylum seeking children and acknowledges its impact on family reunification cases. In the cited case of ***Tanda-Muzinga**,* the Court restates its position on the issue, maintaining that '*[w]here children are concerned, the national authorities must, in assessing proportionality for the purposes of the Convention, take account of their best interests*'[165], which must be '*at the heart of the […] considerations*' of the domestic courts (*Mandet v. France,* no. 30955/12, *§§ 56-57).* What the assessment of the child's best interest concretely entails will depend on the particular circumstances of the case. However, some elements are recurring in the Court's assessment of whether the Courts have duly assessed the child's best interest.

Factors of relevance:

- **The role played by the age of the child in determining whether family reunification is his/her best interest in the particular case:**

In ***Tuquabo-Tekle and Others v The Netherlands*** the Applicant's adolescent daughter's age contributed to the Court finding that this fact made it 'even more pertinent' for her to be reunified with the mother and leave Eritrea, irrespective of her accepted '*strong cultural and linguistic links'* with country or the availability of care arrangements for her there. Due to the very fact of having reached marriageable age, the Applicant's daughter had in fact been taken out of school by her grandmother and risked being married off against the Applicant's will. This circumstance was considered relevant by the Court in finding the by refusing the Applicant's reunification with her daughter the authorities had been in violation of Art 8.

In ***El Ghatet v Switzerland*** the age of the applicant's child, with whom he was seeking to be reunited, was considered relevant to the **prospects of integration in the country.** As the applicant was a teenager at the beginning of the process, but reached adulthood through it, it was argued at the domestic level that his age and the connected attachment to his home country would have put obstacles to his integration in Egypt, where he had only lived for a comparatively short time (1 year and a half).

164 Reference should be made to the UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*– citing the case of *Saleck Bardi v. Spain*, where proceedings for family reunification eventually ended with the '*granting of guardianship of the girl to a Spanish host family after a long period of uncertainty and despite her biological mother's request for her return'.* This led the Court to consider that '*the passage of time, the lack of diligence on the part of the authorities responsible, and the lack of coordination among the relevant services had contributed to the daughter's sense of abandonment by her mother and her refusal to rejoin her'*

165 *Tanda Muzinga* §67, citing *Popov v. France*, nos. 39472/07 and 39474/07, § 139 among others.

El Ghatet v Switzerland

In ***El Ghatet v Switzerland*** (no. 56971/10) the applicants were father and son. **The first applicant** (the father) was a failed asylum seeker in Switzerland, who later regularised his stay in the country by marrying a Swiss national and obtaining a residence permit. The couple had a daughter together. **The second applicant**, the first applicant's son, remained in Egypt, and was cared for by his mother there. After being granted a first temporary visit to Switzerland, the second applicant sought to be reunified with the first applicant on a permanent basis. This arrangement only worked temporarily due to issues between the second applicant and his father's new spouse in Switzerland, leading the second applicant to return to Egypt after 1 year and a half. In the meantime, the first applicant naturalised as a Swiss citizen and separated from his spouse. Following this, the Applicants sought again to be reunified, but their application was rejected. The nature of the care arrangements in place for the second applicant in Egypt also changed in the meantime, as the second applicant's mother moved abroad, with the result that he was only cared for by his grandmother.

The second applicant's **age and level of maturity** and his established presence in Egypt supported the State's argument that he would have faced obstacles to his integration. The failure to provide 'sufficient reasons' to justify the request was also taken into account. Furthermore, the Court observed that the first applicant's conduct throughout did not conclusively indicate whether he had always planned to be reunited with his son. It was however noted that the fact that he had in the meantime established new family links in Switzerland was relevant in concluding that it was unreasonable for him to relocate elsewhere and unfeasible for the whole family to enjoy family life elsewhere.

Finally, while the child's age and established links in Egypt run counter to finding that relocation would be in his best interest, the Court's observed that the domestic courts' assessment of the second's applicant interests had not been up to the Convention standards. The above considerations led the Court to find a violation of Art 8.

Similarly, as noted in the UNHCR study on reunification referred to at various points in this chapter,[166] in the inadmissibility decision of I. *M. v. The Netherlands*, the Court dismissed the case declaring '*that 'by the time a final decision had been taken on the applicant's request, S.* ***had reached an age where she was presumably not as much in need of care as a young child****, and also that she has a considerable number of relatives living in the Cape Verde Islands''*. The child's age, considered in combination with her links to the country of origin, was hence considered as a decisive factor.

- **Quality of the personal and social ties in the country of relocation**

It has been stated above how the child's ties to the country of origin and his/her links to the country of proposed relocation, considered in the light of his/her age, adaptability etc., play an important role in the Court's assessment as to whether by refusing a reunification request, the domestic courts' have erred in the balancing exercise required by Art 8. Among others, the role of age of the child in shaping the child's adaptability and his/her ties to the country of origin vis-à-vis that of relocation, are exemplified by the ECtHR case of *Osman v. Denmark*, no. 38058/09.

166 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

In this case the Court placed emphasis on the fact that '*the applicant had spent her formative years in Denmark, spoke Danish and had received schooling in Denmark and that all her close family lived in Denmark. Accordingly, she could be considered a settled migrant who had lawfully spent all or the major part of her childhood and youth in the host country so that* ***very serious reasons would be required to justify the refusal to renew her residence permit***'.[167] Accordingly, the Danish authorities were found in violation of their ECHR obligations.

- **The links in the country of origin – reunification and the child's best interest**

In the case of ***Ahmut v the Netherlands***, for instance, the Applicant's youngest child established links in his country of origin, Morocco, and the presence of a significant family network there, led the Court to conclude that the authorities' decision not to allow his reunification with the father in the Netherlands had been in line with the State's margin of appreciation under Art 8. In this case the Court gave preference to the fact that the child had been registered for boarding school in Morocco, had '*strong links with the linguistic and cultural environment of his country'* as well as a considerable family network in the country *'his elder brother Hamid, his sister Souad, two uncles and possibly his grandmother'*.

Antwi and ors v Norway

In ***Antwi and ors v Norway***, no. 26940/10, the Applicants were a couple of Ghanaian origin with a 10-year-old daughter, born in Norway from their marriage. The first applicant reached Norway on false premises, on the strength of a forged passport indicating him as a Portuguese national, while the second applicant was granted a right to remain in the country on the basis of her family links there and later obtained Norwegian citizenship. Some time into their stay in Norway, the first applicant secured a work permit, which was granted to him on the basis of his false status as an EEA citizen. The applicants later married and had a child together, the third Applicant. After the first applicant's passport was discovered as false, an expulsion order with a 2-year ban on re-entry was made against him.

Findings: In this case the Court found that the first Applicant's expulsion was not in violation of the Applicants' Art 8 rights, irrespective of the effects of such decision on the third applicant, the couple's young daughter. The decision was not without internal dissent, as two judges authored a separate opinion accompanying the case. The Court does not fail to note that the third applicant is *'a Norwegian national'* with strong links to the country, as she *'is fully integrated into Norwegian society and […] speaks Norwegian with her parents'*, and acknowledges that she would therefore face difficulties in the event of her relocation in Ghana. However, irrespective of the above and while sharing the domestic Court's view that the family's resettlement would not be '*beneficial*' to the child, the Court concluded that the obstacles faced therein were not insurmountable (§98).

In this case, the Court departed from its earlier stance in the similar case of *Nunez* (§100), where the expulsion of the mother of 2 young children was considered in breach of Art 8, on account of the **exceptional circumstances** of the case, including the lengthy procedural times leading to the expulsion decision which had left the children vulnerable to *'disruption and stress'*. Such hardship, it was argued, had been absent in the present case and hence differentiated the Court's approach.

167 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]*

In the same sense, reference should also be made to the case of ***I.M. v The Netherlands***, no. 41226/98, cited above, where the child's links to the country of origin and her maturity were considered to militate against the necessity of her relocation in that case.

1.3.2.2.4. Non-discrimination

In some instances State's policies and/or practices in the area of family reunification may give rise to *de facto* differences in treatment which, in some cases, have been alleged to constitute discriminatory actions against migrants as a category or particular categories of migrants.

For instance, in ***Biao v Denmark*** (no. 38590/10) the refusal by the Danish authorities to grant the Applicant family reunion, on the basis of a domestic law confining the right to family reunification for those holding Danish citizenship for 28 years or more, was considered to be in breach of Art 8 both taken alone and in conjunction with Art 14 of the Convention.

Similarly, in ***Hode and Abdi v The UK***, no. 22341/09, the Court again dealt with the issue of family reunification under Art 14 in conjunction with Art 8 on account of the State's domestic rules on reunification. The applicant was granted refugee status in the UK in 2006 and was then granted leave to remain. He married the second applicant in Djibouti in 2007 and then applied to have the second applicant granted a visa to come to the UK to join him. This was however refused as the **rules only permitted those who had been married prior to a refugee fleeing their country of origin**. The Court considered that there was a clear difference of treatment between those refugees married before and those after the grant of their status. This treatment was found to have no objective justification: the UK had sought to honour their international obligations whilst not incentivising refugees to come to the UK in preference over other countries. As such, there was a breach of Art 8 in conjunction with Art 14.

Biao v Denmark

Biao v Denmark (no. 38590/10), the Grand Chamber of the Court had to answer the question of whether a domestic rule restricting the ability of a Danish citizens to request family reunification, limiting this possibility to cases where the citizen had held his citizenship for a minimum of 28 years, was compatible with Art 14 considered in conjunction with Art 8 of the Convention. In this case the possibility for the Applicant to be joined by his spouse was considered.

The rule in question only applied where the ties of the couple to another country were greater than their combined ties to Denmark. The first applicant had lived in Denmark for 10 years, during 2 of which he had been a citizen. Prior to this, he had lived in Ghana. His wife, the second applicant, a Ghanaian national, had never lived in Denmark. Therefore, they were subject to this 28-year rule.

The Court noted that this rule was an indirectly discriminatory measure - being a generally neutral policy applied with disproportionally prejudicial effects to those who had acquired citizenship later in life. The Court hence moved to consider whether such difference in treatment was justified on permissible grounds. In order to prove that this was the case the Government were required to produce 'weighty reasons' not based upon ethnic origin to justify the measure. The Danish government failed to adduce such reasons. In essence, the Government's aim had been to, on the one hand, permit Danish expats who had a non-Danish spouse, to return to Denmark after having lived abroad for some time and be joined by their spouses. On the other hand, the policy was aimed at controlling the pattern of marriages where an individual with newly acquired Danish citizenship would marry a person from their country of origin and bring them to live in Denmark. In relation to this 'marriage pattern', the Court stated that generally biased assumptions of prevailing social prejudice in a particular country do not provide sufficient justification for a difference of treatment based in terms of ethnic origin. Therefore, the 28-year rule favoured Danish nationals of Danish origin and placed at a disadvantage those who acquired Danish nationality later in life and who were of other origin.

As a result, the Court concluded that there had been a violation of Art 14 in conjunction with Art 8. It however stressed that Art 8 taken on its own does not impose on States a general obligation to respect a married couple's choice of country for their residence or to authorise family reunification.

This case is considered very useful for family reunification cases even though it does not directly involve asylum seekers or refugees and for this reason it was included in this Chapter.

2. SPECIFIC ISSUES IN CASES INVOLVING REFUGEES AND APPLICANTS FOR INTERNATIONAL PROTECTION SEEKING FAMILY REUNIFICATION

The introductory sections to this Chapter have already outlined how, when refugees and international protection beneficiaries are involved, the importance of restoring family links is heightened. This is both on account of the conditions of refugees' journey, their lack of control on the circumstances leading to their flight, and the preservation of their sense of belonging and identity. As was explained above, UNHCR considers family reunification as an important conduit for the integration of refugee families.

Refugees' lack of responsibility for the events leading to the separation of their family is expressly recognised by the Court, which in ***Tanda-Muzinga*** cared to observe '*that the applicant's family life had been discontinued purely as a result of his decision to **flee his country of origin, out of a genuine fear of persecution** […]'* and that he could hence *'not be held responsible for the separation from his family' (§74).*

In view of their particular circumstances, however, refugees do not only have specific needs but they also face specific difficulties and challenges in the context of family reunification. Below are some of the main issues identified by the Court in its jurisprudence, both in terms of specific challenges and dedicated safeguards for refugees in family reunification procedures:

The case of ***Tanda Muzinga v France***, no 2260/10, one of 3 cases (***Tanda Muzinga***, ***Mugenzi***, no. 52701/09 and ***Senigo Longue*** no. 19113/09), decided in a brief period by the Court against France, provides a clear example of the Court's approach to the procedural and substantial safeguards that should be afforded to refugees in family reunification procedures.

In the case of *Tanda-Muzinga*,,is of particular importance. The Court expressed its views on the particular circumstances of refugees in these contexts, stating how '*family unity is an essential right of refugees and […] family reunification is a* ***fundamental element allowing persons who have fled persecution to resume a normal life***'. In the same judgment, it is recalled that the recognition of international protection needs is to be regarded by itself as *'proof of the vulnerability of the persons concerned'*, which requires States to ensure that they are granted '*a family reunification procedure that is* ***more favourable than that available to other foreigners***'.[168]

As part of the same case, the Court observed that on account the Applicant's refugee status, the State's authorities were '*under an obligation […] to institute a procedure that took into account the events that had disrupted and disturbed his family life and had led to his being granted refugee status*'.

2.1. Promptness

Procedurally speaking, the promptness and efficiency displayed by the authorities when handling refugees' cases, with a view to ensuring that they are not kept in a prolonged status of uncertainty which may compound their distress, is also of key relevance.

In the three 'linked' cases of ***Tanda Muzinga***, ***Mugenzi*** and ***Senigo Longue***, the Court examined Frances's promptness in dealing with family reunification cases, particularly in instances involving recognised refugees. In its consistent rulings on the cases, the Court maintained the view that, at the relevant time, the French system overall lacked the urgency promptness and flexibility to deal with the requests for family reunification in an Art 8 compliant manner. The cases highlight in particular how France failed to provide the '*fair, flexible and prompt procedure*' required to safeguard the best interests of the children involved and ensure that, in refugees' cases, their inherent vulnerability is not made worse by long procedural times.

In ***Tanda Muzinga*** the applicant complained that the long procedural delays in his case, had failed '*to take account of both* ***his refugee status and the urgency of examining carefully the visa applications***' (§71). Similar arguments were made by the Applicant in ***Mugenzi.*** The Court noted in this case that the applicant's recognised status as a refugee, made it of '*crucial importance that the visa applications be examined* ***promptly, attentively and with particular diligence***'.

168 For the whole paragraph on this case the references are to the non-official translation of this case provided in UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above]* on *Tanda-Muzinga c. France, § 75.*

Tanda-Muzinga

In ***Tanda-Muzinga***, the Applicant had been left in the dark as to the Court's reasons for rejecting his family reunification request for a total of **15 months** since the beginning of the procedure. Also, as regards the establishment of paternity more specifically, it took the court *'almost three and a half years for the national authorities to cease contesting the parent-child relationship'*, a length that was *'excessive, having regard to the applicant's specific situation and what was at stake for him in the verification procedure.*

Also on account of the above, '*the accumulation and protracted nature of the numerous hurdles encountered in the course of the proceeding'* was deemed to further jeopardise the Applicant's situation, especially as he *'had already been subject to traumatic experiences'.*

Similarly, in ***Mugenzi v France***, 19 months passed between the Applicant's reunification request and the Authorities' refusal and that, overall, it had taken more than 5 years for the case to be concluded.

In this case the Court stated that the inflexibility and delay of the French family reunification process for refugees violated Art 8. The applicant, a Rwandan national with refugee status, applied for reunification in 2003, but was not given a conclusive rejection until 2008 - 5 years later. While the granting of visas for his family members was not automatic under Art 8, the State is required to put in place a process that takes account of the particular situation of the applicant and weighs their needs against the interests of the State in controlling immigration. In this case, the ability of the applicant to resume normal family life in the country he had fled to was at stake. Therefore, as the system was severely delayed and lacked flexibility, the French state had failed to strike the required fair balance, inherent in the Art 8 positive obligation, between the family rights of the applicant and the interest of the state to control immigration.

2.2. Difficulties in obtaining documentation evidencing family links or having their validity accepted by domestic authorities

It has been mentioned when dealing with family reunification standards under EU law that recognised difficulties exist in refugee cases in terms of their ability to provide documentation supporting their family reunification cases. In its jurisprudence, the ECtHR also confronted linked questions on a series of occasions.

In this sense the Court has ruled that insofar as the burden of proof for refugee cases is concerned, '69. '[…] *Having regard to the special situation in which they find themselves, it is appropriate in numerous cases to give them the* ***benefit of the doubt when assessing the credibility of their statements*** *and the* ***documents submitted in support thereof****. Equally, when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions'* and '*Likewise, the applicant is responsible for providing a satisfactory explanation so as to address any relevant objections as to the authenticity of the documents submitted'.*[169]

169 *Tanda Muzinga*, §68, citing *F.N. and Others v. Sweden, no. 28774/09, § 67 and e Mo.P. v. France (dec.), no. 55787/09)*

Linked to the difficulties in obtaining verification of the documents relied upon is the consideration that in refugees cases, the Domestic Authorities should refrain from making contacts with the authorities of the Country of origin of the Applicant, insofar as this may create a risk of the safety of the refugee him/herself when the risk of persecution feared in the particular case emanates from the State.

This was highlighted by the applicant in the case of ***Mugenzi v France*** (§50), where the applicant specifically complained about the inappropriateness and dangerousness of the French authorities' decision to contact the Consular authorities of his country of origin.

As to the documents that in practice are considered acceptable to prove refugees' family links, in its case law the Court refers to specialised bodies' recommendations (including the UN CRC, the CoE Committee of Ministers and Human Rights Commissioner, endorsing the trend whereby refugees' claims need to be *'examined in a flexible and human manner'* as well as the recommendations, increasingly shared by EU bodies and NGOs, that *'other evidence' of the existence of family ties'* should be accepted *'if the refugee is unable to provide official supporting documents'* (*Tanda-Muzinga* §76).

In *Tanda-Muzinga v France* such difficulties were faced by the applicant with regard to the evidence needed to prove paternity of his children, of whom he was seeking reunification. In its overview of the case, the UNHCR study[170] notes that the burdensome requirements imposed on the applicant to prove his relationship to the children had disregarded the documentation provided to him by the '*French Office for the Protection of Refugees and Stateless Persons (OFPRA) [which] had issued him with a marriage certificate and a family book, as provided for under French law'* and *'OFPRA had certified the composition of his family'*. Similar difficulties were faced by the Applicant in ***Mugenzi,*** where the reliability of children's age assessment also had a prominent place in the authorities' refusal decision.[171]

Tanda-Muzinga v France

In ***Tanda-Muzinga v France***, examined above in connection with the general considerations on refugees' claims for family reunification and the length of procedures, the French authorities contested the validity of the **birth certificate of one of the applicants' children,** arguing that it may have been forged. The applicant was only informed of this when he lodged an appeal against the implied refusal of the authorities, as they had not responded to any subsequent requests for information. Several appeals to the Conseil d'Etat were rejected. Eventually, after a court proceeding in Cameroon, it was possible to authenticate the child's birth certificate and Visas were issued by the French authorities. The applicant was only informed of the objections of the French authorities of the allegedly forged birth certificate in September 2008. It then took a further two years for the French authorities to accept the validity of the birth certificate. The excessive length of the proceedings contributed to the Court's finding that the authorities had failed to act with the required flexibility, promptness and effectiveness.

170 UNHCR, *The 'Essential Right' to Family Unity of Refugees [cited above][multiple citations]*

171 *Mugenzi* §51 *'It must be noted that, in the present case, the Consular Authority found a discrepancy between the physiological age of the children and the age mentioned in the civil status records submitted at the time of the application for family reunification, and that the national courts have decided that this circumstance is sufficient to justify the refusal to issue visas.'*

Senigo Longue v France

In ***Senigo Longue v France***, the Court dealt with the case of a Cameroonian national married to a Frenchman seeking to bring her children to live with her. She had been lawfully resident in France since 2005 but was not a refugee. She submitted her request in 2007. Her request was ultimately denied on the grounds that her children's birth certificates were not authentic and the parent-child relationship had not been established. The Appeals Board did not respond to her appeal. She therefore appealed unsuccessfully to the Conseil d'Etat, who decided her case prior to her statement of appeal being received which contained a DNA test that demonstrated that she was irrefutably their parent.

The Court noted again that the refusal to issue a visa was itself not an interference, but the fact that the state had failed to strike a balance between its interest in controlling immigration and the right to a family life of the applicant in the procedure established was a violation of Art 8 ECHR.

The procedure itself had left the applicant unable to understand the nature of the objections to her application. It also lacked the required promptness and urgency given what was at stake for the applicant: she was required , given the lengthy delays and refusals of the authorities, to choose between family reunification and the status that she had acquired in France. However, the courts had failed to take this urgency to heart: the whole process lasted 2 to 3 years. Equally, the French process had failed to take into consideration the interests of the children. Therefore, the protracted nature of the proceedings had prevented the applicant from being able to assert her right to live with her children, whose situation ought to have been given greater consideration.

2.3. Family links established outside the country of origin

In some circumstances, migrants' family situation can undergo significant developments after their departure from the country of origin. In the case of refugees and asylum seekers, this can be the result of the prolonged duration of relocation, which sometimes forces them to spend long periods in transit locations such as transit centres, open reception centres and refugee camps.

The above scenarios often challenge the traditional (rather outdated) concept of how a family is created and sustained.

The case of ***Kaplan and ors v Norway*** provides an example in this sense. In this case, the applicants were a Turkish family of Kurdish origin, including the mother, father and 3 children. The parents were failed asylum seekers in Norway. As an aggravating circumstance, the father was twice convicted in Norway for assault and speeding. While 2 of the children, the third and fourth applicant, were born before the family's attempt to relocate in Norway, the fifth applicant was born pending the family's attempts to regularise their stay in Norway. The fifth applicant displayed signs of severe **child autism**. In this case, the special care and protection needs of the fifth applicant, born after the family's arrival in the country, were considered to outweigh the State's interest in removing the first applicant owing to his conduct and criminal record.

Kaplan and ors v Norway

In the case of ***Kaplan and ors v Norway***, the applicants, a Turkish family of Kurdish origin pursued reunification in Norway. The first applicant (the father) was a failed asylum seeker who, over a long period of time, made attempts to establish himself in Europe, first in Denmark and then in Norway. In both country his asylum claims were rejected and on two occasions the applicant was charged with bodily assault and speeding during his stay. As a result of these charges, an expulsion order was made against him. The second to fourth applicant, i.e. the first applicant's wife and two children, reached Norway independently and also claimed asylum. Their applications for asylum were rejected and in their case too, expulsion decisions were made. In the meantime, the first and second applicants' youngest daughter, the fifth applicant, was born in Norway. Upon the latest negative decision on the Applicants' request for a humanitarian permit, their representative at the time argued that as the fifth applicant was affected by severe child autism and was in need of special care, the applicants' proposed expulsion could not be carried out. A request for the decision to be stayed was made. While such request was upheld in the case of the second, third and fourth applicant, in the first applicant's case, the decision to remove him was maintained as, in the Court's appraisal, his previous conviction and prolonged permanence in Norway as an overstayer raised public interest arguments that weighted against the fifth applicant's rights to benefit from the father's stable presence in the country (§83). The expulsion was considered proportionate and was in fact carried out. At the time of the expulsion the family had been living together in Norway, albeit under irregular circumstances for nearly 8 years.

Determination: While the Court accepted that the national Courts had discretion in evaluating the necessity of sanctions to contrast the applicant's overstay and prior criminal charges and that the first to fourth applicants could all be assumed to have strong links in Turkey, a separate reasoning was made in the case of the fifth applicant. In this respect the Court examined in particular whether the father's expulsion would give rise to '*exceptional circumstances pertaining in particular to the best interests of the youngest child*' (§85, citing *Nunez*, §§ 78 and 84; *Antwi*, §§ 100-101; *Butt*, cited above § 79). The Court found that, in view of the family's long-standing stay in Norway, the foreseeable split of the unit as a result of the father's expulsion and connected separation between the first and fifth applicant – who would only be allowed to see the father by visiting him Turkey (§97) – the decision to uphold the expulsion had failed to provide adequate reasons to prove that such measure was '*necessary within the meaning of paragraph 2 of Art 8*' (§97). In view of – *inter alia* – '*the youngest child's long-lasting and close bonds to her father, her special care needs*' the Court maintained that it was '*not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attach*ed to the best interests of the child'. A **violation of Art 8** was hence found.

2.4. The irrelevance of the 'voluntariness' of departure in refugees cases

As was mentioned above, in cases involving refugees and migrants fleeing situations of humanitarian risk, the Court's appreciation of this element, i.e. the 'voluntary' choice to relocate from a country leaving the family members behind, differs. As a vulnerable group whose movement is prompted by uncontrollable factors, the disruption of refugees' families' unity is often the result of scattered journeys and fortuitous events. In ***Tuquabo-Tekle and Others v The Netherlands***, the Court considered that in view of the situation of the Applicant, a refugee who had fled the Eritrean civil war, it was '*questionable to what extent it can be maintained [that the Applicant had left her daughter] of 'her own free will''*.

Tuquabo-Tekle v The Netherlands

In ***Tuquabo-Tekle v The Netherlands***, the Court was faced with the situation of an Eritrean national who was seeking to have her 15-year old daughter to join her. The applicant had fled Eritrea during the civil war, reaching the Netherlands, where she married a refugee and had two children with him. The Applicant herself was granted a humanitarian visa in the country. Having regularised her stay in the country, the applicant sought to obtain the reunification with her daughter from her previous marriage, who had remained in Eritrea.

The domestic authorities refused to grant the Applicant's request for reunification arguing that the mother and daughter **no longer shared family life**; this was both on account of their long separation and of the daughter's integration in Eritrea, where she was cared for by other family members. Also, no such relation existed between the Applicant's daughter and her husband in the Netherlands.

Findings: Relying heavily on its pronouncement in *Sen*, the Court reiterated that the applicant's choice to leave her child behind in their country of origin had not been by 'her own free will', insofar as she had fled the country to escape serious humanitarian risks. Furthermore, it was observed that the Applicant's subsequent behaviour had demonstrated clearly that it had always been her intention to bring her daughter to live with her. She had proved the reasons for not requesting reunification sooner as well as the difficulties in obtaining the necessary documentation with Eritrea and lack of cooperation from neighbouring countries. Equally, given the applicant's new family arrangements and the fact that the daughter was set to be removed from education and married off in Eritrea, the reunification of the family in the Netherlands constituted the most adequate means to secure the rights of everyone involved. As such, the Court concluded that the Dutch State had failed to strike a fair balance between its interest in controlling immigration and the right to family life of the applicant and her daughter.

3. STANDARDS AND PRINCIPLES FROM THE JURISPRUDENCE OF THE UN HUMAN RIGHTS COMMITTEE IN THE AREA OF FAMILY REUNIFICATION OF MIGRANTS AND ASYLUM SEEKERS

As in the case of the ECHR law and jurisprudence, also in the case of the ICCPR the concrete scope of the protection afforded by the Covenant is defined by its jurisprudence. In the case of **family reunification**, situations under this category are generally considered to fall under the **protection of the right to family life** under Art 23. Art 17, protecting the individual from arbitrary interferences in his/her family life is also of relevance. In its **General Comment No. 15**, on the Position of Aliens under the ICCPR, it is recognised that aliens 'may enjoy the protection of [ICCPR] even in relation to entry or residence, for example, when considerations of [...] respect for family life arise'.

In its jurisprudence, the body in charge of monitoring the application of the Covenant, the Human Rights Committee (HRC), elaborates further on the above position. From the HRC views in the case of ***Benjamin Ngambi and Marie-Louise Nébol v France***[172]***:*** *'§ 6.4 Art 23 of the Covenant guarantees the protection of family life including the interest in family reunification'.*

The Committee's General comments, which provide authoritative interpretation of the ICCPR's provisions, also elaborate on the scope of its protection. Insofar as this chapter is concerned, reference should be made to General Comment (GC) No. 19 on Art 23, which recognises and protects family as society's fundamental unit. The GC also acknowledges how the protection of this Article is complemented by the connected provision under Art 17, protecting the individual from arbitrary interferences in his/her family life. At §5 the GC stipulates that: '*The right to found a family implies, in principle, the possibility to procreate and live together'* which in turn *'implies the adoption of appropriate measures […]* ***to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons***'. The jurisprudence of the HRC and the interpretations given to the ICCPR provisions in the GCs would seem to disclose a more generous approach to the definition of what constitutes family life in the context of families separated by immigration, considered in comparison with the ECtHR's interpretation of the same topic. This is evident in a number of issues which are worth recalling here:

- **The role of the culture and society norms in recognising family relations of migrants seeking reunification**: in the case of ***Benjamin Ngambi and Marie-Louise Nébol***, cited above, the HRC takes an explicit stance on the needs to give recognition to a more widely defined concept of 'family' in the context of migrants' reunification. The cultural specificities and costumes of migrants' countries of origin often play a large part in shaping family relations, to the effect that the bond with family members who are not considered as 'nuclear family' under western parameters, can often be of great significance. Similarly, the **lack of formal arrangements** or **institutions** certifying a certain family status is also not always decisive. In this sense, the HRC observes: §6.4. '*The Committee recalls that the term 'family', for purposes of the Covenant, must be understood broadly* ***as to include all those comprising a family as understood in the society concerned***. […] *The protection of such family is not necessarily obviated […]* ***by the absence of formal marriage bonds,*** *especially where there is a* ***local practice of customary or common law marriage***'.
- **The relevance of an illegal stay in the country of destination:** In ***Mohamed El-Hichou v Denmark***, for instance, the Committee argues that the **'illegality'** of the appellant's stay in the country, which he had entered in order to be with his father

172 *Benjamin Ngambi and Marie-Louise Nébol v. France*, CCPR/C/81/D/1179/2003, UN Human Rights Committee (HRC), 16 July 2004 at: http://www.refworld.org/docid/4162a5a46.html

'does not influence the fact that he developed family ties not only with his father, but with his half–siblings and their mother' and is without prejudice to the fact that he had, as a consequence, *'learned the local language and developed certain ties with the local culture and society'*. This is arguably a more favourable approach to that of the ECtHR, examined below, whereby the conscious choice to establish oneself in a country and remain there despite the lack of an immigration status, is considered to have an impact on the degree of protection afforded to family plans made in the country, which are regarded as 'precarious'.

Mohamed El-Hichou v Denmark

In ***Mohamed El-Hichou v Denmark***[173], the applicant (the 'author' in the language of the HRC) is the minor son of divorced parents and lives in Morocco, where he is formally under the mother's custody but materially under the care of his grandparents. The applicant's father relocated in Denmark, where he founded a new family, while continuing supporting the applicant both financially and emotionally, through consistent visits and phone communications with him. In spite of this, the applicant remained under his mother's sole custody. Due to this fact, the applicant's request to be reunited with his father in Denmark was rejected by the local authorities. Once the applicant's mother also re-married, she agreed for the applicant's custody to be transferred to the father, giving him title to request for his reunification claim to be reconsidered. Such request was again unsuccessful, on grounds that the father's lacked the resources to provide for the applicant. Pending attempts to challenge the decision the applicant joined the father, staying in Denmark illegally. While the authorities authorised the author's stay pending a final decision, the domestic authorities eventually upheld the refusal of his application and he was ordered to leave the country.

The Applicant argued before the HRC that Denmark's refusal of his application for reunification had breached his rights to family life under Art. 23 and 24 CCPR, with particular reference to his **rights as a child** to receive adequate protection against separation, as provide for under the UN CRC. The HRC noted that, in spite of the initial refusal on his reunification application, the applicant had remained in Denmark unlawfully. It however accepted that this fact alone did not invalidate his bond with the father or the links established in Denmark during that period. It was remarked that the separation between father and son had been the result of the former's relocation choices but that he had then made efforts to seek reunification with his son as soon as the latter's care arrangements changed and he was given custody. In view of the above, the HRC concluded that by denying reunification, Denmark acted in breach of the Applicant's rights under Art. 23 and 24 CCPR, *'due to a failure to provide [him] with the necessary measures of protection as a minor'* (§7.5).

In the particular scenario of **asylum seekers and refugees family reunification**, the UN HRC also expressed its views, importantly differentiating the situation of these vulnerable categories from the general rules applied to migrants in conditions of family separation, examined above. The case of ***El Dernawi v Libya***[174] provides a significant example in this sense:

173 CCPR/C//99/D/1554/2007 Mohamed El-Hichou v Denmark

174 El Dernawi v. Libya, No. 1143/2002, UN HRC, CCPR/C/90/D/1143/2002 (2007)

El Dernawi v Libya

In ***El Dernawi v Libya***, the UN HRC was faced with a case where the father had been granted refugee status in Switzerland and was seeking to have his wife and 6 children join him there. Upon attempting to leave Libya, the wife's passport had been confiscated and she was returned to her residence. Subsequent attempts to recover the passport had failed. As the father had been the 'breadwinner' this left his wife and children without any significant income. The HRC stated that this was a violation of the right to family life as well as the right to freedom of movement. Specifically, the measure had no reasonable justification. Equally, the state had failed to take into account the special status of the children. The HRC took the opportunity to emphasise that the state parties are under an obligation to ensure that in such circumstances the family would have an effective remedy, including compensation and the return of the wife's passport, to enable her to challenge the prohibition on her and her family's departure.

4. RELEVANT JURISPRUDENCE OF THE CJEU IN FAMILY REUNIFICATION CASES – SPECIFIC ISSUES

In Section 1, the key EU law instruments and principles of relevance in reunification cases have been presented. In an attempt to complement the principles derived from the ECtHR's approach to reunification cases, above, this section will offer the perspective of the CJEU on some of the issues already explored, highlighting some aspects and specific issues that are dealt with in more detail or approached differently under EU law than they are under ECHR law.

4.1 Children and family reunification under the CJEU jurisprudence

We saw in the sections above how, under the ECtHR jurisprudence, the age of the child at the time of the reunification proceedings plays a key role in determining the effects of the decision on him/her, as it is indicative of the child's maturity, developmental stage and adaptability. As such the age of the child is hence liable to significantly condition the assessment of the domestic courts faced with family reunification requests. While this issue is not confronted by the ECtHR in its jurisprudence, it is worth wondering **what happens if the child whose reunification is sought turns 18** pending the conclusion of the proceedings. While no express answer is provided under the ECtHR cases examined above, the CJEU judgement ***A and S v Staatssecretaris van Veiligheid en Justitie*** C 550/16 provides us with useful views in this sense.

In this case[175] the CJEU shed light on the scope of the EU Family Reunification Directive, with particular regard to the applicability of the provisions regarding the reunification of minor children to individuals who had – pending the conclusion of the relevant procedures – reached the age of majority.

A and S v Staatssecretaris van Veiligheid en Justitie

In ***A and S v Staatssecretaris van Veiligheid en Justitie***, A's minor daughter (S) had arrived in the Netherlands and been granted refugee status. During the procedure, she had turned 18. After the procedure was concluded, her parents applied for family reunification pursuant to the EU Family Reunification Directive, Art 2(f) of Directive 2003/86/EC. This was however refused as the daughter was now no longer a minor. The CJEU made clear that regardless whether an asylum seeker reaches majority during the asylum procedure, they are to be treated as minors from the moment that they make their asylum application to the responsible member state. The Court emphasised that to conclude otherwise would incentivise member states to frustrate the asylum process so as to bring minor applicants to the age of majority before they are granted refugee status, thus depriving them of some of the additional protections included. Therefore, the application ought not to have been refused on the ground that A and S's daughter had now reached majority.

Ruling: *Art 2(f) of Directive 2003/86/EC 22 September 2003 on the right to family reunification, read in conjunction with Art 10(3)(a) thereof, must be interpreted as meaning that a third-country national or stateless person who is below the age of **18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application** in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a 'minor' for the purposes of that provision.*

With regard to the particular safeguards that need to be afforded to **refugee children** in relocation procedures (in this case a 'Dublin' transfer), the case of *(MA, BT and DA) v the UK Secretary of State for the Home Department (SSHD)*,[176] provides important guidance.

In ***R (MA, BT and DA)***[177], the CJEU was faced with the situation of three unaccompanied minors who had submitted asylum requests in the UK, but who had previously submitted requests in Italy for two of them and the Netherlands for the other.

In this case the Court addressed the scope of **Art 6(2) of the Dublin II Regulation** (referred to above in the Section on EU law(1.2.2.2)– in its equivalent under the Dublin III Regulation), on the criteria to assign responsibility for an asylum application made by unaccompanied migrant children, where it is not possible to identify any family member of relatives in the EU MS. Based on the letter of the ruling, in such cases, the Regulation indicate 'that responsibility is to lie with the Member State 'where the minor has lodged his or her application for asylum'' but does not specify whether – in case of multiple applications – the country so identified is the one where the first application was made or the one where the child made his 'most recent' application (§48-49).

175 Case C-550/16, A, S v Staatssecretaris van Veiligheid en Justitie

176 C-648/11, MA, BT and DA v Secretary of State of the Home Department

177 R (MA, BT and DA) , C-648/11 R

Having regard to unaccompanied children particular vulnerability, and with a view to the recognised destabilising effects on them of long procedural times, the CJEU established that in cases like the one at stake such provision is to be understood as requiring that the EU Member State responsible for dealing with the asylum request is the one **where the applicant is present.** Finding to the contrary would go against the principle that the child's best interests should be paramount and that there should be no **unnecessary prolongation of their access to the asylum system**.

4.2. The 'Resources' requirement

In ***O and S v Maahanmuuttovirasto; Maahanmuuttovirasto v L***,[178] the CJEU examined joined cases concerning the following situation: a third country national, A, had married a Finnish national, B, and been granted the right to reside. A child was born of that marriage, C. Upon separation of the parents, A had sole custody of C. C is a Finnish national. A then met another third country national, D, married and had a child, E, who does not hold Finnish nationality. The Finnish authorities refused to grant D a residence permit so that he could remain unified with his wife A. The Court made clear that the national authorities were not in principle prevented from refusing to grant D a residence permit.

However, they could not refuse to do so where it would the denial of the genuine enjoyment of the substance of the right of EU citizenship held by C - the child of the first marriage and Finnish national. It is not required that D and C are blood related. It is the relationship of dependency that is relevant, as if the person on whom C is dependent is removed then the substance of his right to enjoy EU citizenship will be lost. However, the Court did note that in this case, it was unlikely that the necessary relationship was present on the evidence before it. However, under the Family Reunification Directive, **the domestic authorities must always seek to promote family life and respect the best interests of children involved. To do otherwise would undermine the effectiveness of that directive.**

4.3. Requirement for the family member to undertake efforts towards integration in the country of reunification

In ***Minister van Buitenlandse Zaken v K and A***,[179] two third country nationals - one Azerbaijanian and one Nigerian - were required to take an language test in order to be eligible to be reunified with their family members in the Netherlands. The fees for the course and materials necessary to pass the test came to around EUR 460 for a single attempt.

The court noted that the manner in which the domestic authorities had applied these measures and the cost that they entailed were liable to undermine the effectiveness

178 Joined Cases C-356/11 and C-357/11, O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L

179 Minister van Buitenlandse Zaken v. K. and A., C-153/14

of the Family Reunification Directive. In particular, the Court made clear that such '**integration measures' could only be used where their objective was to facilitate integration not to filter out applicants.** Equally, as in this case the applicants sought to be exempt from the test on health grounds, the national authorities are bound to carry out an examination on an individual basis of whether the applicant is or is not able to carry out the test.

It was established that: '[I]*n accordance with the principle of proportionality […] the measures implemented by the national legislation transposing [the Family Reunification Directive] must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary to attain them [which] would, in particular, be the case if the application of that requirement were systematically to prevent family reunification of a sponsor's family members where ... they have demonstrated their willingness to [do so] and they have made every effort to achieve that objective'*.[180]

4.4. Cases of dependency

It has been anticipated that **situation of dependency**, between family members and more distant relatives or even non-related individuals, may be of relevance in determining the necessity of relocation in a particular case, insofar as the dependent person should be kept in the same country as the person on whom he/she is dependent upon in order to effectively benefit of their assistance.

When asylum seekers are concerned, in ***K v Bundesasylamt***, C-245/11, the CJEU made clear that it would be contrary to remove an asylum seeker from one member state to the member state responsible for processing her application under the **Dublin II Regulation**, in force at the time, where that asylum seeker is the carer of an individual who is dependent upon her. Therefore, the state in which the dependent is located will be that responsible for processing the carer's asylum claim. In this case, the mother was an asylum seeker and had originally applied for asylum in Poland. However, she had left for Austria where she had begun to care for her severely ill daughter. She re-applied for asylum in Austria. Art 15(2) of the Dublin II Regulation (Regulation (EC) No 343/2003) concerned could not be interpreted solely as referring to the dependency of the asylum seeker on another, but also included the situation of someone dependent upon the assistance of an asylum seeker. As such, the member state was normally obliged to keep them together. This is in keeping with the humanitarian purpose behind Art 15(2) of Dublin II.

180 Partially adapted citation from: UNHCR's Study (cited multiple times in this Chapter)

5. FAMILY REUNIFICATION UNDER ARTICLE 8 OF THE ECHR

5.1. Right to Respect for Family Life and Special Protection of the Family

5.1.1 Constitution of the Republic of Serbia

The **Serbian Constitution** does not include a separate provision on the respect for private and family life, which does not mean that individual aspects of this right are not guaranteed by the highest law of the land. The Constitution protects dignity and the free development of personality (Article 23), the inviolability of the home (Article 40), the confidentiality of letters and other means of communication (Article 41) and personal data (Article 42). However, the principle of family reunification, as the most important aspect of Article 8 of the ECHR in asylum matters, is not guaranteed by the Serbian Constitution. The Constitution does, however, extend special protection to families (Article 66) and equates marital and common law unions (Article 62).

5.1.2. Family Act of the Republic of Serbia

The Serbian Family Act[181] guarantees families special protection by the state and everyone the right to respect for their family life (Article 2).

Article 2 of the Family Act of the Republic of Serbia reads:

“(1) Families shall enjoy the special protection of the state.

(2) Everyone is entitled to the respect for their family life.“

5.2. Family Reunification

Family reunification entails the entry and residence of the nuclear family of Serbian nationals or aliens lawfully residing in the territory of the Republic of Serbia, with a view to preserving family unity (Article (3(1(18)) of the Serbian Aliens Act). The Serbian **Aliens Act** and **Asylum and Temporary Protection Act** include provisions relevant to family reunification.

181 Official Gazette of the Republic of Serbia Nos. 18/2005, 72/2011 – other law and 6/2015

5.2.1. Aliens Act

The Aliens Act provides for several forms of residence of aliens with a view to facilitating family reunification and the preservation of family unity: temporary residence, independent residence and permanent residence in special cases. This law also lays down the principles and rules of the procedure in which the submitted residence applications are reviewed. Notably, the Aliens Act lays down different requirements various categories of aliens must fulfil to be granted residence; these requirements are more lenient for the family members of aliens granted asylum.

5.2.1.1. Temporary Residence

Article 40 of the Aliens Act defines temporary residence as residence granted to foreign nationals planning on staying in the Republic of Serbia more than 90 days. The grounds on which temporary residence may be permitted include, notably, family reunification. The principle of family unity is, however, relevant also to other grounds on which temporary residence is granted, e.g. temporary residence on humanitarian grounds or because the applicant has the status of a presumed victim of trafficking in humans

5.2.1.1.1. Temporary Residence for the Purpose of Family Reunification

Temporary residence for the purpose of family reunification may be granted to three categories of aliens: those who are nuclear family members of Serbian nationals, of aliens granted temporary or permanent residence in Serbia, and of aliens granted asylum in the Republic of Serbia (Article 55(1)). The Aliens Act defines nuclear family members as spouses and civil partners, their minor children born in or out of wedlock, their minor adopted children and minor stepchildren who are not married. Exceptionally, nuclear family members may include direct relatives who are dependent on the applicants or their spouses or civil partners and cannot avail themselves of adequate family care in their country of origin and the adult unmarried children of the applicants or their spouses or civil partners, who cannot satisfy their needs because of their health (Article 55(3(2 and 3)). In any case, pursuant to Article 55 of the Aliens Act, family reunification is possible if the applicants fulfil the general temporary residence requirements enumerated in Article 43. Under this Article, along with their applications, they must submit their personal travel documents and registered address of residence, proof that they have sufficient means to support themselves whilst in Serbia, of health insurance coverage, documents substantiating their application and proof that they paid the administrative fee. The duration of temporary residence on grounds of family reunification is governed by Article 57 of the Aliens Act.

Article 43 of the Aliens Act reads:

"(1) Together with their application for a temporary residence permit or extension thereof, aliens shall submit:

1) A valid personal or service passport;
2) Evidence of sufficient means of subsistence during their planned stay;
3) Registered address of residence in the Republic of Serbia;
4) Evidence of health insurance coverage during their planned stay;
5) Evidence substantiating their application for a temporary residence permit pursuant to Article 40 of this Act, as well as other documents at the request of the competent authority;
6) Proof of payment of the prescribed administrative fee.

(2) The detailed temporary residence requirements, the temporary residence application form and the design and manner of affixing temporary residence permits in the form of stickers in foreign travel documents shall be laid down by the minister charged with internal affairs."

Article 55 of the Aliens Act reads:

"(1) Provided that the general requirements referred to in Article 43 of this Act are fulfilled, temporary residence on grounds of family reunification may be granted to aliens who are nuclear family members of Serbian nationals, of aliens with temporary or permanent residence permits in the Republic of Serbia, or of aliens granted asylum in the Republic of Serbia.

(2) Within the meaning of this Act, nuclear family members shall denote: spouses, civil partners, their minor children born in or out of wedlock, their minor adopted children and minor stepchildren, who have not married.

(3) The following may exceptionally be considered nuclear family members:

1) Direct relatives of Serbian nationals or aliens with temporary or permanent residence permits in the Republic of Serbia, or of their spouses or civil partners, who are dependent on them and do not have adequate family care in their country of origin; or
2) Unmarried adult children of Serbian nationals or aliens with temporary or permanent residence permits in the Republic of Serbia, or of their spouses or civil partners, who cannot satisfy their needs because of their health.

(4) In case of a polygamous marriage, family reunification shall be granted only to one spouse and their common unmarried minor children."

Article 57 of the Aliens Act reads:

"(1) Temporary residence on grounds of family reunification referred to in Articles 55 and 56 of this Act shall be granted for a period of one year, and extended for the same period of time, except in the case referred to in Article 44(5) of this Act.

(2) Aliens granted temporary residence on grounds of family reunification with aliens holding temporary residence permits in the Republic of Serbia shall be granted temporary residence for the duration of the validity of the temporary residence permits of the aliens with whom they are to reunite. "

5.2.1.1.2. Temporary Residence for Family Members of Aliens Granted Asylum

The family reunification provisions of the Aliens Act apply also to aliens granted asylum unless Article 70(2) of the Asylum and Temporary Protection Act applies, i.e. unless the aliens to be reunited with aliens granted asylum are their minor children born in our out of wedlock, their minor adopted children or minor stepchildren, in which case the decision on family reunification is taken by the Asylum Office. As already noted, due to the specific situation of aliens granted international protection, Article 56 lays down that temporary residence may be granted even if not all the general requirements enumerated in Article 43 of the Act are fulfilled. The legislator provides a higher degree of protection to minors granted asylum in the Republic of Serbia, considering their parents family members for the purpose of applying Article 56(2) of the Act. The periods of validity of temporary residence permits granted to the family members of successful asylum seekers are the same as the periods of validity of those granted to other aliens and is regulated by Article 57 of the Aliens Act.

Article 56 of the Aliens Act reads:

"(1) Aliens, who are nuclear family members of aliens granted asylum in the Republic of Serbia, may be granted temporary residence on account of the specific and personal circumstances of aliens granted asylum and their nuclear family members even if they do not fulfil all the general requirements under Articles 43 and 41(2) of this Act.

(2) In the event aliens granted asylum in the Republic of Serbia are minors, temporary residence permits on grounds of family reunification may be granted to their parents under the same conditions laid down in paragraph (1) of this Article, with a view to preserving family unity.

(3) In the event the nuclear family members of aliens granted asylum in the Republic of Serbia do not have travel documents, their temporary residence shall be approved by a ruling."

5.2.1.1.3. Temporary Residence on Humanitarian Grounds

Temporary residence on humanitarian grounds may be granted to aliens, whose circumstances require particular consideration of, inter alia, their family ties in the Republic of

Serbia, in which case these aliens must fulfil the general requirements under Article 43 of the Aliens Act.

Article 61(1(1)) of the Aliens Act reads:

"(1) Temporary residence may be granted to aliens fulfilling the general requirements referred to in Article 43 of this Act, when other circumstances exist that require special consideration of their:

1) Family, cultural or social ties with the Republic of Serbia, the degree of their recent integration in social life in the Republic of Serbia, particularly with regard to their education, work or language skills;

(...)

(3) Temporary residence on humanitarian grounds shall be granted for a minimum of six months and for a maximum of one year and may be extended in the event the circumstances on the basis of which it was granted still exist. "

5.2.1.1.4. Temporary Residence of Aliens Presumed to be Victims of Trafficking in Humans

Aliens presumed to be victims of trafficking in humans may be granted temporary residence although they do not fulfil the general requirements under Article 43. Due to the particular vulnerability of this category of aliens, the Aliens Act lays down the obligation of the relevant state authorities to take measures to establish whether the family members of unaccompanied minors presumed to be victims of trafficking in humans are in the territory of the Republic of Serbia with a view to reuniting them. Article 62(9) of the Act, however, insists on the application of the principle of the best interests of the child. Under this provision, unaccompanied minors presumed to be victims of trafficking in humans may be reunited with their families only if that is in their best interest; in other words, these minors will not be reunited with their families if the authorities suspect that the latter are involved in trafficking in humans.

5.2.1.1.5. Temporary Residence Application Review Procedure

The Aliens Act thoroughly regulates the procedure in which temporary residence applications are reviewed.

5.2.1.1.5.1 *Principles of the Temporary Residence Application Review Procedure*

Under Article 65(1) of the Aliens Act, the competent authorities reviewing a temporary residence application are under the obligation to assess both the fulfilment of the general temporary residence requirements and the circumstances of each individual case. They shall, in particular, to take into account the family, economic and social circumstances of the applicants, and, in case of minors, be guided by their best interests.

5.2.1.1.5.2. *Submission of Temporary Residence Applications*

Under Article 41 of the Aliens Act, aliens shall personally submit their temporary residence applications to the competent authority in the prescribed form. All aliens except those granted asylum, must submit their applications within 90 days from the day they last entered the country or before their longer stay visas expire. Temporary residence extension applications are to be filed between three months and 30 days before the expiry of the valid residence permits. Pursuant to paragraph 6 of this Article, aliens, who apply for temporary residence permits or extension of their temporary residence permits on time, are entitled to remain in the Republic of Serbia pending the completion of the first-instance procedure or the appeals procedure in the event they contest the ruling dismissing their application. The competent authorities shall decide on the applications within 30 days from the day of their submission (Article 42(1), Aliens Act).

5.2.1.1.5.3. *Duration of Temporary Residence*

Under Article 44(1) of the Aliens Act, aliens may be granted temporary residence for a period of up to one year; the permits may be extended for another year, depending on the grounds on which they were granted and the existence of the reasons why they were granted. Temporary residence permits are affixed in the form of stickers to the aliens' travel documents (Article 44(2)). The validity period of the travel document must be at least three months longer than the validity of the temporary residence permit (Article 44(5)). Exceptionally, the authorities may issue a ruling granting or extending the temporary residence permits of aliens who do not have a valid travel document but fulfil the general requirements under Article 43 of the Aliens Act, on humanitarian grounds, if that is in the interest of the Republic of Serbia or in the event of a *force majeure*.

5.2.1.1.5.4. *Dismissal of Temporary Residence Applications*

Article 45(1) of the Aliens Act enumerates the grounds for dismissing temporary residence applications. Article 60 lays down that marriage of convenience shall be grounds for dismissing temporary residence applications relying on family reunification grounds. Namely, temporary residence or extension of temporary residence for the purpose of family reunification shall not be granted to aliens in the event investigation into the circumstances in which they entered into a marriage has given rise to reasonable grounds to believe that they had entered into a marriage of convenience or with the aim of acquiring temporary residence. (Article 60(3)). Rulings dismissing applications for temporary residence or extension of temporary residence may be appealed with the competent authorities within 15 days from the day of service (Article 45(5)). The appeals shall be ruled on by the Ministry of Internal Affairs (Article 45(5). These appeals have suspensive effect (Article 45(6)). The Ministry's ruling on the appeal may be contested in an administrative dispute; the initiation of the administrative dispute does not stay the enforcement of the Ministry's ruling (Article 45(7)).

Article 60 of the Aliens Act reads:

"(3) Temporary residence or extension of temporary residence for the purpose of family reunification shall not be granted to aliens in the event investigation into the circumstances in which they entered into a marriage has given rise to reasonable grounds to believe that they entered into a marriage of convenience or with the aim of acquiring temporary residence.

(4) The provisions of this Article shall also apply to common-law unions."

5.2.1.2 Independent Residence

In addition to temporary residence, the Aliens Act also provides for the approval of so-called independent residence on family reunification grounds to aliens who fulfil the requirements enumerated in Article 59. Namely, aliens, who have resided on family reunification grounds in the territory of Serbia for four consecutive years, qualify for independent residence provided they fulfil the requirements under Article 43 of the Act. Exceptionally, aliens may be granted independent residence in the event of the demise of the individuals with whom they exercised the right to family reunification, even if they have not resided in Serbia for four consecutive years in Serbia, more precisely, if they have resided three years in Serbia. Furthermore, aliens residing in Serbia on family reunification grounds may be granted independent residence in the event it is ascertained that they were victims of domestic violence or in case of other particularly adverse circumstances, even if they do not fulfil the general requirements under Article 43 of the Aliens Act.

5.2.1.3 Permanent Residence in Special Circumstances

Aliens temporarily residing in Serbia on family reunification grounds may be granted permanent residence if they fulfil the requirements under Article 68 of the Aliens Act. Permanent residence may be granted also to aliens, who 1) are in a marital or common-law union with a Serbian national or an alien granted permanent residence, 2) have a temporary residence permit and 3) who have resided at least three consecutive years in Serbia on family reunification grounds provided they fulfil the requirements under Article 70 of the Act. Permanent residence may also be granted to a minor, one of whose parents is a Serbian national or an alien granted permanent residence. Under Article 69 of the Aliens Act, aliens shall personally submit their permanent residence applications in the prescribed form to the competent authority in the place where they had been granted temporary residence. The Ministry of Internal Affairs shall rule on the permanent residence applications within 60 days from the day of submission (Article 69(2)).

5.2.2. Asylum and Temporary Protection Act

5.2.2.1. Family Unity Principle

The family unity principle is one of the basic principles underpinning the **Asylum and Temporary Protection Act**. Article 9 of this law imposes upon the competent authorities the obligation to take all available measures to preserve family unity, both during the review of the asylum applications and after asylum or temporary protection is granted. The family unity principle is incorporated in the provisions governing the right to family reunification, as well as other provisions of the Act, including Article 50(3) governing material reception conditions (housing accommodation, food and clothing). Family unity must be borne in mind when assessing the best interests of a minor (Article 10(2)).

Article 9 of the Asylum and Temporary Protection Act reads:

"The competent authorities shall take all the available measures for the purpose of preserving family unity during the procedure, as well as after asylum or temporary protection is granted.

All persons who have been granted asylum or temporary protection shall be entitled to family reunification, in accordance with the provisions of this Act."

5.2.2.2. The Notion of Family

Under Article 2(1(12)) of the Asylum and Temporary Protection Act, family members shall denote spouses with whom individuals granted asylum or temporary protection had entered into marriage prior to their arrival in the Republic of Serbia or their common-law partners under Serbian law and their minor children born in or out of wedlock, minor adopted children, or minor stepchildren. Pursuant to the Act, the status of a family member may exceptionally be recognised in respect of other persons, particularly taking into account the fact that they had been supported by the person granted asylum or subsidiary protection, their age and psychological dependence, as well as their health, social, cultural and other similar circumstances.

5.2.2.3. Right to Family Reunification

The Asylum and Temporary Protection Act guarantees the right to family reunification to persons granted asylum or temporary protection. It imposes upon the competent authorities special obligations with respect to unaccompanied minors granted asylum in the Republic of Serbia due to their particular vulnerability.

5.2.2.3.1. Right to Family Reunification of Persons Granted Asylum

The Asylum and Temporary Protection Act devotes an entire article to the right to family reunification. Paragraph 1 of Article 70 guarantees the right to family reunification to persons granted asylum in the Republic of Serbia. The Asylum Office reviews family reunification applications concerning the successful asylum seekers' minor children born in or out of wedlock, their minor adopted children or minor stepchildren who have not formed families of their own (Article 70(2)).[182] The residence of their other family members is regulated under the relevant provisions of the Aliens Act (Article 70(3)). Under paragraph 4 of this Article, family members not qualifying for asylum are not entitled to family reunification. Family members granted reunification shall have the same rights and obligations that persons granted asylum have under Article 59 of the Act, with the exception of the right to family reunification (Article 59(5)).

Article 70 of the Asylum and Temporary Protection Act reads:

"Persons granted asylum are entitled to reunite with their family members.

Minor children born in or out of wedlock, minor adopted children or minor stepchildren who have not formed families of their own shall have the same legal status as their parents, who have been granted asylum, pursuant to an Asylum Office decision.

The family members of persons granted asylum, who are not referred to in paragraph 2 of this Article, shall regulate their residence in accordance with the regulations governing the legal status of aliens.

Family members not qualifying for asylum are not entitled to family reunification."

5.2.2.3.2. Special Rights of Unaccompanied Minors Granted Asylum

Under Article 73(5) of the Asylum and Temporary Protection Act, the competent authorities are under the obligation to start searching for the family members of unaccompanied minors when necessary, whilst protecting the best interests of the minors.

5.2.2.3.3. Right to Family Reunification of Persons Granted Temporary Protection

Article 76 of the Asylum and Temporary Protection Act governs the rights and obligations of persons granted temporary protection. Pursuant to paragraph 3 of this Article, persons granted temporary protection may be allowed to reunite with their families in justified cases and the competent authority may grant temporary protection to these family members as well.

182 This provision differs from the one in the prior Asylum Act, which had been in force until the new Asylum and Temporary Protection Act entered into force. Under the prior Act, applications for family reunification filed by persons granted asylum were reviewed by the Asylum Office, not the authority competent for ruling on family reunification under the Aliens Act. Under the new Asylum and Temporary Protection Act, the Asylum Office is charged with ruling only on family reunification applications concerning the successful asylum seekers' minor children born in or out of wedlock, or their minor adopted children or stepchildren who have not formed their own families. According to the data of the Belgrade Centre of Human Rights, the Asylum Office never reviewed any family reunification applications under the prior Asylum Act, wherefore there was no information on how this right was exercised in practice by the end of 2017. BCHR, *2017 Right to Asylum in the Republic of Serbia annual report*, 2018, pp. 109-110, available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf

5.3. Separation of the Family Due to Return or Forced Removal

The principle of family unity needs to be borne in mind not only in the context of reuniting aliens or persons granted asylum with their families, but also in order to prevent the separation of aliens from their families in case of return or forced removal, which is governed by the **Aliens Act of the Republic of Serbia**.

5.3.1. Importance of the Family Unity Principle in the Return Procedure

During the return procedure, the competent authorities are under the obligation to take into consideration the specific situation of particularly vulnerable persons and the family and health status of the persons being returned (Article 75(1)). Moreover, paragraph 3 of this Article explicitly incorporates the principle of family unity – actions taken during the return procedure must ensure the unity of all family members present in the territory of Serbia.

Article 75 of the Aliens Act reads:

"(1) During the return procedure, the competent authorities shall take into consideration the specific situation of particularly vulnerable persons, the family and health status of the persons being returned, as well as the best interest of minors.

(…)

(3) During the return procedure, the competent authorities shall take actions in accordance with the family unity principle, with a view to ensuring the unity of all family members present in the territory of the Republic of Serbia."

5.3.2. Importance of the Family Unity Principle for Delaying Forced Removal

Article 84(2) of the Aliens Act lays down the obligation to take into account the family unity principle also in cases when the forced removal of aliens from the territory of the Republic of Serbia is delayed. When the conditions for delaying the forced removal of one family member are fulfilled, the competent authority is under the obligation to take into account the principle of family unity when deciding whether to delay the forced removal of other family members.

Article 84 of the Aliens Act reads:

„(2) When the forced removal of one family member is delayed, the competent authority shall take into account the principle of family unity when issuing a ruling delaying the forced removal of other family members."

IV

CHAPTER

PROTECTION OF SPECIFIC GROUPS

1. IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING IN THE COURSE OF ASYLUM PROCEEDINGS

Trafficking in Human Beings (THB) occurs when individuals are transferred, through different means, from one country to another or within one country, on false premises, deception or other coercive means and for the purposes of exploitation.

Definitions for this form of modern-day slavery can be found both at the international level in the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children as well as at the regional level in the Council of Europe (CoE) Convention on action against trafficking in human beings and in the EU Anti-Trafficking Directive 2011/36/EU.

At the regional level both the CoE Anti-Trafficking Convention and the EU Anti-Trafficking Directive use similar wording in defining trafficking in human beings. Taking the EU Anti-Trafficking Directive as an example, Art. 2(1) states that trafficking is: "*[t]he recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation*."

In cases involving a child victim of trafficking, the definition is adapted to the particular safeguards applicable to children. The EU Anti-trafficking Directive provides that: '*When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used*' (Art. 2(5)), hence removing the issue of consent as part of the elements of the crime.

The identification of an individual as a victim of trafficking (VoT) is of fundamental importance because only when individuals are properly assessed, are they granted effective access to the regional and international system of anti-trafficking protection. In turn, identification as VoT also triggers States' obligations to provide them with support, assistance and rehabilitation services[183]. Furthermore, identification of existing and potential trafficking victims is a positive State obligation in itself.[184]

In some circumstances, individuals reaching a country due to international protection needs may be or may be at risk of becoming victims of trafficking as a result of their vulnerability inherent to their migration experience. Vulnerable migrants including **asylum seekers can especially vulnerable to being exploited before, during and after their journey to the country of refuge**. They can fall prey to traffickers as a result of indebt-

183 Artt. 12-15 CoE Anti-Trafficking Convention and Artt. 11-17 EU Anti Trafficking Directive

184 Art. 10 CoE Anti-Trafficking Convention

edness or of dire conditions of the journey. They can be trafficked from the beginning of it or upon arrival in the host country.

It is therefore possible that a person in need of international protection can also be a victim of human trafficking and vice versa. Therefore, rules and standards concerning the protection of VoTs should not be read in isolation. To the contrary, in order to ensure a holistic human rights protection of an individual in need, it is essential that anti trafficking legal provisions cross-fertilise international protection legislation and policy.

It is in this sense crucial to keep in mind that one status does not replace or overpower the other. This 'double victim' status as asylum seekers and VoT only adds to the asylum seekers' condition of vulnerability, making their assistance needs more complex.

This section of the Chapter will look precisely at the intersection between the trafficking and asylum protection frameworks, exploring practical issues and legal obligations for those who are simultaneously **victims of trafficking** and **asylum seekers or recognised refugees**, hence falling under the nexus of these categories.

This section of the present Chapter will start by analysing the existing instruments for contrasting trafficking at the international and regional level and will then move address the nexus between trafficking and asylum, specifically looking at those instruments, at the international and EU level, which implemented the particular need for protection of this specific group of individuals.

In broad terms, some of the issues that an individual who is both an asylum seeker and a VoT might experience will be rooted in his/her inadequate identification as a VoT in the context of asylum proceedings or in the complete lack of such identification.

As established over the course of this Handbook, for asylum seekers to be granted refugee status, they must fall under one of the 5 recognised grounds of persecution under the GC. Being a VoT is not listed in the persecution grounds which merit international protection. The experience of trafficked asylum seekers will therefore normally be expressed in terms of '*membership to a particular social group*', depending on the concrete features of the situation of the individual concerned. In general terms, victims of trafficking in a certain country – and often of a certain gender or age group (women and/or children) – have been considered as a particular social group based on the level of stigma and the entity of the risks they would be facing in the country of origin.

It must be noted that, in the event of a refusal of refugee status, a VoT can nonetheless qualify for other forms international protection, for instance protection from return to potential risks under Articles 2 and 3 of the ECHR, based on the *non-refoulement* principle.

1.1 Trafficking specialised instruments

1.1.1 At the international level

At the international level the **UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol)** is recognised as the leading instrument in counter-trafficking legislation. This Protocol was issued as an additional document to the United Nations Convention against Transnational Organized Crime, which was meant '*to promote cooperation to prevent and combat crime more effectively*'.[185] The Palermo Protocol also provides the first internationally binding definition of trafficking in human beings (Art. 3), which sets out the fundamental elements comprising this crime: the act, the means and the purpose. The Protocol further covers the protection of VoTs in terms of provision of assistance to victims (Art. 6) taking due account of their special needs (Art. 6 (4)); and in terms of their possibility to remain in the territory of the State (Art. 7).

1.1.2 At the regional level

1.1.2.1 The Council of Europe Convention on action against trafficking in human beings (Anti-Trafficking Convention)

In May 2005, the CoE issued **The Council of Europe Convention on action against trafficking in human beings (Anti-Trafficking Convention)** with the aim of further developing the definition of and approach to trafficking, by way of strengthening the protective provisions of the UN Palermo Protocol. The intention of the CoE to redact a wider scope of protection against trafficking in human beings is enshrined in its Art. 2, which reads: '*This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime*'. The Anti-Trafficking Convention distances itself from the crime-centric approach of the Palermo Protocol and clearly establishes the non-essential international nature of human trafficking.[186]

Some of the core provisions enshrined in this legal instrument are: **the obligation to identify victims of trafficking (Art. 10)**, intended at both adopting relevant legislative measures as well as ensuring the necessary training and qualifications to authorities; **the right to assistance** *in their physical, psychological and social recovery* **(Art. 12)**; their **right to a recovery and reflection period of at least 30 days (Art. 13)** and their **right to a residence permit** which shall be '*without prejudice to the right to seek and enjoy asylum*'**(Art. 14)**. This latter provision serves the aim of averting conflicts between the Convention and '*international law, including international humanitarian law and international*

185 Art. 1 United Nations Convention against Transnational Organized Crime

186 CoE, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, § 61

human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein'.[187]

Apart from this provision the Convention does not address the special situation of those individuals who are both victims of trafficking and in need of international protection elsewhere in its text.

1.1.2.2. The European Convention of Human Rights (ECHR)

The obligations established under the Anti-Trafficking Convention must also be interpreted and applied consistently with the obligations emanating from the **European Convention of Human Rights (ECHR)**, with particular reference to **Art. 4** ECHR and with the **European Court of Human Rights (ECtHR) relevant case-law**.

It has to be noted that while Article 4 of the ECHR deals with slavery, servitude, and forced labour, **it does not refer to trafficking in human beings explicitly.** The following case summaries will show nonetheless how the **jurisprudence of the Court** has shaped the content of Art. 4 ECHR and how the important judgments in the cases of *Rantsev v Cyprus and Russia* (no. 25965/04) and *Siliadin v. France* (no. 73316/01) led to the recognition of human trafficking as a breach of Art. 4. Article 4 ECHR reads:

Art. 4 ECHR- Prohibition of slavery and forced labour

1. *No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour.*

The judgment in ***Rantsev v. Cyprus and Russia*** is of fundamental importance because the ECtHR held for the first time that trafficking, even though not expressly included under Art.4, falls under the umbrella of violations which are prohibited under the provision.

Rantsev v Cyprus and Russia

In ***Rantsev v Cyprus and Russia***, no. 25965/04, the applicant's daughter, Ms Rantseva, a Russian national, arrived in Cyprus on a cabaret 'artiste' visa. It was known that these types of visas were in practice used to force individuals into the sex industry as it happened to Ms Rantseva. Within a few weeks she left the place where she worked, but was traced by her employer who brought her to the police with the aim of having her detained and extradited. The police noted that she had a work permit and made her go back with her employer. Ms Rantseva was later found dead and an inquest held in Cyprus concluded that she had died as a result of an accidental fall while attempting to flee the apartment. Russia considered the verdict unsatisfactory. Their offer of further assistance was refused by Cypriot authorities, who also refused to carry out any additional investigations.

The Court found violations of the Applicant's rights under Article 2, 4 and 5 of the Convention. It found that human trafficking falls within the scope of Article 4 ECHR. While Cyprus had put in place a sufficient legislative framework, its administrative implementation and immigration policy offered insufficient protection to actual or potential victims of human trafficking: the 'artiste' visa scheme's

187 Art. 40(4) Anti-Trafficking Convention

reliance upon cabaret managers taking responsibility for the women concerned encouraged the trafficking trade; police officers also handed Ms Rantseva over to her manager, even where there were sufficient indices to identify her as a potential victim of trafficking. Russia had failed in its duty to investigate: the recruitment of victims occurred on its territory and no steps had been taken to identify Ms Rantseva's recruiters. Regarding Ms Rantseva's right to life, the Court found that Cyprus had breached its procedural obligation to carry out an effective investigation into her death (both the immediate and broader context); Russia had not. Circumstances surrounding her death, described in the Cypriot verdict as 'strange', were not investigated further: relevant witnesses had not been questioned and the assistance offered by Russia had been refused.

Apart from clarifying that trafficking falls within the violations prohibited by Article 4, the Court in Rantsev further established several **positive obligations** binding upon States as regards prevention and prosecution of such crimes:

- **Obligation to put into place an appropriate legal and administrative and legal framework** to prohibit and punish such acts (*Rantsev* § 285);
- **Obligation to provide relevant training for law enforcement and immigration officials** (*Rantsev* § 287);
- **Obligation to take operational measures to protect victims**, or potential victims, of treatment in breach of that Article. *In order for a positive obligation to take operational measures to arise in the circumstances of a particular case,* ***it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited*** *within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (Rantsev* § 286);
- A procedural **obligation to investigate** where there is a credible suspicion that an individual's rights under that Article have been violated (*Rantsev* § 288).

Siliadin v. France

In ***Siliadin v. France***, the Court addressed again the issue of exploitation, this time considering domestic slavery of a 15-year old Togolese girl. On account of the minor age of the Applicant this case is dealt with in detail in the section on **trafficked children** below in the Chapter.

The Court further expanded its previous findings on the scope of Article 4 ECHR to also include conditions amounting to forced labour in the framework of work carried out by migrant workers. This was dealt with by the Court in the infamous case of *Chowdury and Others v. Greece* (also known as the 'Manolada' strawberry farm case).

Chowdury and Others v. Greece

In ***Chowdury and Others v. Greece***, no. 21884/15, the applicants, a group of 42 undocumented immigrants from Bangladesh, worked in a strawberry farm in Manolada, Greece. The applicants worked for 12 hours under armed guard supervision, were living in makeshift tents of cardboard boxes without running water and toilet. They had been promised to receive 22 euros for 7 hours and 3 euros per hour of overtime, but they never received their wages and for this reason went on several strikes. During one of these strikes the applicants were shot at by an armed guard and several of the them were injured.

A criminal prosecution was brought against the management of the farm and the guard who opened fire for both grievous bodily harm and human trafficking. The defendants were acquitted of the charge of human trafficking.

The ECtHR held that the situation amounted to human trafficking and forced labour. The Court found therefore a violation of the applicants' Article 4 rights owing to the lack of preventative measures taken by the Greek authorities to protect the applicants from the risk of trafficking and the lack of an effective investigation and judicial procedure. All the applicants - injured or not – were found to be victims of human trafficking for forced labour. The Court noted that their status as undocumented immigrations rendered them vulnerable. The Greek authorities had previously sought to remedy the situation, but had not taken sufficient steps to do so, and so failed to protect the applicants from the treatment they suffered. With regard to the restriction upon freedom of movement of the workers, whilst the domestic courts had found that it was a necessary condition in order to establish a situation of trafficking, the Court held that this was not required and found Article 4 was applicable although the migrant workers could –in theory- freely move and leave the employment.

The judgement in *Chowdury* notably specified that exploitation through labour is to be considered as one aspect of trafficking in human beings and reiterated the concept of positive obligations as established in *Rantsev*, specifically the duty to prevent trafficking and forced labour; the duty to protect victims; to conduct an effective investigation into the offences committed and to punish those responsible for the violations. Moreover, the Court placed particular weight to the fact that the authorities were aware of the situation in which migrant workers found themselves through official reports and the media well before the shooting incident involving the applicants and had failed to take adequate measures to prevent trafficking and to protect the applicants (*Chowdury and Others v. Greece* §§ 111-115).

More recently, the ECtHR had the opportunity to address under the protection of Art. 4 ECHR both a violation relating to the trafficking of women into prostitution as well as the sexual exploitation itself in the case of *S.M. v Croatia*.[188]

S.M. v Croatia

The case of ***S.M. v Croatia*** concerns a Croatian woman's complaint that she had been trafficked and consequently forced into prostitution within Croatia. The applicant argued in particular that State authorities had failed to respond adequately to her criminal complaint against her trafficker and

188 *S.M. v. Croatia*, no. 60561/14

that Croatia lacked a proper legal framework to deal with such issues.

The Court found that -although an adequate legal framework for criminalising trafficking in human beings, forced prostitution and exploitation of prostitution was present in Croatia- there had been shortcomings in the authorities' investigation into her case. The Court noted *inter alia* that the Croatan authorities failed to interview all the possible witnesses and, in finding that she had voluntarily given sexual services, mistakenly had not taken into account international laws on human trafficking according to which the consent of the victim is irrelevant.

The Court noted that with regard to the applicant's claim, Article 4 could be applied even if there **was no international element** to her trafficking situation, as she was not forced to cross any international borders by her trafficker .The Court held furthermore that, as both THB and exploitation of prostitution threaten human dignity and fundamental freedoms, not only trafficking but also the exploitation of prostitution falls within the scope of Art. 4 ECHR. (§ 54)

1.1.2.3 The European Social Charter and the protection of children VoTs

Another important tool in the context of anti-trafficking legislation is the **European Social Charter (ESC),** which represents the principal CoE instrument regulating economic and social rights including, e.g. employment, housing and education. Aim of the ESC is to supplement the ECHR in the field of economic and social rights, as the latter is largely focussed on civil and political rights and hence fails to explicitly address some issues of key importance to vulnerable categories.

The ESC contains several articles aimed at the protection of children and young persons: Art. 7 (the right of children and young persons to protection, primarily in relation to employment rights) and Art. 17 (the right of children and young persons to social, legal and economic protection) which includes under Art. 17(1)(c) the provision of '*protection and special aid'* where children are '*temporarily or definitively deprived of their family's support*', with important implications for migrant children.

Particularly, for the subject of this Chapter **Article 7(10)** has to be noted, highlighting to '*ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work*'. In order to comply with this article States must take **specific measures to prohibit and combat all forms of sexual exploitation of children**, by criminalizing all acts of sexual exploitation as well as other forms of exploitation following from trafficking or being on the street, such as, among others, domestic exploitation, begging, pickpocketing, servitude or the removal of organs.

Defence for Children International (DCI) v. the Netherlands,
Complaint No. 47/2008, decision on the merits of 20 October 2009

A violation of Article 31(2) and 17(1)(c) was lamented on the grounds shelter was not provided to children unlawfully present in the Netherlands. The Committee concluded that States Parties are required, under Art. 31(2) of the Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children. The Committee held that the situation in the Netherlands constitutes a violation of Art. 31(2).

On the basis of this judgment the Netherlands expanded the reception facilities for families and children so that they were provided with shelter and the follow up assessment of the Committee registered that the situation was brought into conformity with the Charter.

Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012

The complainant, Defence for Children International (DCI), alleged that the lack of reception accommodation available to migrant and asylum seekers children – due to oversaturation of the existing reception centres – rendering vulnerable minors effectively homeless, violated their rights to social, legal and economic protection (Article 17(1)) and to protection against exploitation (Article 7(10). The Committee emphasises that, even though paragraph 1 of the Appendix to the Charter appears to restrict the application of these rights to those not on the territory illegally, this does not restrict the application of these rights to the minors in this instance. To restrict these rights in that way would expose the children to breaches of their right to human dignity.

In this circumstance, the Committee said that the Belgian state must have both a legal framework in place and sufficient resources available to implement that framework. The general refusal of the government to guarantee accommodation to foreign minors on their territory violated the right to protection under Article 17(1).

Regarding specifically the children's exposure to exploitation, the Committee noted that there was insufficient evidence to conclude that there was a widespread begging-exploitation of children in Belgium. However, they found a violation of Article 7(10) on the basis that the denial of reception accommodation to these minors – rendering them homeless – exposed minors to a sufficient risk of exploitation. The Belgian government had thus taken insufficient positive steps to prevent this risk to minor migrants.

In ***Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland*** (no. 89/2013) FAFCE asked the European Committee of Social Rights to find that the low rate of identification of victims of child trafficking and the low conviction rate of perpetrators of child trafficking in Ireland demonstrated that the Irish authorities were in violation of Article 17 § 1 of the European Social Charter. The Committee decided to examine the issue under Article 7 § 10 (the right of children and young persons to protection). The Committee stated that Article 7 § 10 of the Charter establishes a positive obligation on states to combat sexual exploitation of children by adopting an adequate legislative framework and action plan to deal with child prostitution, child pornography, and the trafficking of children; the trafficking of children covering all forms of exploitation including domestic/labour exploitation, begging, and the removal of organs. This legislation must be comprehensive and effective in practice. The Committee noted that Ireland was improving its record of identifying child victims of trafficking and that identification was a major challenge for most European states. The Committee referred to reports by the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) and the OSCE in 2013, which both acknowledged the efforts of the Irish authorities but stated that there were still additional measures that needed to be taken. The Committee ruled that a low identification rate and low conviction rate were not in themselves sufficient indicators of a violation of Article 7 § 10 and that the Article imposed an obligation on the authorities as to results and means that was being met. Therefore, there was no violation of Article 7 § 10.

1.1.3 At the EU Level

In 2011 the European Union (EU) adopted the **Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (Anti-Trafficking Directive)**. Aim of this Directive was to *'establish[es] minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings [...]to strengthen the prevention of this crime and the protection of the victims thereof'* (Art. 1).

The EU Anti-Trafficking Directive imposes fundamental duties and obligations on Member States with regards to victims of trafficking and their protection, as for example:

> **Article 11** requires Member States to provide sufficient **assistance and support measures** to victims of trafficking, in particular through '*the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate*'. Information provision shall cover, *inter alia*, and where relevant, information on the possibility of being granted international protection.

Furthermore, it is important to refer to the **EU 'Victims Directive' (2012/29/EU), which** sets out a comprehensive framework of rights (including the right to access information, support, remedy, protection during investigations and protection from contact with the offender etc.), which shall apply to a wide range of victims of crime. The Directive places special emphasis on the importance of an individualized assessment of protection needs and explicitly recognises and addresses the particular position of victims with '*specific protection needs*'. As far as trafficking victims are concerned, without prejudice to the more far-reaching obligations contained in the EU Anti-Trafficking Directive, the Victims Directive also identifies victims of trafficking as a category which '*tend[s] to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation*', mandating '*particular care*' in the assessment of such risk and a '*strong presumption that those victims will benefit from special protection measure*'(Recital no. 57).

1.2 Instruments explicitly regulating the condition of trafficked asylum seekers

The instruments presented above represent therefore a comprehensive legal framework both at an international as well as at the CoE and European Union level for the protection of victims of human trafficking and the prevention of such crime. They do not nevertheless address the nexus between human trafficking and international protection, lacking to foresee the existence of trafficked asylum seekers as an autonomous category, worthy of dedicated protection.

As far as legal instruments governing the **nexus explicitly**, there is no explicit provision protecting this particular vulnerable sub-group at the international level, although international jurisprudence and specialised soft law instruments explicitly **acknowledge this category** detailing the specific procedural and substantial guarantees that should be granted to those falling under it.

In contrast at the regional level, several EU law instruments explicitly regulate the situation of asylum seekers who are also victims of trafficking, placing them in the category of **asylum seekers with special procedural and reception needs**. These are looked at directly below.

1.2.1 At the EU level

- The **Recast Reception Conditions Directive (2013/33)** explicitly classifies VoTs as members of the category of *asylum seekers with special needs* entitled to specific guarantees in terms of **reception conditions and procedural guarantees.** According to **Article 2 (k)** an applicant with special reception needs is *'a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive'.*

  Article 21 explicitly regulates the special reception needs of this group of individuals. The importance of proper identification 'in order to effectively implement Article 21' is also highlighted. (Art. 22(1)) Member States are under an obligation to properly identify and initiate the assessment of a vulnerable applicant within a reasonable period of time after an application for international protection has been made. (Art. 22(1));

- Art. **24** of the **Recast Asylum Procedures Directive** (Directive 32/2013/EU) reiterates the need for **proper identification** of applicants in need of **special procedural guarantees**. This group of applicants is identified in Preamble 29 of the Directive, which lists *inter alia 'mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence'.*

  Member States should take appropriate steps to enable early identification of applicants in need of special procedural guarantees before a first instance decision is taken. They shall also ensure that where applicants have been identified as in need of special procedural guarantees, to provide them with adequate support in order to allow them to benefit from the rights they are entitled to and comply with the provisions of this Directive throughout the duration of the procedure (Art.24(3)). These should include sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure (Art. 24(4));

- Echoing the above, VoTs are identified as '**vulnerable persons'** under Article 3)20) of the **Recast Qualification Directive (2011/95/EU)** which refers to *'minors,* *unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, **victims of human trafficking**, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence*';

- The **Dublin III Regulation** foresees only one specific provision for VoTs with regards to minors under Art 3)6)(c): '*3In assessing the best interests of the child, Member States shall […] due account of the following factors: [..](c)safety and security considerations, in particular where there is a risk of the **minor being a victim of human trafficking***'. No specific provisions are foreseen for adult VoTs, although their cases could be addressed under the discretionary clause in Art. 17, which allows the examination of asylum claims beyond the state's responsibility due to the existence of humanitarian or other grounds in the particular case.

1.2.2 Soft Law

As mentioned above no explicit provision protecting this particular vulnerable subgroup is present at the international level. It has to be noted nevertheless that specialised **soft law** instruments have **acknowledged this category** detailing the specific procedural and substantial guarantees that should be granted to those falling under it. The United Nations High Commissioner for Refugees (UNHCR), responsible for the interpretation and oversight of the Geneva Convention (GC), has issued tailored guidance for governments, legal practitioners, decision makers and the judiciary as to victims of trafficking in the asylum process.

In its Guidelines on refugees who are trafficked or at risk to be trafficked[189] the UNHCR refers to Art.14 of the Palermo Protocol and the principle of non-*refoulment* (cited above) as evidence of the '*implicit possibility*' for '*[s]ome victims or potential victims of trafficking*' to '*fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention and […] therefore be entitled to international refugee protection*'.[190]

The UNHCR Guidelines observe that for trafficking to constitute a legitimate basis for an asylum application decision makers should assess the '***persecutory nature of the various acts associated with trafficking***', evaluating the significance of their impact in the concrete case. To this end, the spectrum of the activities encompassed by trafficking is considered in its entirety, to the effect that both the actual persecution as deriving by the acts of exploitation and the possibility of **reprisals upon return and re-trafficking**, as well as the victim's fear of '*ostracism, discrimination or punishment by the family and/*

189 UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, available at: https://cms.emergency.unhcr.org/documents/11982/49074/UNHCR,+Handbook+and+Guidelines+on+Procedures+and+Criteria+for+Determining+Refugee+Status+under+the+1951+Convention+and+the+1967+Protocol+Relating+to+the+Status+of+Refugees/30fe78f2-5414-47ec-9439-0f2663889e58

190 UNHCR, Guidelines on International Protection no. 7, The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, § 12

or the local community or […] by the authorities' must be regarded as relevant. Specific considerations and guarantees are in place for women and children, in recognition of their enhanced vulnerability. The Guidelines indicate that '*potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the 1951 Convention refugee definition*' so that '*even if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker's selection of the particular victim*'.[191]

In these cases trafficked asylum seekers will normally be considered as **members of a particular social group** for the purposes of international protection, in view of the risks of re-trafficking that they would face upon return.

2. CHILDREN IN MIGRATION, ASYLUM AND TRAFFICKING SITUATIONS

2.1 Introduction

Asylum-seeking and migrant children are recognised as a category of persons of exceptional vulnerability. When these children are separated from their parents or responsible adults their vulnerability is increased. International and regional human rights law recognises increasingly higher standards to migrant and refugee children, both in terms of substantive as well as procedural rights and guarantees. This section will examine some of the main instruments and principles applying in the protection of asylum-seeking and migrant children, especially when they are separated from their parents or other responsible adults.

Migrant children as a group, and asylum seeking children in particular, undergo different procedures during their migration journey. Depending on the context, these can be part of the asylum route, the national anti-trafficking mechanisms or other protection mechanisms in the country of destination. Often, migrant children's status as minors in a foreign country can supersede their condition as asylum seekers, to the effect that they are protected primarily on account of them being vulnerable children.

Migrant children, on account of their inherent vulnerability, limited physical and psychological autonomy, face increased obstacles in the course of their migration experience, especially where this entails '*detention and return, proceedings before the national referral mechanism or equivalent bodies responsible to ascertain situation of trafficking and exploitation and other medical, age- assessment procedures and a variety of medical, psychologi-*

191 UNHCR, Guidelines on International Protection no. 7, The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, § 13

cal and social care screenings'.[192] Through the various situations that a migrant or asylum seeking child can experience in the course of his/her journey and within the country of destination, he/she should be afforded specialised legal safeguards and reception conditions, which normally differ – and are more favourable – than those afforded to adults.

The following section will examine the main international and regional instruments applicable to migrant children, both accompanied and unaccompanied. As with the other chapter of this Handbook, the analysis will begin with an overview of the international standards and will move to the EU and CoE frameworks and jurisprudence.

2.2 International legal standards and procedures applied to children seeking asylum

2.2.1 The UN Convention on the Rights of the Child (UNCRC) and the jurisprudence of the UN Committee on the rights of the child (CRC) in cases involving migrant and asylum-seeking children

The UN Convention on the Rights of the Child (UNCRC) constitutes the cornerstone of children protection at the international level. While the Convention is not an asylum or migration specialised instrument, it applies to children as a group irrespective of their nationality or migration status. The UNCRC however acknowledges and explicitly addresses the situation of migrant children and asylum-seeking children as a particular group within this category, recognising the particular needs and safeguards that they should be afforded.

The UNCRC deals with migrant children, and asylum seeking children more specifically, under **Article 22,** which creates an explicit obligation for States to protect asylum seeking children, ensuring '*that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures receives appropriate protection and humanitarian assistance in the enjoyment of his/her rights under the UNCRC and other instruments. This obligation is irrespective of whether the child is accompanied or unaccompanied'.*

The meaning of the above provision is clarified by the UN Committee on the rights of the child (CRC) itself, which, under its **General Comment No. 6 (2005) (GenCom No.6)** on **unaccompanied and separated children outside their country of origin** specifies the definition of these categories as follows:

- §7 "**Unaccompanied children**" (also 'unaccompanied minors') are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

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- §8 "**Separated children**" are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

The UNCRC dedicates various General Comments (GenCom) to the specific needs of this group: **GenCom No. 14 (2013)** stipulates that children's best interest must '*be a primary consideration'* in all decisions affecting them and **GenCom No. 12 (2009)** on children's right to be heard. **GenCom No. 6 (2005)** on **unaccompanied and separated children** outside their country of origin specifically disciplines all aspects of the child's migration experience and affords them targeted rights.

More recently, the **UNCRC and UN CMW, Joint GenComs No. 3 and 4 and No. 22 and 23 (2017)** address the general principles on the human rights of children in international migration and the corresponding State obligations in countries of origin, transit, destination and return.

2.2.1.1 Principles specific to migrant children

The UNCRC and its General Comments provide core principles for the protection of migrant children. Some of these principles are so fundamental that they should be considered and inform every action or decision when a child is concerned. They will be briefly outlined below:

- **Best interests of the child [BIOTC]:** the principle of the BIOTC is a general principle of international law and an underlying rule applying in all situations where children are concerned. In its UNCRC understanding, respect for the best interest of the child is prescribed in the following terms: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child **shall be a primary consideration**."* The UNCRC understands the BIOTC as a 'threefold concept', enshrining different rights and obligations. Specifically, the BIOTC is described to be at once **a substantive right, a fundamental, interpretative legal principle** and a **rule of procedure** (GenCom no. 6§ 14). As such, respect for this principle can be invoked both in its dimension as an autonomous right, as an **interpretative direction** when making any decision impacting the child. Finally, the BIOTC shall serve as a **source of procedural guarantee,** in the sense that when a decision is taken in a case concerning children, the assessment of the best interest of the child must be clearly demonstrable. States are required to '*explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases*'. (GenCom no. 6§ 14(c)). When children in migration are considered their **best interest** must be considered in '*the search for short and long-term solutions*'.(GenCom no.19 § 6). *'In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life'*.(GenCom no.19 § 6).

- The **child's right to express those views freely** *in all matters affecting him/her,* under Article 12 UNCRC, is intimately connected to the BIOTC principle, insofar as seeking the child's involvement and participation in decision making processes affecting him helps ensuring that the child himself expresses his/her views on what this principle should be understood as in the particular situation. Such situations can include *'any judicial and administrative proceedings affecting him/her'* and the child's views can be obtained *'either directly, or through a representative or an appropriate body'*. The concrete relevance given to the child's views will depend on his/her **age and maturity**. (GenCom no. 29 ,28 § 12)

2.2.1.2 Relevant provisions

Alongside the above overarching principles, the UNCRC contains a series of substantive and procedural rules applying to children in migration, both asylum-seeking children and migrant children who have not expressed international protection needs. These include the following:

- **Protection from separation (Article 9):** As a general rule, the UNCRC protects children from actions resulting in their separation from their family members or relatives, unless '**such separation would be necessary**' for the best interests of the child in a particular case *'such as one involving abuse or neglect'*. Protection under this article is particularly relevant to children becoming separated in the course of asylum or migration procedures or as a result of detention. The Article provides for express procedural guarantees, such as the right of *'all interested parties [to have an] opportunity to participate in the proceedings and make their views known'* (para. 2) and the child's right '*to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*'. The provision explicitly mentions separation as a result of state actions, such as **detention, imprisonment, exile, deportation or death** (para. 4).
- **Family Reunification (Article 10):** The above principle of protection from separation, directly informs the subsequent rule under Article 10 UNCRC, which regulates **family reunification** applications in cases involving children. The provision states that '*applications by a child or his or her parents to enter or leave a State Party for family reunification shall be dealt with […] in a positive, humane and expeditious manner*' and (para. 2) where the child and the parents reside in different States, their right to maintain contact on a regular basis, save in exceptional circumstances, must be ensured.

- **Family Tracing (Article 22.2)** – the UNCRC creates an obligation for States to take part in international efforts for family tracing: Including a duty to assist the refugee child in tracing the parents or other family member with a view to reunification. Failing the efforts to trace family members, the child deprived of his/her family must receive the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.
- **Special Protection of children temporarily or permanently deprived of their family environment (Article 20):** when children are temporarily or permanently separated from their family environment due to external and uncontrollable circumstances, they will normally be in receipt of **alternative forms of care** trying to recreate a familial environment for them. Some of the arrangements recognised by the UNCRC include (para.3) '*foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the* ***desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background***'. This provision is of particular relevance with regard to asylum seeking and migrant children from Islamic backgrounds, whose family members or *kafalah* sponsors want to reunite with them.
- **Right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development** (Article 27): with regard to asylum seeking and trafficked children who often face situations of deprivation or destitution.
- **Right to education (Article 28):** with special reference to primary education, which State Parties must make '*compulsory and available free to all*'. In light of unaccompanied and separated children's situation, this right should be read in conjunction with the protection of ethnic and linguistic minorities and relevant cultural and social rights under Article 30.
- **Right to protection from torture or other cruel, inhuman and degrading treatment or punishment (Article 37),** keeping in mind that 'the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time' as well as the principle whereby children and adults must be separated in detention facilities, unless it is considered in the child's best interest not to do so and the right to maintain contact with the family must, as a rule, be maintained.
- **Safeguards for the protection, assistance and recovery of children victim of trafficking, exploitation and abuse (Article 32-36 and 39):** The UNCRC recognises and protects children who are victim of trafficking or other forms of exploitation and abuse. In addition to providing from their right to protection (Article 32.1 and 36-35) and the State's corresponding obligations '*to take legislative, administrative, social and educational measures*' to this end, the UNCRC makes explicit provisions against the employment of children in sexual exploitation and drug trafficking (Art.34-33), in their various forms. As the trafficking experience – as well as other

broadly exploitative labour arrangements – can often involve breaches of domestic criminal law, it should be recalled that a principle of **non-penalisation** exists for acts committed under the broadly coercive conditions inherent to these situations. Children who have been found to be victims of '*should not be penalised and should receive assistance as victims of a serious human rights violation*' (GenCom no 6 UNCRC).[193]

Specific guarantees for the protection of children who are accused of breaches of criminal law provisions are provided for under **Article 40,** both in terms of procedural guarantees to be ensured throughout the process and in terms of **State's obligations** to establish '*a minimum age below which children shall be presumed not to have the capacity to infringe the penal law*' (para 3) and to ensure the availability of alternatives to institutionalisation *'such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other […]'.*

The enduring consequences of the trafficking experience, especially pervasive when children are affected, are considered to also impose an obligation for the State to ensure the long-term rehabilitation of children victims of exploitation. According to **Article 39**, appropriate measures must be taken '*to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.*

2.2.1.3 Relevant General Comments (GenCom) of the Committee on the Rights of the Child

The above provisions must be read in conjunction with specialised UN tools in this field, the so-called General Comments (GenCom). These are authoritative interpretations of provisions under UN instruments. In the case of the UNCRC, the authority in charge of giving such interpretation is the Committee on the Rights of the Child(CRC). The Committee authored various GenCom providing guidance on the UNCRC provisions. Some of these focus on the content of specific CRC articles, examining its meaning in different contexts; other examine the application of the Convention as a whole to children belonging to specific groups. As far as the General Comments on the meaning of core UNCRC provisions are concerned, the following tools must be considered:

- **GenCom No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration** (Art. 3.1) *"In all actions concerning children,*

193 On the issue of non-punishment of VoTS and the lack of consent in trafficking offences involving minors see also: Art. 8 EU Anti-Trafficking Directive '*Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled* ***not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2'***(emphasis added); Art. 4(c) CoE Anti-Trafficking Convention '*The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article*'.

whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

- **GenCom No. 12 on the right of the child to be heard** (Art. 12 CRC), elaborates on the scope of this provision establishing that States are under an obligation to *'assure to the child who is capable of forming his or her own views the right to express those views freely'* in all matters affecting him/her. As far as asylum seeking, trafficked and migrant children more generally are concerned, this provision must be read as requiring for the voice of the child to be heard and given due weight in immigration and asylum proceedings and for surrounding guarantees to be provided, including:
  a. *Regard for the child's own migration projects and migration-driving factors (para.35)*
  b. *The child's right to receive all relevant information on services, complaints mechanisms, immigration and asylum processes and their outcomes in his/her own language, in a timely manner and in a child-sensitive and age-appropriate manner.*
  c. *If unaccompanied or separated, the rights to be appointed a qualified legal representative and a trained guardian as soon as possible on arrival and free of charge*
  d. *Independentconsiderationofthechild'sviewsfromthoseofhis/herparents*
  e. *Consideration of the child's views in his/her parent's immigration procedures, where these could indirectly affect them (except when this would be in their best interest).*
- **GenCom No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin**. This GenCom, already mentioned above, deals broadly with unaccompanied and separated children outside their countries of origin. In that, it directly and indirectly deals with both asylum seeking and children at risk of exploitation and trafficking. Amongst the main observations made by the Committee in this GenCom, it is specified that the Convention **does not only apply to the geographical territory of the State but extends to all children under the State's jurisdiction** hence including '*those children who come under the State's jurisdiction while attempting to enter the country's territory*'. This is relevant when considering children in push back or return operations. The joint GenCom no 3 and 4 (below), further specify the above stating that States parties' are under an obligation to respect the Convention rights also where they exercise effective control outside the borders of the state**. Jurisdiction cannot be limited/excluded in zones or areas subjected to migration control operations, including international waters or other transit zones** and can arise in presence of children *'attempting to enter the State territory'* (Joint GenCom No. 3 Para.12)
- **Joint GenCom No. 3 and 4 (23 and 24) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the rights of the child (CRC)** on the general principles regarding the human rights of children in the context of international migration and on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. In 2017

the CMW and the CRC, conscious of the urgency of the situation of children on the move, jointly agreed on the texts of two GenCom s addressing the particular rights and safeguards applying to migrant children and their parents in the context of international migration and the corresponding obligations of the States engaging with them. Amongst the key findings of the joint GenComs is the recognition of the **double vulnerability of children in international migration**, who are considered in need of protection both as '*children and as children affected by migration*'. The GenComs adopt a wide understanding of the term 'migration', which includes all stages of the migration experience and to covers all subjects directly or indirectly affected. As a result, the GenComs s have effect on the rights of children who: *(a) Are migrants themselves, [...] alone or with their families; (b) Were born to migrant parents in countries of destination or; (c) Remain in their country of origin while one or both parents have migrated to another country.*

Importantly, the GenCom shed light on the meaning and scope of the assessment of the BIOTC in migration procedures, examining its impact in terms of policy making. The GenCom states in particular that the BIOTC '*shall be a primary consideration and thus have high priority'* in the formulation of '**immigration law, the planning, implementation and assessment of migration policies'**.

While the UNCRC generally applies to migrant children irrespective of their migration status in the country, some tailored safeguards are provided for children who seek asylum, who are entitled to procedural and substantive guarantees in order to effectively exercise their right to claim international protection. To fulfil their obligations to this end States are, *inter alia,* required to '*set up a* ***functioning asylum system****,* ***enact legislation addressing the particular treatment of unaccompanied and separated children*** *and to build capacities necessary to realise this treatment in accordance with applicable rights codified in the Convention and in other international human rights, refugee protection or humanitarian instruments'*. For the same purpose, another key principle for the protection of refugee children is their right to be **appointed a guardian** who is able to effectively represent and express the child's interest. This should be '*an adult who is familiar with the child's background and who is competent and able to represent his or her best interests. The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults. The guardian and the legal representative should be present during all interviews'* (GenCom no. 6 of the UNCRC §69).

Other procedural guarantees include the **prioritisation of asylum applications** lodged by children (§70-72), the assistance of an interpreter where needed and the recognition of the "**benefit of the doubt**" should credibility issues arise and the possibility to appeal for a formal review of the decision. As far the substantive aspects of the above statement is concerned, cases of children who seek international protection should be approached having due regard to the existence of **child specific forms of persecution (**GenCom **no 6 UNCRC §74)** which include but are not limited to: *'Persecution of kin; Under-age re-*

cruitment; Trafficking of children for prostitution; Sexual exploitation or subjection to female genital mutilation'.

2.2.1.4 Jurisprudence of the Committee on the Rights of the Child in cases involving migrant children

Further to its role of interpretation and oversight, the UN Committee for the rights of the child also serves as *quasi*-judicial body ruling on the correct interpretation of the Convention in particular circumstances and establishing whether there was a violation of children's rights in a particular case. In order to enable the Committee to exercise this function, States must be signatories to the Third Optional Protocol to the UNCRC (OP3), which allows for complaints by children (or individuals representing them).[194] As with the procedure before the ECtHR, also in cases before the UNCRC, domestic remedies must have been exhausted prior to filing a complaint and the complaint itself must be brought within one year from the event causing the violation.

Upon completion, the procedure before the CRC however does not ensure the same level of enforcement as the ECtHR, in that the CRC is not able to mandate general or individual measures to remedy the violation, but only **recommendations to the State concerned**. However, the possibility exists also under this route to request that the State party concerned takes **interim measures** necessary to avoid *possible irreparable damage to the victim or victims of the alleged violations* (Art.6). This provision is particularly relevant for asylum seeking and trafficked children whose life and freedom might be at risk in cases where return is threatened or in the context of inadequate reception arrangements (among other cases).

To date **only two cases have been decided on the merits, one of which pertains to asylum and can be found summarised below:**

I.A.M. (on behalf of her daughter K. Y. M.) v Denmark

***I.A.M. (on behalf of her daughter K. Y. M.) v Denmark* (views adopted on 25 Jan 2018)** - **Violation of articles 3 and 19 UNCRC** - on the proposed deportation to Somalia of the new-born daughter of a failed asylum seeker, with the risk of the girl being subjected to female genital mutilation (FGM). The Committee decision recalled the principle under GenCom No. 6 (above) whereby States are prohibited from returning a child to face a risk of irreparable nature, which **extends beyond risks under articles 6 and 37 UNCRC**. The existence of **child-specific forms of persecution**, already described above, was also recalled, especially as female genital mutilation appears among the types of persecution listed. The impact of action concerning children on the rights of the parents, in this case the rights of the child's mother, were also taken into account. In this case, the mother's inability to resist social pressure to protect the daughter from FGM, due to the pervasive nature of the practice in the country, was given particular weight.

194 As of 1 Jan 2018, 37 states had ratified OP3

Y.B and N.S.

The case of ***Y.B and N.S.*** (communication no. 012/2017, decided on 27 September 2018) pertained to the refusal of a humanitarian visa for a child taken in charge within the framework of a kafala adoption procedure by a Belgian- Moroccan couple.[195]

The route of the CRC as an alternative avenue for raising a complaint for asylum seeking and other vulnerable children has led to other cases involving migrant children being brought before it more recently.[196]

2.3 The Regional Framework for the protection of migrant children

2.3.1 The protection of migrant and refugee children in the framework of the ECHR and the ECtHR

As highlighted in previous sections, the ECHR is neither a migration nor a children-specific instrument but constitutes a far-reaching human rights legal instrument. As such, it does not contain provisions dedicated to migrant children. However, some articles make reference to children and have particular relevance in situations involving children in international migration.

In its jurisprudence, the **ECtHR** treats children as **members of a vulnerable group** and asylum seeking and trafficked children regarding as **especially vulnerable** individuals, due to their concurrent belonging to two different vulnerable groups (asylum seekers and children) (See: *Mubilanzila v Belgium* (no. 13178/03), *Popov v France* (nos. 39472/07 and 39474/07), *Tarakhel v Switzerland* (no. 29217/12), *Rahimi v Greece*, (no. 8687/080)).

This condition of enhanced vulnerability is not just the sum of these two conditions but is characterised by specific needs and the peculiar condition arising from the combined effect of being a child and facing a situation, which is intrinsically one of distress, fatigue and deprivation, such as the one of an asylum seeker. Furthermore, the ECtHR has observed in various occasions that when migrant children in detention are involved the States are under an obligation to provide them with targeted and enhanced guarantees.

Some of the provisions of relevance in cases involving migrant children include the following:

- Art.3: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*. Children benefit from special considerations when assessing the

195 Further information on this case can be found at: http://juris.ohchr.org/Search/Details/2421

196 See in particular the case of DD v Spain (4/2016)on the rights of children in age-assessment procedures – in relation to which the AIRE Centre and other organizations intervened as a third party: http://www.asylumlawdatabase.eu/en/content/third-party-intervention-dd-v-spain-42016-un-committee-rights-child-interveners

severity of a treatment under Art.3, as '*the sex, age and state of health of the victim*' can be a relevant circumstance;

- Art.4: Prohibition of Servitude and forced or compulsory labour (*Siliadin v France,* no. 01/73316 *and C.N. & V. v. France,* no. 09/67724);
- Article 5: Right to liberty and security (see below: Detention and deportation)
- Article 8: Right to respect for private and family life (separation from parents in detention (*Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no. 03/13178), deportation of the child without adequate protective measures (*Mubilanzila*);
- Article 14: Prohibition of discrimination, e.g. access to education of migrant children (*Ponomaryovi v Bulgaria*, no. 05/5335)
- Article 13: Right to an effective remedy – adequate to the level of maturity and needs of the child (*Rahimi v. Greece* , no. -080/8687 inadequacy of the information provided to the child)
- Protocol no 1 to the ECHR, Art. 2: Right to education (above)
- Protocol no Protocol No. 4, Art. 4: Prohibition of collective expulsion of aliens

Under the jurisprudence of the Court, respect for children's enhanced vulnerability must be a primary consideration, **taking precedence over their irregular migration status** (*Mubilanzila v Belgium* (above) M.*S.S. v Belgium and Greece*, no. 30696/09, § 232).

In view of their peculiar condition, asylum seeking and trafficked children are afforded specific and higher guarantees under the ECHR. The Court has identified the specific guarantees afforded to migrant children by considering their particular predicaments where they are likely to be exposed to violations of their rights under the Convention. For instance, in many occasions the Court considered the effects of **inadequate reception or detention conditions on children**, often reaching different conclusions than when examining cases of adults in similar situations (*Muskhadzhieyeva and Ors v Belgium*, no. 41442/07).

Detention facilities and conditions inadequate to meet the children's special needs have been deemed to raise issues under Art.3.[197]In *Mubilanzila* the compounded effect of the applicant's condition as a 5-year old unaccompanied asylum-seeking child in a detention centre was considered to place her '*in an extremely vulnerable situation*'.[198]

For the purposes of determining the adequacy of conditions where children are placed in detention, the ECtHR has looked at the existence of measures for providing them with **counselling and educational assistance from qualified personnel.**[199] Equally significant is the requirement to **appoint a guardian representing the unaccompanied minor**, for the purposes of challenging detention, as observed in *Rahimi v Greece.*

197 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no. 13178/03 and *Muskhadzhiyeva and Others v Belgium*, no.. 41442/07; *Kanagaratnam and Others v Belgium*, no. 15297/09; *Popov v France*, nos. 39472/07 and 39474/07; *M.S. v the United Kingdom*, no. 24527/08; *Price v. the United Kingdom*, no. 33394/96.

198 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, §55

199 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, §50

Many difference situations have been examined by the Court under its jurisprudence on migrant children, and the resulting standards and principles, will be exposed in detail below.

2.3.1.1 Violations of Article 3 in various scenarios involving asylum-seeking and migrant children

Article 3 of the ECHR provides for the prohibition of torture or inhuman or degrading treatment or punishment, in absolute terms and hence without prejudice to the conduct held by the victim. In its assessment of alleged violations under this Article, the Court's reasoning is based on whether the consequences of the action at stake are capable to '***attain a minimum level of severity***', the assessment of which '*depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects*'. When assessing the severity of a treatment under Art.3, '*in some instances, the sex, age and state of health of the victim*' could also be relevant circumstances, with the effect that children are indirectly afforded special considerations.

2.3.1.1.1 In the context of Dublin Transfers to countries lacking sufficient standards for children

In the previous version of this Handbook, careful consideration has been given to the consequences of returning asylum seekers to a different Member State pursuant to the Dublin Regulation rules. Causing a crucial jurisprudential upheaval, with the case of *M.S.S. v Belgium and Greece,* the Court established that on account of the severity of the reception circumstances in Greece, returning asylum seekers there, was in itself liable to cause a violation of Article 3. While up to that moment the Court had found violations of Article 3 in cases where aliens risked being returned to a third country, with *M.S.S.* the Court found that, irrespective of it being a signatory to the ECHR and other relevant Conventions, Greece was unsuitable to adequately host asylum-seekers.

M.S.S. v. Belgium and Greece

In the leading case of ***M.S.S. v. Belgium and Greece*** **(no. 30696/09)** the applicant travelled from Afghanistan to Greece, where his fingerprints were taken, and then to Belgium where he applied for asylum. Under the Dublin Regulation the applicant was returned from Belgium to Greece where he began the process of applying for asylum. After experiencing problems with his asylum procedure and becoming homeless, the applicant was arrested for attempting to leave Greece on false papers. The applicant was held in detention, sentenced to a two-month suspended sentence, and -after a second attempt to leave Greece- was taken by the police to the Turkish borders for expulsion but 'at the last moment, the Greek police decided not to expel him, according to the applicant, because of the presence of the Turkish police' (§ 53).

The Court found violations of the Applicant's rights under various provisions of the Convention. The Court found **violations of Article 3** by Greece due to the applicant's conditions of detention in Greece and the applicant's living conditions in Greece. The Court found that there had been a violation of Article 13 of the Convention when read with Article 3 because of deficiencies in the Greek asylum procedure and the possibility that the applicant might suffer the danger of expulsion to Afghanistan without proper examination of his case or access to an effective remedy. The Court also found violations of Article 3 by Belgium in their decision to send the applicant back to Greece despite their knowledge that the applicant would be exposed to deficiencies in that state's asylum procedures, and that the state's detention and living conditions were in breach of the same article.

Following the landmark decision in *M.S.S.* the Court further evolved its approach to the issue with the decision in ***Tarakhel v. Switzerland*** **[GC], no. 29217/12.** In this *M.S.S.* 'lookalike', the proposed return of a family of asylum seekers with minor children to from Switzerland to Italy was considered to be in violation of Art 3, on account of '*the absence of individual guarantees'* for the care of the applicants and in view of the inhuman and degrading treatment they would have suffered as a result of the '*systematic deficiencies*' in the reception arrangements in Italy. Importantly, in the case of *Tarakhel,* the Court differentiated the situation of Italy from that of Greece, arguing that the failures of the asylum system in Italy were not of such severity to be comparable to Greece. Nevertheless, the young age of the applicant's children and their particular needs as a family in terms of care and assistance played a crucial role, leading the Court to formulate its case-by-case approach to cases of return to other Member States. Specifically, without failing to acknowledge the overall better state of the Italian asylum system, it was still unable to meet the **individual needs of the applicants** in this case. As a result, Dublin returns to a Member State where the reception and assistance services **are not adequate for the returnee's individual need can** give rise to a violation of Article 3 even where the deficiencies of the system as a whole are not of such seriousness to pose a risk for any individual.

On this point, the case reads: '*117. […] just as the overall situation of asylum seekers in Italy is not comparable to that of asylum seekers in Greece as analysed in the M.S.S. judgement […] the specific situation of the applicants in the present case is different from that of the applicant in M.S.S'*. In view of the particular needs of the applicants, as a family with small children, and given the founded allegations that the Italian asylum system was experiencing difficulties, it was considered '*incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together'*.

Tarakhel v. Switzerland, no. 29217/12

In *Tarakhel v Switzerland* the Afghan applicant, his Pakistani wife, and their six minor children travelled from Iran where they had been living, to Italy where they were registered. After experiencing poor living conditions in their reception centre, the family travelled to Austria, where their application for asylum was rejected, and then on to Switzerland where their application for asylum was again rejected. Under the Dublin Regulations the family were to be removed to Italy despite the Swiss authorities recognising the 'difficult living conditions in Italy'. The applicant appealed this decision, had their appeal rejected, appealed again to a higher domestic court, and after a second rejection, appealed to the ECtHR.

The capacity of the reception facilities in Italy were considered to be inadequate, with families systematically split up in some cities. The reception facilities themselves were considered to often be violent and insalubrious. As the family of the applicant included minor children, the need for the Italian authorities to afford special protection was especially important. This meant housing the family in conditions adapted to their needs.

The Court found that there would be a violation of Article 3 if the applicants were returned to Italy without the Swiss authorities first obtaining individual guarantees that the Italian authorities would take charge of the applicant and his family in a manner suited to the age of the children and the family would be kept together.

2.3.1.1.2 Conditions and length of detention as inhuman or degrading treatment

The general principles applying to migration detention under the ECHR have been explored in detail in **Chapter 2** of this Handbook. For the purposes of this section, however, it is worth recalling the particular remarks made by the Court when such detention affects children, both accompanied and unaccompanied.

As was mentioned in the introduction to this section, in cases involving children the Court has found violations of Article 3 or even in presence of conditions that – if considered in a case involving an adult – would not give rise to a violation. This is illustrated in the case of ***S.F. and Others v. Bulgaria***, **no. 8138/16**, where a detention in a police station lasting for an overall limited period, **32-48 hours**, was found to be in breach of Article 3 of the Convention on account of the particular situation of the individuals subjected to it, i.e. a family of Iraqi asylum seekers with minor children. The Court observed in particular that the *'[e]xtreme vulnerability of asylum seeking children [raised] particular considerations in the context of the applicants' detention':*

> Namely*: '[I]rrespective of the overall limited period of* ***time (shorter than the ones normally sanctioned by the ECtHR)*** *the conditions in the border police's detention facility were considerably worse than in the ECtHR case law on the issue (dirt, worn out mattresses and bed linen, litter and damp cardboard on the floor, limited access to toilet, delayed access to food –* ***particularly severe given that one of the applicant was only 1 year and 1/2 old****. The combined physical and psychological effects on applicants, especially the youngest one, were such to cause a violation under this provision'.*

The case of ***Mubilinanzila Mayeka and Kaniki Mitunga v. Belgium*** and the case of ***Muskhadzhieyeva v. Belgium*** provide two notable examples of instances where children are – respectively – separated from their parents and detained or kept with the parents in detention. While the reasoning in the cases partly differs owing to the different experience of the children involved as concern their separation from their parents, in both cases the **lack of adequate services and guarantees** for the children, and the **prolonged state of distress** caused by the detention experience was considered to give rise to a violation of Article 3. In ***Mubilanzila***, particularly, the Court expressed the general principle whereby children placed in detention or reception facilities should as a rule **not** be kept with unrelated adults as this exposes them to higher risks of harm, abuse and exploitation.

In ***Mubilinanzila Mayeka and Kaniki Mitunga v. Belgium***, the Court considered the placement of a 5-year old unaccompanied asylum seeker in a detention centre with unrelated adults, pending her deportation.[200]

The child was detained for two months in a centre intended for adults, with no counselling or educational assistance from a qualified person specially appointed for that purpose.

The Court noted the very young age of the applicant as well as the conditions in which she was detained and her separation from her family. The Court found that the Applicant was in an '*extremely vulnerable situation*' (§55). The ECtHR held that there had been a violation of Article 3 with regard to the inadequate detention conditions. Furthermore, the Court found a violation of Art. 3 in relation to her removal. It was held that in deporting her the State had violated its positive obligation to take the requisite precautions or operational measures to protect her.

In ***Muskhadzhieyeva v. Belgiu***m, the detention of four Chechen children pending a Dublin transfer in a facility not equipped to deal with their specific needs was considered to be in breach Art.3. Although the children concerned had not suffered separation from their mother, the Court placed decisive focus on the psychological impact of the prolonged detention on their mental well-being, with particular regard to the youngest of them (5 year old at the relevant time), considering that it has been of such severity as to amount to a violation of Art.3.

2.3.1.2 Violation of Article 5 aspects: lawfulness of the detention of migrant children, assessment of available alternatives and access to remedies

In addition to providing important insights on the Court's approach to Article 3 violations in cases involving children in detention, the cases examined above also shed light on the Court's position with regard to migrant children's right to liberty and security of the person under **Article 5**. The Court's approach and assessment under Article 5 in cases involving migrants who are deprived of their liberty has been examined in detail **Chapter 2** of this Handbook. This section will hence only briefly refer to cases where the deprivation of liberty concerns migrant children.

Mubilanzila v. Belgium

In ***Mubilanzila v. Belgium,*** already examined above in connection with Article 3 right, the first applicant, a Congolese national, was granted refugee status in 2001 and granted indefinite leave to remain in 2003. Her daughter, a 5-year old Congolese national, was brought to Belgium by her uncle - to later join her mother in Canada. Upon arriving in Belgium, she was detained for 2 months without her uncle. She was subsequently deported to the DRC where no family member was present to receive her.

200 *Ibid*. §52

The Court found a violation of several of the second applicant's rights. It found a violation of Art 3 and 8 owing to the inadequate detention conditions. Regarding the **second applicant's article 5 right**, the Court noted that there were no provisions in Belgian national law dealing specifically with the immigration detention of minors. She was detained in a centre unsuited to her extremely vulnerable status. Her detention was thus not 'lawful' within the meaning of Article 5. Furthermore, as far as Article 5.4 is concerned, the Court found a separate violation owing to the conduct of the Belgian authorities, who had issued an *'order to deport the child before the chambre du conseil had delivered its decision'* and had failed *'to reconsider the deportation at any stage and execution of the deportation at the scheduled date, despite the 24-hour period for the appeal, in which a stay applied, had not expired'.*

In the above-cited case of ***Muskhadzhiyeva and Others v. Belgium,*** the situation faced by the ECtHR was partially different, in that the children (4 – including an infant) in this case did not suffer separation from their mother but were detained with her pending their Dublin transfer to Poland.

Muskadizheyva and others v. Belgium

In more detail, in ***Muskadizheyva and others v. Belgium,*** the applicants, a mother and four children, all of Russian nationality, fled from Chechnya to Belgium, where they claimed asylum. As they had first arrived in Poland, the Belgian authorities sought to return them under the Dublin II Regulation. The applicants were detained for 1 month in a 'closed transit centre' pending their removal. The centre was not adapted to house children, who were held under the same conditions as adults. Their application for release was rejected. Medical examinations attributed the development of serious psychological and physical health issues to their detention, urging their immediate release.

The Court found a violation of the children's rights, but not of the mother's rights. The 'best interests' and the extreme vulnerability of the children took precedence over their status as an illegal alien. The fact that the children were accompanied by their mother did not exempt the authorities from their obligation to protect the children. In the face of ongoing concern from doctors, the applicants had nevertheless been held for 1 month in a closed centre, which was not designed to house children, violating Article 3.

As the children had been detained in conditions that were not suited to their extreme vulnerability, **the Court therefore found that the detention was not in accordance with the principle of 'lawfulness' and breached Article 5(1).** However, as the domestic courts with effective jurisdiction had examined the challenges without delay while the applicants were still in Belgium, there was no violation of Article 5(4).

A violation of **Article 5** was also found by the Court in the older case of ***Rahimi v. Greece*** (no. 8687/08), where the lawfulness of the detention was refuted on the basis of the failure to consider the applicant's special needs as an unaccompanied minor and the failure to consider whether *'less coercive measures'* where available. In this case too, the Court found a breach of the procedural aspect of **Article 5 (4)**, in that *'the applicant had been unable to contact a lawyer and the information provided was incomprehensible to him (in a language he did not understand) […] and he had no guardian who could act as his legal representative'.*

Rahimi v. Greece

In ***Rahimi v. Greece***, the applicant, and 15-year old Afghan national, arrived on the Greek island of Lesvos. He was placed in detention for 2 days pending his removal. The Greek authorities stated that the applicant was accompanied by his "cousin", NM. The applicant was later released without any support. After several days of being homeless, he was housed by a non-governmental organisation. His application for asylum was rejected.

The Court found a violation of the applicant's Article 3 and 5 rights. Regarding Article 3, the Court found that the applicant was an unaccompanied minor, contrary to the submissions of the Government that he arrived with his 'cousin'. CPT and other NGO reports affirmed that there was a routine practice in Lesvos of assigning adult Afghan asylum seekers to unaccompanied Afghan minors as their 'brother' or 'cousin'. The detention conditions themselves also constituted 'degrading treatment' under Article 3, even if only lasting for 2 days: the hygiene and infrastructure were so poor they undermined the concept of human dignity; the specific circumstances of the applicant – a vulnerable unaccompanied minor – were not taken into account by the authorities when his detention was ordered. Following his release, the authorities failed to take the positive measure required by Article 3, given the applicant's vulnerable status: no accommodation, social or financial assistance or tickets to leave Greece were provided. No guardian had ever been appointed for him.

The Court also found that the applicant's detention was not justified under Article 5(1)(f) as it did not satisfy the requirements of 'lawfulness': no examination of the best interests of the child had taken place; the use of detention was clearly not a measure of last resort; no alternatives to detention had been sought. The applicant had been in principle unable to contact a lawyer; the information note provided to him had been in a language he could not understand. Thus, the Court found that even if the remedies had been effective, the applicant could not have utilised them.

2.3.1.3 Age assessment procedures

An issue of growing importance in the international migration framework has to do with the **assessment of children's age**. As the formal determination of minor age effectively gives access to a wide range of procedural and substantial guarantees and to dedicated treatments, States have been increasingly seen disputing children's declared age and using questionable techniques and methods to assess their age. This is in spite of the principle whereby, as a rule, the assessment of children's age should be made only in presence of doubt as to the child's age, which are founded enough for the state to waive the **presumption of minority** otherwise applying in children cases. As far as the concrete techniques for age assessment are concerned, a broad consensus had developed in the direction of curbing **medical assessments** (including x-rays, assessments of the child's sexual maturity, dental examinations etc.) and favour instead a multi-disciplinary and holistic approach to age assessment, involving a psycho-social evaluation of the child. The issue of age assessment has not yet been examined by the Court, however, the case of ***Darboe and Camara v. Italy*** (no. 5797/17) currently pending before it, raised the issue for the first time arguing that invasive age assessment techniques should be considered to cause interferences with both **Article 3 and 8** of the Convention. While a decision on the issue is pending, The AIRE Centre, the Dutch Council for Refugees and ECRE submitted a third-party intervention to inform the views of the Court on this matter.[201]

2.3.1.4 In presence of risks of exploitation / trafficking

As outlined in general terms under the section dedicated to Trafficking and Asylum, (Section 1.1.2.2) the ECHR covers trafficking and other forms of labour exploitation under Article 4, which – in its relevant parts - reads as follows: *Prohibition of Servitude and forced or compulsory labour (Art.4): '1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour'.*

The explicit incorporation of trafficking into the scope of the above provision resulted from the above-examined case of ***Rantsev v Cyprus and Russia****,* where the Court stipulated trafficking as falling under the remit of Article 4. In its jurisprudence, the Court addressed situations where various forms of exploitation affected migrant children. In these cases, the Court expressed its stance as to what safeguards and particular considerations should be taken into account. The cases where the Court notably expressed its views on the issue include the case of ***Siliadin*** **(forced labour)** and the case of ***C.N. and V. v. France*** (application no. 67724/09).

Siliadin v. France

In ***Siliadin v. France,*** the applicant, a 15-year old Togolese national, arrived in France in 1994 on the agreement she would work for Mrs D until the cost of her ticket had been paid. After a few months, Mrs D 'lent' her to Mrs B. The applicant, worked in reality as an unpaid housemaid for Mrs B for around 15 hours per day, 7 days per week and without a day off. She slept in the same room as one of Mrs B's children – so she could care for him if he woke up – and was not paid. Prosecution was brought against Mrs B. Mrs B but was acquitted on appeal.

The Court found a violation of the applicant's Article 4 rights as the French national law did not afford the applicant practical and effective protection against forced labour and servitude. The Court defined 'forced labour' as including all work or services which is exacted from any person under the menace of any penalty where the person is not working of their own free will; 'servitude' describes a situation where a person is obliged by means of coercion to provide his or her services. The applicant fell under both categories. As the French criminal law provisions did not deal specifically with the rights guaranteed under Article 4, the applicant was unable to see those responsible for the wrongdoing convicted under criminal law. A civil law remedy is insufficient given the fundamental nature of the Article 4 right.

2.3.1.5 With reference to access to education

Finally, a field where migrant children tend to face significant disadvantage is that of education. Restrictive migration policies, limits stemming from children's migration sta-

201 See the text of the intervention at: http://www.asylumlawdatabase.eu/en/content/darboe-and-camara-v-italy-applno579717-third-party-intervention-aire-centre-dutch-council

tus and obstacles in the material access to education services can significantly hamper migrant children's effective access to education, causing issues both under **Protocol no 1, Article 2 (Access to education)** and **Article 14 (prohibition of discrimination).**

The case of ***Ponomaryovi v. Bulgaria*** provides a clear illustration of the issue.

Ponomaryovi v. Bulgaria

In ***Ponomaryovi v. Bulgaria* (no. 5335/05)** the applicants were two brothers, born in Kazakhstan, who moved to Bulgaria at a young age with their mother and enrolled in school there. After turning eighteen, but still in secondary school, the first applicant was informed he had to obtain a permit to continue living in Bulgaria. Both he and his brother were eventually able to gain permanent residence permits after taking out a bank loan to pay the requisite fees. Prior to their receipt of the permits, both brothers were ordered by their schools to pay certain fees owed to their schools as they were aliens without permanent resident permits. The brothers sought a judicial review of the decision, however the orders were fundamentally upheld. The Supreme Administrative Court upheld the lower court's judgments and held that even after the brothers had gained a permanent residence permit, they still owed the fees for when they had not possessed one. The situation delayed the first brother's graduation from secondary school by about two years. The second brother was able to attend classes during the years for which his school had demanded fees, however his school then brought a claim against him for the fees he had not paid. In the Regional Court the claim was allowed and the second brother was ordered to pay the fees.

Education is a right directly enshrined under the Convention in Article 2 of Protocol 1 and a state's margin of appreciation shrinks with lower levels of education. **The Court considered that lack of access to secondary education prevented individuals from adjusting to their environment and had far reaching consequences for their social and economic well-being.**

The Court held that there had been a **violation of Article 14 taken in conjunction with Article 2 of Protocol 1** as the applicants had been ordered to pay school fees exclusively due to their nationality and immigration status. This difference in treatment had no objective and reasonable justification as the brothers were not unlawfully laying claim to public services, did not choose to settle in Bulgaria, were unable to realistically move to another country to continue their education and were fully integrated into Bulgarian society and these factors had not been taken into account.

2.3.2 Relevant standards of EU Law

It is finally worth recalling the relevant provisions of EU legislation that regulate the situation of migrant children. In its various instruments on the issue EU law significantly incorporated and expanded upon the principles on the protection of migrant children, as deriving from international developments and evolving position on the issue.

Migrant children's rights feature prominently both in EU primary legislation and in secondary legislation and asylum and/or migration specialised instruments. The structure and function of EU legislation has been amply discussed in the first volume of this Handbook. This section will be limited to the discussion of those instruments and provisions which are specifically relevant to migrant children's rights.

It is finally worth recalling the relevant provisions of EU legislation that regulate the situation of migrant children in various circumstances.

2.3.2.1 Charter of Fundamental Rights

It has been explained how the EU Charter of Fundamental Rights (CFR) is the core instrument regulating human rights in the Union as well as part of EU primary law. As such it has the same legal value as EU treaties and binds MS in the discharge of their obligations. Under **Article 24** the CFR explicitly deals with **'the rights of the child'**, essentially incorporating into EU law the principles enshrined in the UNCRC – in particular the general principles of best interests and the right to participate. The third paragraph of the provision restates the child's right '*to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests'* and is hence – in principle – significant to migrant children, in that it protects children in situation of separation or seeking reunification with their families. The protection of this article is complemented by the provision under Art.7 CFR which protects the right to family life (equivalent to Art. 8 ECHR). With reference to the group of children considered here, it is also important to recall that the CFR also includes specific reference to asylum, including the **right to asylum under Art. 18** and the **protection from *refoulement* and collective expulsion under Art.19.**

2.3.2.2 Asylum legislation

In particular, dedicated provisions exist for the identification, processing and reception of asylum seeking children and the best interest of the child is explicitly incorporated and underpins the legislation in this area as a whole. As a general principle, asylum seeking children are considered to be vulnerable persons under EU Asylum Law and are hence entitled to higher protection (Art 21 of rRCD - below). The following are the main instruments regulating asylum at the EU level:

- **Recast Reception Conditions Directive 2013/33 (rRCD)**
- **Recast Asylum Procedures Directive 2013/32 (rAPD)**
- **Recast Asylum Qualification Directive 2011/9516 (rAQD)**
- **Dublin III Regulation**

Rather than providing a dedicated section to each of the instruments, the section below will highlight some of the main aspects regulated by them as well as the key safeguards provided for migrant children under each instrument.

2.3.2.2.1 Representation and Guardianship

The appointment of a **guardian**, in charge of representing the interests of the child when a parental figure or another responsible adult is not present, is one of the key aspects through which the rights of migrant children are protected. Owing to its central role, the appointment of a guardian is addressed both by asylum and other migration instruments, on account of the fact that the migration status of the child does not, by itself, affect his/her right to receive adequate representation.

For each category of migrant children the provisions regulating the appointment of guardians and their powers and responsibilities are as follows:

- **For Asylum Seeking Children**
  - Appointment of representative and right to be informed (Art.26(1) rRCD)
  - Right to the appointment of a guardian as soon as possible after the granting of refugee or subsidiary protection – the body responsible to this effect can both be a physical person acting as the legal guardian or where necessary 'a*n organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order'*. (Article 31 rAQD) .
  - The correct discharge of the guardian's responsibility must be monitored by Member States through **regular assessments** (Article 31(2) rAQD)
- **Children Victims of Trafficking** à ****See also Section 1 of this Chapter: Asylum and Trafficking**
  - **Recital no. 23 EU Anti Trafficking Directive:** '*From the moment an unaccompanied child victim of trafficking in human beings is identified and until a durable solution is found, [….] The necessary measures should be taken to ensure that, where appropriate, a guardian and/or a representative are appointed in order to safeguard the minor's best interests';*
  - **Article 14 EU Anti Trafficking Directive: Assistance and support to child victims:** '[…] *Members States shall appoint a guardian or a representative for a child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded '.*
  - **When the child is unaccompanied, Art.16 EU Anti Trafficking Directive:** '[…] 3. Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings'.

2.3.2.2.2 Special guarantees during the asylum procedure

The inherent vulnerability, reduced autonomy and awareness characterising asylum seeking children requires that, when they undergo an asylum procedure, MS should provide them with higher and dedicated safeguards, so as to ensure their understanding of and effective access to the procedures. Some of the guarantees ensuring active and conscious involvement of the child in the asylum procedures are as follows:

- Right to have the asylum **interview conducted in a child appropriate manner** (Article 3)15)(e) rAPD)
- Right to prompt appointment of a **representative** and information on the procedure (Article 1)25)(a) rAPD)
- Right to be **interviewed by adequately qualified staff** (Article 3)25)(a) rAPD)
- Right to **legal and procedural information** (Article 4)25) rAPD)
- Right to the **benefit of the doubt** in age assessment procedures and for the procedure to be the least invasive possible and surrounded by adequate guarantees (Article 5)25) rAPD)

2.3.2.2.3 Assistance, reception conditions and access to integration services

In addition to dedicated procedural guarantees, children in the asylum process are also to be afforded dedicated standards in terms of **material conditions of reception and assistance**. The rRCD, which regulates the conditions of reception for asylum seekers in Europe, affords heightened guarantees to asylum seekers, which are explicitly considered as including children (Articles 23 and 24). Under this instrument **children are entitled to a standard of living adequate to physical, mental, spiritual and social development**. Also, States must take into account '*the minor's well-being and social development [...] background...safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking*'.

To this end, the reception arrangements designed for children must comply with the following conditions:

- Reception facilities must be adapted to children needs in both temporary and long-term reception centres, **with access to leisure activities adapted to their age**(Art. 3)23) rRCD);
- Children must have **access to rehabilitation** when they have been victims of "abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or [....] armed conflict"(Art. 4)23) rRCD);
- Adequate types of accommodation for unaccompanied children include: (a) placement with adult relatives, (b) foster family, (c) accommodation centres with special provisions for minors, and (d) in other suitable accommodations, maintaining changes of residence to a minimum; (Art. 2)24) rRCD)
- It is generally prohibited to accommodate child asylum seekers with adults – save in exceptional cases where children who are sixteen or older may be placed in an accommodation centre with unrelated adults provided that it is in their best interests (Article 2) 24) rRCD);
- Changes of residence to be kept to a minimum so as not to cause distress (Article 4)30) rAQD and Art. 2)24) rRCD);

- **Right to access schooling and education**: Under Art.14 of the rRCD, child asylum seekers have a right to access the education system under similar conditions as their own nationals which can be provided in accommodation centres. Under the same Article, MS are not permitted to '*withdraw secondary education for the sole reason that the minor has reached the age of majority*'(Art. 1)14)).

2.3.2.2.4 Trafficked children

Similarly to asylum seeking children, also children victims of trafficking are profoundly scarred by the trauma of their exploitation and are hence in need of rehabilitation. With a view to restore child victims' ability to resume a normal life and reintegrate in the host society, Member States are under an obligation to take certain steps under the EU Anti-Trafficking Directive. The measures taken with a view to support and rehabilitate child victims of trafficking must always take into account the child's views and particular circumstances (Article 13 and 14), including provision of:

- Physical and psycho-social recovery (Art. 1)14))
- Access to education (Art. 1)14))
- Provision of assistance and support to the family of a child victim of trafficking in human beings when the family is in the territory of the Member States. (Art. 3)14))

3. GENDER-BASED CLAIMS, GENDER-SPECIFIC PERSECUTION AND PROTECTION OF LGBTI+ ASYLUM SEEKERS

In the prevision edition of this Handbook, the question of gender has been addressed when considering the concept of 'particular social group' for the purposes of the GC. In that context we explained how, for the purposes of identifying a risk of persecution within the terms of the Convention, the grounds invoked by the applicant are limited to: race, religion, nationality, political opinion and membership of a particular social group. In the absence of an explicit inclusion of 'gender' and 'sexual orientation' among the qualifying grounds recognised by the GC, claims tied to these issues are normally treated under the broadly defined category of **particular social group.**[202]

In its guidance, the UNHCR defines the expression 'particular social group' as a category of individuals sharing characteristics that are '*innate, unchangeable, or [...] otherwise fundamental to identity, conscience or the exercise of one's human rights*'[203]. Owing to the

202 UNHCR, Guidelines on International Protection No. 2: Membership of a Particular Social Group Within the Context of Article 1A(2) of the of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, available at: https://www.unhcr.org/3d58de2da.pdf

203 UNHCR, Guidelines on International protection No. 1: Gender-Related Persecution Within the Context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, available at: http://www.refworld.org/docid/3d36f1c64.htm, §29

spirit of the provision, as interpreted by UNHCR and further developed in other soft law instruments, claims based on sexual orientation, identity or gender are dealt with under this category.

Due to the approach taken by the Geneva Convention, the disadvantaged situation of women and members of the LGBTI+ community in some contexts had in fact gone 'unrecognised'.[204] Although gender and sexual orientation do not constitute autonomous grounds for claiming asylum, it is accepted that they can underlie certain acts of persecution.

The increased acceptance of these factors as substantiating persecutory acts was driven by international law characterisation of acts '*such as sexual violence …as serious abuses, amounting to persecution*'.[205] In light of the definition of social group under the GC relying on *inter alia* such characteristics that are of **'fundamental'/'innate'** nature, persecution based on gender/sex-related issues is deemed to duly fall under the particular social group ground.[206]

In some cases, **gender and religion** and/or **socio-cultural norms** can also be linked. Where a certain religion assigns particular roles or conducts to a group, for instance women, and a punishment is imposed for non-compliance with such norms, this can be '*evidence that a woman holds unacceptable religious opinions regardless of what she actually believes*'.

Belonging to a certain group in terms of gender and/or sexuality is recognised to – in some instances – form the basis of **specific forms of persecution and other treatments** that might entitle the affected individual to asylum or other form of international protection.

Owing to the separate considerations applying to them, LGBTI+ claims will be examined separately below. The following section will focus on **gender-related** issues in asylum claims.

3.1 The relevance of gender-related issues in the context of asylum

In its Resolution of 2010 on '**gender-related claims for asylum**', the CoE Parliamentary Assembly embraces the above concept, urging State to take into account – in the context of the asylum process and the '*special problems faced by: '11.1. victims of trafficking, notably women and girls'*.

In this sense, although the nexus between asylum and trafficking was considered above, it is necessary to remind that while sexual trafficking affecting women and girls does not exhaust the many shapes that this crime can take, in its historic dimension trafficking

204 *Ibid* §5

205 *Ibid* §9

206 *Ibid* §30

for sexual exploitation is a markedly gender-specific crime. As such, the CoE resolution describes it *'as a form of persecution on which a claim for asylum can be based'* (§ 11.1.1).[207]

Amongst other gender-specific practices and acts that can have persecutory features for the purposes of asylum or be of sufficient gravity to justify granting other forms of international protection, the Resolution lists:

- *'[V]ictims or potential victims of* ***female genital mutilation*** *[FGM]'* which should, in this sense be *'recognised as a potential ground for an asylu*m claim';
- Women victims of psychological and physical violence perpetrated '[d]uring armed conflict […] *'including* ***rape, sexual exploitation, forced marriage, forced abortion, forced pregnancy and forced sterilisation****'.*
- Victims of *'****Systematic rape*** *and sexual violence'* used as *'an instrument in "ethnic cleansing" campaigns'.*

While the above are all forms of violence and treatment heavily characterised by a gender element, the importance of gender in the asylum context does not only manifest itself in the external appearance of the treatment suffered by the group concerned.

The multi-faceted significance of gender in the asylum and migration context is best explained in the extensive analysis offered in the Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum, drafted by Andrej Zernovski, rapporteur, examined in detail in the section on regional instruments.[208]

The following section will look at some of the main instruments governing the issue of gender and asylum and international protection.

3.2 International realm – legal instruments and case law of reference

The GC does not explicitly recognise gender as one of the qualifying grounds for an individual to be granted protection. Gender, sexuality, and sexual identity are however broadly traced back to the category of '**particular social group'**, owing to their nature as innate and fundamental characteristics of the individual.

207 Andrej Zernovski, Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12509&lang=en, Draft resolution, § 11.1.1

208 Andrej Zernovski, Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum

3.3 Regional Level

3.3.1 Council of Europe instruments (other than the ECHR)

While the main legal refugee protection instruments do not elaborate on the concept of gender and its impact in the asylum process, other tools dealing with related matters expressly addressed the issue.

This is particularly the case for the **Council of Europe Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention),**[209] which, under Article 60 regulates gender-based asylum claims:

Article 60:

1 *Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be* ***recognised as a form of persecution*** *within the meaning of Article 1, A (2), of the [GC] and* ***as a form of serious harm*** *giving rise to complementary/subsidiary protection.*

2 *Parties shall ensure that a* ***gender-sensitive interpretation*** *is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.*

3 *Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.*

3.3.1.1 Gender considerations in international protection claims

The Istanbul Convention addresses 3 separate issues:

- The need for gender-specific conducts and acts to be regarded as **autonomous forms of prosecution** or **serious harm** for the purposes of granting international protection;
- The need to ensure that the GC is interpreted in a **gender-sensitive manner**;
- The importance of ensuring that the **protection needs connected to gender-based asylum claims** are reflected in **dedicated procedural guarantees.**

The Istanbul Convention's approach to the issue is in response to what is described as '**gender blindness**' of asylum law when it comes to explaining the *'difference between women and men in terms of why and how they experience persecution'.*[210]

209 CoE, Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, available at: http://www.refworld.org/docid/4ddb74f72.html

210 CoE, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, available at: https://rm.coe.int/16800d383a

In this sense, as illustrated in the relevant explanatory report, the Istanbul Convention attempts to overcome the classical approach whereby gender is only predominantly considered under the **social group** lens, '*overlooking the other grounds*'. In a forward-looking fashion, the Istanbul Convention invites States to acknowledge the **broadly pervasive role** played by a migrant's gender in his/her experience, irrespective of whether the harm or persecution considered is wholly or primarily dependent upon this factor, '*recognising and understanding how gender can have an impact on the reasons behind the type of persecution or harm suffered*'.

Accordingly, the question of gender can be considered as a primary factor for the purposes of international protection:

- Examining its role in **refugee claims** where the question of gender and sexuality constitutes the primary basis for the fear of persecution and
- In situations likely to fall under the **subsidiary protection category,** where, even in the absence of a risk of persecution, the migrant's gender or sexuality would create a risk of serious harm upon return.

Even where this issue is not of such significance to give rise, in itself, to international protection, it should nonetheless be considered as a further factor when considering the vulnerability of an individual. In this sense, while a migrant may qualify for refugee status or subsidiary protection for reasons other than his/her gender or sexuality, the latter should not be overlooked when considering issues such as the procedural guarantees that should be afforded in the specific case, the need to ensure access to specific services or the accommodation arrangements to be set up.

In line with the broader relevance of gender considerations in international migration, the Istanbul Convention explanatory notes highlight that: '*undocumented migrant women, and women asylum-seekers form two subcategories of women* ***that are particularly vulnerable to gender-based violence*** *[and] face* ***similar difficulties and structural barriers*** *in overcoming violence*'. In so stating, it is recognised that the greater exposure to risks of violence in the migration experiences affects refugee and non-refugee women equally, irrespective of the reasons for their flight.[211] Such forms of violence can emerge in the country of origin or at a later stage in the migration journey.

Article 59 of the Istanbul Convention recognises the possibility to grant affected migrant women '*an independent residence status*'[212], separate from the individual's entitlement to international protection,'*in the event of the dissolution of the marriage or the relationship*' and in presence of '*particularly difficult circumstances*' (Art. 59(1)).

As far as the relation between **gender and subsidiary protection** is concerned, the Explanatory note to the Convention recognises that, in order to reach the level of severity required for the risks of '**serious harm'** under this provision, the gender-based violence

211 CoE, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, §299

212 *Ibid*

faced upon return would need to *'amount to inhuman or degrading treatment or seriously threaten the life of the individual.*

Finally, and linked to the concept of subsidiary protection, the prohibition of *refoulement,* whereby no one should be returned to a place where he/she would face a risk to his/her life or freedom, is also of relevance in presence of gender-specific issues. Without elaborating on the content of this principle, the Istanbul Convention at Article 61 confirms that such principle *'equally [applies] to victims of violence against women'* and that State Parties are under an obligation *'to take the necessary legal or other measures to ensure that [victims] shall not be returned under any circumstances if there were a real risk, as a result, of arbitrary deprivation of life or torture or inhuman or degrading treatment or punishment […] irrespective of the status or residence of the women concerned'.* As made explicit by the Explanatory note,[213] in practice this reinforces how a failure to meet the criteria for refugee status or subsidiary protection **does not deprive women from their rights not to be returned to a country where there is a real risk that they will be subject to torture or inhuman or degrading treatment or punishment.**

3.3.1.2 Gender-specific violence and gender-related persecution

In the **Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum** [214]mentioned above it is explained how the question of gender can both **characterise the particular form of treatment or punishment** administered upon an individual, in response to a conduct that is not necessarily gender related or, be **the reason at the root of acts of persecution of violence** (which are not necessarily dependent on a gender-specific element). These conditions can exist in combination or in isolation. In this sense the Memorandum identifies three hypotheses (§16):

1. *'[A]n **asylum seeker may be persecuted in a gender-specific manner for reasons unrelated to gender** (for example, raped because of her membership of a political party)'*
2. *'[S]he may be **persecuted in a non-gender specific manner**, but **because of her gender** (for example, flogged for refusing to wear a veil)'*
3. Or in other cases: *'**persecuted in a gender specific manner** and **because of her gender** (female genital mutilation or the honour killing of an adulterous woman)'*

The above classification is based on the fundamental distinction between 'gender-related persecution' and 'gender-specific violence'. In the memorandum, this is described as follows:

- *'**Gender-related persecution'** […] relates to the causal relationship between the persecution and the reason for the persecution'.* In this case the persecutory treatment

213 CoE, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, § 322

214 Andrej Zernovski, Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum

suffered has its causes in the individual's gender, and is hence not limited to '*persecution on the basis of biological sex*' but relates more broadly on societal, political and religious expectations attached to a certain gender identity.[215]These can include among others: 'Refusing arranged marriages, having sexual relations outside marriage, failing to provide a satisfactory dowry or wearing certain forms of dress can result in persecution'

- Conversely, **'Gender-specific violence'** is described in the Memorandum as violence primarily characterised by its form, which is such to affect the individual disproportionately by reasons of his/her gender. Amongst the examples cited, the Memorandum highlights **systematic rape and sexual violence,** used as means of ethnic cleansing during warfare, **FGM and trafficking.**

3.3.1.3 Procedural and substantive safeguards accorded to gender-based asylum claims and cases significantly impacted by gender considerations

- **Reception conditions:** '*reception procedures that take into account women's and men's differences in terms of experiences and specific protection needs to ensure their right to safety when considering standards of treatment for the reception of asylum-seekers. Examples of gender-sensitive reception procedures may include inter alia**: the identification of victims of violence against women as early in the process as possible; the separate accommodation of single men and women; separate toilet facilities, or at a minimum, different timetables** established and monitored for their use by males and females; rooms that can be locked by their occupants; adequate lighting throughout the reception centre; guard protection, including female guards, trained on the gender-specific needs of residents; training of reception centre staff; code of conduct applying also to private service providers; formal arrangements for intervention and protection in instances of gender-based violence; and provision of information to women and girls on gender-based violence and available assistance services'* [216];
- **Access to mental and physical rehabilitation and support:** States should make available '*support services for asylum-seekers that provide assistance in a gender-sensitive manner [including] taking measures such as providing additional psycho-social and crisis counselling, as well as medical care for survivors of trauma since for example, many female asylum-seekers have been exposed to sexual or other forms of abuse and are therefore particularly vulnerable'*[217];
- **Procedural guarantees: '***…to properly examine asylum claims by women and girls who are victims of gender-based violence, [States must]* ***develop gender-sensitive asylum procedures*** *[encompassing] inter alia: the* ***provision to women of information on***

215 Andrej Zernovski, Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum, § 15

216 CoE, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, §314

217 CoE, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, §315

asylum procedures; the opportunity for women dependents to have a personal interview separately *and without the presence of family members; the opportunity for women to raise independent needs for protection and gender specific grounds leading to a separate application for international protection; the elaboration of gender guidelines on the adjudication of asylum claims, and training[,] gender-sensitive interviews led by an interviewer, and assisted by an interpreter when necessary; the possibility for the applicant to express a preference for the sex of their interviewer and interpreter which the Parties will accommodate where it is reasonable to do so; and the respect of confidentiality of the information gathered through interviews'*.[218]

3.3.1.4 LGBTI+ asylum claims

While the consideration on gender, explained above, can apply irrespective of whether the individual also identifies him/herself with a particular sexual orientation, LGBTI+ claims are not only based on the individual's gender (perceived or actual) but with his/her sexual orientation and gender identity more broadly. The two are deeply connected but it is worth here to make a differentiation dedicated standards apply to the latter category.

In this respect reference should be made to the UNHCR Guidelines No. 9 (Claims to Refugee Status based on Sexual Orientation and/or Gender Identity […]'.[219]

LGBTI individuals can be targets of – among other things – gender based forms of violence,[220] as well as numerous other forms of physical and psychological abuse and social isolation and disapproval, being '*targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education […]'*.[221]

The CoE shares and incorporates in its approach the above considerations on LGBTI+ asylum seekers, recognising that '*4. Individuals who are gay, lesbian, bisexual or transgender also face particular forms of gender-related persecution and gender-based violence and often have to hide their sexual orientation or risk being harassed, or in extreme cases being beaten and even killed'*.[222]

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218 CoE, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, §317

219 UNHCR, Guidelines on International Protection no.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, available at: https://www.unhcr.org/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html

220 UNHCR, Guidelines on International Protection no.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

221 *Ibid* § 2

222 CoE, Parliamentary Assembly, Gender-related claims for asylum, Doc. 12350, Draft resolution, available at: http://www.refworld.org/docid/4c6b8eb04.html

When it comes to asylum seekers claiming international protection on the basis of their sexual orientation or gender identity, some factors are of particular relevance. The following are some of the issues identified by the UNHCR in its guidance:

- **Whether their country of origin or habitual residence criminalises homosexual behaviours** – while this is not a conclusive indication that the person will be at risk of persecution in the country, the severity of the sanctions associated to such legislative feature or the application of this law in practice can serve as strong evidence of whether the person's safety would be at risk in the country.[223] Namely: '*[…] Where persons are at risk of* ***persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident'***. In the absence of sanctions of such severity '*Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution'*.[224]
- **The existence of other concurring** 'intersecting factors' exposing the individual to even higher risks, such '*sex, age, nationality, ethnicity/race, social or economic status and HIV status'*
- '**Discrimination**' can by itself constitute persecution in asylum claims by LGBTI+ individuals – '*where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned'*.[225]
- '**Past persecution'** '*is not a prerequisite to refugee status and in fact, the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin'*.[226]
- **Conversion efforts can amount to torture: '***Efforts to change an individual's sexual orientation or gender identity by force or coercion may constitute torture, or inhuman or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of person. Examples at the extreme end and which on their face reach the threshold of persecution include* ***forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal therapy****'*.[227]
- **Concealment**: The individual's alleged ability to '*avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously,* ***is not a valid reason to deny refugee status****' […] The question is not, could the applicant, by being discreet, live in that country without attracting adverse*

223 Andrej Zernovski, Explanatory memorandum to the Parliamentary Assembly Report on Gender-related claims for asylum, § 15 §4

224 UNHCR, Guidelines on International Protection no.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, §27

225 *Ibid* §17- see also general section on discrimination and LGBTQIA individuals in this Chapter.

226 *Ibid* §18

227 *Ibid* §21

consequences. […] even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime […] Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms'.[228]

- **Internal Flight Alternative (IFA):** i.e. *'whether it is possible for an individual to be relocated to a specific area of the country where the risk of feared persecution would not be well-founded and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself and live a normal life'* – the existence of an IFA should be objected when:
  a. '[…] *the country in question criminalizes same-sex relations and enforces the relevant legislation'*
  b. There are legal limits impeding *'a transgender or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on his or her documents'*
  c. *'IFA should not be relied upon where relocation involves (re-)concealment of one's sexual orientation and/or gender identity to be safe'*
  d. As a general rule, attention should be paid to whether *'return to the proposed place of relocation would cause undue hardship, including by examining the applicant's personal circumstances'.*[229]
- Claims made after the individual's arrival in the host country – so called '**Sur place claims':** in some instances asylum claims linked to one's sexual orientation or gender identity may be submitted at a later stage after the person's arrival in the country of asylum. Given the delicate nature of claims based on fear of persecution due to sexual orientation, personal factors and choices may influence a person's decision to rely on his/her sexual orientation or gender identity for the purposes of obtaining protection. The UNHCR recognises how: *'[…] some LGBTI applicants may not have identified themselves as LGBTI before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin'*. Significant changes in claimants' circumstances may hence occur after he/she left the country, for instances in cases where *'an LGBTI individual engages in political activism or media work or their sexual orientation is exposed by someone else'.*[230]

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228 *Ibid* §32-33
229 I*bid* § 51-56
230 *Ibid* § 57

3.3.2 The ECtHR position on gender-related and LGBTI+ claims involving asylum seekers

In the ECtHR practice and jurisprudence, the role of gender – and specifically its implications for the purposes of asylum claims – has been considered in several cases. While the ECHR is not an asylum or a gender-specialised instrument, it must be considered in the context of the CoE broader legislative framework, which includes the above mentioned Convention on preventing and combating violence against women and domestic violence(**Istanbul Convention**). The Istanbul Convention should be considered to inform the interpretation of the ECHR in cases involving gender-related considerations.

In general terms, the Court considers gender as a relevant factor when assessing violations of ECHR provisions. It is a well-established principle that, for example, for the purposes of assessing whether a certain act reaches the required level of severity for the purposes of Article 3, **the sex of the victim can play a role** (among other factors).[231]

Insofar as asylum seekers are concerned, the Court has examined the question of gender and sexual orientation in a number of cases.

For ease of reference, these will be dealt below noting the difference between cases where the court considered **gender-specific** forms of persecution, **normally involving women**, and claims where the alleged violation was linked to the person's **gender identity** or **sexual orientation.**

3.3.2.1 The Court's approach to gender-specific persecution and/or gender-specific forms of violence and abuse in asylum cases

Insofar as this category of claims is concerned, one of the leading cases in ECtHR jurisprudence is ***Jabari v Turkey,* no. 40035/98.** In this case the Court tackled the issue of **adultery** and its perception in the Iranian society at the relevant time, focusing on the conditions and repercussions faced by women committing it. In the case in question, in the event of the applicant's return to Iran, she would face risk of being punished by means of '*stoning to death, flogging and whipping',* as provided by the Iranian law on adultery. While the Court does not express itself on the issue, the case is notable for its reference, in the UNHCR's appreciation of the Applicant's claim, to the status of adulterer women in Iran – at the relevant time – as evidence of '**membership of a particular social group'** for the purposes of international protection.

Jabari v Turkey

In ***Jabari v Turkey (no 40035/98)*** the Applicant, an Iranian woman, engaged in emotional and sexual relations with a married man. Upon walking with him on the streets, the couple was arrested by the Iranian police on the grounds that the man was married and they were hence prohibited from engaging in such conduct. The applicant was arrested, detained and subjected to a **virginity test**.

231 Among others: *Price v the United Kingdom*, no. 33394/96, § 24

Upon release she fled Iran through Turkey on a forged passport and eventually claimed asylum with the Turkish Aliens Department, initially rejected on account of the delay in the submission. In spite of UNHCR granting her refugee status on account of the real risks for her life and safety in Iran, the Ankara Administrative Court dismissed the applicant's request to halt her deportation, on account that, among other things, '*its implementation would not cause irreparable harm to the applicant'*.

Before the Court, the Applicant's claimed a violation **of Article 3, alone and in conjunction with Article 13**, on account of the risks she would have faced if deported. In her plea she relied on Amnesty International's report supporting her views that **women guilty of adultery in Iran risked punishment by stoning.** As such she argued that she should have been granted refugee status as a member of a particular social group, i.e. women '*who have transgressed social mores according to the UNHCR guidelines on gender-based persecution*.' In expressing its condemnation for the punishments imposed by Iran upon women in cases of adultery, considering them as prohibited treatments under Article 3, the Court concluded that as things stood at the time no foreseeable change in Iran's practice or law existed, to the effect that – if returned – the applicant would have been at risk of facing the above treatment.

More recently the Court considered a gender-related issue in the context of deportation, specifically the risk of being coerced into a **forced marriage** in the case of ***W.H v Sweden*, no. 49341/10**. While the case is relevant in highlighting the situation of single Iraqi women, the Court did not have the chance to express itself on the merits of the claim, in that alternative means of resolution were provided.

The issue of non-conformity to social norms, especially by way of extra-marital relations or other behaviour perceived as 'transgressive', was considered by the Court in the case of ***N v Sweden***, no. 23505/09.

N v. Sweden

In ***N v. Sweden***, the Applicant claimed international protection on account of the repercussions and threats faced due to her political activities and personal conduct in Afghanistan. Particularly, '*10. […] her activities in educating women'* and – at some point – her separation and intention to divorce her husband had marked her as a "bad woman" in the community. As in *Jabari,* the Applicant also raised how, having had an extra-marital relation, she also risked facing potentially deadly punishment in case of return. She remarked, among other things, that it was not possible for her to obtain a divorce in Afghanistan. As a result, she had been disowned by her family and had attracted the rage of her husband's family. Similarly to its approach in *Jabari*, also in this case the Court reported the UNHCR information on the issues at stake, referencing a letter provided in support of the case whereby: '….an assessment of a refugee claim of an Afghan female asylum-seeker, should take into account the specifically vulnerable situation in which Afghan women are found, including pressure from within families, communities, and by the public to conform [to] behaviour in accordance with particular codes of behaviour. In this regard, a separation and/or divorce effected in the country of asylum, may indicate adoption of a westernised way of life and be perceived as, or actually transgressing, prevailing social mores and thereby indicates a heightened risk of sur place persecution linked to the grounds of religion and/or political opinion under the scope of Article 1 A (2) of the 1951 Refugee Convention. ...'. The Court eventually found that her return would have resulted in a violation of Article 3.

Importantly, in this case (§56) the Court gave weight to the fact **that the Applicant's prolonged stay in Sweden – even if illegal – had allowed her to adopt a 'westernised' lifestyle and habits** that may suggest – in case of her return – her non-conformity '*to the gender roles ascribed to her by Afghan society, tradition and legal system*'. Weight was also given to the fact that, if returned, and in the event of her separation from her husband, as a single woman the Applicant would have faced '*limitations on conducting a normal social life*' as well as '*social rejection and discrimination'.*

The practice of **female genital mutilation (FGM)** described above as a gender specific form of persecution and violence, was also examined by the Court in the context of alleged risks upon return and international protection claims. The case of ***I.A.M. (on behalf of her daughter K. Y. M.) v Denmark**,* adopted by the CRC and examined above in the section on children, also addresses the issue of FGM and should also be referred to.

R.B.A.B. and ors v The Netherlands

In ***R.B.A.B. and ors v The Netherlands,* no. 7211/06**, eventually struck out by the Court, the Applicant's asylum claim was based on the view that their proposed expulsion to Sudan exposed their two daughters to a risk of being subjected to FGM. The Applicants argued that the practice was (§12) to be regarded as *'contrary to Article 3 of the Convention'* and that the authorities in the country would not have been able to protect them from the societal pressure. Citing its previous jurisprudence on the issue (*Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, *Izevbekhai and others v. Ireland* (dec.), no. 43408/08, § 73) and despite eventually not finding a violation on the merits, the Court affirmed that (§54) '*it is not in dispute that subjecting a child or adult to FGM amounts to treatment proscribed by Article 3 of the Convention*'.

It is finally worth noting that, albeit in a very limited number of cases, the Court has also considered the relevance of gender in cases involving men. Specifically, in *N.A. v the UK*, no 25904/07, the Applicant's gender and age, as a '*young male Tamil in Sri Lanka, particularly in Colombo*' was raised as a factor exposing him to a '*relatively higher level of risk'*.[232]The Court in this case found that the Applicant belonged to a specific group all of whose members were at risk of ill-treatment and for this reason could not be returned to Sri Lanka.

3.3.2.2 Specific considerations applying to asylum claims from LGBTI+ individuals before the ECtHR

In a number of cases the ECtHR considered the specific substantive and procedural guarantees applying to individuals whose asylum claims are based on fear of persecution due to their sexual orientation or gender identity.

As a general rule, discrimination on the grounds of sexual orientation has been found by the Court to be liable to breach **Article 8 alone and in conjunction with Article 14** (*Dudgeon v the United Kingdom*, no. 7525/76; *Norris v Ireland*, no. 10581/83; *Modinos*

232 *N.A. v the UK,* no. 25904/07, § 32

v Cyprus, no. 15070/89; *Schalk and Kopf v Austria*, no 30141/04 among others) and that differences in treatment based on sexual orientation require '*particularly convincing and weighty reasons*', that '*the State's margin of appreciation is narrow*'. (*Vallianatos and ors v Greece*, no 29381/09 and 32684/09 citing *Smith and Grady*, no. 33985/96 § 90 and *Karner v Austria*, no. 40016/98§ 41 and *Kozak v Poland*, no. 13102/02§ 92) and that '*[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention*' (again *Vallianatos and ors v Greece* citing *Salgueiro da Silva Mouta v Portugal*, no.33290/ 96 § 36 and ors.).

Some of the main cases examined by the Court on this issue, as well as the principles elaborated through them, are illustrated below.

The case of ***O.M. v. Hungary,* no. 9912/15**, arguably provides the best and most elaborate representation of the Court's approach to the situation of LGBTI+ asylum seekers. In this case the applicant, an Iranian national, had entered Hungary irregularly from Serbia, and applied for asylum relying on the risks faced as a homosexual in Iran, especially on account of the fact that '*criminal proceedings had been instituted against him for this reason*'. In this case, the Court considered in particular the alleged violation of **Article 5** stemming from the applicant's placement in asylum detention.

Recalling the already cited UNHCR Guidelines on the issue, and specifically no. 97 on 'Lesbian, gay, bisexual, transgender or intersex asylum-seekers',[233] the Court reiterated the need to ensure that LGBTI+ asylum seekers in detention should be shielded from risks '*of violence, ill-treatment or physical, mental or sexual abuse*' and ensured *'access to appropriate medical care and counselling, where applicable'* among other protective measures. In expressing its views on the Applicant's detention, the Court formulated important general principles on LGBTI+ asylum seekers as a group, defining them as members of a vulnerable group. Specifically, at paragraph 53: *'[…] in the course of placement of asylum seekers **who claim to be a part of a vulnerable group** in the country which they had to leave, the authorities should exercise **particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place**. In the present case, the authorities failed to do so when they ordered the applicant's detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran (see, mutatis mutandis, Alajos Kiss v. Hungary, no. 38832/06, § 42, 20 May 2010)'*.

Furthermore:

233 UNHCR, The protection of lesbian, gay, bisexual, transgender and intersex asylum-seekers and refugees, available at: https://www.refworld.org/pdfid/4cff9a8f2.pdf

M.E. v. Sweden

In ***M.E. v. Sweden*** **(no. 71398/12)** the applicant applied for asylum in Sweden after traveling there from Libya via Tunisia. He initially claimed asylum on the basis of his alleged torture in Libya at the hands of the government there, the threat of imprisonment by the government, and the threat of murder by militias (that he had betrayed) should he returned. After mentioning that he had planned to marry a woman, the applicant subsequently mentioned in a supplementary interview that he was homosexual and had a relationship with a man, N, who held permanent residence in Sweden. After marrying N, the applicant argued that if he returned to Libya to apply for family reunion, his sexual orientation would be revealed there and he would risk persecution and ill-treatment. The Migration Board rejected M.E.'s asylum application, questioning the applicant's homosexuality and the nature of his relationship with N. The Migration Court rejecting the applicant's appeal, not questioning the applicant's sexuality but ruling that it had not been substantiated that there was a threat against him in Libya on that account. The applicant's appeal to the Migration Court of Appeal was rejected, and the Migration Board refused to reconsider the case. However, after a change in the security situation in Libya, examined in the context of N's sexuality, the applicant was granted permanent residence status by the Migration Board.

The Court struck out the applicant's complaint as it considered that the situation had been resolved domestically. The Court also found that as the Migration Board had taken the applicant's homosexuality into account in its final decision, there were no special circumstances regarding respect for human rights, which required further examination of the case.

A.E. v. Finland

In ***A.E. v. Finland*** **(no. 30953/11)** the applicant, an Iranian national, had fled his home country to Turkey, and then to Finland, after the police in Iran had discovered his homosexuality and arrested a number of his homosexual friends. In Finland, the applicant's initial application for asylum was rejected because the Court disbelieved that the police knew about the applicant's sexuality and considered Iran to be a relatively tolerant country despite its criminalisation of homosexuality, which could be punished by death. The Administrative Court rejected the applicant's appeal against this decision, with the Supreme Administrative Court confirming this decision and refusing the applicant leave to appeal against the refusal of his request for a stay of removal. After the Supreme Administrative Court refused the applicant's request to reopen his case, the applicant sought asylum for a second time. This in turn was rejected, as was his appeal and his request for an oral hearing. A further appeal was refused by the Supreme Administrative Court. After a third asylum claim was rejected and a fourth submitted, the Immigration Services advised that the applicant seek a residence permit on the basis of studies or work. This the applicant did and he was granted a work permit for a period of one year that could be renewed. As the applicant was no longer subject to an expulsion order, the Court considered that there was no imminent risk that the applicant was to be returned to Iran. Therefore, his complaint that he would be subject to ill-treatment or torture if he were removed to Iran was resolved and the Court struck out the complaint.

F. v. the United Kingdom

In ***F. v. the United Kingdom*** **(no. 17341/03)** the applicant, an Iranian citizen, claimed asylum in the UK alleging that he feared persecution in Iran on the basis of his homosexuality. He had previously been held in prison for three months after his partner had confided his sexual orientation to the police. The application for asylum was rejected, as the authorities were not convinced the applicant was Iranian. The UK authorities also stated that they did not believe that the Iranian authorities had planned to execute the applicant for his homosexuality. The applicant's appeal was rejected, with the Adjudicator ruling that while homosexuality in Iran was illegal and carried a harsh punishment, in practice convictions were rare and difficult to achieve. The Adjudicator also disbelieved the applicant's account of his detention and took evidence which concluded that homosexuality in Iran was relatively tolerated. F.'s application for leave to appeal this decision was rejected and he was made subject to an expulsion order. The Court ruled that the materials submitted to it did not disclose a situation of active persecution of homosexuals by the authorities and it accepted the domestic courts' view of the state of homosexual persecution in Iran. There had been no substantiated recent instances of trials held solely on the basis of homosexuality. The Court considered that there were no bases for the applicant's argument that he was exposed to a real risk of treatment contrary to Articles 2 and 3 of the Convention and so the complaint was manifestly ill-founded. In respect of the applicant's complaint under Article 8 the Court stated that beyond its findings under Articles 2 and 3, the Court could not require that Contracting States only return aliens to countries in full and effective compliance with the Convention. Therefore, the application was deemed inadmissible.

Finally, the **CJEU** also offers guidance on the issue of asylum claims from **LGBTI+** individuals. In ***X, Y and Z v Minister voor Immigratie en Asiel*** (Joined Cases C-199/12 to C-201/12) for instance, the applicants, citizens of Sierra Leone, Uganda and Senegal respectively, had applied for asylum in the Netherlands on the basis that their homosexuality had inspired violent reactions by their families and others and repression by the authorities in their respective countries. They feared that if returned to these countries they would have faced continued persecution. Their applications were refused on the grounds that they had not proven the facts of their persecution and therefore failed to show that they would be persecuted on their return. X and Y had their appeals upheld, but then subsequently appealed by the Minister for Immigration, while Z had his initial appeal rejected, against which he then appealed. The domestic court referred all three applicants' cases to the CJEU for a preliminary ruling. The CJEU first ruled that homosexual individuals must be regarded as forming a particular social group in the context of an assessment of the grounds for their application for refugee status. The CJEU then stated that while criminalisation of homosexual acts alone does not constitute persecution, the systematic application of a prison term as punishment must be considered disproportionate and constitute an act of persecution. The CJEU went on to say that when adjudicating an application for refugee status it cannot be expected that the applicant conceal his homosexuality to avoid persecution at home by exercising greater restraint than a heterosexual in expressing their sexual orientation.

F v Bevándorlási és Állampolgársági Hivatal

In the recent case of ***F v Bevándorlási és Állampolgársági Hivatal*, C-473/16**, the CJEU examined the rights implications of the **techniques used to assess the applicant's sexual orientation** – including reliance on a psychologist's report. The Court stated that the AQD should be read as requiring that, when an **expert report** is ordered to assess '*the declared sexual orientation of an applicant'* the procedures used must be *'consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union'* and in any case *the* authorities' decision shall not be based *'solely on the conclusions of the expert's report'* and their assessment shall not be bound by them. Importantly the case also clarifies that a rights-oriented reading of the AQD precludes *'the preparation and use [...]of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant'* with a view **to proving the veracity of the applicant's claims.**

4. PROTECTION OF OTHER VULNERABLE GROUPS IN ASYLUM PROCEEDINGS (PERSONS WITH DISABILITIES, VICTIMS OF TORTURE, ELDERLY)

It is finally important to note that, even in the absence of gender or sex-related considerations, international and regional human rights law pays particular attention to other vulnerable categories of asylum seekers.

Once again, having a comprehensive asylum legislation, EU law is particularly relevant in this respect, as it provides a more articulate position on the issue, explicitly acknowledging other vulnerable categories of asylum seekers and addressing their needs.

In the Reception Conditions Directive, Art 21 recognises and protects '*the specific situation of vulnerable persons such as [. . .]* ***disabled people, elderly people, pregnant women […] persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation****'*. The existence of such conditions of vulnerability must be assessed *'throughout the asylum procedure'* (Article 22), hence ensuring that – if indicators to this effect emerge at a later stage – they are adequately addressed.

4.1 Asylum seekers with disabilities

Under international law, people with disabilities as a vulnerable group are covered by the **United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol**, of 13 December 2006. The protection of asylum seekers who are also affected by physical or mental disabilities is made implicit under **Article 11**, whereby '*States Parties shall take […] all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, **including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters'***.

Similarly to children and to victims of particular forms of violence or abuse, asylum seekers with disabilities are in a position of inherent and pre-existing disadvantage that compounds their vulnerability. To address such status and ensure that asylum seekers benefit from the protection accorded to them *'[…] States Parties shall take all **appropriate measures to promote the[ir] physical, cognitive and psychological recovery, rehabilitation and social reintegration'.*** This obligation is provided by the above UN Convention to persons with disabilities '*who become victims of any form of exploitation, violence or abuse'*. As victims of grave acts of persecution or humanitarian emergencies, asylum seekers should be considered to fall under this category.

The **ECtHR** jurisprudence on asylum seekers with disabilities or of an advanced age is not particularly extensive. In ***Louled Massoud v. Malta***, no. 24340/08, the asylum seekers concerned in the case were considered '*vulnerable, either because of their age, their medical condition or disability'*. [234]

The case that addressed the situation of asylum seekers with disability more explicitly is that of ***S.H.H. v. the United Kingdom***, no. 60367/10. In this case, the applicant, an Afghan citizen, had been left physically disabled having been harmed by a rocket launch. The Court observed that his condition as a disabled migrant (§19) posed specific risks and challenges to him, noting that: '*[H]e would have certain disadvantages greater than others by reason of his disability'*. However, while his disability (§89) could not *'**be considered to be a "naturally" occurring illness and [did] not require medical treatment […] in both scenarios the future harm would emanate from a lack of sufficient resources** to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State'*. The Court acknowledged the '***significant hardship facing persons with disabilities in Afghanistan, including discrimination, a lack of employment opportunities and a scarcity of services'*** but concluded that the presence of family networks for the applicant in the country provided him with reasonable perspectives of being supported in the country.

In addition to the above in cases involving refugees, and although not binding, the dissenting opinion of Judge Ranzoni in the case of *V.M. and ors v Belgium* (60125/11), citing the case of *M.S.S. v Belgium and Greece* (30696/09), the Court recalled that while asylum seekers are recognised to be a '"particularly underprivileged and vulnerable" population group' under the Convention they '***may vary in their degree of vulnerability** according to their means of subsistence, the type of treatment or persecution of which they have been or are liable to be victims, their **age, their family situation or their state of health or their disability'***. Both a condition of disability or the advanced age of an asylum seeker could hence increase his/her vulnerability.

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234 *Louled Massoud v Malta*, no. 24340/08, §44

The issue of vulnerability of migrants with disabilities in general also appeared in the case of ***Biao v. Denmark* (no. 38590/10)**, in the concurring opinion issued by Judge Pinto De Albuquerque. Although not binding, the opinion refers to the elderly and disabled as '§42 [….] most vulnerable' members of a migrant family, facing specific difficulties for the purposes of '***integration and knowledge-based requirements***'.

5. PROTECTION OF SPECIFIC GROUPS OF MIGRANTS IN THE REPUBLIC OF SERBIA

The principle of equality and prohibition of discrimination is one of the main human rights protection principles guaranteed also by the legal system of the Republic of Serbia. The Serbian laws and strategies, however, recognise members of specific groups as particularly vulnerable categories, who are in need of additional support and assistance, provided to them in the form of special, affirmative measures with a view to protecting and empowering them.

5.1 Constitution of the Republic of Serbia

Article 21 of the Constitution of the Republic of Serbia enshrines the principle of equality and prohibits discrimination on any grounds, especially on grounds of "race, sex, ethnic origin, social status, birth, religion, political or other opinion, financial standing, culture, language, age or physical or mental disability." The Constitution allows derogation from formal equality by allowing affirmative measures (Article 21(4)) and specifies categories of people in need of particular protection, such as national minorities (Article 14), women (Article 15), mothers, single parents and children (Article 66).

5.2 Serbian Legal Framework

5.2.1. General Anti-Discrimination Act

Equality before the law and prohibition of discrimination are enshrined in the **Anti-Discrimination Act**.[235] This law deals with the general prohibition of discrimination, forms and cases of discrimination and procedures for protection from discrimination. The Commissioner for the Protection of Equality, an independent, specialised authority established pursuant to this law, has issued several opinions confirming that the An-

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ti-Discrimination Act also applies to asylum seekers/refugees/migrants. For instance, the Commissioner found that a bank, V, had discriminated against asylum seekers and other refugees because it had required of them to fulfil requirements it otherwise did not request of other clients to extend them the MoneyGram transfer service.[236] In the February-November 2015 period, the bank repeatedly refused to transfer the money of these individuals unless they produced proof of registered residence, which it did not require of other aliens, thereby placing them in an unequal position in relation to other aliens. In response to the complaint, the bank claimed it required of all aliens staying over 24 hours in Serbia to produce such proof and that the transactions performed by migrants fell in the category of high-risk transactions under the Money Laundering and Terrorist Financing Risk Assessment Guidelines, wherefore it had applied enhanced identification and monitoring measures to these clients. The bank did not contest evidence that it did not pose the same requirements on all aliens wishing to transfer money in practice. Nor did it produce any evidence that proof of registered residence was a guarantee against suspicious transactions or that denial of the money transfer service amounted to a justified derogation from the principle of equal rights and obligations. The Commissioner therefore found the bank in violation of the Anti-Discrimination Act because the it had refused to extend the MoneyGram service to a Syrian national and that migrant status also constituted grounds on which discrimination was prohibited.

5.2.2. Serbian Laws on Asylum Seekers and Migrants

5.2.2.1. Asylum and Temporary Protection Act

Article 7 of the **Asylum and Temporary Protection Act**[237] introduces the principle of non-discrimination as one of the main asylum procedure principles. This principle is set broadly and prohibits all discrimination on any grounds. All asylum centres and reception-transit centres have separate rooms for single women and men. All centres provide access to gynaecologists in the relevant out-patient health clinics and access to international organisations responsible for reproductive health of migrants, thereby ensuring continuous access to information and services. Persons are placed in accommodation with due respect of the principles of non-discrimination, family unity, gender equality and special care for asylum seekers with special needs.[238]

236 Commissioner for the Protection of Equality, complaint by Belgrade-based NGO CZPTA v. V Bank a.d. N.S., Ref. No. 07–00–668/2015–02, opinion of 29 March 2016. See also the Commissioner's opinion on a complaint against a teller at the Central Belgrade Railway Station who refused to sell a migrant a Belgrade-Šid train ticket (CKPR v. Serbian Railways, Ref. No. 07–00–575/2016/02, of 27 March 2017) and her opinion on a complaint against a train guard, who had refused to let two Afghani boys with tickets board a train (P. v. Serbian Trains, Ref. No. 07–00–2011/2017–02, of 7 September 2017)

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238 Fourth periodic report submitted by Serbia on the Implementation of the Convention on the Elimination of all Forms of Discrimination against Women, Belgrade, July 2017, paragraph 212, available at: http://www.ljudskaprava.gov.rs/sh/node/19867.

Respect for the principle of equality, however, does not mean that particular attention may not and should not be devoted to specific groups of migrants. Article 17 of the Act, which deals with the provision of special procedural and reception guarantees, recognises the following as particularly vulnerable categories of migrants: 1) minors; 2) unaccompanied minors; 3) persons with disabilities; 4) elderly persons; 5) pregnant women; 6) single parents with minor children; 7) human trafficking victims; 8) gravely ill migrants; 9) migrants with mental disorders; and 10) victims of torture, rape or other grave forms of psychological, physical or sexual abuse. These persons are to be extended the adequate assistance. The law, notably, lays down the obligation of the authorities to identify their vulnerabilities as soon as possible.

Article 7 of the Asylum and Temporary Protection Act reads:

"In the course of the implementation of the provisions of this Act, any discrimination on any grounds shall be prohibited, in particular on grounds of race, skin colour, sex, gender, gender identity, sexual orientation, ethnic origin, social origin or similar status, birth, religion, political or other opinion, financial standing, culture, language, age or intellectual, sensory or physical disability."

Article 17 of the Asylum and Temporary Protection Act reads:

" In the course of the asylum procedure, consideration shall be given to the specific circumstances of persons requiring special procedural and/or reception guarantees, such as minors, unaccompanied minors, persons with disabilities, the elderly, pregnant women, single parents with minor children, human trafficking victims, gravely ill persons, persons with mental disorders and victims of other grave forms of psychological, physical or sexual abuse, such as victims of female genital mutilation.

Special procedural and reception guarantees shall serve to provide adequate assistance to asylum seekers who, due to their personal circumstances, are unable to exercise their rights and fulfil their obligations under this Act without such assistance.

The relevant authorities shall continuously conduct the identification of the personal circumstances of persons referred to in paragraph 1 of this Article, at the earliest within a reasonable time upon the initiation of the asylum procedure or expression of the intention to apply for asylum at the border or in a transit area. "

5.2.2.2. Aliens Act

The Aliens Act[239] also defines the following as particular vulnerable aliens: 1) persons with disabilities; 2) elderly persons; 3) pregnant women; 4) single parents with minor children; 5) victims of torture, rape or other grave forms of violence (including domestic and intimate partner violence caused by sex, gender, sexual orientation and gender identity); 6) human trafficking victims; 7) aliens at risk of torture, inhuman or degrading treatment

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or punishment in their country of origin on account of their sexual orientation or gender identity; 8) minors; and 9) unaccompanied minors (Article 3(1(24))).

5.3. Categories of Asylum Seekers and Migrants Warranting Particular Protection

5.3.1. Children

The Asylum and Temporary Protection Act defines minors as aliens under the age of 18 (Article 2(1(13)). Under Article 11 of the Act, parents or guardians of minors shall participate in the asylum procedure (express the intention to seek asylum or apply for asylum in the Republic of Serbia on behalf of the minors). The Act exceptionally allows minors to independently apply for asylum – if they are over 16 years of age and married (Article 11(3)).

The Act lays down the principle of the best interests of the child. Article 10(1) sets out that the authorities shall implement this law with due consideration of the best interests of the child. They shall, therefore, be guided by the children's: 1) well-being, 2) social development and background; 3) opinions, depending on their age and maturity; 4) the principle of family unity; 5) protection and safety, especially if they suspect the children are victims of human trafficking or gender-based violence (Article 10(2)).

Furthermore, Article 70(2) of the Act lays down that minor children born in or out of wedlock, minor adopted children or minor stepchildren who have not formed families of their own shall have the same legal status as their parents, who have been granted asylum, pursuant to an Asylum Office decision. The Act is also the first Serbian law to explicitly introduce the obligation to provide minor asylum seekers with access to education immediately, within a maximum of three months from the day they apply for asylum (Article 55(2)).

5.3.2. Unaccompanied Children

The new Asylum and Temporary Protection Act focuses in particular on unaccompanied children and is the first to draw a distinction between unaccompanied children and children separated from their parents. It defines unaccompanied minors as "aliens under 18 years of age who were unaccompanied by their parents, or guardians or adults responsible for them when they entered the Republic of Serbia, or who were left unaccompanied by their parents, guardians or adults responsible for them after they entered the Republic of Serbia." (Article 2(1(14))). On the other hand, separated minors denote "aliens under 18 years of age who were unaccompanied by their parents, or guardians or adults responsible for them when they entered the Republic of Serbia, or who were left unaccompanied by their parents, guardians or adults responsible for them after they entered the Republic of Serbia, but who were not necessarily unaccompanied by their other relatives, and to whom the provisions of this law on unaccompanied minors apply." (Article 2(1(15))).

The new Act includes several provisions guaranteeing the protection of unaccompanied children and defines the role of guardians. Article 12 lays down that temporary guardians shall be appointed by the guardianship authorities for all unaccompanied children, with the exception of married minors over 16 years of age, and as soon it is established that they are unaccompanied, before they apply for asylum at the latest. Unaccompanied minors shall be notified without delay that they have been appointed a temporary guardian.

The Act lays down that temporary guardians shall be under the obligation to:

1) notify the unaccompanied minors without delay of the asylum procedure and their rights and obligations;
2) be present at the time the unaccompanied minors express the intention to seek asylum;
3) be present at the time the unaccompanied minors personally apply for asylum or file asylum applications on their behalf when that is in the minors' best interest;
4) be present at the time the authorities interview the unaccompanied minors with respect to their hold the asylum applications.

Under Article 12(9) of the Act, the authorities shall give priority to asylum applications filed by unaccompanied minors and other procedures regarding their rights over other procedures.

Article 52 of the Act lays down that unaccompanied minors shall be provided with material reception conditions in asylum centres or other facilities designated for the accommodation of asylum seekers pending the final decision on their asylum application. Exceptionally, if the unaccompanied minors cannot be provided with adequate accommodation in such facilities, the Commissariat for Refugees and Migration shall provide them with accommodation in a social protection institution, another accommodation provider or a family, in accordance with a ruling of the social work centre.

Article 73 od the Act sets out that unaccompanied children granted asylum are entitled to the following special rights:

1) to be appointed a guardian or legal representative as soon as possible;
2) to be accommodated, preferably together with their adult relatives or persons they are particularly close to;
3) to be placed in a foster family or a social protection institution;
4) to be accommodated, if possible, together with their siblings, in accordance with their best interest and taking into account their age and maturity.

Unaccompanied minors may also be referred to social protection institutions under enhanced supervision, but only in the event alternative measures cannot be applied effectively (Article 80(2)).

Under Article 73(5) of the Act, the competent authorities are under the obligation to start searching for the family members of unaccompanied minors when necessary, whilst protecting the best interests of the minors. They must ensure that the collection, processing and exchange of data are in accordance with the principle of confidentiality if there is a risk to the life or integrity of the minors or their close relatives, especially if the latter remained in their country or origin (Article 73(5)).

These provisions were introduced to improve the status of unaccompanied migrant children; particular account was given to the observations of the Committee on the Rights of the Child.

Concluding observations on the combined second and third periodic reports of Serbia, Committee on the Rights of the Child (2017)

"22. The Committee welcomes the initiatives introduced by the State party to address discrimination, particularly against Roma children. However, it is concerned about: (a) The persistent discrimination against Roma children in all areas of life, which is among the principal reasons leading to the placement of Roma children in institutions; (b) The fact that […] migrant, refugee and asylum-seeking children, […] continue to face discrimination with regard to access to education, health care and adequate housing;

[…]

"23. The Committee urges the State party to: (a) Ensure full implementation of relevant existing laws prohibiting discrimination, including by strengthening public education campaigns to address negative social attitudes towards Roma children, children with disabilities, minority children, refugees and asylum-seeking children, migrant children

[…]

I. Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37 (b)-(d) and 38-40)

Refugee and asylum-seeking children

56. While the Committee welcomes the State party's continued cooperation with the Office of the United Nations High Commissioner for Refugees and the efforts the State party has made to improve reception facilities for children and to adapt the child protection system to suit the needs of asylum-seeking and refugee children, it is concerned that: (a) Vague references in the Law on asylum in relation to the special treatment of refugee and asylum-seeking children, along with the absence of a proper identification procedure and an insufficient number of interpreters at the border, increase the risk that unaccompanied children will not be identified as such when entering the country; (b) Under current regulations there is no separate asylum procedure for unaccompanied children, resulting in delays in the appointment of legal representatives, inadequate interpretation services, the appointment of up to

three different guardians, who are often not properly trained to act as custodians, the identification of ad hoc accommodation for unaccompanied girls while boys are initially placed in centres for foreign unaccompanied minors, and long-term placement of unaccompanied asylum-seeking children under the age of 16 in asylum centres that do not have adequate facilities or trained staff to care effectively for the children 24 hours per day, seven days per week; (c) Limited space in asylum centres has forced many asylum-seeking and refugee children, including unaccompanied and separated children, to sleep on the streets without adequate shelter and in unsafe and unsanitary conditions, while others are afraid to go to the centres for fear of being deported, leaving them vulnerable to smuggling rings reportedly operating in the State party; (d) Some unaccompanied and separated children have been returned, pursuant to the readmission process, without an assessment of their best interests and without being informed, in a language they can understand, of their right to seek asylum; (e) A number of children of undetermined citizenship are currently at risk of becoming stateless in the State party.

57. In the light of general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, the Committee recommends that the State party: (a) Establish fair and efficient asylum procedures that are to be carried out in a child-sensitive manner, in both procedural and substantive aspects, and that can be used to systematically identify and refer unaccompanied or separated children for appropriate protection and support, and consider amending relevant national legislation, including the Law on asylum, in this regard; (b) Ensure the full inclusion of asylum-seeking and refugee children who are unaccompanied or separated in the existing child protection system, provide accommodation in foster families or other accommodation facilities adequate for their age, gender and needs in line with best interest assessments conducted on an individual basis and establish specialized services for children with emotional, psychiatric and behavioural problems; (c) Ensure that all asylum-seeking children are systematically provided with information on their rights and obligations, asylum procedures and available services to prevent them from resorting to sleeping without shelter for fear of deportation, and take the steps necessary to protect unaccompanied children from smuggling rings; (d) Ensure full respect for the principle of non-refoulement and facilitate access to the asylum system for children in need of international protection in line with articles 6, 22 and 37 of the Convention; (e) Guarantee the right to acquire Serbian citizenship for all children currently residing in the State party who would otherwise be stateless, regardless of their own, or their parents', legal status."

5.3.3. Victims of Gender-Based Violence

The Asylum and Temporary Protection Act devotes a number of provisions to gender-based violence but does not define it. Article 17 of the Act, for instance, explicitly lays down that account shall be taken of the specific situation of persons in need of special procedural or reception guarantees, such as persons who have been "raped or exposed to other grave forms of psychological, physical or other grave forms of gender-based violence". Since the Act does not define gender-based violence, public officials charged with asylum matters should rely both on the definition in the Gender Equality Act,[240] and the one in the Act Ratifying the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence.[241]

The Gender Equality Act defines gender as "socially established roles, position and status of women and men in public and private lives giving rise to discrimination based on their biological sex due to social, cultural and historic differences" (Article 10(1(2)), and gender-based violence as "conduct jeopardising the physical integrity, mental health or tranquillity or causing economic harm to persons, as well as grave threats of such conduct, preventing or limiting their exercise of rights and freedoms based on the principle of gender equality" (Article 10(1(5))). The definitions in Article 3 of the Act Ratifying the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence are more comprehensive.

Article 3 of the Act Ratifying the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence reads:

"Definitions

For the purpose of this Convention:

a. "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;
b. "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;
c. "gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;
d. "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;
e. "victim" shall mean any natural person who is subject to the conduct specified in points a and b;
f. "women" includes girls under the age of 18."

In addition to psychological and physical violence, this Convention also deals with other forms of gender-based violence: sexual violence, including rape (Article 36), forced mar-

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riage (Article 37), female genital mutilation (Article 38), forced abortion and forced sterilisation (Article 39) and sexual harassment (Article 40). All these enactments need to be taken into account when reviewing risk of persecution related to gender-based violence.

With a view to protecting victims of gender-based violence, the Asylum and Temporary Protection Act introduces gender-sensitive procedures. Gender equality and sensitivity are among the main principles to be complied with throughout the asylum procedure (Article 16). This means that women asylum seekers are entitled to apply for asylum and be interviewed separately from their male companions. This provision is extremely important, because it can facilitate faster and easier identification of victims of gender-based violence. Furthermore, this is the first Serbian asylum law to explicitly lay down that asylum seekers are entitled to be assisted by interpreters and translators of the same sex, and to be physically searched by public officials of the same sex.

Article 16 of the Asylum and Temporary Protection Act reads:

"The provisions of this Act shall be interpreted in a gender-sensitive manner.

At their request, applicants shall be provided with the possibility of lodging their asylum applications with and being interviewed by a person of the same sex and with the assistance of a translator or interpreter of the same sex, unless this is impossible or associated with disproportionate difficulties for the authority conducting the asylum procedure.

The principle referred to in paragraph 1 of this Article shall always be applied when conducting searches, body checks and other actions in the course of the procedure that include physical contact with the applicant.

Female applicants accompanied by men shall lodge their applications and be interviewed separately from their male companions."

Article 26 of the Act, which enumerates the factors to be taken into account when assessing risks of persecution, explicitly recognises that social groups include, inter alia, groups based on a common characteristic of sex, gender or gender identity. Under the Act, it suffices that the asylum seekers are presumed to have a personal characteristic exposing them to the risk of persecution, i.e. it is immaterial whether those characteristics are actual or imputed by the persecutors. Furthermore, the law specifies that acts of persecution may entail, in particular, "physical or psychological violence, including sexual and gender-based violence" (Article 28(2)).

Finally, Article 10(2) of the Act, which deals with unaccompanied minors, specifies that assessments of the best interests of the child shall, inter alia, pay due attention to their protection and safety, especially where there are suspicions that they may be "victims of domestic violence or other forms of gender-based violence".

The Aliens Act explicitly lays down that aliens may not be forcibly removed to a territory where they would be at risk of persecution on account of their membership of a particular social group (Article 83(1)). As noted above, persecution based on gender-based violence can be subsumed under membership of a particular social group.

5.3.4. Human Trafficking Victims

The Asylum and Temporary Protection Act includes only several provisions referring to victims of human trafficking. Article 17, notably, explicitly lays down that account shall be taken of the specific situation of persons in need of special procedural or reception guarantees, such as victims of human trafficking. In Article 10(2) of the Act, which is devoted to unaccompanied minors, sets out that assessments of the best interests of the child shall, inter alia, pay due attention to the protection and safety of unaccompanied minors, especially where there are suspicions that they may be "victims of human trafficking".

The position of victims of human trafficking is governed more thoroughly in the **Aliens Act**, which introduces important novel provisions. Firstly, it recognises the right to temporary residence of aliens planning on staying in the Republic of Serbia over 90 days in the event they are presumed to be victims of human trafficking (Article 40(1(12)) or are victims of human trafficking (Article 40(1(13))).

Article 62 of the Aliens Act reads:

"(1) In the event particular indicators lead to the presumption that an alien whose identity is being established is a victim of human trafficking, the competent state authority charged with the identification and coordination of the protection of victims of human trafficking shall assess the situation and needs of the victim, and identify the victim in accordance with its legal powers in the domain of the registered activity.

(2) The competent state authority charged with the identification and coordination of the protection of victims of human trafficking shall notify the Ministry of the Interior of the initiation of the procedure referred to in paragraph (1) of this Article and shall notify the aliens of the requirements for granting them temporary residence and their other rights.

(3) Aliens presumed to be victims of human trafficking shall be granted 90-day temporary residence permits even if they do not fulfil the general requirements under Article 43 of this Act.

(4) The victims shall be provided with the possibility of recovering during their temporary residence and any further influence of the perpetrators of the criminal offence on the victims shall be eliminated. The victims shall be provided with timely and comprehensive information about their status. They shall be free to decide whether or not to cooperate with the competent state authority charged with the identification and coordination of the protection of victims of human trafficking, the court, prosecution service or police and shall not be required to testify.

(5) Rulings on return may not be issued during the period of validity of temporary residence on these grounds.

(6) During the validity period of temporary residence on these grounds, the competent state authority charged with the identification and coordination of the protection of victims of human trafficking shall coordinate the protection of victims of human traf-

ficking, and, in cooperation with other institutions and organisations, ensure their safety and protection, and provide them with adequate and safe accommodation, psychological and material assistance, access to emergency medical services, access to education if they are minors, counselling and information about their legal and other rights in a language they understand.

(7) If necessary, the presumed victims shall be provided with translation and interpretation services and assistance in exercising their rights and interests in case of criminal proceedings.

(8) In the event it is ascertained that minor aliens presumed to be victims of human trafficking are unaccompanied by a parent, guardian or legal representative, the competent authority, the guardianship authority and the police shall, in cooperation with the competent state authority charged with the identification and coordination of the protection of victims of human trafficking, establish whether their families are in the territory of the Republic of Serbia with a view to family reunification.

(9) Unaccompanied minor victims shall not be reunited with their families in the event the competent state authority charged with the identification and coordination of the protection of victims of human trafficking assesses that their reunification with their families would not be in their best interest, especially where there are suspicions that their families are involved in human trafficking. Minors shall be reunited with their families only when the competent guardianship authority ascertains, in cooperation with the competent state authority charged with the identification and coordination of the protection of victims of human trafficking, that such reunification is in the best interest of the child.

(10) Minor victims shall be appointed guardians in accordance with the law in the event their families are not or cannot be found in the territory of the Republic of Serbia."

Article 63 of the Aliens Act reads:

"(1) In the event it is established during the procedure referred to in Article 62 (1) of this Act that an alien is a victim of human trafficking and s/he freely decides to continue cooperating with the competent state authority charged with the identification and coordination of the protection of victims of human trafficking, the court, prosecution service or police, the competent state authority charged with the identification and coordination of the protection of victims of human trafficking shall notify the Ministry of the Interior thereof in the form of a professional opinion.

(2) Victims of human trafficking may be granted temporary residence although they do not fulfil the requirements under Article 41(1) or Article 43 of this Act.

(3) Victims of human trafficking, including minor victims, shall be granted temporary residence in the event the competent state authority charged with the identification and coordination of the protection of victims of human trafficking deems their stay necessary for their own protection, recovery and safety, or in the event the court,

prosecution service or police deem their presence necessary for cooperation in criminal proceedings.

(4) Aliens, who are victims of human trafficking, shall be granted temporary residence for a period of one year, which may be extended under the same circumstances.

(5) In addition to their rights under Article 62 of this Act, aliens granted temporary residence as victims of human trafficking shall not be required to testify in order to exercise their rights to access the labour market, vocational training and education.

(6) In cooperation with the relevant social work centres and other service providers and organisations, the competent state authority charged with the identification and coordination of the protection of victims of human trafficking shall provide access to medical and all other requisite assistance to aliens granted temporary residence as victims of human trafficking.

(7) When granting temporary residence to minor aliens, the competent authority shall take into account their best interests, age and maturity.

Article 64 of the Aliens Act reads:

Termination of Temporary Residence Permits Approved for Humanitarian Reasons or to Victims of Human Trafficking

"(1) Temporary residence for victims of trafficking in human beings or temporary residence referred to in Article 61 (1(3)) may be terminated at any time in the event aliens no longer fulfil the requirements, in particular if:

1) the aliens actively, voluntarily and at their own initiative renewed contacts with persons suspected of committing a criminal offence in the area of human trafficking and irregular migration, or in the event it is established that their reports of these criminal offences were false or ill-founded;

2) the aliens stopped cooperating, or resorted to deceit in the process of cooperation;

3) necessary to protect the security of the Republic of Serbia and its citizens;

4) the judicial authorities decide to discontinue the proceedings.

(2) Temporary residence for humanitarian reasons referred to in Article 61 (1(1, 2, 4 and 5)) shall be terminated if the circumstances under which the aliens had been granted temporary residence cease to exist, or if necessary to protect the security of the Republic of Serbia and its citizens."

5.3.5. LGBTI Asylum Seekers

The Asylum and Temporary Protection Act explicitly mentions sexual orientation. Firstly, it mentions sexual orientation in Article 7, which enumerates grounds on which discrimination is prohibited during the asylum procedure and with respect to the asylum seekers' rights and obligations. Secondly, Article 26(2) of the Act explicitly recognises that particular social groups may include groups based on common characteristics of sexual orientation. Importantly, it suffices that the asylum seekers are presumed to have a personal characteristic exposing them to the risk of persecution under this law, i.e. it is immaterial whether those characteristics are actual or imputed by the persecutor.

The **Aliens Act** explicitly prohibits forced removal of aliens to a territory where they are at risk of persecution on account of their sexual orientation or gender identity (Article 83(1)).

The Asylum Office granted asylum to two asylum seekers in a same-sex union back in 2013.[242] It took into account reports documenting the legal challenges and discrimination faced by LGBT persons in Turkey. It found that widespread homophobic discrimination existed in Turkey and that LGBT persons faced harassment and violence on the part of their relatives, neighbours, co-workers, teachers and even the police, and that the authorities' response was either non-existent or inadequate. It particularly took into account the homicides of several persons belonging to sexual minorities and the fact that Turkey did not have a law protecting them from discrimination, which was prominent in the fields of recruitment, housing, health, public accommodation, loans et al. The Asylum Office thus established that the asylum seekers risked persecution in Turkey and that they should be granted asylum in Serbia. The Administrative Court recently reviewed a complaint filed by Cuban nationals, who had fled their country of origin fearing persecution on account of their sexual orientation. The Administrative Court quashed the Asylum Commission decision denying them asylum and remitted the case for review. It explained that the administrative authorities were under the obligation to ascertain, *ex officio*, all the facts and circumstances regarding the plaintiffs' membership of a particular social group and in accordance with its view.[243]

242 Asylum Office Ruling Ref. No. 03/9-4-26-1280/13 of 25 December 2013

243 Judgment of the Administrative Court of the Republic of Serbia, 3 U 11867/17 of 7 September 2017.

CHAPTER V

PROCEDURAL GUARANTEES AND THE RIGHT TO AN EFFECTIVE REMEDY IN EXPULSION CASES

The first volume of this Handbook addressed the rights at stake when considering decisions to return an asylum seeker or an otherwise vulnerable migrant to the country of origin or transit, i.e. the absolute right not to have one's life put at risk (Art. 2 ECHR) and the right not to face torture or inhuman or degrading treatment or punishment (Art. 3 ECHR). The rights afforded to individuals whose circumstances are overlooked in the context of collective expulsions were also examined (Art. 4 Protocol no.4). When such rights are put at risk by a decision to return, the ECHR gives the individual sustaining the violation the right to have access to an effective remedy to challenge it [Art. 13].

This Chapter will take stock of the above analysis, examining the standards and jurisprudence of international and regional (both Council of Europe (CoE) and European Union (EU)) instruments regulating the right to an effective remedy in situations of expulsion and return. It will consider how the scope of decisions to 'return' must be interpreted in light of the evolving trends and practices in migration management. In addition to instances of return by plane or other means of transport, measures such as push-backs and entry bans will also be considered. While push-backs and entry bans are not 'returns' in a traditional sense, they practically can result in the individual being forced to return to a country of transit or to his/her country of origin, potentially facing a situation of risk.

1. INTERNATIONAL AND REGIONAL LAW PRINCIPLES ON REMEDIES TO CHALLENGE RETURN DECISIONS

1.1 The International Covenant on Civil and Political Rights (ICCPR) and its general comments

While this Chapter will mainly focus on the standards and jurisprudence of the ECtHR on the issue, it is useful to briefly recall the international standards regulating the right to an effective remedy and its effect in the context of return decisions.

The International Covenant on Civil and Political Rights, the main human rights Treaty in the UN legislative framework, and its General Comments provide important provisions on this topic. As a general rule, the ICCPR recognises the right to 'an effective remedy' to any person whose rights and freedoms under the Covenant have been violated, as well as the right to see such remedy enforced (Article 2 (a) and (c)). When aliens are involved, the applicability of the ICCPR is confirmed by the provision in Article 2(1) whereby the Covenant's rights must be afforded to "*all individuals within [the State's] territory and subject to its jurisdiction*" (art. 2, para. 1), hence irrespective of the person's migration status.[244]

244 CCPR General Comment No. 15: The Position of Aliens Under the Covenant Adopted at the Twenty-seventh session of the Human Rights Committee, on 11 April 19861

The body of the ICCPR does not define in detail the conditions for a remedy to be considered 'effective', nor does it make differentiations based on the right(s) violated in each case.

In general terms, under the Covenant, aliens are protected from expulsion or return decisions under Article 13, which lays out the basic content of the relevant remedy, providing that as a rule, the returnee shall be entitled '*to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority*'.

1.2 European Union Law standards

Prior to delving into the relevant ECHR standards, this section will examine the relevant EU law framework.

In EU law, the right to an effective remedy is provided under Article 47 of the CFR. This article is understood to incorporate the right to a fair and public hearing (Art. 47(2)). In the case of *Marks and Spencer plc v. Commissioners of Customs & Excise*, the CJEU clarified the provision in the second paragraph of Article 47, establishing the principle whereby '*individuals are […] entitled to rely before national courts, against the State […] not only when the Directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the Directive are not being applied in such way as to achieve the result sought by it*'.

This Article represents a general guarantee to '*everyone whose rights and freedoms guaranteed by the law of the Union are violated*' without specifically addressing asylum or migration situations. It should be underlined that Article 6 ECHR (right to a fair trial) does not apply to asylum/migration issues, in that the rights underlying this area are not deemed to be 'civil rights' and are hence not covered by this provision. In EU Members States, therefore, this issue can arguably be addressed by the protection provided by Article 47 CFR, whose scope is not affected by this limitation.

The right to an effective remedy in the particular context of Asylum and migration is separately incorporated in the various instruments comprising the Common European Asylum System (CEAS), particularly the Recast Asylum Procedures Directive. (Art 46 rAPD)

The broader applicability of Article 47 as well as the specific CEAS provisions means that EU Member States are bound by specific effective remedy legal standards in migration and asylum situations, under EU law. This is not as straight forward in the CoE legal order, as it will be analysed in the relevant section of this Chapter.

1.3 Council of Europe soft law instruments (other than the ECHR)

In its **Twenty Guidelines against forced return**, the Committee of Ministers of the Council of Europe provides important guidance on the standards and principles States must observe when implementing return decisions. As far as the right to a remedy is concerned, **Guideline 5** should be considered:

Guideline 5. Remedy against the removal order

1. *In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to* ***review the removal order, including the possibility of temporarily suspending its execution****.*
2. *The remedy shall offer the required procedural guarantees and present the following characteristics:*
   - *the time-limits for exercising the remedy shall not be unreasonably short;*
   - *the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;*
   - *where the returnee claims that the removal will result in a violation of his or her human rights as set out in Guideline 2.1, the remedy shall* ***provide rigorous scrutiny*** *of such a claim.*
3. *The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1".*

In turn, the rights violations referred to in Guideline 2.1 include (relevant extracts only):

> *"a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment; b. a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or c. other situations which would, under international law or national legislation, justify the granting of international protection."*

The above provision introduces some of the core concepts underpinning the right to a remedy in the context of return decision:

1. The need for **a rigorous scrutiny of decisions to return** where the returnee claims that he/she would be exposed to the risk of a grave violation of his/her rights, as above.

2. Where the existence of such risks is substantiated by an **arguable claim**, the need for the remedy to have **suspensive effect,** so as to ensure that the returnee is shielded from potentially irreparable harm.

The above Guidelines and the ECtHR jurisprudence are complementary, with the result that the same standards outlined above are relied upon and further developed by the ECtHR in its jurisprudence, as will be explained in the following sections.

1.4 ECHR Standards and jurisprudence

Under the ECHR the right to an effective remedy is regulated under Art. 13 and is intended to protect individuals against **arguable violations** of their Convention rights. The provision reads as follows:

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

By ensuring such right the Court seeks '*to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order*'.[245] As suggested by this statement, this Article is not a standalone provision and must be considered in conjunction with an alleged violation of one or more substantive rights under the Convention.

In the context of return, the above principle is given context by the CoE 20 GoFR – cited above – which state that Guideline no 5 (on remedies in return decisions) draws on the understanding that Article 13 ECHR considered '*in conjunction with [a substantive provision of the ECHR, in particular with Article 2, Article 3, Article 8 or Article 4 of Protocol no. 4 ECHR]* ***requiring that States must make available to the individual concerned the effective possibility of challenging the removal order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness*** *by an appropriate domestic forum offering adequate guarantees of independence and impartiality" (Shebashov v Latvia (dec.) no. 50065/99, Al-Nashif v Bulgaria, no. 50963/99, §133)*

In order to be in line with the Convention, a remedy under Article 13 must conform with a series of general principles.

First of all, the right to an effective remedy is not made available indiscriminately against any alleged violation of the Convention, but only to those claims, which are regarded as being 'arguable', i.e. claims that have a certain degree of foundedness. On the issue, the CoE Guide on Article 13 specifies that, while **the Court has failed to provide a precise definition of 'arguability',** it has reiterated that only 'arguable' claims should be afforded a remedy.[246] The CoE Guide continues to state that: '*the question of whether the claim*

245 *Abdolkhani and Karimnia v Turkey*, no. 30471/08, § 111; *Ilias and Ahmed v. Hungary,* no. 47287/15, § 98

246 *Athanassoglou and ors v Switzerland*, no. 27644/95, §58 citing *Boyle and Rice v the UK,* 27 April 1988, Series A no. 131, p. 23, § 52

is arguable should be determined in the light of the particular facts and the nature of the legal issue or issues raised'. Among the factors considered relevant to determine whether a claim can be considered arguable, based on the Court's jurisprudence, the CoE Guide notes considerations linked to the **evidence presented** by the applicants, as well as other considerations that will depend on the specific facts of the case.

On the same issue, the CoE HELP tool on asylum and the ECHR provides that for a claim to be arguable, it is not necessary for '*the substantive right [to] have been violated' (Leander v. Sweden, §79),* adding that '*the claim is arguable if it is not manifestly unfounded in the meaning of Article 35(3)(a) ECHR'* and *'[i]n that sense it coincides - to some extent - with the question of admissibility'*.[247]

A core feature in this sense has to do with its effectiveness, which determines the concrete use and impact of the remedy. As a general rule, a remedy must be **effective in practice as well as in law**.[248]

In its guide on the issue, the Committee of Ministers of the CoE lays out the general principles and requirements that a remedy must abide by in order to be considered '**effective'** by Convention standards, as well as specific requirements to be followed in cases involving a remedy against removal. Given its interpretative value, the above guide will be largely relied upon in the following sections.[249]

Khlaifia and Others v. Italy

Case of Khlaifia and Others v. Italy* (no. 16483/12) - §268 '… the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13* ***does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority****'*.[250]

Along the same lines: '*… even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (Khlaifia, §268 Kudła, § 157, and Hirsi Jamaa and Others, § 197).*

The effectiveness of a remedy also depends from the factual context where it is invoked; factors such as the conduct of the authorities and their response to the remedy can have a key impact on the remedy's ability to deliver effect. On this issue the ECtHR has stated that: '*[the] exercise [of the remedy] must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State*' (*Çakici v. Turkey*, no 23657/94, § 112).[251]

In order to be considered compatible with the Convention's definition, above, the remedy must satisfy both formal and substantive requirements. Failure to satisfy formal and

247 Course on the ECHR and Asylum prepared jointly by the HELP Programme of the Council of Europe and UNHCR (CoE HELP Course – Asylum and the ECHR)

248 *Ibid* 115

249 CoE - Committee of Ministers - Guide to good practice in respect of domestic remedies, Directorate General - Human Rights and Rule of Law Council of Europe, 2013

250 Also *Ilias and Ahmed v. Hungary,* no. 47287/15, § 98

251 CoE HELP Course – Asylum and the ECHR citing *Çakici v. Turkey*, §112

substantive requirements, a remedy can be considered inadequate to protect the individual from breaches of his/her rights.

It should be added that, even where **Article 13 is not invoked in a particular case, procedural failures can be raised through different routes.** The CoE HELP tool on Asylum and the ECHR[252], in this sense, recalls that procedural guarantees in the context of return can also derive from '*the procedural limb of Article 3, as well as Article 4 Protocol 4 and Article 1 Protocol 7'*. Both Article 3 and Article 4 Protocol 4, relevant to the present chapter, are deemed to include a procedural element, which allows the Court to consider alleged procedural failures even where the right to an effective remedy is not invoked separately.

Having provided a summary outline of the general features of effective remedies under the ECHR, the following sub-section will delve in more detail into some aspects that are of particular relevance in the context of return.

1.4.1 The form of the remedy and the authorities entrusted with it

In itself, the rather concise formulation of Article 13 is not prescriptive about the concrete form that a remedy should have and hence does not bind States to predefined judicial or administrative measures.[253] While the Convention fails to provide specific requirements in this sense, and States are considered to benefit from *'a margin of discretion in how to comply with their obligation'* the CoE guidance notes that such discretion is inherently limited by '*the nature of the right at stake'* which *'has implications for the type of remedy the State is required to provide'*.[254]

Similarly, the authority that is entrusted with the power to receive the claim for a remedy, once one is invoked, does not have to be a judicial one. On this point too, the Court leaves the definition of the appropriate authority to consider the case to the discretion of the State, with the limit that the review offered by the appointed authority is capable to assess the effectiveness of the remedy. In the context of migration and return, in ***Ilias and Ahmed v Hungary*** the ECtHR clarifies that***:*** '*98..the "authority" referred to in that provision [does not] necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective'*.

252 CoE HELP Course – Asylum and the ECHR

253 CoE - Committee of Ministers - Guide to good practice in respect of domestic remedies: '*The question of the judicial nature of the remedy is not decisive. For instance, it has been noted that, under certain circumstances, administrative remedies may prove effective'* (Citing: *Torreggiani and Others v Italy*, §51 and *Norbert Sikorski v. Poland*, no. 17599/05, §111)

254 I*bid* and also *De Souza Ribeiro v France,* no. 22689/07, §78*: '[…] The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. The States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see Jabari v. Turkey, no. 40035/98, § 48, ECHR 2000-VIII). However, the remedy required by Article 13 must be "effective" in practice as well as in law (see Kudła, cited above, § 157); Budayeva and Others v. Russia,* no. 15339/02 et alt., § 190-191

1.4.2 The 'scope' of an effective remedy under the ECHR

Under the Convention, a remedy is considered to comply with Article 13 insofar as it is able to both '*allow the competent domestic authorities […] to* ***deal with the substance*** *of the relevant Convention complaint and to* ***grant appropriate relief'***.[255] An Article 13 remedy must hence go beyond a function of mere scrutiny and assessment of the merits of the claim, but must be able to follow up on its findings providing a form of relief/redress to remedy the alleged violation.

The CoE HELP Course adds that an effective remedy must enable the authorities to: '*to examine the merits of the case (Chahal, paras. 155-157) […] without being bound by the scope of review of the lower authority'*.[256]

1.4.3 Accessibility of the remedy

The CoE Guidelines on Forced Return (GoFR)[257], examined above, specify that in the removal orders and in the process leading to it, the effective remedy afforded to the returnee must be **accessible**. For the above purpose, various elements examined separately in this section (such as time-limits and the access to legal aid) are of relevance.

In addition to these, one of the determining elements of an accessible remedy is the **availability and provision of information** about it to the applicant. The lack of access to information is considered to create major obstacles to asylum seekers' ability to effectively benefit from the relevant protection system. In its case law, the ECtHR underscores the importance of guaranteeing '*anyone subject to a removal measure…the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints*' (*Ilias and Ahmed v Hungary, §116* citing *M.S.S. v. Belgium and Greece*, §§ 301 and 304, and *Hirsi Jamaa and Others*, § 204).

Abdolkhani and Karimnia v. Turkey

In ***Abdolkhani and Karimnia v. Turkey***,[258] Turkey failed to consider the applicants' requests for temporary asylum and to '*notify them of the reasons for not taking their asylum requests into consideration and to authorise them to have access to legal assistance while in Hasköy police headquarters*'. In addition, the applicants had been unable to apply for '*annulment of the decision to deport them to Iraq or Iran as they were never served with the deportation orders made in their respect*' and were not notified of the reasons for their proposed removal.

The Court found *inter alia* that the Applicants had not been afforded an effective and accessible remedy in relation to their complaints under Article 3, in violation of Article 13.

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255 CoE - Committee of Ministers - Guide to good practice in respect of domestic remedies; *M.S.S. v Belgium and Greece*, no. 30696/09, §291

256 CoE HELP Course – Asylum and the ECHR

257 CoE Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005: http://www.refworld.org/docid/42ef32984.html

258 *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, §§ 111-117

The accessibility of information on which the decision to deport is based on – and hence the transparency of the process as a whole, is also relevant to whether the remedy available to the applicant can be considered effective. Insofar as the CoE 20 GoFR are concerned:

> '[…] *in the case of Al-Nashif v. Bulgaria, the Court found that Article 13 ECHR had been violated where the deportation order could not be effectively challenged* ***as it was based on reasons related to national security, making it impossible for the competent Court to collect relevant evidence about the alleged national security reasons****. The Court held that "Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available* […] *Al-Nashif v. Bulgaria (No. 50963/99), para. 137-138).*

1.4.4 Effective 'in practice and law'

Further to the above features, it is a well-established principle that the **effectiveness** of a remedy for the purposes of the Convention is assessed on the basis of its presence both in **law and in practice** (among others: *İlhan v. Turkey* [GC], no. 22277/93, § 97).

The two strands of meaning ("in law and in practice") given to 'effectiveness' for the purposes of this provision, essentially require the remedy under consideration to be provided for both in domestic legislation and also be able to – once triggered – produce effects, preventing or remedying the alleged violation. To this end, relevance is also given to '*the general legal and political context in which they operate as well as the personal circumstances of the applicant*'.[259]

When addressing the issue of preventive remedies, the CoE Guidance states, for instance, that to be effective in practice, such remedies '*must [inter alia] be capable of preventing the continuation of the alleged violation […]*'.[260] This is particularly relevant when considering remedies against removals, where the primary aim is precisely that- to halt the decision to remove, preventing the risks that the individual would face if returned.

259 CoE - Committee of Ministers - Guide to good practice in respect of domestic remedies citing: *Đorđević v. Croatia*, no. 41526/10, §101; *Van Oosterwijck v. Belgium*, no. 7654/76, §36-40

260 Ibid

2. PARTICULAR STANDARDS AND CONSIDERATIONS APPLYING TO EFFECTIVE REMEDIES AGAINST REMOVALS OF FOREIGNERS

2.1 General principles

Over the years, cases involving the removal of foreigners from a CoE Member State to a third country or transfer of aliens between Member States have raised several questions of 'effective remedy' before the ECtHR. Amongst the scenarios examined by the Court, distinctions can be drawn depending on the category of foreigners affected by the measure (irregular migrants, overstayers or criminally convicted aliens as well as asylum seekers or recognised international protection beneficiaries) and in terms of the risk alleged (from violations of absolute rights, under Art. 2 and 3, to allegations under qualified rights, such as Art. 5 or 8). In essence, breaches of the right to an effective remedy can and have been invoked among other reasons, on account of the **procedural or material circumstances of the removal,** the procedural failings affecting **the accessibility of the remedy** or the ineffectiveness of the remedy itself to produce the desired result (Art.2 and 3) or to challenge the failure to assess individual circumstances in the context of a **group return** (Art. 4 Prot. no.4).

The content and scope – in terms of substantive and procedural rights – of the remedy provided to challenge the removal measure has also been examined in detail by the Court, which was able to identify its core components.

The requirements that a remedy must meet in order to be considered effective for the purposes of the ECHR will vary depending on the severity of the consequences that the returnee is likely to face if his/her return is carried out as well as the broader context where the return takes place and the particular circumstances of the applicant.

In the context of Asylum, the ECtHR has given consideration to the particular characteristics of the remedies owed to asylum seekers. Relevance is given to the effectiveness of the remedies available to them, *inter alia,* to challenge detention or expulsion measures or to appeal an asylum decision.

2.2 What is considered 'return' under the ECHR for the purposes of Article 13

The concept of *refoulement* has been amply examined in the previous volume of this Handbook and will not be dealt with in detail for the purposes of this paragraph. For purposes of clarity, it suffices to recall that *refoulement* is considered to occur where there are **substantive grounds** to consider that, if returned, a person would be at risk of treatment contrary to Articles 2 and 3 ECHR. For the purposes of the ECtHR jurisprudence, equal importance is also afforded to cases where the person has been victim of a practice of collective return, as a result of which his circumstances may have been overlooked and he/she could hence face similarly severe consequences from the return. In the ECtHR jurisprudence, situations involving the decision to return aliens – through different procedures and route - to a different country has been understood to include:

2.2.1 Refusal-of-entry orders (*Khlaifia and Others v Italy*)

Example

In ***Khlaifia and Others v. Italy*** **(no. 16483/12)** the Applicants were served with refusal-of-entry orders, which provided for the possibility of an appeal, within a period of sixty days, to the Agrigento Justice of the Peace. However, the applicants alleged that such a remedy would not have stayed the execution of the removal. While the Court eventually did not find a violation of Article 13 of the Convention taken together with Article 4 of Protocol 4, the particular setting of this case makes it an important reference.

2.2.2 Interceptions and push-backs (*Hirsi Jamaa and Others v.Italy* [GC])

Hirsi Jamaa and Others v Italy

In ***Hirsi Jamaa and Others v Italy*** **(no. 27765/09)**, already dealt with under previous sections of this Handbook, the twenty-four applicants were intercepted by the Italian authorities while travelling on three boats from Libya to Italy in 2009 along with around 200 other individuals. The applicants were transferred onto Italian military ships while at sea and returned to Libya. The applicants alleged that the authorities never attempted to identify them nor told them of their destination. Two applicants died in unknown circumstances after the application was lodged, fourteen were granted refugee status by the UNHCR in Tripoli, and since the 2011 revolution in Libya the applicants' lawyer can only make contact with six of the applicants, one of whom has been granted refugee status in Italy.

Further to making important findings on the extraterritorial application of the ECHR in high waters, starting that while on board the Italian ships the applicants were under the *de jure* and *de facto* control of the Italian authorities, the Court found violations of Art 3, insofar as the risk of *refoulement* and *chain-refoulement* were concerned, and of Art. 4 Prot. 4 as the authorities had transferred the applicants to Libya without examining each applicant's individual situation (see further analysis of this aspect in Chapter 2 of this Volume).

As far as remedies are concerned, the **Court ruled that there had been violations of Article 13 in conjunction with Article 3 and of Article 13 in conjunction with Article 4 of Protocol 4** as the applicants had no access to any avenue for obtaining a remedy before they were removed from Italian jurisdiction.

2.2.3 Push backs at land borders/airport transit zones (*Gebremedhin v France*)

Gebremedhin v. France

In ***Gebremedhin v. France*** **(full summary in sections below)** the applicant was an Eritrean national who arrived in France and was held in the airport's international waiting area. He made an urgent application to the Administrative Court requesting leave to enter the country with a view to applying for asylum, which was rejected. The Applicant lodged an application with the ECtHR, which indicated to the French Government, under Rule 39 of the Rules of Court (interim measures)[261] that it was desirable not to remove him to Eritrea for the time being. **The Court determined that the remedy available to the applicant to challenge the decision refusing leave to enter was ineffective because it did not have a suspensive effec**t. The Applicant had not had access to such a remedy while in the waiting area. The Court found a violation of Art. 3 in conjunction with Art 13.

2.2.4 Dublin transfers to a member state considered responsible (*M.S.S. v Belgium and Greece*)

It is important to restate that the prohibition of *non-refoulement* also includes cases of hazardous returns to other CoE Member States. Although historically deportation cases before the ECtHR addressed the responsibility of the expelling State for surrendering an individual to a third State where he/she could face a risk of serious harm under Art. 2 and 3 of the ECHR, the same possibility exists for returns to a country, which is also a member of the CoE.[262] The cases, which are more illustrative of the above point, are those of ***MSS v. Belgium and Greece*** and ***Tarakhel v. Switzerland.*** Both cases have been already examined in earlier sections of this handbook due to their high relevance for the ECtHR's evolving approach to Art.3 in the context of asylum and migration. Very often these cases are termed as 'Dublin cases', as they deal with transfer decisions taken under the EU Dublin Regulation.

M.S.S. v. Belgium and Greece

In ***M.S.S. v. Belgium and Greece*** **(no. 30696/09)** the applicant travelled from Afghanistan to Greece, where his fingerprints were taken, and then to Belgium where he applied for asylum. Under the Dublin Regulation the applicant was returned from Belgium to Greece where he began the process of applying for asylum. After experiencing problems with his asylum procedure and becoming homeless, the applicant was arrested for attempting to leave Greece on false papers. The applicant was held in detention, sentenced to a two-month suspended sentence, and -after a second attempt to leave Greece- was taken by the police to the Turkish borders for expulsion but 'at

261 The European Court of Human Rights may, under Rule 39 of its Rules of Court, indicate interim measures where there is an imminent risk of irreparable harm. For more detail see: ECHR Factsheet-Interim measures available at: https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

262 Please note that all EU Member States are also Council of Europe Member States. Thus, a transfer or return decision from an EU Member State to another EU Member State, under the Dublin Regulation, can also raise ECHR issues, if a violation of an ECHR provision has occurred in the context of this return.

the last moment, the Greek police decided not to expel him, according to the applicant, because of the presence of the Turkish police' (§ 53).

The Court found that there had been a violation of Article 13 of the Convention when read with Article 3 because of deficiencies in the Greek asylum procedure and the possibility that the applicant might suffer the danger of expulsion to Afghanistan without proper examination of his case or access to an effective remedy. Specifically: §321: *'….the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of* ***the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits*** *of his asylum application and without having access to an effective remedy'*.

2.3 Characteristics that a remedy should have in order to be considered effective in a situation where risks under Article 2 or 3 are present

Summary

Requirements for a remedy to be effective in the context of decisions to return:

- The remedy must offer an **effective opportunity to review the return decision** (*Gebremedhin v France*, no 05/25389; *Vilvarajah and ors v. The UK,* nos. ,87/13163 87/13448 ,87/13447 ,87/13165 ,87/13164)
- The remedy must allow the competent "national authority" **to deal with the substance of the complaint** and grant relief (*Vilvarajah and Others*, § 122).
- Provide an "**Independent and rigorous scrutiny**" of the victim's complaint (*Shamayev and Others v Georgia and Russia*, no. 02/36378 and *Jabari v Turkey,* no. 98/40035)
- Have **automatic suspensive effect** to prevent an irreparable harm to the returnee (*Mamatkulov and Askarov v. Turkey*, nos 99/46827 and 99/46951; *Gebremedhin and Hirsi Jamaa and ors v. Italy*) due to "the irreversible nature of the harm" that might arise upon return.

2.3.1 The right to an effective remedy against decisions to return raising risks under Art 2 or 3

In its jurisprudence on returns to a situation of potential risk for the applicant, the ECtHR has placed great emphasis on those cases where the returnee claims that – if implemented – the return decision would expose him/her to a *'real risk of treatment contrary to Article 3 of the Convention or a real risk of violation of their right to life as protected by Article 2 of the Convention'*.[263]

263 CoE - Committee of Ministers - Guide to good practice in respect of domestic remedies, p. 36

As was illustrated in detail in the previous volume of this Handbook, Article 2 and 3 ECHR provide for absolute rights and cannot be derogated from in any circumstance. Given the importance of the rights and interests protected by these provisions, the relevant procedural safeguards owed to applicants are enhanced. In the Court's own words, if carried out, a decision to return an applicant to a situation of risk under Article 2 or 3 could cause a '*potentially irreversible risk*'.[264] In this sense, the **preventive** component of remedies against this type of removal is paramount. The CoE Guide on Article 13 lists some of the core guarantees that must be in place in order to avoid such risks.

In ***F.G. v Sweden*, (no. 43611/11), §111**, among other key precedents, the ECtHR spells out the legal principle underpinning the above, explicitly stating that *'[…] the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 […]* ***where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3*** *in the destination country. In these circumstances,* ***Article 3 implies an obligation not to deport*** *the person in question to that country'* (citing *Saadi v. Italy [GC], no. 37201/06, §§ 124-125).*

In line with the relevant jurisprudence on the issue, in cases where the above risks are alleged, '*the Court['s] […] main concern is whether* ***effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled*** *(Ilias and Ahmed v Hungary §113* citing *M.S.S. v. Belgium and Greece, § 286)'.*

Accordingly, the Court's scrutiny will extend beyond the risk's factors in the country of proposed return, to also consider whether the country in question may subject the applicant to a new, further transfer towards a country where the person could be at risk of Art. 2 or 3 ECHR violations (*chain refoulement,* as above in *Hirsi Jamaa and Others v Italy*). The severity of the violation feared in these cases is such that the Court also requires particular forms of remedies.

In ***Yarashonen v Turkey*** (no. 72710/11), §61, the Court provided that: '*where the fundamental right to protection against torture, inhuman or degrading treatment is concerned,* ***preventive and compensatory remedies have to be complementary in order to be considered effective*** *[…] the existence of a preventive remedy is indispensable for the effective protection of individuals against the kind of treatment prohibited by Article 3'*. This citation shows the importance attached by the Court to the prohibition provided under Article 3 and the irreparable harm that would arise where a risk under this provision could occur.[265]

Along these lines, the ECtHR found in *M.S.S.* that: '§293 *[…] the effectiveness of a remedy within the meaning of Article 13* ***imperatively requires*** *[…] independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 […]'.*

264 *Hirsi Jamaa and ors v. Italy*, no. 27765/09, §§ 199-200

265 See CoE HELP Course – Asylum and the ECHR, citing *De Souza Ribeiro v France*, §82

It is further worth to recall that when a complaint is made that a return could expose the applicant to risks under Article 2 or 3, the **conduct of the returnee is immaterial** to the State's assessment of his case. The severity of the offences for which an alien may have been convicted or investigated, including affiliation to terrorism or other serious crimes, cannot be considered as an element justifying his/her deportation.[266]

K.I. v. Russia

In ***K.I. v. Russia* (no. 58182/14)**, the applicant, a national of Tajikistan, arrived in Russia in 2003. He was convicted *in absentia* in 2011 for being a member of an 'extreme religious' group. His extradition was requested by the Tajik prosecution authorities. The Russian authorities refused his extradition on the basis that he had committed no culpable actions under Russian law. The applicant was later rearrested for migration related offences, and detained pending administrative removal. His application for asylum was rejected.

The applicant alleged that his removal to Tajikistan **would violate Article 3 ECHR as he would face persecution for extremism and a real risk of ill-treatment at the hands of the law-enforcement agencies of the country if he were to return to Tajikistan.**

The Court found a violation of Article 3 ECHR. In relation to his administrative removal, Russian authorities failed to carry out a rigorous scrutiny of the applicant's claim that he would be subject to ill-treatment. Instead, they cursorily rejected his asylum application. Likewise, by refusing to extradite him, the Russian authorities did not remove the risk of ill-treatment upon return to Tajikistan; his administrative removal would expose him to the same real risk of ill-treatment that his extradition would have.

The court also found a violation of Article 5(4) in that the appeals process available did not constitute a prompt and effective remedy by which to challenge his detention. No violation of Article 5(1) was found.

2.3.2 Remedy with '*automatic suspensive effect*'[267]

As a general rule, in cases where return is threatened, an applicant with an arguable claim under Article 2 or 3 should be granted a remedy **with automatic suspensive effect**. In essence, when endowed with a 'suspensive' effect, the remedy effectively halts the execution of a certain decision, preventing its effects.

The need for remedies against expulsion to have a 'suspensive' effect is arguably one of the most litigated and controversial aspects of the issue of deportation and access to effective remedy. In the context of decision to return of aliens to their country of origin or previous residence, resorting to a remedy with suspensive effect stops, at least temporarily, the administrative and other practical arrangements required to remove the alien from the country where he/she is present. This high level of protection is also afforded

266 FRA Handbook, footnote no.158, citing *Chahal v. the UK*, No. 22414/93, §§150-151

267 See FRA Handbook on European law relating to asylum, borders and immigration - 2014 edition p. 102 and subsequent

when complaints under Article 4 of Protocol No. 4 have been lodged. This is examined in detail below.[268]

Gebremedhin v. France

In ***Gebremedhin v. France,* 25389/05,** the applicant was an Eritrean national who arrived in France and was held in the airport's international waiting area. He made an urgent application to the Administrative Court requesting leave to enter the country with a view to applying for asylum, which was rejected. The Applicant lodged an application with the ECtHR, which indicated to the French Government, under Rule 39 of the Rules of Court (interim measures) that the applicant must not be removed to Eritrea temporarily.

A specific border procedure to request an admission into the country on asylum grounds is provided by French law for foreign nationals arriving on French territory through airports or harbours. The Border guards interview the asylum seekers and formulates a binding opinion that is communicated to the Ministry of Interior. Foreign nationals are then held in a 'waiting area' while the authorities examine whether or not their intended asylum application is 'manifestly ill-founded'. If the authorities deem the application to be 'manifestly ill-founded', they refuse the person concerned leave to enter the country. He or she is then automatically liable to be removed without having had the opportunity to apply for asylum. While the individual in question could apply to the administrative courts to have the Ministerial decision refusing leave to enter set aside, such an application had no suspensive effect and was not subject to any time-limits.

The Court determined that the remedy available to the applicant to challenge the decision refusing leave to enter was ineffective because it did not have suspensive effect. Given the importance of Art. 3 and the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialised, it was a requirement of Art. 13 that, where a State decided to remove a foreign national to a country where there was real reason to believe they might face a risk of such ill-treatment, the person concerned must have access to a remedy with automatic suspensive effect (a remedy with such effect 'in practice' was not sufficient). The Applicant had not had access to such a remedy while in the waiting area. The Court found a violation of Art. 3 in conjunction with Art 13.

Abdolkhani and Karimnia v. Turkey

In ***Abdolkhani and Karimnia v. Turkey*,**[269] Turkey failed to consider the applicants' requests for temporary asylum and to '*notify them of the reasons for not taking their asylum requests into consideration and to authorise them to have access to legal assistance while in Hasköy police headquarters*'. In addition, the applicants had been unable to apply for '*annulment of the decision to deport them to Iraq or Iran as they were never served with the deportation orders made in their respect*' and were not notified of the reasons for their proposed removal.

The remedy in place against the removal in the country **did not have an automatic suspensive effect** – that could only be ordered at the discretion of the administrative court. The above circumstances were considered to violate the applicants' rights under Art.13 in conjunction with Art.3 to have an effective remedy against *refoulement.*

268 CoE - Committee of Ministers - Guide to good practice in respect of domestic remedies, p. 36 citing *Conka v. Belgium*, no. 51564/99, §§ 81-84

269 *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, §§ 111-117

Further to the above, in its ruling in ***I.M. v. France,*** the ECtHR underlined that the effectiveness of an appeal *'depends on the requirements of* ***quality, speed and its suspensive effect****, considering in particular the importance the Court attaches to Art. 3 and the irreversible nature of the harm likely to be caused if the risk of torture or ill-treatment should be realised'*[270].

I.M. v. France (No. 9152/09)

In this case the applicant, a Sudanese national had fled Sudan after having been held in detention, travelling to Spain with a view to crossing the border into France, carrying a forged French visa. The applicant was arrested in France for 'unlawful entry' and 'using forged documents'. He was sentenced to one months' imprisonment for an offence under aliens' legislation. While in detention, he filed an asylum application that was not registered by the competent authority. Subsequently, steps were taken with a view to his deportation. The applicant did not receive adequate linguistic or legal assistance to challenge his removal. Eventually, the applicant filed an asylum application, which was registered to be treated under the 'fast track' procedure, intended for manifestly inadmissible or unfounded claims, which were deemed to include those made in the context of expulsion. Following his asylum application, the applicant again did not receive adequate assistance and his asylum interview presented serious deficiencies. As action was being taken to deport him, the applicant **requested and obtained, under Rule 39, the indication of an interim measure** by the ECtHR with a view to stay his expulsion.

Finding a violation of Art 13 in conjunction with Art.3, the ECtHR established that the processing of the applicant's claim under the fast track procedure did not deprive the applicants of a detailed review of their claims. However, the applicant had been forced to file his application to the administrative Court in an extremely short timeframe, therefore so, although in theory it would have been capable to stop the execution of the deportation, such remedy had been only available in theory but not in practice. Also he had not been afforded all the relevant guarantees in terms of legal and linguistic assistance that would have made his remedy effective.

Not in all cases where a risk for the human rights of the returnee is alleged, however, will the remedy need to have a suspensive effect. As mentioned above, the importance of suspensive effect is in fact connected to allegations of **irreparable consequences that would follow from the implementation of the decision**. In this sense, the **remedy's ability to effectively halt the decision to return** is central to the very concept of a 'suspensive remedy', to the effect that: '*the mere possibility to request suspensive effect is in principle not sufficient (Gebremedhin v. France)'*.[271]

Conversely, in presence of allegations that removal would expose the applicants to risks of violation of non-absolute rights (qualified rights) under the Convention, '*a remedy with suspensive effect is not normally required*'.[272] This is normally the case where qualified ECHR rights (such Article 5 or 8) are at stake, and the State is hence allowed a margin of discretion in balancing the interests at stake. Therefore, in presence of risks other than those

270 *I.M. v France*, no. 9152/09, § 132

271 CoE HELP Course – Asylum and the ECHR

272 *De Souza Ribeiro v. France* [GC], no. 22689/07, § 83

under Art. 2 and 3 (e.g. Art.8): '*it is not imperative [for a remedy to] have automatic suspensive effect [but] the effective possibility of challenging the deportation' should be granted and sufficient procedural safeguards should afforded (Al-Nashif v. Bulgaria, no. 50963/99)'.*

In the case of *De Souza Ribeiro* the issue of remedy against return decisions posing risks under qualified rights of the Convention was addressed explicitly, considering the impact of a return decision on the Applicant's Article 8 rights.

***Summary adapted from the ECtHR Information Note on the case*

De Souza Ribeiro v. France [GC] **- 22689/07** – in this case the applicant, a Brazilian national, who lived in French Guiana with his family from 1988, had failed to prove valid residence upon being stopped by the police when he was 7 years old. As a result he was served with administrative orders for his removal and was placed in detention pending removal. In spite of his prompt attempt to request a stay on the execution of the return, he was deported to Brazil 50 minutes after the order had been issued. The Court considered the applicant's claim under Article 13 in conjunction with Article 8, noting that while the applicant **had in principle been able to resort to a remedy** fulfilling requirements of independence, impartiality and competence to examine his complaints, the **brevity of the period between the applicant's application to the administrative court and his removal had excluded any possibility that the court had seriously examined the circumstances** and legal arguments for and against finding a violation of Article 8. The Court recalled that the discretion the States were afforded regarding the manner in which they conformed to their obligations under Article 13 could not be exercised in a way that deprived applicants of the minimum procedural safeguards against arbitrary expulsion. In the light of all the foregoing, the applicant had not had access in practice to effective remedies in respect of his complaint under Article 8 of the Convention when he was about to be deported.

Whilst a Chamber of the Court in its judgement in 2011 found the complaint inadmissible for lack of victim status on the grounds that the administrative court had acknowledged the unlawfulness of the measure on the basis of which the applicant had been deported to Brazil and the applicant had subsequently been able to return to France and obtain a renewable residence permit, the Grand Chamber found that the situation had not been remedied by the eventual issue of a residence permit and dismissed therefore the Government's submissions in this regard.

2.3.3 Independent and rigorous scrutiny[273]

As far as the substance of the review of a situation of potential *refoulement* (as above) is concerned, the State authorities are also under a duty to comply with heightened procedural obligations. Specifically, when a violation of Art.13 is alleged in conjunction with Art.3 in the context of return, the assessment of the effectiveness of the remedy also depends upon the conducting of an '**independent and rigorous scrutiny'**.[274]

273 *Ibid* 108 and *Muminov v. Russia*, no. 42502/06, § 101; *Gebremedhin v France*, no. 25389/05, § 66; *Jabari v Turkey,* no. 40035/98, § 39

274 *Ibid* 108 and *Muminov v. Russia*, no. 42502/06, § 101; *Gebremedhin v France*, no. 25389/05, § 66; *Jabari v Turkey,* no. 40035/98, § 39

The quality of such scrutiny will depend on different components that will be examined in detail below. In order to give a broad sense of what is considered relevant by the Court when assessing whether the authorities were able to provide a satisfying examination of the claim in practice, reference can be made again to *Ilias and Ahmed v Hungary* (Grand Chamber judgment pending), which sums up some of the most recurring procedural failures in cases involving the return of asylum seekers to a situation of potential hazard.

In §124 of this case, the Court considered that '*the procedure applied by the Hungarian authorities'* had been *'not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment'*. This was due to the fact that the assessment of the safety of the country of proposed return had been made relying *'on a schematic reference to the Government's list of safe third countries […] disregard[ing] the country reports and other evidence submitted by the applicants and imposed an unfair and excessive burden of proof on them'*.

2.3.4 In the context of accelerated asylum procedures

Accelerated/priority asylum procedures – depending on the domestic definition used – are a procedural route to assess asylum claims within a shorter procedural framework and, often in practice, with curtailed procedural safeguards. Border procedures, intended as the fast-track examination of asylum claims at the border, will normally fall under this definition. States are allowed to use such procedures, within certain conditions, when dealing with manifestly ill-founded, repetitive claims or other cases for which the full examination of the claim is not considered necessary.[275] The specific hypotheses in which the use of accelerated procedures will be legitimate depends – in practice – on the conditions set by the State in its domestic law. However, some limits to their use exist.[276]

In particular, since accelerated procedures lend themselves to offer lower procedural safeguards – to an extent inherent to their stricter timeframe – it is crucial that the use of such procedures does not wholly deprive the person subjected to it to his/her right to an effective remedy.

The issue will be further dealt with under the **individual procedural safeguards** listed in the sections below and has been explicitly addressed by the Court in the case of ***I.M. v. France***, also examined in section 2.3.2 above and below.

275 FRA Handbook on European law relating to asylum, borders and immigration p. 105: '*Under EU law, Article 31 (8) of the Asylum Procedures Directive lists 10 situations in which accelerated procedures might be applied, such as when an application is considered unfounded because the applicant is from a safe country of origin or when applicants refuse to give their fingerprints. While the basic principles and guarantees set forth in the directive remain applicable, an appeal may not have automatic suspensive effect such that the right to stay during the appeal procedure must specifically be requested and/or granted on a case by case basis […] In practice, accelerated procedures may also have shorter deadlines in which to appeal a negative decision*'

276 When a EU MS is under consideration, for instance, accelerated and border procedures are regulated under the rAPD

2.4 Right to an effective remedy in the context of collective expulsion under Article 4 of Protocol no. 4

The general principles applying when a return decision raises issues under Article 2 or 3, and the individual safeguards and procedural obligations that must be respected to avoid breaches under Article 13 in conjunction with these provisions have already been examined in the sections above. It has however been emphasised that Article 13 is not an autonomous provision and, as such, must be invoked in conjunction with a separate substantive article under the ECHR. In the context of returns, claims that the State's decision to return had a 'collective' dimension also raise important questions in terms of remedies. As collective expulsions are prohibited under Article 4 of Prot. No. 4 ECHR, a returnee's concerns under this provision must also be addressed by adequate procedural guarantees.

As is examined in detail in the first volume of this Handbook, the distinguishing feature of collective expulsions as a practice is the failure to duly assess the individual circumstances of each of the individuals subjected to the measure, hence overlooking potential risk factors. The 'collective' aspect of returns hence relies primarily on a procedural failure.

To date, the ECtHR has only ruled on the merits of 6 cases under Article 4 of Protocol no 4 (A4P4) but not in all of these has it explicitly addressed Art. 13. The Court has however considered Art.13 in conjunction with A4P4 in the cases of *Conka v. Belgium,* no. 51564/99*, Hirsi Jamaa and Others v Italy,* no 27765/09*, Khlaifia and Others v Italy,* no. 16483/12 and *ND and NT v Spain,* nos. 8675/15 and 8697/15.[277] In these cases, in addition to other legal issues, the Court also considered the characteristics required for a remedy to be effective in practice as well as in law in the context of collective expulsions.

In the case of *Conka*, particularly, the Court considered whether '*the expulsion in question afforded "sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account"*' (§*63).*[278]

As a general rule, in cases involving risks of a violation of A4P4 the Court has so far extended the same considerations applying in presence of risks under Article 2 and 3 (above). Hence, the need for an *'independent and rigorous scrutiny'* and *'the possibility of suspending the implementation of the measure impugned'*[279] also apply in these scenarios.

In addition to the above, the Court has found that in order for a remedy to address a violation of A4P4, it must also provide for an effective possibility to challenge the 'collective' dimension of the return decision.

In *ND* and *NT*, for instance, the applicants complained that the *modus operandi* of the Spanish border guards had been unsuitable to the aim of **establishing their identity,**

277 These cases have been examined from different vantage points in the previous chapters of this Handbook

278 CoE HELP Course – Asylum and the ECHR– citing *Conka v. Belgium*, no. 51564/99

279 *Hirsi Jamaa and Others v Italy*, no. 27765/09, §198-199, citing *Conka v. Belgium*, no. 51564/99

assert their individual circumstances and **challenge the decision to return them through an appeal with suspensive effect.**[280]

In the recent case of *Khlaifia*, also examined in previous chapters, the applicants complained for '*the lack of any effective remedy by which to challenge their expulsion from the perspective of its collective aspect' (§ 272).*

In the Chamber judgement, the Court found a violation of Art.13 in conjunction with Art.4 Prot.4 insofar as the remedy available in the concrete case would not have had suspensive effect and hence failed to '*meet the requirements of Article 13 of the Convention [….] as established in De Souza Ribeiro […] the requirement under Article 13 that execution of the impugned measure be stayed* ***cannot be regarded as a subsidiary aspect'.***[281] Regrettably, this finding was not confirmed by the Grand Chamber judgement on the same case.

In ***Conka v Belgium***, the Court addressed a case of removal from Belgium of Slovak nationals of Roma origin, who had been the object of racist attacks in Slovakia in response to which no action had been taken by the police. In this case, the Court applied the criteria elaborated in *Andric,*[282] this time finding that in the specific circumstances of the case, the lack of sufficient procedural guarantees had been of such degree that an individual assessment of the cases could not have occurred in practice, hence giving rise to a violation of **Art.4 Prot.4.**

Conka v Belgium

Summary re-adapted from the ECtHR factsheet on Art. 4 Prot. 4

The applicants in this case were Slovakian nationals of Roma origin. They had fled from Slovakia where they claimed to have been subjected to racist attacks in which the police were unwilling to intervene and for these reasons applied for asylum in Belgium. The Belgian authorities rejected their claims as inadmissible and refused them permission to enter. They were later deceived into presenting themselves at a police station and were there served with an order to leave the territory, a decision to remove them to Slovakia and a detention order. The applicants were then taken to a closed transit centre and were deported 5 days later along with a number of other Slovakian families. The applicants complained in particular about the circumstances of their arrest and expulsion to Slovakia.

The Court held that there had been a violation of Article 4 of Protocol No.4, noting that the expulsion procedure had not incorporated sufficient guarantees that would demonstrate that each applicant's personal circumstances had been genuinely and individually considered. The Court reiterated the principle and definition of collective expulsion formulated in *Andric v Sweden*, adding the important

280 *ND and NT v Spain,* nos .8675/15 and 8697/15, §109

281 Khlaifia and Others v Italy, no. 16483/12, §71, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 388, *Hirsi Jamaa and Others*, no. 27765/09, §206

282 *Čonka v Belgium*, no. 51564/99, § 59: '*The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, 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 (see Andric, cited above). That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.*'

element whereby, even in presence of a genuine individual assessment of the circumstances has taken place, the background to the execution of the expulsion orders also plays a role in determining whether there has been compliance with Art. 4 of Prot. 4.

In the Court's view, the procedure followed by Belgian authorities did not enable them to eliminate all doubt that the expulsion might have been collective. This was reinforced by several factors:

- The political authorities had previously given instructions to the relevant authority for the implementation of operations of that kind;
- The aliens concerned had been required to attend the police station at the same time;
- The orders served on them requiring them to leave the territory and for their arrest were put in identical terms;
- It was very difficult for the aliens to contact a lawyer;
- The asylum procedure had not been completed.

This case therefore underlines the fact that procedural details such as these are crucial in determining whether a breach of Art.4 Prot.4 has occurred.

The ECtHR, thus, in *Conka*, added a new element to its assessment of whether a violation of Art.4 Prot.4 has occurred in practice, observing that, even in presence of return decisions targeting individual returnees, **the background to the execution of the expulsion orders itself plays a role in determining whether there has been compliance with this provision.**[283] In *Conka* the elements considered included:

- The observation that the political authorities involved had been instructed to carry out similar expulsion operations in the past;
- There had been a **lack of access to a lawyer;**
- The **incomplete assessment of the asylum claims** filed by the applicants.

As to the formal requirements of the expulsion decision: In this case, although enacted through individual measures, the expulsion orders had been formulated in **identical terms** to the effect that the individual assessment had only taken place in procedure of issuance of the expulsion measure but not in examination of the substance of the claim. This need for a substantive individual examination of each claim now constitutes an important element of assessments carried out under Art.4 of Prot.4.

In addition to the above, the reasoning of the Court in *Conka* appeared to break new grounds in terms of **burden of proof** issues: a *prima facie* case under Article 4 of Protocol No. 4 would shift the burden to the government to prove that a violation has not taken place.[284] The Court found that '*the procedure followed [by the state authorities] did not enable it to eliminate all doubt that the expulsion might have been collective*' .[285]

In particular, the Court noted that '*at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford suffi-*

283 *Čonka v Belgium*, no. 51564/99, §59

284 Mole, Nuala; Meredith, Catherine, *Asylum and the [ECHR]*, previously cited in full, p.127

285 *Ibid*

cient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account'.[286] Based on this reasoning, the Court accepted that in order to demonstrate that cases were dealt individually - and hence to dispel a risk of collective expulsion - it is essential that the relevant procedures put in place by the authorities provide adequate guarantees.

3. RULES ON THE ASSESSMENT OF THE APPLICANT'S CLAIM AND INDIVIDUAL PROCEDURAL GUARANTEES IMPACTING THE ACCESS TO AN EFFECTIVE REMEDY IN THE CONTEXT OF RETURN DECISIONS (INCLUDING DUBLIN TRANSFERS)

So far some of the general principles applying to remedies against a decision to return to face potential risks under the ECHR have been examined, outlining in broad terms the concept of 'effectiveness' in relation to domestic remedies. This section will look at the issue of **individual procedural guarantees and conditions** the availability of which – or lack thereof – has been given weight by the Court in assessing whether the domestic authorities carried out an adequate assessment of the applicant's claim. These procedural aspects normally do not only pertain to Article 13 but also usually involve the **procedural limb** of Article 3.

In the Court's jurisprudence, the procedural conditions considered to have particular importance in return decisions include the **adequate length** of the procedural times, respect for the **returnee's language needs** (right to be informed of the decision in a language of one's understanding or – where necessary – be assisted by an interpreter) and his/her **right to receive legal information and assistance**. These and other guarantees will be examined in detail below through ECtHR case-examples providing leading guidance on each issue.

The case of *M.S.S.* touches upon most of the procedural shortcomings deemed to impact asylum seekers' effective access to procedures, including for those subjected to Dublin returns. In the case these are summarised as follows (§301):

- '*insufficient information for asylum-seekers about the procedures to be followed;*
- *difficult access to the Attica police headquarters;*
- *no reliable system of communication between the authorities and the asylum-seekers;*
- *a shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews;*
- *a lack of legal aid effectively depriving the asylum-seekers of legal counsel;*

286 *Čonka v. Belgium*, no. 51564/99, §63

- *and excessively lengthy delays in receiving a decision'.*

Due to the above the Court found in §321:*'[..] the preliminary objections raised by the Greek Government (see paragraph 283 above) cannot be accepted* ***and the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request*** *and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy'*(emphasis added).

Some of the above elements will be dealt with in greater detail in the following sections.

3.1 Adequate time limits

A key element that contributes to the effectiveness of the remedy has to do with the remedy's ability to produce effects in a prompt manner. In the cited case of *De Souza Ribeiro*, §82, '*the speediness of the remedial action itself'* and the requirement for the remedy to operate with '*reasonable promptness'* are also tied to its effectiveness, as *'the adequate nature of the remedy can be undermined by its excessive duration'*.[287]

Similarly, an excessively short time limit can also reduce the applicant's ability to present his/her claim effectively. In ***Jabari v. Turkey***, for instance, the Court deemed the '*automatic and mechanical application' of a 5-day time limit' for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Art. 3 of the Convention*' (§40).

This issue also raises the question of whether **accelerated/fast-track procedures can be in violation of Art. 13 as far as this aspect is concerned** (this issue was already examined in section 2.3.4 of this chapter) .

In its ruling in ***I.M. v. France,*** presented above, the ECtHR summed up many of the above aspects, underlining that the effectiveness of an appeal '*depends on the requirements of quality, speed and its suspensive effect, considering in particular the importance the Court attaches to Art. 3 and the irreversible nature of the harm likely to be caused if the risk of torture or ill-treatment should be realised'*.

3.2 The Applicant's duty to substantiate the risk

According to the Court's established case law, it is in principle for the person alleging the violation to provide some evidence to show the risks that he/she would be faced upon return. In spite of this, the Court provides for a series of exceptions and more favourable considerations applying to claims involving asylum seekers.

287 CoE HELP Course – Asylum and the ECHR, citing *De Souza Ribeiro v France,* no. 22689/07; also *M.S.S. v Belgium and Greece*, no. 30696/09, §292

- ***Ilias and Ahmed v Hungary***, §115 '*It is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of it, and to adduce evidence capable of proving that there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of treatment in breach of Article* 3'.

While individual seeking international protection are also required to provide elements in support of their claim, the Court concedes that '*in relation to **asylum claims based on a well-known general risk**, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on States under Article 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion' (M.S.S. v. Belgium and Greece, § 366,* among others). [288]

Similarly, where the applicant specifically claims to be '*a member of a group systematically exposed to […] ill-treatment'*, special considerations also apply, in that the protection of Art.3 will be engaged where there are '***serious reasons** to believe in the existence of [such] practice […] and in his or her membership of the group concerned*', at variance with the general principle whereby claims under Article 3 require to be backed by **substantial grounds**.[289]

The above exception is a reflection of the broader approach taken by the Court when it comes to asylum seekers, who are sometimes granted more favourable conditions in terms of procedural obligations owing to them being part of a vulnerable group and their '*special situation'*. Based on these circumstances, the Court considers it '*frequently necessary to give [asylum seekers] the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof'*.[290]

The case of ***Ilias and Ahmed***, already cited above, is a perfect example of the above principle. As mentioned, the case concerned the return of failed asylum seekers from Hungary to Serbia. The ECtHR observed that the applicants' removal had been ordered pursuant to a Government Decree, which had listed Serbia as a 'safe third country', establishing a presumption of safety in this respect (§120 of the judgement).

The application of this provision had resulted in '*a reversal of the burden of proof to the applicants' detriment including the burden to prove the real risk of inhuman and degrading treatment in a chain-refoulement situation to Serbia and then the former Yugoslav Republic of Macedonia, eventually driving them to Greece*'. Restating its jurisprudence on the field of *non-refoulement,* with regard to the burden

288 Also *F.G. v Sweden*, no. 43611/11, §126

289 *F.G. v Sweden,* §127: '...considering the absolute nature of the rights guaranteed under Art[2 and 3 ECHR], and having regard to the position of vulnerability that asylum seekers often find themselves in, if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under [Art.2 and 3] entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned'

290 *F.G. v Sweden*, no. 43611/11, §113

of proof in *non-refoulement* cases the ECtHR reminded that while it is in principle for the applicants to substantiate their claim under Art.3, where such claim is based on a well-known general risk, and ascertainable from a wide number of source, States have a duty to carry out an assessment of such risk of their own motion. This case is currently pending before the Grand Chamber of the ECtHR.

3.3 *Ex nunc* and *ex tunc* assessment of the risk

As explained, under the ECtHR jurisprudence, the applicant alleging an Art. 2 or 3 violation must provide adequate evidence in this respect, unless the situation of risk **is a well-known one** and the authorities are expected to ascertain the risks upon return through elements obtained *propriu motu*.

Once provided with the necessary information, the authorities must assess the existence of the situation of risk alleged by the applicant. In this respect, the **temporal scope** of the authorities' scrutiny is of central importance. It can often be the case that external developments in the country of origin or proposed return or changes relating to the Applicant's personal circumstances can have a decisive impact on whether there is an ongoing risk for him/her.

Aim of any challenge to a potentially harmful decision to return is to halt the transfer and prevent potential negative consequences on the applicant. It is therefore crucial that the authorities are alert to the importance of carrying out an ***ex nunc* assessment** of the returnee's case. An '*ex nunc*' assessment essentially requires the authorities to consider the circumstances of the returnee and the conditions of the country of return **at the moment in time when the return should be carried out, so as to consider any development occurred at a late stage.**

As mentioned, the elements considered for the purposes of the *ex nunc* assessment can include both **changes in the personal circumstances** of the returnee and developments in the country of proposed return.

For instance in *F.G. v Sweden* the Court examined the case of an asylum seeker of Muslim faith who had converted to Christianity during his stay in the country. This development was considered crucial to the new assessment of his circumstances.

3.4 Effective chance to rebut the presumption of safety

The previous volume of this Handbook introduced the concept of '**safe third country**' (STC) and '**first country of asylum**' (FCA), which operate on the assumption that a third country can constitute a safe haven for a particular asylum seeker and he/she could hence be legitimately transferred from the country where he is present to such third country and be offered sufficient protection.

The concept of STC and FCA have proved to be controversial, in law and practice, in that they create rigid assumptions on country's safety, which may result in the underestimation of the individual risk factors present in a particular case and in a broader downgrading of the procedural guarantees afforded in practice. To avert risks that the recourse to a presumption of safety may create in the particular circumstances of a case, the ECtHR has elaborated a series of procedural rules that aim to ensure that the applicant is able to challenge and raise objections to the application of these rules.

In this sense the Court provides as a general rule that '*the applicant shall be able to challenge – and rebut – the presumption that a country is safe for her or him, is well entrenched in the Court's jurisprudence. However, the Court must also ensure that such possibility is practical and effective and that the national remedies and procedures are adequate to enable the applicants to effectively put forward their arguments, so as to avoid placing the entire burden of proof on them*'.[291]

This issue has currently been brought to the attention of the Court in the communicated case of *J.B. v Greece*, no. 54796/16,[292] which looks at the concept of STC and returns of asylum seekers to Turkey under the EU-Turkey press statement.

3.5 Documentary Evidence

Leaving aside the Applicant's input into the elements considered by the Court to determine whether there would be risks for him/her upon his transfer to the country of proposed return, the Court's assessment will also be informed by objective information able to corroborate or disprove the Applicant's version.

As an established principle in the Court's jurisprudence, the existence of reports and other documentation produced by credible and authoritative NGOs and other International Organisations, UN bodies or other member states, is of particular relevance to the issue.

This is made explicit by the Court in ***F.G. v. Sweden,*** § 113 where it is states that the State's assessment of the returnee's complaint must be *'[…] adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations […]'*.

The existence of consistent, frequent reports substantiating the claims and allegations advanced by the applicant has been ordinarily relied upon by the Court in both STC and Dublin return cases. (See *M.S.S. v Belgium and Greece*, no. 30696/09*, § 353; T.I. v The Unit-*

291 ECRE, The ECtHR Ruling in Ilias and Ahmed: 'safe third country' concept put to the test, online journal, April 2017, at: http://www.asylumlawdatabase.eu/en/journal/ecthr-ruling-ilias-and-ahmed-%E2%80%98safe-third-country%E2%80%99-concept-put-test – (case currently before the Grand Chamber)

292 *J.B. v. Greece*, no.54796/16. The AIRE Centre, ICJ, DCR, and ECRE have jointly submitted a third-party intervention before the Court in this case, available at: http://www.asylumlawdatabase.eu/en/content/jb-v-greece-applno5479616-third-party-intervention-aire-centre-icj-dcr-and-ecrett

ed Kingdom, Application No. 43844/98, Decision as to the Admissibility, p. 16*; Tarakhel v Switzerland,* no. 29217/12, § 57)

3.6 Diplomatic Assurances

Amongst the elements considered by the Court to determine whether a decision to return would cause risks for the Applicant in a particular circumstance, the Court ordinarily takes into consideration whether the authorities of the country of proposed return offer adequate assurances that the Applicant will be provided protection. Depending on the concrete circumstances of the case, it is not always possible for the country examining the claim to obtain such assurances. Furthermore, even where assurances are provided, they may not satisfy the conditions required by the Court for them to be considered reliable. Depending on the circumstances of the case, diplomatic assurances will be significant but not conclusive of whether the risk of violations upon return will be wholly averted.[293]

The leading case of *Othman (Abu Qatada) v. the UK*, no. 8139/09, constitutes the leading precedent in this sense, as it lists some of the issues that will need to be specifically considered when examining the quality and reliability of the assurances provided in the particular case.

Currently, the Court's established position on the issue of diplomatic assurances can be summarized as follows:

1. '*Assurances* ***are not in themselves sufficient to ensure adequate protection*** *against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment'* (*Othman (Abu Qatada) v The UK*, §187);
2. In order to be considered adequate to dispel serious risks for the applicant upon return, the diplomatic assurances provided by the country of proposed return must be assessed – in each case - against the background of 'the **circumstances prevailing at the material time'**. (*Othman (Abu Qatada) v The UK*, § 187 citing *Saadi v Italy*, no. 37201/06, § 148);
3. In certain contexts, the general human rights situation in a country can be such that accepting Assurances from the country's authority should be excluded as a possibility (*Othman (Abu Qatada) v The UK,, §194*);
4. In addition to reflecting the conditions in the country at the time of the proposed return, the assurances provided by the receiving country must be **individualised**, i.e. they should not be expressed in broad, general terms and should make explicit reference to the particular situation and needs of the returnee (***M.S.S. v Belgium and Greece****, §354,* the assurances of the Greek Government '*contained no guarantee concerning the applicant in person. Nor did [they] contain any individual guarantee'*);

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Saadi v Italy

In ***Saadi v Italy*** the Tunisian authorities – that would have been entrusted with the return of the Applicant - initially failed to provide the assurances requested by Italy and only later provided a *note verbale* generally stating Tunisia's respect for prisoners' rights and accession to International instruments (§147).

Similar considerations were made in relation to the Belgian Government's assertion, in ***M.S.S. v Belgium and Greece***, *§354*, that the assurances provided by the Greek Government that they would have agreed to receive the applicants had been reliable. The Court noted in particular that: '*the agreement document was worded in stereotyped terms […] and contained no guarantee concerning the applicant in person. Nor did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice'.*

5. **The quality of the assurances**, and hence their reliability, is judged by the Court on the basis of a series of 11 criteria elaborated in the case of ***Othman (Abu Qatada) v The UK***, §189 (some of the following have already been mentioned above but are recalled for sake of completeness):
   i. *Whether the terms of the assurances have been disclosed to the Court (Ryabikin v. Russia, no. 8320/04, § 119; Muminov v. Russia, no. 2242502/06 § 97);*
   ii. *Whether the assurances are specific or are general and vague (Saadi; Klein v. Russia, no. 24268/08 § 55; Khaydarov v. Russia, no. 21055/09, § 111);*
   iii. *Who has given the assurances and whether that person can bind the receiving State (Shamayev and Others v. Georgia and Russia, no. 36378/02, § 344* and ors*);*
   iv. *If the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them (Chahal, §§ 105-107);*
   v. *Whether the assurances concerns treatment which is legal or illegal in the receiving State (Cipriani v. Italy (dec.), no. 221142/07; Youb Saoudi v. Spain (dec.), no. 22871/06,* and others)
   vi. *Whether they have been given by a Contracting State (Chentiev and Ibragimov v. Slovakia (dec.), nos. 21022/08 and 51946/08; Gasayev v. Spain (dec.), no. 48514/06)*
   vii. *The length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances (Babar Ahmad and Others, §§ 107 and 108; Al-Moayad v. Germany (dec.), no. 35865/03, § 68);*
   viii. *Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers (*Among others: *Kolesnik v. Russia, no. 26876/08, § 73)*
   ix. *Whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing*

to investigate allegations of torture and to punish those responsible (Ben Khemais, §§ 59 and 60; Soldatenko, § 73, Koktysh v. Ukraine, no. 43707/07, § 63);

x. *Whether the applicant has previously been ill-treated in the receiving State (Koktysh, § 64); and*

xi. *Whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State (Gasayev; Babar Ahmad and Others¸ § 106; Al-Moayad, §§ 66-69);*

6. The requirement to obtain diplomatic assurances by the country of proposed return is not satisfied by the mere proof of the 'existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights' especially where evidence to the contrary is reported by authoritative sources (*Saadi v Italy, §148*);
7. The existence of '***reliable sources*** *[reporting] practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention'* in the country of proposed return must be given due consideration when assessing the reliability of the diplomatic assurances provided (*Saadi v Italy, §148*);
8. In cases where the diplomatic assurances are provided by the Country of return, the ECtHR maintains in its powers that '*to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (Saadi v Italy, §148 citing Chahal, § 105).*

T.I. v. The UK

In one of the leading cases on the issue of diplomatic assurances, ***T.I. v. The UK***, 43844/98, the Court was satisfied, on the basis of diplomatic assurances by the German Government, that the applicant's claims, if accepted by the authorities, could fall within the scope of section 53(6) of the relevant domestic law, which would have afforded the applicant with protection. The Court found that it was largely a matter of speculation that the authorities might still reject the Applicant's case. Therefore to the extent that there was a possibility of the applicant's removal, it was not shown to be sufficiently concrete.

3.7 Individual procedural safeguards

3.7.1 Right to obtain information for the effective exercise of the remedy

Having the information necessary to challenge a decision to return is crucial to the very accessibility of the remedy. Such information should cover both the procedural conditions and time limits of the remedy the person is seeking to invoke and information regarding access to legal aid lawyers, or to legal assistance from legal practitioners and specialised organisations.[294]

294 EU FRA, Handbook on European law relating to asylum, borders and immigration citing *Hirsi Jamaa and Others v Italy*, no 27765/09, § 204; M.*S.S. v. Belgium and Greece*, no 30696/09, §§ 304-309

The inadequacy or absence of this information prevents migrants from effectively making use of the remedy, making the protection offered illusory. The Court has described the lack of access to information as '*a major obstacle in accessing asylum procedures*'.[295]

In *Sharifi and Others v Italy and Greece* (no. 16643/09), the Court considered in detail the procedural arrangements necessary to ensure the access to asylum procedure in the context of the execution of summary return decisions, which were then found in violation of Art.4 Prot.4. Taking into account evidence from a number of sources,[296] the Court found that the practice of the Italian authorities of pushing back people at the border in the ports of the Adriatic Sea, was unfit for to the purpose of providing asylum seekers with adequate procedural and substantial rights.

Similarly, in the context of sea operations, the ECtHR has reiterated in the case of *Hirsi v Italy 'the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints'* (§ 204).

In *Ilias and Ahmed v Hungary*, §124, the Court considered that '*the procedure applied by the Hungarian authorities'* had been *'not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment'*. Particularly, the information provided was itself insufficient and was in any case provided through means inadequate to meet the needs of the applicants, as it was given through leaflet, despite both the applicants being illiterate.

3.7.2 Legal assistance

The importance of being granted with adequate legal assistance has been stressed on different occasions in the Court's jurisprudence. Given the technical nature of the proceedings, being able to rely on the provision of legal information is often essential to ensure the applicant's effective access to the remedy. In many countries, specialised organisations dealing with migrants' rights will supply such information in cases involving asylum seekers and migrants in precarious situations, since the individual will normally lack the resources to hire a lawyer of his/her choice. In this respect, however, it remains the responsibility of the State authorities to ensure that this form of support is in place. In *M.S.S.,* for instance, the Court stressed that the Applicant had received '319. […] *no information concerning access to organisations which offer legal advice and guidance'*. In the Court's view, this circumstance '*may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum-seekers are concerned'*.

295 *M.S.S. v. Belgium and Greece*, cited above, § 304

296 CIR (Italian Refugee Council), Activity Report 2007 – CIR ONLUS, at: http://www.cir-onlus.org/wp-content/uploads/2017/08/cirnotizie_maggio_2008.pdf, Progetto Melting Pot Europa, *Diritti respinti. Gli atti dell'assemblea cittadina sul porto di Venezia*, 11 December 2008; International Catholic Migration Commission, *May Day! Strengthening responses of assistance and protection to boat people and other migrants arriving in Southern Europe*, September 2011

In *Ilias and Ahmed v Hungary* (still pending before the Grand Chamber), the Court addressed this aspect too stating how the applicants' circumstances and their overall understanding of the procedure had been '*aggravated by the fact that they could not meet their lawyer prior to the court hearing in order to discuss their cases in detail*' (§124).

3.7.3 Language assistance

From the perspective of individual guarantees owed to applicants in the context of a return decision, the case of *Ilias and Ahmed v Hungary (pending now before the Grand Chamber),* among others, identifies the failure to provide the applicants with adequate linguistic assistance as a key failure on the side of the authorities to ensure their access to and involvement in the proceedings and their ability to understand the reasons of their proposed return.

This finding was due to, *inter alia*, the fact that in the particular case one of the applicants had been assisted by an interpreter in Dari, '*a language he does not speak' (§ 13 of the judgement) and '[a]s a consequence, his chances of actively participating in the proceedings and explaining the details of his flight from his country of origin*' were deemed to be '***extremely limited***'.

Similar (linguistic) issues have been raised in the communicated case of *J.B. v Greece* mentioned above, currently pending before the Court.[297] This indicates that the issue of language and access to an effective remedy are intrinsically linked and the jurisprudence on this very pertinent issue is under development.

4. PROCEDURAL SAFEGUARDS AND THE RIGHT TO AN EFFECTIVE LEGAL REMEDY IN EXPULSION CASES

The introduction of the suspensive effect of legal remedies in asylum procedures is undoubtedly one of the main novelties in the **Asylum and Temporary Protection Act**. Although the right to a legal remedy is explicitly guaranteed by the **Constitution of the Republic of Serbia**, the prior **Asylum Act** did not provide for the suspensive effect of appeals: it only laid down the deadline by appeals of first-instance decisions on asylum had to be filed and did not deal at all with complaints filed with the Administrative Court, an issue governed by the **Administrative Disputes Act**.[298] These deficiencies were eliminated by the new **Asylum and Temporary Protection Act**, which does not only provide for the right to submit appeals of first-instance asylum decisions and file complaints

297 *J.B. v. Greece,* no. 54796/16, communicated on 18/05/2017

298 Official Gazette of the Republic of Serbia No. 111/09

contesting final asylum decisions, but explicitly lays down that they shall have suspensive effect as well.

The provisions of the **Aliens Act** on the right to appeal various decisions of the competent authorities, pursuant to which aliens may be ordered to leave the territory of the Republic of Serbia, are also relevant given that migrants may be returned independently of the asylum procedure.

Provisions of the **General Administrative Procedure Act**[299] apply to issues regarding procedures implemented under the Asylum and Temporary Protection Act and the Aliens Act that are not regulated by these two laws.

4.1 Constitution of the Republic of Serbia

Article 36 of the **Serbian Constitution** guarantees everyone the right to equal protection of their rights and to a legal remedy. Article 39 of the Constitution lays down that aliens may be expelled only pursuant to a decision of the competent authority in a procedure stipulated by the law and if they have the right to appeal.

Article 36(2) of the Constitution reads:

"Everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations or lawful interests."

Article 39(3) of the Constitution reads:

"A foreign national may be expelled only under a decision of the competent body, in a procedure stipulated by the law and if time to appeal has been provided for him and only when there is no threat of persecution based on his race, sex, religion, national origin, citizenship, association with a social group, political opinions, or when there is no threat of serious violation of rights guaranteed by this Constitution."

4.2 Asylum and Temporary Protection Act

4.2.1 Right to Appeal a First-Instance Asylum Decision

Asylum seekers are entitled to appeal the decisions of the Asylum Office with the Asylum Commission within 15 days from the day of service. Such appeals have suspensive effect and stay the enforcement of the first-instance decisions. Shorter deadlines for appeal are provided in cases of specific asylum procedures, such as the accelerated and border/transit area procedures, or in the event the Asylum Office rendered its decision without reviewing the asylum application on the merits.

299 Official Gazette of the Republic of Serbia No. 18/16

Article 95 of the Asylum and Temporary Protection Act reads:

"First-instance decisions rendered in the asylum procedure may be appealed within 15 days from the day of service, unless this Law provides otherwise.

The appeal shall suspend the enforcement of the decision."

4.2.2 Right to Appeal Decisions under an Accelerated Procedure

Examination of asylum applications under an accelerated procedure is another novelty introduced by the Asylum and Temporary Protection Act. Namely, decisions on asylum applications can be taken under an accelerated procedure in case of a situation listed in sub-paragraphs 1-8 of Article 40(1), especially if it is ascertained that the asylum seekers applied for asylum with the obvious intention of postponing or preventing the enforcement of a decision resulting in their removal from the Republic of Serbia, that the asylum seekers constitute a grave threat to national security or public order, or that the safe country of origin concept is applicable. Asylum applications of unaccompanied minors cannot be reviewed under an accelerated procedure (Article 40(4)). The first-instance authority is under the obligation to notify asylum seekers that their applications will be reviewed under an accelerated procedure (Article 40(3). Appeals of first-instance decisions rendered under an accelerated procedure may be filed within eight days from the day of service. Although Article 40 of the Asylum and Temporary Protection Act does not explicitly lay down that appeals of decisions taken under an accelerated procedure shall stay enforcement, such appeals undoubtedly have suspensive effect because Article 95 of the Act, under which appeals of all first-instance decisions shall stay the enforcement of those decisions, applies also to first-instance decisions rendered under an accelerated procedure.

4.2.3 Right to Appeal Decisions Rendered in an Asylum Procedure Conducted at the Border or in the Transit Area

The right to appeal is prescribed also when the asylum procedure is implemented at a border crossing or an airport transit zone, under Article 41 of the Asylum and Temporary Protection Act. First-instance decisions may be appealed, albeit within merely five days from the day of service. The Act lays down the obligation of the Asylum Office to render its decision within 28 days, otherwise the asylum seeker must be allowed to enter the Republic of Serbia, where his asylum application will be reviewed. As in the case of the accelerated procedure, the Act does not spell out that appeals shall stay the enforcement of decisions rendered in a border/transit area procedure. However, such appeals undoubtedly have suspensive effect because Article 95 of the Act, under which appeals of all first-instance decisions shall stay the enforcement of such decisions, applies also to first-instance decisions rendered in a procedure conducted at the border or in a transit area.

4.2.4 Right to Appeal Decisions Dismissing Asylum Applications without Examining Them on the Merits

A shorter deadline is also prescribed for appealing first-instance decisions dismissing asylum applications without examining them on the merits. In other words, asylum seekers, whose asylum applications were dismissed because the first country of asylum or the safe third country concept was applied, are entitled to appeal such decisions with the Asylum Commission within eight days from the day of service. Under Article 95 of the Asylum and Temporary Protection Act, appeals of decisions dismissing asylum applications shall stay the enforcement of such decisions.

Article 42 of the Asylum and Temporary Protection Act reads:

"A decision dismissing an asylum application without examining it on the merits shall be rendered if it is possible to apply:

1) the first country of asylum concept in accordance with Article 43 of this Law;
2) the safe third country concept in accordance with Article 45.

The provisions of paragraph 1(1) of this Article shall apply provided the asylum-seeker will be allowed to re-enter the first country of asylum.

The Asylum Office shall render a decision dismissing a subsequent asylum application in the event it finds it inadmissible pursuant to paragraphs 2 and 3 of Article 46, of this Act.

A decision dismissing an asylum application or a subsequent asylum application may be appealed with the Asylum Commission within eight days from the day of service."

4.2.5 Right to Re-Examination of Removal Decisions in the Light of the Asylum Seekers' Personal Circumstances and Conditions in the Country of Return

The prohibition of refoulement, enshrined both in the Serbian Constitution and the Asylum and Temporary Protection Act, entails, inter alia, the obligation of the competent authorities to examine whether an individual's life or freedom would be at risk on account of his/her race, sex, language, religion, ethnic origin, membership of a particular social group or political opinion or whether s/he would be at risk of being subjected to torture or inhuman or degrading treatment or punishment in the territory s/he is to be returned to (Article 6 (paragraphs 1 and 3) of the Asylum and Temporary Protection Act). This obligation exists not only in the context of ruling on the merits of the asylum applications in various stages of the asylum procedure, but also when taking any other decisions that may result in the removal of alien from the territory of the Republic of Serbia.

The Asylum and Temporary Protection Act includes several provisions guaranteeing the asylum seekers' right to a thorough review of their asylum applications and the right to an effective review of the decisions to remove them, as one of the possible outcomes of the asylum procedure. These guarantees are twofold: they entail both the obligation to assess the individual circumstances of the asylum seekers and the obligation to assess the conditions in the country they are to be returned to.

The Asylum and Temporary Protection Act lays down the obligation of the Asylum Office to collect and review all the relevant facts, evidence and circumstances, and, in particular, to take into account the current reports on the situation in the asylum seekers' countries of origin, and, if necessary, the situation in the countries of transit, including the laws and regulations of those countries and the manner in which they are applied (Article 32(2(2))), as well as the situation and personal circumstances of the asylum seekers (Article 32(2(3))). Furthermore, the Act explicitly guarantees the asylum seekers the right to contest the application of the first country of asylum, safe country of origin and safe third country concepts in the light of their personal circumstances; the fulfilment of the requirements for applying the above concepts must be assessed in each individual case.

Article 32 of the Asylum and Temporary Protection Act reads:

"(...)

In examining the substance of the asylum applications, the Asylum Office shall collect and consider all the relevant facts, evidence and circumstances, particularly taking into consideration:

1) The relevant facts and evidence presented by the asylum seekers, including information about whether they had been or might be subject to persecution or a risk of serious harm;
2) Current reports about the situation in the asylum seekers' country of origin or habitual residence, and, if necessary, countries of transit, including the laws and regulations of these countries and the manner in which they are applied - as contained in various sources provided by international organisations, such as UNHCR and the European Asylum Support Office (hereinafter: EASO) and other human rights organisations;
3) The position and personal circumstances of the asylum seekers, including their sex and age, in order to assess on those bases whether the procedures and acts they had been or may be subject to would amount to persecution or serious harm;
4) Whether the activities the asylum seekers engaged in since they left their country of origin had the sole purpose of creating the necessary conditions to be granted the right to asylum, with a view to assessing whether the asylum seekers would be subject to persecution or a risk of serious harm if returned to that country on account of those activities;

5) Whether the asylum seekers can avail themselves of the protection of another country where they can assert citizenship.

The fact that asylum seekers had already been subject to persecution or risk of serious harm, or threats of such persecution or serious harm, shall be indication of their well-founded fear of persecution or serious harm, unless there are good reasons to believe that such persecution or serious harm will not recur."

Article 43(2) of the Asylum and Temporary Protection Act reads:

"(...)

Asylum seekers may contest the application of the first country of asylum concept in view of their specific circumstances. "

Paragraphs 5 and 7 of Article 44 of the Asylum and Temporary Protection Act read:

"(...)

The fulfilment of the requirements for the application of the safe country of origin concept shall be established individually, for each submitted asylum application.

(...)

Asylum seekers shall promptly be notified of the application of the safe third country concept, with a view to allowing them to challenge it, in accordance with paragraph 5. of this Article, in view of their personal circumstances."

Paragraphs 2 and 3 of the Asylum and Temporary Protection Act read:

"(...)

The fulfilment of the requirements for the application of the safe third country concept shall be established for each individual application and shall involve examining whether a state fulfils the requirements under paragraph 1 of this Article and whether there is a connection between that state and the asylum seeker based on which s/he can be reasonably expected to seek asylum in that state.

Asylum seekers shall promptly be notified of the application of the safe third country concept, with a view to allowing them to challenge it, in accordance with paragraphs 1 and 2 of this Article, in view of their personal circumstances.

4.2.6 Right to Judicial Protection in the Asylum Procedure

Articles 22 and 96 of the Asylum and Temporary Protection Act guarantee the right to initiate administrative disputes challenging final asylum-related decisions and clearly qualify complaints filed with the Administrative Court as legal remedies with suspensive effect.

Article 96 of the Asylum and Temporary Protection Act reads:

"Final decisions rendered in the asylum procedure may be challenged in an administrative dispute.

The complaint shall stay the enforcement of the decision."

4.3 Aliens Act

Under Article 83 of the Aliens Act, aliens may not be forcibly removed to a territory where they are at risk of persecution or of being subjected to capital punishment, torture and inhuman or degrading treatment or punishment or of a serious violation of their constitutionally guaranteed rights The prohibition of forced removal applies also to aliens reasonably believed to be a threat to national security, provided they are at risk of being subjected to capital punishment, torture and inhuman or degrading treatment or punishment in the country of return (Article 83(3)). The Act prohibits the forced removal of unaccompanied minors unless the competent authority is convinced they will reunite with their family members or guardians or be referred to an adequate child care institution (Article 83(4)).

The importance of Article 83 of the Aliens Act with regard to various decisions ordering aliens to leave the territory of the Republic of Serbia is twofold. It, on the one hand, imposes upon the competent authority the obligation to examine whether there is a risk of persecution, capital punishment or torture in the country of return whenever it is to render a decision that may result in the aliens' removal from Serbia. On the other hand, if the requirements for applying Article 83 are fulfilled, the legal remedies aliens may apply to contest the first-instance decisions will stay the enforcement of these decisions, even in situations in which appeals do not have suspensive effect.

4.3.1 Right to a Legal Remedy against a Decision Refusing Entry

Article 38 of the Aliens Act guarantees aliens the right to appeal decisions refusing them entry into the territory of the Republic of Serbia. Decisions refusing entry entail both decisions refusing entry on grounds specified in Article 15 of the Act and decisions refusing the aliens' visa applications, visa applications at border crossings, visa renewal applications and decisions annulling or revoking their visas. Such appeals must be filed within eight days from the day of service (Article 38(1)). They do not have suspensive effect but will nevertheless stay the enforcement of the first-instance decisions if any of the grounds for applying Article 83 of the Aliens Act exist, i.e. if the requirements for prohibiting forced removal are fulfilled (Article 38(3)). Aliens may initiate an administrative dispute challenging the second-instance rulings (Article 38(4)).

4.3.2 Right to a Legal Remedy against Rulings Terminating Temporary Residence

The competent authority shall issue a ruling terminating the aliens' right to temporary residence and specify the deadline by which they must leave the territory of the Republic of Serbia in the event that it subsequently becomes aware of one or more grounds for denying them temporary residence (Article 66). The Act provides clear guarantees regarding this procedure: the competent authority must assess the particular circumstances of each individual case, especially the duration of the aliens' prior temporary residence periods and their ties with the Republic of Serbia (Article 66(3). Aliens may contest the rulings terminating their right to temporary residence by filing appeals within 15 days from the day of service of the rulings (Article 66(4)). The Act explicitly lays down that this legal remedy shall have suspensive effect (Article 66(7)). As opposed to appeals of first-instance rulings, which stay the enforcement of these rulings by force of law, the initiation of an administrative dispute challenging the second-instance rulings does not have suspensive effect (Article 66(8)).

4.3.3. Right to a Legal Remedy against a Ruling Terminating the Right to Permanent Residence

Aliens may also be ordered to leave the territory of the Republic of Serbia if any of the reasons for terminating their right to permanent residence under Article 72(1) exist. When deciding on the termination of the aliens' right to permanent residence, the competent authority is under the obligation to examine all the circumstances of the case and particularly take into account the duration of the aliens' prior residence in the Republic of Serbia, their personal and family circumstances and ties with the Republic of Serbia vis-à-vis the threat they pose to public order (Article 72(3)). Aliens are entitled to appeal rulings terminating their right to permanent residence within 15 days from the day of service (Article 72(7)). Such appeals of first-instance rulings shall stay the enforcement of the rulings, as opposed to the initiation of an administrative dispute challenging the second-instance ruling, which does not have suspensive effect (Article 72(11)).

4.3.4 Right to a Legal Remedy against Rulings on Return

Under Article 77 of the Aliens Act, the competent authority shall issue rulings ordering the return of aliens staying illegally in the territory of the Republic of Serbia and specifying the deadline by which they are voluntarily to leave the Republic of Serbia. Aliens who do not leave the Republic of Serbia within the deadline in the ruling on return shall be forcibly removed from the Republic of Serbia. However, Article 80(1) of the Aliens Act guarantees such aliens the right to appeal the rulings on return, within 15 days from the day of service. Such appeals shall not stay the enforcement of the rulings; they, however, shall exceptionally have suspensive effect both in case the requirements for applying

Article 83 are fulfilled (i.e. if there is a real risk of their persecution, capital punishment, torture or inhuman or degrading treatment), and if that is warranted by serous humanitarian reasons (Article 80(3)). Aliens may initiate an administrative dispute contesting the second-instance rulings (Article 80(4)).

4.3.5 Right to a Legal Remedy in Cases of Forced Removal and Postponement of Forced Removal

Aliens may be forcibly removed from the territory of the Republic of Serbia in the event they failed to leave it by the deadline they are given for voluntary return, in the event such a deadline is not set or a court has issued a decision ordering the security measure of their expulsion or the protective measure of removing them from the country; in each individual case, the authority must review whether the requirements for the prohibition of forced removal under Article 83 of the Aliens Act have been fulfilled. In the event the aliens are to be forcibly removed pursuant to a court decision ordering the security measure of their expulsion or the protective measure of removing them from the country, the Act lays down that the competent authority shall issue a ruling on the termination of their stay and specify the deadline by which they are to leave the territory of the Republic of Serbia. The aliens are not entitled to appeal such rulings but they may contest them by initiating an administrative dispute (Article 81(2) of the Aliens Act).

The Aliens Act allows the postponement of forced removal. Rulings postponing forced removal shall be issued in the event of fulfilment of the requirements for the prohibition of forced removal under Article 83 or of the requirements under Article 84(1) of the Act, i.e. in the event the aliens' identity has not been established, they cannot be transported from the Republic of Serbia or they have serious psychological, physical or health problems. The postponement of forced removal may be terminated in the event the aliens do not comply with their obligations deriving from mandatory residence (Article 85(2)).

In any case, aliens are guaranteed the right to appeal rulings postponing their forced removal and rulings revoking them. They are entitled to file such an appeal within eight days from the day of service. The appeal shall stay the enforcement of the ruling. Aliens are entitled to initiate an administrative dispute contesting the second-instance rulings.

Article 85 of the Aliens Act reads:

"(1) Postponement of forced removal shall be granted for a period not exceeding one year and may be extended by the competent authority.

(2) Postponement of forced removal shall be revoked in the event the grounds for postponement ceased to exist or in the event the aliens did not comply with their obligations deriving from mandatory residence.

(3) Aliens shall return the document referred to in Article 84(6) of the Act in the event of expiry of the validity or the revocation of the rulings postponing their forced removal pursuant to paragraph (2) of this Article.

(4) Appeals of rulings postponing forced removal and rulings revoking postponement of forced removal shall be filed with the competent authority within eight days from the day of service.

(5) Appeals shall be filed in writing and in Serbian upon the payment of the prescribed fee.

(6) The appeal shall delay the enforcement of the ruling.

(7) The Ministry of Internal Affairs shall rule on the appeal.

(8) An administrative dispute may be initiated against the decision on the appeal."

4.4 Right to an Effective Legal Remedy in Case of Extradition under the Act on International Legal Assistance in Criminal Matters

The problem arising in practice regarding the concurrent conduct of the extradition and asylum proceedings was already discussed in Chapter 2 of this manual, primarily with respect to extradition custody and protection of the asylum seekers' right to liberty and security of person. Another aspect of the issue that has arisen in practice regards the right to a legal remedy in expulsion cases. Namely, the Serbian authorities in 2017 extradited two aliens to the requesting states pursuant to final extradition decisions although no final decisions on their asylum applications had been rendered.[300] In both cases, the Serbian authorities dismissed their asylum applications by applying the safe third country concept. Given that the authorities did not review the merits of these asylum applications, they did not examine the risks that these aliens may be subject to persecution, capital punishment, torture or inhuman or degrading treatment in the requesting states. In the light of Article 39 of the Serbian Constitution, which prohibits the expulsion of aliens to a territory where they are at risk of persecution on account of their race, sex, religion, ethnic origin, nationality, membership of a particular social group or political opinion or of a grave violation of their constitutionally guaranteed rights, as well as international conventions binding on the Republic of Serbia, such as the UN Convention against Torture, the authorities deciding on extradition must examine the circumstances and potential risks accompanying the return of asylum seekers to the requesting states, all the more since their extradition may be requested by their countries of origin. As noted in Chapter 2, one of the two cases in which extradition and asylum proceedings were conducted concurrently ended with the Republic of Serbia extraditing the asylum seeker to the requesting state despite the interim measure indicated by the UN Committee against Torture.[301]

300 See BCHR's 2017 *Right to Asylum in the Republic of Serbia* annual report, pp 36-39, available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf

301 UN Committee against Torture Decision No. 857/2017 of 11 December 2017.