THE AIRE CENTRE

Advice on Individual Rights in Europe

Development of human rights law in the migration context;

Two steps forward, one step back: The cautious “cha-cha”of the ECtHR in the area of asylum

17 November 2020

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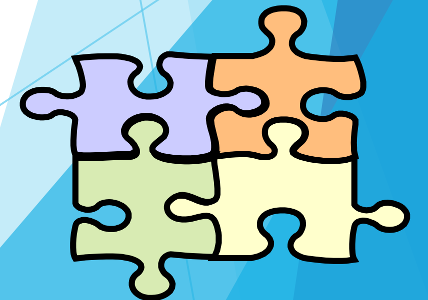
The ECtHR jurisprudence in asylum

- Is VAST even though the ECHR does not include a right dedicated to asylum as the CFR Art. 18

- Most asylum judgments on Art.3,5,8, 13 and Art.4 Prot.4, Rule 39 (interim measures).
- Spotlight on the key judgments on 2020 in asylum
- Key themes: Safe Third Country Concept, Access to Territory, Humanitarian visas, Children
- Assessment: case presentation, context within jurisprudence, challenge ahead



Safe third country: Ilias and Ahmed v. Hungary App no. 47287/15

21 November 2019

Facts:

- The case concerned two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary, where they immediately applied for asylum and were held in a transit zone for 23 days. They were then sent back to Serbia based on a 2015 Government Decree listing Serbia as a "safe third country".
- The applicants complained that their detention conditions at the transit zone violated their rights under Article 3, Article 5 (1) and (4), and Article 13, and that their expulsion to Serbia had exposed them to possible chain-refoulement to Greece.

The Court's Findings:

Article 3 (removal to Serbia)

- Hungary violated Article 3 by failing to conduct an efficient and adequate assessment when applying the safe third country clause for Serbia.
- When examining cases on their admissibility rather than on their merits, Article 3 imposes a duty on the receiving State to apply a thorough and comprehensive legal procedure to assess the existence of such risk by looking into updated sources regarding the situation in the receiving third country.

Article 3 (lawfulness of detention)

- No violation of Article 3; the applicants' significant restriction to their freedom of movement was necessary in relation to their asylum procedures.

Safe third country: Ilias and Ahmed v. Hungary App no. 47287/15

Violation of Article 5(1) and (4)

- The Grand Chamber departed from the Chamber's conclusion that the applicants were deprived of their liberty.
- No violation of Article 5(1) and 5(4) in relation to the Röszke transit zone was found:
  - the applicants' stay involved a short waiting time in order for Hungary to verify their right to enter;
  - they had entered on their own initiative; and
  - they were free to leave the area in the direction of Serbia.
- The Court emphasised that Serbia observes the 1951 Geneva Convention and that there was no direct threat to their lives.

Additional Notes:

- This case further eroded the protection extended to asylum-seekers under the Convention.
- The Court's failure to scrutinize the necessity of immigration detention under Article 5(1)of the ECHR has been criticised.
- Restrictions imposed upon asylum-seekers might not qualify as deprivation of liberty worthy of the protection of Article 5.

Access to territory: N.D. and N.T. v. Spain App no. 28820/13

13 February 2020

Facts:

- This case concerned the immediate return of two men to Morocco after attempting to cross the border of the Melilla enclave. The applicants arrived in Morocco independently of one another after fleeing from their countries of origin.
- A group of around 600 migrants attempted to cross the border fence. N.D. and N.T., who succeeded in doing so, were helped down by the Spanish border guards and immediately handed over to Moroccan authorities. They allege that no identification procedures were carried out in Spanish territory and that they were not given the opportunity to explain their individual circumstances before being removed to Morocco.
- They complained that they were subject to a collective expulsion without an individual assessment of circumstances and legal assistance contrary to Article 4 of Protocol No. 4. They also complain under Article 13 in conjunction with Article 4 Protocol No. 4 that they had no access to an effective remedy with suspensive effect by which to challenge their immediate return. In its Chamber judgment, the Court had previously found violations in relation to both complaints.

The Court's Findings:

Whether the border fence was under Spanish jurisdiction

- The Court held that Convention rights cannot be selectively restricted due to an artificial reduction in the scope of territory.

Article 4 Protocol No. 4

- The Court held that the removal of the applicants amounted to expulsion, however, the applicants' expulsions did not violate Article 4 Protocol No. 4.
- The Court highlighted that an applicant's own conduct is a relevant factor in assessing the protection afforded under Article 4 Protocol No.4.Applicants placed themselves in an unlawful situation by deliberately attempting to enter Spain as part of a large group rather than using available legal procedures.
- The State had not failed to provide genuine and effective means of legal entry.

Article 13

- No violation of Article 13 in conjunction with Article 4 Protocol No. 4.

Access to territory: N.D. and N.T. v. Spain App no. 28820/13

Additional notes:

- This case was important in two respects:

1. It addressed, for the first time, the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border.
2. It established a two-tier test to assess the extent of protection to be afforded under this provision to persons who cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force.

Two tier test:

I. Whether the State *“ma[de] available* ***genuine and effective*** *access to means of legal entry”*.

II. Where the respondent State has provided such access, the Court will consider whether there were cogent reasons for an applicant not made use of it not to do so, based on objective facts for which the respondent State was responsible.

- There will be no violation of Article 4 of Protocol No.4 if the lack of an individual expulsion decision can be attributed to the applicant’s own conduct

Humanitarian visas: M.N. and others v. Belgium App no. 3599/18

5 May 2020

Facts

- The applicants, a family of four, are Syrian nationals from Aleppo, Syria. In 2016, they requested visas on humanitarian grounds from the Belgian Consulate in Beirut, Lebanon. The Belgian Aliens Office rejected their requests and the applicants requested the suspension of execution of the decision by the Council for Alien Law Litigation (CALL).
- CALL ruled that the political and security situation in Aleppo created an Article 3 risk and instructed the authorities to issue new decisions. The Aliens Office again rejected the applicants' requests and the CALL suspended them once more. Subsequent applications for judicial review were dismissed.
- The applicants lodged an application before the European Court of Human Rights alleging a violation of Article 3 and Article 13, on account of Belgium's refusal to issue visas on humanitarian grounds, as well as a violation of Article 6 on the state's failure to execute the judgments.

The Court's Findings:

Issue of Jurisdiction

- The Court reiterated that Article 1 ECHR is limited to persons within the jurisdiction of State Parties to the Convention.
- The Court assessed whether exceptional circumstances existed which could lead to a conclusion that Belgium had exercised extraterritorial jurisdiction in respect of the applicants.
- The Court concluded the applicants were not within Belgium's jurisdiction as regards the circumstances in which they complain under Articles 3 and 13 of the Convention.
- The administrative proceedings were brought at the initiative of private individuals who had no connection to Belgium except for the proceedings they themselves had freely initiated.
- To find the application admissible, would enshrine a near-universal application of the Convention and unlimited forms of positive obligations for States on the basis of individual choices, regardless of the individual's presence.

Humanitarian visas: M.N. and others v. Belgium App no. 3599/18

Article 6

- The Court found that Article 6 was not applicable as the right to entry to territory is not a civil right within the meaning of that Article.
- This finding does not prejudice actions taken by states to ensure and facilitate access to asylum procedures through diplomatic and consular representations.

Additional notes:

- The ECtHR made it clear that individuals who apply for visas at embassies with the intention to seek protection, do not fall within the jurisdiction of the ECHR State Parties in the sense of Article 1 ECHR.
- As a consequence, the protection from *non-refoulement* under Article 3 cannot be triggered.

Children: Moustahi v. France App no. 9347/14

25 June 2020

Facts:

- The applicants, Mr. Moustahi and his two children, are Comorian nationals, now living in Mayotte after successfully applying for family reunification in 2014.
- Mr. Moustahi entered Mayotte in 1993 with a temporary residence permit and his wife, with irregular status, and were issued a removal order to the Comoros in 2011 together with their children.
- In 2013, the children travelled to Mayotte by boat, and were intercepted by the French authorities. They were detained, together with other adults, before their immediate removal. During this time, the children were incorrectly associated with another adult and were included in his removal order.
- The applicant children complain that their detention was contrary to Article 3 ECHR, Article 5(1), and 5(4) ECHR. They also complain that they were subject to a collective expulsion contrary to Article Protocol No. 4. All three applicants complain, inter alia, that the detention and separation of the family throughout the proceedings was contrary to Article 8 ECHR.

The Court's Findings:

Article 3

- By arbitrarily associating the applicant children with an unrelated adult in respect of their return order and by detaining the children in the same location and conditions as other adults, the French authorities had failed to treat the children in a manner compatible with Article 3 ECHR.
- The Court found no violation of Article 3 in relation to the first applicant, their father.

Article 5(1)

- The placement of the children in detention with other unrelated adults was also found to amount to a violation of Article 5(1) ECHR.

Chidren: Moustahi v. France App no. 9347/14

Article 5(4)

- Detention was contrary to Article 5(4) as a result of the children's inability to challenge their removal order.

Article 8 ECHR

- The decision refusing to reunite the children with their father was not in their best interests and amounted to a violation of Article 8 in respect of all three applicants.

Article 4 Protocol No. 4

- The removal of the children amounted to a violation in respect of Article 4 Protocol No.4.
- The requirements of Article 4 of Protocol No. 4 could be met if an adult was in a position to submit, meaningfully and effectively, arguments against the expulsion on behalf of the child.

Article 13

- The Court found violations in relation to the lack of effective remedies in respect of Articles 8 ECHR and Article 4 Protocol No. 4 in conjunction with Article 13.

Additional notes:

- The administrative association of the two children with an unrelated adult had not sought to preserve the children's best interests but rather to ensure their speedy removal to the Comoros.
- The best interests of children should always be the paramount consideration of authorities.

What does the future hold?
Contemporary challenges and pending matters

- **Safe third country and asylum procedures:** J.B. v. Greece 54796/16 communicated on 18 May 2017
  - Return to Turkey in violation of Article 3?
- **Safe third country:** S.B. v. Croatia 18810/19 communicated on 26 March 2020
  - Article 4 Protocol No. 4 at issue
- **Children and Reception Conditions in camps:** Darboe and Camara v. Italy 5797/17 communicated on 14 February 2017
  - Unaccompanied minors in poor reception conditions
- **Children and detention:** Trawalli v Italy 47287/17 communicated on 11 January 2018
  - Detention of unaccompanied minors in violation of Articles 3, 5 and 8
- **Pushbacks and Search and Rescue:**
  - AN v Greece, S.S. v Italy

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Thank you for your attention!
Any questions?

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Development of human rights law in the migration context; The approach in trafficking

17 November 2020

Matthew Evans

Article 4 ECHR

- Article 4: Prohibition of slavery and forced labour
- 1. No one shall be held in slavery or servitude.
- 2. No one shall be required to perform forced or compulsory labour.
- 3. For the purpose of this Article the term ‘forced or compulsory labour’ shall not include:
  - any work required to be done in the ordinary course of detention or conditional release
  - any service of a military character
  - any service exacted in case of an emergency or well-being of the community, or
  - any work or service which forms part of normal civic obligations.

Article 4 ECHR

- Article 4 enshrines "*one of the fundamental values of democratic societies*": *Siliadin v France* §112
- Article 4(2) ECHR makes no provision for exceptions *J v Austria* §103
- The exclusions in Article 4(3) ECHR are not intended to "*limit*" the exercise of the right guarantee by paragraph 2, but to "*delimit*" the very content of that right: *Stummer v Austria* §120. None of them are applicable to human trafficking
- Article 4 ECHR imposes a number of positive obligations
- Includes a Soering-type duty not to send an individual to another state where there are substantial grounds for believing that he or she would face a real risk of being subject to trafficking
- Positive obligations in Article 4 ECHR are informed by ECAT and related instruments

MS (Pakistan) & v SSHD Judgment date. 18 March 2020. Neutral citation number [2020] UKSC 9.

- Case addressed;

1. whether the immigration appeals tribunals are bound to accept the decisions of the NRM as to whether a person is a victim of trafficking; and
2. the relevance of a finding that a person has been trafficked to any immigration decisions that come before the immigration appeals tribunals.

MN & IXU v SSHD C4/2019/1319 & C4/2019/1069

The Court of Appeal is now looking at;

(i) the correct standard of proof to be applied in CG decisions

(ii) the nexus between ‘action’ and ‘purpose’ of the trafficking definition

(iii) the approach to expert evidence, and

(iv) the approach to credibility, in CG decision making.

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Questions?