



Training Seminar for Lawyers on EU Law relating to Asylum and Immigration (TRALIM)

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**The Council of Europe legal system regulating asylum and
immigration: instruments and case law**

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Instruments

LEGAL FRAMEWORK OF THE COUNCIL OF EUROPE

- **European Convention on Human Rights (ECHR) of 1950**
 - **European Court of Human Rights (ECtHR) case law**
- **European Social Charter revised of 1996**
 - **Art. 19 >>> right of migrant workers and their families to protection and assistance (applicable only to lawfully resident aliens with a regular work)**

The system provided for by the ECHR

- **Few provisions expressly mentioning aliens:**
 - **Art. 5, § 1(f) >>>** allows arrest/detention of a person to prevent an unauthorised entry
 - **Art. 4, Protocol n. 4 >>>** prohibition of collective expulsions of aliens
 - **Art. 1, Protocol n. 7 >>>** procedural safeguards relating to expulsion of aliens (regularly resident)
- **No specific provision on the right to asylum** (≠ the EU Charter of Fundamental Rights >>> art. 18)

The European Convention on Human Rights (ECHR)

Extensive ECtHR case law on asylum and migration, especially regarding

- **Art. 2 ECHR: « Right to life » *F.G.***
- **Art. 3 ECHR: « Prohibition of torture » *Soering; M.S.S. ; Saadi ; Tarakhel***
- **Art. 5 ECHR: « Right to liberty and security » *Khlaifia***
- **Art. 8 ECHR: « Right to respect for private and family life » *Biao; Ramadan***
- **Art. 13 ECHR: « Right to an effective remedy » *Hirsi ; M.S.S. ; Sharifi***
- **Art. 14 ECHR: « Prohibition of discrimination » *Biao***

ECtHR Case law

Soering v. UK, 1989

- **technique of « protection par ricochet »:**
 - Access to the territory for non-nationals is not expressly regulated in the ECHR (States have the right to control the entry, residence and expulsion of non-nationals) but...
 - The case law has underlined some important limitation, regarding i.e. extradition, the principle of *non refoulement*
 - Necessity of **protection from indirect extradition, expulsion or *refoulement***, not only in the country of destination but as well in the third receiving countries
 - The principle of *non refoulement* includes as well some dangerous situations dependent on acts/facts not directly attributable to the country of destination (danger is enough itself)

ECtHR Case law: Soering

Para. 85. **“What is at issue in the present case is whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State”.**

Para. 88 “In the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article”.

Para. 91. “ In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country...”

ECtHR Case law

Saadi v. Italy [GC], 2008 (UK third intervention)

- Mr Saadi is a Tunisian national with charges of international terrorism
- The application concerned the possible deportation of the applicant to Tunisia, where he claimed to have been sentenced in 2005
- Italian Minister of the Interior ordered him to be deported to Tunisia cause he was a possible threat to national security and had an active role in fundamentalist Islamic cells
- The Court, even if not underestimating the danger of terrorism and taking care that States were facing considerable difficulties in protecting their communities from terrorist violence, stated that these consideration should not call into question the absolute nature of Article 3.
- Substantial grounds have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country

ECtHR Case law

M.S.S. v. Belgium and Greece [GC], 2011

GREECE responsibility on 2 aspects:

- **Degrading detention conditions**
- **Degrading living conditions (contrary the EU Reception Conditions Directive)**

“ the Court considers that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity”

ECtHR Case law

MSS v Belgium and Greece, 2011

- **Condemnation of the Belgian government under art 3 ECHR:**
- Belgium consciously applied the Dublin regulation, asking Greece to take charge of the asylum seeker despite this latter would be subject of inhuman and degrading treatment (due to the systemic failure of the Greek asylum system)
- The systemic flaws of the Greek asylum system would lead to the risk of a subsequent expulsion by the government itself (chain of *refoulement*)

ECtHR Case law

Hirsi Jamaa & others v. Italy [GC], 2012

Facts:

- Italian new policy of push backs at the High Sea (2009-2011)
- 200 migrants are intercepted on the high seas by the Italian authority and transferred to Libya in accordance with a bilateral agreement for fight against illegal immigration;
- applicants have been given no information by the Italian military personnel, who had led them to believe that they were being taken to Italy and had not informed them as to their asylum rights and the procedure;
- 11 Somalian and 13 Eritrean nationals presented an application to the ECtHR

ECtHR Case law

Hirsi Jamaa & others v. Italy [GC], 2012

The judgement:

- Question of jurisdiction under Article 1: acts performed outside the Italian territory, but exercise of the jurisdiction >>> agents exercised control and authority over individuals
- Violation of Article 3
 - Risk of suffering ill-treatment in Libya + Risk of suffering ill-treatment in the applicants' country of origin
- Violation of art. 4, Prot. No. 4 >>> second time the Court recognises a violation after Conka v. Belgium: before expulsion, each individual concerned by the measure must be duly examined
- Violation of art. 13 ECHR: applicants unable to lodge their complaints

ECtHR Case law

TARAKHEL c. Switzerland [GC], 2014

Facts:

- Afghan family with 6 children arrives to the shores of Calabria (Italy)
- Identification process through the EURODAC system
- Temporary host
- Transfer to CARA of Bari
- The family fled to Austria, and then to Switzerland, where they applied for international protection
- Austria and Switzerland ask for taking over by Italy, first hosting country
- Italy accepts
- Switzerland issues an expulsion order to Italy
- Applicants demands an interim measure (art. 39 Rules of the Court) complaining for the violation of
 - The prohibition of inhuman or degrading treatment (art. 3);
 - The right to respect for family life (art. 8)

ECtHR Case law

TARAKHEL c. Switzerland, 2014

▪ **Condemnation of the Swiss government under art 3 ECHR:**

Para 88-91

- Even if Switzerland is not a EU Member State, it has to respect the dispositions of Dublin regulation agreed, including the **sovereignty clause** (Art. 3, § 2, Dublin II) that allows the assessment of the asylum application on his territory
- therefore the Court considers that the Swiss decision to send applicants back to Italy is **not** the implementation of an obligation contained in the regulation, **but** it represents the exercise of a **discretionary power**

Para 93-94

- There's a violation of art. 3 because there were serious motivations to believe that the person expelled **would have incurred to a real risk of inhuman or degrading treatments** into the country of destination (Italian system not adequate for the protection of minors and large families)

ECtHR Case law

Sharifi & others v. Italy and Greece, 2014

Facts:

- ✓ 35 applicants (32 Afghans, 2 Sudanese, 1 Eritrean) were pushed back from the Italian government towards Greece (the Court rules only on the application of 4 Afghans applicants with which lawyers have been in contact)
- ✓ Practise of automatic push backs from the Adriatic ports to Greece implemented by the Italian border authorities
- ✓ Greek authorities have subjected some of the applicants, pushed back by Italy, to administrative detention, while others have left "free" to move, without a fixed abode (some of them have been deported to Afghanistan)

ECtHR Case law

Sharifi & others v. Italy and Greece, 2014

- *General principle*: European Union (EU) member states cannot ignore or circumvent their obligations under the ECHR when implementing EU law or bilateral agreements aimed at returning asylum-seekers to another EU country.
- *Greek responsibility* >>> **violation of art. 13 ECHR, in conjunction with art. 3 ECHR** because it did not guarantee to the application the access to the asylum procedures, as well as cause it put them at risk to a *refoulement* in Afghanistan
- *Italian responsibility* >>> **violation of art. 4, Prot. n. 4 ECHR** because of the collective expulsion towards Greece without proceeding with an individual exam on the situation of each application (applications had not the possibility to apply for international protection) + **violation art. 3 ECHR** cause Italian authorities put the applicants at risk of *refoulement* to Afghanistan even if they knew the systemic flaws of the Greek asylum system + **violation art. 13 ECHR**, cause there was no effective remedy

ECtHR Case law

Ramadan v. Malta, 2016

Facts:

- The applicant was born in Egypt but he is (apparently) stateless;
- Acquired Maltese citizenship following his marriage to a Maltese national in 1993, and had to renounce to the Egyptian citizenship;
- Maltese authorities then revoked Mr Ramadan's citizenship in July 2007, concluding that he had obtained Maltese citizenship by fraud (simulated marriage even if they had a child together);
- The applicant is still residing in Malta with his second wife and their two children where he carries out a business activity;
- No expulsion order has been issued.

ECtHR Case law

Ramadan v. Malta, 2016

Judgement:

- Loss of a citizenship already acquired = denial of recognition of citizenship
- Revocation (and denial) of citizenship could be arbitrary and raise an issue under Article 8 >>> impact on a private & family life
- The Court was not convinced of the arbitrariness of the revocation cause:
 - It has a clear legal basis in the Maltese legislation; procedural fairness;
 - There is no risk of an expulsion;
 - Mr Ramadan was continuing his private and family life in Malta, where he had a business and could even apply to a work permit according to that circumstance
- No violation of art. 8 ECHR
- Strong dissenting opinion by Judge Pinto de Albuquerque in favor of a recognition of the existence of an **autonomous Convention right to citizenship!**

ECtHR Case law

Biao v. Denmark [GC], 2016

Facts:

- The applicants are a married couple complaining about the Danish authorities' refusal to grant them family reunion;
- Mr Biao, born in Togo, married a Danish national in 1994, and was granted Danish nationality in 2002;
- After a divorce, in 2002 he married his current wife, born and raised in Ghana;
- Authorities found that the applicants did not comply with the requirement that a couple applying for family reunion must not have stronger ties with another country than with Denmark (known as the "attachment requirement" >>> 28-year rule);
- The couple moved to Sweden in 2003. Mr Biao maintains a job in Copenhagen and commutes every day from Malmö in Sweden.

ECtHR Case law

Biao v. Denmark [GC] 2016

Judgement:

- The applicants are a married couple complaining about the Danish authorities' refusal to grant them family reunion;
- The 28-years rule required very weighty reasons unrelated to ethnic origin to justify a difference in treatment based exclusively on the ground of nationality;
- There was an unjustified different treatment between certain categories of persons (namely, Danish-born expatriates) who could be exonerated from the attachment requirement under the 28-year rule, and individuals with no ethnic ties with Denmark who acquired Danish nationality later in life
- The 28-year rule had had the indirect effect of favoring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on persons who, like Mr Biao, had acquired Danish nationality later in life and who were of an ethnic origin other than Danish.

ECtHR Case law

F.G. v. Sweden [GC], 2016

- Refusal of asylum to an Iranian national converted to Christianity in Sweden
- The case involved important issues concerning the duties to be observed by the parties in asylum proceedings >>> **no denial for formality reason without a thorough assessment on the merit**
- Violation of Articles 2 and 3 ECHR if F.G. were to be returned to Iran without a fresh and up-to-date assessment being made by the Swedish authorities of the consequences of his religious conversion

ECtHR Case law

Khlaifia & others v. Italy, 2015

Facts:

- ✓ Three Tunisians nationals leave Tunisia by sea during the Arab Spring;
- ✓ Their boats are intercepted by the Italian authorities and they are escorted to the island of Lampedusa, where they are transferred to a first reception centre (CSPA);
- ✓ The are subjected to detention without explanation and denied appeal against it
- ✓ Unsustainable hygienic conditions on the centre of Lampedusa and no contact with the external
- ✓ Evasion, arrest and transfer to ships moored in Palermo
- ✓ Subsequent expulsion

ECtHR Case law

Khlaifia & others v. Italy, 2015

- UNANIMOUSLY : violation of art. 5, § 1 EHCR (Right to liberty and security), 5, § 2 (right to be informed of the arrest and the accusation charges of the arrested), 5, § 4 (right to a prompt decision by a court on the lawfulness of detention).
- MAJORITY (5 votes to 2): violation of art. 3 ECHR regarding the detention conditions within the reception centre in the isle of Lampedusa + violation of art. 4, Protocol No. 4 (prohibition of collective expulsions of aliens) and of art. 13 CEDU in conjunction with articles 3 e 4, Prot. No. 4.
- The GC panel of 5 judges decided to refer the case to the Grand Chamber at the request of the Italian government > Hearing was held on 22 June 2016

Workshop simulation

Khlaifia & others v. Italy [GC] *your arguments, your judgement*

- **GROUP 1:** What will you stress and underline if you were the co-agent of the Italian government?
- **GROUP 2:** How would you defend the results of the Chamber judgements if you were supposed to represent the applicant?
- *What type of pronouncement from the Grand Chamber? Towards a partial overruling?*