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THE EUROPEAN CONVENTION ON HUMAN RIGHTS – RECENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON IMMIGRATION AND ASYLUM, AND CHALLENGES FOR THE COURT

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I. Recent case law of the European Court of Human Rights on immigration and asylum

1. Asylum determination and barriers to removal: substantive issues

A. Risk of ill-treatment (Arts. 2 and 3 ECHR)

- Right to asylum and principle of non-refoulement

See, e.g., ECtHR [GC], 23 March 2016, F.G. v. Sweden:

> 111. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (…). However, the expulsion of an alien 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 in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (…).

Compared to Geneva Convention, Art. 3 offers a wider protection:
. absolute prohibition, irrespective of conduct individual (serious threat to society)
. applies not only to asylum seekers, but to anyone subject to removal

- Nature of the risk

a. Security risk
General situation vs. individual situation

b. Health risk
ECtHR [GC], 13 December 2016, Paposhvili v. Belgium

- Assessment of the risk

ECtHR [GC], 23 March 2016, F.G. v. Sweden
ECtHR [GC], 23 August 2016, J.K. and Others v. Sweden: restatement

> . Principle of ex nunc evaluation of the circumstances. But emphasis on data available at moment of decision of domestic authorities (§ 83)
> . Principle of subsidiarity – limited review by ECtHR, in particular of credibility asylum seeker (§ 84)
> [. Assessment of the existence of a real risk (§§ 85-90)]
> . Distribution of the burden of proof (§§ 91-98):

. Applicant: adduce evidence; Government: dispel doubts. But: benefit of doubt (§§ 91-93).
. *Individual* circumstances: "shared duty" of asylum seeker and immigration authorities (§§ 94-97).
N.B.: when authorities are made aware of facts relating to a specific individual, that could expose him to a risk (in casu: conversion to Christianity): obligation to carry out assessment of their own motion (F.G. v. Sweden, § 127).
. *General* situation: to be established by authorities of their own motion (§ 98).
. Past ill-treatment as an (important) indication of risk (§§ 99-102)
. Membership of a targeted group: no need to establish special distinguishing features (§§ 103-105)

B. Separation from family members (Art. 8 ECHR)

ECtHR [GC], 13 December 2016, Paposhvili v. Belgium
ECtHR, dec. 6 June 2017, Alam v. Denmark
ECtHR, 14 September 2017, Ndidi v. United Kingdom

C. Prohibition of collective expulsion (Art. 4 Protocol No. 4)

ECtHR [GC], 23 February 2012, Hirsi Jamaa and Others v. Italy (no identification procedure: violation)
ECtHR [GC], 15 December 2016, Khlaifia and Others v. Italy (identification; genuine individual interview: opportunity to inform authorities of reasons why applicants should not be returned: no violation)
ECtHR, 3 October 2017, N.D. and N.T. v. Spain (return from Spanish territory in Melilla: violation)

2. Procedural safeguards in asylum and return cases

- Asylum procedures: protection against arbitrary refoulement
. Possibility to present case (access to information)
. Careful assessment by the authorities

ECtHR [GC], 21 January 2011, M.S.S. v. Belgium and Greece (asylum proceedings in Greece: insufficient guarantees)
ECtHR (Chamber), 14 March 2017, Ilias and Ahmed v. Hungary (asylum proceedings in Hungary: insufficient guarantees) (referred to GC)

- Art. 13: right to an effective remedy.
. In combination with Art. 3: "principle" of automatic suspensive effect (ECtHR, 26 April 2007, Gebremedhin [Gaberamadhien] v. France; ECtHR [GC], 23 February 2012, Hirsi Jamaa and Others v. Italy)
. In combination with Arts. 8 or 4 Prot. No. 4: no automatic suspensive effect required (ECtHR [GC], 15 December 2016, Khlaifia and Others v. Italy)

- Dublin procedures
ECtHR [GC], 21 January 2011, M.S.S. v. Belgium and Greece (responsibility of Belgium: exposure to deficient asylum procedure and deplorable living conditions in Greece)
ECtHR [GC], 4 November 2014, Tarakhel v. Switzerland (responsibility of Switzerland)

3. Family reunion

ECtHR [GC], 24 May 2016, Biao v. Denmark

4. Administrative retention

. In general: ECHR compatible with CCPR and EU law?

ECtHR [GC], 29 January 2008, Saadi v. United Kingdom:
No requirement that retention is a "necessary" measure of last resort?

. Nuances in case law Chambers:

- ECtHR (Chamber), 14 March 2017, Ilias and Ahmed v. Hungary (Röszke transit zone: de facto detention, without legal basis and without appropriate judicial review) (referred to GC).
- ECtHR (Chamber), 21 March 2017, Z.A. and Others v. Russia (referred to GC)
- ECtHR, 4 April 2017, Thimothawes v. Belgium (lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country – Belgian law not fully implementing EU law?)

5. Reception of migrants

a. Reception conditions (while asylum request or request for permit to stay is pending)
. Greece: ECtHR [GC], 21 January 2011, M.S.S. v. Belgium and Greece (situation in Greece)
. Italy (Lampedusa): ECtHR [GC], 15 December 2016, Khlaifia and Others v. Italy
. Hungary: ECtHR (Chamber), 14 March 2017, Ilias and Ahmed v. Hungary (conditions of detention in transit zone: no violation) (referred to GC)
. Transit zone of airport: ECtHR (Chamber), 21 March 2017, Z.A. and Others v. Russia (referred to GC)

b. Victims of trafficking (= long-term reception)
ECtHR, 30 March 2017, Chowdury and Others v. Greece

II. Some challenges for the Court

A. The caseload

- Latest figures:

Pending applications on 1 January 2016: 65,000
Incoming applications (allocated for decision) in 2016: 53,000
Decided applications in 2016: 38,000
Pending applications on 1 January 2017: 80,000

Pending applications on 31 October 2017: 67,000

- ECtHR, 12 October 2017, *Burmych v. Ukraine*: 12,000 cases struck out.

B. The relationship between the Court and some governments

- States are more critical: "The Court should not be overly activist (evolutive interpretation), and should not unduly interfere with national policies".

Sensitive areas include immigration and asylum

See Izmir Declaration, 26-27 April 2011: the Court is invited, "when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human

rights, to avoid intervening except in the most exceptional circumstances".

- Need for reform of the Court, by the States: Interlaken (2010), Izmir (2011) and Brighton (2012) Conferences on the future of the Court:

. Brighton Declaration (19-20 April 2012): idea of "shared" responsibility worked out:

. Court: subsidiary role; some measures to enable it to cope with workload.

. States: domestic remedies; execution of judgments of the Court.

. Concretisation in Protocol No. 15, signed on 24 June 2013:

. principles of subsidiarity and margin of appreciation in preamble ECHR – see above;

. condition of "significant disadvantage" strengthened;

…

- Brussels Declaration (27 March 2015): focus on responsibility of States to implement ECHR and execute judgments of ECtHR.

- Further reforms of the ECHR system?

. Steering Committee for Human Rights ("CDDH"), *CDDH report on the longer-term future of the system of the European Convention on Human Rights*, 11 December 2015

. Danish Chairmanship of Council of Europe (Nov. 2017 – May 2018)

C. The relationship between the European Court and national courts, in particular supreme courts: a judicial dialogue

- Examples in the Court's case law:

ECtHR [GC], 13 December 2016, Paposhvili v. Belgium

- Protocol No. 16 (advisory opinions), signed on 3 October 2013.

III. Concluding remarks