Macedonian Young Lawyers Association

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Case Summaries

Regarding Articles 3, 6, 8 & 13 of the European Convention on Human Rights

July, 2016

Contents

Terminology

Unless stated otherwise:

- "the Convention" refers to the Convention for the Protection of Human Rights and Fundamental Freedoms
- "the Commission" refers to the European Commission of Human Rights
- "the Court" refers to the European Court of Human Rights

Author of this paper is Michael Stojanovski, MYLA's legal intern during July, 2016.

ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

NO ONE SHALL BE SUBJECTED TO TORTURE OR TO INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

WHERE DOES IT COME FROM?

- All legal systems permitted torture for centuries.
- The 1689 British Bill of Rights banned "cruel and unusual punishment".
- After WW2, the ban on torture was recognised as a fundamental international value.
- The 1944 Geneva Conventions and 1948 Universal Declaration banned torture altogether.

WHAT DOES IT MEAN IN PLAIN ENGLISH?

- Nobody can torture, never. Not even Jack Bauer.
- Less severe ill-treatment is also banned if it's inhuman or degrading.
- We can't be treated in ways that violate our dignity and cause severe physical or mental suffering.
- Governments must ensure torture and ill-treatment never take place and carry out effective investigations if they do.

THREE KEY THINGS THAT IT DOES FOR US

Landmark court cases:

1998 **States must make beating up children illegal** – A. v UK, Europe
A stepfather beat his stepson with a cane. He said it was "reasonable chastisement". This was inhuman and degrading treatment.

2001 **Disabled people must be protected from ill-treatment** – Price v UK, Europe
The police held a disabled woman. She had to sleep in her wheelchair and couldn't go to the toilet. This was degrading treatment.

2015 **Rape allegations must be taken seriously** – Police v DSD, UK
Women told the police they had been raped. The police didn't investigate and he raped and assaulted 100 women. The police's failure breached Article 3.

WHY IS IT NEEDED NOW?

TORTURE GOES ON, EVEN IN EUROPE

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EUROPEAN CONVENTION OF HUMAN RIGHTS MEMBER STATES

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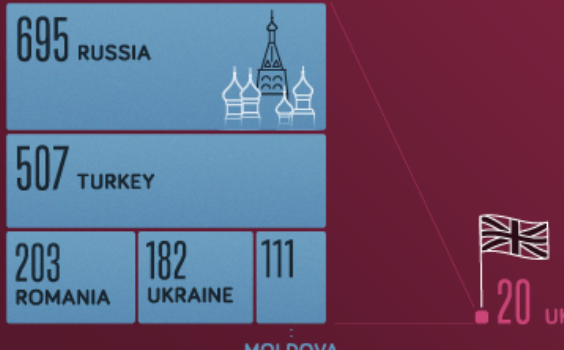
MEMBER STATES THAT VIOLATED THE TORTURE CLAUSE OF ARTICLE 3, 1959-2014

Countries that have violated Article 3 the most, 1959-2014



THE MAJORITY OF COUNTRIES USE TORTURE

www.rightsinfo.org

Article 3

Tyrer v The United Kingdom (no. 5856/72) (1978)

Degrading Punishment

Facts:

- UK citizen Anthony Tyrer, aged 15, was sentenced to corporal punishment ('three strokes of the birch') for unlawful assault by a local juvenile court in the Isle of Man
    - Corporal punishment had been abolished in most of the UK in 1948, but remained in force on the Isle of Man
- Tyrer appealed the sentence to the High Court of Justice of the Isle of Man
    - Appeal rejected and the punishment was carried out
        - Tyrer birched across bare buttocks
- Tyrer lodged an application with the Commission on September 1972
    - Argued that his punishment violated (among others) Article 3 of the Convention
- The Commission found that the punishment inflicted on the applicant was degrading, breaching Article 3
    - The Commission then brought the case before the Court

Issues:

- Was the punishment inflicted on in breach of Article 3 of the Convention?
    - Did it constitute torture?
    - Did it constitute inhuman punishment?
    - Did it constitute degrading punishment?

Legal Reasoning:

- The Court did not consider that enough suffering was inflicted to constitute "torture" or "inhuman" punishment [29]
    - However, the Court did find that the punishment was "degrading" [35]
- In order for a punishment to be "degrading" and in breach of Article 3, the humiliation or debasement involved must:
    - attain a particular level; and
    - in any event be different to the usual element of humiliation that judicial punishment generally entails [30]
- A punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control [31]
    - it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be [31]
- The Convention is a living instrument, must be interpreted in light of present-day conditions [31]
    - the Court is influenced by developments and commonly accepted standards in the penal policy of member states of the Council of Europe [31]
- Publicity may be a relevant factor in assessing whether a punishment is degrading, but the fact that a punishment is carried out in private does not mean it is not "degrading" [32]

    - May be enough that the victim is humiliated in his own eyes [32]
- Birching Tyrer across his bare buttocks constituted an assault on his dignity and physical integrity – 'he was treated as an object in the power of authorities' [33]
- In addition to physical pain, Tyrer was subjected to 'the mental anguish' of anticipating the violent punishment for several weeks between the initial verdict and the carrying out of the punishment [33]
- Not relevant that Tyrer had committed a violent crime [34]
- The fact that one penalty may be preferable to another penalty does not mean that the first penalty is not "degrading" within the meaning of Article 3 [34]

Ratio:

- Judicial corporal punishment of this kind (birching across the bare buttocks) is "degrading punishment" within the meaning of Article 3.

Ireland v The United Kingdom (no. 5310/71) (1978)

Torture

Facts:

- In context of persistent violence against state targets by the IRA in Northern Ireland, the UK government passed emergency laws allowing for internment without trial of people suspected of involvement with the IRA
    - The arrested persons were usually interrogated by police to gather information about the IRA
- At least 14 individuals were subjected to "interrogation in depth", using five particular techniques (the "five techniques") [96]:
    - (i) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
    - (ii) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
    - (iii) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
    - (iv) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
    - (v) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

Issues:

- Did the 5 techniques amount to a violation of Article 3?
    - Inhuman?
    - Degrading?
    - Torture?

- Did a national emergency allow the UK government to derogate from Article 3?

Relevant Rules:

- Article 1, Resolution 3452 (XXX) of the General Assembly of the United Nations (9 December 1975) ("GA Resolution 3452 (XXX)")
    - 'Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'.

Legal Reasoning:

Inhuman or degrading treatment

- The "five techniques" were applied in combination, with premeditation and for hours at a stretch [167]
    - This amounted to "inhuman treatment":
        - caused intense physical and mental suffering;
        - led to acute psychiatric disturbances during interrogation. [167]
    - Also amounted to "degrading treatment":
        - aroused in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. [167]

Torture

- However, the Court did not consider that the combined use of the "five techniques" amounted to "torture" for the purposes of Article 3.
    - Article 3 of the Convention clearly distinguished between "torture" and "inhuman or degrading treatment"
        - The Court cites GA Resolution 3452 (XXX) to define "torture" as 'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.'
    - 'Although the five techniques, as applied in combination… amounted to inhuman and degrading treatment… they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.'
- Therefore, the Court found that the combined use of the "five techniques" amounted to a breach of Article 3, but not of a sufficient severity to amount to "torture".

Derogation for national emergency

- The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct
- No provisions are made for exceptions and, under Article 15 para. 2, there can be no derogation from Article 3 in the event of a public emergency threatening the life of the nation.

Ratio:

- Treatment causing intense physical and mental suffering is <u>inhuman</u>
- Treatment causing feelings of fear, anguish and inferiority capable of humiliating and debasing a person is <u>degrading</u>
- Inhuman or degrading treatment must be of a particular intensity and cruelty to qualify as <u>torture</u>

- Cannot derogate from Article 3, even in the case of a national emergency

Soering v The United Kingdom (no. 14038/88) (1989)

Extradition

Facts:

- Soering, a German national, was wanted for murder in Virginia, US.
    - 18 at the time, allegedly had an impaired mental state
- He had already been imprisoned in the UK for cheque fraud
- The US sought extradition of Seoring
- If convicted of murder in Virginia, Seoring could face the death penalty
- Seoring alleged that extradition to a State where he could face the death penalty amounted to a breach of Article 3

Issue:

- Does Article 3 impose liability on a Contracting State for acts which occur outside its jurisdiction?
    - Is there an exception for cases of extradition?
- Does the imposition of the death penalty constitute a breach of Article 3?

Legal Reasoning:

Liability for acts outside jurisdiction

- It would be a breach of Article 3 for a Contracting State to knowingly surrender a fugitive to another State where there are substantial grounds for believing that he would be in danger of torture or inhuman or degrading treatment [88]
    - "Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article" [88]
- The extraditing State can attract liability for breaches of Article 3 where it has taken action which, as a direct consequence, exposes an individual to proscribed ill-treatment [91]
- Article 3 makes no provision for exceptions and no derogation from it is permissible, even where an individual has committed a heinous crime. [88]

Death Penalty

- The death penalty itself is not prohibited by Article 3
    - Article 2-1 makes provision for the death penalty
- However, the circumstances surround the imposition of the death penalty can amount to inhuman or degrading treatment
    - In this case, relevant surrounding circumstances include:
        - An average time spent on death row in Virginia of 6-8 years [107]
            - "the condemned prisoner has to endure for many years the [severe and stringent] conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death" [106]

        - The youth and mental state of Soering at the time of the crime [109]
            - Put into question the appropriateness of the death penalty, potentially rendering it incompatible with Article 3
        - The legitimate purpose of the extradition (criminal punishment) can be achieved through methods which entail less intense suffering [111]
            - Since Soering was a German citizen, could be extradited to Germany for trial instead [110]
    - Therefore, the extradition of Soering to the US would give rise to a breach of Article 3 [111]

Ratio:

- Where the actions of a Contracting State directly lead to breaches of Article 3 in another jurisdiction, the Contracting State can still be liable under the Convention
    - There is no exception for extradition, no matter how heinous the alleged crime
- While the death penalty on its own does not breach Article 3, the surrounding circumstances (i.e. prolonged mental anguish, personal circumstances, availability of other options) can bring the death penalty within the scope of Article 3.

Aksoy v Turkey (no. 21987/93) (1996)

Torture

Facts:

- The applicant, Zeki Aksoy, was a resident of South-eastern Turkey
- In 1992, Aksoy was arrested and detained for at least 14 days on suspicion of involvement with the Kurdistan Workers' Party (PKK)
    - Held without charge, without access to legal representative
- While in custody, Aksoy was subjected to "Palestinian hanging" – stripped naked, hands tied behind his back, and strung up by his arms
    - As a result, Aksoy was left paralysed in both arms
        - no evidence that he had suffered any disability prior to his arrest,
- Aksoy also alleged to have been beaten and electrocuted, although this could be neither proved nor disproved
- Turkish prosecutor was aware of the Aksoy's injuries but took no action
- After receiving threats to his life (allegedly in relation to his complaint to the Commission), Aksoy was shot and killed in 1994

Issues:

- Did Aksoy's treatment amount to torture for the purposes of Article 3?

Relevant Rules:

- Article 1, *United Nations Convention against Torture 1987*
    - 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining… information or a confession, punishing... intimidating or coercing… or for any reason based on discrimination of any kind, when such pain or suffering is inflicted

by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. …"

Legal Reasoning

- 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention' [61]
- 'Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.' [62]
    - 'Article 3… makes no provision for exceptions and no derogation from it is permissible… even in the event of a public emergency threatening the life of the nation' [62]
        - N.B. Cannot use Article 15 to derogate from Article 3
- The Court found that the treatment of Aksoy ("Palestinian hanging") 'was of such a serious and cruel nature that it can only be described as torture' [64]
    - The treatment was deliberately inflicted
    - Administered by public officials with the aim of obtaining a confession or information
    - Caused 'severe pain', leading to the paralysis of both arms

Ratio:

- Severe pain or suffering intentionally inflicted by public officials for the purpose of extracting a confession/information constitutes 'torture' for the purposes of Article 3

Chahal v The United Kingdom (no. 22414/93) (1996)

Expulsion

Facts:

- Chahal, an Indian citizen, had resided in the UK since 1971
- In 1984 Chahal visited India, where he became involved in the Sikh separatist movement
- On 30 March 1984 he was arrested by the Punjab police
    - He was taken into detention and held for twenty-one days, claimed that he was:
        - kept handcuffed in insanitary conditions;
        - beaten to unconsciousness;
        - electrocuted on various parts of his body; and
        - subjected to a mock execution.
    - Subsequently released without charge and returned to the UK
- Upon return to the UK, Chahal remained active in the Sikh separatist movement
    - In 1985 was arrested on suspicion of plotting to assassinate the Indian prime minister, but was released without charge
    - In 1986 was arrested on suspicion of plotting to assassinate moderate Sikhs in the UK, but again released without charge
    - In 1987 he was sentenced to prison for assault and affray on two separate occasions
        - Was later acquitted due to having been handcuffed in court, which was found to be prejudicial

- In 1990, the Home Secretary decided to deport Chahal on the basis that his presence in the UK was unconducive to the public good, for reasons of national security and the fight against terrorism
- Chahal argued that if deported to India, he would face torture and persecution, citing:
    - Treatment in 1984
    - The detention and torture of family members in India in 1989
- which would be a breach of Article 3

Issues:

- Does deporting somebody to a place where they may face ill-treatment constitute a violation of Article 3?
- Is there an implied limitation on Article 3, allowing expulsion on national security grounds, even where the person faces a real risk of ill-treatment in the receiving State?

Legal Reasoning:

Risk of ill-treatment

- Expulsion by a State may breach Article 3, "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country." [74]
    - Well established in case-law of the Court
- The court is not persuaded merely by assurances that the receiving State will abide by Article 3 [105]
    - Must look to material situation
    - In this case, evidence suggested that there was a real risk that Chahal would face ill-treatment if expelled to India:
        - Endemic practice of "torture" by Punjab police [104]
        - Multiple complaints about Punjab police to the UK High Commission in India [102]
        - Amnesty International report on the continued "disappearances" of Sikh activists at the hands of Punjab police [102]
        - Well document involvement of Punjab police in killings and abductions outside their State [103, 107]
        - No evidence of fundamental reform or reorganisation of the Punjab police [103]
        - Chahal's high profile as a Sikh activist increased the risk of ill-treatment at the hands of the authorities [106]

National security exception

- There is **no exception or limitation** on Article 3 [80]
    - State's cannot derogate from Article 3, even in the case of a public emergency threatening the life of a nation (*Ireland v UK* (1978))
    - "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases." [80]

- Where it is shown that an individual would face a real risk of ill-treatment contrary to Article 3 if removed to another State, the Contracting State has a responsibility to safeguard him or her against such treatment in the event of expulsion [80]
- "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" [80]

Ratio:

- Look at what actually happens in practice in the receiving State, rather than what the receiving State says will happen.
- Expelling a person to a State where there is a real risk of ill-treatment is a breach of Article 3.
- There is no implied limitation or exception to Article 3 for the expulsion of a person deemed a threat to national security.

Selmouni v France (no. 25803/94) (1999)

Inhuman or degrading punishment; Torture

Facts:

- Ahmed Selmouni a dual Moroccan/Dutch national, arrested in France on charges of heroin trafficking
- Selmouni alleged that while in custody, he was repeatedly physically assaulted and raped
    - Doctors confirmed the physical injuries (cuts, bruises etc) but could not verify the rape (too long had passed between the incident and the examination)
- The Commission found that Selmouni's treatment violated Article 3 of the Convention
    - The Commission then declared the application admissible to the Court

Issues:

- Could an Article 3 complaint be examined by the court?
    - Had Selmouni exhausted all domestic remedies for the purpose of Article 35?
- Did Selmouni's treatment amount to a breach of Article 3?
    - Inhuman or degrading treatment?
    - Torture?

Relevant Rules:

- Article 1, *United Nations Convention against Torture 1987*
    - 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining… information or a confession, punishing... intimidating or coercing… or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. …"

Legal Reasoning:

Exhaustion of Domestic Remedies for violation of Article 3

- Rule regarding exhaustion of domestic remedies is not absolute [77]

    - Essential to have regard to individual circumstances [77]
    - The existence of a domestic remedy is not enough on its own – the remedy must be "effective" [79]
        - For Article 3 claims, this entails a thorough and effective investigation by the State, capable of leading to the identification and punishment of those responsible [79]
    - In this case, the officers did not appear before a court until 7 years after the incident [78]
        - French Government failed to show that this was "effective" or "adequate" [81]
- Court found that the remedy available (criminal proceedings + application to join as a civil party) was not sufficient to afford redress for a breach of Article 3 [81]
    - N.B: This is not a general rule, but specific to the circumstances of this case [81]
- Therefore, "effective" domestic remedies exhausted, Court could examine the case

Breach of Article 3

- 'Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment… Article 3 makes no provision for exceptions and no derogation from it is permissible… even in the event of a public emergency threatening the life of the nation.' [95]
- Where an individual is taken into police custody in good health but is found to be injured at the time of release the State has an obligation to provide a plausible explanation of how the injuries were caused [87]
    - This obligation remains, regardless of whether the police officers involved are acquitted or convicted [87]
    - The French Government failed to provide a plausible explanation of how the injuries were caused [88]
- The doctors' reports, combined with a lack of credible alternative explanation, were enough to establish that Selmouni has been physically assaulted
    - However, the allegation of rape could be neither proved nor disproved

Gravity of Breach

- The court finds that Selmouni's treatment was degrading or inhuman [99]
    - The treatment aroused 'feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance' [99]
    - In any case, in respect of a detained person, the use of physical force which is not made strictly necessary by the detainee's own conduct diminishes human dignity, breaching Article 3 [99]
- The Convention is a 'living instrument which must be interpreted in light of present-day conditions' (from *Tyrer*)
    - Acts which were not considered severe enough to qualify as 'torture' in the past may be classified differently in the future (contrast to *Ireland v UK*)
- *Prima facie*, Selmouni's treatment meets most of the criteria for 'torture' provided by Article 1 of the *UN Convention Against Torture* (outlined above), given that:

- the various medical reports establish the existence of physical (and most likely mental) pain or suffering;
- the course of events show that the pain or suffering was inflicted on Selmouni intentionally for the purpose of making him provide information or confess; and
- the pain or suffering was inflicted by police officers in the course of their duties. [98]

- The court finds that this pain or suffering was in fact 'severe' enough to establish torture for the purposes of Article 3
  - Clearly established that Selmouni endured 'repeated and sustained assaults over a number of days of questioning' [104]
    - This treatment was violent, heinous and humiliating [103]
  - 'Under these circumstances, the Court is satisfied that the physical and mental violence… caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.'

Ratio:

- For Article 3 claims, if the domestic remedies available are not *effective,* they may be considered exhausted
- Severe pain or suffering intentionally inflicted by public officials for the purpose of extracting a confession/information constitutes 'torture' for the purposes of Article 3
  - Conduct which may not have been considered torture in the past can be considered torture in light of present day conditions

Hilal v The United Kingdom (no. 45276/99) (2001)

Expulsion

Facts:

- Applicant was Said Mohammad Hilal, a Tanzanian national from Zanzibar, a semi-autonomous republic within Tanzania
- In 1992 Hilal joined the Civic United Front (CUF), an opposition party in Zanzibar
- In 1994 he was arrested and detained for three months by ruling party officers due to his involvement with the CUF
- While in detention he was tortured
  - Repeatedly locked in a cell full of water, so unable to lie down, for days at a time
  - Hung upside down until he bled through his nose
  - Subjected to electric shocks
- Brother had also been detained and ill-treated, subsequently dying in hospital
- Amnesty International, US State Department and the British High Commission in Dar es Salaam have all issued reports confirming human rights violations in Zanzibar
- Arrived in UK in 1995 and claimed asylum
  - After Hilal applied for asylum, his parents and wife were harassed by police, demanding that they explain why Hilal had 'embarrassed' the government

- The Secretary of State denied his request for asylum, on basis that his account lacked substantiating evidence and credibility
    - At initial interview, purpose of which was to take down initial details of claim, Hilal merely stated that he was "threatened a lot by the ruling party" [13]
        - Didn't give specifics of ill treatment until later interview
        - Didn't initially provide documentary evidence of his ill-treatment
- An appeal to a special adjudicator was dismissed in 1996
- After the dismissal of his appeal, Hilal obtained his brother's death certificate, the police summons sent to his parents and his own medical report recording the severe nasal bleeding he suffered from being hung upside down.
    - Requested that they be referred to the special adjudicator, as provided by Section 21 of the *Immigration Act 1971*.
- Secretary of State refused to refer the documents to the special adjudicator
    - Doubted their authenticity
        - Even if they were authentic, considered them irrelevant
    - Made no findings as to whether the documents showed that Hilal faced a risk of ill-treatment
        - Rather, claimed that regardless of what the documents showed, Hilal could return to mainland Tanzania safely, as long as he avoided Zanzibar (the 'internal flight' option).
            - The human right's situation is considered to be more secure on the Tanzanian mainland
- Hilal unsuccessfully sought leave to apply for judicial appeal
- Notified that he would be removed to Zanzibar

Issues:

- Would Hilal's deportation to Zanzibar breach Article 3?
    - Was their sufficient evidence to show that he was at real risk of ill-treatment?
    - Could Hilal be returned to the Tanzanian mainland (the 'internal flight' option)?

Legal Reasoning:

Sufficient Evidence

- The initial application for asylum was refused for lack of substantiating evidence
    - Hilal subsequently obtained documentary evidence
    - Secretary of State failed to reach any findings of fact regarding the documents, but rather, dismissed them on the basis that 'internal flight' was an option – a different basis entirely [62]
- Court finds no basis to doubt the authenticity of the documents provided by Hilal
    - Government has not provided any evidence to substantiate their doubts [63]
- Failure by Hilal to give specific details at the initial interview is less significant given the documentary evidence he later submitted [64]
- Evidence shows that in general, ordinary CUF members have suffered "serious harassment, arbitrary detention, torture and ill-treatment by the authorities" in Zanzibar [66]

- Therefore, Court concluded that Hilal would be at risk of detention and ill-treatment if returned to Zanzibar

Internal flight option

- While the human rights situation is better on the Tanzanian mainland than on Zanzibar, there is still a 'long-term, endemic situation of human rights problems' [67]
    - Police beatings of detainees
    - Inhuman conditions of detention
    - Members of the Zanzibari ruling party travelling to the mainland to harass CUF members there
- Police in mainland Tanzania are institutionally linked to the Zanzibari police, cannot be relied upon as a safeguard against ill-treatment [67]
- Possible for Zanzibar to demand extradition from mainland Tanzania [67]
- Therefore, court not persuaded that 'internal flight' offers a reliable guarantee against the risk of ill-treatment [68]
    - Deportation to Tanzania, even to the mainland, would breach Article 3.

Ratio:

- The State cannot, on one hand, dismiss an application for lack of evidence, but then once evidence is supplied, dismiss it as irrelevant on a different basis
    - Have to look at the merits of the evidence
- 'Internal flight' not an option where the risk of ill-treatment will follow the applicant

Kalashnikov v Russia (no. 47095/99) (2002)

<u>Conditions of detention</u>

Facts:

- Kalashnikov arrested on charges of embezzlement from the bank he was president of
- Held in pre-trial detention from February 1995 until August 1999 and again from December 1999 until June 2000.
    - Held in a cell measuring somewhere between 17m^2 and 20.8m^2
    - Cell contained 8 beds, but held between 18-24 inmates at any given time
        - Amounts to between 0.9-1.9m^2 per inmate - in contrast to the recommendation of 7m^2 by the European Committee for the Prevention of Torture (CPT)
    - Inmates (including Kalashnikov) suffered significant sleep deprivation due to:
        - Having to sleep in shifts;
        - Constant lighting and noise
    - Cell unventilated, very hot in summer/cold in winter
    - Inadequate sanitation:
        - 1 toilet between up to 24 inmates, which offered no privacy
        - Limited opportunities to wash
        - Infestation by cockroaches and other vermin
        - Inmates with syphilis and tuberculosis in same cell as other inmates

- Kalashnikov developed multiple infections/illnesses over period of detention
    - Was given treatment, but the conditions leading to the infections were not addressed

Issues:

- Did the conditions of Kalashnikov's detention amount to inhuman or degrading treatment?
- Does the treatment need to be *deliberately* inhuman or degrading to amount to a breach of Article 3?

Legal Reasoning:

Inhuman or degrading treatment

- Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour [95]
- Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [95]
    - depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim [95]
- In previous cases, the court has considered treatment as:
    - 'inhuman' where:
        - it was premeditated;
        - was applied for hours at a stretch; and
        - caused either actual bodily injury or intense physical and mental suffering
    - 'degrading' where:
        - the object was to humiliate and debase the person concerned; and
        - the treatment adversely affected his or her personality in a manner incompatible with Article 3. [95]
- In this case, Kalashnikov's conditions of detention, in particular the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment. [102]

Intention

- In this case, there was no indication of a deliberate intention to humiliate or debase Kalashnikov
    - While intention is a relevant consideration, the fact that it was not the State's intention to humiliate or debase does not rule out a violation of Article 3. [101]
- The State has a duty to ensure that:
    - a person is detained in conditions which are compatible with respect for his human dignity; and
    - he is not subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention [95]
- Therefore, regardless of the State's intention, the degrading treatment of Kalashnikov amounted to a violation of Article 3. [103]

Ratio:

- Conditions of detention which are of such a poor standard (i.e overcrowded, unsanitary) as to cause humiliation and debasement beyond what would normally be expected of detention, amounts to degrading treatment for the purposes of Article 3.
- The fact that degradation was not the purpose of the detention does not rule out a violation of Article 3.

M.S.S v Belgium and Greece (no. 30696/09) (2011)

Conditions of detention; living conditions; expulsion

Facts:

- M.S.S, an Afghan asylum seeker, entered the EU through Greece before ending up in Belgium in 2009
- M.S.S claimed asylum in Belgium, however as he had entered the EU through Greece, the Belgian authorities requested that Greece take charge of his claim
- Whilst the request was pending, the UNHCR wrote to the Belgian Immigration Minister about deficiencies in Greek procedures and conditions of detention
    - recommended the suspension of all transfers to Greece
- Despite the UNHCR recommendation, the Belgian authorities claimed to have no reason to suspect that Greece would not honour its obligations, to M.S.S
- M.S.S. was subsequently transferred to Greece
- M.S.S was detained on two occasions in Greece
    - From 15-18 June 2009, and again from 1-7 August 2009
- While in detention, M.S.S:
    - was locked in a small room with twenty other people;
    - had access to the toilets only at the discretion of the guards;
    - had not been allowed out into the open air;
    - had been given very little to eat;
    - had had to sleep on a dirty mattress or on the bare floor; and
    - had been beaten by the guards.
- Following his release from detention (both times), M.S.S lived on the streets with no means of subsistence
    - unable to access basic food, hygiene, or shelter
    - constantly in fear of attack or robbery
    - no prospects of his situation improving
- M.S.S alleged that both Greece and Belgium had breached Article 3

Issues:

- Did the conditions of M.S.S' detention in Greece amount to inhuman or degrading treatment
    - If so, did the short period of detention preclude a breach of Article 3 by Greece?
- Did the state of extreme poverty in which M.S.S lived in Greece amount to inhuman or degrading treatment within the meaning of Article 3?

- Did Belgium breach Article 3 by exposing M.S.S to the risks arising from the deficiencies in the asylum procedure in Greece?

Legal Reasoning:

Detention in Greece

- The confinement of aliens is acceptable only where:
    - it is for the purpose of preventing unlawful immigration; and
    - it complies with the State's international obligations, in particular under the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. [216]
- The response of States to the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions [216]
- In cases of detention, Article 3 of the Convention requires the State to ensure that:
    - detention conditions are compatible with respect for human dignity;
    - detainees are not subject to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; and
    - the detainee's health and well-being are adequately secured, given the practical demands of imprisonment [221]
- While it is true Greece is experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers, this does not alter their Article 3 obligations, which are absolute [223]
- The Court has previously ruled that similar conditions in Greek detention centres are unacceptable [222], [231]
    - These unacceptable conditions, taken together with the feelings of arbitrariness, inferiority and anxiety often associated with detention, as well as the "profound effect such conditions of detention indubitably have on a person's dignity", constitute degrading treatment contrary to Article 3 of the Convention [233]
        - Distress was accentuated by vulnerability inherent in being an asylum-seeker [233]
- The Court does not regard the duration of detention – four days in June 2009 and a week in August 2009 – as being insignificant [232]
    - Being an asylum-seeker, M.S.S was particularly vulnerable due to previous traumatic experiences
- Therefore, the relatively short period of detention did not preclude a breach of Article 3

Living conditions in Greece

- Article 3 does not oblige Contracting States to provide everyone within their jurisdiction with a home [249]
- Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living [249]
    - However, the Court has previously said that "State responsibility [under Article 3] could arise for 'treatment' where an applicant, in circumstances wholly dependent

on State support… [was] faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity"[1] [253]

- In this case, M.S.S' situation is linked to his status as an asylum-seeker and to the fact that his asylum application has not yet been examined by the Greek authorities [262]
- Had they examined the his asylum request promptly, the Greek authorities could have substantially alleviated his suffering [262]

- The Greek authorities failed to have due regard to the applicant's vulnerability as an asylum seeker [263]
  - "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." [263]
  - M.S.S was subject to "humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation." [263]
- The Court considered that M.S.S' living conditions attained the level of severity required to fall within the scope of Article 3 of the Convention, due to:
  - the extreme poverty he was left in;
  - the prolonged uncertainty which he endured; and
  - the total lack of any prospects of his situation improving. [263]
- Therefore, through the fault of the Greek authorities, M.S.S found himself in an inhuman and degrading situation incompatible with Article 3

Belgium's expulsion of M.S.S to Greece

- It is well established that the "expulsion of an asylum-seeker by a Contracting State 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 faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country"[2] [365]
- Since 2006, multiple reports had been made about the degrading conditions of detention for asylum-seekers in Greece, including by the Council of Europe Commissioner for Human Rights, the UNHCR, Amnesty International and Human Rights Watch [160]
  - The reports all outlined the degrading conditions of detention in Greece, including:
    - overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care, racist insults proffered by staff and the use of physical violence by guards. [162]
  - These facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources [366]

[1] *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009

[2] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161; *Chahal v. the United Kingdom*, 15 November 1996, Reports 1996-V

- In addition, the UNHCR had sent a letter to the Belgian Minister for Migration and Asylum Policy, criticising the deficiencies in the asylum procedure and the conditions of reception of asylum-seekers in Greece and recommending the suspension of transfers to Greece [194]
- Therefore, the Belgian authorities knowingly exposed M.S.S to degrading detention and living conditions by deporting him to Greece, breaching Article 3

Ratio:

- Even short periods of degrading detention can amount to a breach of Article 3, particularly where the detainee is an asylum-seeker, and therefore especially vulnerable
- While States do not have an obligation to guarantee a certain standard of living, where State action/inaction is directly responsible for a person's degrading living conditions, there may be a breach of Article 3
- The deportation of asylum seekers to a place where they are exposed to degrading treatment will breach Article 3

El-Masri v The Former Yugoslav Republic of Macedonia (no. 39630/09) (2012)

Torture; Acts by foreign agents

Facts:

- In 2003, El-Masri, a German national, was apprehended by Macedonian authorities at the Tabanovce border crossing with Serbia after suspicions were raised about the validity of his passport
- Held incommunicado in a Skopje hotel for 23 days, the final 10 of which were spent on hunger strike
    - Was not subjected to any physical mistreatment during this time
- Handed over to a CIA rendition team at Skopje airport
    - Subjected to beatings, stripped naked and sodomised with an object at Skopje airport.
        - N.B: this treatment amounted to torture under Article 3 [211]
    - Taken to Afghanistan where he suffered further ill-treatment
    - Sent to Albania, from where he was deported to Germany
- In 2008, El-Masri brought a criminal complaint against unidentified law-enforcement officials with the Skopje Public Prosecutor's Office

Issues:

- In the absence of physical mistreatment, did El-Masri's incommunicado detention at the Skopje hotel breach Article 3?
- Could the breaches of Article 3 committed by the CIA at Skopje airport be imputed to Macedonia?
- Did Macedonia breach Article 3 by allowing El-Masri's rendition to Afghanistan?
- Did the lack of an effective investigation by the Macedonian authorities into El-Masri's treatment breach Article 3?

Legal Reasoning:

Incommunicado detention

- Article 3 refers not only to inflicting physical pain but also mental suffering, which is caused by "creating a state of anguish and stress by means other than bodily assault" [202]
- Prolonged confinement in the hotel left El-Masri "entirely vulnerable". [202]
    - He undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he was subjected [202]
    - This treatment was meted out intentionally for the purpose of extracting a confession or information about his alleged ties with terrorist organisations [202]
    - His suffering was exacerbated by the fact that he was kept in an extraordinary place of detention outside any judicial framework [203]
- Therefore, El-Masri's incommunicado detention in the Skopje hotel amounted to inhuman or degrading treatment for the purposes of Article 3

Torture at Skopje airport

- The treatment meted out to El-Masri at the airport amounted to torture
- Deliberate infliction of "severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant" [211]
- Macedonia was "directly responsible" for El-Masri's torture [211]
    - the acts complained of were carried out in the presence of Macedonian officials and within Macedonia's jurisdiction [206]
    - Macedonia was "responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities" [206]
        - "its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring" [211]

Allowing rendition to Afghanistan

- According to case-law (e.g. *Seoring*), the removal of a fugitive by a contracting State may breach Article 3 if there are substantial grounds for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country [212]
- "Macedonian authorities knew or ought to have known, at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention" [218]
    - Macedonian authorities were aware that El-Masri was to be taken to Afghanistan by the CIA [217]
    - There was publicly available information about US practices which are manifestly contrary to the Convention, especially regarding the interrogation of terror suspects in Afghanistan [218]
    - El-Masri's removal amounted to "extraordinary rendition", completely outside the judicial system, exacerbating the risk of torture or inhuman or degrading treatment [221]

- Therefore, Macedonia breached Article 3 by allowing the removal of El-Masri to Afghanistan [222]

Lack of an effective investigation

- When read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", Article 3 requires by implication that there should be an effective official investigation. [182]
    - Without an investigation capable of leading to the identification and punishment of those responsible for violations, Article 3 would be ineffective in practice [182]
        - would allow agents of the State to abuse the rights of those within their control with virtual impunity [182]
    - For an investigation to be effective, the authorities must be prompt and thorough, and must make a serious attempt to establish the truth [183]
        - Must take reasonable steps to secure evidence, including eye-witness testimony and forensic evidence [183]
    - The victim must be able to participate in the investigation [183]
- On the sole basis of papers submitted by the Ministry of Interior, the public prosecutor dismissed the case for lack of evidence [187]
    - The prosecutor did not undertake any other investigative measure to examine the applicant's allegations - had interviewed neither the applicant nor the personnel working in the hotel at the material time. [187]
        - This falls short of what could be expected from an independent authority, especially considering the seriousness of the allegations [189]

Ratio:

- Article 3 refers not only to physical suffering but also mental suffering
    - Incommunicado may exacerbate mental suffering
- A respondent State is liable for breaches of Article 3 committed by foreign officials on its territory with the acquiescence of its authorities.
- Removing an applicant from the State can breach Article 3
    - Where authorities know, or ought to know, that this would entail a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention
        - Removal conducted outside the judicial system (i.e 'extraordinary rendition') increases this risk
- Read in conjunction with Article 1 of the Convention, Article 3 requires by implication that there should be an effective official investigation
    - For an investigation to be effective:
        - Must be prompt and thorough, and must make a serious attempt to establish the truth
        - The victim must be able to participate

ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

RIGHT TO A FAIR TRIAL

WHAT DOES THE RIGHT SAY?

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

WHERE DOES IT COME FROM?

- 1215 Magna Carta: "to no one will we sell, to no one will we refuse or delay, right or justice".
- 1689 Bill of Rights banned excessive fines and protected the right to a trial by jury.
- 1701 Act of Settlement enshrined judicial independence.

WHAT DOES IT MEAN IN PLAIN ENGLISH?

- We have the right to a fair trial before an unbiased judge, in public and in a reasonable amount of time.
- If you are accused of a crime you are innocent until proved guilty.
- You have the right to be assisted by a lawyer. If you can't afford it the state will sometimes have to pay.

THREE KEY THINGS THAT IT DOES FOR US

Landmark court cases:

1975 **Gives us the right to contact a lawyer...** – Golder, Europe
A prisoner was stopped from writing a letter to his solicitor. This breached his rights.

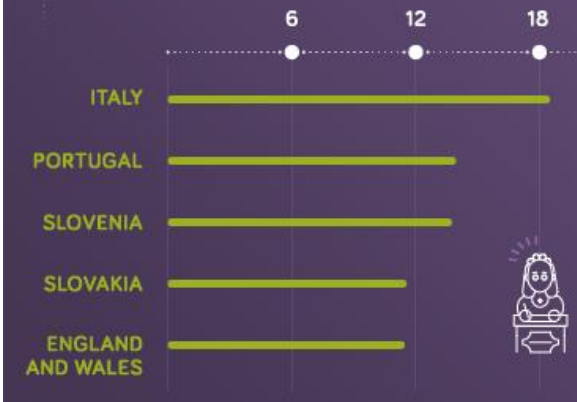
1996 **We must have proper access to a lawyer** – Murray, Europe
John was arrested. He was interviewed 12 times over two days without being allowed to see a lawyer. This breached his rights.

2014 **We get free legal help if it's necessary for justice** – Gudanaviciene, UK
Teresa was threatened with deportation after stabbing her abusive husband. She would have to leave her daughter. She got legal aid because of Article 6.

WHY IS IT NEEDED NOW?

WE SHOULDN'T WAIT YEARS FOR A FAIR TRIAL

Five OECD countries with longest civil proceedings in court of first instance, 1959-2014



54% of Article 6 violations between 1959 and 2014 were about proceedings that went on too long

A FAIR TRIAL MUST BE AFFORDABLE

The number of acts of assistance (figures in '000s) funded by legal aid in England and Wales is falling

39% drop in total legal aid funded acts of assistance, 2009-10 to 2013-14

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Article 6

Colozza v Italy (no. 9024/80) (1985)

Trial *in absentia*

Facts:

- Giacinto Colozza, an Italian citizen, was wanted by the authorities in Rome in 1972 for a number of offences, including fraud
- Colozza was no longer living at his last-known address
    - Police unable to locate him for questioning
    - Bailiff unable to serve court summons on him
    - Three arrest warrants, issued between 1974-75, failed to be executed as the police could not find him
    - Court considered that Colazza was wilfully avoiding the execution of a warrant
- Proceedings for a trial in absentia were commenced in 1975
    - In 1976 Colazza sentenced to 6 years imprisonment and 600,000 Lira fine.
- Colazza was finally located and arrested in 1977
- An appeal against the decision was dismissed – appellate court found that the trial judge was correct in finding that Colazza was wilfully avoiding the execution of a warrant
- Colozza applied to the Commission, which found that Article 6(1) had been breached

Issues:

- Did Colazza's trial *in absentia* violate Article 6(1)?
    - Had Colazza effectively waived his Article 6 rights by being untraceable?

Legal Reasoning:

Trial in absentia

- The "object and purpose of [article 6] taken *as a whole* show that a person 'charged with a criminal offence' is entitled to take part in the hearing." [27]
    - Article 6(3), sub-paragraphs (c), (d) and (e) guarantee to 'everyone charged with a criminal offence' the right:
        - to defend himself in person;
        - to examine or have examined witnesses; and
        - to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
    - It is difficult to see how he could exercise these rights without being present.
- Therefore, Article 6(1) guarantees the right to appear in court

Waiver

- A waiver of the exercise of a Convention right must be unequivocal to be effective [28]
    - The Italian authorities were *not* entitled to infer that Colazza had waived his Article 6 rights based on the presumption that he was avoiding the execution of a warrant
    - N.B: This may be different if Colazza had been notified in person of the charges against him, and had expressly chosen not to appear and defend himself.

Ratio:

- Article 6(1) guarantees the right to appear in court and take part in the hearing
- Convention rights can only be considered waived if the defendant unequivocally does so
    - Authorities cannot presume waiver where defendant has not been contacted

Maaouia v France (no. 39652/98) (2000)

Applicability of Article 6

Facts:

- Nouri Maaouia, a Tunisian national, had a deportation order made against him in 1991
    - Married a French national in 1992
- Maaoui refused to leave France
    - Was subsequently imprisoned for 1 year and had exclusion order made against him, excluding him from France for 10 years
- Brought proceedings for the rescission of his exclusion order in 1994
    - Proceedings lasted until 1998
- Maaoui argued that the length of these proceedings was unreasonable, breaching Article 6(1) of the Convention

Issue:

- Is Article 6 applicable to decisions regarding the entry, stay and deportation of aliens?
    - Does such a dispute concern the determination of the applicant's civil rights or of a criminal charge against him, within the meaning of Article 6(1)?

Legal Reasoning:

- While the Court has never ruled on this question before, the Commission has consistently found that a decision of this nature "does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1"[3] [35]
- Provisions of the Convention need to be read in light of the entire Convention system, including Protocols [36]
    - Article 1 of Protocol 7 contains procedural guarantees applicable to the expulsion of Aliens
        - This indicates that signatory States do not believe that Article 6 applies to expulsion proceedings – otherwise, why include it in the Protocol?
    - The explanatory report on Protocol 7 states that "a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention" [36]

[3] For example: *Uppal and Singh v. the United Kingdom*, no. 8244/78, Commission decision of 2 May 1979, Decisions and Reports (DR) 17, p. 149; *Bozano v. France*, no. 9990/82, Commission decision of 15 May 1984, DR 39, p. 119; *Urrutikoetxea v. France*, no. 31113/96, Commission decision of 5 December 1996, DR 87-B, p. 151; and *Kareem v. Sweden*, no. 32025/96, Commission decision of 25 October 1996, DR 87-A, p. 173

- The fact that the exclusion order incidentally impacted on the applicant's private and family life and his prospects of employment does not bring those proceedings within the scope of civil rights protected by Article 6 § 1 [38]
- Exclusion orders are made for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 § 1. [39].
    - Fact that the exclusion order was imposed in the context of criminal proceedings against him for his refusal to leave France does not alter the character of the exclusion order [39]
        - Remains a protective measure for the purposes of immigration control

Ratio:

- Decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1
- Article 6 § 1 is therefore not applicable

Kalashnikov v Russia (no. 47095/99) (2002)

<u>Reasonable time</u>

Facts:

- Kalashnikov arrested on charges of embezzlement from the bank he was president of
- Criminal proceedings began on 8 February 1995, and were not finally determined until 31 March 2000
    - Total of 5 years, 1 month and 23 days for, in effect, one level of jurisdiction, despite numerous ancillary proceedings
- Kalashnikov filed numerous requests in connection with his case, both during his trial and between hearings
    - In particular, between 15 April and 15 July 1999, the trial court examined more than 30 applications submitted by the applicant, including repetitive applications on previously rejected motions
        - The trial court considered this to be obstructive to the examination of the case
- The charges were discontinued on 29 September 1999
    - However, a new charge was brought, on the same set of facts, on 30 September 1999
- Kalashnikov claimed that the length of proceedings violated Article 6(1):
    - *"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] tribunal established by law."*

Issue:

- Were the proceedings determined within a reasonable time?
    - Could the length of proceedings be justified by the circumstances of the case?

Legal Reasoning:

- Reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, in particular [125]:
  (a) the complexity of the case;
  (b) the applicant's conduct; and
  (c) the conduct of the competent authorities.
    - On this point, what is at stake for the applicant also must to be taken into consideration
- (a) <u>complexity</u>
  - While there was considerable evidence to take into account, and numerous witnesses to question, no investigative measure were undertaken from 7 May 1997, when the trial was adjourned, until 15 April 1999, when it resumed [128]
  - The case was not so complex as to justify a such lengthy proceedings [128]
- (b) <u>conduct of the applicant</u>
  - Article 6 does not require a person charged with a criminal offence to co-operate actively with the judicial authorities [129]
  - While Kalashnikovs numerous applications between April 15 and July 15 were found to be obstructive at trial, the Court found that the applicants conduct in other trial periods could *in no way* be said to have been intended to cause delay [129]
  - Requests lodged by Kalashnikov in between hearings were largely in relation to prolonged delays in examining his case, and remained largely without effect [129]
    - Court cannot find that these requests slowed down the proceedings
  - Kalashnikov's conduct, while causing certain delays, did not contribute substantially to the length of proceedings [130]
- (c) <u>conduct of the authorities</u>
  - Case lay dormant for 2 years, from 7 May 1997 to 15 April 1999 [131]
  - Following the decision to dismiss the charges on 29 September 1991, the bringing of a new charge the next day on the same set of facts contributed even further to the length of proceedings [133]
  - The fact that Kalashnikov was kept in custody for the entire length of the proceedings requires particular diligence on the part of the courts to determine proceedings expeditiously [132]
  - The Court considered that the authorities failed in this duty of special diligence [134]
- Given the low complexity of the case, the lack of obstructive conduct by the applicant and the failure to administer justice swiftly by the authorities, the Court found that the length of proceedings was not reasonable
  - Therefore, violation of Article 6(1)

Ratio:

- Reasonableness of the length of proceedings is to be assessed in light of the particular circumstances of the case
- Article 6 does not require a person charged with a criminal offence to co-operate actively with the judicial authorities

- Authorities have a duty to act with special diligence in determining proceedings expeditiously where the defendant is held in custody during the trial

A.M & Others v Sweden (no. 38813/08) (2009)

Applicability of Article 6

Facts:

- The applicant were a family of Russian citizens who had been in Sweden for four years
    - Did not possess any residence permits
- While serving in the Russian military, the first applicant had blown the whistle on weapons smuggling by military officers, and was subsequently subject to threats by those involved
    - Sought asylum in Sweden on this basis
- Asylum was denied, and an appeal to the Migration Court was dismissed
    - Further leave to appeal to the Migration Court was denied, without an oral hearing

Issues:

- Did the denial of leave to appeal without an oral hearing by the Migration Court violate Article 6?

Legal Reasoning:

- Per *Maaouia*, Article 6 does not apply to deportation proceedings
    - They do not concern the determination of either civil rights and obligations or of any criminal charge, therefore do not attract Article 6
    - This includes claims for asylum

Ratio:

- Article 6 does not apply to deportation proceedings, including where asylum is being sought

Othman (Abu Qutada) v United Kingdom (no. 8139/09) (2012)

Liability for breach of Article 6 in receiving state; admission of torture evidence

Facts:

- In 1993 the applicant, a Jordanian national, arrived in the United Kingdom and was granted asylum
- In 1999, and then again in 2000, Othman was convicted *in absentia* in Jordan for terrorism offences
    - In each case, the prosecution relied on the evidence given by a co-accused, who each subsequently alleged that they were tortured during interrogation
        - Each co-accused had subsequently been executed, therefore could not be questioned again
- The Jordanian government sought Othman's extradition, but the UK government was advised by the Foreign Office that extradition to Jordan would violate Article 3 of the convention, due to the real risk of ill-treatment in Jordan.

- In 2005, the UK and Jordan signed a Memorandum of Understanding assuring that Othman would not be ill-treated in the event of any extradition
    - Memorandum was very detailed, provided for significant oversight
- Othman was subsequently served with notice of intention to deport by the UK authorities
    - Appeals against the deportation order were dismissed by the UK courts

Issues:

- Does deportation/expulsion of somebody to a place where they will be trialled unfairly constitute a violation of Article 6?
- Would Othman's retrial in Jordan amount to a flagrant denial of justice because of the admission of evidence obtained by torture?
- Would the UK be in breach of Article 6 by deporting him to Jordan?

Legal Reasoning:

Expulsion to place where there is risk of unfair trial

- Article 6 may be breached by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country [258]
    - Established in the Court's case law[4]
- What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. [260]
    - goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself [260]
- A "flagrant denial of justice" occurs in a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein [259]
    - Examples of "flagrant denial of justice" [259]:
        - conviction in absentia with no subsequent possibility to obtain a fresh determination of the merits of the charge[5]
        - a trial which is summary in nature and conducted with a total disregard for the rights of the defence[6]
        - detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed[7]
        - deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country[8]

[4] *Soering v. the United Kingdom*, Series A no. 161*; Mamatkulov and Askarov v. Turkey [GC],* nos. 46827/99 and 46951/99*; Al-Saadoon and Mufdhi v. the United Kingdom,* no. 61498/08.
[5] *Einhorn v. France* (dec.), no 71555/01; *Sejdovic v. Italy* [GC], no. 56581/00; *Stoichkov v. Bulgaria*, no. 9808/02.
[6] *Bader and Kanbor v. Sweden*, no. 13284/04.
[7] *Al-Moayad v. Germany (dec.)*, no. 35865/03.
[8] Ibid.

- The burden of proof lies with the applicant to prove that there are substantial grounds for believing that he would be at risk of a flagrant denial of justice in the country of return [261]
    - If such proof is brought by the applicant, the burden lies with the government to dispel any concerns [261]

Flagrant denial of justice

- The Court considers that the use at trial of evidence obtained by torture would amount to a flagrant denial of justice [263]
    - "crucial difference between a breach of Article 6 because of the admission of torture evidence and breaches of Article 6 that are based simply on defects in the trial process or in the composition of the trial court" [265]
    - The use of evidence obtained through torture is "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice."[9] [264]
    - statements obtained through torture are intrinsically unreliable[10] [264]
    - Torture evidence "damages irreparably" the trial process; [264]
        - substitutes force for the rule of law
        - taints the reputation of the court
        - "Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself"
- International law "has declared its unequivocal opposition to the admission of torture evidence" [264]
    - The exclusion of evidence obtained by torture a fundamental international norm relating to the right to a fair trial [266]
        - 149 States have signed the UN Convention Against Torture, including all members of the Council of Europe, indicating the clear will of the international community to eradicate torture in all its forms
            - Article 15 of the UNCAT prohibits, in near absolute terms, the admission of torture evidence

Return to Jordan

- Torture, and the admission of torture evidence in courts, is widespread in Jordan [277]
- The UN Committee Against Torture, Amnesty International and Human Rights Watch have all reported that the use of torture and forced confessions is widespread in Jordan [277]
- While Jordanian law prohibits the use of torture evidence, providing theoretical protection to defendants, the Court is unconvinced that these measure have any practical value [278]
- Therefore, returning Othman to Jordan would be in violation of Article 6

Ratio:

- Returning an applicant to a nation where they are at risk of a 'flagrant denial of justice' can violate Article 6

[9] *A and others (no. 2) v Secretary of State for the Home Department* [2005] UKHL 41

[10] *Söylemez v. Turkey*, no. 46661/99.

    - ‘Flagrant denial of justice’ is a high threshold test – violation must be more than a ‘mere irregularity’ or lack of safeguards
- The admission of evidence obtained through torture is a ‘flagrant denial of justice’
- The existence of legal protections for defendants does not in itself mitigate the risk of the use of evidence obtained through torture
    - Court will look at the practical effect of these protections

ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

RIGHT TO FAMILY AND PRIVATE LIFE

WHAT DOES THE RIGHT SAY?

"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

WHERE DOES IT COME FROM?

- English law has long protected marriage, the right to be left alone, the right to communicate privately and not to have personal information published without lawful authority.
- In 1998 a right to privacy was introduced into our law for the first time through the Human Rights Act.
- Article 8 is based on Article 12 of the Universal Declaration of Human Rights.

WHAT DOES IT MEAN IN PLAIN ENGLISH?

- Four key aspects of our personal autonomy are protected: private life, family life, home, correspondence.
- Those rights can't be unreasonably interfered with by the government.
- Article 8 is a "qualified" right, so the state can restrict our rights in limited circumstances, such as when it is in the public interest.

THREE KEY THINGS THAT IT DOES FOR US

Landmark court cases:

1981 Stops the criminalisation of homosexuality
– Dudgeon v UK, Europe
A Northern Irish law criminalising private consensual homosexual acts was a violation of the private life.

2007 Stops our employers secretly spying on our emails
– Copland v UK, Europe
A school monitored a teacher's email without telling her. This was a breach of her right to privacy.

2010 Stops the police searching us without reasonable suspicion
– Gillan & Quinton v UK, Europe
Two protesters were stopped and searched by the police without any grounds for suspicion. The European Court said this violated their right to privacy.

WHY IS IT NEEDED NOW?

THE POLICE KEEP A DATABASE OF MILLIONS OF PEOPLE'S DNA

Timeline of the UK DNA database

EUROPE'S WORST OFFENDERS

Countries that have violated Article 8 the most, 1959-2014

www.rightsinfo.org

Article 8

Slivenko v Latvia (no. 48321/99) (2003)

Private life; Home; Family life; National security

Facts:

- The applicants are a mother and daughter of Russian origin.
    - The first applicant, Tatjana Slivenko moved to Latvia at one month of age, accompanying her father, a USSR military officer at the time
    - Tatjana married Nikolay Slivenko, also a USSR military officer, in 1980
    - Their daughter Karina, the second applicant, was born in Latvia in 1981.
- On 4 March 1993, the applicants were entered in the register of Latvia as ex-USSR citizens.
    - Nikolay Slivenko remained in his military post until 2 March 1994, however his leave was not formally processed until 5 June 1994.
- A treaty regarding the withdrawal of Russian troops and their family members from Latvia was signed and became effective on 30 April 1994.
    - This treaty retroactively applied to Nikolay since he was in service as of 28 January 1992.
- On 7 October 1994, Nikolay applied for a residence permit in Latvia but was denied due to the specifications of the withdrawal treaty.
    - He subsequently returned to Russia while the applicants remained in Latvia
- On 20 August 1996, the immigration authorities issued a deportation order in respect of the applicants.
    - A drawn out appeal procedure ensued – ultimately unsuccessful
- On 11 July 1999 the applicants moved to Russia as a result of the deportation order
    - Their flat in Riga, which had been initially provided by the defence authorities, was repossessed by the State
- The applicants alleged a breach of Article 8, as their removal interfered with their private life, family life and home
    - Claimed that they were completely integrated into Latvian society, having developed irreplaceable personal, social and economic ties
    - In addition, her elderly parents remained in Latvia
    - As a result of the removal, they lost their flat

Issues:

- Did the removal of the applicants from Latvia interfere with their rights under Article 8(1)?
    - Interference with “private life”?
    - Interference with “home”?
    - Interference with “family life”?
- If so, was this interference in accordance with Article 8(2)?
    - “In accordance with the law”?
    - In pursuit of a “legitimate aim”?

- "Necessary in a democratic society"?

Legal Reasoning:

Interference with "private life" and "home"

- The applicants were removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being [96]
- Furthermore, as a result of the removal, the applicants lost the flat in which they had lived in Riga [96]
- In these circumstances, the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8(1) of the Convention [96]

Interference with "family life"

- Even though the applicants evidently had an established "family life" in Latvia, the impugned measures did not break up the family [97]
    - The authorities issued deportation orders against the entire family (Nikolay, Tatjana and Karina) [97]
    - The Court's case law is clear that the applicants were not entitled to choose in which country to continue their family life [97]
- Tatjana's elderly parents, adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family, could not be relied upon to show the interference with "family life" [97]
    - The Court did however take this relationship into account under the head of the applicants' "private life" [97]
- Therefore, there has been no interference with "family life" within the meaning of Article 8(1)

"In accordance with the law"

- The expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law [100]
    - also refers to the quality of the law in question, requiring that it should be:
        - accessible to the person concerned; and
        - foreseeable as to its effects [100]
- The ground for the applicants' removal was the Latvian-Russian treaty on the withdrawal of the Russian troops [106]
    - The relevant domestic provisions could legitimately be interpreted and applied in the light of the treaty, a legal instrument which was clearly <u>accessible</u> to the applicants at the relevant time [106]
    - It must have been <u>foreseeable</u> to a reasonable degree, at least with the advice of legal experts, that the applicants would be regarded as covered by the treaty provisions requiring the departure of relatives of Russian military officers affected by the withdrawal [107]
- Therefore, the applicants' removal was done "in accordance with the law" [109]

In pursuit of a "legitimate aim"

- After the dissolution of the USSR, former Soviet troops remained in Latvia under Russian jurisdiction, at the time when both Latvia and Russia were independent States [111]
    - The Court therefore accepts that with the Latvian-Russian treaty on the withdrawal of Russian troops and associated measures, the Latvian authorities sought to protect the interest of the country's national security [111]
- Therefore, the applicants' were removed in pursuance of the protection of national security, a "legitimate aim" within the meaning of Article 8(2) [112]

"Necessary in a democratic society"

- A measure interfering with Article 8(1) rights can be regarded as being "necessary in a democratic society" if:
    - it has been taken in order to respond to a pressing social need; and
    - the means employed are proportionate to the aims pursued [113]
- The Court's task is to examine whether the measure strikes a fair balance between the namely the individual's rights protected by the Convention on the one hand and the community's interests on the other [113]
- In general, the removal of active troops and their families would normally not appear disproportionate, having regard to the conditions of service of military officers [117]
    - Their withdrawal can be treated as akin to a transfer to another place of service, which might have been ordered in the course of their normal service [117]
- Moreover, the continued presence of active troops of a foreign army, with their families, may be seen as being incompatible with the sovereignty of an independent State and as a threat to national security [117]
    - The public interest in the removal of active servicemen and their families from the territory will therefore normally outweigh the individual's interest in staying [117]
- Justification of removal measures does not apply to the same extent to retired military officers and their families. [118]
    - After their discharge from the armed forces a requirement to move for reasons of service will normally no longer apply to them [118]
    - The interests of national security carry less weight in respect of retired soldiers, while more importance must be attached to their legitimate private interest [118]
- The authorities made no allegation that the applicants presented a specific danger to national security or public order [121]
    - The application of a removal scheme without any possibility of taking into account the individual circumstances of persons affected is not compatible with the requirements of Article 8(2) [122]
- Latvian authorities failed to strike a fair balance between the protection of national security and the protection of the applicants' rights under Article 8 [128]
    - Therefore, the applicants' removal from Latvia cannot be regarded as having been "necessary in a democratic society", and is in breach of Article 8 [129]

Ratio:

- The application of a removal scheme without any possibility of taking into account the individual circumstances of persons affected is not compatible with the requirements of Article 8(2)

Üner v The Netherlands (no. 46410/99) (2006)

Private life; Family life; Alien convicted of criminal offences

Facts:

- The applicant, Üner, was a Turkish national residing in the Netherlands, having arrived in 1981 at the age of 12 with his mother and brothers
- In 1989 and 1992, Üner was convicted of relatively minor offences, receiving a fine, a suspended sentence and community service
- In 1991 Üner entered into a relationship with a Netherlands national, with whom he had a son in 1992
    - However, they only briefly cohabited
- In 1993 he was convicted and imprisoned for manslaughter and assault
    - He continued to have regular contact with his partner and son while in gaol, and a second son was born in 1996
- In 1997, the Deputy Minister of Justice withdrew Üner's permanent residence permit and imposed a ten-year exclusion order
    - The Deputy Minister considered that the general interest in ensuring public safety and the prevention of disorder and crime outweighed the applicant's interest in being able to continue his family life with his partner, children, parents and brothers in the Netherlands
- Üner claimed that the respondent Government had failed to strike a fair balance between his interests on the one hand and its own interest in preventing disorder or crime on the other

Issues:

- Was the revocation of Üner's residence permit and the imposition of the eclusion order "necessary in a democratic society"?
    - Did these measures strike a fair balance between the interests of the State in pursuing legitimate aim of prevent disorder or crime, and the interests of Üner?

Legal Reasoning:

*The "*Boultif *criteria"*

- In pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences [54]
- The Court has previously elaborated the relevant criteria (the "*Boultif* criteria")[11] for assessing whether an expulsion measure was "necessary in a democratic society" and proportionate to the legitimate aim of preventing disorder or crime:

[11] *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination. [57]

- All the above factors should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction [60]

*Application of the "*Boultif *criteria"*

- The Court does not doubt that the applicant had strong ties with the Netherlands [62]
  - The applicant lived for a considerable length of time in the Netherlands
  - Moreover, he subsequently went on to found a family there.
- However the applicant lived with his partner and first-born son for a relatively short period only, and never lived together with his second son [62]
  - "... the disruption of their family life would not have the same impact as it would [have had] if they had been living together as a family for a much longer time" [62]
- While the applicant came to the Netherlands at a relatively young age, the Court does not accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society. [62]
- The offences of manslaughter and assault committed by the applicant were of a very serious nature [63]
  - In conjunction with his previous convictions, the applicant may be said to have displayed criminal propensities [63]
- At the time the exclusion order became final, the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age [64]
  - Given that they have Netherlands nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there.
- Despite the practical difficulties for his Dutch partner in following the applicant to Turkey, in the particular circumstances of the case the family's interests were outweighed by nature of the applicant's offences [64]

- While the exclusion order has significant negative consequences in that renders even short visits to the Netherlands impossible for the applicant, it is outweighed by the nature and the seriousness of the offences committed by the applicant [65]
    - Considering that the exclusion order is limited to ten years, the respondent State did not assign too much weight to its own interests when it decided to impose that measure. [65]
- Therefore, the Netherlands authorities struck a fair balance between the interests of public order and the interests of the applicant, thereby complying with the requirements of Article 8(2)

Ratio:

- All of the "*Boultif* criteria" should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction

Mubilanzila Mayeka and Kaniki Mitunga v Belgium (no. 13178/03) (2006)

Family life; Private life; Positive obligations

Facts:

- The applicants, Ms Pulchérie Mubilanzila Mayeka and her daughter Tabitha Kaniki Mitunga, are Congolese nationals
- Ms Mubilanzila Mayeka arrived in Canada in September 2000, where she was granted refugee status in July 2001 and obtained indefinite leave to remain in March 2003.
- After being granted asylum, she asked her brother, a Dutch national living in the Netherlands, to collect Tabitha, who was then five years old, from the Democratic Republic of the Congo and to look after her until she was able to join her in Canada.
    - On 18 August 2002 flew to Brussels airport, where Tabitha was detained as she did not have the necessary documents to enter Belgium.
        - Held at Transit Centre no. 127, a closed centre for adults
    - On 27 August 2002 an application for asylum that had been lodged on behalf of Tabitha was declared inadmissible by the Belgian Aliens Office.
    - Its decision was upheld by the Commissioner-General for Refugees and Stateless Persons on 25 September 2002.
- On 26 September 2002 Tabitha's lawyer asked the Aliens Office to place Tabitha in the care of foster parents, but did not receive a reply.
- On 16 October 2002 the *Chambre de conseil* of the Brussels Court of First Instance held that Tabitha's detention was incompatible with the UN Convention on the Rights of the Child and ordered her immediate release.
    - On the same day the Office of the High Commissioner for Refugees sought permission from the Aliens Office for Tabitha to remain in Belgium while her application for a Canadian visa was being processed and explained that her mother had obtained refugee status in Canada.
- The following day, 17 October 2002, Tabitha was removed to the Democratic Republic of Congo.

    - No members of her family were waiting for her when she arrived in the Democratic Republic of Congo.
    - On the same day, Ms Mubilanzila Mayeka rang Transit Centre no. 127 and asked to speak to her daughter, but was informed that she had been deported.
- At the end of October 2002 Tabitha joined her mother in Canada following the intervention of the Belgian and Canadian Prime Ministers.
- The applicants complained that Tabitha's detention and deportation violated Article 8 of the Convention

Issues:

- Did the detention and deportation of Tabitha constitute an interference with the right to a "family life" and/or "private life" under Article 8(1)?
- If so, did the interference comply with Article 8(2)?
    - "In accordance with the law"?
    - In pursuit of a "legitimate aim"?
    - "Necessary in a democratic society"?
- Did Article 8 impose positive obligations on Belgium to take care of the second applicant and to facilitate the applicants' reunification?

Legal Reasoning:

Interference with "family life"

- by its very essence, the tie between a minor child, and her mother comes within the definition of "family life" within the meaning of Article 8(1) [75]
    - Tabitha's detention amounted to interference with both applicants' right to a "family life" under Article 8(1) [76]

Interference with "private life"

- The term "private life" is broad and does not lend itself to exhaustive definition [83]
    - Thus, private life, in the Court's view, includes a person's physical and mental integrity. [83]
    - The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings [83]
- Therefore, the case could also be considered from the perspective of Tabitha's "private life", although the Court does not find it necessary to make a definitive finding in this regard

"In accordance with the law"

- The detention was based on section 74/5 of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980 and was therefore in accordance with the law [78]

In pursuit of a "legitimate aim"

- Tabitha was detained under the authorities' powers to control the entry and residence of aliens on the territory of the Belgian State. [79]
    - The decision to detain could have been in the interests of national security or the economic well-being of the country or, just as equally, for the prevention of disorder or crime. [79]

- Therefore the interference pursued a legitimate aim for the purposes of Article 8(2) [79]

"Necessary in a democratic society"

- In the absence of any risk of the second applicant's seeking to evade the supervision of the Belgian authorities, her detention in a closed centre for adults was unnecessary [83]
  - Therefore, Tabitha's detention failed to comply with Article 8(2)
- N.B: The same reasoning as applied to Tabitha's detention above, also applies to Tabitha's deportation to Congo
- Therefore, both Tabitha's detention and deportation to Congo amounted to a disproportionate interference with both applicants' right to a "family life", in violation of Article 8.

Belgium's positive obligations

- Since the second applicant was an unaccompanied foreign minor, the Belgian State was under an obligation to facilitate the family's reunification [85]
- Therefore, by detaining and deporting Tabitha, Belgium failed to fulfil its positive obligations under Article 8

Ratio:

- In immigration cases, detention amounting to an interference with an Article 8 right must be proportionate to the risk of the detainee seeking to evade the supervision of the authorities
- Article 8 imposes a positive obligation on a State to facilitate the reunification of an unaccompanied foreign minor with his or her family

Kurić and Others v Slovenia (no. 26828/06) (2012)

Private life; Family life; National security

Facts:

- The applicants were eight non-citizens of Slovenia who were resident in Slovenia when it declared independence from the former SFRY
  - Most had been resident in Slovenia for decades and had family, employment etc. in Slovenia
- On 25 June 1991, the Citizenship of the Republic of Slovenia Act (the "Citizenship Act") came into force in Slovenia
  - Section 40 provided for the acquisition of Slovenian citizenship by non-citizens, provided that:
    - they had acquired permanent resident status in Slovenia by 23 December 1990;
    - they were actually residing in Slovenia; and
    - they applied for citizenship within six months after the Citizenship Act
  - The deadline for applications expired on 25 December 1991.
- Section 81 of the Aliens Act specified that two months after the expiry of the deadline for applications, non-citizens would become aliens

- A secret administrative circular sent by the Ministry of Interior to administrative units specified that those aliens were to be removed from the Register of Permanent Residents
    - Consequently, on 26 February 1992, municipal administrative authorities removed those who had not applied for or obtained Slovenian citizenship from the Register of Permanent Residents ("erasure")
- However, there was no express legal clause specifying that aliens would be "erased" in this manner
- The applicants were given no notification of their erasure, only learnt about it incidentally afterwards

- The applicants alleged that they were not able to submit a formal request for citizenship within the short period set out in the domestic legislation.
    - Three of the applicants were also unable to acquire citizenship of any other successor State of the SFRY and had become, *de facto*, stateless persons.
- The applicants claimed that they were arbitrarily deprived of the possibility of preserving their status as permanent residents in Slovenia, in violation of Article 8

Issues:

- Did the applicants' complaint fall within the scope of an interest protected by Article 8(1)?
- Did the erasure of the applicants' residency statuses interfere with that right?
    - If so, did this interference comply with the Section 8(2) requirement that any interference:
        - is in accordance with the law
        - pursues a legitimate aim; and
        - is necessary in a democratic society?

Legal Reasoning:

Complaint within scope of Article 8

- The applicants "had all spent a substantial part of their lives in Slovenia and had developed there the network of personal, social, cultural, linguistic and economic relations that made up the private life of every human being" [336]
    - Most also formed families in Slovenia
- the applicants therefore had a private and/or family life in Slovenia at the material time within the meaning of Article 8(1) [337]

Interference

- the repercussions of the "erasure" had an adverse effect on the applicants and amounted to an interference with their "private or family life" or both within the meaning of Article 8(1) [339]
    - They had been separated from family members, including spouses, parents and children, and struggled to access employment, health and social services
    - This was particularly the case for those made stateless [337]

Compliance with Article 8(2) – "in accordance with the law"

- the impugned measure must have some basis in domestic law [341]

- Court found that it did, being based on the joint operation of Section 40 of the Citizenship Act and Section 81 of the Aliens Act [342]

- as to the quality of the law in question, it must be "accessible to the person concerned and foreseeable as to its effects" [341]
  - The decision to implement the erasure was communicated by the Ministry of Interior to administrative units in secret administrative circulars [345]
    - Was therefore not accessible
  - In the absence of an express legal clause, it was <u>not</u> foreseeable that their status as aliens would result in such an extreme measure as "erasure" [343]
    - This is particularly the case since the erasure was done automatically, in secret and without notification [343]
      - Absence of notification could have led them to believe that their status as residents had remained unchanged - being an alien does not automatically entail non-resident status [343]
- Therefore, the Court found that the impugned legislation and the administrative practice stemming from it failed to meet the standards of accessibility and foreseeability set out in the Court's case law [346]
  - Therefore, the interference with the applicants' Article 8 rights was not 'in accordance with the law' [350]

Compliance with Article 8(2) – legitimate aim

- The Court found that the impugned legislation was made in pursuit of the legitimate aim of protecting national security [351]
- In the context of the dissolution of Yugoslavia, establishing a "corpus of Slovenian citizens" was also a legitimate aim
  - the establishment of an effective political democracy required the formation of a "corpus of Slovenian citizens", for the purpose of conducting parliamentary elections [352]
- Moreover, the well-established right for a State to control the entry and residence of aliens in its territory entails dissuasive measure against persons infringing immigration laws [351]
- Therefore, the legislation was made in pursuit of legitimate aims under Article 8(2)

Compliance with Article 8(2) – necessary in a democratic society

- In order to be regarded as being "necessary in a democratic society", a measure interfering with Article 8(1) rights must:
  - have been taken in order to respond to a pressing social need; and
  - be employed through means which are proportionate to the aims pursued.
- The impugned measures must strike a fair balance between the relevant interests, namely:
  - the individual's rights protected by the Convention on the one hand; and
  - the community's interests on the other
- It is well established in international law that States have the right to control the entry, residence and expulsion of aliens [354]
  - However, "measures restricting the right to reside in a country may, in certain cases, entail a violation of Article 8 of the Convention if they create disproportionate

repercussions on the private or family life, or both, of the individuals concerned" [355]

- The applicants experienced significant adverse repercussions, such as:
    - the destruction of identity documents;
    - loss of job opportunities;
    - loss of health insurance;
    - the impossibility of renewing identity documents or driving licences; and
    - difficulties in regulating pension rights [356]
- Article 8 not only compels the State to abstain from interfering with rights, but may also impose positive obligations to uphold the private and/or family rights of an individual [358]
    - In this case, the State should have provided for the regularisation of the residence status of former SFRY in order to ensure that failure to obtain Slovenian citizenship would not disproportionately affect the Article 8 rights of the "erased"
- An alien residing in a country can continue living in a country without acquiring citizenship [357]
    - Not necessary to erase their legal status in order to regulate their residence as aliens
- The erasure "upset the fair balance which should have been struck between the legitimate aim of the protection of national security and effective respect for the applicants' right to private or family life or both"
    - Therefore, Court found that the erasure was not necessary in a democratic society

Compliance with Article 8(2) – conclusion

- The erasures were neither "in accordance with the law" nor "necessary in a democratic society" to achieve the legitimate aim of the protection of national security [361]
- Accordingly, there has been a violation of Article 8 [362]

Ratio:

- Any interference with private and/or family life can only be justified if it is in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society
- Article 8 not only prohibits states from unjustified interference with private and/or family life, but can impose a positive obligation to uphold those rights

El-Masri v The Former Yugoslav Republic of Macedonia (no. 39630/09) (2012)

<u>Private life; Family life; Extra-judicial action</u>

Facts:

- In 2003, El-Masri, a German national, was apprehended by Macedonian authorities at the Tabanovce border crossing with Serbia after suspicions were raised about the validity of his passport
- Held incommunicado in a Skopje hotel for 23 days, the final 10 of which were spent on hunger strike
    - Was not subjected to any physical mistreatment during this time

- Handed over to a CIA rendition team at Skopje airport
    - Subjected to beatings, stripped naked and sodomised with an object at Skopje airport.
        - N.B: this treatment amounted to torture under Article 3 [211]
    - Taken to Afghanistan where he suffered further ill-treatment
    - Sent to Albania, from where he was deported to Germany
- El-Masri claimed that his ordeal had been entirely arbitrary, constituting a serious violation of his right to respect for his private and family life under Article 8(1)
    - For over four months he had been detained in solitary confinement and separated from his family, who had no idea of his whereabouts.
    - This situation had had a severe effect on his physical and psychological integrity

Issues:

- Did El-Masri's secret and extrajudicial abduction and detention interfere with his "private life" and/or "family life"?
- If so, did this interference comply with the requirements of Article 8(2)?
    - "In accordance with the law"?

Legal Reasoning:

Interference with "private life" and/or "family life"

- An essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities [248]
- The notion of "private life" is a broad one and is not susceptible to exhaustive definition
    - it may, depending on the circumstances, cover the moral and physical integrity of the person [248]
- The mutual enjoyment by members of a family of each other's company constitutes a fundamental element of "family life" [248]
- Article 8 also protects a right to personal development, the right to establish and develop relationships with other human beings and the outside world [248]
    - A person should not be treated in a way that causes a loss of dignity, as "the very essence of the Convention is respect for human dignity and human freedom" [248]
- Given these elements of Article 8, the "private life" and the "family life" were clearly interfered with by his extrajudicial abduction and detention

"In accordance with the law"

- El-Masri's capture, rendition and detention were all done completely outside the judicial system [221], [249]
- Therefore, the interference with El-Masri's rights under Article 8(1) was not "in accordance with the law", thereby breaching Article 8(2) [249]

Ratio:

- The notion of "private life" may include a person's physical or moral integrity
- Detention is a clear interference with a person's "private life" and/or "family life", and must therefore be done in accordance with the law
    - Extra-judicial capture and detention is not "in accordance with the law"

ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

RIGHT TO AN EFFECTIVE REMEDY

WHAT DOES THE RIGHT SAY?

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

WHERE DOES IT COME FROM?

- Has its origins in the Roman Law principle "ubi jus ibi remedium": where there is a right, there must be a remedy.
- This principle has run through our legal system for centuries; it forms the basis of 'equity', that justice is about fairness.

WHAT DOES IT MEAN IN PLAIN ENGLISH?

- If any of our human rights have been breached by the state, there should be a way to take action.
- The action is usually for a judge to stop the breach.
- It may also involve repairing the damage caused, for example by financial compensation.
- The government must make it possible for us to take such action in the first place.

THREE KEY THINGS THAT IT DOES FOR US

Landmark court cases:

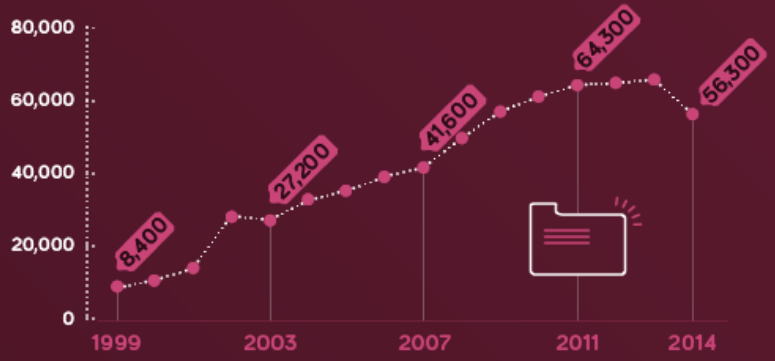
2000 **We have the right to complain that a criminal case is taking too long** – Kulda, Europe
A man was imprisoned awaiting his criminal trial for seven years because of delays, with no way to complain about them.

2002 **The state needs to effectively investigate deaths and mistreatment** – Z v UK, Europe
Four children were abused. Their social workers had failed them. They were allowed to sue them.

2007 **We must have access to an effective remedy for rights violations** – Isayev, Europe
Chechen victims of disappearances, extra-judicial executions and illegal occupation didn't have access to a remedy for breaches of their rights.

WHY IS IT NEEDED NOW?

HUMAN RIGHTS APPLICATIONS ARE ON THE INCREASE
Applications to the European Court of Human Rights allocated to a judicial formation, 1999-2014



The majority of these cases are struck out, but a small number will be subject to judgment

MANY COUNTRIES LACK AN EFFECTIVE HUMAN RIGHTS POLICY
Countries found to violate Article 13 most often in European Court of Human Rights, 1959-2014

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Article 13

Chahal v The United Kingdom (no. 22414/93) (1996)

Remedy for breach of Article 3

Facts:

- Chahal, an Indian citizen, had resided in the UK since 1971
    - Had been involved in the Sikh separatist movement
- In 1990, the Home Secretary decided to deport Chahal on the basis that his presence in the UK was unconducive to the public good, for reasons of national security and the fight against terrorism
    - Because of the national security elements of the case, there was no right of appeal against the detention order
    - The matter was instead heard by an "advisory panel"
        - The advisory panel did not inform Chahal of the evidence against him
        - Chahal was not allowed to be represented by a lawyer or to be informed of the advice which the panel gave to the Home Secretary
- Chahal subsequently applied for judicial review of the deportation order, seeking to have the order set aside
    - In UK judicial review, an order can only be set aside if it is "so irrational or perverse that no reasonable decision maker in the same position could have made it"[12]
- The court found that the Home Secretary was required to weigh the threat to Mr Chahal's life or freedom if he were deported against the danger to national security if he were permitted to stay
    - However, it was not possible for the court to judge whether the decision to deport was irrational or perverse because, for national security reasons, it did not have access to the evidence relating to the national security risk posed by Mr Chahal
        - In the absence of evidence of irrationality or perversity, it was impossible under English law to set aside the Home Secretary's decision
- Chahal argued there was no effective remedy to address his claim that if deported to India, he would face treatment contrary to Article 3

Issues:

- Did the hearing by the "advisory panel" provide an effective remedy within the meaning of Article 13?
- Was judicial review rendered ineffective by its inability to examine the national security risk posed by Chahal?

Legal Reasoning:

General propositions

[12] From UK case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948]

- Given the irreversible nature of the harm that might occur if Article 3 is breached and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [151]
    - This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State [151]

The advisory panel

- The proceedings before the advisory panel had a number of shortcomings:
    - Chahal was not entitled to legal representation;
    - he was given only an outline of the grounds for deportation;
    - the panel had no power of decision;
    - the panel's advice to the Home Secretary was not binding and was not disclosed [154]
- Therefore, the Court was not convinced that the advisory panel offered sufficient procedural safeguards for the purposes of Article 13 [154]

Judicial review

- The English courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security [153]
    - However, given the irreversible nature of the harm that might occur if Article 3 is breached and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [151]
    - This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State [151]
- Therefore, judicial review in this case was not an effective remedy, as it was carried out with explicit regard the perceived threat to national security posed by Chahal [153]

Ratio:

- A remedy must offer sufficient procedural safeguards to be considered effective for the purposes of Article 13
- For the purposes of Article 13, scrutiny of Article 3 claims must be carried out without regard to what the person may have done or the threat they may pose to national security

Hilal v The United Kingdom (no. 45276/99) (2001)

<u>Judicial Review</u>

Facts:

- Hilal, a Tanzanian national from Zanzibar, suffered ill-treatment at the hands of the Zanzibari authorities on account of his political activities (further details above)
- Arrived in the UK in 1995 and sought asylum

- The Secretary of State denied his request for asylum, on basis that his account lacked substantiating evidence and credibility
    - At initial interview, purpose of which was to take down initial details of claim, Hilal merely stated that he was "threatened a lot by the ruling party" [13]
        - Didn't give specifics of ill treatment until later interview
        - Didn't initially provide documentary evidence of his ill-treatment
- An appeal to a special adjudicator was dismissed in 1996
- After the dismissal of his appeal, Hilal obtained documentary evidence of ill-treatment and harassment by Zanzibari authorities
    - Requested that they be referred to the special adjudicator, as provided by Section 21 of the *Immigration Act 1971*.
- Secretary of State refused to refer the documents to the special adjudicator
    - Doubted their authenticity
        - Even if they were authentic, considered them irrelevant
    - Made no findings as to whether the documents showed that Hilal faced a risk of ill-treatment
        - Rather, claimed that regardless of what the documents showed, Hilal could return to mainland Tanzania safely, as long as he avoided Zanzibar (the 'internal flight' option).
            - The human right's situation is considered to be more secure on the Tanzanian mainland
- Hilal sought leave to appeal for judicial review
    - Argued that by refusing to refer the new documentary material to the Special Adjudicator, the Secretary of State had acted with Wednesbury unreasonableness
        - N.B – Wednesbury unreasonableness: a decision so irrational or perverse that no reasonable decision maker in the same position could have made it[13]
- Hilal's application denied – failed to satisfy the very high threshold for Wednesbury unreasonableness
    - English law does not permit the courts to make findings of fact on matters within the jurisdiction of the Secretary of State
    - Courts can only quash the Secretary of State's decision if he has failed to apply English law correctly, or has acted with Wednesbury unreasonableness

Issues:

- Did the denial of Hilal's application for judicial review mean that he had no effective remedy against his proposed deportation, thereby breaching Article 13?

Legal Reasoning:

- Contracting States are afforded some discretion as to the manner in which they conform to Article 13 [75]
    - However, the remedy required by Article 13 must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State [75]

[13] From UK case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948]

- In past decisions,[14] the Court has considered judicial review proceedings to be an effective remedy for the purposes of Article 13 [77]
    - English courts have power to quash a deportation, albeit with a very high threshold for doing so (Wednesbury unreasonableness) [77]
- The Court not convinced that the strict criteria applied in judicial review deprived the procedure of its effectiveness [78]
    - <u>The effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant</u> [78]
- Therefore, the Court finds that Hilal had available to him an effective remedy, and therefore there was no breach of Article 13

Čonka v Belgium (no. 51564/99) (2002)

<u>Remedy for expulsion</u>

Facts:

- The applicants, the Čonka family (parents and two children) were Slovak nationals of Roma ethnicity
- In 1998 they sought asylum in Belgium, claiming to have been violently assaulted by Slovak skinheads, with the police refusing to intervene
- On 3 March 1999 the applicants claim was refused, and they were ordered to leave Belgium within 5 days
- On 5 March they lodged an appeal under the urgent applications procedure with the Commissioner-General for Refugees and Stateless Persons
    - Their appeals were dismissed based on:
        - Mr Čonka's failure to attend a scheduled appointment without due course
        - Alleged discrepancies and lack of credibility in Mrs Čonková's deposition
- On 3 August 1999 the applicants lodged applications with the *Conseil d'Etat* for judicial review of the Commissioner-General's decision and for a stay of execution under the ordinary procedure. They also applied for legal aid.
    - As of 1991, appeals to the *Conseil d'Etat* had no automatic suspensive effect
        - The change was made due to the glut of appeals being lodged as a delaying tactic
    - The *Conseil d'Etat* dismissed the applications for legal aid on the grounds that one of the necessary certificates provided was a photocopy, rather than the original, as required by Belgian law.
    - As they subsequently failed to pay the required court fees, their applications for judicial review and for a stay of execution were struck out
- The applicants were told that the they had no further remedy against the deportation order, and were subsequently deported to Slovakia on 5 October 1999

Issues:

[14] *Vilvarajah and Others v The United Kindom* (1991); *Soering v the United Kingdom* (1989)

- Was the appeal to the *Conseil d'Etat* ineffective due to the lack of automatic suspensive effect?
- Did the mere power to issue a stay of execution suffice for the purposes of Article 13?

Legal Reasoning:

- The President of the *Conseil d'Etat* had the power to immediately summon parties and order a stay of deportation before the execution date [81]
    - It is also the practice of the *Conseil d'Etat* that they make arrangements for the procedure to be completed before the scheduled date of deportation [81]
- However, the Court found that it was "not possible to exclude the risk that, in a system where stays of execution must be applied for and are discretionary, they may be refused wrongly", in particular if the court, ruling on the merits, nonetheless eventually decided to quash a deportation order for failure to comply with the Convention [82]
    - This would render the remedy ineffective, as it has not prevented the breach from occurring before the merits of the case are examined [82]
- While the it was the practice of the *Conseil d'Etat* to arrange the procedure to minimise risk of wrongful expulsion, Article 13 requires an actual guarantee, not a mere statement of intention or practical arrangement [83]
    - There was no legal requirement for the Belgian authorities to wait for the *Conseil d'Etat*'s decision before executing a deportation order [83]
    - Nor was there an obligation on the *Conseil d'Etat* to ascertain the authorities intentions regarding expulsion [83]
- Belgium could not rely on the alleged "glut of appeals" to justify removing the automatic suspensive effect [84]
    - "Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements" [84]
- Therefore, due to the lack of automatic suspensive effect, and the resultant risk of expulsion in contravention of the Convention, Belgium failed to provide an effective remedy for the purposes of Article 13

Ratio:

- In cases of expulsion entailing a real risk of a breach of the Convention, Article 13 requires the remedy to have automatic suspensive effect
- Article 13 requires that remedies are guaranteed to be effective, not just that they are effective as a matter of practice
- Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements
    - Cannot use case load or difficult circumstances to justify departure from Article 13 requirements

Sürmeli v Germany (no. no. 75529/01) (2006)

Remedy for excessive length of proceedings

Facts:

- Mr Sürmeli, a Turkish national resident in Germany, was involved in an accident in 1982
- In 1989 Sürmeli initiated proceedings against the relevant insurer
- As of 2006, the proceedings were still pending – alleged violation of Article 6(1)
- Sürmeli claimed that he did not have an effective remedy under Article 13 to address the length of proceedings
- The German Government asserted that the applicant had had four remedies available in respect of the length of the proceedings:
    - a constitutional complaint;
    - an appeal to a higher authority;
    - a special complaint alleging inaction; and
    - an action for damages

Issues:

- Did any of the four remedies cited by the German Government amount to an effective remedy under Article 13?

Legal Reasoning:

General Propositions

- Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order [98]
    - Requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief [98]
- The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant [98]
- If a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so [98]
- Remedies available to a litigant at domestic level are "effective" within the meaning of Article 13 of the Convention if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred [99]
    - For complaints about the length of proceedings, remedies must be capable of either expediting a decision by the courts dealing with the case, or providing the litigant with adequate redress for delays that have already occurred [99]
    - As well as being effective, remedies must be sufficient and accessible [101]
        - Excessive delays may affect the sufficiency of the remedy [101]

Constitutional complaint

- The right to expeditious proceedings is guaranteed by the German Basic Law and a violation of this right may be alleged before the Federal Constitutional Court [105]

    - Where that court finds that proceedings have taken an excessive time, it declares their length unconstitutional and requests the court concerned to expedite or conclude them [105]
- However, the German Federal Constitutional Court is not empowered to set deadlines for the lower court or to order other measures to speed up the proceedings in issue; nor is it able to award compensation [105]
    - Previous cases had continued for a number of years even after Constitutional Court findings of excessive length of proceedings [106]
- Therefore the Court was not satisfied that proceedings before the German Federal Constitutional Court were capable of affording redress for the excessive length of pending civil proceedings [108]

Appeal to a higher authority

- The Court has found on a number of occasions that appeals to a higher authority are not an effective remedy within the meaning of Article 13 [109]
    - They do not generally give litigants a personal right to compel the State to exercise its supervisory powers and expedite proceedings [109]
- Therefore, Court not satisfied that an appeal to a higher authority could provide an effective remedy to excessive length of proceedings

Special complaint alleging inaction

- A special remedy of a "complaint alleging inaction" has no statutory basis in German domestic law – it has been developed through case law [110]
- Although a considerable number of courts of appeal have accepted it in principle, the admissibility criteria for it are variable and depend on the circumstances of the particular case [110]
- As of the time of application of this case (1999), no court had given an order specifically directing lower courts to speed up proceedings, or given their own decisions in the lower court's place [110]
    - While there were four such instances subsequent to 1999, the Court has ruled that the effectiveness of a remedy is generally assessed with reference to the date of application [110]
- In this case, the relevant court of appeal (Celle Court of Appeal) had never given a ruling on the admissibility of a special complaint alleging inaction [111]
    - Given this uncertainty, it is irrelevant that the Celle Court of Appeal has never explicitly ruled out admitting a special complaint alleging inaction in principle [111]
- Therefore, the Court did not regard a special complaint alleging inaction to be an effective remedy in this case [112]

Action for Damages

- In German case law, there had only ever been one instance where it was held that the inaction observed in proceedings in the administrative courts amounted to a breach of judicial duties [113]
    - a single final judicial decision is not sufficient to satisfy the Court that there was an effective remedy available in theory and in practice [113]

- Furthermore, the Sürmeli's application to the civil courts for legal aid in order to bring an action for damages was refused on the ground, that there had not been any unjustified delays in the proceedings [113]
- In any case, the relevant courts are not able to award non-pecuniary damages for excessive length of proceedings, which the Court has ruled is the main damage suffered in this type of case [113]
    - In the single case where damages were awarded, they were only for partial recovery of legal costs incurred in lodging the complaint [113]
- Therefore, the Court did not consider that an action for damages could afford adequate redress for the excessive length of proceedings [114]

Ratio:

- For complaints about the length of proceedings, remedies must be capable of either expediting a decision by the courts dealing with the case, or providing the litigant with adequate redress for delays that have already occurred
- The authority providing a remedy must be empowered to actually enforce the provision of the remedy
- A remedy should give the applicant a personal right to compel the State to exercise its supervisory powers
- A remedy which theoretically may be awarded by a Court, but has no basis in statute, will not be effective without solid precedent
- A remedy must be able to afford non-pecuniary damages for cases where there is an allegedly excessive length of proceedings

M.S.S v Belgium and Greece (no. 30696/09) (2011)

Refoulement

Facts:

- M.S.S, an Afghan national, had worked in Afghanistan as an interpreter for international forces
    - As a result, he was subject to attempts on his life by the Taliban
- He arrived in the EU through Greece, before arriving in Belgium in 2009
- Belgian authorities ordered his deportation to Greece, despite the known degrading conditions of detention for asylum seekers in Greece – breach of Article 3
    - There were two avenues of appeal available to M.S.S before the Alien Appeals Board
        - Application to set aside the deportation order
        - Application for a stay of execution of the deportation order under the "extremely urgent procedure"
    - Each avenue of appeal has significant limitations
        - An application to set aside the order does not suspend the enforcement of the order while the appeal is considered

        - An application for a stay of execution under the "extremely urgent procedure" has the power to suspend enforcement, but reduces the rights of the defence and keeps examination of the case to a minimum
    - He was subsequently deported to Greece in June 2009
- M.S.S applied for asylum in Greece, but the authorities failed to properly examine the merits of his claim, leaving him at risk of *refoulement*
    - He narrowly escaped expulsion from Greece on two occassions
    - *Refoulement* to Afghanistan without an examination of the merits of his case would constitute a breach of Article 3
- M.S.S claimed that:
    - The avenues of appeal available to him in Belgium did not meet the requirements of Article 13; and
    - The deficiencies in the Greek examination of asylum requests left him with no effective remedy against being exposed to the risk of *refoulement*

Issues:

- Did the deficiencies in Greek asylum procedures leave M.S.S without an effective remedy against the risk of *refoulement*?
    - Did the availability of judicial review compensate for these deficiencies?
- Did the avenues of appeal available to M.S.S in Belgium provide an effective remedy for the alleged violation of Article 3?

Legal Reasoning:

General Propositions

- In cases concerning the expulsion of asylum-seekers, the Court does not examine the actual asylum applications or verify how the States honour their obligations under the Refugee Convention [286]
    - The Court's main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement* to the country of origin [286]
- Remedies to enforce the substance of the Convention can be provided in whatever form happens to be available in the domestic legal order [288]
    - Article 13 merely requires that remedies are "effective" in practice, as well as in law [288]
    - If a single remedy does not fulfil the requirements of Article 13, the aggregate of remedies provided by domestic law may do so [289]
- The effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant [289]
    - All that is required is that the remedy allows the competent national authority both to deal with the substance of the relevant Convention complaint, and to grant appropriate relief [291]
        - Although, effectiveness may be undermined by excessive duration [292]
    - Each State has discretion as to how they fulfil this obligation [291]

- Due to the importance of Article 3, and the irreversible nature of the damage which may result if it is breached, the effectiveness of a remedy within the meaning of Article 13 requires:
    - close, independent and rigorous scrutiny by a national authority;
    - a particularly prompt response; and
    - an automatic suspensive effect. [293]

Greek asylum procedure

- Various international bodies have shown that the asylum procedure in Greece is "marked by such major structural deficiencies that asylum-seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin" [300]
    - This is despite legislative guarantees protecting the rights of asylum seekers [299]
    - Deficiencies in the procedure include:
        - insufficient information for asylum-seekers about the procedures to be followed;
        - difficult access to the Attica police headquarters (where applications must be submitted);
        - no reliable system of communication between the authorities and the asylum-seekers;
        - a shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews;
        - a lack of legal aid effectively depriving the asylum-seekers of legal counsel; and
        - excessively lengthy delays in receiving a decision. [301]
    - These deficiencies affected M.S.S [304]-[313]
- These deficiencies resulted in M.S.S having "no real and adequate opportunity to defend his application for asylum." [313]
    - This was exacerbated by a UNHCR finding that almost all first-instance decisions were negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given [302]

Greek judicial review

- If an expulsion order were to made against M.S.S, he had the theoretical ability to apply to the Supreme Administrative Court for judicial review [316]
    - However, applications for judicial review do not suspend enforcement of an order [317]
    - Furthermore, M.S.S could not pay a lawyer, had no access to legal aid, and was given no information regarding organisations which offer free legal advice [319]
    - Therefore, judicial review is, in practice, an ineffective remedy against the possibility of *refoulement*, and does not offset the inadequacies in the examination of M.S.S' asylum application

Conclusion as to breach by Greece

- The asylum procedure in Greece was so deficient as to not offer adequate remedy against the risk of *refoulement*, and the judicial review theoretically available did not, in practice, compensate for the deficiencies,
    - Therefore, Greece was in breach of Article 13

Breach by Belgium

- While it is true that the Aliens Appeals Board did examine the complaints under Article 3 of the Convention in their decision not to set aside the deportation order, "the Court fails to see how, without its decision having suspensive effect, the Aliens Appeals Board could still offer the applicant suitable redress even if it had found a violation of Article 3" [393]
    - while the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress raises an issue under Article 13 [394]
    - Therefore, an appeal to set aside the deportation order did not constitute an effective remedy under Article 13 [396]
- The "extremely urgent procedure" is designed to come to decisions quickly, and therefore reduces the rights of the defence and keeps examination of the case to a minimum [389]
    - The Court did not consider the examinations conduction under the "extremely urgent procedure" to be thorough [389]
    - The examination was limited to verifying whether the persons concerned had produced "concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3" [389]
        - This increased the burden of proof to such an extent as to "hinder the examination on the merits of the alleged risk of a violation" [389]
    - Therefore, the procedure for applying for a stay of execution under the extremely urgent procedure did not meet the requirements of Article 13 [390]

Ratio:

- In cases concerning the expulsion of asylum-seekers, the Court's main concern is whether effective remedies exist that protect the applicant against arbitrary *refoulement* to the country of origin
- For breaches of Article 3, an effective remedy:
    - close, independent and rigorous scrutiny by a national authority;
    - a particularly prompt response; and
    - an automatic suspensive effect.
- Where there is an alleged breach of Article 3, avenues of appeal which are inaccessible, have no suspensive effect or fail to thoroughly examine the case, may fail to provide an effective remedy for the purposes of Article 13

Kurić and Others v Slovenia (no. 26828/06) (2012)

Government compliance with remedy; Effectiveness at material time

Facts:

- The applicants were eight non-citizens of Slovenia who were resident in Slovenia when it declared independence from the former SFRY
    - Most had been resident in Slovenia for decades and had family, employment etc. in Slovenia
- On 25 June 1991, the Citizenship of the Republic of Slovenia Act (the "Citizenship Act") came into force in Slovenia
    - Section 40 provided for the acquisition of Slovenian citizenship by non-citizens, provided that:
        - they had acquired permanent resident status in Slovenia by 23 December 1990;
        - they were actually residing in Slovenia; and
        - they applied for citizenship within six months after the Citizenship Act
    - The deadline for applications expired on 25 December 1991.
- Section 81 of the Aliens Act specified that two months after the expiry of the deadline for applications, non-citizens would become aliens
- On 26 February 1992, municipal administrative authorities removed those who had not applied for or obtained Slovenian citizenship from the Register of Permanent Residents ("erasure") and put them on the Register of Aliens without a Residence Permit
    - However, there was no express legal clause specifying that aliens would be "erased" in this manner
- In 1999 the Constitutional Court of Slovenia ruled that "the transfer of the names of the "erased" from the Register of Permanent Residents to the Register of Aliens without a Residence Permit had no domestic legal basis" [344]
- As a result of this judgment, Slovenia passed the Legal Status Act in 1999 to rectify the gap and regulate the position of the "erased".
- However, in 2003 the Constitutional Court also found this Act to be unconstitutional
    - Failed to remedy the "erasure" because it did not grant retrospective permanent residence from the date of the "erasure", or regulate the position of those who had been deported following "erasure".
- The government did not amend the Act to deal with these deficiencies until 2010, despite being legally bound to do so
    - Until 2010, the government refused to issue *ex tunc* ("from the outset") residence permits to the "erased"
- The applicants contended that there were no adequate or effective remedies available to them at the material time capable of addressing their Article 8 complaints

Issues:

- Did the Constitutional Court rulings provide the applicants with an effective remedy?
- Did the amended Legal Status Act and issue of *ex tunc* residence permits in 2010 provide an effective remedy at the material time for the violations of Article 8?

Legal Reasoning:

Constitutional Court

- The Constitutional Court's leading decisions of 1999 and 2003, both ordering general measures to address the erasure, were not fully complied with for several years [307]
- The essence of the applicants' complaints had, at the material time, been addressed by those leading decisions [307]
    - However, due to government refusal to act, these remedies provided by the constitutional court were ineffective [371]

Amended Legal Status Act 2010

- The amended Legal Status Act 2010 came into force on 24 July 2010
    - Six of the applicants' complaints had already been declared admissible by the Chamber judgement of the Court on 13 July 2010 [308]
- Therefore, while the remedies available under the amended Legal Status Act 2010 may have been effective, they were not at the applicants disposal at the material time [371]
- Therefore, there was a breach of Article 13 in conjunction with the breach of Article 8 [372]

Ratio:

- Remedies ordered by domestic courts can be rendered ineffective by the refusal of governments to comply with the decision
- Remedies must be effective *at the material time* – not after the case has already been deemed admissible by the Court

De Souza Ribeiro v France (no. 22689/07) (2012)

<u>Remedy for interference with private/family life</u>

Facts:

- The applicant, De Souza Ribeiro, was born in Brazil, but had been living in French Guiana since the age of four
    - His parents had permanent residence cards, while his four siblings had either French citizenship or were entitled to French citizenship
- In 2007 he was stopped at a road check, and since he could not prove that his presence on French soil was legal, he was arrested
    - He was subsequently issued with an administrative removal order
- He applied for judicial review of the removal order, seeking its cancellation and the issue of a residence permit, on the basis that the authorities had manifestly misjudged the consequences of his removal on his family life under Article 8
    - He also submitted an urgent application for the court to suspend the enforcement of the removal order in view of the serious doubts about its compliance with Article 8
- On the same day, he was deported to Brazil
    - Immediately after his deportation, the urgent-applications judge at the Cayenne Administrative Court declared the urgent application for a suspension of the applicant's removal devoid of purpose as he had already been deported

- The applicant subsequently lodged an urgent application for the protection of a fundamental freedom with the Cayenne Administrative Court, seeking a return to French Guiana so that he could effectively pursue the alleged violations of the Convention, and to be reunited with his family while the prefecture examined his right to stay in French Guiana
    - This application was also denied
- The applicant subsequently re-entered French Guiana illegally, and in 2009 the prefecture granted him a residency permit
- De Souza Ribeiro complained that he had had no effective remedy under French law in respect of his complaint of unlawful interference with his right to respect for his private and family life as a result of his expulsion to Brazil.
    - He relied on Article 13 of the Convention taken in conjunction with Article 8

Issues:

- Did France fail to provide an effective remedy for the alleged violation of Article 8?

Legal Reasoning:

General Propositions

- In cases concerning immigration laws the Court has consistently affirmed that, as a matter of well-established international law and subject to their treaty obligations, the States have the right to control the entry, residence and expulsion of aliens. [77]
- The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. [77]
    - However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society [77]
- Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. [78]
    - The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief. [78]
- The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. The States are afforded some discretion as to the manner in which they conform to their obligations under this provision[15] [78]
- In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State [80]

Article 13 as it applies to Article 8 claims generally

- Where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect [83]

[15] *Jabari v. Turkey*, no. 40035/98, ECHR 2000-VIII

    - This is in contrast to claims under Articles 2 and 3 [82]
- Article 13 in conjunction with Article 8 requires that States must make available the effective possibility of:
    - challenging the deportation or refusal-of-residence order; and
    - having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality

As to the present case

- After applying to the Administrative Court on 26 January 2007 at 3.11 p.m., the applicant was deported to Brazil the same day at 4 p.m.
    - In the Court's view the brevity of that time lapse excludes any possibility that the court seriously examined the circumstances and legal arguments in favour of or against a violation of Article 8 of the Convention in the event of the removal order being enforced. [94]
- As a result of the excessively swift deportation, the urgent-applications judge was powerless to do anything but declare the application devoid of purpose. [95]
    - Therefore, the applicant was deported solely on the basis of the decision of the administrative authority [95]
- The authorities gave the applicant no chance of having the lawfulness of the removal order examined sufficiently thoroughly by a national authority offering the requisite procedural guarantees, thereby breaching Article 13 [96]
- The French government was not entitled to use immigration pressures and high case load to avoid its Article 13 obligations [97]-[98]
    - Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements [98]
- Therefore France failed to afford the applicant an effective remedy against the alleged breach of Article 8

Ratio:

- For Article 8 claims, Article 13 does not require that a remedy has automatic suspensive effect, but the remedy must make available the effective possibility of having the relevant issues examined with sufficient procedural safeguards and thoroughness, by an appropriate domestic forum offering adequate guarantees of independence and impartiality
- An excessively swift deportation may breach Article 13 if it gives no opportunity to have a claim examined
- States cannot justify the denial of an effective examination on the basis of high case load or immigration pressures

Khlaifia and Others v Italy (no. 16483/12) (2015)

Remedy for breach of Article 3

Facts:

- The applicants were three Tunisian nationals who arrived in Italy by boat on 16-17 September 2011
- They were first detained on the island of Lampedusa, and then on two ships harboured at Palermo
- All three applicants were given refusal-of-entry orders
    - The orders provided for the possibility of an appeal against them, within a period of 60 days, to the Justice of the Peace of Agrigento, but also indicated that such a remedy would not suspend enforcement.
- Between 27-29 September all three applicants were expelled to Tunisia as part of a larger group of deportees
- The applicants claimed that they had no effective remedy against either their conditions of detention or their expulsion

Issues:

- Was there an effective remedy against the allegedly degrading conditions of detention?
- Was there an effective remedy against their expulsion to Tunisia?

Legal Reasoning:

General Propositions

- Article 13 requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief [166]
- The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint [166]
- The remedy required by Article 13 must be "effective" in practice as well as in law [166]
- The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant [166]
- The "authority" referred to in Article 13 does not necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective [166]
- Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so [166]
- In respect of complaints concerning a removal measure entailing a real risk of treatment contrary to Article 3, Article 13 requires imperatively that:
    - the complaint is subject to close and independent scrutiny; and
    - the remedy should have automatic suspensive effect. [167]

Remedy against degrading conditions of detention

- Other than the appeal against the refusal-of-entry orders, there was no form of appeal available to the applicants against the conditions of their detention [169]
- Therefore, there was a breach of Article 13

Remedy against expulsion

- There is nothing to suggest that the Justice of the Peace would have disregarded the applicant's claims [171]
- However, refusal-of-entry orders expressly stipulated that the appeal to the Justice of the Peace had no suspensive effect [172]
    - It is established in case law that in cases of expulsion entailing a real risk of ill-treatment, Article 13 requires the remedy to have automatic suspensive effect[16] [172]
- Therefore, the appeal was not an effective remedy for the purposes of Article 13

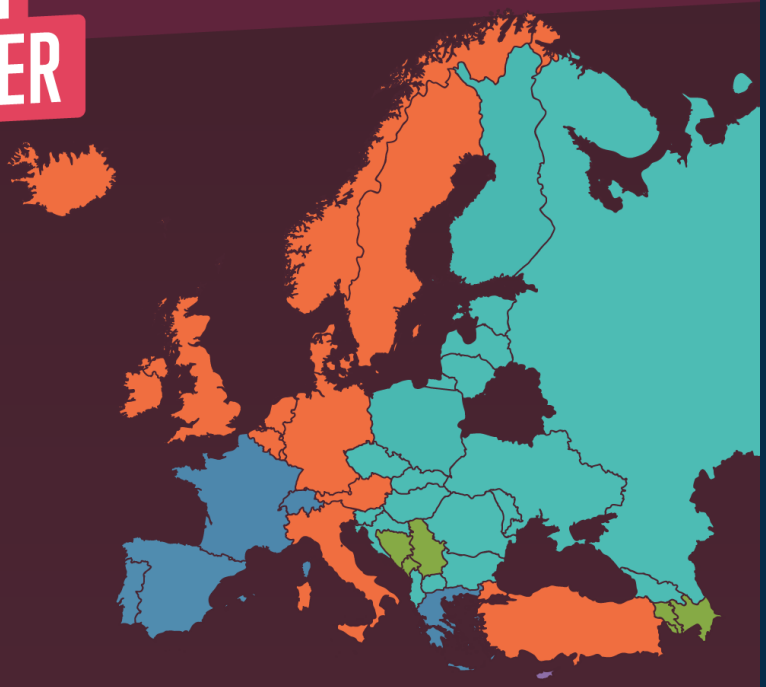
Ratios:

- In respect of complaints concerning a removal measure entailing a real risk of treatment contrary to Article 3, Article 13 requires imperatively that:
    - the complaint is subject to close and independent scrutiny; and
    - the remedy should have automatic suspensive effect.

[16] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011; *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

HUMAN RIGHTS IN EUROPE: EXPLAINER

WHERE DO THEY COME FROM AND WHO IS PROTECTED?



DECADE EUROPEAN CONVENTION CAME INTO FORCE

1940s 1950s 1960s 1970s 1980s 1990s 2000s

FOUNDED
1949 **COUNCIL OF EUROPE**

An organisation of 47 European countries that agree to work together to protect and promote human rights and democracy

DRAFTED
1950 **EUROPEAN CONVENTION ON HUMAN RIGHTS**

IN FORCE
1953

An international treaty signed by the 47 countries which protects the rights and freedoms of over 820 million people

FOUNDED
1959 **EUROPEAN COURT OF HUMAN RIGHTS**

An international court made up of 47 elected judges (one from each country) that ensures the rights in the Convention are upheld

THE LIFE OF A EUROPEAN COURT CASE

BRINGING A CASE

Anyone can bring a case to the court - 700,000 cases have been brought so far

THE INITIAL SIFT

Around 85% of cases get struck out by a judge

GOING TO A FULL JUDGMENT

The cases that make it through are then decided on by a panel of judges