

**Tomasz Szewczyk**

# **The Rights of Refugees and Asylum- Seekers under the European Convention on Human Rights**

**A Case-Study of Selected Judgments of the  
European Court of Human Rights 2000-2015**

**Articles 2, 3, 5, and 6**



**HÁSKÓLI ÍSLANDS**

**Háskóli Íslands / University of Iceland  
Mannréttindastofnun / Human Rights Institute  
April 2016**

# Index

<b>Literature</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>5</b>
<b>Article 2 and Article 3 of the Convention as barriers to removal</b> .....	<b>8</b>
Article 3 .....	9
General information .....	9
Assessment of a risk of ill-treatment .....	10
<i>Sufi and Elmi v. the United Kingdom</i> .....	11
<i>Iskandarov v. Russia</i> .....	13
<i>NA. v. the United Kingdom</i> .....	14
<i>Abdolkhani and Karimnia v. Turkey</i> .....	16
A threat of ill-treatment from person or group of persons other than public officials .....	17
Dire humanitarian conditions and a risk of ill-treatment .....	18
<i>M.S.S. v. Belgium and Greece</i> .....	18
<i>N. v. the United Kingdom</i> .....	19
The possibility of internal relocation .....	21
Indirect removal .....	22
Evidential requirements .....	23
Diplomatic assurance in assessment of risk of ill-treatment .....	24
<i>Ismoilov and others v. Russia</i> .....	25
<i>Ahorugeze v. Sweden</i> .....	26
Timing of the assessment .....	27
Article 2 .....	28
<i>Bader and Kanbor v. Sweden</i> .....	29
<b>Article 5 - Detention of asylum seekers and its limits</b> .....	<b>31</b>
General information .....	32
Definition of the term "detention" .....	33
<i>Iskandarov v. Russia</i> .....	33
Exclusive reasons for the detention under the Convention .....	34
<i>M.A. v. Cyprus</i> .....	34
General rules governing Article 5 § 1 .....	35
Compliance of detention with domestic law .....	36
<i>Abdolkhani and Karimnia v. Turkey</i> .....	36
The notion of arbitrariness .....	38
<i>Conka v. Belgium</i> .....	38

<i>Mubilanzila Mayeka and Kaniki Mitunga v. Belgium</i> .....	40
<i>Suso Musa v. Malta</i> .....	41
Detention of asylum-seekers under Article 5 § 1 (f) .....	42
Detention prior to deportation .....	42
<i>M. and others v. Bulgaria</i> .....	43
Detention upon arrival.....	44
<i>Saadi v. the United Kingdom</i> .....	44
Influence of the application of Rule 39 of the Rules of Court on the possibility of detention under Article 5 § 1 (f).....	47
<i>Gebremedhin [Gaberamadhien] v. France</i> .....	47
Article 5 § 1 as an additional barrier to removal .....	49
<i>Othman (Abu Qatada) v. the United Kingdom</i> .....	49
Procedural safeguards - general information.....	51
Right to information .....	51
<i>Shamayev and others v. Georgia and Russia</i> .....	52
Right to review the detention .....	53
<i>A. and others v. the United Kingdom</i> .....	55
<b>Article 6 - right to fair trial and the situation of asylum-seekers .....</b>	<b>57</b>
General information .....	57
Applicability of Article 6 to procedures for the expulsion of aliens .....	58
Barrier to removal .....	59
<i>Othman (Abu Qatada) v. the United Kingdom</i> .....	60
<b>Summary .....</b>	<b>62</b>

## Literature

1. C. Ovey, R. White, European Convention on Human Rights. Third Edition, Oxford 2002;
2. D. J. Harris, M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights, London, Dublin, Edinburgh 1995;
3. L. Garlicki and o., Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1 -18, Warsaw 2010;
4. P. van Dijk, G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights. Second Edition, Deventer 1990;
5. UNHCR Regional Bureau for Europe Department of International Protection, UNHCR Manual on Refugee Protection and the European Convention on Human Rights, Geneva 2003-2006.

## Introduction

The problem of rights of refugees and asylum-seekers is growing faster now than ever before. Europe, especially its southern countries have to deal with incomers from Africa and Asia on a daily basis, fearing for their lives and looking for a better future. Their presence in European countries raises issues for the governments that need to be resolved. Those issues include admissions and expulsions of asylum-seekers, their accommodation, possibility of detention and ensuring existence of appropriate proceedings that can be used when applying for the refugee status. Sometimes issues concern foreign policy, when the authorities of non-European states are determined to bring an asylum-seeker back for some particular reason (most often to charge him with crime, or to imprison him).

The question therefore arises, how the individuals can protect themselves from unfavourable decisions of the governments, and thus what are the rights of the asylum-seekers and refugees in the receiving countries. All these matters are regulated by both international and domestic laws. One of the most important acts is the Convention relating to the Status of Refugees from 28 of 1951, a United Nation multilateral treaty, and its Protocol of 1967 which provide the contracting parties with the legal definition of the term "refugee" and sets number of obligations for them. Some obligations for the contracting states regarding asylum-seekers and refugees derive from other international agreements, *inter alia* the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment signed on 10 December 1984 (Article 3 prohibits expulsion of an individual to a country where he or she would be in danger of being subject to torture), and the Convention on the Rights of the Child of 20 November 1989 (prohibition of sending a child to a country where he or she might be subject to actions causing an irreparable harm derives from Articles 6 and 37<sup>1</sup>). Prohibition of expulsion of aliens in certain situations may be interpreted from the provisions of International Covenant on Civil and Political Rights of 16 December 1966 and The

---

<sup>1</sup> UN Committee on the Rights of the Child, *General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, § 27

International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965<sup>2</sup>.

In Europe the situation of the refugees and asylum-seekers is regulated widely by the European Union's law. The general rules are established in the Treaty of the Functioning of the European Union - Articles 77-80 set the common policies on immigration, border control and asylum matters. More specific obligations for the EU member countries concerning asylum-seekers and their rights derive from, *inter alia* the Convention implementing the 1985 Schengen Agreement of 19 June 1990; the EU Charter of Fundamental Rights (Article 18 provides with the right to asylum); Asylum Procedure Directive (2013/32/EU); and the Return Directive (2008/115/EC).

The Convention for the Protection of Human Rights and Fundamental Freedoms (later referred to as "the Convention") does not acknowledge the right to political asylum. The European Court of Human Rights (later referred to as "the Court" or "ECHR") has reiterated this fact on multiple occasions in its judgments. Nevertheless, once an asylum-seeker enters the territory of the contracting state, he or she can exercise the rights set by the Convention. This in turn gives rise to some serious consequences. Apart from an obligation to ensure enjoyment of all said rights within their borders, the contracting states share responsibility for the asylum-seekers' fate outside of them, in third countries. Therefore, the Convention imposes some additional obligations on the governments which in general come into play, when the possibility of expulsion, refoulement or extradition is considered.

During the course of years, the Court has set a number of rules governing asylum related cases and established the level of protection for refugees and asylum-seekers. The aim of this paper is to analyse the most important judgments in this category within the last 15 years. Therefore, apart from providing information of general manner concerning all the relevant provisions and their influence on asylum-seekers' cases, the focus is on the latest findings, rules and interpretations provided by the Court. In other words, the aim of the paper is to present which matters have been regarded the most important for the Court and how they were resolved. Of course, to analyse those cases properly there is a need of having general knowledge concerning a particular provision and its application in asylum related matters. Nevertheless, the recent development of the Court's jurisprudence in respect of said matters is

---

<sup>2</sup> see: United Nations Human Rights Council, *General Comment no. 15/27*, 22 July 1986, § 5; United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation no.30*, 1 October 2004, § 25

the core of the paper. Therefore some of the matters of great importance are discussed briefly, while others are explained in detail.

To achieve this outlined goal there was a need of choosing the right method of research. The search of judgments was performed with HUDOC search engine (<http://hudoc.echr.coe.int>). The timeline was set from 1 January 2000 until 1 June 2015. Regarding the level of importance, the search was limited to "Level 1" and "Case Reports" categories. Chosen languages were English and French and articles of the Convention concerned were set at Article 2, 3, 5 and 6. Finally the free text search was performed within abovementioned frames, where the formula used was "refugee OR asylum". Then the judgments were read and divided into two categories: relevant (where the case concerned asylum-seeker or refugee and his or her rights) and irrelevant (where words "refugee" or "asylum" appeared in a judgment but the case did not concern asylum-seeker or refugee). The relevant judgments were then examined. This examination and its conclusions led to completion of the goal set for this paper.

This document is divided into chapters concerning each of the articles of the Convention covered with the research. All the provisions are first described generally, in its entirety, then their application to the refugees and asylum-seekers' cases is explained. If the established rule or the interpretation of particular provision was set in one of the judgments, which met the criteria mentioned in the previous paragraph, the case is explained in detail.

The first chapter concerns Articles 2 - right to life, and 3 - prohibition of torture and inhuman treatment. In the cases of asylum-seekers those provisions can work as barriers to removal. In other words, in certain situations expulsion or extradition of an individual from a Contracting State to a third country is prohibited by Article 3 or 2. All the relevant criteria and circumstances for those provisions to work as barriers to removal are explained in chapter 1. The second chapter deals with Article 5 and a possibility of detaining asylum-seekers and refugees in particular situations. The circumstances are described under which an individual can be lawfully deprived of liberty and numerous cases are examined. Finally the last chapter concerns provision placed in Article 6 (right to a fair trial). In exceptional cases this provision can work as an additional barrier to removal. Those exceptional cases are explained and the examples are given.

## Article 2 and Article 3 of the Convention as barriers to removal - introduction

The European Court of Human Rights has confirmed in multiple judgments the right of the countries to control the entry, residence and expulsion of aliens. It is a matter of international law and subject to various treaty obligations<sup>3</sup>. The Court has also reminded that the right to political asylum is not explicitly protected by either the Convention or its Protocols<sup>4</sup>.

However, expulsion of aliens might give rise to a breach of the Convention, primarily Articles 2 (right to life) and 3 (prohibition of torture and inhuman treatment). Legal norms placed in those articles can constitute barriers to removal of such persons. Namely, the Convention prohibits expulsion in situations, where substantial grounds have been shown for believing that the individual concerned, if deported, faces a real risk of being subjected to treatment contrary to Articles 2 or 3<sup>5</sup>.

Therefore there is a need to examine closely all the issues arising from abovementioned provisions which play role in determination, if the individual can be sent back to the receiving country without breaching Article 2 or 3 of the Convention. For the purposes of this paper it is appropriate to begin with the analysis of Article 3 and then move on to Article 2 of the Convention as the breach of the latter can be established only in the most extreme cases, often as a consequence of breaching the former.

---

<sup>3</sup> see: *Üner v. the Netherlands [GC]*, app. no. 46410/99, 18 October 2006, § 54; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, app. no. 24888/94, 28 May 1985, § 67; *Boujlifa v. France*, app. no. 25404/94, 21 October 1997, § 42;

<sup>4</sup> *Salah Sheekh v. the Netherlands*, app. no. 1948/04, 11 January 2007, § 135,

<sup>5</sup> *Abdolkhani and Karminia v. Turkey*, app. no. 30471/08, 22 September 2009, § 42.

## Article 3

Article 3 states:

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

### General information

The prohibition of torture and inhuman or degrading treatment is a direct consequence of the idea of human dignity. Article 3 of the Convention prohibits therefore treatment of a person that would be contrary to the nature of human dignity. It has a special place within other provisions of the Convention, being one of its core values. ECHR has even stated that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe.<sup>6</sup>

It is agreed that Contracting States have competence to control the entry, residence and expulsion of aliens, as mentioned in the introduction. Nevertheless ECHR sets out a number of exceptions to this rule. One of the most significant is the exception based on the provision of Article 3. It implies an obligation of the Contracting State not to send an individual to a country, where substantial grounds have been shown that he or she, if deported, faces a real risk of being subjected to torture, inhuman or degrading treatment or punishment<sup>7</sup>. The actions undertaken by the Contracting State are in this case perceived as a first link in the chain of events leading to the ill-treatment of the individual contrary to Article 3. It is thus sufficient to render an indirect responsibility of the state for the ill-treatment taking place outside of its borders<sup>8</sup>.

At this point it is crucial to reiterate the absolute nature of Article 3. It means firstly, that no ill-treatment of an individual by the public authorities can be justified by other provisions of the Convention. Secondly, the protection of Article 3 cannot be suspended or revoked even if the serious public interest is believed to be a reason for it. Finally, prohibition of ill-treatment takes effect notwithstanding the features and actions taken up by an individual<sup>9</sup>. Application of these rules has important repercussions in respect to the cases of

---

<sup>6</sup> *Chahal v. the United Kingdom*, app. no. 22414/93, 15 November 1996, § 96

<sup>7</sup> *Saadi v. Italy*, app. no. 37201/06, 28 February 2008, § 125

<sup>8</sup> L. Garlicki and o., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1 -18*, Warsaw 2010, p. 131

<sup>9</sup> L. Garlicki, *Konwencja...* op. cit., p. 98-99

refugees and asylum seekers'. It means that cases of extradition and expulsion must be treated in the same manner. The Court noted that Article 3 imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to ill-treatment<sup>10</sup>. There can be no derogation from that rule and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3<sup>11</sup>.

As to the concept of torture and inhumane or degrading treatment the Court has indicated on multiple occasions that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, sometimes, the victim's sex, age and state of health.<sup>12</sup>

### **Assessment of a risk of ill-treatment**

It is then established that a breach of Article 3 occurs where substantial grounds have been shown for believing that an individual will face a real risk of being subjected to ill-treatment. Therefore there is a need to assess this risk individually for each case. Over the last 15 years the Court established a number of principles and instructions according to which the process of the assessment should be conducted. It must focus on foreseeable consequences of the removal of an individual to the country of destination<sup>13</sup>. In respect of that the Court has stated that the risk of ill-treatment might emanate from a general situation of violence in that country, a personal characteristic of the applicant, or a combination of the two<sup>14</sup>.

Firstly the Court focused on the general situation in the country in question. It was underlined that not every general violent situation is sufficient to create a barrier to removal. The Court stated that a general situation of violence would only be of sufficient intensity to create such a risk "in the most extreme cases" where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return<sup>15</sup>. In the case *Sufi*

---

<sup>10</sup> *Saadi v. Italy*, op. cit., § 138

<sup>11</sup> *Ibidem*, § 138

<sup>12</sup> *Ibidem*, § 134

<sup>13</sup> *Vilvarajah and Others v. the United Kingdom*, app. no. 13163/87, 30 October 1991, § 108

<sup>14</sup> *Sufi and Elmi v. the United Kingdom*, app. no. 8319/07, 28 June 2011, § 218

<sup>15</sup> *Ibidem*, § 218

*and Elmi v. the United Kingdom* ECHR set the list of the criteria that had to be met to render that the general situation of violence creates the risk of ill-treatment by itself.

***Sufi and Elmi v. the United Kingdom***

Mr. Sufi and Mr. Elmi were both Somali nationals and asylum seekers in the United Kingdom. After committing a number of serious crimes in Great Britain they were issued with deportation orders. Following unsuccessful domestic appeal they decided to start proceedings before the ECHR, claiming that they would be at risk of ill-treatment if they were deported to Somalia.

One of the applicants' main concern was the general situation in Mogadishu, the capital of Somalia and the the destination point for their deportation from the United Kingdom. The Court thus had to examine the matter. In order to do that, it created the abovementioned, non-exhaustive list of criteria that can be used to measure the level of violence. Those were: first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting<sup>16</sup>. Applying aforesaid criteria to the case facts, the Court came to the conclusion that the armed conflict in Mogadishu amounted to indiscriminate violence of such a level of severity as to pose a real risk of treatment, reaching the Article 3 threshold to anyone in the capital<sup>17</sup>. The Court justified such a verdict by pointing out the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons

---

<sup>16</sup> *Sufi and Elmi*, op. cit., § 241

<sup>17</sup> *Ibidem*, § 248

displaced within and from the city, and the unpredictable and widespread nature of the conflict<sup>18</sup>.

For comparison, in the very same case the Court had to examine the conditions in other parts of Somalia, outside of Mogadishu, to establish if it was safe for the applicants to travel and settle there. In its evaluation of the situation in southern and central parts of Somalia controlled by the fundamental Islamic organization al-Shabaab the Court stated that the general level of violence was not high enough to constitute a real risk of ill-treatment for everybody who entered those areas. According to a number of sources those areas were stable and generally safe for the Somalis who respected the radical form Sharia law imposed by al-Shaabab and avoided the unnecessary attention of the organization<sup>19</sup>. Only by adding personal circumstances of the applicants to the described general situation ECHR could hold that it was not safe for them to travel there either<sup>20</sup>.

When the general situation in the receiving country has been examined and as a result is not considered serious enough to constitute a real risk of ill-treatment by itself, the Court moves on to analysing the personal circumstances of the applicant. In most cases the personal characteristics of an individual can give rise to a real risk of ill-treatment contrary to Article 3 of the Convention. Those characteristics differ in respect of the countries in question. It is helpful however to reiterate those placed in Article 1 of the UN Convention Relating to the Status of Refugees: race, religion, nationality, membership of a particular social group or political opinion. In addition, sexual orientation and criminal past can be included in the list of said characteristics. The Court, in the case of *Iskandarov v. Russia*<sup>21</sup>, faced the problem, where the applicant feared ill-treatment in the receiving country because of his political views and previous activities.

---

<sup>18</sup> *Sufi and Elmi*, op. cit., § 248

<sup>19</sup> *Ibidem*, § 92

<sup>20</sup> *Ibidem*, § 277

<sup>21</sup> *Iskandarov v. Russia*, app. no. 17185/05, 23 September 2010

***Iskandarov v. Russia***

The applicant was a Tajik national and one of the opposition leaders in Tajikistan. He fled to Russia, fearing ill-treatment in his motherland and launched asylum proceedings. The Tajik authorities issued an extradition request based on terrorism, gangsterism and embezzlement accusations, which was refused in Russia due to abovementioned asylum proceedings. Then, after couple of days, while taking a walk, the applicant was abducted by a group of twenty-five to- thirty men wearing civilian clothes. He was placed in a car that then drove off. Blindfolded, he was escorted to an airport where he was forced to enter an airplane (without showing any identification documents). The plane took off and landed in Dushanbe, the capital of Tajikistan.

In his complaint the applicant stated that the Russian authorities were behind his abduction. Moreover, by sending him back to Tajikistan, they had breached Article 3 of the Convention as he was at risk of ill-treatment. The Court first examined the background situation in the receiving country. It established that there was no general violence that would by itself prevent contracting states from sending there their failed asylum-seekers. It was then noted that there had been major human rights abuses, including torturing of the detainees and imprisoning political oppositionists for the crimes they probably did not commit. Having discovered that, the Court moved on to examining the personal features of the applicant in order to form an opinion, if he could be exposed to ill-treatment, if returned to Tajikistan. The number of factors of relevance for the case was given: the applicant was a member of the political opposition, he was charged by the Tajik authorities with serious crimes and was very likely to be detained upon his arrival<sup>22</sup>.

Given that information, the Russian government should have foreseen the risk of ill-treatment threatening the applicant in Tajikistan

---

<sup>22</sup> *Iskandarov v. Russia*, op. cit., § 131

and abstained from sending him back. By doing otherwise Russia breached Article 3 of the Convention.

In some cases, as mentioned before, only the combination of personal features of an individual and a general situation of violence can amount to a real risk of ill-treatment, if that individual was to be sent back to a particular country. That possibility is described in the case of *NA. v. the United Kingdom*<sup>23</sup>

### ***NA. v. the United Kingdom***

The applicant in the case was Mr. NA., Sri Lankan citizen of Tamil ethnicity. He entered the United Kingdom and launched an asylum application. He was denied refugee status and issued with a deportation order. In his application to the ECHR he stated he feared ill-treatment in Sri Lanka by the Sri Lankan army and The Liberation Tigers of Tamil Eelam ("Tamil Tigers", "the LTTE")- a militant organization operating in northern Sri Lanka.

Considering the general situation in Sri Lanka, the Court observed that in 2008 deterioration in security level occurred which was followed by the increase of human rights violations and rise of torture and ill-treatment of the citizens<sup>24</sup>. It was described as the effect of the emergency measures taken by domestic authorities against terrorism<sup>25</sup>. Nevertheless the Court did not conclude that this created a general risk of being exposed to a treatment contrary to Article 3 to all Tamils returning to Sri Lanka. In respect of the fact that some Tamils on the other hand would definitely be exposed to ill-treatment, if returned to Sri Lanka, the personal situation of the applicant had to be examined. This sort of examination must usually be conducted individually for each case, taking into consideration all the relevant factors for given circumstances. In the discussed case the Court adopted a non-exhaustive list of factors that might affect a situation of a returnee being sent to Sri Lanka and expose him or her to ill-treatment. Those

---

<sup>23</sup> *NA. v. the United Kingdom*, app. no. 25904/07, 17 July 2008

<sup>24</sup> *Ibidem*, § 124

<sup>25</sup> *Ibidem*, § 69

factors were: a previous record as a suspected or actual Tamil Tigers' member; a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; return from London or other centre of Tamil Tigers fundraising; illegal departure from Sri Lanka; lack of an ID card or other documentation; having made an asylum claim abroad or having relatives in the Tamil Tigers<sup>26</sup>.

The Court also emphasized that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk<sup>27</sup>.

Applying these rules to the personal situation of the applicant, the Court found that the number of set factors appeared in his case. This in turn in connection with the general situation of violence and unrest created a real risk of drawing attention of Sri Lankan authorities and exposed him to a treatment contrary to Article 3, if he was to be returned.

One of the particular personal factors that might expose an individual to ill-treatment is their membership to a certain group. The Court would take a slightly different approach there: In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group is concerned<sup>28</sup>. In such circumstances, the Court would not insist that the applicant show the

---

<sup>26</sup> *NA. v. the United Kingdom*, op. cit. § 30 and § 142

<sup>27</sup> *Ibidem*, § 130

<sup>28</sup> *Saadi v. Italy*, op. cit., § 132

existence of further special distinguishing features<sup>29</sup>. This rule has been materialised in the recent years in the case of *Abdolkhani and Karimnia v. Turkey*.

### ***Abdolkhani and Karimnia v. Turkey***

Mr. Abdolkhani and Mr. Karimnia were Iranian nationals and former members of the People's Mojahedin Organisation ("the PMOI"), an opposition movement with the agenda of overthrowing the Islamic Republic of Iran. The applicants left Iran for Iraq and entered a refugee camp set up by the United States forces in Iraq, where they were recognised as refugees by the United Nations High Commissioner for Refugees. Then they decided to enter the territory of Turkey. They were not given a chance to file an asylum request and were convicted of illegal entry into Turkey. Following an unsuccessful attempt to deport them by Turkish authorities, the applicants started proceedings before the ECHR.

In their applications they claimed that they would be exposed to ill-treatment, and even executed in Iran on the sole ground of being former members of the PMOI. They also stated that they would not be safe in Iraq, where they would be placed by Turkish authorities, for there was a great risk that they would be deported from there to Iran.

Relying on various independent sources the Court established that there had been cases of ill-treatment of the PMOI members in Iran, including arbitrary detention and even deprivation of life under suspicious circumstances<sup>30</sup>. Despite the impossibility of closer examination of the situation in Iran the Court found that there were serious reasons to believe that the former or current PMOI members and sympathisers could be killed and ill-treated in that country<sup>31</sup>. Having established also the real risk of deportation of the applicants

---

<sup>29</sup> *Abdolkhani and Karimnia v. Turkey*, op. cit., § 75.

<sup>30</sup> *Ibidem*, § 82

<sup>31</sup> *Ibidem*, § 83. For the details of the situation in Iran, see § 46 and n.

from Iraq to Iran, the Court found that expelling them from Turkey would constitute a breach of Article 3 of the Convention<sup>32</sup>.

### **A threat of ill-treatment from person or a group of persons other than public officials**

A real risk of ill-treatment is in general linked with the actions of the government and its agents in the country in question. The Court did not however exclude the possibility of prohibiting expulsion on the grounds of Article 3, when the danger of ill-treatment comes from a party other than public authority. The Court noted that it must be shown that the risk is real and that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection<sup>33</sup>. In the abovementioned case of *NA. v. the United Kingdom*, one of the applicant's arguments considered his fear of ill-treatment from the Tamil Tigers, i.e. not the public authority. Mr. NA. claimed that his brother was associated with the organization and his father might have revealed this fact to the Sri Lankan army. In respect of that he pointed out the risk of being exposed to the violence from the Tamil Tigers and argued the insufficiency of the protection provided by Sri Lankan authorities<sup>34</sup>.

The Court in its assessment of the situation agreed with the statement of the applicant inasmuch as some Tamils might face a risk of ill-treatment from the LTTW and Sri Lankan authorities were not able to provide sufficient level of security<sup>35</sup>. It added however, that this would only apply to Tamils with a high profile as opposition activists, or those seen by the LTTE as renegades or traitors<sup>36</sup>. In the case before it the Court found that the applicant's situation did not fit the criteria presented above and ruled that, if returned to Colombo he would be of little interest to the Tamil Tigers. Therefore there was no real risk of ill-treatment from them<sup>37</sup>.

---

<sup>32</sup> *Abdolkhani and Karimnia v. Turkey*, op. cit., § 92

<sup>33</sup> *H.L.R. v. France*, app. no. 24573/94, 29 April 1997, § 40

<sup>34</sup> *NA. v. the United Kingdom*, op. cit., § 96-98

<sup>35</sup> *Ibidem*, § 137

<sup>36</sup> *Ibidem*, § 137

<sup>37</sup> *Ibidem*, § 141

## **Dire humanitarian conditions and a risk of ill-treatment**

As mentioned before, a real risk of ill-treatment in a receiving country might derive from actions taken up by the public authorities as well as, under certain circumstances, by persons or groups of persons other than public authorities. In addition to that in very exceptional cases dire humanitarian conditions in a receiving country can lead to a breach of Article 3 if an individual was to be expelled to that country. The Court emphasized that socio-economic and humanitarian conditions do not necessarily have a bearing, and certainly not a decisive bearing, on the question whether the persons concerned would face a real risk of ill-treatment<sup>38</sup>. Nevertheless in other judgments it was established that humanitarian conditions would give rise to a breach of Article 3 of the Convention where the humanitarian grounds against removal were "compelling"<sup>39</sup>. The Court therefore underlined a need of flexibility when it comes to that matter. In respect of recent years there are two judgments that need to be examined closely, the case of *M.S.S. v. Belgium and Greece*<sup>40</sup> and the case of *N. v. the United Kingdom*.

### ***M.S.S. v. Belgium and Greece***

The applicant in this case was an Afghan national, who entered the European Union through Greece in 2008. After a short period of detention he was issued with an order to leave the country<sup>41</sup>. He then arrived in Belgium and applied for asylum. In accordance with the EU law - Article 10 § 1 of Council Regulation No. 343/2003/EC ("the Dublin Regulation") the Belgian authorities requested that the Greek government take charge of the application for asylum. Following this request he was sent back to Greece. There he was detained and had to face poor living conditions, brutality and insults from the police officers. After his release, having no funds, he was forced to live for months in the street in extreme poverty. This was accompanied by a permanent state of fear of being attacked and robbed, and of complete destitution generated by his situation (difficulty in finding

---

<sup>38</sup> *Salah Sheekh v. the Netherlands*, op. cit., § 141

<sup>39</sup> *N. v. the United Kingdom*, app. no. 26565/05, 27 May 2008, § 42

<sup>40</sup> *M.S.S. v. Belgium and Greece*, app. no. 30696/09, 21 January 2011

<sup>41</sup> *Ibidem*, § 9-10

food, no access to sanitary facilities, etc.)<sup>42</sup>. In the case before the Court he stated that the permanent state of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3 of the Convention<sup>43</sup>.

Having reiterated that Article 3 does not oblige contracting states to provide refugees with a home or financial assistance, the Court admitted that a situation of extreme material poverty can raise an issue under aforementioned provision and that the described case undoubtedly falls under this category<sup>44</sup>. The Court also established that the Belgian authorities were well aware of the living conditions of asylum-seekers in Greece. Therefore they had the obligation not to send the applicant there. By doing that they exposed him to a real risk of ill-treatment and thus violated Article 3.

### ***N. v. the United Kingdom***

This case connects the alleged dire humanitarian conditions with the personal circumstances of the individual - his state of health. The applicant, Mrs. N. was an Ugandan national, who entered the United Kingdom and lodged an asylum request. She claimed that she had been ill-treated and raped in her country of origin. She was admitted to hospital and was diagnosed with AIDS. Her asylum claim was rejected on credibility grounds and she was ordered with a deportation order. In her application to the ECHR Mrs. N. stated that sending her back to Uganda would constitute a real risk of ill-treatment deriving from poor humanitarian conditions. She argued that the Ugandan health system is not able to cope with AIDS, the hospitals were not equipped enough and the doctors could not be effective, given aforementioned circumstances. Therefore the quality of her life in the

---

<sup>42</sup> *M.S.S. v. Belgium and Greece*, op. cit., § 170

<sup>43</sup> *Ibidem*, § 238

<sup>44</sup> *Ibidem*, § 253, 264

country in question would be appalling and the state of her health would deteriorate rapidly<sup>45</sup>.

The Court first reiterated that a proposed removal of an alien from contracting state can give rise to a violation of Article 3 on grounds of the applicant's health but only under very exceptional circumstances<sup>46</sup>. It also reserves to itself sufficient flexibility to address the application of Article 3 in other contexts which might arise, where the source of the risk of proscribed treatment in the receiving country stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, did not in themselves infringe the standards of Article 3<sup>47</sup>.

Further it was established that aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state<sup>48</sup>. Moreover, the fact that the applicant's state of health, including her life expectancy, would be significantly reduced if she were to be removed to the country in question is not sufficient in itself to give rise to breach of Article 3<sup>49</sup>. To describe the exceptional circumstances, where the removal of alien who is suffering from a serious illness could give rise to a breach of Article 3, the Court reiterated its previous case of *D. v. the United Kingdom*. In that case the applicant was critically ill, close to death, could not be guaranteed any nursing or medical care in the country in question and had no family there willing or able to care for him or provide him with even basic level of food, shelter or social support<sup>50</sup>. This high threshold, applied to Mrs. N. case, drove the Court to the conclusion that her deportation to Uganda would not constitute a breach of Article 3 of the Convention. It was accepted that the quality of her life and life

---

<sup>45</sup> *N. v. the United Kingdom*, op. cit., § 27

<sup>46</sup> *Ibidem*, § 34

<sup>47</sup> *Ibidem*, § 32

<sup>48</sup> *Ibidem*, § 42

<sup>49</sup> *Ibidem*, § 42

<sup>50</sup> *Ibidem*, § 42

expectancy could deteriorate. Nevertheless, she was not at the time critically ill, would obtain access to medical treatment in Uganda, and could rely on help from her relatives<sup>51</sup>.

### **The possibility of internal relocation**

The Court states clearly that its assessment of the existence of a real risk of ill-treatment must be rigorous<sup>52</sup>. In general this assessment should consider the receiving country in its entirety. Nevertheless an individual might face a risk of ill-treatment only within certain areas of that country. In those situations it is necessary to determine if it is possible for him to relocate within the borders of the country. Therefore the possibilities of internal flight and other forms of transit have to be considered. If an individual is able to make a safe journey to a place where he is safe, his expulsion will not constitute a violation of Article 3.

The Court stated that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision<sup>53</sup>. It was also added that as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment<sup>54</sup>.

In the previously described case of *Sufi and Elmi v. the United Kingdom* the applicants were to be sent to the international airport in Mogadishu. The Court admitted that it could not however limit its assessment of the situation only to those areas as the British authorities claimed that it would be safe to travel to the other parts of Somalia. In respect of the abovementioned criteria the Court established that there are possibilities of travelling from the Mogadishu International Airport. Having considered that, the Court moved on to analysing the general situation in different areas in Somalia in connection with the personal features of

---

<sup>51</sup> *N. v. the United Kingdom*, op. cit. § 42

<sup>52</sup> *Chahal*, op. cit., § 128

<sup>53</sup> *Salah Sheekh v. the Netherlands*, op. cit., § 141

<sup>54</sup> *Ibidem*, § 141

the applicants to find out, if they would have chance to settle there and avoid the risk of ill-treatment.

It instantly excluded the possibility of travelling to the northern lands of Somaliland and Puntland, as the applicants would not be admitted there without strong family connections in the region. Aforesaid connections did not exist<sup>55</sup>. In respect of southern and central parts of Somalia, the Court established that they are ruled by fundamental Islamic organisation al-Shaabab and due to personal circumstances the applicants would not be safe there<sup>56</sup>. In addition the Court came to the conclusion that the applicants might eventually be forced to seek refuge in IDP camps in Somalia or refugee camps in Kenya. After analysing the situation in those areas the Court ruled that the applicants would face a real risk of ill-treatment due to dire humanitarian conditions<sup>57</sup>. In summary, the Court first considered all the possibilities of locating the applicants in Somalia. In each location however, they were exposed to treatment contrary to Article 3. Only after thorough analysis the Court was able to rule that deporting them would lead to a breach of the Convention.

### **Indirect removal**

In its jurisprudence the Court established that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling contracting state to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention<sup>58</sup>. Therefore in some cases there is a need to examine if there is a possibility that the intermediary country will transfer an individual to the country where he or she might face ill-treatment. In the previously mentioned case of *Abdolkhani and Karimnia v. Turkey*, the applicants, Iranian nationals, entered the Turkish territory through Iraq. Being former members of the PMOI, they feared ill-treatment in Iran, Turkish authorities decided to deport them to Iraq, from where they had arrived. The Court however, pointed out that there was a strong possibility of removal of persons perceived to be affiliated with PMOI from Iraq to Iran<sup>59</sup>. The government in Turkey failed to recognise the threat even though this was indicated by numerous available sources. Having previously established a real risk of ill-treatment of the applicants, had they been transferred to Iran, the Court concluded that

---

<sup>55</sup> *Sufi and Elmi*, op. cit., § 267

<sup>56</sup> *Ibidem*, § 271-277

<sup>57</sup> *Ibidem*, § 278-292

<sup>58</sup> *Abdolkhani and Karimnia v. Turkey*, op. cit., § 88

<sup>59</sup> *Ibidem*, § 87

deporting them by Turkish authorities to Iraq would constitute a violation of Article 3 of the Convention<sup>60</sup>.

## **Evidential requirements**

The applicant is the party which should adduce evidence capable of proving that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3, if sent to a receiving country. Where such evidence is adduced, it is for the government to dispel any doubts about it<sup>61</sup>. In accordance with the subsidiarity principle, the Court must take into consideration the findings made in the domestic proceedings<sup>62</sup>. To render its compliance with the Convention the assessment made by the authorities of the Contracting State should be adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources (UN reports, non-governmental organisations like Amnesty International, other countries' assessments)<sup>63</sup>. Nevertheless the rule was set according to which the Court should, if necessary, assess the issue in the light of the material obtained *proprio motu*- on its own initiative<sup>64</sup>. It needs to be done especially when the applicant – or a third party within the meaning of the Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent government<sup>65</sup>.

The Court set certain rules regulating the assessment of the weight of the material placed before it. Consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations<sup>66</sup>. Appropriate attention should also be given to the presence and reporting capacities of the author of the material in the country in question<sup>67</sup>. As to the content of the material the Court set priority to reports considering the human rights situation in the country in question and

---

<sup>60</sup> *Abdolkhani and Karimnia v. Turkey*, op. cit., § 92

<sup>61</sup> *Saadi v. Italy*, op. cit., § 129

<sup>62</sup> Lech Garlicki, *Konwencja...*, op. cit. p. 114

<sup>63</sup> *NA. v. the UK*, op. cit., § 119

<sup>64</sup> *H.L.R. v. France*, op. cit., § 37

<sup>65</sup> *NA. v. the UK*, op. cit., § 119

<sup>66</sup> *Saadi v. Italy*, op. cit., § 143

<sup>67</sup> *NA. v. the United Kingdom*, op. cit., § 121

directly addressed the grounds for the alleged real risk of ill-treatment in the particular case over the papers reporting on the general situation<sup>68</sup>.

The importance of those rules is clear in the cases where the parties rely on different varying or sometimes even contradictory materials which consider the situation in the country in question. In the previously mentioned case of *NA. v. the United Kingdom* the British authorities based the deportation order on materials obtained from domestic sources, including Home Office Operational Guidance Notes on Sri Lanka and the British High Commission in Colombo<sup>69</sup>. Following the content of these documents the authorities rendered that it was safe for Mr. NA. to travel and settle in Sri Lanka. The applicant on the other hand pointed out the reports of the United Nations High Commissioner on Refugees entitled *Position on the International Protection Needs of Asylum Seekers from Sri Lanka* and the reports from non-governmental human rights' organisations- Amnesty International and Human Rights Watch<sup>70</sup>. The information contained in these documents led him to the contrary conclusions.

The Court in its assessment of the situation took into consideration documents presented by both parties and added the material obtained on its own initiative. Following that the Court observed that some statements made in British High Commission's letters were uncorroborated and contrary to the other reliable documents (i.a. the assessment of the Immigration and Refugee Board of Canada)<sup>71</sup>. Moreover by basing its assessment on multiple independent sources the Court criticised indirectly the domestic authorities for the shortage of materials gathered in order to make a verdict.

### **Diplomatic assurance in assessment of risk of ill-treatment**

One of the documents that might be used in assessing, if there is a real risk of ill-treatment of an individual in the country in question is the diplomatic assurance made by that country's government in which the guarantees of security and fair treatment are issued. In general the risk of treatment contrary to Article 3 decreases when the diplomatic guarantee exists<sup>72</sup>. At the same time the contracting country is obliged to assess its credibility and

---

<sup>68</sup> Ibidem, § 122

<sup>69</sup> Ibidem, § 57-64

<sup>70</sup> Ibidem, § 96

<sup>71</sup> Ibidem, § 135

<sup>72</sup> L. Garlicki, *Konwencja...*, op. cit., p. 133

accuracy<sup>73</sup>. The weight of it depends, in each case, on the circumstances prevailing at the material time<sup>74</sup>. The Court underlined that diplomatic assurances were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where other, reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention<sup>75</sup>. Applying these principles to the circumstances of the cases *Ismoilov and others v. Russia*, and *Ahorugeze v. Sweden*<sup>76</sup> brought the Court to different conclusions.

### ***Ismoilov and others v. Russia***

The applicants were Uzbek and Kyrgyz nationals, asylum seekers in Russia and Muslims. After obtaining an extradition request from the government of Uzbekistan (based on allegations that they had helped to finance the unrest in Andijan, Uzbekistan) the Russian authorities ordered aforesaid extradition. It was explained that the Russian government did not fear the ill-treatment of the applicants in Uzbekistan as it had received diplomatic assurance from the Uzbek authorities. The Uzbek authorities claimed that they had no intention of persecuting the applicants out of political motives, or on account of their race, ethnic origin, religious or political beliefs and that they would not be ill treated or subjected to the death penalty<sup>77</sup>.

The Court first assessed the general situation in Uzbekistan. It established that torture and ill-treatment were common and systematic practice, especially with regard to Muslims believed to have participated in Andijan events<sup>78</sup>. Therefore the Court could not be persuaded that the diplomatic assurances from the Uzbek government offered a reliable guarantee against the risk of ill-treatment of the applicants<sup>79</sup>. It ruled that the Russian authorities breached Article 3 by having put trust in the abovementioned declaration and not making an

---

<sup>73</sup> *Ibidem*, p. 133

<sup>74</sup> *Saadi v. Italy*, op. cit., § 148

<sup>75</sup> *Ismoilov and others v. Russia*, app. no. 2947/06, 24 April 2008, § 127

<sup>76</sup> *Ahorugeze v. Sweden*, app. no. 37075/09, 27 October 2011

<sup>77</sup> *Ismoilov and others v. Russia*, op. cit., § 109

<sup>78</sup> *Ismoilov and others v. Russia*, op. cit., § 147

<sup>79</sup> *Ibidem*, § 147

effort to analyse other available and independent sources of information.

### ***Ahorugeze v. Sweden***

In this case the applicant was a Rwandan national of Hutu origin who lived in Denmark and was granted the refugee status there. During his holiday in Sweden he was arrested under an international arrest warrant on charges including genocide and crimes against humanity. The Rwandan government then made a request for the extradition of Mr. Ahorugeze. The Rwandan Ministry of Justice formally assured the Swedish authorities that the applicant would face a fair trial and be detained in Mpanga Prison- a facility which met all the requirements as to accommodation and treatment of the inmates. The Ministry of Justice further assured that the applicant would not be subjected to solitary confinement, death penalty or life imprisonment in isolation and the Swedish authorities would be able to monitor and evaluate detention and imprisonment conditions<sup>80</sup>. The applicant rejected the Rwandan government assurances and claimed that he would, if extradited, face a real risk of torture and ill-treatment in detention. He noted that the Swedish government would not be able to take any measures, if the Rwandan government decided not to abide by the abovementioned assurances<sup>81</sup>.

In the discussed case the Court took into consideration the Rwandan authorities' guarantees expressed in the letter of the Ministry of Justice. It was however, only one out of the number of documents that were analysed in assessing the situation in Rwanda and its prisons. Others were, inter alia Amnesty International report, International Criminal Tribunal for Rwanda's decisions on transferring genocide suspects to Rwanda, as well as other contracting states' reports and decisions. These documents constituted the base to ECHR's assessment. Nevertheless Rwandan diplomatic guarantees

---

<sup>80</sup> *Ahorugeze v. Sweden*, op. cit., § 24

<sup>81</sup> *Ibidem*, § 79

played its role in reassuring the Court of the safety of the applicant once extradition would occur. The applicant's observations concerning these guarantees were considered as "no more than speculative" since he could not support his fears with any evidence<sup>82</sup>.

### **Timing of the assessment**

There is an important difference between the cases, where the expulsion to the country in question had already happened and where the decision to expel had been made but the expulsion itself had been delayed. The latter situation takes place often as a result of indication by the Court of an interim measure under Rule 39 of the Rules of Court. This difference lies in the timing of the assessment of a risk of ill-treatment. In the case of *Saadi v. Italy* the Court explained that with regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion<sup>83</sup>. It is important though that the Court is not precluded from having regard to information which comes to light subsequent to the extradition or deportation<sup>84</sup>.

On the other hand, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court<sup>85</sup>. It was further added that while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive<sup>86</sup>.

---

<sup>82</sup> *Ahorugeze v. Sweden*, op. cit., § 91

<sup>83</sup> *Saadi v. Italy*, op. cit., § 133

<sup>84</sup> *Abdolkhani v. Karimnia v. Turkey*, op. cit., § 76

<sup>85</sup> *Saadi v. Italy*, op. cit., § 133

<sup>86</sup> *Ibidem*, § 133

## Article 2

Article 2 of the Convention stipulates:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - in defence of any person from unlawful violence;
  - in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - in action lawfully taken for the purpose of quelling a riot or insurrection.

The right to life guaranteed in Article 2 is the right of fundamental value in all human rights' protection systems. The significance of it is underlined in the Convention through the fact that it is one of the few provisions that cannot be derogated from in time of war or other public emergency<sup>87</sup>. Article 2 imposes two types of obligations on contracting states. On one hand there is a positive obligation to create and abide by legal rules for the protection of the right to live in respect of all the situations, where human life is endangered. This danger does not have to arise from the direct actions of state authorities, it might be caused by third parties or other factors. On the other hand paragraph 2 of Article 2 formulates a negative norm - prohibition of depriving individuals of life by the state and its agents<sup>88</sup>. The interpretation of Article 2 by the ECHR has evolved over the years, obtaining a wider meaning and providing better protection.

In respect of rights of refugees and asylum-seekers, Article 2 can constitute a barrier to removal in the most extreme cases. Therefore, conclusion can be made that the Convention prohibits expulsion in situations, where substantial grounds have been shown to believe that the individual concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 2<sup>89</sup>. In its judgments the Court admitted that it had not excluded the possibility that a contracting state's responsibility might be engaged under Article 2 of the Convention where

---

<sup>87</sup> D. J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh 1995, p. 37

<sup>88</sup> L. Garlicki, *Konwencja...*, op. cit., p. 66

<sup>89</sup> see: *mutatis mutandis Abdolkhani and Karminia v. Turkey*, op. cit., § 42

an alien is deported to a country where he or she is seriously at risk of being executed, as a result of the imposition of the death penalty or otherwise<sup>90</sup>.

In the case of *Öcalan v. Turkey* the Court analysed, whether imposing the death penalty can be in accordance with the Convention. It noted that thanks to the fact that all contracting states have signed Protocol No. 6 to the Convention and almost all of them ratified it, the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment<sup>91</sup>. ECHR then concluded that capital punishment in peacetime has come to be regarded as an unacceptable form of punishment that is no longer permissible under Article 2<sup>92</sup>. However, the fact that there are still a large number of contracting states who have not yet signed or ratified Protocol No. 13 to the Convention may prevent the Court from finding that it is the established practice of the contracting states to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war<sup>93</sup>. At the same time the Court stated that the imposition of a capital punishment following an unfair trial as an arbitrary deprivation of life always has to be concerned as contrary to Article 2 of the Convention<sup>94</sup>. The aforesaid rules were implemented later in favour of the applicant, in the case of *Bader and Kanbor v. Sweden*.

### ***Bader and Kanbor v. Sweden***

Mr. Bader and Mrs. Kanbor were Syrian nationals and couple with two minor children. They came to Sweden and launched a number of asylum applications. Mr. Bader explained in them that in Syria he had been convicted, *in absentia*, of complicity in a murder. He allegedly provided the weapon to his brother, who then killed their brother-in-law. Mr. Bader was found guilty by the Syrian court and sentenced to death. The Swedish authorities rejected all of the asylum applications and the applicants were served with the deportation order. In their complaint before the Court they indicated that the first applicant, if deported to Syria would face a real risk of being arrested and executed, as the death sentence against him had gained legal force.

---

<sup>90</sup> *Bader and Kanbor v. Sweden*, app. no. 13284/04, 08 November 2005, § 42

<sup>91</sup> *Öcalan v. Turkey*, app. no. 46221/99, 12 May 2005, § 163

<sup>92</sup> *Ibidem*, § 163

<sup>93</sup> *Ibidem*, § 165

<sup>94</sup> *Ibidem*, § 166

That in the applicants' view would constitute violations of Articles 2 and 3 of the Convention<sup>95</sup>.

The Court applied the general rules to the case and agreed with the applicants. It pointed out that the first applicant had a justified and well-founded fear that the death sentence against him would be executed as there was a very little probability of his case being re-opened<sup>96</sup>. Following that it was established that there were serious concerns as to the fairness of the Syrian trial of the applicant. The Court noted that it transpired from the Syrian judgment that no oral evidence was taken at the hearing, that all the evidence examined was submitted by the prosecutor and that neither the accused nor even his defence lawyer was present at the hearing<sup>97</sup>. In respect of that the Court had no option but to regard the Syrian proceedings as a flagrant denial of a fair trial<sup>98</sup>.

Having established the facts ECHR came to the conclusion that deporting Mr. Bader to Syria where the death sentence had been imposed on him following an unfair trial, would constitute a breach of Article 2 of the Convention.

Nevertheless in most cases complaints made by the applicants under Article 2 are dealt within the context of the examination of the related complaints under Article 3<sup>99</sup>. The fear of death can constitute one of the elements of ill-treatment prohibited in Article 3. In most of the cases where death of the applicant can occur but it is not certain (or almost certain) the complaint under Article 2 must be seen as indissociable from the complaint under Article 3<sup>100</sup>.

---

<sup>95</sup> *Bader and Kanbor v. Sweden*, op. cit., § 33

<sup>96</sup> *Ibidem*, § 46

<sup>97</sup> *Ibidem*, § 47

<sup>98</sup> *Ibidem*, § 47

<sup>99</sup> see: *Said v. the Netherlands*, app. no. 2345/02 § 37, 05 July 2005; *NA. v. the United Kingdom*, op. cit., § 95; *Abdolkhani and Karminia v. Turkey*, op. cit., § 62

<sup>100</sup> *NA. v. the United Kingdom*, op. cit., § 94-95

## **Article 5 - Detention of asylum seekers and its limits**

Article 5 states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a. the lawful detention of a person after conviction by a competent court;
  - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

## General information

The right to liberty and security constitutes one of the fundamental rights in today's society. In this context the term "liberty" should be understood as "freedom from a detention" or "freedom from putting an individual in a place of isolation"<sup>101</sup>. This right has existed in Europe for a very long time and origins in *Magna Charta Libertatum*, an English charter signed by the king, John Lackland. This document introduced the prohibition of arbitrary detention - the prison sentence could only be ordered by the courts. The concept of the freedom from arbitrary detention developed in Europe throughout the years, appearing in all of the most important legal acts concerning civil rights, like the Habeas Corpus Act in the United Kingdom, The French Declaration of the Rights of Man and of the Citizen and almost all national constitutions in the XIX and XX century<sup>102</sup>. Therefore the right to liberty and security have become one of the crucial rights protected by the Convention.

In respect of the fact that the deprivation of liberty of some individuals is a necessity in every society, the creators of the Convention faced the challenge of enumerating the situations in which it would be possible. This enumeration was placed in subparagraphs (a) to (f) of Article 5 § 1 and is of exclusive nature. It means that there can be no other deprivation of liberty than one fitting the criteria of said subparagraphs. From the position of this paper, attention should be paid merely to Article 5 § 1 (f) enabling detention of persons trying to effect an unauthorised entry in the country and persons awaiting deportation or extradition. Important procedural safeguards were set in Article 5 § 2 (right to information) and Article 5 § 4 (right to review of the detention orders) and those provisions need to be examined closely as well in respect of the rights of asylum-seekers.

Nevertheless, before exploring the details of aforementioned provisions there is a need to analyse what the term "detention" means in the context of the Convention.

---

<sup>101</sup> L. Garlicki, *Konwencja...*, op. cit., p. 158

<sup>102</sup> *Ibidem*, p. 155

## **Definition of the term "detention"**

It is important to understand correctly the term "detention" in order to differentiate it from the term "restrictions on the freedom of movement" which is subject to the provision of Article 2 of Protocol No. 4 to the Convention.

The Court has not established in its case-law any fixed definition of detention. It only stated that detention is a deprivation of liberty and pointed out several factors which can indicate in a particular situation whether deprivation of liberty had occurred<sup>103</sup>. The consideration must be put into, *inter alia*, the type, duration, effects and manner of implementation of the measure in question<sup>104</sup>. Thus the Court concluded that the difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance<sup>105</sup>. During recent years the Court needed to apply those rules in a previously described case of *Iskandarov v. Russia*.

### ***Iskandarov v. Russia***

The applicant, as it was mentioned before, was a Tajik national and one of the opposition leaders in Tajikistan. He fled to Russia. The Tajik authorities issued an extradition request which was originally refused in Russia due to pending asylum proceedings. After a couple of days, while taking a walk, the applicant was abducted by a group of men wearing civilian clothes, placed in a car and driven away. Blindfolded, he was escorted to an airport where he was forced to enter an airplane (without showing any identification documents). The plane took off and landed in Dushanbe, the capital of Tajikistan.

The applicant accused the Russian government of conducting the aforementioned actions. In response it denied any involvement. The Court then firstly had to establish which party was stating the facts incorrectly. It concluded that the described operation would have never been possible without at least the knowledge of Russian authorities. Further evidence indicated that the government commissioned and *de facto* conducted it. Therefore issue arose if the abovementioned events could be qualified as deprivation of liberty.

---

<sup>103</sup> UNHCR Regional Bureau for Europe Department of International Protection, *UNHCR Manual on Refugee Protection and the European Convention on Human Rights*, Geneva 2003-2006, p. 21

<sup>104</sup> *Amuur v. France*, app. no. 19776/92, 25 June 1996, § 42

<sup>105</sup> *Guzzardi v. Italy*, app. no. 7367/76, 06 November 1980, § 93

The Court could not determine (due to lack of evidence) whether at some point in time during that journey the applicant was confined to a cell or locked up in any premises. Nevertheless it established that he was accompanied by Russian state agents and was brought to Tajikistan against his will<sup>106</sup>. The Court could not consider this as a mere restriction of the applicant's freedom of movement as his journey was imposed on him by state agents<sup>107</sup>. In addition it was noted that in that case the relatively short duration of the period during which the applicant was under control of the Russian authorities was not decisive for determining whether there had been a deprivation of liberty<sup>108</sup>. Moreover the Court reiterated its case-law and stated that deprivation of liberty effected in a moving vehicle may be regarded as "detention"<sup>109</sup>. In conclusion, the facts in the described case determined that detention within the meaning of Article 5 § 1 had occurred.

### **Exclusive reasons for the detention under the Convention**

Having established that an individual in a particular case had been detained, the Court moved on to examine if the detention fell under one of the categories described in subparagraphs (a) to (f) of Article 5. As it was mentioned before, those subparagraphs provide an exclusive list of situations in which detention is possible in accordance with the Convention. Therefore any detention that does not fit the description of the abovementioned provisions will automatically constitute a breach of Article 5. One of the recent cases involving an asylum-seeker where the Court touched on that subject was the case of *M.A. v. Cyprus*<sup>110</sup>.

#### ***M.A. v. Cyprus***

The applicant was a Syrian national of Kurdish origin who came to Cyprus and requested asylum. Unsatisfied with the government's asylum policy he joined a protest that was held against it. During this

---

<sup>106</sup> *Iskandarov v. Russia*, op. cit., § 140

<sup>107</sup> *Ibidem*, § 140

<sup>108</sup> *Ibidem*, § 140

<sup>109</sup> *Ibidem*, § 141

<sup>110</sup> *M.A. v. Cyprus*, app. no. 41872/10, 23 July 2013

protest he was apprehended (along with others) by the police forces and detained in police headquarters with a view of determining his immigration status. Having discovered that his presence in the country was illegal he remained in detention, now with a view to deportation (deportation order was issued in spite of the pending asylum proceedings). After launching proceedings before ECHR but before the judgment he obtained refugee status.

Bearing in mind the subject of this subchapter, the matter that needs to be examined is the applicant's stay in the police headquarters with a view of determining his immigration status. The government submitted that Mr. M.A. was not deprived of his liberty during this period<sup>111</sup>. It was explained that the authorities suspected that a number of the protesters were failed asylum seekers and therefore “prohibited immigrants”, but considered that it would have been impossible to carry out an effective on-the-spot inquiry without provoking a violent reaction<sup>112</sup>.

The Court however established that in the instant case the government had detained the applicant. Moreover, the detention, described as leading to determining his immigration status, did not fall under any of the categories listed in Article 5 § 1. What is more, it did not have any domestic legal basis<sup>113</sup>. Therefore, for more than one reason, it needed to be deemed contrary to the Convention.

### **General rules governing Article 5 § 1**

The Court set the number of general rules governing all the provisions deriving from Article 5 § 1. Those rules apply to each of the subparagraphs and come into play as soon as it has been established in each particular case that an individual has been detained and the detention is based on one of the exceptions set out in subparagraphs (a) to (f). The Court on multiple occasions reiterated that, in addition, any deprivation of liberty must be "lawful"<sup>114</sup>.

---

<sup>111</sup> *M.A. v. Cyprus*, op. cit., § 199

<sup>112</sup> *Ibidem*, § 201

<sup>113</sup> *Ibidem*, § 202

<sup>114</sup> *Saadi v. the United Kingdom*, app. no. 13229/03, 29 January 2008, § 67

The notion of "lawfulness" comprises of two elements: obeying by the state authorities a procedure prescribed by national law (the substantive and procedural rules of national law) and protecting the individual from arbitrariness (the element that extends beyond lack of conformity with national law)<sup>115</sup>.

In other words the detention of the individual must be lawful both in domestic and Convention terms. Apart from laying down an obligation to comply with the substantive and procedural rules of national law, the Convention requires that any deprivation of liberty should be in keeping with the purpose of Article 5 which is to protect an individual from arbitrariness<sup>116</sup>. Therefore the Court also examines the quality of domestic law.

### **Compliance of detention with domestic law**

When the procedure proscribed by law is the matter, in order for it to be compliant with the Convention, there has to be a domestic procedure (clear legal rules concerning all the details of detention, *inter alia*, its ordering, extending, setting time limits) and it has to be followed strictly. Taking into consideration the judgments within the scope of this paper the case that is worth examining is the previously mentioned case of *Abdolkhani and Karimnia v. Turkey*.

#### ***Abdolkhani and Karimnia v. Turkey***

As mentioned before, the applicants were Iranian nationals and former members of the PMOI who came to Turkey and requested asylum. Apart from their complaint based on the real risk of ill-treatment contrary to Article 3, if sent back to Iraq or Iran, they accused the Turkish government of breaching Article 5 § 1.

The applicants were convicted of illegal entry into Turkey and then the unsuccessful attempt was made to deport them to Iran. After that they applied for an interim measure from the Court under Rule 39 of the Rules of Court. Therefore it was requested from the Turkish authorities not to proceed with the deportation of the applicants until the case was resolved before the Court. Meanwhile Mr. Abdolkhani and Mr. Karimnia were kept in the police headquarters in the town of

---

<sup>115</sup> Ibidem, § 67

<sup>116</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, app. no. 13178/03, 12 October 2006, § 96

Hasköy. After issuing an interim measure by the Court, the Turkish authorities placed the applicants in a Foreigners' Admission and Accommodation Centre in Kırklareli Province, where they awaited the judgment of the Court.

The Court had to examine two situations: the applicants' stay in the police headquarters following the unsuccessful deportation attempt, and placing them in Foreigners' Admission and Accommodation Centre. It was established, taking into consideration criteria such as type, duration, effects and manner of implementation, that both measures in question amounted to deprivation of liberty<sup>117</sup>. Therefore the Court moved on to assessing if the applicant's detentions had a legal basis in domestic law.

As to the stay in the police headquarters in Hasköy, the Turkish government ascertained that there was a procedure proscribed by law that had been used in the case. It pointed out provisions in domestic law according to which foreigners who did not have valid travel documents or who cannot be deported are obliged to reside at places designated by the Ministry of the Interior<sup>118</sup>. The Court however observed that said provisions did not refer to a deprivation of liberty in the context of deportation proceedings. They set the rules concerning the residence of certain groups of foreigners in Turkey, but not their detention<sup>119</sup>. Moreover, according to the findings of the Court, those provisions did not provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention<sup>120</sup>.

As to the detention of the applicants in the Foreigners' Admission and Accommodation Centre, the case was even more obvious, as the Turkish government could not present any argument indicating that it

---

<sup>117</sup> *Abdolkhani and Karimnia v. Turkey*, op. cit., § 127

<sup>118</sup> *Ibidem*, § 133

<sup>119</sup> *Abdolkhani and Karimnia v. Turkey*, op. cit., § 133

<sup>120</sup> *Ibidem*, § 133

had a strictly defined statutory basis in domestic law<sup>121</sup>. The Court then had to render that both detentions were not based on the procedure proscribed by law and therefore they were in a breach with domestic law. This in turn led to the breach of Article 5 § 1 of the Convention<sup>122</sup>.

### **The notion of arbitrariness**

In recent years in the cases of the asylum-seekers many more important judgments concerned the notion of arbitrariness and the quality of domestic law. As mentioned before, there can be situations, where the detention in question might be in accordance with the national law but still be contrary to the purpose of Article 5 - protection of an individual from any arbitrariness. In that case detention will be in breach of the Convention.

The Court in its case-law never set a definition of the term "arbitrariness". Instead, four conditions were given determining if a detention in a particular case can be proclaimed as arbitrary. To avoid that, such detention must be carried out in good faith; it needs to be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued<sup>123</sup>.

Acting in bad faith as a factor that led to the breach of Article 5 § 1 is best to be extracted from the case *Conka v. Belgium*<sup>124</sup>. Even though the judgment had been issued prior to establishment of the criteria mentioned in the paragraph above, it was the bad faith of the Belgian authorities that caused the breach of the Convention.

### ***Conka v. Belgium***

The applicants were Slovakian nationals of Romany origin who came to Belgium and requested asylum, claiming that they had been subject to ill-treatment in Slovakia and were not given sufficient protection by the authorities. Their requests were denied and they were issued with the orders to leave the country within five days. They appealed against those decisions but the appeals were rejected.

---

<sup>121</sup> Ibidem, § 134

<sup>122</sup> Ibidem, § 135

<sup>123</sup> *A. and others v. the United Kingdom*, app. no. 3455/05, 19 February 2009, § 164

<sup>124</sup> *Conka v. Belgium*, app. no. 51564/99, 05 February 2002

Then they obtained information from the police that they were to attend the police station in order to complete their asylum applications. However, at the police station the applicants were served with the new decision for their removal to Slovakia and the detention order connected with the removal.

In their complaint to the Court the applicants stated that they had been lured into a trap and deceived. Therefore their detention was contrary to the purpose of Article 5. The Belgian authorities stated that the wording of the information given by the police was "unfortunate" but that did not influence the lawfulness of the detention, as it was conducted in order to secure the deportation and fell under subparagraph (f) of Article 5 § 1.

The Court admitted that it might be legitimate for the police to use stratagems in some situations but acts whereby the authorities seek to gain the trust of asylum-seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention<sup>125</sup>. Further, it was noted that while the wording of the notice was "unfortunate", it was not the result of inadvertence; on the contrary, it was chosen deliberately in order to secure compliance of the largest possible number of recipients<sup>126</sup>. Therefore the Court concluded that a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5<sup>127</sup>.

Even though the Court did not use the words "acting in bad faith" when describing the activities of the police, this is a clear example of how dishonest intentions of the authorities can amount to the arbitrariness of the detention and

---

<sup>125</sup> *Ibidem*, § 41;

<sup>126</sup> *Conka v. Belgium*, § 41

<sup>127</sup> *Ibidem*, § 42

therefore, the breach of Article 5. The length and the conditions of the detention were widely discussed in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*.

***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium***

The applicants in this case were mother (the first applicant) and her five-year-old daughter (the second applicant), both Congolese nationals. The mother fled the Democratic Republic of Congo for Canada, where she obtained a refugee status. Following that she asked her brother to bring her daughter from the DRC to Canada so that they could rejoin. The uncle and his niece boarded the plane in Kinshasa and arrived in Brussels, Belgium. The second applicant did not have any valid travel documents. Therefore the Belgian authorities refused her entry into the country and ordered her removal. Following that the child was detained in a transit centre for adults and no one was assigned to look after her. She spent there two months, during which no measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose<sup>128</sup>.

The Court firstly admitted that the detention of the second applicant could have been lawful as it fell under the category specified in Article 5 § 1 (f). It was however added that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention<sup>129</sup>. In assessing the conditions of the detention in that particular case, the Court noted that they were not adapted to the position of extreme vulnerability in which the applicant found herself as a result of her position as an unaccompanied foreign minor<sup>130</sup>. Therefore there had been a breach of Article 5.

---

<sup>128</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, op. cit., § 50

<sup>129</sup> *Ibidem*, § 102

<sup>130</sup> *Ibidem*, § 103

The length of the detention had also been an issue in the cases tried by the Court. One of the important judgments which fell under this category was in the case of *Suso Musa v. Malta*<sup>131</sup>.

### ***Suso Musa v. Malta***

The applicant was an asylum-seeker of uncertain origins who came to Malta by boat and was arrested by the police and detained. He spent over six months in detention before the decision was made rejecting his asylum claim.

The Court reiterated that many international human rights' acts allow the detention of asylum-seekers in certain circumstances, for example while identity checks were taking place or when elements on which the asylum claim was based had to be determined. However, detention had to be compatible with the overall purpose of Article 5, which was to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion<sup>132</sup>. The Court then referred to its case-law where it has already been established that periods of three months' detention pending a determination of an asylum claim to be unreasonably lengthy, when coupled with inappropriate conditions<sup>133</sup>.

Having considered that and given the unacceptable conditions of the detention the Court stated that it could not consider a period of six months to be reasonable and therefore it must be rendered arbitrary and not compatible with Article 5 of the Convention<sup>134</sup>.

In the cases of refugees and asylum-seekers, the last factor being taken into consideration when examining arbitrariness of the detention - the close connection to the ground of detention relied on by the government, concerns directly the provision of Article 5 § 1 (f). Therefore it is explained below in the next chapter in the commentary to this specific provision.

---

<sup>131</sup> *Suso Musa v. Malta*, app. no. 42337/12, 23 July 2013

<sup>132</sup> *Suso Musa v. Malta*, op. cit., § 90

<sup>133</sup> *Ibidem*, § 102

<sup>134</sup> *Ibidem*, § 102

## **Detention of asylum-seekers under Article 5 § 1 (f)**

Article 5 § 1 (f) states: "*...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.*"

The subparagraph (f) includes *de facto* two provisions. In its first limb it describes the possibility of the detention of individuals trying to enter the country in an unauthorised manner. The second limb enables the deprivation of liberty in respect of individuals that face deportation or extradition. There are different rules governing each of the situations, therefore they need to be examined separately.

The Court has developed a rich case-law concerning the second limb of the described subparagraph and then used it to create the rules governing the first limb. Therefore the analysis of the Article 5 § 1 (f) should start with taking a close look at its second provision.

## **Detention prior to deportation or extradition**

The second limb of subparagraph (f) enables detention of a person against whom action is being taken with a view to deportation or extradition. It means that the detention is lawful if it meets all the general criteria described above and as long as "action is being taken with a view to deportation or extradition". In its case-law the Court held that there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing (the notion of necessity is crucial for establishing if the detention under subparagraphs (b), (c), (d) and (e) of Article 5 § 1 is arbitrary)<sup>135</sup>.

As to the principle of proportionality, according to the Court it applies to detention under the second limb of subparagraph (f) only to the extent that the detention should not continue for an unreasonable length of time<sup>136</sup>. Therefore any deprivation of liberty in those cases will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible<sup>137</sup>. There is no fixed definition of the term "due diligence" in respect of

---

<sup>135</sup> Saadi v. the United Kingdom, § 72

<sup>136</sup> Saadi v. the United Kingdom, § 72

<sup>137</sup> Saadi v. the United Kingdom, § 72

conducting deportation or extradition proceedings. The Court must adjust it to the circumstances of each case.

***M. and others v. Bulgaria***<sup>138</sup>

The applicant in this case, Mr. M. was of Afghan nationality. He arrived in Bulgaria and was granted there a refugee status (the reason for the decision was his conversion to Christianity). Due to his alleged involvement in human-trafficking his residence permit was withdrawn and he was subject to detention pending expulsion. The expulsion order however, did not specify the country to which the applicant was to be deported - this was not required under domestic law<sup>139</sup>. The obstacle to immediate deportation mentioned in the detention order was the absence of direct flights from Bulgaria to Afghanistan. The Bulgarian government submitted also that there were difficulties in providing the applicant with an identity document<sup>140</sup>.

The Court noted however, that the deportation order was issued on 6 December 2005 and "the first effort on the part of the Bulgarian authorities to secure an identity document for his deportation" was made in February 2007, when they sent a letter to the Afghan Embassy in Sophia, requesting providing the applicant with an identity document<sup>141</sup>. The letter remained unanswered and the authorities did not take up any further action as to this matter. When it came to the absence of direct flights to Afghanistan, the Court noted that it had not been shown that any effort had been made to resolve the ensuing difficulty, which, moreover, was apparently known even before the first applicant's arrest<sup>142</sup>. The Court further reiterated that, where there are obstacles to deportation to a given country but other destinations are in principle possible, detention pending active efforts by the authorities to organise removal to a third country may fall within the scope of Article 5 § 1 (f)<sup>143</sup>. Again however, there had been

---

<sup>138</sup> *M. and others v. Bulgaria*, app. no. 40020/03, 31 July 2012

<sup>139</sup> *M. and others v. Bulgaria*, op. cit., § 69

<sup>140</sup> *Ibidem*, § 70

<sup>141</sup> *Ibidem*, § 71

<sup>142</sup> *Ibidem*, § 72

<sup>143</sup> *Ibidem*, § 73

no effort on the part of the government to pursue this option and secure the first applicant's admission to a third country<sup>144</sup>.

In conclusion, having considered all the circumstances and actions taken up by the Bulgarian authorities the Court rendered that they failed to conduct the proceedings with due diligence and that they were not entitled to keep Mr M. in detention where no meaningful "action with a view to deportation" was under way and actively pursued<sup>145</sup>.

### **Detention upon arrival**

The first limb of subparagraph (f) concerns detention of a person to prevent his effecting an unauthorised entry into the country. For a long time the Court did not have an opportunity to set the general rules to this provision. Only in 2011 in the case of *Saadi v. the United Kingdom* the Court had to examine it closely and give answers to the questions of what "unauthorised entry" means and if the "necessity test" applies to this type of detention.

#### ***Saadi v. the United Kingdom***

Mr. Saadi, a Kurd of Iraqi nationality fled his country for the fear of prosecution and arrived at Heathrow Airport in London. Then he launched an asylum request. He was first granted a temporary admission and accommodated in a hotel for the night and the next day. The following morning the applicant reported to the immigration officer as required, and was detained and transferred to Oakington Reception Centre, where the asylum proceedings continued. He had been detained for seven days, with access to a lawyer and finally obtained the refugee status.

The applicant in his complaint stated that if he had not been detained, he would have been lawfully present in the United Kingdom

---

<sup>144</sup> Ibidem, § 74

<sup>145</sup> *M. and others v. Bulgaria*, op. cit., § 75

with "temporary admission", an "authorised" status in fact and law<sup>146</sup>. Moreover, he further noted that there was a need for distinguishing between the two limbs of subparagraph (f), as they concerned different type of immigrants (those who seek entry into the country have not committed criminal offences but often fled their own countries fearing for their lives)<sup>147</sup>. Thus the necessity test should apply to the persons detained upon their arrival.

The Court, as it was mentioned above, had to, for the first time, interpret the meaning of the words "to prevent effecting an unauthorised entry". Having reiterated that the states enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory", it moved on to stating that until a state has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person, who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to "prevent his effecting an unauthorised entry"<sup>148</sup>. This concerns all the immigrants, including the asylum-seekers. The Court disagreed with the applicant, stating further that it cannot accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f). According to the Court, the interpretation of said limb that would permit detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the state to exercise its undeniable right of control referred to above<sup>149</sup>.

The next step for the Court was establishing if the necessity test applies to the first limb of subparagraph (f). It first reiterated its position on the interpretation of the second limb, according to which there is no requirement that the detention be reasonably considered

---

<sup>146</sup> *Saadi v. the United Kingdom*, op. cit., § 51

<sup>147</sup> *Saadi v. the United Kingdom*, op. cit., § 52

<sup>148</sup> *Ibidem*, § 65

<sup>149</sup> *Ibidem*, § 65

necessary. Then it stated that the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1 (f) in the same manner as it applies to detention under the second limb<sup>150</sup>. Therefore as long as the detention is to prevent person's effecting an unauthorised entry into the country and meets other general criteria mentioned earlier in this paper, it cannot be considered arbitrary.

In Mr Saadi's case the detention was conducted in a good faith, the place and conditions were appropriate, and the length - reasonable. The Court further noted that it was closely connected to the ground of detention relied on by the government (the purpose of preventing unauthorised entry) - as the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant's claim to asylum<sup>151</sup>. Therefore there had been no violation of Article 5 § 1.

In its later cases the Court developed and refined the interpretation of the first limb of subparagraph (f). It stated that the *Saadi* case should not be read as meaning that all member states may lawfully detain immigrants pending their asylum claim, irrespective of national law<sup>152</sup>. In fact, when a state enacts legislation creating further rights (e.g. authorising the entry or stay of immigrants pending an asylum application), an ensuing detention for the purpose of preventing an unauthorised entry may give raise to an issue as to the lawfulness of detention under Article 5 § 1 (f)<sup>153</sup>. That situation would constitute a breach of domestic law and therefore a breach of Article 5. In conclusion, the Court admitted that the question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law<sup>154</sup>.

---

<sup>150</sup> Ibidem, § 73

<sup>151</sup> *Saadi v. the United Kingdom*, op. cit., § 77

<sup>152</sup> *Suso Musa v. Malta*, op. cit., § 97

<sup>153</sup> Ibidem, § 97

<sup>154</sup> Ibidem, § 97

## **Influence of the application of Rule 39 of the Rules of Court on the possibility of detention under Article 5 § 1 (f)**

Rule 39 of the Rules of Court concerns the interim measures that can be applied, when it is needed. Its § 1 states:

1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

In the cases of asylum-seekers and refugees the application of Rule 39 comes into existence as a request to the state's authorities not to return an individual to the country, where he or she would be exposed to ill-treatment contrary to Article 3 or Article 2 of the Convention. Therefore the question arose of what impact the application of Rule 39 in a particular case has on the possibility of further detention of an individual under Article 5 § 1 (f). The Court addressed the issue in its judgment in the case of *Gebremedhin [Gaberamadhien] v. France*<sup>155</sup>.

### ***Gebremedhin [Gaberamadhien] v. France***

The applicant in this case was an Eritrean national, a journalist, who fled his country for the fear of ill-treatment. Eventually he came to France, where he requested asylum. He was placed in the waiting zone on the airport. The next day the Ministry of Interior declined to admit him to French territory and arrangements were made to deport him to Eritrea or any other country where he could be legally presented. The applicant turned to the ECHR and obtained an interim measure under Rule 39. Nevertheless, his detention in France continued.

In his complaint to the Court the applicant stated that according to the French law, an individual can be detained in the waiting zone on the airport only "for the time strictly necessary to arrange his departure and, if he is an asylum-seeker, to investigate whether his application is manifestly unfounded". It was clear that his application was not manifestly unfounded. As to the first provision, because of the

---

<sup>155</sup> *Gebremedhin [Gaberamadhien] v. France*, app. no. 25389/05, 26 April 2007

indication of the interim measure by the Court there was no possibility to remove him to Eritrea. Therefore, there was a breach of the domestic law on the part of French authorities and that led to the breach of Article 5 of the Convention<sup>156</sup>.

The Court disagreed with the applicant and stated that the implementation of an interim measure with a request not to return an individual to a particular country does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 of the Convention<sup>157</sup>. The Court clearly stated that both limbs of Article 5 § 1 (f) can apply in spite of an application of Rule 39. Firstly, the state authorities might not have any other option but to end the deprivation person's liberty with a view to his "deportation". That means granting this person leave to enter the country. In this situation it is possible to keep him or her in detention for the time strictly necessary for the authorities to check whether his entry into the country is lawful may amount to the "lawful detention of a person to prevent his effecting an unauthorised entry into the country" within the meaning of Article 5 § 1 (f)<sup>158</sup>.

On the other hand the Court noted that the application of Rule 39 does not prevent the person concerned from being sent to a different (third) country – provided it has been established that the authorities of that country will not send him or her on to the country referred to by the Court – his or her detention for that purpose may amount to the "lawful" detention of a person "against whom action is being taken with a view to deportation or extradition"<sup>159</sup>.

In the case before it, the Court rendered the applicant's detention as lawful under the first limb of subparagraph (f). The French authorities followed the domestic law and were authorised to conduct further

---

<sup>156</sup> *Gebremedhin [Gaberamadhien] v. France*, op. cit., § 68

<sup>157</sup> *Ibidem*, § 74

<sup>158</sup> *Ibidem*, § 74

<sup>159</sup> *Ibidem*, § 74

checks as to his identity before granting him leave to enter the country<sup>160</sup>.

### **Article 5 § 1 as an additional barrier to removal**

Two main barriers to removal in the Convention, as mentioned before in this paper, consist of Article 2 and 3. The Court adds to that two other provisions, which exceptionally can also work as a bar to removal of an individual to a particular country: Article 6 § 1 (discussed later in this paper) and Article 5§1.

The Court has not yet issued any judgment, which would prevent a contracting state from returning an individual to a country in question, based on Article 5. Nevertheless in the case of *Othman Abu Qatada v. the United Kingdom*<sup>161</sup> the Court delivered an important interpretation of Article 5§1, where it endorsed such possibility and described the circumstances under which expulsion of an individual could constitute a breach of said provision.

#### ***Othman (Abu Qatada) v. the United Kingdom***

The applicant was a Jordanian national and a recognised refugee in the United Kingdom. In connection with his alleged terroristic activity he was ordered with a notice of intention to deport to Jordan. There he had been convicted *in absentia* of conspiracy to carry out bombings and explosions.

One of the applicant's complaints before the Court concerned Article 5. He stated first that, if deported, he would be at real risk of a flagrant denial of his right to liberty as guaranteed by that article due to the possibility under Jordanian law of incommunicado detention for up to 50 days. Moreover, he would not obtain any legal assistance during such detention<sup>162</sup>. The second statement concerned his situation after the re-trial that Jordanian authorities agreed to conduct. The applicant complained that if convicted at his re-trial, any sentence of

---

<sup>160</sup> *Gebremedhin [Gaberamadhien] v. France*, op. cit., § 75

<sup>161</sup> *Othman (Abu Qatada) v. the United Kingdom*, app. no. 8139/09, 17 January 2012

<sup>162</sup> *Ibidem*, § 226

imprisonment would be a flagrant breach of Article 5 as it would have been imposed as a result of a flagrant breach of Article 6<sup>163</sup>.

The Court first addressed one of its previous judgments, when it doubted whether Article 5 could be relied on in an expulsion case<sup>164</sup>. It was noted that the interpretation of Articles 3, 5 and 6 had evolved throughout the years. The Court had already found that a flagrant denial of a fair trial can constitute a bar to removal. Therefore the conclusion was made that it would be illogical if an applicant who faced imprisonment in a receiving state after a flagrantly unfair trial could rely on Article 6 to prevent his expulsion to that State but an applicant who faced imprisonment without any trial whatsoever could not rely on Article 5 to prevent his expulsion<sup>165</sup>. It was further noted that the situation could happen, where an applicant has already been convicted in the receiving state after a flagrantly unfair trial and is to be extradited to that state to serve a sentence of imprisonment. If there was no possibility of those criminal proceedings being reopened on his return, he could not rely on Article 6 because he would not be at risk of a further flagrant denial of justice. It would be unreasonable if that applicant could not then rely on Article 5 to prevent his extradition<sup>166</sup>.

The Court added however, that even though Article 5 can be used in expulsion cases, a high threshold must apply<sup>167</sup>. Then two examples are given of types of situations that would amount to a flagrant breach of Article 5: first - if the receiving state arbitrarily were to detain an individual for many years without any intention of bringing him or her to trial; second - there would be a risk for an individual of being imprisoned for a substantial period in the receiving state, having previously been convicted after a flagrantly unfair trial<sup>168</sup>.

---

<sup>163</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 226

<sup>164</sup> *Ibidem*, § 231

<sup>165</sup> *Ibidem*, § 232

<sup>166</sup> *Ibidem*, § 232

<sup>167</sup> *Ibidem*, § 233

<sup>168</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 233

In the case of Mr. Othman the Court did not find a flagrant breach of Article 5 if he was to be send back to Jordan. It was noted that, minding the abovementioned high threshold, fifty days' incommunicado detention falls far short of the length of detention required for a flagrant breach of Article 5<sup>169</sup>.

### **Procedural safeguards - general information**

The supplements to the material norms placed in Article 5 § 1 are the procedural safeguards listed in the next paragraphs of that article. In the cases of asylum-seekers and refugees two provisions that apply are Article 5 § 2 - the right to information and Article 5 § 4 - the right to obtain a review of the detention.

### **Right to information**

Article 5 § 2 states: "*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*".

The justification for the right to information derives from the necessity of humanitarian treatment of each human-being. In case of deprivation of liberty an individual should be aware of his legal and factual situation<sup>170</sup>. Moreover, only a well-informed person can exercise his further rights granted by the Convention, namely challenging his detention in the court and applying for compensation. The Court describes the right to information as a minimum safeguard against arbitrary treatment<sup>171</sup>. What is important, the obligation to inform an individual of the grounds of his or her deprivation of liberty exceeds the norms listed in Article 5 § 1. It means that if a person was detained for the reasons different than those deriving from paragraph 1 (thus he or she was detained illegally), it is still necessary for the authorities to reveal the cause for the detention. Otherwise a cumulative breach of Article 5 § 1 and § 2 occurs<sup>172</sup>.

Explaining the wording of Article 5 § 2, the Court noted that in order to fulfil its requirements any person arrested must be told, in simple, non-technical language that he can

---

<sup>169</sup> Ibidem, § 235

<sup>170</sup> L. Garlicki, *Konwencja...*, op. cit., p. 195

<sup>171</sup> *Shamayev and others v. Georgia and Russia*, app. no. 3678/02, 12 April 2005, § 413

<sup>172</sup> L. Garlicki, *Konwencja...*, op. cit., p. 195

understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. The information must be conveyed "promptly".

The content and promptness of the information should be, according to the Court, assessed separately in each case<sup>173</sup>. The case-law though clarifies this general statement. Said information should be given, in principle, at the moment of the arrest. Nevertheless a few hours delay cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 § 2<sup>174</sup>. On the other hand in the previously mentioned case of *Saadi v. the United Kingdom* the Court decided that a delay of seventy-six hours in providing reasons for detention was not compatible with the requirement of promptness<sup>175</sup>.

The proper information to an individual must be given when the reason and the grounds for the detention change. The Court dealt with this problem in the case of *Shamayev and others v. Georgia and Russia*.

### ***Shamayev and others v. Georgia and Russia***

The applicants were 13 Russians and 1 Georgian who, allegedly attacked Russian army units with illegally obtained weapons. They then crossed the Russian-Georgian border. In Georgia they were prosecuted, *inter alia*, with crossing the border illegally and possessing illegal arms. They were placed in pre-trial detention. Meanwhile Russian authorities requested extradition of the applicants. Special troops removed five of the applicants from prison and handed over to Russian officers. While in Georgia, the applicants of Russian origins tried to obtain political asylum.

In this case the Court did not find any violation of Article 5 § 1. During the described period the applicant's detention always fell either under the provision of Article 5 § 1 (c) or (f). Nevertheless, while the applicants were properly informed about the grounds for their detention under subparagraph (c), the cause of said detention changed when Georgian authorities decided to extradite them to Russia. At that moment the detention under subparagraph (f) began. The applicants

---

<sup>173</sup> *Shamayev and others v. Georgia and Russia*, op. cit., § 413

<sup>174</sup> *Fox, Campbell and Hartley v. the United Kingdom*, app. no. 12244/86, 30 August 1990, § 42

<sup>175</sup> *Saadi v. the United Kingdom*, op. cit. § 84

however, had only been informed of the extradition proceedings four days after the decision had been made. The Court deemed this interval as incompatible with the notion of promptness<sup>176</sup>. Also the content of the information was insufficient as the lawyers of the applicants were denied access to the extradition files. The Court established that while Article 5 § 2 does not require that the case file in its entirety be made available to the person concerned, the latter must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 § 4<sup>177</sup>.

### **Right to review the detention**

Article 5 § 4 states: "*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*".

Thanks to general construction of the aforementioned provision, the right to judicial control under Article 5 § 4 covers all forms of arrest and detention, including situations described in subparagraph (f) of Article 5 § 1. It is also considered *lex specialis* to the norm placed in Article 13. Therefore each complaint under Article 13 concerning the same legal issue as a complaint under Article 5 § 4 will be absorbed by the latter<sup>178</sup>.

The term "lawfulness" used in § 4 has according to the Court the same meaning as in § 1. This in turn means that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1<sup>179</sup>.

In its case-law the Court has set many rules governing the interpretation of Article 5 § 4 that apply also to the asylum-seekers' and refugees' cases. It was established that the provision does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own

---

<sup>176</sup> *Shamayev and others v. Georgia and Russia*, op. cit., § 416

<sup>177</sup> *Ibidem*, § 427

<sup>178</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, op. cit., § 110

<sup>179</sup> *M.A. v. Cyprus*, op. cit., § 160

discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1<sup>180</sup>. What is more, the remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release<sup>181</sup>. There has to be a realistic possibility of using the remedy and its existence must be sufficiently certain. Otherwise it will not be deemed as accessible and effective and thus, contrary to Article 5<sup>182</sup>.

As to the notion of speediness of the remedy, it should always be examined in connection with circumstances of each particular case. Nevertheless the Court set strict standards in its case-law concerning the question of State compliance with the speed requirement. In previous judgments time-periods of seventeen, twenty-one and twenty-three days had been deemed excessive<sup>183</sup>.

The term "court" used in Article 5 § 4 means a body that must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful. It is unacceptable if that body has only advisory functions<sup>184</sup>. The Court also set the requirement of procedural fairness. It established that although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question<sup>185</sup>. The proceedings must be adversarial and must always ensure "equality of arms" between the parties<sup>186</sup>. Depending on each case, the elements that might be necessary to ensure compliance with Article 5 § 4 are oral hearings, witness depositions and granting the detainee or his representative an access to documents relevant for his case<sup>187</sup>.

Nevertheless the Court pointed out, reiterating its interpretation of Article 6 in respect of fair trial, that there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national

---

<sup>180</sup> *E. v. Norway*, app. no. 11701/85, 29 August 1990, § 50

<sup>181</sup> *Louled Massoud v. Malta*, app. no. 24340/08, 27 July 2010, § 39

<sup>182</sup> *M.A. v. Cyprus*, op. cit., § 160

<sup>183</sup> *Ibidem*, § 162

<sup>184</sup> *A. and others v. the United Kingdom*, op. cit., § 202

<sup>185</sup> *A. and others v. the United Kingdom*, op. cit., § 203

<sup>186</sup> *Ibidem*, § 204

<sup>187</sup> *Ibidem*, § 204

security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities<sup>188</sup>. The Court then established that abovementioned principles can apply also to the review under Article 5 § 4. In the recent years the Court had to face the problem of restrictions on the right to adversarial procedure in refugee-related case of *A. and others v. the United Kingdom*.

### ***A. and others v. the United Kingdom***

11 applicants (mostly asylum-seekers or refugees) had been detained in the UK after the terroristic attacks of 11 September 2001 in the United States of America. The British authorities considered them a threat to security as they were allegedly providing a support network for Islamic extremists. The government believed that these detentions might not be compatible with the requirements of Article 5 § 1, so a derogation notice under Article 15 was issued and the power was granted to the state authorities to detain foreign nationals certified as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom.

The applicants were provided with a procedure to challenge their detentions before the Special Immigration Appeals Commission (SIAC) but the material evidence for the case was not disclosed neither for them nor their legal advisors. During the closed sessions before SIAC, the special advocates could make submissions on behalf of the applicants, but after seeing closed material, they were not permitted to have any further contact with the applicants and their representatives<sup>189</sup>. Therefore the procedure before SIAC was in the applicants' opinion deprived of elementary procedural fairness.

The Court first admitted that it must be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack<sup>190</sup>.

---

<sup>188</sup> Ibidem, § 204

<sup>189</sup> *A. and others v. the United Kingdom*, op. cit., § 215

<sup>190</sup> Ibidem, § 216

Nevertheless the applicants had right to procedural fairness and under exceptional circumstances of that case (when they were kept in detention that did not fall under any of the categories listed in Article 5 § 1) Article 5 § 4 should have imported substantially the same fair-trial guarantees as Article 6 § 1 in its criminal aspect<sup>191</sup>.

The Court made a general statement, that in the instant case it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him<sup>192</sup>. This statement was followed with the observation that the review before SIAC and the figure of special advocate could have met the requirements set in Article 5 § 4 in spite of the lack of a full, open and adversarial hearing. It would however require more contact with the detainee, e.g. to provide exonerating evidence like an alibi<sup>193</sup>.

---

<sup>191</sup> Ibidem, § 217

<sup>192</sup> Ibidem, § 218

<sup>193</sup> *A. and others v. the United Kingdom*, op. cit., § 220

## **Article 6 - right to fair trial and the situation of asylum-seekers**

Article 6 stipulates:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b. to have adequate time and facilities for the preparation of his defence;
  - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

### **General information**

Article 6 constitutes the right to a fair trial. A fair trial in both civil and criminal cases is a basic element of the notion of the rule of law and a part of the common heritage of

European legal systems<sup>194</sup>. As one of the rights of fundamental value, the right to a fair trial comprises of a number of material and procedural safeguards. Moreover the Court believes that in a democratic society the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 would not correspond to the aim and the purpose of that provision<sup>195</sup>. Therefore the Court gives itself a competence to an in-depth examination of the way in which Article 6 has been interpreted and applied by the national authorities<sup>196</sup>.

During the recent years, most of the cases brought before the Court it concerned the requirement of speediness of the trial and violations of Article 6 through the excessive length of the proceedings before the national courts. Nevertheless the Court had to explain a few matters arising from the said provision in the refugees' related cases.

### **Applicability of Article 6 to procedures for the expulsion of aliens**

The question arose in the past, if Article 6 of the Convention could apply to the procedures for the expulsion of aliens from the contracting states. The legal matter concerned the problem of the concept of "civil rights and obligations", the term determining applicability of Article 6 § 1. The Court had to render if deciding on the expulsion of an individual concerns his civil rights and therefore, if this individual has a right to a fair trial.

In the case of *Maaouia v. France*<sup>197</sup> it reiterated that Article 6 of the Convention is applicable only to the procedures concerning the determination of a civil right and of a criminal charge. It was also established that the case of expulsion of an alien does not consider his civil rights nor it is a criminal charge. Therefore Article 6 could not apply<sup>198</sup>. The UNHCR summed up the Court's findings by stating that in the Court's opinion, decisions relating to the entry and stay of foreigners, including the granting of asylum, do not involve civil rights or criminal charges and therefore the procedures whereby such decisions are taken cannot be scrutinised on the basis of Article 6<sup>199</sup>.

---

<sup>194</sup> C. Ovey, R. White, *European Convention on Human Rights. Third Edition*, Oxford 2002, p. 139

<sup>195</sup> *Delcourt v. Belgium*, app. no. 2689/65, 17 January 1970, § 25

<sup>196</sup> P. van Dijk, G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights. Second Edition*, Deventer 1990, p. 295

<sup>197</sup> *Maaouia v. France*, app. no. 39652/98, 05 October 2000

<sup>198</sup> *Ibidem*, § 40

<sup>199</sup> UNHCR Regional Bureau for Europe Department of International Protection, *UNHCR Manual...*, op. cit., part. 2.4, p. 1

## Barrier to removal

Despite this strict attitude of the Court, Article 6 § 1 can nevertheless apply in some cases of refugees and asylum-seekers. In fact, it might work as an additional barrier to removal of an alien to a particular country. The Court indicated in its case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country<sup>200</sup>.

A definition of the term "flagrant denial of justice" has not yet been given. The word "justice" can though relate to the words "fair trial" and concern its elements listed in all the provisions of Article 6<sup>201</sup>. Moreover in its case-law the Court has already indicated that some forms of unfairness in a legal system amount to a flagrant denial of justice. These are: conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality the detention reviewed; deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country<sup>202</sup>. The Court added that in its view "flagrant denial of justice" is a stringent test of unfairness which goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the contracting state itself<sup>203</sup>. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article<sup>204</sup>.

As to the evidential requirements, the Court adapts the standards of expulsion cases under Article 3 of the Convention. It means that it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is returned to a country in question, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the government to dispel any doubts about it<sup>205</sup>.

---

<sup>200</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 258

<sup>201</sup> *Sejdovic v. Italy*, app. no. 56581/00, 01 March 2006, § 84

<sup>202</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 258

<sup>203</sup> *Ibidem*, § 260

<sup>204</sup> *Ibidem*, § 260

<sup>205</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 261

In the recent years the Court has dealt with a number of applications where the argument of a risk of flagrant denial of justice has been raised<sup>206</sup>. In most cases the judgments given denied the applicants' allegations. Often it is unnecessary to examine separately a complaint under Article 6 if the violation of Article 3 has already been established<sup>207</sup>. However, in the previously mentioned case of *Othman (Abu Qatada) v. the United Kingdom*, the risk of flagrant denial of justice was recognised and the judgment was issued in favour of the applicant stating that there would be a violation of Article 6, if he was to be returned to the country in question.

### ***Othman (Abu Qatada) v. the United Kingdom***

As mentioned before, the applicant in this case was a Jordanian national and a recognised refugee in the United Kingdom. In connection with his alleged terroristic activity he was ordered with a notice of intention to deport to Jordan. In Jordan he had been previously convicted *in absentia* of conspiracy to carry out bombings and explosions. The Jordanian authorities however agreed to organise a retrial for the applicant. In the original trial the Jordanian court admitted evidence obtained by torture of third persons. The applicant's complaint concerned the fear that the same would happen at his retrial.

The Court needed to answer the question if the admission of evidence obtained by torture amount to a flagrant denial of justice. It noted that accepting torture in a legal trial would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe<sup>208</sup>. The Court further reiterated that the trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself<sup>209</sup>.

---

<sup>206</sup> see, inter alia: *Ismoilov and Others v. Russia*, op. cit., § 153 and n.; *Ahorugeze v. Sweden*, op. cit., § 96 and n.

<sup>207</sup> see: *Ismoilov and Others v. Russia*, op. cit., § 156

<sup>208</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 264

<sup>209</sup> *Othman (Abu Qatada) v. the United Kingdom*, op. cit., § 264

Therefore, the Court considered admission of torture evidence to be a flagrant denial of justice.

Having then established that in the instant case there was real risk of admission of torture evidence in the applicant's retrial, the Court had to declare that there would be a violation of Article 6 if he was to be sent to Jordan<sup>210</sup>.

---

<sup>210</sup> Ibidem, § 287

## Summary

As mentioned before, the problem of immigration and asylum related matters is growing rapidly in Europe. The need of clarification of the rights of asylum-seekers and refugees follows it. Multilateral treaties created on the UN forum are helpful, nevertheless sometimes prove ineffective. The human rights' protection system created by the Council of Europe on the other hand can provide the individuals with higher level of protection through the powers and jurisdiction of the Court. Therefore the rules set by the Court in asylum related cases are essential.

On the course of the last 15 years many cases have been brought before the Court, which proves that the refugees and asylum-seekers rely on this particular institution. Many new rules and interpretations have been introduced that contribute to a better protection of their rights. On the other hand the Court has been criticised by numerous scholars and non-governmental organisations for its restrictive attitude, expressed for example in the case of *Saadi v. the United Kingdom* (no necessity test for the detention of asylum-seekers) or *N. v. the United Kingdom* (sending an individual suffering from AIDS to Uganda would not constitute a real risk of ill-treatment based on humanitarian grounds).

Nevertheless the existence of a remedy in the form of an ECHR's judgment has great value for the asylum-seekers and refugees. Apart from the chance of winning their own cases and resolving personal problems, the trial before the Court constitutes the opportunity to discuss the rights of those groups and their position in European countries on a wide forum. In time it might lead to changes in interpretation of the Convention by the Court in favour of the applicants and modifications in the laws and policies of the contracting states.