“Children of a Lesser God”: The Rights of Migrants and Refugees under the European Convention on Human Rights

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Abstract

When it comes to the protection of migrants and refugees the European Court of Human Rights is set on a course to limit, narrow and curb individual rights. It continues to abide by precedents that are unclear, unfair, and dated, like Saadi v United Kingdom, A v United Kingdom and N v United Kingdom. The Court has utterly failed to extend the same fundamental rights citizens of Member States enjoy under the European Convention on Human Rights to those individuals who often make a perilous journey to our shores, treating them as children of a lesser god. Such failure is disturbingly reflected in its art.3 case law on detention of migrants and expulsion or removal of foreigners, including terminally ill people, its art.8 case law on family reunification and access to citizenship, and most strikingly in its art.4 Protocol 4 case law on prohibition of collective expulsions, which is often tainted by crimmigration policy needs and an undisguised populist rhetoric tone. The recent GC judgment Sanchez-Sanchez v United Kingdom is yet another unfortunate example of this trend.

Introduction

The current approach of the European Court of Human Rights (the Court) towards migrants and refugees has been contradictory and somewhat confusing, creating an atmosphere of uncertainty across Europe. There is, in short, a messy state of affairs, rife with internal contradictions within the jurisprudence of the Court. This is compounded by the regressive nature of the jurisprudence over the last decade, such that migrants’ rights are now in dire need of reconsideration and clarification.[1] This opinion piece reflects on some of the many challenges that migrants face before the Court. These issues are complex such that it is not possible to be exhaustive, instead the discussion focuses on some of the most important issues, such as the detention of migrants and the expulsion of terminally ill foreigners.

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[1] L.R. Helfer and E. Voeten, “Walking Back Human Rights in Europe?” (2020) 31(3) E.J.I.L. 797.

Articles 3 and 5: Prohibition of torture and ill-treatment and right to liberty

First, we consider the plight of migrants detained at the border or during the process of deportation.[2] The detention of migrants has posed real challenges for the Court and illustrates two competing interests at play: on the one hand, the Court must take into account a state's right to control its borders, but on the other, it must protect an individual's right not to be subject to torture or ill-treatment. It is indisputable that each state has the right to secure its borders and ensure that individuals do not attempt to circumvent immigration restrictions. And, when it is accompanied by suitable safeguards for the persons concerned, the confinement of aliens is acceptable in order to enable states to prevent unlawful immigration.[3] However, even in such limited circumstances, states must nevertheless ensure that they continue to abide by their international obligations, including the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights (the Convention or ECHR).[4] In other words, "[s]tates' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions".[5]

Assessing the risk of violating rights in the event of removal

The Court prohibits removal if there is a real risk, based on "substantial grounds", of suffering a breach of the right to life (art.2), ill-treatment (art.3), or a violation of their integrity (art.8).[6] It is for the national authorities to carry out the risk assessment and it falls to the Court to control it with great firmness.[7] The risk may sometimes be systemic, depending on the situation in the receiving state. The Court then relies on a body of factual information and places particular emphasis on the analyses of non-governmental organisations or international bodies such as the United Nations (UN) High Commissioner for Human Rights and the High Commissioner for Refugees. The Court routinely states that a situation of generalised violence is not sufficient in itself,[8] however, it also considers that certain contexts can, in themselves, characterise a risk of violation of the Convention. This is the case, for example, in Syria, due to the existence of high-intensity armed conflict and attacks against civilians.[9] Consequently the situation in the receiving state is always part of the assessment of the risk of a violation of the specific applicant's rights.

[2] Several publications have highlighted the problem of detention in various European countries. See J. Sarkin, "Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons" (2017) 22(2) *The International Journal of Human Rights* 207; B. Frelick, "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers" (21 September 2009), *HRW*, *https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers* [Accessed 24 April 2023]; P. Blomfield, "We Are Locking Up People Indefinitely. This Inhumane Practice Needs to End" (24 August 2017), *The Guardian*, *https://www.theguardian.com/commentisfree/2017/aug/24/migrants-europe-detention-centres-time-limit* [Accessed 24 April 2023].

[3] *MSS v Belgium and Greece* [GC] (App. No.30696/09), judgment of 21 January 2011; (2011) 53 E.H.R.R. 2 at [216].

[4] *MSS* [GC] (App. No.30696/09), judgment of 21 January 2011; (2011) 53 E.H.R.R. 2 at [216]. See N. Sitaropoulos, "Why International Migration Law Does Not Give a License to Discriminate" (20 May 2015), *EJIL: Talk!*, *https://www.ejiltalk.org/why-international-migration-law-does-not-give-a-license-to-discriminate/* [Accessed 24 April 2023]; F. Pizzutelli, "The Human Rights of Migrants as Limitations on States' Control Over Entry and Stay in Their Territory" (21 May 2015), *EJIL: Talk!*, *https://www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/* [Accessed 24 April 2023].

[5] Pizzutelli, "The Human Rights of Migrants as Limitations on States' Control Over Entry and Stay in Their Territory" (21 May 2015), *EJIL: Talk!* (citing *Amuur v France*, 25 June 1996, [43], *Reports of Judgments and Decisions* 1996-III).

[6] See for example, *Chahal v United Kingdom* (App. No.22414/93), judgment of 15 November 1996 (1996) 23 E.H.R.R. 413; *Shamayev v Georgia and Russia* (App. No.36378/02), judgment of 12 April 2005; *Saadi v Italy* (App. No.37201/06), judgment of 28 February 2008; (2009) 49 E.H.R.R. 30; *Daoudi v France* (App. No.19576/08), judgment of 3 December 2009; *MA v Belgium* (App. No.19656/18), judgment of 27 October 2020. The removal may also have amounted to ill-treatment, if a young child was involved, because of the extreme distress inflicted to him/her. See *Mayeka v Belgium* (App. No.13178/03), judgment of 12 October 2006; (2008) 46 E.H.R.R. 23 at [69]. On this case, see B. Masson, "Un enfant n'est pas un étranger comme les autres, obs. sous Cour eur. dr. h., 1e section, arrêt *Mubilanzila Mayeka et Kaniki Mitunga v. Belgium, 12 octobre 2006 RTDH*" (2007), pp.823–835.

[7] For recent examples, see *KI v France* (App. No.5560/19), judgment of 15 April 2021; *Bivolaru and Moldovan v France* (App. Nos 40324/16 and 12623/17), judgment of 25 March 2021. Concerning M. Bivolaru, see fn.xx. For an example of a removal to China, see *Liu v Poland* (App. No.37610/18), judgment of 6 October 2022.

[8] See for example, relative to Kirghizstan, *TK and SR v Russia* (App. No.49975/15), judgment of 19 November 2019.

[9] *OD v Bulgaria* (App. No.34016/18), judgment of 10 October 2019 at [52]. See also *LM v Russia* (App. Nos 40081/14, 40088/14 and 40127/14), judgment of 15 October 2015; (2018) 66 E.H.R.R. 6.

For instance, in the case *OD v Bulgaria*, the Court stressed the risk of execution, arbitrary detention and ill-treatment incurred by the applicant because of his desertion from the Syrian army.[10]

Yet whilst this systematic approach is well established in the case law, some of the recent cases suggest that the Court has modified its approach in respect of the removal of foreigners convicted of or wanted for terrorist activities to Algeria. Until fairly recently the Court had consistently objected to removal in these cases on the basis that there were "substantial grounds" for believing that individuals ran a "real risk" of being subjected to ill-treatment contrary to art.3.[11] This was evident as recently as 2018 in *MA v France*.[12] However, in the subsequent case of *AM v France*, the Court accepted the compatibility of a removal order. On that occasion it found no violation of the Convention regarding a removal order in respect of an Algerian national living in France since 2008 and sentenced to a term of imprisonment for participation in terrorist activity. While, in *MA*, the Court firmly found that the risk of breach was high, in *AM* it considered that the situation had radically changed. The Court's reasoning in this respect is questionable as it was not based on evidence that the situation had changed, but rather on institutional changes (changes which were acknowledged in international reports as being insufficient).[13] Indeed, the United Nations Human Rights Committee expressly stated that they remained concerned about allegations of torture and ill-treatments inflicted by agents of the Algerian surveillance and security department.[14]*AM* is thus difficult to square with the Court's judgment in *Saadi*, in which it established that the mere existence of domestic legislation guaranteeing respect for human rights was not sufficient to ensure adequate protection against the risk of ill-treatment, since reliable sources reported "practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".[15] Such a shift is all the more regrettable since, in order to conclude that there were no such practices in *AM*, the Court merely noted that the applicant had not been able to "establish that any third party in a situation comparable to his own had actually been subjected to inhuman and degrading treatment in 2017 and 2018",[16] a stance that clearly places an "excessive burden" on applicants.[17] Moreover, the introduction of the principle of subsidiarity and the appeal to other states' domestic practice in a litigation which was hitherto foreign to it, as well as the refusal to consider Algeria's failure to provide the diplomatic guarantees requested by France, are concerning.[18]

Another context in which serious difficulties arise is in respect of the extradition of persons at risk of being sentenced to an irreducible life sentence. Indeed, the Court itself has recently admitted to establishing a two-tiered regime which grants less protection to individuals whose sentence is to be served in a third state than to those whose sentence is to be served in a state party to the Convention. In *Sanchez-Sanchez*,[19] a case concerning an individual subject to an extradition request from the United States (US), the Court considered that the procedural guarantees established in *Vinter*[20] and *Murray*[21] are not necessarily applicable in extradition cases. Yet the same guarantees had been applied in *Trabelsi*, which is now explicitly reversed.[22]

The main message of *Sanchez-Sanchez* is that the procedural safeguards set out in *Vinter* and *Murray* in respect of the domestic context are not applicable in the extradition context; it is an implicit reversal of these judgments. As a matter of fact, the *Murray* Court did not want a different standard of procedural

[10] *OD* (App. No.34016/18), judgment of 10 October 2019 at [55].
[11] See for example *Daoudi* (App. No.19576/08), judgment of 3 December 2009.
[12] *MA v France* (App. No.9373/15), judgment of 1 February 2018.
[13] *AM v France* (App. No.12148/18), judgment of 29 April 2019 at [28]–[45] and [120]. Also see H. Raspail, chron. RGDIP, 2019/3, pp.771–774.
[14] *AM* (App. No.12148/18), judgment of 29 April 2019 at [42] and [122].
[15] *Saadi* (App. No.37201/06), judgment of 28 February 2008; (2009) 49 E.H.R.R. 30 at [147].
[16] *AM* (App. No.12148/18), judgment of 29 April 2019 at [122].
[17] See H. Raspail, chron. RGDIP, 2019/3, pp.771–774.
[18] See H. Raspail, chron. RGDIP, 2019/3, pp.771–774.
[19] *Sanchez-Sanchez v United Kingdom* (App. No.22854/20), judgment of 3 November 2022; (2023) 76 E.H.R.R. 16.
[20] *Vinter v United Kingdom* (App. Nos 66069/09, 130/10 and 3896/10), judgment of 9 July 2013; (2016) 63 E.H.R.R. 1.
[21] *Murray v Netherlands* (App. No.10511/10), judgment of 26 April 2016; (2017) 64 E.H.R.R. 3.
[22] *Trabelsi v Belgium* (App. No.140/10), judgment of 4 September 2014; (2015) 60 E.H.R.R. 21.

guarantees to apply in an extradition context. On the contrary, the *Murray* majority deliberately emphasised that it was confirming *Vinter* and its progeny in the extradition context.[23] Judge Pinto de Albuqerque expressly referred to this at [14] of his Concurring Opinion, observing that: "Beyond *Vinter and Others*, the authorities confirmed by the Grand Chamber are *Trabelsi* (…)". It is evident that the *Murray* Court wanted to set a point of no return, for everybody, in a domestic and non-domestic context. This point of no return has now been revoked by the unfortunate *Sanchez-Sanchez* judgment.

The problem in *Sanchez-Sanchez* is that the Court has invoked a questionable distinction between substantive and procedural guarantees. This is doomed to failure and manipulation because many guarantees are so interconnected in national law that they are both substantive and procedural. There is no clear-cut separation between these two types of guarantees, which points to a serious epistemological mistake of the Grand Chamber.

This departure from the previous case law is motivated by opportunistic reasoning, which is political rather than legal in nature. Henceforth, in matters of extradition for trial, the possibility of an independent review is no longer a necessary criterion in assessing the risk to the applicant. This consideration led the Court to conclude, on the basis of a deficient assessment of the risk posed by the applicant, that there had been no violation of the Convention. In its view, the applicant had every chance, given what had already been decided in respect of his co-accused, of not receiving a de facto life sentence. The justification for this is surprising: on the pretext of a contextualised assessment of risk, the Court claims, through a set of relatively debatable elements, to be able to determine in advance the outcome of the trial in the United States for the applicant. It is venturing here into the dangerous territory of predictive justice, disregarding all consideration for the hazards of criminal proceedings and its own case law which has required until now express guarantees from the receiving state authorities. The restricted scope of the *Vinter* and *Murray* procedural guarantees was explicitly confirmed in the *McCallum v Italy* decision handed down on the same day,[24] also in relation to extradition, although this time the Italian authorities had obtained a guarantee from their US counterparts, through a diplomatic note, that the applicant would not be prosecuted on charges that could lead to an unconditional life sentence.

Detention conditions

The Court has assessed detention conditions for migrants on several occasions and in several instances found that they amounted to degrading treatment in violation of art.3 ECHR. For example, the Court held that confining an asylum seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounted to degrading treatment within the meaning of art.3 ECHR.[25] In the same case, the Court held that a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet was unacceptable.[26]

The Court has also considered that the detention of an asylum seeker for three months in police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals constituted degrading treatment.[27] In another case, the Court held that the detention of an asylum seeker, for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions, amounted to degrading treatment.[28]

[23] *Murray* (App. No.10511/10), judgment of 26 April 2016; (2017) 64 E.H.R.R. 3 at [100].
[24] *McCallum v Italy* (App. No.22854/20), decision of 3 November 2022.
[25] *SD v Greece* (App. No.53541/07), judgment of 11 June 2009 at [49]–[54].
[26] *SD* (App. No.53541/07), judgment of 11 June 2009 at [51].
[27] *Tabesh v Greece* (App. No.8256/07), judgment of 26 November 2009 at [38]–[44].
[28] *AA v Greece* (App. No.12186/08), judgment of 22 July 2010 at [57]–[65].

More recently, however, in the Grand Chamber case of *Khlaifia v Italy*,[29] the Court ruled that the detention of migrants in a reception centre on Lampedusa island and subsequently on ships moored in the Palermo harbour, did not amount to inhuman and degrading treatment in violation of art.3. This is an unfortunate departure from the established case law and a setback in the protection of rights for migrants.[30] The Grand Chamber overturned the Chamber's finding and rested its conclusion on the "situation of extreme difficulty facing the Italian authorities at the relevant time".[31] The abhorrent living conditions of migrants were acknowledged by the Court but dismissed as having taken place during a particularly difficult period of influx of migrants.[32]

If the Court is willing to use influxes of migrations or difficult situations to permit states to create unsafe and unsanitary conditions in detention centres for migrants, the risk to these individuals will remain unchecked. While the Court needed not to dismiss the stress on the Italian authorities, neither should it underestimate the states' capabilities to continue to uphold the Convention rights during difficult times. It is especially important that the Court should require states to continue to abide by their obligations during such times, when it is easy to dismiss the lack of protections for individuals as the by-product of a stressful and unexpected event.

It should also be noted that, while the Convention permits states to derogate from the obligations embodied in the Convention under art.15, there is a set process in place for that purpose and states must give notice of their intention and need to derogate from their obligations. States may not use political difficulties, such as an unforeseen influx of migrants, to excuse actions that are incompatible with the Convention, and certainly not in relation to non-derogable obligations such as those deriving from art.3.

Fortunately, the detention of foreign children seems to have escaped the backsliding of the Court, as it continues to condemn states for breaches of arts 3, 5 and 8 of the Convention in this context. Regarding art.3, the Court relies on elements such as the length of detention, the reception conditions in the centre,[33] as well as the child's state of health and age;[34] indeed, many cases feature all three elements.[35] Consequently, the Court has condemned states on several occasions, including for detaining unaccompanied minors with adults, or for the conditions of isolation they have suffered.[36]

However, it is regrettable that the Court's reasoning puts the child's best interests below the policy imperatives of states. It is true that the Court recognises the vulnerability of children, as in the *Popov* case, where it referred to the work of the Commissioner for Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) emphasising that stress, insecurity and hostility in holding facilities had harmful effects on children,[37] and recognised that the child's best interests implied not only the preservation of the family unit, but also the limitation of

[29] *Khlaifia v Italy* (App. No.16483/12), judgment of 15 December 2016.

[30] For a more detailed discussion of the case and its shortcomings, see also D. Venturi, "The Grand Chamber's ruling in Khlaifia and Others v Italy: one step forward, one step back?" (10 January 2017), *Strasbourg Observers*, *https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/#more-3466* [Accessed 24 April 2023]; S. Zirulia and S. Peers, "A Template for Protecting Human Rights During the 'Refugee Crisis'?" (5 January 2017), *EU Law Analysis*, *http://eulawanalysis.blogspot.com/2017/01/a-template-for-protecting-human-rights.html* [Accessed 24 April 2023].

[31] Separate Opinion of Judge Raimondi in *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [6].

[32] In *JR v Greece* (App. No.22696/16), judgment of 25 January 2018, the Court found again that the conditions of detention, in a centre where three Afghan nationals were held, were not sufficiently severe to be qualified as inhuman or degrading treatment. The reasoning was, in part, based on the fact that the Greek authorities were faced with an emergency situation after the arrival of a large number of migrants, which created material difficulties.

[33] *Popov v France* (App. Nos 39472/07 and 39474/07), judgment of 19 January 2012; (2016) 63 E.H.R.R. 8; *SF v Bulgaria* (App. No.8138/16), judgment of 7 December 2017.

[34] *Muskhadzhieva v Belgium* (App. No.41442/07), judgment of 19 January 2010; *Kanagaratnam v Belgium* (App. No.15297/09), judgment of 13 December 2011; (2012) 55 E.H.R.R. 26.

[35] See *AM v France* (App. No.5560/19), judgment of 12 July 2016; *AB v France* (App. No.11593/12), judgment of 12 July 2016; *RR v Hungary* (App. No.36037/17), judgment of 2 March 2021.

[36] *Popov* (App. Nos 39472/07 and 39474/07), judgment of 19 January 2012; (2016) 63 E.H.R.R. 8. For recent examples, see *HA v Greece* (App. No.19951/16), judgment of 28 February 2019; *Sh.D. v Greece* (App. No.14165/16), judgment of 13 June 2019; *Moustahi v France* (App. No.9347/14), judgment of 25 June 2020.

[37] *Popov* (App. Nos 39472/07 and 39474/07), judgment of 19 January 2012; (2016) 63 E.H.R.R. 8 at [96].

detention of accompanied families.[38] Nevertheless, the Court has also accepted that the deprivation of children's liberty, which "stems from the legitimate decision of the parents having authority over their children, not to entrust them to the care of a third party", does not in itself constitute a violation of the Convention. The fact that the situation is, for children, a "source of anxiety and tension that may cause them serious harm", only requires the authorities to take "that measure of last resort … after actual verification that no other measure involving a lesser restriction of their freedom could be implemented".[39] Although such a case rarely arises,[40] it is possible to question the consistency of finding a breach of art.3 because of the detention conditions for children while admitting non-violation on the ground of art.5 because there was no less intrusive measure to be implemented, as in the 2016 case of *AB v France*.

Further, findings of violation of art.3 are most often made on the basis of a combination of detention conditions and the excessive duration of it, but neither the one nor the other seems to be sufficient in and of itself in the Court's view. In *AB v France*, the Court noted that "the constraints inherent in a place of detention, which are particularly arduous for a young child, together with the centre's conditions of organisation, must have caused the applicants' child some anxiety". In addition, the child the subject of those proceedings "witnessed the mental distress sustained by his parents, in a place of confinement that did not allow him to distance himself". Nevertheless, "such conditions even though they necessarily represent a significant source of stress and anxiety for a small child, are not sufficient, where the confinement is for a short duration, depending on the circumstances of the case, to attain the threshold of severity required to engage Article 3".[41]

The rise of "crimmigration"

The issue of detention of migrants as a state policy must also be analysed from a broader perspective, going beyond the material conditions and the length of detention in individual cases. Over the past few years, as Europe has seen a surge in migration, there has also been a trend towards "crimmigration", a process by which criminal law has been used to enforce immigration laws and punish immigration offences, while immigration law has been used as a tool of criminal policy.[42] What has happened is that state criminal law machinery, including detention, has been instrumentalised for the purpose of immigration enforcement and, similarly, expulsion and deportation measures are imposed as a method of crime control.[43] This policy,

[38] *Popov* (App. Nos 39472/07 and 39474/07), judgment of 19 January 2012; (2016) 63 E.H.R.R. 8 at [118] and [146]–[147]. On the case, see for example C.A. Chassin, "La retention des étrangers mineurs accompagnant leurs parents, obs. sous Cour eur. dr. h., arret Popov c. France" (19 January 2012), Rev. trim. dr. h., pp.681–697.

[39] *AB* (App. No.11593/12), judgment of 12 July 2016 at [122]–[123]; *MD and AD v France* (App. No.57035/18), judgment of 22 July 2021 at [85].

[40] See for examplee *AM v France* (App. No.5560/19), judgment of 12 July 2016 at [66]–[67].

[41] *AB* (App. No.11593/12), judgment of 12 July 2016 at [114]. See also *MD and AD* (App. No.57035/18), judgment of 22 July 2021 at [64]: "the material reception condition reserved for a minor child in detention are not sufficient in the case of short-term detention, to be considered as necessarily reaching the severity threshold required to fall under Article, even when it appears that they are a significant source of stress and anxiety". It is only "beyond a short period of detention" that "the repetition and accumulation of the effects of de privation of liberty, particularly at psychological and emotional level, necessarily have a detrimental effect on a young child".

[42] For an introduction to the concept of crimmigration, see L. Gatta, V. Mitsilegas and S. Zirulia (eds), *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on "Crimmigration"* (Oxford: Hart Publishing, 2021); C.C. García Hernández, *Crimmigration Law* (ABA Book Publishing, 2021); M. Joaao Guia and others (eds), *Social Control and Justice: Crimmigration in the Age of Fear* (Eleven International Publishing, 2013); I. Majcher, "'Crimmigration' in the European Union through the Lens of Immigration Detention", *Global Detention Project Working Paper*, 2013, no.6 ; M.J. Guia, M.A.H. Ven der Woude and J.P. Van der Leun (eds), *Social Control and Justice: Crimmigration in an Age of Fear* (Eleven International Publishing, 2011); D. Wilsher, *Immigration Detention, Law, History, Politics* (Cambridge: Cambridge University Press, 2011); J.P. Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign State" (2006) 56(2) American University L. Rev 367. For a sociological approach of the phenomenon, see J. Platt, "(Cr)immigration, Race and Belonging: Why We Must Conceptualize Immigration Detention as Punishment?" (2021) 15(1) *Journal of Identity and Migration Studies* 2; A. Armenta, "Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality" (2017) 3(1) *Sociology of race and ethnicity* 82.

[43] See D.A. Sklansky, "Crime, Immigration, and Ad Hoc Instrumentalism" (2012) 15(2) New Criminal L. Rev. 157; J.M. Chacón, "Overcriminalizing Immigration" (2012) 102(3) *Northwestern Law Journal of Criminal Law & Criminology* 613; C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008); Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign State" (2006) 56(2) American University L. Rev 367; A. Spena, "Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law" (2014) 8(3) *Criminal Law and Philosophy* 635; Commissioner for Human Rights' Office, *Criminalisation of Migration in Europe: Human Rights Implications* (Council of Europe, 2010).

which perceives the migrant as the new enemy, has been tinged with the ignoble legacies of racism and xenophobia of the last century and has the potential to create an atmosphere of hate and distrust towards immigrants across Europe.

There are serious issues with the crimmigration trend and its reflection in the Court's case law. The detention of migrants has been just one way to observe the fusion of criminal and immigration law. Over the past few years, the number of migrants detained has reached unprecedented levels, something the Court has not always been able (or willing) to resist or put an end to. There are several cases that illustrate the Court's failure in this regard.

In *Saadi v United Kingdom*,[44] the Court held that a state may detain a temporarily admitted asylum seeker to prevent unauthorised entry and to expedite the asylum claim.[45] In that case the Court also held that it is not relevant whether detention is necessary in order to prevent that irregular entry. Although the Court in *Saadi* read into the first limb of art.5(1)(f) a requirement of non-arbitrariness, it also took away the necessity test from this analysis. While the detention of migrants should not be arbitrary, and should be carried out in good faith as the Court suggests, it is obvious that the non-arbitrariness requirement does not provide the same degree of protection as the necessity test. What this shows is that, in the view of the Grand Chamber, migrants can be treated worse than ordinary criminals (whose detention must be necessary), simply because efficiency trumps liberty in migration law. A detention order for the sole purpose of state bureaucratic convenience equates the targeted people to commodities. This was an unfortunate departure from the necessity principle, ultimately giving states carte blanche to detain whenever they please, without assessing possible less intrusive alternatives, suited to each asylum seeker. Ultimately, the Court's decision to adopt a bad-faith criterion of the arbitrariness requirement worsens even further the legal situation of the asylum seeker, since it leaves the asylum seeker's protection dependent on the Court's assessment of the state of mind of the detaining authorities. In most cases, state authorities will be in a position to argue that they acted in good faith in detaining asylum seekers.

Later on, the Grand Chamber in *A. v United Kingdom* extended the *Saadi* arbitrariness criterion to the second limb of art.5(1)(f).[46] In this case, the Grand Chamber admitted the applicability of the not "too narrow" *Saadi* interpretation to detention with a view to deportation or extradition. In the landmark case *Chahal v United Kingdom*,[47] the Court discarded the necessity test in situations where detention was imposed to individuals facing deportation, expulsion, or extradition when they were already inside the country. The Grand Chamber in *Chahal* read art.5(1)(f) as not demanding that detention be necessary, such as when detention would prevent the person concerned from committing an offence.[48] In *A v United Kingdom*, the Grand Chamber repeated this analysis, clarifying its scope in the light of the *Saadi* case. It limited the principle of proportionality and held that it applied to detention under art.5(1)(f) only to the extent that detention should not continue for an unreasonable time.[49] Thus, the Court held that any deprivation of liberty will only be justified "for as long as deportation proceedings are in process" and will cease to be justified if deportation is no longer feasible, even if the individual is refusing to cooperate.[50] In other words, *A* updated the language of *Chahal* in the light of *Saadi*.

[44] *Saadi* (App. No.37201/06), judgment of 28 February 2008; (2009) 49 E.H.R.R. 30 at [50] and [64].

[45] For another view of the case, see F. de Londras, "Saadi v Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition ases" (13 May 2008), *ASIL*, *https://www.asil.org/insights/volume/12/issue/9/saadi-v-italy-european-court-human-rights-reasserts-absolute-prohibition* [Accessed 24 April 2023]; G. Gentili, "European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-Treatment Is a Genuine Risk" (2010) 8(2) I.J.C.L. 311.

[46] *A. v United Kingdom* (App. No.3455/05), judgment of 19 February 2009; (2009) 49 E.H.R.R. 29. For more information on this case, see S. Shah, "From Westminster to Strasbourg: A and others v. United Kingdom" (2009) 9(3) H.R.L.R. 473; M. Milanovic, "European Court decides A and others v. United Kingdom" (19 February 2009), *EJIL*: Talk!, *https://www.ejiltalk.org/european-court-decides-a-and-others-v-united-kingdom/* [Accessed 24 April 2023].

[47] *Chahal* (App. No.22414/93), judgment of 15 November 1996; (1997) 23 E.H.R.R. 413.

[48] *Chahal* (App. No.22414/93), judgment of 15 November 1996; (1997) 23 E.H.R.R. 413 at [112].

[49] *A* (App. No.3455/05), judgment of 19 February 2009; (2009) 49 E.H.R.R. 29 at [164].

[50] *A* (App. No.3455/05), judgment of 19 February 2009; (2009) 49 E.H.R.R. 29 at [164]. See also *Chahal* (App. No.22414/93), judgment of 15 November 1996; (1997) 23 E.H.R.R. 413 at [113].

Within the Court, there has been a silent but growing revolt from some chambers against *Saadi* and its spill-over effect on *Chahal*. In several cases the Court has held that detention of asylum seekers and, in general, of migrants breaches art.5(1)(f) when it is applied automatically and no other less drastic measure was sought. Some of the most prominent cases where this revolt can be witnessed include *Louled Massoud v Malta*,[51] *Suso Musa v Malta*,[52] *Rahimi v Greece*,[53] *Raza v Bulgaria*,[54] and *Mikolenko v Estonia*.[55]

Louled Massoud and *Rahimi* acknowledged the primordial role of the necessity test in the application of the second limb of art.5(1)(f) to the detention of asylum seekers, while *Raza* and *Mikolenko* did so more generally with regard to detention of migrants. The importance of the necessity test has also been affirmed in the application of the first limb when an individual has been detained pending the asylum assessment procedure. This was the situation in *Suso Musa*.[56]

In view of the silent revolt of the chambers, the challenge for the Grand Chamber is now to revisit and reverse the *Saadi* approach and finally hold that the detention of asylum seekers is, as a matter of principle, a measure of last resort and may only be applied when no less intrusive alternative is possible. This will help bring coherence to the Court's messy case law by aligning it with international human rights and refugee law. A number of international organs, organisations and instruments have repudiated the outrageous *Saadi* rationale, including the United National General Assembly, the European Parliament, the Court of Justice of the European Union, the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights.[57] The Court cannot continue to ignore the worldwide call that *Saadi* must go.

In *Ilias and Ahmed v Hungary*,[58] the Grand Chamber has further weakened the protection provided by art.5 regarding the detention of migrants in the Rözske transit zone on the European border between Hungary and Serbia. It is true that the Grand Chamber reaffirmed that compliance with art.3 ECHR can only be validly maintained through a judicial procedure involving a thorough examination of asylum claims, even if these claims subsequently prove to be unfounded. Nevertheless, migrant detention centres have been disguised as "transit zones", for which art.5 ECHR is not applicable. Hence, the strategy of double talk, which assimilates migrant detention centres with "foreigners' admission and accommodation centres", "transit centres", or "guest houses", as well as detention to "holding", has been fully endorsed by the Court in the Hungarian case.[59]

Furthermore, in examining the detention issue, the Court found that Hungary had violated art.3 due to the absence of a rigorous assessment of the "real risks" faced by the applicants following their deportation to Serbia. However, at the same time, the Court held that the applicants were not detained by Hungary within the meaning of art.5 and could therefore be returned to Serbia based on the country's safety conditions.[60] In doing so, it contradicted the unanimous conclusions of the Court of Justice of the European

[51] *Louled Massoud v Malta* (App. No.24340/08), judgment of 27 July 2010.
[52] *Musa v Malta* (App. No.42337/12), judgment of 23 July 2013; (2015) 60 E.H.R.R. 23.
[53] *Rahimi v Greece* (App. No.8687/08), judgment of 5 April 2011.
[54] *Raza v Bulgaria* (App. No.31465/08), judgment of 11 February 2010.
[55] *Mikolenko v Estonia* (App. No.10664/05), judgment of 8 October 2009. For a recent example, see *HM v Hungary* (App. No.38967/17), judgment of 2 June 2022; (2023) 76 E.H.R.R. 10.
[56] *Musa* (App. No.42337/12), judgment of 9 December 2013; (2015) 60 E.H.R.R. 23.
[57] See Concurring Opinion of Judge Pinto de Albuquerque in *Abdullahi Elmi and Aweys Abubakar v Malta* (App. Nos 25794/13 and 28151/13), judgment of 22 November 2016 at [6]–[15].
[58] *Ilias v Hungary* (App. No.47287/15), judgment of 21 November 2019; (2020) 71 E.H.R.R. 6. See V. Stoyanova, "The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode" (23 December 2019), *Strasbourg Observers*, *https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/* [Accessed 24 April 2023]; P. Kilibarda, "The ECtHR's Ilias and Ahmed v Hungary and Why It Matters" (20 March 2020), *EJIL: Talk!*, *https://www.ejiltalk.org/the-ecthrs-ilias-and-ahmed-v-hungary-and-why-it-matters/* [Accessed 24 April 2023].
[59] See Concurring Opinion of Judge Pinto de Albuquerque in *Abdulhahi Elmi and Aweys Abubakar v Malta* (App. Nos 25794/13 and 28151/13), judgment of 22 November 2016 at [4]. More recently, the Court reproached the situation of Tunisian sea-migrants detained in so called "hotspot centre" under art.5(1), (2) and (4) of the Convention in *JA v Italy* (App. No.21329/18), judgment of 30 March 2023.
[60] It is incomprehensible that the Court could have made these clearly irreconcilable statements at [165] and [223] of the judgment.

Union,[61] the Council of Europe's Committee for the Prevention of Torture,[62] and the United Nations Working Group on Arbitrary Detention,[63] specifically regarding the treatment of asylum seekers in the Rözske transit zone at the European Union (EU)-Hungary border. This deliberate jurisprudential isolation by the Court is incomprehensible.

More importantly, by arguing that the applicants had voluntarily entered Hungary to seek asylum and were free to leave the transit zone to Serbia, the Court not only imputed the responsibility for the situation to the applicants,[64] implicitly criticising the asylum seekers for seeking to escape their desperate situation, it also showed its lack of sensitivity to the real situation leading to these people seeking asylum. In its view, art.5 was inapplicable because of the applicant's possibility to choose between freedom and the continuation of a procedure designed to protect them from the risk of exposure to a treatment contrary to art.3.[65] This is simply intolerable.

The other cases concerning the Rözske transit zone have only marginally corrected the Court's deviation from the path of protection of asylum seekers. In *ZA v Russia*[66] and *RR v Hungary*,[67] the Court certainly departed from *Ilias and Ahmed* by finding a violation of art.3 on the basis of the conditions in the transit zone, but this was only because of the particular circumstances in which the applicants found themselves in the second case and, in the first case, because the applicants were not free to leave the transit zone, implying a deprivation of liberty and shifting the Court's analysis to the issue of the compatibility of detention conditions with human dignity.[68]

Finally, it is worth noting the emergence of case law relating to art.5(1)(f), specifically in the context of whether the removal of a person detained for this purpose is still intended. This case law is regrettable in that it grossly undermines the protection afforded by refugee status. In *Shiksaitov v Slovakia*, the Court found a violation of the Convention because of the excessive length of proceedings and the lack of diligence of the authorities in seeking the information necessary to resolve the case.[69] However, it considered that the applicant's extradition was not "completely excluded" because the recognition of refugee status by Sweden did not automatically exclude the possibility that the applicant could be extradited by the Slovak authorities. Although the Slovak authorities were bound by the Swedish decision, the Court accepted that "exceptional circumstances"—in this case, because of the new information available to them—could justify their reconsideration of the applicant's refugee status.[70] In so doing, it greatly reduced the scope of the 1951 Geneva Convention and the effects of refugee status.[71] The Court went a step further in the decline of protection in its judgment in *Bivolaru and Moldovan v France*,[72] in which it simply held that the refugee status of one of the applicants, granted by Sweden, was not sufficient to prove that he faced a risk of

[61] Joined cases *FMS v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (C-924/19 PPU) and (C-925/19 PPU), 14 May 2020 CJEU at [226]–[231], finding that detention in the Rözske transit zone amounts to detention under art.2 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (on reception conditions).

[62] CPT/Inf (2018) 42 at [42], with its conclusions after visiting transit zones in Rözske and Tompa in 2017. As noted by CPT, the possibility of leaving to Serbia was practically excluded.

[63] United Nations Working Group on Arbitrary Detention, advisory opinion adopted by the Working on its 87th session, 27 April–1 May 2020, and Opinion No.22/2020 regarding Saman Ahmed Hamad (Hongrie), 5 June 2020 at [70].

[64] *Ilias* (App. No.47287/15), judgment of 21 November 2019; (2020) 71 E.H.R.R. 6 at [213].

[65] The Working Group on Arbitrary Detention refuses that "a person who has to agree to remain in transit zones or lose the possibility to lodge an asylum application can be qualified as freely consenting to remain in transit zones": United Nations Working Group on Arbitrary Detention, advisory opinion adopted by the Working on its 87th session, 27 April–1 May 2020, and Opinion No.22/2020 regarding Saman Ahmed Hamad (Hongrie), 5 June 2020 at [69].

[66] *ZA v Russia* (App. No.61411/15 and others), judgment of 21 November 2019; (2020) 70 E.H.R.R. 24.

[67] *RR* (App. No.36037/17), judgment of 2 March 2021.

[68] *RR* (App. No.36037/17), judgment of 2 March 2021 at [53]–[57]; *ZA* (App. No.61411/15 and others), judgment of 21 November 2019; (2020) 70 E.H.R.R. 24 at [187].

[69] *Shiksaitov v Slovakia* (App. Nos 56751/16 and 33762/17), judgment of 11 December 2020.

[70] *Shiksaitov* (App. Nos 56751/16 and 33762/17), judgment of 11 December 2020 at [68]–[69].

[71] In this sense, see J. Ferrero, RGDIP, 2021/1, pp.136–138.

[72] *Bivolaru and Moldovan* (App. Nos 40324/16 and 12623/17), judgment of 25 March 2021. See W. Julié, "Bivolaru and Moldovan v. France: a new challenge for mutual trust in the European Union?" (22 June 2021) *Strasbourg Observers*, *https://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union/* [Accessed 24 April 2023]; Ferrero, RGDIP, 2021/2, pp.400–402.

persecution in Romania. It concluded thus that the execution of the European arrest warrant by the French authorities would have not violated the Convention.[73]

This clear regression in the protection of refugee rights was confirmed a month later in *KI v France*, in relation to a decision to expel to Russia an individual whose refugee status—this time granted by French authorities—had been withdrawn because of his participation in terrorist activities.[74] Although it considered that "Article 3 embraces the prohibition of refoulement within the meaning of [1951] Geneva Convention",[75] and despite the reminder of the absolute character of the art.3, the Court placed the burden of proof on the applicant to prove the risk of ill-treatment he would suffer in the event of removal. Whereas the Court had previously shown understanding in this regard concerning asylum seekers, because of their vulnerability, here it adopted a punitive attitude towards the applicant because of his alleged terrorist activities.[76] Although the Court ultimately condemned the state on the grounds of the authorities' inadequate risk assessment—which did not take into account the case law of the Court of Justice of the European Union according to which the loss of refugee status does not imply the loss of refugee quality—the reasoning nonetheless reflects a double standard that is incompatible with the absolute nature of art.3.

Expulsion of terminally ill foreigners

2008, the year of delivery of *Saadi*, is an *annus horribilis* for the human rights of migrants as it was during this time that the Court handed down *N v United Kingdom*.[77] In *N* the Court held by 14 votes to three that the expulsion of the applicant, who claimed that removing her would be contrary to the prohibition of inhuman and degrading treatment of art.3 ECHR, for lack of adequate HIV/AIDS health care facilities in Uganda, did not amount to a violation of that article. To reach this conclusion, the Court set out three conditions that should guide any assessment whether an expulsion of a seriously ill individual would be in breach of art.3: (1) the seriousness and stage of the illness; (2) the availability of adequate treatment in the country of destination; and (3) the availability of support by one's relatives. The Court clarified that expulsion would violate only in "very exceptional case(s), where the humanitarian grounds against the removal are compelling".[78]

The Court had established this principle in *D v United Kingdom*,[79] where it held that "the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support".[80] Although the Court accepted that there might be other instances where exceptional circumstances prevent removal, it noted that "[any] alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country".[81]

The majority in *N* extrapolated a general principle from the situation relating to the expulsion of a person with a HIV and AIDS-related condition, and held that "[t]he same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which

[73] *Bivolaru and Moldovan* (App. Nos 40324/16 and 12623/17), judgment of 25 March 2021 at [133].
[74] *KI v France* (App. No.5560/19), judgment of 15 April 2021. See Ferrero, RGDIP, 2021/2, pp.405–406.
[75] *KI* (App. No.5560/19), judgment of 15 April 2021 at [123].
[76] *KI* (App. No.5560/19), judgment of 15 April 2021 at [176].
[77] *N v United Kingdom* (App. No.26565/05), judgment of 27 May 2008; (2008) 47 E.H.R.R. 39. See F. Julien-Laferriere and A. Buyse, "Grand Chamber judgment in N. v. UK" (28 May 2008), *ECHR Blog*, *https://www.echrblog.com/2008/05/grand-chamber-judgment-in-n-v-uk_28.html* [Accessed 24 April 2023].
[78] *N* (App. No.26565/05), judgment of 27 May 2008; (2008) 47 E.H.R.R. 39 at [42].
[79] *D v United Kingdom* (App. No.30240/96), judgment of 2 May 1997; (1997) 24 E.H.R.R. 423. See R. English, "Removal of Child Following Faulty Diagnosis of Injury Breached Article 8" (2 April 2010), *UK Human Rights Blog*, *https://ukhumanrightsblog.com/2010/04/02/removal-of-child-following-faulty-diagnosis-of-injury-breached-article-8/* [Accessed 24 April 2023].
[80] *N* (App. No.26565/05), judgment of 27 May 2008; (2008) 47 E.H.R.R. 39 at [42].
[81] *N* (App. No.26565/05), judgment of 27 May 2008; (2008) 47 E.H.R.R. 39 at [43].

may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost".[82] Finding that this "high threshold" should be applied to *N*, who "was fit to travel", the Court agreed to her removal from the contracting state in spite of her poor state of health and the doubts about the possibility of her obtaining appropriate health care in the receiving state. Unsurprisingly, *N.* died shortly after her removal to Uganda.

There are serious problems with the Court's judgment in *N v United Kingdom*.[83] For one, the ground put forward by the majority to deny a positive obligation for the state to treat seriously ill foreign nationals lacks any clear legal criteria for deciding when a terminally ill person may or may not be removed, both in terms of the degree of seriousness of the illness and in terms of the quality, accessibility and cost of the treatment provided in the receiving country. Uncertainty, in this case, benefits the state. If an applicant cannot prove that treatment in the country to which he or she is deported falls short of what he or she needs, and poses a threat, the Court will weigh this uncertainty in favour of deportation. This *argumentum ad ignorantiam* contradicts a basic tenet of legal reasoning, that one should not draw substantive conclusions from a lack of information or incomplete or insufficient sources of information. Furthermore, the Court based its conclusions, inter alia, on the promise that uncertain scientific developments might one day reach the receiving country.

The Court tried to limit *N*'s morally repugnant and legally untenable stance somewhat in the subsequent case of *Paposhvili v Belgium*,[84] but it did not formally depart from the standard of "exceptional circumstances". In a unanimous judgment, the Grand Chamber stated that these circumstances refer not only to cases of imminent risk of death, but also apply when the person "would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".[85] Adopting a rather elliptical and unusual approach to this type of case, the Court formulated two procedural obligations for states confronted with such situations: to assess the risk before removal and, if need be, to obtain individual guarantees of appropriate treatment from the receiving state. In addition to being unrealistic, this assurances requirement shows that ultimately the Grand Chamber is willing to take the risk of sending someone to die where "serious doubts persist regarding the impact of removal on the persons concerned—on account of the general situation in the receiving country and/or their individual situation".[86] This requirement was inspired by Judge Lemmens' proposal in a separate opinion that he had delivered in a previous case, where he suggested that *Tarakhel* type assurances should be used in cases of expulsion of terminally ill patients.[87] Again, like in *N*, the doubt surrounding the availability of treatment works against the applicant. Furthermore, the health care needs of children (like in *Tarakhel*) and terminally ill patients cannot be equated. The underlying logic of *Paposhvili* is to get rid of the terminally ill foreigner, at any cost. In fact, the paragraph of the judgment that purports to move away from the problematic standard set in *N* is so convoluted that the UK Upper Tribunal considered it unworkable ("over-elastic and ill-defined" test which is "as long as the judge's sleeve") and that, until further clarification, *N* remains the guiding case.[88] Subsequently, the Court of

[82] *N* (App. No.26565/05), judgment of 27 May 2008; (2008) 47 E.H.R.R. 39 at [45].

[83] Dissenting opinion of Judge Pinto de Albuquerque in *SJ v Belgium* (App. No.70055/10), judgment of 19 March 2015; (2015) 61 E.H.R.R. 21 at [6]–[11]. For a critic of Court's view, see also V. Mantouvalou, "N v UK: No Duty to Rescue the Nearby Needy?" (2008) 20(4) M.L.R. 637. For more elements on N and the Court's role in protection of irregular immigrants' rights, see S. Da Lomba, "The ECHR and the Protection of Irregular Migrants in the Social Sphere" (2015) 22 *International Journal on Minority and Group Rights* 39.

[84] *Paposhvili v Belgium* (App. No.41738/10), judgment of 13 December 2016; [2017] Imm. A.R. 867. See L. Peroni, "Paposhvili v. Belgium: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons" (15 December 2016), *Strasbourg Observers*, *https://strasbourgobservers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/* [Accessed 24 April 2023].

[85] *Paposhvili* (App. No.41738/10), judgment of 13 December 2016; [2017] Imm. A.R. 867 at [183].

[86] *Paposhvili* (App. No.41738/10), judgment of 13 December 2016; [2017] Imm. A.R. 867 at [191].

[87] Dissenting opinion of Judge Lemmens in *Tatar v Switzerland* (App. No.65692/12), judgment of 14 April 2015; (2016) 62 E.H.R.R. 11.

[88] *EA (2017) UKUT 445 (IAC);* [2018] Imm. A.R. 249 (art.3 medical cases—*Paposhvili* not applicable).

Appeal provided formal guidance, based on the *Paposhvili* judgment, to all courts and tribunals below the level of the Supreme Court on decisions regarding a stay on removal.[89] The Court took note of this development in domestic law in *Khaksar v United Kingdom*,[90] an inadmissibility decision due to non-exhaustion of domestic remedies. It nonetheless added that this is all "pending consideration of the Supreme Court of the impact of [the *Paposhvili* case] for the purposes of domestic law".[91] In April 2020, the UK Supreme Court finally found that the *Paposhvili* test is not compatible with the test in *N.*, as the new criterion (set out in *Paposhvili*) is aimed at determining whether an applicant was at a real risk of imminent decline in health or a significant reduction in life expectancy and, therefore, eliminated the untenable distinction between those who were already dying and those whose state of health was such that their life expectancy would be significantly reduced if their care was withdrawn.[92] The Supreme Court found that the procedural obligations needed to be clarified, given their obscure and novel character.

The opening created by the *Paposhvili* judgment caused a jolt to the Court in 2019 in the *Savran v Denmark* case, concerning a Turkish national resident in Denmark, suffering from paranoid schizophrenia, who had been subject to a deportation order due to his conviction for gang violence leading to a person's death. Previous case law on the removal of schizophrenic patients was rather favourable to the applicant. In 2001, the Court had emphasised that "the suffering associated with such a relapse could, in principle, fall within the scope of Article 3".[93] More recently, in *Aswat v United Kingdom*, the Court found that because detention conditions were likely to aggravate the applicant's mental health, his removal to the US would violate art.3 ECHR.[94] In *Savran*, the Fourth Section applied the conditions set out in *Paposhvili* and found a violation of art.3. It recalled that the authorities of the returning state "must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness" and to "consider the extent to which the applicant will actually have access to the treatment" in the state of return. On the latter point, consideration should be given to the "cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care".[95] In the event of persistent doubt as to the effects of removal on the applicant, the returning state is required to obtain sufficient assurances from the receiving state that appropriate treatment will be available and accessible to the person concerned.[96] In *Savran*, while the Chamber recognised that medication was available in Turkey, the Danish state had not considered the need for the applicant to receive intensive in-patient therapy in order to prevent his health condition from deteriorating. Moreover, the applicant had no family or support network in Turkey, and the authorities should have ensured that he would have had the support of another person.[97] The Chamber therefore concluded that his removal to Turkey had violated art.3.

Nevertheless, in a judgment of 7 December 2021,[98] the Grand Chamber completely rejected this reasoning and considered that the threshold of severity required by art.3 had not been reached. Regardless of the fact that one of the experts had found that there were "serious consequences" for the applicant, and that numerous third-party interventions had highlighted the very high suicide rate among people with mental illness, the applicant's schizophrenia was not, in the view of the Grand Chamber, of such a nature as to cause him "intense suffering".[99] Although the Court finally found a violation of art.8 of the Convention—the authorities having failed to take into account the applicant's situation and to weigh up the interests at stake

[89] *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64; [2018] 1 W.L.R. 2933.
[90] *Khaksar v United Kingdom (Admissibility)* (App. No.2654/18), judgment of 3 April 2018; (2018) 67 E.H.R.R. SE3.
[91] *Khaksar* (App. No.2654/18), judgment of 3 April 2018; (2018) 67 E.H.R.R. SE3 at [32].
[92] *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; [2021] A.C. 633.
[93] *Bensaid v United Kingdom* (App. No.44599/98), judgment of 6 February 2001; (2001) 33 E.H.R.R. 10 at [37].
[94] *Aswat v United Kingdom* (App. No.17299/12), judgment of 16 April 2013; (2014) 58 E.H.R.R. 1 at [49]–[57].
[95] *Savran v Denmark* (App. No.57467/15), judgment of 1 October 2019 at [46]–[47].
[96] *Savran* (App. No.57467/15), judgment of 1 October 2019 at [48].
[97] *Savran* (App. No.57467/15), judgment of 1 October 2019 at [56]–[64].
[98] *Savran* [GC] (App. No.57467/15), judgment of 7 December 2021; 53 B.H.R.C. 201.
[99] *Savran* [GC] (App. No.57467/15), judgment of 7 December 2021; 53 B.H.R.C. 201 at [143].

properly, notably by overlooking the applicant's lack of family ties in Turkey[100]—the solution remains highly problematic, in that it reflects a profound misunderstanding of the psychological suffering that a person with a mental disorder may experience, including—and especially—when the disorder presents an immediate risk to others rather than to the person.

The Dublin transfers

In the ground-breaking *MSS* case,[101] regarding the transfer of an Afghan national from Belgium to Greece in June 2009 in accordance with the Dublin II Regulation, the Court held that the Belgian authorities must have been aware of the deficiencies in the asylum procedure in Greece when the expulsion order against him had been issued. The Belgian authorities should not simply have assumed that the applicant would be treated in conformity with the Convention standards, they should have verified how the Greek authorities applied their asylum legislation in practice, but they had not done so. There had therefore been a violation by Belgium of the art.3 prohibition of degrading treatment because of the applicant's living conditions, who "spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live".[102] The Court further found a violation of the art.13, the right to an effective remedy taken together with art.3, because of the lack of an effective remedy against the applicant's expulsion order.

Although the Court of Justice of the European Union adopted a similar position to that of the European Court of Human Rights, referring explicitly to the judgment in *MSS*,[103] the subsequent case law of the Strasbourg Court has been quite erratic. For example, in October 2008, faced with a similar complaint that Greece based on a transfer from Austria to Greece under the Dublin II Regulation, the Court held that the applicant's transfer did not violate art.3.[104] According to the Chamber, while the Austrian authorities must have been aware of serious deficiencies in the Greek asylum procedure and the living and detention conditions for asylum seekers, the Court held that they did not (and were not reasonably expected to have known) at the time that those deficiencies reached the threshold of art.3.

In another case,[105] the Court reached the same conclusion with regard to a situation of an applicant transferred from Austria to Greece during the spring of 2009, directly contradicting the *MSS* judgment, which dealt with a transfer that occurred in June 2009. Yet in a subsequent case[106] the Court found no reason to depart from its findings in the judgment in the case of *MSS*, and held that it had been for the authorities, Italian in this case, to examine the applicants' individual situations and to verify, before returning them, how the Greek authorities applied their legislation on asylum in practice. Consequently, it found a violation by Italy of art.3, as the Italian authorities, by returning these applicants to Greece, had exposed them to the risks arising from the shortcomings in that country's asylum procedure.

In 2020, in *BG v France*, while acknowledging that the camp in which the applicants had lived for more than three months "was saturated and unhealthy, with critical sanitary conditions", the Court concluded that there had been no violation of the Convention on the grounds that it was not in a position to "assess

[100] *Savran* [GC] (App. No.57467/15), judgment of 7 December 2021; 53 B.H.R.C. 201 at [190]–[202].

[101] *MSS* [GC] (App. No.30696/09), judgment of 21 January 2011; (2011) 53 E.H.R.R. 2. See G. Clayton, "Asylum Seekers in Europe: MSS v Belgium and Greece" (2011) 11(4) H.R.L.R. 758; P. Mallia, "Case of MSS v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation" (2011) 30(3) *Refugee Survey Quarterly* 107; T. Zuijdwijk, "MSS v. Belgium and Greece (European Court of Human Rights): The Interplay Between European Union Law and the European Convention on Human Rights in the Post-Lisbon Era" (2011) 39 *Georgia Journal of International and Comparative Law* 808; T. Syring, "European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: MSS v. Belgium & Greece" (2011), A.S.I.L., *https://www.asil.org/insights/volume/15/issue/5/european-court-human-rights-judgment-expulsion-asylum-seekers-mss-v* [Accessed 24 April 2023].

[102] *MSS* [GC] (App. No.30696/09), judgment of 21 January 2011; (2011) 53 E.H.R.R. 2 at [254]. See also *VM v Belgium* (App. No.60125/11), judgment of 7 July 2015; (2017) 65 E.H.R.R. 14 at [162].

[103] See, in particular, at [88]–[91] of the CJEU Grand Chamber judgment of 21 December 2011, *R. (on the application of NS) v Secretary of State for the Home Department* (C-411/10 and C-493/10) EU:C:2011:865; [2013] Q.B. 102.

[104] *Safaii v Austria* (App. No.60104/08), judgment of 5 December 2013 at [38].

[105] *Safaii v Austria* (App. No.44689/09), judgment of 7 May 2014.

[106] *Sharifi v Italy and Greece* (App. No.16643/09), judgment of 21 October 2014.

the applicants' living conditions in concrete terms", that the rehousing had taken place quickly (three months) given the number of asylum seekers present in the camp, and the authorities had provided them with their basic needs, namely "food, hygiene and a place to live".[107] This point is highly questionable, as the Court here applies, particularly strictly, the "obligation to provide accommodation and decent material conditions to impoverished asylum-seekers" identified in *MSS*,[108] by limiting it to the provision of the "most basic needs". As if "decent living conditions" could be reduced to "food, hygiene and a place to live".

Another example of this contradictory case law is the divergent assessment of the situation of the reception system in Italy. In *Tarakhel v Switzerland*,[109] the Court found a violation of art.3 given the absence of detailed and reliable information concerning the specific facility of destination, and the fact that the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. However, in *AME v the Netherlands*,[110] the Court concluded that the situation in Italy for asylum seekers could in no way be compared to the situation in Greece at the time of the *MSS v Belgium and Greece* judgment and the structure and overall situation of the reception arrangements in Italy could not therefore in themselves act as a bar to all removals of asylum seekers to that country. *Tarakhel v Switzerland* seems to have been buried with regard to the Italian reception conditions, as the Court now refuses complaints on the grounds that they are manifestly ill-founded if the applicants do not prove that they face a sufficiently real and imminent risk of hardship so serious as to result in a violation of art.3 of the Convention.[111]

Article 8: Right to respect for private and family life

The right to family life

Where expulsions of migrants are challenged on the basis of art.2 or art.3, the Court has previously required that the remedy must have a suspensive effect to be "effective".[112] In other words, if expulsion threatens to interfere with the individual's right to life or may subject the individual to torture or inhuman or degrading treatment or punishment, the expulsion proceedings must be paused until the application is assessed.

Such is not the case, the Court held in *De Souza Ribeiro v France*,[113] if an expulsion is challenged on the basis of alleged interference with private and family life. Where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for their private and family life, States must give the individual concerned the possibility of challenging the order, there is no requirement that the expulsion order be suspended. Therefore, the alien may end up unable to return to his family and his home until the process is completed. This is, in fact, what happened to the applicant in *De Souza Ribeiro*, who was arrested, placed in administrative detention, and removed from French Guiana within 36 hours. Although the Court did find that the applicant had suffered a breach of his Convention rights, due to the brevity of the time that lapsed between the arrest and deportation, the Court did not go as far as to require states to

[107] *BG v France* (App. No.63141/13), judgment of 10 September 2020 at [87], and see A.K. Speck, "A camel's nose under the tent: the court's failure to discuss evidence in B.G. and others v. France" (23 October 2020), *Strasbourg Observers*, *https://strasbourgobservers.com/2020/10/23/a-camels-nose-under-the-tent-the-courts-failure-to-discuss-evidence-in-b-g-and-others-v-france/* [Accessed 23 April 2023].

[108] *MSS* [GC] (App. No.30696/09), judgment of 21 January 2011; (2011) 53 E.H.R.R. 2 at [250].

[109] *Tarakhel v Switzerland* (App. No.29217/12), judgment of 4 November 2014; (2015) 60 E.H.R.R. 28.

[110] *AME v Netherlands* (App. No.51428/10), judgment of 13 January 2015.

[111] *MT v Netherlands* (App. No.46595/19), judgment of 23 March 2021.

[112] M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford: Hart Publishing, 2014).

[113] *De Souza Ribeiro v France* [GC] (App. No.22689/07), judgment of 13 December 2012; (2014) 59 E.H.R.R. 10. On this case, see N.N. Arajärvi, "Case Note: De Souza Ribeiro v. France" (18 March 2013), *SSRN*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234992* [Accessed 24 April 2023].

institute a suspensive art.8 rights. Such a situation is very worrying and requires a clear reorientation of the Court's case law.[114]

Some international bodies have specifically called for a right to a suspensive appeal against expulsion, deportation, or removal of undocumented immigrants. For example, the Human Rights Committee examined the situation in French Guiana, in the context of *De Souza Ribeiro*, and called on the state party to "ensure that all individuals subject to deportation orders have an adequate period to prepare an asylum application, with guaranteed access to translators, and a right of appeal with suspensive effect".[115] This is but one example of many in international human rights and international migration law that suggests these two bodies of law impose at least a twofold procedural guarantee in respect of undocumented migrants: firstly, the right of access to courts in the host country in order to uphold their human rights, including their family rights; and, secondly, the right to an automatic suspensive review of any order of expulsion, deportation, removal or any similar measure when they face the risk of alleged irreversible damage to their family lives.

The European Court has already held that a remedy against a removal measure is only effective if it has a suspensive effect, particularly where such measures would place the migrant in danger of irreversible damage. Usually, "irreversible damage" is associated with physical damage resulting from torture and ill-treatment, generally protected under art.2 and art.3 of the Convention. However, the Court severed the link between physical damage and the necessity of a suspensive measure in *Čonka v Belgium*,[116] where the notion of irreversible damage was derived from the prohibition of the collective expulsion of aliens.[117] Thus, the Court in that case set a principle according to which potential irreversible damage may be invoked without the simultaneous allegation of danger of torture or ill-treatment. The separation of family members indeed may cause such irreversible damage. This "damage" should not be seen in any way as secondary to or less important than the physical damage caused by ill-treatment. The consistency of the Court's jurisprudence requires that the same broad understanding of the notion of "irreversible damage" be upheld in the interpretation of art.13. Unfortunately, in *Khlaifia* the Court went the opposite way,[118] taking the view that removal from the territory of the respondent state will not expose a person to harm of a potentially irreversible nature where the individual does not allege that he or she faces violations of arts 2 or 3 of the Convention in the destination country.

Indeed, the challenge for the Grand Chamber is not only to reconsider this line of case law, but more broadly the *Maaouia* principle that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations within the meaning of art.6(1) of the Convention.[119] Serious doubts can be raised about the proposition that, on account of the alleged discretionary and public-order element of such decisions, they are not to be seen as determining the civil rights of the person concerned. Firstly, these decisions will necessarily have major repercussions on the alien's private and professional and social life. Secondly, these decisions are not discretionary at all; they have to comply with international obligations, such as those resulting from the prohibition of refoulement. Such a restrictive interpretation of the right of access to courts unjustifiably discriminates between migrants and nationals, since art.1 of Protocol No.7 affords documented migrants ("migrants lawfully resident") fewer procedural guarantees than those set by art.6 for nationals and, even worse, imposes a groundless differentiation among migrants, because it leaves undocumented migrants outside the scope of *both* art.6

[114] Concurring opinion of Judge Pinto de Albuquerque in *De Souza Ribeiro* [GC] (App. No.22689/07), judgment of 13 December 2012; (2014) 59 E.H.R.R. 10.

[115] UN Doc. CCPR/C/FRA/CO/4, 31 July 2008 at [20].

[116] *Čonka v Belgium* (App. No.51564/99), judgment of 5 February 2002; (2002) 34 E.H.R.R. 54. For a more detailed analysis of this case and its implications, see J. Apap, "Infringement of the European Convention on Human Rights by Belgium", *CEPS Policy Brief*, February 2002, No.12.

[117] See also *Gebremedhin [Gaberamadhien] v France* (App. No.25389/05), judgment of 26 April 2007; (2010) 50 E.H.R.R. 29 at [58].

[118] *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [277]–[281].

[119] With regard to the expulsion procedure, see *Maaouia v France* [GC] (App. No.39652/98), judgment of 5 October 2000; (2001) 33 E.H.R.R. 42 and on the asylum procedure see *Katani v Germany* (App. No.67679/01), decision of 31 May 2001.

and art.1 of Protocol No.7. To avoid this self-created legal gap, the Court has ingeniously provided undocumented migrants with a minimum degree of protection of their right of access to courts, based on art.13 applied in conjunction with arts 2, 3 or 8.[120] The same legal avenue was taken in *De Souza Ribeiro*. It is high time to put an end to this minimalist interpretation of art.6.[121]

Even more questionable is the recent path taken by the Court in the area of family reunification, as illustrated in the *MA v Denmark* judgment.[122] The case concerned the state's legal regime for protection of aliens and the refusal of the applicant's application for family reunification. Danish law provided for three degrees of protection: refugee status (under 1951 Geneva Convention), protection because of serious threat of being sentenced to death or ill-treatment, and a so-called "temporary" protection, which could be granted to persons threatened with persecution in their state of origin because of a serious situation of general instability. The applicant in *MA* was afforded "temporary" protection. Unlike the other two degrees, persons admitted under temporary protection were not eligible for family reunification directly after they obtained the status, but only three years later. Recalling that states are entitled to control the entry, the residence and the removal of aliens into its territory, the Court, in the line with its previous case law,[123] listed the factors to be taken into account in order to demonstrate the existence of an obligation to authorise family reunification: the fact that refusal of reunification would constitute an obstacle to family life, the nature and extent of the links which the persons concerned maintain with the respondent state, whether there are insurmountable obstacles to the family living in the state of origin, whether the children are involved,[124] etc. The Court also recalled that it had already found violations based on excessive waiting periods for family reunification in the case of refugees and other residence permit holders.[125] Nevertheless, the Court did not follow this case law and enshrine a right to family reunification once a migrant's residence status has been formalised. While stressing the fact that the applicants were fleeing ill-treatment, the Court also emphasised the non-absolute nature of art.8, the margin of appreciation enjoyed by the state and, more problematically,[126] the absence of consensus among the states on a specific solution. In fact, the practice amongst states reflected a consensus *against* the Danish approach. Although the Court finally concluded that there had been a violation of art.8 because of the three-year time limit required for the granting of family reunification,[127] the solution is not entirely without criticism. As has been pointed out, the Court missed an opportunity to enshrine, as other international bodies have done,[128] an obligation to authorise family reunification once foreigners are lawfully resident in the state's territory. Furthermore, it validated a difference in treatment between refugees and other categories of protected persons based on the risk of ill-treatment in the state of origin, which, although justified in terms of the granting of status, is not very relevant in terms of family reunification. It is difficult to see why the duration of such reunification should differ according to the risk suffered by the protected person.[129]

[120] For example, the Court has already based its assessment of the fairness of an asylum procedure on art.3 of the Convention. See *Jabari v Turkey* (App. No.40035/98), judgment of 11 July 2000; 9 B.H.R.C. 1 at [39]–[40].

[121] Concurring Opinions of Judge Pinto de Albuquerque in *De Souza Ribeiro* [GC] (App. No.22689/07), judgment of 13 December 2012; (2014) 59 E.H.R.R. 10 and in *Hirsi Jamaa v Italy* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21.

[122] *MA v Denmark* [GC] (App. No.6697/18), judgment of 9 July 2021. See Voy. H. Molbaek-Steensig, "M.A. v. Denmark: is Denmark (still) a good-faith interpreter with legitimate aims?" (21 September 2021), *Strasbourg Observers*, *https://strasbourgobservers.com/2021/09/21/m-a-v-denmark-is-denmark-still-a-good-faith-interpreter-with-legitimate-aims/* [Accessed 24 April 2023]; Ferrero, RGDIP, 2021/3, pp.649–652.

[123] *Jeunesse v Netherlands* (App. No.12738/10), judgment of 3 October 2014; (2015) 60 E.H.R.R. 17.

[124] *MA* [GC] (App. No.6697/18), judgment of 9 July 2021 at [135].

[125] *MA* [GC] (App. No.6697/18), judgment of 9 July 2021 at [137]–[139]. See *Tanda-Muzinga v France* (App. No.2260/10), judgment of 10 July 2014 and *Mugenzi v France* (App. No.52701/09), judgment of 10 July 2014.

[126] See Ferrero, RGDIP, 2021/3, p.651.

[127] On the other hand, the Court considers that a period of two years is justified. See *MT v Sweden* (App. No.22105/18), judgment of 20 October 2022; (2023) 76 E.H.R.R. 29.

[128] Especially the United Nations Human Rights Committee.

[129] See Ferrero, RGDIP, 2021/3, p.652.

The right to citizenship

Article 8 protects the right to privacy, including a right to citizenship. The Court tackled this issue in *Ramadan v Malta*.[130] In that case, the applicant, who at the time was an Egyptian national, had acquired Maltese citizenship by reason of his marriage to a Maltese national. The applicant's marriage was annulled five years later, and he subsequently remarried in Malta. His second wife was a Russian national with whom he had two children. In 2007, after becoming aware of the annulment of his first marriage, Maltese authorities withdrew the applicant's citizenship on the ground that he had only married his first wife for the purpose of acquiring citizenship. The applicant brought a case to the Court arguing that the order to deprive him, and subsequently his second wife, of Maltese citizenship deprived him of his art.8 rights.

Although the Court asserted that it could not rule out that "an arbitrary denial of citizenship might in certain circumstances raise an issue under art.8 of the Convention because of the impact of such a denial in the private life of the individual",[131] in this case, the Court held there had been no violation. The Court concluded that the decision of the Maltese government had been in accordance with the law, not arbitrary, and did not lead to any real negative consequences. While the applicant and his second wife were stripped of their Maltese nationality, his children were not, and the applicant could continue to live and work in Malta. As to the applicant's argument that as a result of the Government's decision he was, in effect, rendered stateless (since he had already renounced his Egyptian citizenship), the Court reasoned that "the fact that a foreigner has renounced his or her nationality of a State does not mean in principle that another State has the obligation to regularise his or her stay in the country".[132] Given all of the above-mentioned considerations, the Court held that there had been no violation of art.8 of the Convention.

The majority's assessment of the fairness of the revocation procedure and the proportionality of the revocation are questionable, in view of the applicant's ensuing statelessness, the risk of his imminent expulsion from Malta and its impact on his family life. The right to citizenship is an extremely important right, and despite the fact that it was not explicitly included in the Convention, it has been identified and protected in subsequent Protocols, as well as other international instruments.[133]

The Court has taken some steps to protect this right, but unfortunately the majority in the above-mentioned *Ramadan* case failed to take these authorities into consideration when deciding the case. For example, in *Karassev v Finland*[134] the Court did not exclude the possibility that an arbitrary denial of a citizenship might in certain circumstances raise an issue under art.8 of the Convention because of the impact of such denial on the private life of the individual. There is nothing to suggest that the above principle cannot apply to cases of deprivation or loss of citizenship or to the right to renounce citizenship. The issue of arbitrary denial of citizenship can also arise under art.3 of Protocol No.4, if the purpose of the denial is to evade the prohibition against expulsion of nationals, as was the case in *Slivenko v Latvia*,[135] where the Court was asked to decide whether the expulsion of a Russian military officer's wife and daughter pursuant to the Latvian-Russian treaty on the withdrawal of Russian troops violated art.3 of Protocol No.4. The Court in that case held there had been a breach of art.8 of the Convention as a result of the applicants' removal from Latvia as regards their right to respect for their private life and their home.

What this case law suggests is that, within the Convention system, there is now a well-established prohibition of arbitrary denial or revocation of citizenship and by logical implication, the existence of a right to citizenship under art.8 of the Convention, read in conjunction with art.3 of Protocol No.4. Thus, the manner in which states regulate matters bearing on nationality cannot today be deemed to be within the states' sole jurisdiction. States are bound by two obligations: a negative obligation not to deprive a

[130] *Ramadan v Malta* (App. No.76136/12), judgment of 21 June 2016; (2017) 65 E.H.R.R. 32.
[131] *Ramadan* (App. No.76136/12), judgment of 21 June 2016; (2017) 65 E.H.R.R. 32 at [84].
[132] *Ramadan* (App. No.76136/12), judgment of 21 June 2016; (2017) 65 E.H.R.R. 32 at [91].
[133] See concurring opinion of Judge Pinto de Albuquerque in *Ramadan* (App. No.76136/12), judgment of 21 June 2016; (2017) 65 E.H.R.R. 32.
[134] *Karassev v Finland* (App. No.31414/96), decision of 12 January 1999.
[135] *Slivenko v Latvia* (App. No.48321/99), decision of 9 October 2003; (2004) 39 E.H.R.R. 24.

person of their citizenship if the person would thereby become stateless, and a positive obligation to provide citizenship to stateless persons, at least when they were born or found in their respective territories or when one of their parents is a citizen. It is time for the Court to recognise explicitly that state citizenship belongs to the core of someone's identity, which is protected by art.8 of the Convention, and it is disappointing it failed to do so in *Ramadan v Malta*.[136]

Nevertheless, a recent development in the Court's case law can be observed with regard to cases of revocation of nationality. Indeed, some cases have resulted in findings of violations of art.8 on the basis of the two criteria set out in *Karassev* and recalled in *Ramadan v Malta*, namely the arbitrary nature of the measure and its consequences for the applicant's private life.[137] In one of them, *Usmanov*—which concerned the withdrawal of Russian citizenship from a Tajikistani national and a subsequent expulsion order—the Court found that the national authorities had not established with sufficient certainty that the applicant's alleged threat to national security outweighed the family ties he had established in Russia.[138]

The prohibition of arbitrary expulsion and collective expulsion

According to the Court's well-established case law, a state is entitled to control the entry of migrants into its territory. Nevertheless, states do not have unlimited and unrestrained power to detain migrants, deny them entry, and/or return them. States continue to have duties and obligations, under both the Convention and international law more broadly, towards migrants. States must ensure that, for one, they do not deport individuals in an arbitrary manner, and when migrants are "knocking at their door" states must ensure they do not engage in collective expulsions.

Arbitrary expulsion

The Court is used to deferring to national authorities in cases of expulsion, and often this has led to arbitrary expulsions that have infringed upon individuals' rights under the Convention. In *Vasquez v Switzerland*,[139] the applicant complained that his expulsion from Switzerland was in breach of his art.8 rights. In short, an administrative process in Switzerland had resulted an expulsion order, in circumstances where the criminal courts had not considered it necessary to impose such an order on the applicant following his conviction for a sexual crime. In practical terms, the administrative authorities had "punished" the applicant with a penalty that the criminal courts had seen no need to apply. Moreover, the Federal Supreme Court had inferred a threat to public safety from legally irrelevant facts, such as two decisions dismissing criminal charges for a lack of criminal characterisation of the facts. The arbitrariness of this presumption of risk or threat to public safety was patent. Nevertheless, the Court found that there had been no violation of art.8 of the Convention, stating that the national authorities had not exceeded their margin of appreciation.

It should be noted that this is neither the first, nor the last time the Court has failed to protect individuals from arbitrary expulsions. Similar issues arose in *Shala v Switzerland*[140] and *Koffi v Switzerland*,[141] handed down by the Court on the same day in 2012. These are typical cases of crimmigration, whereby the state uses administrative immigration law to give effect to criminal prevention policy.

[136] See L. Lavrysen and C. Poppelwell-Scevak, "Ramadan v. Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?" (22 July 2016), *Strasbourg Observers*, *https://strasbourgobservers.com/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/* [Accessed 24 April 2023].

[137] See, for example, *Ahmadov v Azerbaijan* (App. No.32538/10), judgment of 30 January 2020 at [43]–[44]; *Usmanov v Russia* (App. No.43936/18), judgment of 22 December 2020 at [52]. Generally, the Court's review first focuses on the arbitrary nature of the measure, then on the consequences for the applicant's private life (see *Ahmadov*), but sometimes arbitrariness is assessed secondly (*Usmanov*).

[138] *Usmanov* (App. No.43936/18), judgment of 22 December 2020. See L. Reyntjens, "Usmanov v. Russia: a confusing turn in the right direction?" (22 January 2021), *Strasbourg Observers*, *https://strasbourgobservers.com/2021/01/22/usmanov-v-russia-a-confusing-turn-in-the-right-direction/* [Accessed 24 April 2023]; J. Ferrero, RGDIP, 2021/1, pp.143–144.

[139] *Vasquez v Switzerland* (App. No.1785/08), judgment of 26 November 2013.

[140] *Shala v Switzerland* (App. No.52873/09), judgment of 15 November 2012.

[141] *Koffi v Switzerland* (App. No.38005/07), judgment of 15 November 2012.

Collective expulsion

Article 4 of Protocol No.4 states clearly and unequivocally that "collective expulsion of aliens is prohibited". Collective expulsion is "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".[142] In practical terms, this means that groups of refugees cannot be subject to a diminished status based on an "inherent" mass-influx exception to "genuine" refugee status. To provide reduced, subsidiary protection for people who arrive as part of a mass influx would be unjustified discrimination.

To date, the Court has found a violation of art.4 of Protocol No.4 in only a handful of cases.[143] In *Čonka v Belgium*,[144] measures of detention and removal had been adopted for the purposes of implementing an order to leave the country, but made no reference to the applicants' asylum requests. A number of people had been simultaneously summoned to the police station, without being given an opportunity to contact a lawyer. The "only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months", and the deportation documents made no reference to their application for asylum.[145] The Court held that the expulsion procedure did not afford "sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account",[146] and as such there had been a violation of art.4 of Protocol No.4.

The Court also found a violation of art.4 of Protocol No.4 in *Hirsi Jamma v Italy*.[147] In that case, the applicants did not undergo any identity checks and authorities merely put migrants who had been intercepted at sea onto military vessels to be taken back to the Libyan coast. However, the Court's solution did not go far enough. The Court should have found that the Italian government also had a positive obligation to provide applicants with practical and effective access to an asylum procedure in Italy, not merely to hold that Italy could not push back migrants on the high seas.[148]

In *Georgia v Russia (I)*,[149] the Court again reproached "routine expulsions" which followed a recurrent pattern, the result of a coordinated policy of arrest, detention, and expulsion of Georgians. Applicants were expelled in large groups without legal representation or individual assessment. In that case, the Court found there had been a breach of Convention rights. And in *Sharifi v Italy and Greece*,[150] migrants intercepted at Adriatic ports were subjected to "automatic returns" to Greece and had been deprived of any effective possibility of seeking asylum. Once again, the Court found a violation.

Recently, the Court has, however, been more forgiving of states engaged in group deportation, and has developed a very broad definition of what "individual expulsion" is, so that its recent case law has been described as a "backsliding".[151] This was evident in the *Khlaifia v Italy* case. The facts in that case, very briefly, were as follows: the applicants, Tunisian nationals, were part of a group of migrants who had set

[142] *Georgia v Russia (I)* [GC] (App. No.13255/07), judgment of 3 July 2014 at [167].

[143] For a discuss on positive effects of the Court's case law, see D. Rietiker, "Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times" (2016) 36 Suffolk Transnat'l L. Rev 651; J. Ramji-Nogales, "Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights" (4 January 2016) A.S.I.L., *https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights* [Accessed 24 April 2023].

[144] *Čonka* (App. No.51564/99), judgment of 5 February 2002; (2002) 34 E.H.R.R. 54.

[145] *Čonka* (App. No.51564/99), judgment of 5 February 2002; (2002) 34 E.H.R.R. 54 at [61].

[146] *Čonka* (App. No.51564/99), judgment of 5 February 2002; (2002) 34 E.H.R.R. 54 at [61].

[147] *Hirsi Jamaa* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21 at [186]. On the case, see V. Moreno-Lax, "Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?" (2012) 12(3) H.R.L.R. 574; M. Giuffré, "Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy" (2012) 61(3) I.C.L.Q. 728. For a comentary on the case's impact in Law of the Sea, see J. Coppens, "The Law of the Sea and Human Rights in the Hirsi Jamaa and Others v. Italy Judgment of the European Court of Human Rights", in Y. Haeck et E. Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Dordrecht: Springer, 2013), pp.179–202.

[148] Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21.

[149] *Georgia v Russia* [GC] (App. No.13255/07), judgment of 3 July 2014.

[150] *Sharifi* (App. No.16643/09), judgment of 21 October 2014.

[151] C. Bosch March, "Backsliding on the protection of migrants' rights? The evolutive interpretation of the prohibition of collective expulsion by the European Court of Human Rights" (2021) 35(4) *Journal of Immigration Asylum and Nationality Law* 315.

off by boat from Tunisia to Italy. They were intercepted by the Italian Coastguard and escorted to a port on the island of Lampedusa, where they were placed in an early reception centre. During a riot, the centre was gutted by fire and the applicants were then taken to ships moored in Palermo harbour, where they were then issued with refusal-of-entry orders. They were subsequently received by the Tunisian Consul, who recorded their identities, and put on planes bound for Tunisia. Once in Tunis they were released. The events lasted about 12 days.[152]

The case was first heard by a Chamber of the Court, which found that although the applicants were returned on the basis of individual refusal-of-entry orders, such orders were drafted in identical terms, with only the personal details (for instance, the person's name) varying from individual to individual. As such, even though the applicants had undergone an identification procedure that did not necessarily show that there had not been a collective expulsion, the orders failed to contain any reference to the personal situation of the individuals. These elements led the Chamber to find that the expulsion was collective in nature and breached art.4 of Protocol No.4. Unfortunately, the Grand Chamber did not follow this line of reasoning and failed to find that there had been a breach of the Convention. Instead, the Grand Chamber noted that the applicants underwent two identification procedures, and at the time of their first identification procedure "they had an opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned".[153] Although the Grand Chamber agreed with the Chamber's observation that the refusal-of-entry orders had been drafted in comparable terms, "the relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion".[154] The state's actions and justifications were thus not unreasonable. The Court then went on to find that "the virtually simultaneous removals of the three applicants does not lead to the conclusion that their expulsion was collective' within the meaning of Article 4 of Protocol No. 4 to the Convention".[155] Rather, those removals could be explained as "the outcome of a series of individual refusal-of-entry orders".[156] This was a disappointing finding by the Court, and a move in the wrong direction.

As Judge Serghides (who dissented in that case) emphasised, there are serious issues with the Court's interpretation of art.4 of Protocol No.4. One of the main lines of disagreement between the dissent and the majority in this case was whether an individual interview is required for a deportation to be in line with the Convention. The Court answered in the negative. However, contrary to the decision of the majority, and as Judge Serghides stressed, a personal interview seems to be necessary to guarantee an individualised evaluation of the asylum claims and individual arguments of migrants attempting to cross into the territory of a state. The lack of such an interview should automatically lead to a violation of art.4 of Protocol No.4. Allowing states to proceed with collective or group deportations without conducting personal interviews would be a huge step back for the protections of migrants and would significantly depart from the Court's case law. Under the Convention there is a mandatory procedural obligation to assess the individual circumstances of each migrant a state deports, and this necessarily implies an obligation on the part of states to conduct a personal interview. Otherwise, the Court is effectively giving states a carte blanche to decide when individual circumstances matter, and when they can be ignored.[157] An additional issue in this case was the existence of a bilateral agreement between Italy and Tunisia, which by-passed the need for an individual interview of Tunisian individuals who arrived in Italy. Under this agreement, there was "no mandatory obligation to conduct a personal interview". Again, it seems essential to consider, as Judge

[152] *Khlaifia* (App. No.16483/12), judgment of 15 December 2016.
[153] *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [247].
[154] *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [251].
[155] *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [252].
[156] *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [252].
[157] See also Venturi, "The Grand Chamber's ruling in Khlaifia and Others v Italy: one step forward, one step back?" (10 January 2017), *Strasbourg Observers*.

Serghides does, that "where a bilateral agreement does not require mandatory personal interviews for the collective expulsion of aliens, … it violates the provisions of Article 4 of Protocol No. 4".[158] Since there has not been a reservation to art.4 of Protocol No.4, Italy's full obligations under the Protocol remain in force and cannot be displaced by a bilateral agreement.

In *ND and NT v Spain*,[159] the Court clarified that the notion of expulsion also included decisions of non-admission at the border in accordance with the interpretation of the UN International Law Commission's draft articles on expulsion of aliens, without distinguishing between the different categories of individuals concerned, irrespective of the asylum application or the legitimacy of the request for international protection.[160] Most importantly, the Court established that states could not, through their legislation or by others means, apply the designation of "non-territory" to parts of their territory to escape their obligations under the Convention, and they must provide "available genuine and effective access to means of legal entry" and a "sufficient number" of border crossing points.[161] This positive obligation is a *sine qua non* condition for a border management policy that complies with the Convention.

In the *Melilla* case, that condition had not been met, due to a lack of practical accessibility to the legal channels for admission to Spain. However, the Court overlooked this point.[162] Even worse, by focusing on the behaviour of individuals, the Court reversed the roles of the applicants and the respondent state, treating the former as if they were accused of intentionally disruptive and aggressive behaviour, and the latter as an accuser. The Court's choice to first assess whether the applicants were worthy of human rights protection under the Convention was fundamentally flawed, in that it assumed that the right to access human rights is not inherent to every persecuted person, but depends on the conduct of the applicant. The conclusion in *Hirsi Jamaa v Italy*[163] that there was no violation of art.4 of Protocol No.4 since "the absence of an individual removal decision is the consequence of the wrongful conduct of the persons concerned",[164] did not and could not be interpreted as meaning that the guarantee of the absolute prohibition of refoulement depended on the conduct of the individual crossing the border. Such a reading by *Hirsi Jamaa* would clearly be abusive in the light of the broad interpretation of the term "expulsion" at [174] of the judgment

[158] Dissenting Opinion of Judge Serghides in *Khlaifia* (App. No.16483/12), judgment of 15 December 2016 at [252].

[159] *ND and NT v Spain* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020. On those cases, see D. Thym, "The End of Human Rights Dynamism? Judgments of the ECtHR on 'Hot Returns' and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy" (2020) 32(4) *International Journal of Refugee Law* 569; A. López-Sala, "Keeping up appearances: Dubious legality and migration control at the peripheral borders of Europe. The cases of Ceuta and Melilla", in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union: Complaint Mechanisms and Access to Justice* (Abingdon: Routledge, 2020), pp.26–42; I. Barbero and M. Illamola-Dausa, "Deportations without the right to complaint: cases from Spain", in Carrera and Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsions of Irregular Immigration in the European Union* (2020), pp.43–63; N. Sinanaj, "Push backs at land borders: Asady and Others v. Slovakia and N.D and N.T v. Spain. Is the principle of non-refoulement at risk?" (10 June 2020), *Refugee law initiative*; S. Carrera, "The Strasbourg Court Judgement N.D. and N.T. v Spain: A Carte Blanche to Push Backs at EU External Borders?", *EUI Working Paper* (2020) No.21; G. Raimondo, "N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrants", University of Oxford Faculty of Law, 20 April 2020; N. Markard, "A Hole of Unclear Dimensions: Reading ND and NT v. Spain" (1 April 2020), *EU Immigration and Asylum Law and Policy*; H. Hakiki, "N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?" (26 March 2020), *Strasbourg Observers*; S. Papageorgopoulos, "N.D. and N.T. v. Spain: do hot returns require cold decision-making?" (28 February 2020), *European Database of Asylum Law*; R. Wissing, "Push backs of 'badly behaving' migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)" (25 February 2020), *Strasbourg Observers*; M. Pichl et D. Schmalz, "'Unlawful' may not mean rightless. The shocking ECtHR Grand Chamber judgment in case N.D. and N.T." (14 February 2020), *Verfassungsblog*; C. Oviedo Moreno, "A Painful Slap from the ECtHR and an Urgent Opportunity for Spain" (14 February 2020) *Verfassungsblog*; D. Thym, "A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. and N.T. judgement on 'Hot Expulsions'" (17 February 2020), *EU Immigration and Asylum Law and Policy*.

[160] See Dissenting Opinion of Judge Pinto de Albuquerque in *MA v Lithuania* (App. No.59793/17), judgment of 11 December 2018; (2020) 70 E.H.R.R. 11.

[161] *ND and NT* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020 at [209].

[162] The Court merely dismissed the evidences raised by the UN High Commissioner for Human Rights, the Council of Europe Commissioner for Human Rights and a group of institutions of civil society, as third parties, considering that the various reports were "not conclusive" at [218]. The situation in the field has been assessed by J.M. Sanchez-Tomás, "Las devoluciones en caliente en el Tribunal Europeo de Derechos Humanos" (2018) 65 *Revista Española de Derecho Europeo* 101; L. Imbert, "Refoulements sommaires: la CEDH trace la 'frontière des droits' à Melilla" (28 January 2018), *La Revue des droits de l'homme*; C. Gortazar and N. Ferré, "A cold shower for Spain-hot returns from Melilla to Morocco: N.D. and N.T. v Spain" (20 October 2017), *EU Immigration and Asylum Law and Policy*; I. Gonzalez García, "Rechazo en las Fronteras Exteriores Europeas con Marruecos : Immigración y Derechos Humanos en las Vallas de Ceuta y Melilla 2005-2017" (2017) 43 *Revista General de Derecho Europeo* 17; P. García Andrade, "'Devoluciones en caliente' de ciudadanos extranjeros a Marruecos" (2015) 67 *Revista Española de Derecho Internacional* 214.

[163] *Hirsi Jamaa* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21.

[164] *Hirsi Jamaa* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21 at [184].

(repeated at [185] of *ND and NT*), which rightly emphasises that the term refers "to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and *his or her conduct when crossing the border*".[165] Moreover, invoking the *Berisha and Haljiti v The Former Yugoslav Republic of Macedonia*[166] and *Dritsas v Italy*[167] cases as authoritative was abusive, as they did not relate to a similar situation.[168] The fallacy of the Court's reasoning is even more apparent if it is stretched *ad absurdum* to deny the right of access to human rights to criminals or other "disruptive" individuals, whatever that term may mean. In doing so, the Court not only encouraged Spain's practice in *ND and NT*, but also categorised future applicants into first-class citizens, "good people", who have the right to access human rights, and second-class citizens, "troublemakers", who do not have the right to access human rights and, more specifically, the right to access a procedure that assesses their international protection needs. To the Court, African persons apprehended in Melilla, i.e. on Spanish territory, after having climbed the Spanish Moroccan border fences, were second class citizens, "troublemakers", and could therefore be immediately denied entry without any protection nor access to a judicial procedure. At Europe's borders, foreigners are hunted like animals that have invaded our backyard, and the Court has remained silent on this issue. The most appalling aspect of this line of reasoning is its *reductio ad hitlerum*, as Leo Strauss would say. It is a logic of guilt by association, according to which all people who scale the border fences in Melilla are acting in the same way, share the same intention and are in the same personal situation.[169] In the *ND and NT* cases, the specific applicants' intentions to disrupt and endanger public safety were never established and no evidence was ever presented of any actual acts of violence committed by them or any other person crossing the border on that day.[170] When reading the majority judgment, the principle of individual responsibility seems to have been completely ignored. The rule of law requires the Court to analyse the real situation of each applicant before the Court in Strasbourg and not to trivialise his or her individual characteristics. This is obvious and it is telling of the situation in Strasbourg that this has to be highlighted.

Beyond the obvious, a point of no return has been reached in the Spanish case. Article 31 of the Geneva Convention enshrines the principle of non-criminalisation which obliges contracting states not to impose on migrants "penalties, on account of their illegal entry or presence". In accepting that states could require applications "to be submitted at the existing border crossing points" and "refuse entry to their territory to aliens, *including potential asylum-seekers*, who have failed (…) to comply with these arrangements by seeking to cross the border at a different location",[171] the Court has disregarded the principle of non-refoulement. The opposite position has been consistently upheld by the Parliamentary Assembly of the Council of Europe,[172] the Commissioner for Human Rights,[173] the Special Representative of the Secretary General on Migration and Refugees,[174] and all relevant United Nations bodies: the UN High Commissioner

[165] Emphasis added.

[166] *Berisha and Haljiti v The Former Yugoslav Republic of Macedonia* (App. No.1867/03), judgment of 16 June 2005.

[167] *Dritsas v Italy* (App. No.2344/02), judgment of 1 February 2011.

[168] *ND and NT* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020 at [200].

[169] The Court's *ad hominem* language says that "persons who cross a land border in an unauthorized manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety". See *ND and NT* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020 at [200].

[170] The use of word "assault" at [201], [210], [211] and, above all, [231] of the judgment is equivocal, as it confuses the use of force with the mass arrival of people. Moreover, the video of the events available in the file of the case did not show any use of force.

[171] *ND and NT* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020 at [210]. Emphasis added.

[172] Parliamentary Assembly of the Council of Europe, *Pushback policies and practice in Council of Europe member States*, resolution 2161 (2019).

[173] Council of Europe Commissioner for Human Rights N. Muižnieks, *Annual Activity Report*, 14 March 2016, para.41.

[174] Special Representative of the Secretary General on migration and refugees, *Report of the fact-finding mission in Spain*, 18–24 March 2018, SG/Inf(2018)25, 3 September 2018.

for Human Rights;[175] the Committee on the Rights of the Child;[176] the UN Human Rights Council;[177] the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;[178] and the Committee on the Elimination of Discrimination against Women.[179] At least for the sake of international courtesy, if not analytical rigour, the Court should have sought to engage with these authorities. As in *Ilias and Ahmed*, it is highly regrettable that instead of promoting effective convergence between its case law and international human rights law, the Court in *ND and NT* has embarked on the tortuous path of international law fragmentation.[180]

The Court's morally and legally untenable position on the jurisdictional threshold was further aggravated by the decision in *MN v Belgium*.[181] The worst face of the Court, indifferent to the tragic consequences of decisions taken by Contracting Parties on foreigners outside their territories, so coldly exposed in *Bankovic v Belgium*,[182] was again revealed there. The Court stated unequivocally and uncompromisingly that "the mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory".[183] *A fortiori*, this means that "persons outside [the State's] territory" do not have a right of access to legal mechanisms for the purpose of their asylum application, even when decisions taken at the national level have had an impact on their rights.

MN v Belgium raises delicate issues in the light of the Court's recent case law.[184] In the *ND and NT v Belgium* judgment, the Court considered that the African applicants could have applied for international protection through the Spanish diplomatic and consular services in their country of origin or transit.[185] This, in turn, underpinned the Court's conclusion that Spanish law offered the applicants several possible regular means to apply for admission and justified the "hot return" (*devoluciones en caliente*) of irregular migrants. Given this reasoning in *ND and N*, how could the Court in *MN* conclude that the regular application for a visa at a Belgian consulate in Syria could not trigger a jurisdictional link with Belgium? Furthermore, in *ND and NT*, the Court explicitly refused to allow the state to cut off part of its territory in order to circumvent its international obligations.[186] Considering this refusal, how could the Court in *MN* be prepared to deny the jurisdictional link between the Belgium state and the applicants in spite of its consular and diplomatic posts' authority over foreigners which had taken decisions that have lasting effects on their rights? These questions deserve answers which the Grand Chamber did not give. The only argument put forward by the majority in *MN* was a classic *ad terrorem* fallacy, namely that the acceptance of jurisdiction would constitute "a near-universal application of the Convention on the basis of the unilateral

[175] Report of the Office of the United Nations High Commissioner for Human Rights, HRC/WG.6/35/ESP/2, 18 November 2019. See also the *Recommended Principles and Guidelines on Human Rights at International Borders*, 2014, which remind states to "respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including where they exercise authority or control extraterritorially" and "ensure that all border governance measures taken at international borders, including those aimed at addressing irregular migration and combating transnational organized crime, are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions".

[176] *DD v Spain*, 15 May 2019, No.4/2016.

[177] HRC, *Report of the Working Group on the Universal Periodic Review. Spain*, 13 April 2015, CHD/29/8, paras 131–166 and 131–182.

[178] SPT, *Visit to Spain undertaken from 15 to 26 October 2017: observations and recommendations addressed to the State party*, 2 October 2019, CAT/OP/ESP/1, para.93. For an analysis of the migration issue by SPT, see H. Bhuĭ and M. Bosworth, "Human rights protections and monitoring immigration detention at Europe's Borders" [2020] E.H.R.L.R. 64.

[179] CEDAW, *Concluding observations on the combined seventh and eighth periodic reports of Spain*, 29 July 2015, CEDAW/C/ESP/CO/7-8, paras 36–37.

[180] See Dissenting Opinion of Judge Pinto de Albuquerque in, *Correia de Matos v Portugal* (App. No.56402/12), judgment of 4 April 2018.

[181] *MN v Belgium* [GC] (App. No.3599/18), judgment of 5 March 2020.

[182] *Banković v Belgium* [GC] (App. No.52207/99), decision of 12 December 2001; (2007) 44 E.H.R.R. SE5 at [75].

[183] *MN v Belgium* [GC] (App. No.3599/18), judgment of 5 March 2020 at [112].

[184] See T. Gammeltoft-Hansen, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement" (26 May 2020) *EU Immigration and Asylum Law and Policy*; A. De Leo and J. Ruiz Ramos, "Comparing the Inter-American Court opinion on diplomatic asylum applications with M.N. and Others v. Belgium before the ECtHR" (13 May 2020), *EU Immigration and Asylum Law and Policy*; V. Stoyanova, "M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas" (12 May 2020), *EJIL: Talk!*; M. Baumgärtel, "Reaching the dead-end: M.N. and others and the question of humanitarian visas" (7 May 2020), *Strasbourg Observers*; A.-N. Reyhani, "Expelled from Humanity: Reflections on M.N. and Others v. Belgium" (6 May 2020), *Verfassungsblog*; D. Schmalz, "Der Staat gegen seine Richter: Eindrücke von der EGMR-Verhandlung im Fall M.N." (2 May 2020), *Verfassungsblog*.

[185] *ND and NT* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020 at [212], [214] and more particularly [228].

[186] *ND and NT* [GC] (App. Nos 8675/15 and 8697/15), judgment of 13 February 2020 at [209].

choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction".[187] Ruminating on potential catastrophic outcomes while imagining worst-case scenarios has never been an appropriate means of legal analysis.[188] Moreover, "the principle of non-refoulement would be purely fictional if the State could prevent the application of the principle by means of push-back policies or non-admission or rejection at the border".[189] Furthermore, in *MN*, the Court removed the existence of real and effective access to legal entry mechanisms for the purpose of asylum as a condition *sine qua non* of a border complaints management policy under the Convention.[190] The Court considered the possibility of legal means of protection, such as asylum procedures through embassies and/or consular representations, to the detriment of African applicants, who had not used them, but did not consider them to the benefit of Syrian applicants, who had used them. This is another example of the Court's "patch-work case-law" on jurisdiction.[191] In simple terms, if asylum seekers act like "bad people", who jump border barriers in Africa, they can be sure not to get justice before the Strasbourg Court, but they will not have their rights protected either if they act like "good people" who attempt to seek asylum in an orderly manner through the consular, administrative and judicial ways. Inflexible with "rebellious" asylum seekers, the Court is no less merciless with law-abiding asylum seekers, such as Syrian applicants in the Belgian case.

Defending a principled interpretation of jurisdiction, according to which "immigration and border control is a primary State function and all forms of this control result in the exercise of the State's jurisdiction", was imperative.[192] In this context, it should be admitted that Belgium had a jurisdictional link with the applicants, on the basis of decisions taken by state officials at national level, including decisions of diplomatic and consular authorities, which impacted on the situation of aliens abroad, irrespective of any physical territorial or personal control over them.[193] Furthermore, given the jurisdictional threshold, it has to be reiterated that "if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted".[194] Article 3 of the Convention enshrines the principle of

[187] *MN v Belgium* [GC] (App. No.3599/18), judgment of 5 March 2020 at [123], following the unfortunate case of *Khan v United Kingdom* (App. No.11987/11), judgment of 28 January 2014; (2014) 58 E.H.R.R. SE15 at [27]. The Court did not even take into account the fact that the appeal proceedings in *Abdul Wahab* concerned the withdrawal of leave to remain.

[188] This type of apocalyptic narrative of fear of an invasion of Europe by foreigners is frequently used in the field of migration law. See Dissenting Opinions of Judge Pinto de Albuquerque in *SJ* [GC] (App. No.70055/10), judgment of 19 March 2015; (2015) 61 E.H.R.R. 21, *De Souza Ribeiro* [GC] (App. No.22689/07), judgment of 13 December 2012; (2014) 59 E.H.R.R. 10 and *MA* (App. No.59793/17), judgment of 11 December 2018; (2020) 70 E.H.R.R. 11 at [17].

[189] See Concurring Opinion of Judge Pinto de Albuquerque in *MA* (App. No.59793/17), judgment of 11 December 2018; (2020) 70 E.H.R.R. 11 at [7].

[190] Subsequent case law confirms this. In the recent case of *Asady v Slovakia* (App. No.24917/15), judgment of 24 March 2020, the majority did not say a word about the lack of legal remedies for the applicants, who entered Slovakia illegally and applied for international protection in Slovak diplomatic or consular missions offices abroad. The violation of art.4 of Protocol No.4 is further aggravated by a sham individualised examination of the applicant's situation by the Slovak authorities. No real and effective opportunity was given to them to present arguments against their expulsion. See F.L. Gatta, "'Tell me your story, but hurry up because I have to expel you'—Asady and others v. Slovakia: how to (quickly) conduct individual interview and (not) apply the ND & NT 'own culpable conduct' test to collective expulsions" (6 May 2020), *Strasbourg Observers*.

[191] Expression of Judge Bonello in Dissenting Opinion in GC, *Al-Skeini v United Kingdom* (App. No.55721/07), judgment of 7 July 2011; (2011) 53 E.H.R.R. 18.

[192] See Opinions of Judge Pinto de Albuquerque in *Hirsi Jamaa v Italy* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21, *De Souza Ribeiro* [GC] (App. No.22689/07), judgment of 13 December 2012; (2014) 59 E.H.R.R. 10 and *MA* (App. No.59793/17), judgment of 11 December 2018; (2020) 70 E.H.R.R. 11 at [3]–[5].

[193] To the Inter-American Human Rights Court, acts of diplomatic agents in relation to an individual who enters a foreign state embassy to seek protection automatically fall under the jurisdiction of that state (Advisory Opinion, *The institution of asylum and its recognition as a human right in the Inter-American system of protection (interpretation and scope of Articles 5, 22.7 and 22.8 in relation to Article 1(1) of the American Convention on Human Rights*, 30 May 2018, OC-25/18, paras 188, 192 and 194). The Inter-American Court was inspired by the former European Commission in the case of *WM v Denmark* (App. No.17392/90), judgment of 14 October 1992; (1993) 15 E.H.R.R. CD28 by CCPR, *Mohammad Munaf v Romania*, 21 August 2009, No.1539/2006, CCPR/C/96/D/1539/2006, paras.14.2 and 14.5. It is true that the Danish case involved acts of force on the alien, but neither the Romanian case nor the Advisory Opinion consider that jurisdiction is conditional on acts of diplomatic officials involving physical control of the alien by diplomatic official themselves or at their request.

[194] See Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa* [GC] (App. No.27765/09), judgment of 23 February 2012; (2012) 55 E.H.R.R. 21.

non-refoulement, as it obliges states not to refuse a visa to an alien where there are substantial grounds for believing that the individual concerned, if left in his or her country, would be exposed to a real risk of ill-treatment.[195] For that reason, art.4 of Protocol No.4 prohibits collective expulsions and necessarily involves an individual assessment of the alien's international protection needs. The state cannot prevent the return of "potential asylum seekers" to a dangerous place if individuals are deported collectively.

Fortunately, the Court appears to have reinstated the protection of art.4 of Protocol No.4 in several subsequent cases,[196] in particular *MK v Poland*[197] and *Moustahi v France*.[198] In the first case, the Court found a violation of art.4 of Protocol No.4 on the ground that the decisions to refuse the applicants entry into Poland had not been taken on the basis of an individual assessment of their application, but were part of a general policy of systematically refusing to register asylum applications made by individuals arriving at the Polish border with Belarus, and of returning them.[199] In the second case, the Court came to the same conclusion regarding the removal of two unaccompanied minors by the French authorities from Mayotte to the Comoros. The Court found a violation of art.4 of Protocol No.4 based on the lack of individual assessment of children's situations and the fact that their fate had been arbitrarily linked to the adult's one with whom they were travelling, without having checked the link between them.[200] However, it must be emphasised that the case could not have been concluded otherwise in view of the seriousness of the facts. Indeed, the judgment emphasised the vulnerability and the "feeling of extreme anguish" of the children, who were "completely helpless" and detained with other adults and separated from their families, then sent back without preparation and without reception facilities, as well as the "flagrant lack of humanity" shown by national authorities.[201] These circumstances also led the Court to find a violation of arts 3, 5(1) and (4), (8), and (13) in conjunction with arts 3 and 8 of the Convention and art.4 of Protocol No.4.

Conclusion

When it comes to the protection of migrants, the Court seems set on curbing individual rights. It continues to abide by precedents that are unclear, unfair, and outdated. The Court has utterly failed to extend the same fundamental rights citizens of Member States enjoy under the Convention to those individuals who often make a perilous journey to our shores. In doing so, the Court has turned its back to the most vulnerable and has failed to live up to its mission to protect human rights for *all* individuals. The Court has allowed itself to be involved in the politics of migration, often forgiving states for buckling under pressure, but failing to consider the individuals at the other end of those sweeping "solutions". Politicians and politics may use excuses to limit rights when things get tough. But it is for the Court to stand strong in uncertain times and in face of unexpected world events. It is in those times that the most vulnerable in our society suffer first and suffer most. It is the Court's job, its founding principle as the shining light of human rights in Europe and across the world, to be the voice for the voiceless especially in trying times.

The slippery slope the Court is on will inevitably lead to more problems and less protection. Migration will not go away, and as we watch the world become increasingly more volatile, we must expect that

[195] According to the Inter-American Court of Human Rights, there is an obligation to respect the principle of non-refoulement in diplomatic missions ([192] and [194]), implying both positive and negative obligations for the state, namely the obligation to assess whether there is a real risk of removal if the individual were to leave the embassy and, if such a risk is determined, the obligation to take all necessary diplomatic measures, including requesting the state in which territory the diplomatic mission is located to arrange the safe passage of the individual (Advisory Opinion OC-25/18, [194]–[198]).

[196] In addition to the mentioned cases, see also *Shahzad v Hungary* (App. No.12625/17), judgment of 8 July 2021; (2022) 74 E.H.R.R. 16 and *MH v Croatia* (App. Nos 15670/18 and 43115/18), judgment of 18 November 2021. Again, the finding of violation was based on the failure to examine the individual situation of the applicants, as well as the lack of an adequate judicial remedy. See J. de Coninck, "MH and others v. Croatia: Resolving the jurisdictional and evidentiary black hole for expulsion cases?" (14 January 2022), *Strasbourg Observers*.

[197] *MK v Poland* (App. Nos 40503/17, 42902/17 and 43643/17), judgment of 23 July 2020. See F. L. Gatta, "Systematic push back of 'well behaving' asylum seekers at the polish border: M.K. and Others v. Poland" (7 October 2020), *Strasbourg Observers*.

[198] *Moustahi* (App. No.9347/14), judgment of 25 June 2020. See Ferrero, RGDIP, 2020/3-4, pp.679–680.

[199] *MK* (App. Nos 40503/17, 42902/17 and 43643/17), judgment of 23 July 2020 at [174].

[200] *Moustahi* (App. No.9347/14), judgment of 25 June 2020 at [133].

[201] *Moustahi* (App. No.9347/14), judgment of 25 June 2020 at [65]–[70].

waves of migrations will continue to bring many more vulnerable and desperate people to our shores. The Court will have to reflect on its role in protecting individuals who have come to Europe and managed to create a life here, only to have their lives upturned by arbitrary deportations. The Court will also have to consider its role in condoning an inhuman detention policy which treats migrants as disposable commodities. The Court is on a wrong path: one away from protection, and towards indifference. The implications of this are tragic, not only for individuals who have no other protection but the Convention, but also for the protection and development of human rights across Europe and the world.