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EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2022
SELECTED CASE-LAW

Abstract

The European Court of Human Rights (ECHR) presented its annual report for 2022. The 2022 has been a significant year for Europe and for the Council of Europe. As a (former) member State, the Russian Federation invaded the Ukraine. On 16 March 2022, the Committee of Ministers of the Council of Europe has declared Russia no longer a member of the Organisation. As the Russian Federation ceased to be High Contracting Party to the European Convention of Human Rights, the Court remains competent, pursuant to the residual jurisdiction, to deal with application provided to the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention, if they had occurred up to 16 September 2022. During 2022, the Court had ruled on 39,570 applications, 3,550 of which concerned Italy. The report shows the relentless focus of the Court on the respect and enforcement of fundamental rights, particularly immigrants and detainees rights.

Keywords

European Court of Human Rights, European Convention of Human Rights, Refugee Rights, Immigrant Rights, Extradition, Prohibition of Torture.

H.F and Others v. France (Applications nos. 24384/19 and 44234/20)

Prohibition of expulsion of nationals; right to access the State territory; jurisdictional link; refugee treatment.

The judgment concerned the jurisdiction, the scope of the right to enter national territory and procedural obligations in the context of a refusal to repatriate.
In 2014 and 2015, the applicant's daughters, who were French nationals, left France for Syria with their partners, where they gave birth to children. After the fall of the Islamic State (ISIS), they have been detained, since 2019, in camps run by Syrian Democratic Forces (SDF). The applicant unsuccessfully sought urgent repatriation of their daughters and grandchildren from Syria, but the domestic French courts refused to accept jurisdiction on the ground that the requests concerned the conduct by France of its international relations, reserved to the Government. The applicant complained under the Article 3 of the European Human Rights Convention and Article 3 of its Protocol No. 4.

Although the Court held that the applicants' family members were outside of the French jurisdiction as regards the complaint under the Article 3 of the Convention (alleged ill-treatment in the refugee camps), the jurisdiction of France was established in respect of the complaint under Article 3. of Protocol No. 4. The Grand Chamber of the European Court of Human Rights found a breach of Article 3 of Protocol No. 4 (prohibition of expulsion of nationals) by the French Republic. For the first time, the Grand Chamber has ruled on the potential existence of a jurisdictional link between a State and its nationals in respect of Article 3 § 2 of Protocol No. 4, which states «No one shall be deprived of the right to enter the territory of the State of which he is a national». Although the Court clarified that the fact Article 3 § 2 of Protocol No. 4 applies only to nationals, it was not sufficient to establish that the extraterritorial exercise of jurisdiction by a State as well as the refusal to grant applicants' request had not formal deprived the family of the right to enter France. The Court stated that, in some circumstances relating to the situation of individuals who wished to enter their national State, a jurisdictional link with the State might emerge. The Court ruled the special features which may establish France's jurisdiction in respect of the cited Article 3 § 2 of Protocol No. 4: a) repatriation had been sought officially and referred to a real and immediate threat to the lives and health of the applicants' family members, who have to be French citizens; and b) the impossibility for them to leave the refugee camps without assistance of the French authorities. However, in regard to Article 3 of the Convention, the Court found that neither the French nationality of the applicants' family members, nor their repatriation them had the effect of bringing them within the scope of French's jurisdiction with respect to the ill-treatment suffered in Syrian refugees' camp. Neither domestic law nor international law required the State to act on behalf of its nationals and to repatriate them whereas the Convention itself won't guarantee the right to diplomatic or consular protection.

Safi and Others v. Greece (Application no. 5418/15)

Protection of life; right to life; migrants rights; SAR operations.

The judgement concerned the obligation to protect life, under Article 2 of the European Convention on Human Rights. On 20 January 2014, a fishing boat carrying twenty-seven migrants sank in the Aegean Sea, while the Greek Coast Guard tried to tow it. The wreck caused the death of eleven people, including close relatives of the applicants, who complained under the Articles 2, 3 and 13 of the Convention. In turn, the Court found a violation of Article 2 of the Convention on account of ineffective investigations into the fatal accident. The Court also stated that the Greek authorities had failed to comply with the duty under Article 2 to take preventive operational measures to protect the individuals

whose lives were at risk. The absence of an effective investigation took the Court to not take a position on the details of the rescue operation or on the question whether had been an attempt to push applicants back toward Turkish waters, as alleged by the applicants. The judgement, for the first time, concerns the positive application of the obligations set out in *Osman v. United Kingdom* to take preventive measures to protect migrants during sea rescue operations, under Article 2 of the Convention (right to life). According to the Court, the decisions captains and crew members of SAR operations are called to make have to be inspired, essentially, by the efforts to secure the right to life of the persons in danger. Nonetheless, it has been noted that, in those kind of rescue operation, rescuing everyone whose life is at risk at sea is not always successful.

Sanchez-Sanchez v. United Kingdom (Application no. 22854/20)

Extradition; life imprisonment without parole; prohibition of torture and inhuman or degrading treatment and punishment.

The judgment concerned the assessment of life sentences in an extradition context. The applicant, Mr. Sanchez-Sanchez, is a Mexican national, who is being detained in the United Kingdom while facing extradition in the United States where he's wanted on federal charges of drug dealing and trafficking. According to the US Sentencing Guidelines, the above charges may lead to life imprisonment. The applicant appealed unsuccessfully to the Court under Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment and punishment) against the extradition. The Grand Chamber found that the applicant's extradition to the USA would not be in violation of provision of Article 3, having the applicant not adduced evidence showing that he ran into a actual risk of sentence of life imprisonment without parole. The Court clarified that the compliance to the Convention of a life sentence in a third country requesting extradition is not to be assessed by reference to all standards which apply to serving life prisoners in the Contracting States. In *Sanchez-Sanchez v. United Kingdom*, the Court overruled *Trabelsi v. Belgium*, judgment in which were applied the *Vinter and Others v. the United Kingdom* criteria to extradition. Differently from the now overruled *Trabelsi v. Belgium*, the Court emphasised that *Vinter and Others v. United Kingdom*, ruling about life imprisonment without possibility of parole, was not a case of extradition and the applicant has not been convicted yet. Therefore, the application of the latter's standards is undue in *Trabelsi v. Belgium* as well in *Sanchez-Sanchez v. United Kingdom* at issue. The Court distinguished also between two components of the *Vinters and Others* standards: 1) the substantive obligation to ensure that the life sentence does not become a penalty incompatible with Article 3 of the Convention over time; 2) the related procedural

safeguards. While the domestic system is known to the authorities, it may prove difficult for them to decide on extradition requests, being forced to scrutinise the relevant law and practice of a third State in order to assess its degree of compliance with the procedural safeguards from *Vinters and Other*. This indeed would be an over-extensive interpretation of the responsibility of a State Party to the Convention. Moreover, a finding of a violation of Article 3, owing the lack of a Convention-compliant review mechanism in the requesting extradition State, could entail a risk that a person facing a very serious charges would never stand trial, due to the extradition rejection. The Court concluded that the availability of the procedural safeguards granted to serving life-sentences prisoners in the legal system of the requesting State was not a prerequisite for compliance with Article 3 by the sending State Party. The Court developed an adapted its approach for the extradition context, which comprises two stages. As regards the first stage, it must be established whether the applicant has adduced evidence capable of proving that there is substantial ground for believing that, if extradited and convicted, there is a real risk of a sentence of life imprisonment without parole. In this regard, the burden to prove that such penalty would be on the applicant. If the risk is established, the second stage of the inquiry will focus on the substantive guarantees of *Vinter and Others* standards: the authorities of the sending State must establish that, in the requesting State, exists a mechanism of sentence review which allows competent authorities to consider whether any charges in the life prisoner are significant and that such progress towards rehabilitation has been made during the sentence as to mean that continued detention can no longer be justified, granting parole.

McCallum v. Italy (Application no. 20863/21)

Extradition; life imprisonment without parole; diplomatic note.

The decision concerned life sentence in extradition context. The applicant, Ms. McCallum, is an American national, fugitive for several years and wanted by the United States in relation to the murder of her husband. As she was arrested by the Italian authorities, the US authorities requested her extradition. The Italian courts granted the extradition request, rejecting her argument that the extradition would be contrary to Article 3 since, if convicted, she would face life imprisonment without parole, as prescribed under the laws of Michigan State. Under Rule 39 of the Rules of the Court, the Court indicated to the Italian Government the applicant should not be extradited for the duration of the proceeding. Then, the US Embassy in Rome informed the Italian authorities that the Prosecuting Attorney in Michigan had given a commitment to try the applicant on the lesser charge of second-degree murder: the Diplomatic Note clarified

that, if convicted of this charge, the applicable penalty would be imprisonment for life, or any term of years in the court's discretion, and the applicant would be eligible for parole. The Grand Chamber rejected the application as manifestly ill-founded. There was no risk of the applicant receiving an irreducible life sentence in the event of conviction on the charges now pending against her. The decision was taken in accordance with the *Sanchez-Sanchez v. United Kingdom*. Particularly, the Court underlined that the Diplomatic Note sent from the US Embassy to the Italian authorities carried a presumption of good faith and it came from a third State, the US, which had a long-standing extradition arrangement with States Parties to the ECHR. Under Article 26 of the Vienna Convention on the Law of Treaties, the Court observed that if, following the extradition, the original charges against the applicant were to be revived, that would not be compatible with the duty of good faith in performing Treaty obligations. The allegation by the applicant about the role of the Governor of Michigan in the granting of parole was considered by the Court as an issue of procedural safeguard and not as a substantive safeguard. As stated in *Sanchez-Sanchez*, the availability of procedural safeguards for whole-life prisoners in the legal system of the requesting State is not a prerequisite for compliance with the Article 3 of the European Convention of Human Rights by the requested State Party.

Virabyan v. Armenia (Application no. 40094/05)

Prohibition of torture; application of statues of limitation; advisory opinion.

In the case ,the Court found that the applicant, Mr. Virabyan, an Armenian citizen, had been subjected to torture and that the authorities had failed to carry out an effective investigation in violation of Article 3 of the Convention (prohibition of torture). In the context of the supervision of the execution of this judgement by the Committee of the Ministers, new criminal proceedings were issued and charges were brought against the police officers implicated in Mr Virabyan's ill-treatment, under Article 309 § 2 of the Armenian Criminal Code. The domestic trial court found that the defendants had actually committed said offence, but held that they were exempt from criminal responsibility by virtue of the ten years limitation period provided by the Article 75 § 1 (3) of the Armenian Criminal Code, which had expired in 2014. As the decision was upheld by the Court of Appeal, the Armenian Court of Cassation required the European Court of Human Rights to give an advisory opinion, under the Protocol No. 16 of the Convention. Specifically, the Court was asked about the compliance of the non-application of statutes of limitation for criminal responsibility for torture with Article 7 of the Convention, when the domestic law doesn't provide requirement for non-application of statutes of limitation for criminal responsibility. The ECtHR, in this advisory opinion, underlined that the prohibition of

torture had achieved the status of *jus cogens* (see *Al-Adsani v. the United Kingdom*): in cases concerning torture or ill-treatment inflicted by State agents, criminal proceeding should not be discontinued on account of a limitation period and the manner in which the limitation period is applied has to be compatible with the requirements of the Convention. The Court reaffirms its usual approach whereby it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 at the expense of the guarantees of Article 7, one of which is that the criminal law must not be construed extensively to an accused's detriment. The Court deduced, from the relevant case-law, that where criminal responsibility had been revived after the expiry of a limitation period, it would be deemed incompatible with the overarching principles of legality and foreseeability enshrined in Article 7. Conclusively, "where a criminal offence under domestic law was subject to a statute of limitations and became time-barred so as to exclude criminal responsibility, Article / would preclude the revival of prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting 'the retrospective application of the criminal law to accused's disadvantage'".

Darboe and Camara v. Italy (Application no. 5797/17)

Immigrants' rights; right to respect for private and family life, home and correspondence; age assessing procedure.

The judgement concerned the applicability of Article 8 (Right to respect for one's private and family life, home and correspondence) in connection with age-assessment procedures for migrants requesting international protection. The applicant, a migrant requesting international protection and claiming to be a minor, claimed that he was a minor and orally expressed his intention to apply for international protection shortly after his arrival on the coast of Sicily, in Italy. The local authorities provided him with a healthcare card, indicating 17 years old as age, according with his declaration. After an initial placement in a centre for unaccompanied children, the applicant was transferred to a reception centre for adults and, after a month, an X-ray examination of his wrist was carried out, after which he was considered to be an adult. Following the request by the applicant, the Court granted, as provisional measure under the Rule 39 of the Rules of the Court, that he was transferred again to an unaccompanied minor facility. The Court found a violation of Article 8 on account of the authorities' failure to act with the due diligence to protect the applicant as an unaccompanied minor requesting international protection. Secondly, the Court found a violation of Article 13, in conjunction with Articles 3 and 8, since the applicant had not been afforded an effective remedy under Italian law by which to lodge

his complaints. The Court also found that the Italian authorities failed to promptly appoint a legal guardian or representative for the applicant prevented him from duly and effectively submitting an asylum request. Regarding the application of Article 8, the Court considered that the age of a person is a mean of personal identification and that the procedure to assess it when an individual is alleging to be a minor is essential in order to guarantee the person's right deriving from the minority status. Although the alleged minor status, the applicant was placed in an overcrowded reception centre for adults for more than four months: the authorities failed to apply the presumption of minority, which the Court deemed to be an inherent element of protection of the right to respect private life of a foreign unaccompanied individual claiming to be a minor. After the medical test, there was no judicial decision or administrative measure concluding that the applicant was an adult was issued, which made impossible for the applicant himself to lodge an appeal.

For a deeper analysis, see: Annual Report of the European Court of Human Rights for 2022.

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