

MINI CONFERENCE 2016 MIGRATION



Venice Commission
Joint Council on Constitutional Justice
Venice, Italy
8 June 2016



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

**Venice Commission:
Joint Council
on Constitutional Justice**

**Mini Conference
Migration**

**Venice, Italy
8 June 2016**

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PROGRAMME

MORNING SESSION

Chair: Evgeni TANCHEV, Co-President of the Joint Council on Constitutional Justice

09:00- 09:30 - Tanja GERWIEN, Legal Officer, Division on Constitutional Justice of the Secretariat of the Venice Commission
Introduction

09:30-10:00 - Krisztina KOVACS - Counsellor, Constitutional Court of Hungary
The Constitutional Court of Hungary's case law on migration

10:00-10:30 - Ana VILFAN-VOSPERNIK - Senior lawyer, Registry of the European Court of Human Rights
The European Court of Human Rights' case law related to migration issues

10:30-10:45 - Discussions

10:45-11:15 - Cristián GARCIA MECHSNER, Director of Studies, Constitutional Court of Chile
The Constitutional Court of Chile's case law on migration

11:45-12:15 - Marjolein VAN ROOSMALEN. Legal adviser, Council of State of the Netherlands
The Council of State's case law on migration



AFTERNOON SESSION

**Chair: Marjolein VAN ROOSMALEN, Co-President of the Joint Council on Constitutional Justice
Legal Adviser, Council of State, Netherlands**

**15:00-15:30 - Tereza SKARKOVA, Analyst, Constitutional Court of the Czech Republic
Recent judgments by the Constitutional Court of the Czech Republic on migration/asylum issues**

**15:30-16:00 - Serhat KÖKSAL, Rapporteur-Judge, Constitutional Court, Turkey
Turkish Constitutional Court decisions on interim measures regarding expulsion procedures**

16:00-16:15 - Discussions

**16:15-16:45 - Rodica SECRIERU, Secretary General, Constitutional Court of Moldova
Migration and the Legal Status of Aliens in the Republic of Moldova**

**16:45-17:15 - Manuela BAPTISTA LOPES, Secretary General, Constitutional Court of Portugal
Migration, citizenship and legal status of aliens in Portugal**



**Joint Council meeting,
Constitutional Court, Venice, Italy
8 June 2016
Mini Conference**

Report

The presentations and the discussions during the Mini-Conference, held in conjunction with the 15th Meeting of the Joint Council on Constitutional Justice, showed that national constitutional courts and the European Court of Human Rights had addressed various aspects of migration over the years. Migration is a wide-ranging topic that includes questions on asylum, deportation, shelter and freedom of movement.

Many of the applicants in the cases considered were in vulnerable situations. Some courts had resorted to interim measures to prevent immediate deportation to places where the migrant's life or physical integrity would be in danger. Referendums on immigration were identified as a dangerous tool that could infringe human rights. For EU member States, recent migration movements had shown the limits of the Dublin II Regulation. Courts had to determine admissible distinctions between foreigners and nationals. In many cases, decisions were based on the constitutional-based principles of equality and non-discrimination, proportionality and human dignity.

What clearly emerged from the Mini-Conference presentations and subsequent discussion was that the rights of migrant populations is not only a significant humanitarian issue around the world, as millions seek asylum from conflict nations, but also one for which legal remedies have to be found.



Introduction

Tanja GERWIEN
Legal Officer, Division on
Constitutional Justice, Secretariat
of the Venice Commission

We are very pleased with the great interest shown by our liaison officers with today's topic and many of you have volunteered to be speakers at this mini-conference. Our mini-conferences are held each year to give our liaison officers the opportunity to share the experiences of their courts with respect to the topic chosen. Today's topic is migration, which is a phenomenon that is probably as old as human history. Whether due to environmental changes, wars or other phenomena, humanity has always been in a state of flux. With the movement of people – especially to places that were already settled – came tension and even clashes that needed to be resolved.

■ There are numerous examples throughout history. William Shakespeare, in a recently discovered play script handwritten by him, portrays Sir Thomas More – councillor to Henry VIII and Lord Chancellor of England in 1529 – making an impassioned plea for the humane treatment of refugees, challenging anti-immigration rioters in London. This was written at a time when there were heightened tensions over the number of Huguenots seeking asylum in London.

■ This is probably not much different from the situation in the Europe of today. Migration is widely featured in the European press and the initial enthusiasm in parts of Europe of greeting and helping those fleeing wars has led to a crisis, as European states struggle to cope with the sheer influx of migrants and refugees, testing the states' resolve and capacity to help them.

■ In 2015, over a million people sought refuge in the member states of the EU, which represents a fivefold increase from 2014, according to the 2016 Report by the EU Agency for Fundamental Rights.¹

■ Only today, the Court of Justice of the European Union ruled that Member States cannot permit nationals of non-EU countries, in respect of whom the return procedure established by Directive 2008/115/EC² (the “Return Directive”) has not yet been completed, to be imprisoned merely on account of illegal entry, resulting in an illegal stay, as such imprisonment is liable to thwart the application of that procedure and delay return, and thereby undermine the Directive’s effectiveness. The Court made clear that this does not, however, prevent the Member States from being able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed. (See full press release³ and judgment⁴.)

■ This influx, coupled with the fear of terrorism, has led to an upsurge in racist and xenophobic incidents in Europe.

■ But this does not only concern EU member states, but also other Council of Europe member states such as Turkey and “the former Yugoslav Republic of Macedonia”.

1 <http://fra.europa.eu/en/publication/2016/fundamental-rights-report-2016>

2 Directive 2008/115/EC of the European Parliament and of the Council, 16.12.2008 on *common standards and procedures in Member States for returning illegally staying third-country nationals* (OJ 2008 L 348, p. 98). Denmark, the United Kingdom and Ireland are not subject to this directive. Under the directive, Member States may decide not to apply the directive to nationals of non-EU countries who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

3 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-06/cp160058en.pdf>

4 <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5ac769045338143a7a57fc70b74671fef.e34KaxiLc3qMb40Rch0SaxuTahn0?text=&docid=179662&pageIndex=0&oclang=EN&mode=req&dir=&occ=first&part=1&cid=535433>

Migration has been tackled on various levels at the Council of Europe.

■ The European Convention on Human Rights – which, although it contains few provisions that expressly mention foreigners or limit certain rights to nationals or lawful residents, has generated a vast body of case law from the ECtHR on this issue.

■ The European Social Charter⁵ (1961 revised in 1996) and the 2015 conclusions of the European Committee of Social Rights in which it clarified the rights of refugees under the European Social Charter, is also relevant.

■ There are less known conventions that also deal with the issue and these include:

- the European Convention on Establishment⁶ (1955), which deals with the treatment (rights and privileges) accorded to nationals of each member state in the territory of the others;
- the European Convention on the Legal Status of Migrant Workers⁷ (1977), the aim of which was to ensure, among others, that migrant workers are treated no less favourably than workers who are nationals of the receiving state in all aspects of living and working conditions;
- the Convention on the Participation of Foreigners in Public life at Local Level⁸ (1992), which deals with the need to improve the integration of foreign residents into the local community, especially by enhancing the possibilities for them to participate in local public affairs;
- and there is also the Convention on the Recognition of Qualifications concerning Higher Education in the European Region⁹ (1997) drafted together with UNESCO, which aims to facilitate the recognition of qualifications granted in one Party in another Party and the European Convention on nationality (1997).

5 www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163

6 www.coe.int/en/web/conventions/full-list/-/conventions/treaty/019

7 www.coe.int/en/web/conventions/full-list/-/conventions/treaty/093

8 www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144

9 www.coe.int/en/web/conventions/full-list/-/conventions/treaty/165

■ As addition to these conventions, there are around fourteen recommendations adopted by the Council of Europe's Committee of Ministers on the issue. The most recent ones date from 2011 and are the Recommendations:

- on mobility, migration and access to health care (CM/Rec(2011)13)¹⁰
- on reducing the risk of vulnerability of elderly migrants and improving their welfare (CM/Rec(2011)5)¹¹
- on validating migrants' skills (CM/Rec(2011)2)¹²
- on interaction between migrants and receiving societies (CM/Rec(2011)1)¹³

■ In September 2015, the Secretary General (SG) of the Council of Europe issued guidance on the treatment of migrants and asylum-seekers¹⁴ to the Heads of Governments of the Council of Europe member states. These set out the legal obligations of the member states, including with regard to the reception and temporary living conditions of migrants and asylum-seekers.

■ This concerns special safeguards required for children that derive from the ECHR as interpreted by the ECtHR, the European Social Charter as interpreted by the European Committee of Social Rights, as well as the relevant standards of the European Committee for the Prevention of Torture (CPT).

■ Authorities must also ensure a gender dimension in dealing with migrants and asylum-seekers. The European court of Human Rights has recently confirmed that, even in times of large-scale arrivals, there can be no derogation from Article 3 ECHR, prohibiting inhuman and degrading treatment. I am sure that Ms Vilfan-Vospernik will tell us more about that.

■ As the migration issue grew in importance and became a priority for the Council of Europe, the SG appointed a Special Representative on Migration and Refugees in February 2016. The task of this Special Representative is to assist member states in upholding human rights when adjusting their

10 [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2011\)13&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2011)13&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)

11 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cccd0

12 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cd83b

13 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cd827

14 www.coe.int/en/web/portal/-/refugee-crisis-council-of-europe-reminds-states-of-respect-for-human-rights-of-all?redirect=http://www.coe.int/en/web/portal/home?p_p_id=101_INSTANCE_DibKFqpE518&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=2

relevant laws and policies. In order to carry out this task, he collects information on the human rights situation of refugees and migrants, which includes fact-finding missions.

■ The SG has contacted the Heads of Governments of the member states most affected by the migration crisis to offer the assistance of this Special Representative, who has recently reported on the situation of migrants and refugees in Greece and “the former Yugoslav Republic of Macedonia”.

■ He expressed concern over allegations of maltreatment by the police along the border – and the Council of Europe has offered Skopje assistance in the training of border police to ensure that the border is watched in line with the country’s obligations and the protection of human rights.

At the beginning of May 2016, the Council of Europe’s European Commission against Racism and Intolerance (ECRI) issued a series of 35 recommendations on safeguarding irregularly present migrants from discrimination in which it stated that the fundamental rights of illegal migrants must take priority over the right of the states to control the entry to and residence in their territory for non-nationals.

■ This right of the states is legitimate, but comes second to the obligation to ensure access to education, housing, social security and assistance as well as protection in the workplace and access to justice for any person within their jurisdiction, including illegal migrants.

■ ECRI notably addressed¹⁵ the issue of social service providers having to report the personal data of illegal migrants to the immigration services and encouraged the creation of a type of “firewall” to separate the activities of the sectors in question.

Most recently, on 31 May 2016, another body of the Council of Europe, the Commissioner for Human Rights released an issue paper¹⁶ on migrant integration in which he underlined that after dealing with the short-term imperatives (reception and processing of asylum claims) European governments now have to turn to the long-term goals of promoting the successful integration of migrants.

¹⁵ <https://wcd.coe.int/ViewDoc.jsp?p=&id=2431615&Site=DC&direct=true>

¹⁶ [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/IssuePaper\(2016\)2&Language=lanEnglish&Ver=original&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/IssuePaper(2016)2&Language=lanEnglish&Ver=original&direct=true)

■ This paper contains guidance for governments and parliaments to help them design and implement integration policies successfully. It highlights European standards that govern this field and sets out a number of concrete recommendations to facilitate the integration of migrants, residence rights, language and integration courses, access to the labour market and quality education, effective protection from discrimination and political participation.

■ Among the most important measures highlighted in the paper is the need to uphold the right to family reunification.

A delegation of the Parliamentary Assembly of the CoE (PACE) visited refugee centres on the Greek island of Lesbos at the beginning of June 2016, the focus of which was the implementation of the EU-Turkey agreement and its effects on refugees and migrants.

■ The purpose of this visit was to raise awareness of the challenges faced by Greece in dealing with the crisis. The findings of this visit will be presented at the next Assembly session on 20-24 June 2016. The President of PACE called¹⁷ for more equal sharing of the burden of the refugee crisis and moving from a Europe of fences to a united Europe of bridges and solidarity.

The Venice Commission has also dealt with migration issues, but mainly in the field of elections. For instance, we have prepared an information note in 2012¹⁸ on the Portrayal of migrants and refugees during election campaigns. However, it is not an issue that we have otherwise addressed directly.

The sheer scope of the migration crisis has brought new challenges for Europe and the main issues it raised so far are a lack of co-operation, which has translated into the closing of national borders and an unfair burden placed on those that are the first countries of arrival of the flow of refugees and migrants (Italy, Greece, Turkey) and on those countries to which this flow of refugees and migrants is moving (mainly Germany and Sweden).

■ It is important that governments and political leaders refrain from using xenophobic rhetoric, linking migrants to social problems or security risks, thereby making the integration of migrants staying in the country even more problematic.

¹⁷ www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5798&lang=2&cat=8

¹⁸ [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2012\)063-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2012)063-e)

■ As Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, has said: “An effective response to the current refugee movements across Europe can only be found through concerted European action, but states must continue to abide by their human rights obligations.”

Let me end with the wise words of Anne Brasseur, the President of the Parliamentary Assembly of the Council of Europe (PACE), who stated that: *“Migration is not a threat to our democracies, but intolerance and hatred undoubtedly are. Our common objective must be to combat terrorism, not to combat migrants, refugees and asylum seekers”.*

■ We have seen in your contributions to the Venice Commission’s Bulletin on Constitutional Case-Law that constitutional courts are often confronted with migration issues¹⁹.

■ We are therefore pleased that this topic was chosen for the Mini-Conference and look forward to your presentations!

¹⁹ www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/blr/blr-2010-3-008?f=xhitlist&xhitlist_x=Advanced&xhitlist_q=migration&xhitlist_d=%7bCODICESid%7d&xhitlist_xsl=xhitlist.xsl&xhitlist_sel=title;path;content-type;home-title;item-bookmark&xhitlist_vpc=first&global=hitdoc_g_&hitlist_g_hitindex



The Constitutional Court of Hungary's case law on migration

Krisztina KOVACS
Counsellor at the Constitutional Court of Hungary

Background

— Hungary does not have a history of immigration. Traditionally, Hungary is not a target destination, but a transit country of migration. Last year, the biggest wave of migration ever reached the country.¹ The number of asylum claims submitted in Hungary multiplied by hundred between 2011 and 2015, however, these claims are largely abandoned, as applicants leave the country within a few days.² Over the last summer, thousands of refugees were sitting and sleeping on the ground around railroad stations in Budapest. The majority of them left Hungary within days or weeks. Nonetheless, the Hungarian government has been busy over the past several months handling the migration crisis.

— These In the spring of 2015, the government launched a countrywide campaign on immigration. Hungarian language billboards were displayed which read: "If you come to Hungary, you have to follow our laws!" or "If you come to Hungary, you shouldn't take the jobs of Hungarians!"³

1 Frontex: Risk Analysis available at frontex.europa.eu for 2016 at 7.

2 Hungarian Helsinki Committee Report available at www.helsinki.hu/en/facts-figures-on-immigration-and-asylum-in-hungary-7-august-2015

3 Nick Thorpe: Hungary's poster war on immigration available at www.bbc.com/news/world-europe-33091597

■ In the summer of 2015, a governmental decree declared a list of “safe countries of origin” or “safe third countries” from which asylum applications could benefit from an accelerated procedure⁴ and amendments provided for the erection of a fence on the southern border.⁵ In the autumn of 2015, these fences were built, and new laws made the crossing of the closed border illegal, and criminalised the illegal entry into the country.⁶ The government declared “a state of crisis caused by mass migration” in two southern regions of Hungary⁷ and later it extended to four more counties.⁸

■ Meanwhile, on the 22nd September 2015, an EU Council Decision was adopted,⁹ which introduced a quota system for the distribution and settlement of asylum seekers and migrants among the Member States. In response to that, an Act was adopted by the Hungarian Parliament to call on the Hungarian government to initiate an action for annulment against the Council Decision before the EU Court of Justice.¹⁰ Accordingly, the EU Council Decision was challenged by the Hungarian State before the Luxembourg court.¹¹

■ In December 2015, the European Commission opened an infringement procedure against Hungary concerning its asylum legislation.¹² The Commission has found the Hungarian legislation in some instances to be incompatible with EU law, specifically, with the Asylum Procedures Directive and the Directive on the right to interpretation and translation in criminal proceedings as well as

4 Governmental Decree 191/2015 on the national list of safe countries of origin and safe third countries

5 Act CXXVII of 2015 on the establishment of temporary border security closure and on amending acts related to migration

6 Act CXL of 2015 on the amendment of certain acts relating to the management of mass migration

7 Governmental Decree 269/2015 on declaring a state of crisis caused by mass migration and on the rules in connection with the declaration, continuation and termination of the state of crisis (in counties Bács-Kiskun and Csongrád)

8 Governmental Decree 270/2015 on declaring a state of crisis caused by mass migration in counties Baranya, Somogy, Zala and Vas and on the rules in connection with the declaration, continuation and termination of the state of crisis

9 EU Council Decision 2015/1601 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece

10 Act CLXXV of 2015 on acting against the compulsory settlement quota system in defense of Hungary and Europe

11 Case C-647/15: Action brought on 3 December 2015 — *Hungary v Council of the European Union*. Slovakia also filed an action for annulment against the Decision to the EU Court. Case C-643/15: Action brought on 2 December 2015 — *Slovak Republic v Council of the European Union*

12 European Commission Press Release available at http://europa.eu/rapid/press-release_IP-15-6228_en.htm

the EU Charter of the Fundamental Rights. In response to that, on the 24th of February 2016, the government has called for a referendum that would allow the electorate to vote on the following question: “Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?” Connected to this, a poster campaign was launched. Hungarian language billboards are displayed all over Hungary which read: “Let’s send a message to Brussels, so that they can understand it as well”. On the top of the billboard the text says “Referendum 2016 against compulsory settlement.”¹³

■ In March 2016, the government extended the state of crisis to the entire territory of Hungary by declaring a “nationwide migrant crisis”.¹⁴ Moreover, a constitutional amendment was tabled to include Article 51/A on the “state of terrorist threat” in the constitution. The so-called Sixth Amendment to the Hungarian Fundamental Law permits the government to initiate a “state of terrorist threat” by submitting a request to parliament, to declare the state of terrorist threat, and the government can start exercising emergency powers as soon as it makes the request. The argument for adopting this constitutional amendment was that it would be necessary to manage the adverse results from the migration crisis, including also threats of terrorism.¹⁵ To sum up, in the last couple of months, laws were amended and adopted and even the constitution was changed in order to manage the migration crisis in Hungary.

T he role of the Hungarian Constitutional Court

■ One could assume that several petitions have challenged the constitutionality of the recently adopted legal measures, but that is not the case. Under the Constitution, the affected migrants, judges of the immigration proceedings and the Commissioner of the Fundamental Rights (the ombudsman) are placed to challenge these new rules. None of them have submitted a complaint to the

13 Nick Thorpe: Migrant crisis: The smugglers’ route through Hungary, available at www.bbc.com/news/world-europe-36368580

14 Governmental Decree 41/2016 on declaring a state of crisis caused by mass migration to the entire territory of Hungary and on the rules in connection with the declaration, continuation and termination of the state of crisis

15 More on this see Kriszta Kovács: Hungary’s Struggle. In a Permanent State of Exception, VerfBlog, 2016/3/17 available at <http://verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/>, DOI: <https://dx.doi.org/10.17176/20160317-170900>

Constitutional Court over this issue yet. There are two cases before the Court, which somehow are connected to the migrant crisis: the case concerning the EU Council Decision and the case on the government's referendum.

T he Ombudsman's petition

■ In December 2015, the ombudsman turned to the Constitutional Court¹⁶ asking the Court to interpret two articles of the Fundamental Law over the issue of the European Union migrant resettlement system. One of the constitutional provisions in question prohibits collective expulsion and says that foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision.¹⁷ The other is the so-called European Union clause, which allows Hungary, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties of the EU, to exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union.¹⁸

■ The ombudsman explained this move by saying that he would like to clear up legal concerns around the issue of the mandatory transfer of asylum seekers to Hungarian territory. Although the ombudsman did not challenge explicitly the constitutionality of the Council Decision, the petition questions its lawfulness.

■ One of the issues asked by the ombudsman is whether Hungarian institutions can lend a helping hand in enforcing the "illegal" expulsion decisions of other states. According to the ombudsman, after receiving a decision for expulsion from European Union authorities asylum-seekers have no chance to have their say against the move, which is against general EU legal norms. He says that when the European Union issues expulsion decisions for migrants en masse, this leads to collective expulsion, which is against basic European Union treaties and that expulsion is only possible after processing applications on an individual basis.

¹⁶ Section 38 of the Act CLI of 2011 on the Constitutional Court (Constitutional Court Act). The application number of the ombudsman's petition is X/3327-0/2015

¹⁷ Article XIV (1) of the Fundamental Law

¹⁸ Article E (2) of the Fundamental Law

■ The ombudsman also claims that the EU Council Decision violates international law, namely the Geneva Convention relating to the Status of Refugees, by depriving applicants of their right to remain in the territory of the Member State in which they made their application and by allowing their relocation to another Member State.

■ Last, but not least, the ombudsman suggests that, under the EU clause of the Fundamental Law, there are constitutional constraints as to the validity of the rules of the European Union in the Hungarian legal system. Accordingly, Hungarian institutions cannot enforce any European Union measures which run against the Fundamental Law's human rights chapters.

■ According to the ombudsman, it is the Constitutional Court which, by interpreting the Fundamental Law, could empower itself to exercise ultra vires control by referring to powers granted to the European Union or to exercise control by referring to national and/or constitutional identity. (Article 4.2 of the Treaty of the European Union).

■ Briefly, in the view of the ombudsman, the Fundamental Law protects the fundamental rights of the asylum seekers more than the EU law, therefore the Hungarian Constitutional Court should be competent to declare secondary EU legislation inapplicable in the Hungarian legal order if and to the extent that they conflict with the national protection of human rights.

Government Referendum

■ The other relevant case before the Constitutional Court is the case concerning the referendum on the EU resettlement plan. The question of the government-initiated referendum will ask whether citizens are in favour of the European Union being allowed to make the settlement of non-Hungarians obligatory in Hungary, even if the Hungarian Parliament does not agree.

■ In Hungary, the National Election Committee has the competence to review the formulation and content of the referendum question.¹⁹ The Committee decision can be challenged before the Curia (the Supreme Court).²⁰ Petitioners challenged the question, among others, because of the inaccurate

¹⁹ Section 3 of the Act CCXXXVIII of 2013 on the initiation of national referendum, European Citizens's Initiative and on the referendum procedure (Referendum Act)

²⁰ Section 29 of the Referendum Act

wording. They argued that, for example, the notion of “compulsory settlement” (betelepítés) used by the question does not exist in either Hungarian or EU law. The terms used in connection with refugee matters are “transfer” (áthelyezés) or “resettlement” (áttelepítés). Despite these preliminary concerns, the referendum question got through both the National Election Committee and the Curia.

■ Therefore, in early May 2016, the Hungarian Parliament adopted a parliamentary resolution to order the referendum.²¹ Under the Constitutional Court Act, anyone can file a petition with the Court to review this parliamentary decision with regard to conformity with the Fundamental Law and legality. However, the scope of this constitutional review is limited. The Court can examine the merits of the resolution if, between the authentication of the question and the ordering of the referendum, the circumstances changed to a significant degree in a manner that may significantly affect the decision. The Constitutional Court cannot examine the content of the referendum question itself.²²

■ Several petitions requested the Court to declare the Parliamentary Resolution 8/2016 ordering the referendum unconstitutional.

■ The Fundamental Law says that “national referenda may be held about any matter within the tasks and competences of Parliament”.²³ The main concern of the petitioners was that it was not in the Hungarian Parliament’s power to pass such a resolution, since the referendum question has an impact on EU common policy. Title V Chapter 2 of the Treaty on the Functioning of the European Union treats the policies on external border control, asylum and immigration as EU common policies. Consequently, the Hungarian Parliament has no direct competence over the dealings between Hungary and the European Union on migration matters.²⁴

■ The other main concern of the petitioners was that between the authentication of the question and the ordering of the referendum, the circumstances changed to a significant degree in a manner that significantly affects the decision. On the 4th of May 2016, the European Commission presented

21 Parliamentary Resolution 8/2016 on ordering the referendum

22 Section 33 of the Constitutional Court Act

23 Article 8.1 of the Fundamental Law

24 European Commission Proposal available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf

legislative proposals to reform the Common European Asylum System among others by providing “for tools enabling sufficient responses to situations of disproportionate pressure on Member States’ asylum systems” through a “corrective allocation mechanism”.

■ The Constitutional Court, in its decision delivered on 22nd of June 2016, rejected all quota referendum petitions. The Court rejected the first concern of the petitioners by arguing that the merits of the referendum question shall not be examined in the current procedure. Therefore, the Constitutional Court was not in a position to answer the question of whether or not the subject of the referendum concerned the EU common policy. The Court also rejected the second main concern by saying that the proposal of the European Commission to reform the Common European Asylum System is just a proposal that cannot be seen as a document that changed the circumstances significantly.

Conclusion

■ The case concerning the ombudsman’s petition is still pending. At this point, the only certainty is that almost all constitutional institutions were involved in the handling of the migration crisis. The result will be determined by Parliament, the ombudsman, the National Election Committee, the Curia, and the Constitutional Court reacting to each other’s activities. The way, however, these institutions protect rights is Janus-faced. Apparently, the ombudsman protects the basic human rights of the migrants and the referendum is there to ensure the participatory rights of the citizens. But, both the ombudsman’s petition and the referendum are in conflict with the efforts made by the European Union.

The European Court of Human Rights' jurisprudence on issues related to migration



Ana VILFAN-VOSPERNIK, Senior Lawyer, Registry of the European Court of Human Rights

Ana VILFAN-VOSPERNIK introduced a training video¹, which the Registry of the European Court of Human Rights has just released as one of its pilot series **COURTalks-disCOURS**, in co-operation with Council of Europe's HELP programme. The 25-minute videos provide an overview of the Court's jurisprudence on matters related to asylum and terrorism and complements other information material such as the Handbook on European Law Relating to Asylum, Borders and Immigration.² The videos, now released in English and French, will be subtitled in some ten languages in-keeping with the aim of the Court's translation programme Bringing the Convention closer to home which seeks to improve the understanding of Convention standards in Member States. The new videos, together with the manuscript containing a list of relevant case-law precedents, are available on the Court's website.³ They can also be found on the Court's YouTube channel.⁴ See also the following Factsheets prepared by the Press.⁵

1 www.youtube.com/watch?v=9HqF_ttSuH4&feature=youtu.be

2 www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf

3 <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/courtalks&c=>

4 www.youtube.com/user/EuropeanCourt

5 Expulsion - Collective expulsions of aliens - www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf

Then followed with a presentation on the European Court of Human Rights and asylum.

European Court of Human Rights
Cour Européenne des Droits de l'Homme

Who is an asylum seeker?

- ✓ Article 14 of the UDHR: *"Everyone has the right to seek and to enjoy in other countries asylum from persecution."*
- ✓ Article 1, A § 2, of the 1951 Geneva Convention as amended in 1967:
"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.."

European Court of Human Rights
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Are there any dedicated Articles of the Convention?

- **No Convention Article specifically mentions migrants, asylum seekers or refugees.**
- Very few provisions expressly mention third country nationals:
 - **Art. 16** - *Restrictions on political activity of aliens*
 - **Art. 4, Prot. 4** - *Prohibition of collective expulsion of aliens*
 - **Art. 1, Prot. 7** - *Procedural safeguards relating to expulsion of aliens*

Responsibility of States in cases of expulsion (*Hirsi Jamaa v. Italy*)

- From the basic premise...:

"113. According to the Court's established case-law, 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** (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Court also notes that the **right to political asylum is not contained** in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, Reports 1996-VI)."

How does the Convention enters into play?

- Principles emerging from the Convention/Court:

- Nationality is not important – every person...
- **Extraterritorial jurisdiction**
- In addition to relevant Articles (procedural rights) ... the evolutive interpretation and effective-rights concept of the Convention notions (*right to life, torture, ill-treatment, etc*) in the Court's case-law

▪ ...

Development of the case law

- *Soering v. UK* (1989) – extraterritorial responsibility
- *Cruz Varas v. Sweden* (1991) – principle extended in relation to asylum cases
- *Vilvarajah v. the United Kingdom* (1991) – principle confirmed
- *Chahal v. the United Kingdom* (1996) – principle consolidated

...to the required standard (*Hirsi Jamaa, Tarakhel* § 93)

"114. **However**, expulsion, extradition or any other measure to remove an alien may give rise to an **issue under Article 3** of the Convention, and hence **engage the responsibility of the expelling State under the Convention**, 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**. In such circumstances, **Article 3 implies an obligation not to expel the individual to that country** (see *Soering*, §§ 90-91; *Vilvarajah and Others*, § 103; *Ahmed*, § 39; *H.L.R. v. France*, 29.04. 1997, § 34; *Jabari v. Turkey*, no. 40035/98, § 38.,; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11.01.2007).

115. **In this type of case, the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3**. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State by reason of its having taken action which has as a **direct consequence the exposure of an individual to the risk of proscribed ill-treatment** (see *Saadi v. Italy* [GC], no. 37201/06, § 126, ECHR 2008)".

Which Convention Article?

Asylum issues most frequently concern:

- Article 2 - Right to life;
- Article 3 - Prohibition of torture;
- Article 5 - Right to liberty and security;
- Article 6 – Right to a fair trial;
- Article 8 - Right to respect for private and family life;
- Article 9 – Right of conscience and belief;
- Article 13 - Right to an effective remedy;
- Article 14 - Prohibition of discrimination;
- Art. 4, Prot. 4 - Prohibition of collective expulsion of aliens;
- Art. 1, Prot. 7 - Procedural safeguards relating to expulsion of aliens

Methodological questions

- Sources of information:
 - Analysis at national level
 - Additional sources (regarding political, health, economic situation, etc.)
 - Diplomatic assurances
- Analysis *ex nunc* or not?:
 - To what extent the time element is relevant in asylum cases in Strasbourg?! (*Sufi and Elmi v. UK, F.G. v. Sweden*)
- Individual risk vs. generalised risk (*Chahal, Sufi & Elmi, M.S.S., Tarakhel*)
- Strict scrutiny vs. balancing exercise (asylum seekers vs. migrants)
- Asylum seekers as vulnerable persons? (*MSS 251, Tarakhel*)

A strategic approach in Strasbourg?! (*leading cases*)

- i. The proper assessment of *country of origin information*, in particular the weight to be attached to recommendations of the UNHCR on safety on return;
- ii. The proper interpretation and application of Article 3 of the Convention to questions of *generalized risk*;
- iii. The application of the Convention to the *Common European Asylum System*; and
- iv. The relationship between the Convention and the *1951 Refugee Convention*.

Main issues:

- I. Non-refoulement
- II. Art. 2 regime
- III. Art. 3 regime
- IV. Dublin cases

I. The principle of *non-refoulement*

- General principle provided by the 1951 Geneva Convention (Art. 33) with direct relevance to the situation of asylum seekers ... but with some relevance to the situation of the migrants in general as well:
- The direct impact – **practical impossibility for of any individual assessment**
- ... A situation which might have an impact over several rights of migrants protected by the Convention
- What does it really mean? *Alhailifa v. Germany*

II. Art. 2 regime

- A. Death penalty
- B. Incommunicado removals
- C. Risk of death caused for other reasons in the country of destination

III. Art. 3

"114. However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, 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. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Soering*, §§ 90-91; *Vilvarajah and Others*, § 103; *Ahmed*, § 39; *H.L.R. v. France*, 29 April 1997, § 34; *Jabari v. Turkey*, no. 40035/98, § 38.; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

115. In this type of case, the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Saadi v. Italy* [GC], no. 37201/06, § 126, ECHR 2008)."

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The test being applied

1. Art. 3 – absolute right – strict analysis
2. Real risk
 - personal risk v. generalised risk
3. Burden of proof
4. Reason for persecution
5. The authors of the persecution
6. Extraterritorial v. territorial responsibility
7. The source and nature of law requiring removal

1. Art. 3 – nature of the analysis

- Article 3 of the ECHR protects an absolute right – not to be subject to any proportionality analysis
 - Once the risk is established
 - Despite who is the person being removed (*Saadi, Abu Qatada*)
 - Notwithstanding the counter-interests (*Chahal*)
 - Notwithstanding other legal obligations (*Soering*)
 - ...Any removal would constitute violation of Art. 3

- Strict analysis and not a balancing exercise

3. Burden of proof

- “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” – *Tarakhel § 93*
 - The applicant must first establish that he/she is under the risk of being victim of treatment contrary to Art. 3 if removed

 - If his/her allegations are credible

 - The burden then passes to the Government for dissipating these doubts

Salah Sheekh v. the Netherlands, § 147

“The existence of the obligation not to expel is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials”

6. Extraterritorial v. territorial responsibility

- ❖ Risk of Art. 3 violation because of:
 - Treatment contrary to Art. 3 in the country of destination
(*Soering, etc.*)
 - Treatment contrary to Art. 3 while in detention pending asylum application assessment or pending removal
(*Dougoz, Peers, M.S.S., Tarakhel*)
 - Treatment at large pending asylum application assessment (*M.S.S.* §§ 250-253)

7. The source of law requiring removal

- Extradition treaty (*Soering, etc*)
- EU Law – Dublin system
- *T.I. v. U.K.*

IV. The Dublin System

Determination of the EU Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

T.I. v. UK (also in M.S.S.)

- *i. Removal to an intermediary Contracting State does not affect the responsibility of the sending State to ensure that the applicant is not exposed to treatment contrary to Article 3;*
- *ii. The sending State cannot rely automatically on the arrangements made in the Dublin Convention or Regulation;*
- *iii. Where States have established international organisations or agreements to pursue cooperation there could be implications for fundamental rights.*

The Dublin cases

- *Tarakhel v. Switzerland* (
 - Not the standard of systemic deficiencies but the notion of risk taking into account:
 - the individual circumstances of the applicant(s)
 - the general situation in the destination MS
 - Conditional violation
- *A.M.E. v. the Netherlands*
 - Applicants personal situation different from the *Tarakhels'* one

M.S.S. v. Belgium & Greece

21 January 2011

Judge Rozakis' concurring

- *"In these circumstances, it is clear that European Union immigration policy – including the Dublin II Regulation – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime, which should duly take into account the particular needs and constraints of Greece in this delicate domain of human rights protection."*



The Constitutional Court of Chile's case law on migration

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Immigration created and built what Chile is now. Before entering into the case law of the Supreme Court and the Constitutional Court, let us begin with a short historical introduction.

Chile was a Spanish colony until 1810 and then a stream of Europeans arrived between 1850 and 1950, starting with Germans in South Chile; followed by Britons and Italians in Valparaíso and surroundings and Croatians in Punta Arenas and Antofagasta. They were all welcomed and their arrival was even promoted by State policies, which gave land to immigrants in unsettled territory. No major problems were reported.

It was a little bit different for the diaspora of Palestinians, Syrians and Lebanese that came to Chile. Most of them arrived during the 1st World War and later, during the 1948 Palestine War. Most of them were Christian - largely Orthodox Christian and some Roman Catholics - who were escaping from the mandatory military service ordered by the Ottoman Empire. That is the reason why they were commonly known as the "Turks" in Chile, which was the nationality they had on their passports when they arrived.

The arrival of Palestinian immigrants in Chile in the early 20th century coincided with the Chilean state's decision to end sponsoring immigration to Chile and the country suffered a severe social and economic crisis coupled with a wave of nationalism with xenophobic and racist undertones. Many of

the immigrants were very poor and illiterate and had to take loans to pay their travel costs. Once in Chile, Palestinians largely settled in the marginal areas of cities and worked as small merchants, an economic activity that is despised by the Chilean aristocracy. Hard work permitted them, within a few years, to become part of a large middle class. In the 1950s, many Palestinian-Chileans had acquired substantial economic as well as political power in Chile, some of whom were working as deputies, ministers or ambassadors. Besides these migrants of previous decades, Chile has also welcomed Palestinian refugees later on, as for instance in April 2008 when it received 117 from the Al-Waleed refugee camp on the Syria–Iraq border near the Al-Tanf crossing. All of those refugees were Sunni Muslims. Today, the largest Palestinian colony outside the Arab world resides in Chile: between 450 000 and 500 000 Chileans have Palestinian roots.

Years of economic prosperity and political stability brought Argentinians and Spaniards to Chile, looking for better work opportunities, given the economic crisis their countries suffered over the last years; Colombians, fleeing from the guerrillas and drug dealers; Haitians, and also Peruvians, who sought better wages and work conditions, before the economic boom in their country began.

Proof of that is the electoral registration of foreigners. After five years of permanent residency in the country, they can be registered and then vote in all elections and affiliate to political parties. Their influence is growing every year. For example, communal elections are scheduled for this year and almost 9% of the registered voters of Santiago Downtown are foreigners. In a close race, as it has always been in Santiago Downtown, they could be decisive and their turn out is much higher than that of national voters.

Now for the jurisprudence: Ordinary Courts (Courts of Appeals and the Supreme Court) are increasingly reviewing legal actions against deportation orders decreed by the Ministry of Interior. The first option is a preventive *habeas corpus*, which would be revised by the Court of Appeals of Santiago and by the Supreme Court at second instance. The second option is to go directly to the Supreme Court through a special action against the administrative act that ordered the expulsion.

The jurisprudence of the Courts has been consistent in following aspects:

Firstly, deportation cannot take place when it affects the family, understood as being a fundamental nucleus of society, and it being a State duty to protect and strengthen people and the family. Both aspects are included in Article 1 of the Chilean Constitution.

Secondly, when it is proved that the deported has children under his/her care, and they have a strong attachment to the country (by schooling, for instance) or depend entirely on the deported, besides having children most of whom have the Chilean nationality (*jus soli* rule). In such cases, the Supreme Court justifies its decisions on the principle of the best interests of the child.

The justification of the case-law mentioned above lies on the infringement of the fundamental right of “family as a fundamental nucleus of society” and not directly on the personal freedom or individual safety, as prescribed by the action of *habeas corpus*, contained in Article 21 of the Constitution.

Thirdly, deportation cannot be implemented when the administrative act, which orders the expulsion of a foreigner, is not founded or the measure is disproportionate. In the first case, the administrative act becomes arbitrary when it does not consider the entire information contained in the administrative file; the disproportionality of the deportation occurs when the foreigner has been convicted for a minor offence in Chile (the law prescribes that foreigners may be expelled from the country, if they commit acts including drug dealing, smuggling, human trafficking or any act against moral or decency) or prior to his or her arrival in Chile, in his or her country of origin.

Fourthly, Court conviction for drug dealing constitutes a sufficient basis to reject any reclamation against expulsion, moreover when his or her partner was also legally expelled from the country. In that case, there is no possible allegation about an infringement of family protection.

In conclusion, the expulsion of foreigners is an *ultima ratio* measure. The Ministry of Interior has to collect and consider all the information obtained by the police and other public services and delivered by the deported him-or herself, before signing the expulsion order. He or she has no legal obligation to take such measure, because the attribution is formulated as a discretionary one. There is also a high probability that an expulsion will be stopped by an order in the Courts, if the requisites established by the jurisprudence were not taken into account.

Now, what has the Constitutional Tribunal that I represent said?

The Tribunal reviewed the first action of inapplicability against the legal precept that gives the Ministry of Interior the discretionary attribution to grant visas, its prorogations and permanent residency, considering the convenience or utility to the country and the international reciprocity, always prior to a hearing at the Immigration Police.

The Tribunal declares that norm inapplicable as it contravenes the right of residency, the equal treatment before the law and the equality principle. More interesting than the result of the inapplicability itself, is the doctrine that emanated from the decision.

Firstly, foreigners are entitled to be protected by our Constitution. The epigraph of Article 19 declares “The Constitution assures to all”, and then enumerates fundamental rights. One of them expresses the right of every person to reside and stay in any part of the territory, to move from one place to another and to enter and leave the country at any time; just respecting the law and avoiding harming others. The Constitution does not exclude foreigners.

Secondly, the exercise of the right of circulation and residence must be regulated by law. The right itself cannot be restricted. However, the autonomy of the legislative branch is severely limited by the principles of equality – especially the non-discrimination clause – and proportionality, and also by International Human Rights Treaties, ratified and approved by Chile.

Thirdly, the administrative attribution to grant or deny the admission of foreigners cannot be seen merely as a security measure. In some cases, they have to be admitted, such as asylum seekers or foreigners who entered the

country legally. In the latter case, the principle of equal rights and non-discrimination among nationals and aliens must also be followed and respected. The decision strengthens the change of intensity of the fundamental rights of foreigners – when they entered legally – because they are entitled to reside and stay in the country; to regularise it, and generally an equal treatment to nationals.

Fourthly, the legislative branch can make distinctions between foreigners and nationals, but needs a compelling reason, which justifies the necessity and the fulfilment of a legitimate goal, recognised constitutionally.

Finally, the convenience and utility as concepts defined by the administration itself, from case to case, to grant or reject visa or residency, is a questionable starting point. It must be understood that such provisions have an impact and have repercussions, which often generate a multitude of situations of discrimination based on their legally vulnerable position.



Asylum and Shelter: The Council of State's case law on migration

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Introduction

The Netherlands does not have a constitutional court. Cases are heard in final instance by one of four highest courts. Our Court – the Administrative Jurisdiction Division of the Council of State – not only is the highest administrative court with general jurisdiction, but also the highest court with regard to alien cases. Recently the Council of State has given judgment in landmark cases on claims which are at the heart of the topic ‘migration’: asylum and shelter. I will first report the decision on asylum of April of this year, followed by the decision on shelter of November of last year.

Asylum

— Article 2, second paragraph, of the Netherlands Constitution reads:

The admission and expulsion of aliens shall be regulated by Act of Parliament.

The Act of Parliament concerned is the Aliens Act 2000.

Article 3 of the European Convention on Human Rights provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Netherlands Constitution does not have an equivalent clause, but under Article 94 of the Constitution the courts are under an obligation not to apply legal provisions in national laws (including Acts of Parliament) which violate self-executive treaty provisions and resolutions by international institutions¹.

Article 3 of the European Convention on Human Rights (ECHR) is a treaty provision which is self-executing and it is quite often relied on in asylum cases. This provision colours the interpretation of one of the grounds for granting asylum.² It is also relied on in expulsion procedures.³

The European Court of Human Rights holds in its settled case-law that States, as a matter of international law, have the right to control the entry, residence and removal of aliens.⁴ Moreover, it is settled case-law that neither the Convention nor its Protocols confer the right to political asylum.⁵ However, expulsion does give rise to an issue under Article 3 ECHR when substantial grounds are shown for believing that an asylum seeker, if deported, faces a real risk of being subjected to treatment contrary to Article 3 ECHR.⁶

In cases on Article 3 ECHR, the European Court of Human Rights applies a particularly thorough scrutiny.⁷ In one case, judges of the European Court of Human Rights even travelled all the way to Finland to assess the facts in an asylum case.⁸ Not only does the Convention require a thorough scrutiny under Article 3, but also under Article 13 ECHR (on the right to an effective remedy) – a “full examination of both facts and points of law” by the national courts is required. The latter standard is also required under Article 46, third paragraph, of the EU Directive on common procedures for

1 The same holds true for public authorities

2 Section 29, first paragraph, opening and under b, second sentence, of the Aliens Act 2000

3 Section 72, third paragraph, of the Aliens Act 2000

4 ECtHR (Grand Chamber), *Saadi v. Italy*, 28 February 2008, no. 37201/06, para. 124

5 ECtHR, *Saadi v. Italy*, 28 February 2008, no. 37201/06, para. 124

6 ECtHR, *Saadi v. Italy*, 28 February 2008, no. 37201/06, para. 125

7 ECtHR, *Dumitrescu v. Roumenia*, 24.03.2015, no. 28440/07, para. 55.

8 ECtHR, *N. v. Finland*, 26.07.2005, no. 38885/02.

granting and withdrawing international protection.⁹ Pursuant to that provision, the review by the Court encompasses a full and *ex nunc* examination of both facts and points of law, including, if applicable, an examination of the need for international protection.

Credibility assessment is quite complicated, for instance because:

- The factual substance of every claim will be difficult to check;
- Judicial independence and impartiality can be put under pressure from anti-refugee/migrant or societal pressures;
- Many claimants will have vulnerabilities inherent to their situation, so the psychological and trauma dimensions affecting them must be considered.¹⁰

The scope and intensity of judicial review of credibility assessments by authorities in asylum procedures, is a topic which is much debated in our country.¹¹ The Council of State acknowledged certain discretion for decision-making authorities. This does not mean that there is no review at all, but that the court will not replace the authorities' assessment with its own assessment.¹² Moreover, the court reviews whether or not the authorities have carried out their credibility assessments with due care and whether they had given sufficient reasons for their decisions.¹³

Judgment of 13 April 2016, no. 201507952/1/V2 (*X (an Alien) v. Secretary of State for Security and Justice*)

In a recent judgment¹⁴ – following the entering into force of a law that implemented the EU Directive I just mentioned – the Council of State has strengthened the requirements that the courts should take into account when asylum assessments are reviewed. In a broad and thorough judgment, the Council of State explained how the courts¹⁵ assess the decision-making process leading to the conclusion that an asylum claim lacks credibility. The

9 Directive 2013/32/EU (recast).

10 See the Mackey and Barnes-report to the International Association of Refugee Law Judges (2013), p. 14. See - helsinki.hu/wp-content/uploads/Crede_Paper_March2013-rev1.pdf

11 See e.g. *D. Baldinger, Rigorous Scrutiny v. Marginal Review*, Nijmegen: Wlp 2013.

12 Administrative Jurisdiction Division of the Council of State, 27.01.2003, no. 200206297/1.

13 Administrative Jurisdiction Division of the Council of State, 04.05.2006, no. 200509551/1.

14 Soon to be submitted to the CODICES Database.

15 That is the administrative courts

court assesses whether every legal requirement is satisfied, in particular with regard to the requirement of due care, the merits and the duty to give sufficient reasons.¹⁶

The court examines whether the Secretary of State was correct in his or her assessment of the elements which are relevant and material to his or her overall assessment of an asylum claim's credibility. The court also examines – with the same rigorous scrutiny – allegations with regard to inconsistencies and vagueness. The same intensity of review is applied by the court to assessments of whether statements made by aliens during interviews contradict one another. There is no reason why the court would not be able to assess that. Finally, the court reviews whether or not assessments of credibility are in keeping with the general principles of administrative law.¹⁷

The Council of State has also paid attention to the fact that the European Court of Human Rights sometimes substitutes its own opinion for the opinions of national authorities on the basis of its own investigation and assessment.¹⁸ The position of the European Court is not comparable to that of a national court, according to the Council of State. The European Court arrives at an independent judgment as to if, given the latest state of affairs, there is a genuine risk that Article 3 ECHR will be breached. Unlike a Dutch court, it does not have the ability to quash a decision, nor to require a State to render a new decision.¹⁹

Shelter

In another recent judgment the Council of State has held that the Secretary of State for Security and Justice was allowed to impose conditions to the sheltering of persons without a valid residence permit.²⁰

A bed, a bath and bread

16 Paragraph 7.0.

17 Paragraph 7.1.

18 See e.g. ECtHR, *F.N. and Others v. Sweden*, 18.12.2012, no. 28774/09, paragraphs 70 to 80.

19 Paragraphs 8.2.

20 Administrative Jurisdiction Division of the Council of State, 26.11.2015, no. 201500577/1/V1, CODICES 2015-3-002.

The Council ruled *inter alia* that the Secretary of State was allowed to impose conditions on persons without a valid residence permit obtaining basic housing. The District Court had ruled differently, referring to the European Social Charter, the ECHR and a decision in a Dutch case by the European Committee of Social Rights (ECSR).²¹

The Council of State found that the ruling of the ECSR is not legally binding. Such rulings may play a part in the interpretation or applicability of treaty provisions that can be relied on in court – like Article 8 ECHR – but it is for the European Court to decide if they do and to what extent.

Besides, the Council confirmed its standing case-law that it does not follow from Article 8 ECHR that the State is under a general obligation to provide for shelter for aliens who are of age, with or without a residence permit. It also recognised that respect for private life under Article 8 ECHR – which also includes a basic care for a person’s physical and mental integrity – may in certain circumstances entail positive obligations, for instance to realise some form of housing.²² Indeed in this case some form of shelter had been provided for, as the alien stayed at a location restricting his liberty.

In short, the Council ruled that the Secretary of State was entitled to expect that the alien co-operated in his own departure in exchange for ‘a bed, a bath and bread’. Setting such co-operation as a criterion for ‘a bed, a bath and bread’ was lawful.

The case was a particularly sensitive one, due to the different ways in which the coalition partners within the government had interpreted a statement made by the Committee of Ministers of the Council of Europe following the decision by the European Committee of Social Rights.²³ In the meantime complaints have been made to the European Court of Human Rights.²⁴

21 ECSR, *CEC v. the Netherlands*, decision of 01.07.2014, no. 90/2013, www.coe.int/socialcharter

22 Reference was made to ECtHR, *V.M. v. Belgium*, 07.07.2015, no. 60125/11 and ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 08.04.2014, no. 31045/10.

23 The Central Appeals Tribunal, highest court in *inter alia* social security cases, took the same view as the Council of State in judgments delivered on the same day. Central Appeals Tribunal, 26.11.2015, nos ECLI:NL:CRVB:2015:3803 and ECLI:NL:CRVB:2015:3834,, www.rechtspraak.nl

24 PM.



Recent judgments on migration/asylum issues

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Both cases of the Constitutional Court of the Czech Republic from last year I would like to present deal with migrants/asylum seekers in connection with the right not to be subjected to inhuman or degrading treatment under Article 7.2 of the Charter of Fundamental Rights and Freedoms and Article 3 of the European Convention on Human Rights.

Judgment File No. I. ÚS 860/15: Degrading treatment within the process of administrative expulsion of a foreign national and the related requirement for effective investigation

The complainant was to be expelled from the Czech Republic, but was advised of this fact in a facility for detention of foreign nationals where he was detained with a view to his expulsion less than 24 hours in advance. He refused to co-operate with the police in the process of his expulsion and the police therefore used tear gas, cuffed him and used a restraining belt during the escort. At the airport, the complainant was moved by the police using a baggage trolley. The captain of the aircraft ultimately refused to take him on board as, in his opinion, the complainant presented a risk for the flight. The complainant challenged the procedure taken by the police officers by a complaint filed with the police and also a criminal complaint.

The Constitutional Court followed from the case-law of the European Court of Human Rights according to which degrading treatment need not necessarily be caused by one of the objected circumstances alone, but may also follow from a combination of such circumstances. The minimum threshold for gravity would not be exceeded, in itself, by the use of tear gas, use of handcuffs and restraining belt or failure to inform the complainant of the imminent expulsion at least 24 hours in advance. However, altogether, all these steps and means must have caused feelings of anxiety and inferiority on his part to such an extent that the gravity of the conduct corresponded to degrading treatment in violation of Article 7.2 of the Charter and Article 3 of the European Convention on Human Rights.

The complainant's rights were thus violated both by the police intervention within the process of administrative expulsion and by the contested decisions of the prosecuting bodies on the grounds of failure to pursue effective investigation. The Constitutional Court therefore quashed the decision of the public prosecutor's offices.

Resolution File No. IV. ÚS 3608/14: Reasons for expulsion of a Ukrainian national diagnosed with AIDS in terminal stage

The Constitutional Court further dealt with a very interesting, and previously unresolved, question in its resolution of 20 April 2015, where it rejected as clearly unfounded a constitutional complaint filed by an unsuccessful applicant for international protection (a Ukrainian national), who had been diagnosed with AIDS in terminal stage after arriving in the Czech Republic. The complainant primarily asserted that if he was returned to the country of origin, he would be exposed to inhuman and degrading treatment, as he would not have access to appropriate health care in Ukraine. The Constitutional Court stated that a mere lower level of health care in the country of origin, in the absence of further circumstances, cannot form grounds for granting asylum. The complainant did not find out about his disease until he arrived in the Czech Republic and, in the opinion of the Constitutional Court, his conclusions as to insufficiency of appropriate medicines or his social marginalization were mere speculations, not supported by any evidence. In conclusion,

the Constitutional Court also rejected the complainant's allegation that he should be granted humanitarian asylum, primarily because there existed no legal entitlement to it. Review of administrative discretion in these cases goes clearly beyond the scope of the review powers of the Constitutional Court, which may only examine whether or not the common courts or administrative authorities used arbitrary interpretation of the relevant provisions, which however was not established in the case at hand.



Turkish Constitutional Court decisions on interim measures regarding expulsion procedures

Serhat KÖKSAL, Rapporteur-Judge,
Constitutional Court, Turkey

Although there is no constitutional provision on Turkish Constitutional Court's decisions on interim measure requests, this issue is regulated under Article 49 of Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Law No. 6216) and Article 73 of the Rules of Procedure of the Constitutional Court. The said regulation is as follows:

Article 49-5 of Law no. 6216:

“(5) The Sections may, *ex officio* or upon request of the applicant, decide for measures they deem necessary for the protection of the applicant's fundamental rights. In case a decision of measures is rendered, the decision on the merits must be rendered within six months at the latest. Otherwise, the decision on measures is revoked *ipso facto*.”

Article 73 of the Rules of Procedure of the Constitutional Court on “Measures”

Interim measure

(1) Upon learning that there is a serious danger towards the life or material or moral integrity of the applicant, the necessary measures can be ruled upon *ex officio* by the Sections during the examination on merits or upon the request of the applicant.

(2) In relation to the applications which have been examined; upon learning that there is a serious danger towards the life or material or moral integrity of the applicant unless a decision of interim measure is made ex officio or upon the request of the applicant prior to the decision regarding the merits of the file, the admissibility examination of the application shall be carried out immediately by the Commissions, the application shall be sent to the relevant Section in order for the matter of interim measure to be concluded as well.

(3) In the event that the Section makes a decision of interim measure, it shall notify this to the relevant individuals and institutions for the necessary action to be taken.

(4) The decision in relation to the merits of the application regarding which an interim measure decision is made must be made within six months at the latest. Unless a new decision is made for the continuation of the interim measure, in circumstances where it is decided that the right of the applicant was not violated or it is decided to dismiss the application, the decision of interim measure shall be automatically lifted.

THE PROCEDURE FOR INTERIM MEASURE

Individual Application Bureau:

According to Article 63 of the Rules of Procedure of the Court, individual applications can be made in person to the Court or they can also be made via other courts or representations abroad.

The individual application forms shall be examined by the administrative staff at the individual application bureau to determine whether they request an interim measure or not. If the administrative staff identifies an interim measure request in the application form, they instantly inform the rapporteur-judge in charge of the individual application bureau of this situation without taking any other action on the file.

After the preliminary examination and registration proceedings to be conducted by the rapporteur-judge in charge of the individual application bureau, the file is referred without any delay to the rapporteur-judge in charge of examining the interim measure requests to conduct the necessary examinations.

ommissions – Sections

In accordance with Article 49-5 of Law no. 62166216, the interim measure may be decided by the Sections during the examination on the merits of the application. Therefore, the individual application requesting interim measure shall be forwarded to the Section immediately.

The rapporteur-judge in charge of interim measure requests shall suspend the expulsion proceedings on the same day through a decision by the Section. Accordingly, the applicant is not deported until his/her request for interim measure is decided.

The chairman of the Section decides whether to include the relevant application file in the agenda of the Section's meeting.

The chairman of the Section decides on the meeting date and time for examining the individual application with interim measure request as well. In practice, the interim measure requests may be decided on the very same date depending on the circumstances of the request or it may be examined in the first meeting of the Section.

According to the statistical data by UYAP (National Judiciary Network), total number of interim measure requests filed from 23/09/2012 until 1/12/2015 is 2069. The distribution of these requests is 53 interim measure requests in 2012, 611 in 2013, 834 in 2014 and 571 requests in 2015. 1039 of these applications were decided without concluding the request for interim measure.

The Court decided for suspension of expulsion procedures in 36 decisions.

Execution of decisions

If the interim measure request is accepted in an application, the decision is notified on the very same date by the Chief Rapporteur-Judges' Office directly to the relevant public authority and the applicant both verbally and in writing in accordance with Article 73 of the Rules of Procedure.

EXAMPLES OF COURT'S DECISIONS ON "INTERIM MEASURE" REGARDING EXPULSION PROCEDURES

1) Decision on Ilnar MIFTAKHOV application:

SECOND SECTION

DECISION ON INTERIM MEASURE

President	:	Engin YILDIRIM
Judges	:	Serdar ÖZGÜLDÜR Osman Alifeyyaz PAKSÜT Muammer TOPAL M. Emin KUZ
Rapporteur	:	M. Serhat MAHMUTOĞLU
Applicant	:	Ilnar MIFTAKHOV (Russian Federation citizen)
Counsel	:	Atty. Tahir TOSOLAR

The applicant filed an individual application no. 2016/2016 on 1/2/2016 and requested the Constitutional Court to issue an interim measure to suspend the execution of proceedings for his deportation in accordance with the decision of Antalya Governorate Directorate of Migration Management dated 28/8/2015.

In accordance with Article 49/5 of Law no 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30/3/2011 and Article 73/1 of the Rules of Procedure of the Constitutional Court titled "Interim Measure", the Sections of the Court may, *ex officio* or upon request of the applicant, decide for an interim measure until review on the merits of the case if there is a serious threat against the applicant's physical and moral integrity.

The Court requires information and documents to examine whether there is a serious threat against the applicant's life or physical and moral integrity in the present case. However, the execution of the decision for deportation during the examination of the individual application may lead to irreparable consequences. Therefore, the Court decides on 1/2/2016 to suspend the execution of the decision for applicant's deportation until the application is re-assessed upon collection of relevant information and documents.

2) Decision on R.M. application:

APPLICATION OF R.M.

(Application Number: 2015/19133)

Decision Date: 16/12/2015

SECOND SECTION

DECISION ON INTERIM MEASURE

CONFIDENTIALITY REQUEST

President : Engin YILDIRIM
Judges : Alparslan ALTAN
Celal Mümtaz AKINCI
Muammer TOPAL
M. Emin KUZ
Rapporteur : M. Serhat MAHMUTOĞLU
Applicant : R. M. (Islamic Republic of Iran citizen)
Counsel : Av. Çınar AKSOY

I. SUBJECT MATTER OF THE APPLICATION

1. The application concerns the allegations that the applicants' right to life would be violated in his country if the decision of deportation issued for him was to be executed.
2. The applicant requests for an interim measure to suspend the procedures for his expulsion

II. APPLICATION PROCESS

3. The application was lodged with the Constitutional Court on 8/12/2015. It was decided that the case be referred to the Section as Article 73 of the Rules of Procedure of the Constitutional Court (Rules of Procedure) requires that a request for interim measure shall be concluded by a Section of the Court.

III. THE FACTS

A. The circumstances of the case

4. The facts of the case, as stated in the application form and annexes thereto, may be summarized as follows:

5. The applicant, born in 1981, is a citizen of Islamic Republic of Iran

6. The applicant came to Turkey at an indefinite date and requested for "international protection".

7. The applicant maintained that he was convicted by Islamic Revolutionary Court of Esfahan for participating the demonstrations in his country at School of Medical Sciences in 2008.

8. The applicant alleged that he was accused of engaging activities to overthrow Islamic Republic of Iran and that the said crime is punishable with capital punishment.

9. The applicant maintained that the death penalties are not notified in writing to ease the summons of the respondents and extradition of criminals from foreign countries and he presented the translation of the summons issued by the 1st Revolutionary Court of Esfahan.

10. Kahramanmaraş Governorate Directorate of Migration Management decided on 3/12/2014 for the deportation of the applicant on the grounds that he violated his obligation to give signature imposed on him within the scope of his request for "international protection".

11. The case filed by the applicant for the cancellation of decision for deportation was dismissed on 21/10/2015 by the Administrative Court of Kahramanmaraş (E.2015/343, K.2015/984)

12. This judgment was notified to the applicant on 11/11/2015 and the applicant filed individual application in due time on 8/12/2015

B. Relevant Law

13. Article 53 of Law No. 6458 on Foreigners and International Protection (dated 4/4/2013) titled "Removal decision" is as follows :

(1) A removal decision shall be issued either upon instructions of the Directorate General or *ex officio* by the governorates.

(2) The [removal] decision together with its reasons shall be notified to the foreigner, in respect of whom a removal decision has been issued or, to his/her legal representative or lawyer. If the foreigner, in respect of whom the removal decision has been issued, is not represented by a lawyer, the foreigner or his/her legal representative shall be informed about the consequence of the decision, procedures and time limits for appeal.

(3) Foreigner, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the removal regarding the appeal. Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be removed during the judicial appeal period or until after the finalization of the appeal proceedings.

IV. THE COURT'S ASSESMENT AND GROUNDS

14. The application form and its annexes were examined and it was adjudged with regards to requests for interim measure as follows:

A. The applicants' allegations

15. The applicant maintained that he would be sentenced to capital punishment in his country if the deportation decision is implemented, that he was deprived of the legal guarantees provided under national and international legislation during the case tried by the relevant administrative court and that his rights defined under Article 17 (Personal inviolability, corporeal and spiritual existence of the individual) of the Constitution were violated.

B. Assessment

16. In accordance with Article 49/5 of Law no 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30/3/2011 and Article 73/1 of the Rules of Procedure of the Constitutional Court titled "Interim Measure", the Sections of the Court may, *ex officio* or upon request of the applicant, decide for an interim measure until review on the merits of the case if there is a serious threat against the applicant's physical and moral integrity.

17. In the present case, the applicant maintained that he was convicted for his participation to the demonstration and protests in a university in 2008, that such activities are deemed as engaging activities to overthrow Islamic Republic of Iran and such people are sentenced to capital punishment and the applicant presented some information corroborating his allegations (see. §§ 8-9). As a matter of fact, Human Rights Report prepared for Iran by Human Rights Watch in 2015 states that a large number of crimes are punishable with capital punishment in Iranian law and that such sentences are executed.

18. For the reasons explained, as it is understood that the applicant would possibly face a serious threat against his "life" if he were to be deported at this stage, his request for interim measure must be accepted.

V. JUDGMENT

FOR THESE REASONS THE COURT, UNANIMOUSLY,

- A. ACCEPTS the applicants' request for an interim measure,
- B. SUSPENDS THE PROCEDURES FOR DEPORTATION of R.M. back to this country until a new judgment is issued by the Court,
- C. DECIDES that a copy of this judgment be notified to the applicant and Directorate General of Migration Management.

Done on 16 December 2015.

3) Decision on Uthman Deya Ud Deen Eberle application

FIRST SECTION

DECISION ON INTERIM MEASURE

APPLICATION OF UTHMAN DEYA UD DEEN EBERLE

(Application Number: 2015/16437)

Decision Date: 10/11/2015

FIRST SECTION

DECISION ON INTERIM MEASURE

President : Burhan ÜSTÜN
Judges : Nuri NECİGOĞLU
Hicabi DURSUN
Hasan Tahsin GÖKCAN
Rıdvan GÜLEÇ
Rapporteur : M. Serhat MAHMUTOĞLU
Applicant : Uthman Deya Ud Deen EBERLE
(USA and Pakistan citizen)
Counsel : Atty. Seçil ASİ

I. SUBJECT MATTER OF THE APPLICATION

1. The application concerns the allegations that the applicant's (who is a citizen of the US) life would be threatened and his family unity would be impaired if the decision of deportation issued for him on the grounds that he endangered public security was to be executed.
2. The applicant requests for an interim measure to ensure stay of execution of the decision for his administrative detention and deportation.

II. APPLICATION PROCESS

3. The application was lodged with the Constitutional Court on 16/10/2015. It was decided that the case be referred to the Section as Article 73 of the Rules of Procedure of the Constitutional Court (Rules of Procedure) requires that a request for interim measure shall be concluded by a Section of the Court.

III. THE FACTS

A. The circumstances of the case

4. The facts of the case, as stated in the application form and annexes thereto, may be summarized as follows:

5. The applicant is a citizen of the United States of America and Pakistan

6. The applicant married to L.A., Turkish citizen, on 6/3/2014 and they had a daughter on 26/6/2015.

7. The applicant applied to Directorate General of Migration Management on 22/10/2014 and requested for a residence permit and he was granted such a permit on 11/12/2014.

8. The police issued a restriction decision on the applicant as a judicial procedure was initiated about him on 5/3/2015 (Ç-114) and another restriction decision was imposed on 17/3/2015 for endangering the public security (G-87). The information and documents in the case file does not explain why such decisions were issued.

9. The applicant was taken under administrative detention on 27/6/2015 while he was accompanying his wife giving birth at a private hospital in Yalova city and he was transferred to Kocaeli Deportation Centre (KGGM).

10. Kocaeli Governorate Directorate of Migration Management (Kocaeli Migration Management) decided on 2/7/2015 for the deportation of the applicant.

11. The case filed by the applicant for the cancellation of decision for deportation issued by Kocaeli Migration Management was dismissed on 25/8/2015 by the 1st Administrative Court of Kocaeli (E.2015/853, K.2015/972)

12. This judgment was notified to the applicant on 18/9/2015 and the applicant filed individual application in due time on 16/10/2015.

13. The applicant requested for an interim measure with the additional petition that he filed to the Constitutional Court on 6/11/2015.

B. Relevant Law

14. Article 53 of Law No. 6458 on Foreigners and International Protection (dated 4/4/2013) titled "Removal decision" is as follows:

(1) A removal decision shall be issued either upon instructions of the Directorate General or *ex officio* by the governorates.

(2) The [removal] decision together with its reasons shall be notified to the foreigner, in respect of whom a removal decision has been issued or, to his/her legal representative or lawyer. If the foreigner, in respect of whom the removal decision has been issued, is not represented by a lawyer, the foreigner or his/her legal representative shall be informed about the consequence of the decision, procedures and time limits for appeal.

(3) Foreigner, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the removal regarding the appeal. Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be removed during the judicial appeal period or until after the finalization of the appeal proceedings.

15. Article 57-6 of Law no. 6458 titled "Administrative detention and duration of detention for removal purposes" is as follows:

"The person placed under administrative detention or his/her legal representative or lawyer may appeal against the detention decision to the Judge of the Criminal Court of Peace. Such an appeal shall not suspend the administrative detention. In cases where the petition is handed to the administration, it shall immediately be conveyed to the competent Judge of the Criminal Court of Peace. The Judge of the Criminal Court of Peace shall finalise the assessment within five days. The decision of the Judge of the Criminal Court of Peace shall be final. The person placed under administrative detention or his/her legal representative or lawyer may further appeal to the Judge of the Criminal Court of Peace for a review should that the administrative detention conditions no longer apply or have changed."

IV. THE COURT'S ASSESMENT AND GROUNDS

16. The application form and its annexes were examined and it was adjudged with regards to requests for interim measure as follows:

A. The applicants' allegations

17. The applicant maintained that his life would be threatened if he were to be deported to the United States of America, one of the countries that he is a national of, that his family unity would be impaired if the deportation decision was to be implemented as he would be separated from his wife and child and that his family unity is already impaired as he is still being detained at a deportation centre. The applicant alleged that that his rights guaranteed under Articles 17 and 20 of the Constitution were violated.

B. Assessment

18. In accordance with Article 49/5 of Law no 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30/3/2011 and Article 73/1 of the Rules of Procedure of the Constitutional Court titled "Interim Measure", the Sections of the Court may, *ex officio* or upon request of the applicant, decide for an interim measure until review on the merits of the case if there is a serious threat against the applicant's physical and moral integrity.

19. In the present case, the applicant maintained that his "life" would be threatened if he were to be deported to the United States of America, one of the countries that he is a national. However, he did not present any information or documents as to what type of threat to his life he would face in the country he were to be deported. The information and documents in the case file are not sufficient at this stage of the application to conclude that the applicant's "life" would be threatened if he were to be deported to the United States of America.

20. On the other hand, the applicant had been living in Turkey by means of the residence permit issued by the Migration Management together with his Turkish citizen wife and child until the date he was taken under administrative detention. It is evident that, if the applicant is deported, then the applicant would be separated from his wife and child who is dependent to him until an unforeseen date.

This situation raises a serious threat to the “spiritual integrity” of the applicant (G.B. and other [Interim Measure], App. no. 2015/15273, 17/9/2015, §§ 17-18). As a matter of fact, the ECtHR issued an interim measure in similar case and the deportation of a Georgian national living in Belgium with his wife and three children due to the crimes he committed was suspended until the conclusion of his application alleging that his right to respect for private and family life (see. *Paposhvili v. Belgium*, [G.C.], App. no:41738/10, 16/9/2015).

21. For the reasons explained, as it is understood that there is a real and serious threat against the applicant’s “spiritual integrity”, his request for interim measure must be accepted in accordance with Article 73 of the Court’s Rules of Procedure.

22. However, the applicant who is kept under administrative detention at Directorate General of Migration in Kocaeli requests for an interim measure releasing him from detention. At this stage, as it cannot be concluded from the documents and information in the case file that there is a serious threat which requires an urgent interim measure to be issued for the applicant, his request for interim measure must be rejected.

V. JUDGMENT

FOR THESE REASONS THE COURT, UNANIMOUSLY,

A. REJECTS the applicants’ request for an interim measure release his administrative detention,

B. ACCEPTS the applicants’ request for an interim measure to suspend his deportation procedures

C. SUSPENDS THE PROCEDURES FOR DEPORTATION of applicant Uthman Deya Ud Deen EBERLE until a new judgment is issued by the Court,

D. DECIDES that a copy of this judgment be notified to the applicant, Ministry of Interior Directorate General of Migration Management and Kocaeli Provincial Directorate of Police.

Done on 10 November 2015.

4) Decision on Abdolghafoor Rezaei application

SECOND SECTION

DECISION ON INTERIM MEASURE

APPLICATION OF ABDOLGHAFOOR REZAEI

(Application Number: 2015/17762)

Decision Date: 1/12/2015

SECOND SECTION

DECISION ON INTERIM MEASURE

President : Engin YILDIRIM
Judges : Alparslan ALTAN
Celal Mümtaz AKINCI
Muammer TOPAL
M. Emin KUZ
Rapporteur : M. Serhat MAHMUTOĞLU
Applicant : Abdolghafoor REZAEI (Afghanistan citizen)
Counsel : Av. Muhammed Hatip DURSUN

I. SUBJECT MATTER OF THE APPLICATION

1. The application concerns the allegations that the applicant (who is a citizen of the Afghanistan) would be subject to torture and ill-treatment and his family unity would be impaired as he would be separated from his wife and five children residing in Turkey if the decision of deportation issued for him was to be executed.
2. The applicant requests for an interim measure to ensure stay of execution of the decision for his deportation.

II. APPLICATION PROCESS

3. The application was lodged with the Constitutional Court on 18/11/2015. It was decided that the case be referred to the Section as Article 73 of the Rules of Procedure of the Constitutional Court (Rules of Procedure) requires that a request for interim measure shall be concluded by a Section of the Court.

III. THE FACTS

A. The Circumstances of the Case

4. The facts of the case, as stated in the application form and annexes thereto, may be summarized as follows:

5. The applicant, born in 1971, is a citizen of Afghanistan.

6. The applicant, together with his wife and five children, escaped his country and came to Turkey at an unidentified date.

7. The applicant requested for “international protection” from Turkey, his request was taken into registration and he was placed to Erzincan province on condition that giving signature at certain intervals.

8. Erzincan Governorate Directorate of Migration Management decided on 4/5/2015 for the deportation of the applicant on the grounds that he violated his obligation to give signature imposed on him.

9. The case filed by the applicant for the cancellation of decision for deportation was dismissed on 9/10/2015 by the 1st Administrative Court of Sivas (E.2015/608, K.2015/1568).

10. This judgment was notified to the applicant on 2/11/2015 and the applicant filed individual application in due time on 18/11/2015.

B. Relevant Law

11. Article 53 of Law No. 6458 on Foreigners and International Protection (dated 4/4/2013) titled “Removal decision” is as follows :

(1) A removal decision shall be issued either upon instructions of the Directorate General or ex officio by the governorates.

(2) The [removal] decision together with its reasons shall be notified to the foreigner, in respect of whom a removal decision has been issued or, to his/her legal representative or lawyer. If the foreigner, in respect of whom the removal decision has been issued, is not represented by a lawyer, the foreigner or his/her legal representative shall be informed about the consequence of the decision, procedures and time limits for appeal.

(3) Foreigner, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the removal regarding the appeal. Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be removed during the judicial appeal period or until after the finalization of the appeal proceedings.

IV. THE COURT'S ASSESMENT AND GROUNDS

12. The application form and its annexes were examined and it was adjudged with regards to requests for interim measure as follows:

A. The applicant's allegations

13. The applicant maintained that he lived under the threat of Taliban in his country, that he had to escape from his country as he did not have security of life and property, that he would have to be separated from his wife and five children residing in Turkey who are dependent on him if he were to be deported. The applicant alleged that that his rights guaranteed under Articles 17 and 19 of the Constitution were violated.

B. Assessment

14. In accordance with Article 49/5 of Law no 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30/3/2011 and Article 73/1 of the Rules of Procedure of the Constitutional Court titled "Interim Measure", the Sections of the Court may, ex officio or upon request of the applicant, decide for an interim measure until review on the merits of the case if there is a serious threat against the applicant's physical and moral integrity.

15. In the present case, the applicant maintained that his "life" would be threatened if he were to be deported to his country. The human rights reports on Afghanistan prepared separately by Human Rights Watch and UN High Commissioner for Refugees state that many people share the security concerns as alleged by applicant. It is seen

that the administrative court did not conduct a research or examination on the applicant's allegations.

16. On the other hand, it is evident that, if the applicant is deported, then the applicant would be separated from his wife and five children and that he his family unity would be impaired until an unforeseen date. This situation raises a serious threat to the "spiritual integrity" of the applicant (G.B. and other [Interim Measure], App. no: 2015/15273, 17/9/2015, §§ 17-18).

17. As it is understood that the applicant may face a threat against his "life and physical and spiritual integrity" if he were to be deported at this stage, his request for interim measure must be accepted.

V. JUDGMENT

FOR THESE REASONS THE COURT, UNANIMOUSLY,

- A. ACCEPTS the applicants' request for an interim measure,
- B. SUSPENDS THE PROCEDURES FOR DEPORTATION of Abdolgha-foor Rezaei back to his country until a new judgment is issued by the Court,
- C. DECIDES that a copy of this judgment be notified to the applicant and Directorate General of Migration Management.

Done on 01 December 2015.

5) Decision on Azizjon Hikmatov application

SECOND SECTION
DECISION ON INTERIM MEASURE

APPLICATION OF AZIZJON HIKMATOV
(Application Number: 2015/18582)
Decision Date: 15/12/2015

SECOND SECTION
DECISION ON INTERIM MEASURE

President : Engin YILDIRIM
Judges : Alparslan ALTAN
Celal Mümtaz AKINCI
Muammer TOPAL
M. Emin KUJZ
Rapporteur : M. Serhat MAHMUTOĞLU
Applicant : Azizjon HİKMATOV (Uzbekistan citizen)
Counsel : Atty. Uğur YILDIRIM

I. SUBJECT MATTER OF THE APPLICATION

1. The application concerns the allegations that the applicant (who is a citizen of the Uzbekistan) would be subject to torture and ill-treatment and his right to life would be violated if the decision of deportation issued for him was to be executed.
2. The applicant requests for an interim measure to ensure stay of execution of the decision for his deportation.

II. APPLICATION PROCESS

3. The application was lodged with the Constitutional Court on 4/12/2015. It was decided that the case be referred to the Section as Article 73 of the Rules of Procedure of the Constitutional Court (Rules of Procedure) requires that a request for interim measure shall be concluded by a Section of the Court.

III. THE FACTS

A. The Circumstances of the Case

4. The facts of the case, as stated in the application form and annexes thereto, may be summarized as follows:
5. The applicant, born in 1984, is a citizen of the Republic of Uzbekistan
6. The applicant came to Turkey through legal means in 2009 and requested for an “international protection”. He stated that he has

become a target in his country as he was engaged in political opposition youth movements and that he had to leave his country.

7. On the other hand, the applicant's application to United Nations High Commissioner for Refugees (UNHCR) for refugee status was approved on 30/6/2010 and the procedure for his placement to a secure third country is still continuing.

8. The applicant was caught on 5/3/2015 in a vehicle trying to pass to Syria through Kilis province; he was taken under administrative detention and transferred to Batman on the grounds that he created a threat for public order and security.

9. Batman Governorate Directorate of Migration Management decided on 14/5/2015 for the deportation of the applicant on the said grounds.

10. The case filed by the applicant for the cancellation of decision for deportation issued by Batman Migration Management was dismissed on 14/11/2015 by the Administrative Court of Batman (E.2015/1142, K.2015/2394)

11. This judgment was notified to the applicant on 4/12/2015 and the applicant filed individual application on the same day.

12. Before deciding on the request for interim measure, the Constitutional Court requested the information and documents relating to the applicant's deportation from the Directorate General of Migration Management (Migration Management)

13. Migration Management, in their letter dated 7/12/2015, stated that they enter data in the form of security restriction codes for the foreigner who are considered to create a serious threat for public security and that the applicant was registered with G-87 restriction code for the purposes of "preventing the foreigners from entering Turkey or using Turkey's geopolitical location as a route to armed conflict zones and fighting against international terrorism."

14. The said letter of Migration Management also stated that the applicant would not be deported until the Constitutional Court decides on the applicant's request for interim measure. Article 53 of Law no. 6458 on Foreigners and International Protection (dated 4/4/2013) titled "Removal decision" is as follows :

(1) A removal decision shall be issued either upon instructions of the Directorate General or *ex officio* by the governorates.

(2) The [removal] decision together with its reasons shall be notified to the foreigner, in respect of whom a removal decision has been issued or, to his/her legal representative or lawyer. If the foreigner, in respect of whom the removal decision has been issued, is not represented by a lawyer, the foreigner or his/her legal representative shall be informed about the consequence of the decision, procedures and time limits for appeal.

(3) Foreigner, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court shall also inform the authority that has ordered the removal regarding the appeal. Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be removed during the judicial appeal period or until after the finalization of the appeal proceedings.

IV. THE COURT'S ASSESSMENT AND GROUNDS

15. The application form and its annexes were examined and it was adjudged with regards to requests for interim measure as follows:

A. The applicant's allegations

16. The applicant maintained that there are systematic human rights violations in his country, that he may be subject to torture and ill-treatment due to his religious beliefs and political opinion, that he would face death threat when he is delivered to his country's authorities as he is being deported on "terror" grounds and that his submissions were not taken into consideration by the administrative court during the trial procedures. The applicant alleged that his rights defined under Article 17 and 36 of the Constitution were violated.

B. Assessment

17. In accordance with Article 49/5 of Law no 6216 on the Establishment and Rules of Procedure of the Constitutional Court dated 30/3/2011 and Article 73/1 of the Rules of Procedure of the

Constitutional Court titled “Interim Measure”, the Sections of the Court may, *ex officio* or upon request of the applicant, decide for an interim measure until review on the merits of the case if there is a serious threat against the applicant’s physical and moral integrity.

18. In the present case, the applicant maintained that there are systematic human rights violations in his country and that his life would be endangered if he were to be deported as he is an opponent of the government in his country. The Human Rights Report of 2014/15 for Uzbekistan prepared by Amnesty International states that the persons deported by the foreign countries are under a “real threat of torture and ill-treatment”. The Human Rights Report on Uzbekistan for 2015 prepared by Human Rights Watch states in details that thousands of activists opposing the government have been arrested and some of them have been sentenced to imprisonment.

19. On the other hand, it is seen that the administrative court did not conduct a research or examination on the applicant’s allegations. Besides, the UNHCR approved the applicant’s request for refugee status and decided for his placement to a secure third country. If the applicant is deported to his country, he may not only be subject to ill-treatment in his country but may lose the right he acquired before the UNHCR to be placed in a secure third country as well.

20. For the reasons explained, as it is understood that the applicant would possibly face a serious threat against his “physical and spiritual integrity” if he were to be deported at this stage, his request for interim measure must be accepted.

V. JUDGMENT

FOR THESE REASONS THE COURT, UNANIMOUSLY,

- A. ACCEPTS the applicant’s request for an interim measure,
- B. SUSPENDS THE PROCEDURES FOR DEPORTATION of Azizjon Hikmatov back to his country until a new judgment is issued by the Court,
- C. DECIDES that a copy of this judgment be notified to the applicant and Directorate General of Migration Management.



La migration et le statut juridique des étrangers dans la République de Moldova

Rodica SECRIERU
Secrétaire général,
Cour Constitutionnelle,
République de Moldova

La migration est une composante essentielle des processus de développement. Les différentes formes de ce phénomène sont liées aux changements économiques, à la structure sociale et à la qualité de vie. Dans certaines conditions et sous certains aspects la migration est une réaction à ces changements; à son tour, cette réaction peut avoir des effets sur la vie économique, la qualité de la vie et la structure sociale.

Dans la République de Moldova le phénomène de la migration est ressenti plus particulièrement sous la forme de l'émigration (le départ des citoyens du pays d'origine), lorsque la population choisit, le plus fréquemment, le départ vers les états de l'Union européenne, mais aussi les Etats Unis, le Canada, etc. Compte tenu de l'importance de ce phénomène pour la République de Moldova, ainsi que pour l'UE, le domaine de la migration, de l'asile et de la gestion des frontières a été inscrit, à partir du 27 juin 2014, dans l'Accord d'Association entre la République de Moldova et l'Union Européenne qui a été ratifié par la Loi no.112 du 2 juillet 2014.

En vertu de l'article 14 dudit Accord les Parties réitèrent l'importance d'une gestion commune des flux migratoires entre leurs territoires et, actuellement, sont en train d'approfondir un dialogue étendu sur tous les aspects de la migration, y compris la migration légale, la protection internationale, la migration illégale, le trafic des migrants et la traite d'êtres humains.

Les 28 états membres de l'Union européenne ont déjà ratifié l'Accord qui va prochainement entrer en vigueur, mais il est à souligner que la République de Moldova a développé et poursuit ses efforts afin de garantir les droits et les libertés fondamentales des personnes qui rejoignent notre territoire, quel que soient les raisons qui les ont déterminées à choisir la migration comme voie pour un meilleur avenir.

Les libertés individuelles (l'inviolabilité de la personne, l'intégrité physique, la liberté de conscience, le droit à l'opinion, la liberté de religion, le droit à la vie, le droit d'association, la liberté de circulation, la détermination du domicile, l'égalité devant la loi), les droits et les libertés économiques (la garantie de la propriété et le droit d'héritage, le choix de la profession, le déroulement de l'activité d'entrepreneur), les droits et les libertés socio-politiques (la liberté d'expression d'opinion, le droit à l'information, la liberté de conscience, le droit à l'information, la liberté de la presse, le droit de pétition, le secret de la correspondance) sont garanties dans la République de Moldova aux citoyens étrangers et aux apatrides.

Indépendamment de leur race, origine ethnique, langue, religion, sexe, opinion, appartenance politique, patrimoine ou origine sociale les citoyens étrangers et les apatrides sont égaux devant la loi et devant les autorités publiques. Leur statut juridique est établi par la législation en vigueur et les accords internationaux auxquels la République de Moldova est partie et ils bénéficient, par conséquent, des tous les droits et les libertés sans que ce fait porte atteinte aux intérêts de l'Etat ou aux droits et intérêts légitimes des citoyens de la République de Moldova et d'autres personnes.

Les standards internationaux

L'assistance offerte aux citoyens étrangers et aux apatrides repose sur la protection internationale et se limite, principalement, aux procédures juridiques et administratives, à la délivrance des passeports et d'autres

documents; elle suppose la prise de décisions qui facilitent l'accès des étrangers et des apatrides à certains services juridiques et sociaux.

Parmi l'ensemble des standards internationaux et régionaux faisant référence à cette catégorie de personnes on peut noter:

- la Déclaration Universelle des Droits de l'Homme (1948);
- le Pacte international sur les droits économiques, sociaux et culturels (1966);
- le Pacte international relatif aux droits civils et politiques (1966);
- la Convention européenne pour la protection des droits de l'homme et des libertés fondamentales (1950); le Protocole additionnel no. 4 CEDH (1963); le Protocole no. 7 CEDH (1984);
- la Convention européenne relative au statut juridique du travailleur migrant (24.11.1977)
- la Convention sur le statut des réfugiés de 1951 et son Protocole de 1967 etc.

Le cadre juridique national assure le respect des droits et des intérêts des citoyens étrangers et des apatrides, tout en créant des mécanismes de promotion, de protection et de garantie de leur exercice. Les rapports juridiques dans le domaine de la protection des citoyens étrangers et des apatrides sont réglementés par la Loi fondamentale de l'Etat, la Constitution de la République de Moldova, ainsi que par les actes juridiques élaborés conformément aux standards internationaux auxquels la République de Moldova est partie, parmi lesquels:

- la loi relative au régime des étrangers en République de Moldova no. 200 du 16 juillet 2010, qui prévoit les conditions générales d'entrée / sortie des citoyens étrangers, l'octroi du droit de séjour provisoire /permanent, la documentation et l'évidence des étrangers, leur accès à l'enseignement et le rapatriement dans le pays d'origine, les autorités en charge de ce domaine;
- la Loi relative au statut juridique des citoyens étrangers et des apatrides de la République de Moldova no. 275-XIII du 10 novembre 1994, qui reconnaît les principaux droits, obligations et restrictions des citoyens étrangers et apatrides;

- la Loi sur la migration de la main-d'œuvre no. 180 du 10 juillet 2008, qui prévoit les principes directeurs relatifs à l'immigration d'emploi pour les étrangers et les citoyens de la République de Moldova en /de la République de Moldova, les autorités en charge du domaine, la modalité d'octroi des permis de travail;
- la Loi relative à la citoyenneté de la République de Moldova no. 1024 du 02 juin 2000, qui prévoit les conditions d'acquisition / perte de citoyenneté de la République de Moldova.

En vertu de l'article 19 de la Constitution de la République de Moldova et de l'article 5 de la Loi relative au statut juridique des citoyens étrangers et des apatrides en République de Moldova, les citoyens étrangers et les apatrides ont les mêmes droits, libertés et obligations que les citoyens de la République de Moldova, avec les exceptions établies par la loi qui précise le statut du propre citoyen.

Ainsi, dans la République de Moldova le régime national est appliqué aux citoyens étrangers et aux apatrides, et une série de droits et libertés individuelles leur sont octroyées, parmi lesquels:

- le droit d'entrée, de circulation et au domicile dans le pays, en base des actes d'identité valables, d'un visa d'entrée et l'octroi du droit de séjour provisoire ou permanent;
- le droit à l'emploi et à sa protection;
- le droit au repos et à la protection de la santé;
- le droit de toucher une pension, des indemnités et d'autres types d'assurances sociales;
- le droit au logement;
- le droit aux études;
- le droit de se marier et de se désengager de mariage avec les citoyens de la République de Moldova, ou autres personnes, avec les mêmes obligations dans les relations de famille que les citoyens de la République de Moldova;
- le droit à la satisfaction effective de la part des instances judiciaires compétences, des autorités publiques à l'encontre des actes qui portent atteinte aux droits, libertés et intérêts légitimes;
- le droit de demander la protection de la mission diplomatique de leur Etat.

En même temps, la législation institue certaines restrictions pour les citoyens étrangers et les apatrides, et notamment en ce qui concerne:

- le droit d'élire et d'être élu dans les organes législatifs, exécutifs et autres organes éligibles, de participer au suffrage universel;
- la désignation dans des fonctions et l'engagement dans des activités pour lesquelles la citoyenneté de la République de Moldova est nécessaire;
- la qualité de membre de parti ou d'autres organisations socio-politiques;
- l'organisation des partis politiques, d'autres groupements similaires et la qualité de membre de celles-ci, ainsi que leur financement;
- le service militaire dans l'armée de la République de Moldova;
- l'exercice d'une activité sans permis de travail;
- l'achat des terrains à destination agricole.

En même temps, les citoyens étrangers et les apatrides, tout comme les citoyens de la République de Moldova, ont certaines obligations fondamentales: obligations à assumer dans la vie sociale et qui sont déterminées par les objectifs sociaux dont la valeur est renforcée par leur confirmation juridique. Les obligations fondamentales prévues par la Loi fondamentale s'organisent autour de deux catégories et visent les citoyens de la République de Moldova, ainsi que les citoyens étrangers et les apatrides:

- a. les obligations fondamentales à l'égard de l'Etat, qui réunissent: la dévotion au pays, le respect de la Constitution et d'autres lois, la contribution aux dépenses publiques par le paiement des taxes et impôts;
- b. les obligations fondamentales visant à garantir la vie paisible des citoyens et d'autres personnes qui se trouvent sur le territoire du pays et notamment: le respect des droits, des intérêts légitimes et de la dignité des citoyens, l'exercice de bonne foi des droits et des libertés constitutionnelles, l'obligation de la protection de l'environnement et la préservation des monuments historiques et culturels.

En plus, pour les citoyens étrangers et les apatrides la loi prévoit des obligations spécifiques, telles que:

- le respect de la procédure d'entrée sur le territoire de la République de Moldova conformément aux dispositions légales et, par conséquent, la légalisation visant le séjour;
- l'éloignement du territoire de la République de Moldova à l'expiration du délai de séjour fixé;
- le paiement d'impôts, droits ou autres sur les mêmes bases que les citoyens de la République de Moldova;
- la réalisation de l'examen médical pour le dépistage du VIH/ SIDA et d'autres maladies pouvant présenter un danger pour la santé publique.

En vertu de la législation en vigueur, les citoyens étrangers et les apatrides sont susceptibles de responsabilité administrative et pénale pour la transgression des dispositions légales, et leur séjour sur le territoire de la République de Moldova peut être réduit. Dans ces conditions ils risquent l'expulsion de la République de Moldova, si:

- l'entrée et le séjour ne sont pas effectués conformément à la législation en vigueur;
- la présence sur le territoire porte préjudice à la sécurité nationale, à l'ordre, à la santé ou à la morale publique.

En même temps, les citoyens étrangers peuvent être extradés uniquement en base d'une convention internationale dans des conditions de mutualité en vertu d'un jugement rendu par une instance judiciaire. L'expulsion des citoyens étrangers et des apatrides se fait par les organes du Ministère de l'intérieur en vertu d'un jugement rendu par une instance judiciaire. Les frais d'expulsion sont à la charge des personnes expulsées, des personnes physiques ou morales qui les ont invitées dans la République de Moldova, ainsi qu'à la charge des sociétés d'assurances. Les autorités en charge peuvent demander que l'expulsion soit prise en charge par le budget public.

Les citoyens étrangers et les apatrides ne peuvent pas être expulsés vers le pays où il y a des preuves qu'ils pourraient être poursuivis pour des raisons d'appartenance à une race, à une nation, à une religion, pour leurs convictions politiques ou ils pourraient encourir des traitements inhumains et dégradants, des tortures ou la peine capitale.

Quelques données statistiques relatives à la situation sur les immigrants dans République de Moldova au courant des années 2013-2014:

Total migrants – 3 349 (en 2013) et 4 187 (en 2014), dont:
 pour emploi – 1062 (en 2013) et 1359 (en 2014),
 aux études – 708 (en 2013) et 928 (en 2014)
 regroupement familial – 1073 (en 2013) et 1242 (en 2014)

Si l'on fait un classement des pays de provenance des immigrants de République de Moldova, les données se présentent comme suit:

2013					
	Pays	Total	Emploi	Études	Immigration de famille
1	Roumanie	600	303	16	16
2	Israël	463	12	442	8
3	Turquie	445	267	79	79
4	Ukraine	394	54	37	278
5	Russie	335	54	12	241

2014					
	Pays	Total	Emploi	Études	Immigration de famille
1	Roumanie	852	544	36	161
2	Ukraine	534	93	38	362
3	Israël	525	9	506	8
4	Russie	516	53	9	336
5	Turquie	421	231	120	68

La Cour constitutionnelle a précisé dans son arrêt que selon les traités internationaux qui réglementent le statut des étrangers et des apatrides, auxquels la République de Moldova a adhéré, mais également en vertu de l'article 54 de la Constitution de la République de Moldova (La restriction de l'exercice de certains droits et libertés), l'exercice du droit aux rassemblements, manifestations, processions et autres réunions ne peut être soumis qu'aux restrictions conformes à la loi et nécessaires dans une société démocratique pour protéger la sécurité nationale, l'ordre, la santé ou la morale publique, les droits et les libertés des citoyens, l'instruction pénale, la prévention des conséquences d'une catastrophe ou d'une avarie. La Cour a précisé que l'interdiction imposée aux citoyens étrangers et aux apatrides de participer activement aux réunions était contraire aux dispositions des articles 19, 40 et 54 de la Constitution et des actes internationaux auxquels la République de Moldova est partie et qui ne prévoient pas de restrictions pour l'exercice du droit de réunion en vertu du statut juridique (étrangers, apatrides) et du domicile de la personne.

La Cour a souligné que la Loi qui régit le statut juridique des citoyens étrangers et des apatrides de République de Moldova ne prévoit pas de telles restrictions. Les dispositions de l'article 16 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales consentent la restriction des droits des étrangers, mais cette restriction concerne uniquement l'activité politique des citoyens étrangers. Toutefois, la Cour a noté que les dispositions de l'article 16 de ladite Convention n'ont pas un caractère impératif.

La Cour a été également saisie au sujet du droit d'accès à la justice des citoyens étrangers demandeurs d'asile. Plus précisément, a été contestée la procédure de demande d'asile, comme étant contraire aux dispositions de la Constitution qui prévoient que la justice est faite exclusivement par les juges.

La Cour a examiné la saisine et a statué que le droit de demande d'asile, comme droit fondamental de l'homme, est consacré dans les actes internationaux comme la Déclaration Universelle des Droits de l'Homme, qui dans l'article 14 stipule que toute personne a le droit de demander et de bénéficier d'asile dans un autre pays, ainsi que dans la législation nationale et plus précisément dans l'article 19 alinéa (3) de la Constitution qui prévoit expressément que le droit d'asile est accordé et retiré dans les conditions de la loi, tout en respectant les traités internationaux auxquels la République de Moldova est partie.

La Cour a retenu que la Convention ne prévoit pas des procédures relatives à l'octroi du statut de réfugié, elle laisse aux Etats contractants le choix de la procédure la plus équitable et efficace. A ces fins le législateur doit tenir compte des dispositions constitutionnelles relatives au droit de demande d'asile, d'autres dispositions visant les droits et les libertés fondamentales, des actes internationaux en la matière et doit instituer, par la loi, un mécanisme équitable et efficace d'exercice du droit d'asile.

Par la Loi no.1286-XV du 25 juillet 2002 relative au statut des réfugiés, le Département migration a été désigné en tant qu'autorité compétente de solutionner les questions relatives à l'asile, autorité relevant de l'exécutif dont le directeur était habilité à octroyer, retirer et annuler le statut de réfugié. Le Conseil pour les Réfugiés, créé par ordonnance du directeur du Département migration, réunissant les représentants de l'exécutif et au moins un représentant de la société civile, examinait en appel les plaintes portées contre le refus d'octroyer le statut de réfugié émis par le Département migration. Ultérieurement, la décision du Conseil était susceptible de recours à la Cour d'Appel qui se prononçait sur la légalité de la décision du Conseil pour les Réfugiés.

La Cour Constitutionnelle a constaté qu'en utilisant les notions « appel » et « recours » pour les procédures devant le Conseil pour les réfugiés, tout en tenant compte du fait que le recours devant la Cour d'Appel était la dernière voie de recours dans ces rapports juridiques, le législateur a attribué, en fait, à une autorité publique, le Conseil pour les Réfugiés, les fonctions d'une instance judiciaire (tribunal) et a créé, de la sorte, un mécanisme qui n'est pas prévu par la Constitution.

En vertu des articles 114 et 115 de la Constitution, la justice se réalise au nom de la loi exclusivement par les instances judiciaires, les Cours d'Appel et la Cour suprême de justice, et les voies de recours « l'appel » et « le recours » ne sont envisagées qu'à l'encontre des arrêts judiciaires, et non contre les décisions d'un organe administratif. En ce sens, la Cour a conclu que le mécanisme contesté et établi dans la législation constituait une limitation du libre accès à la justice des étrangers et des apatrides.

MTIC's refusal to submit to the President the applications for acquiring citizenship is unconstitutional

On 30 October 2012 the Constitutional Court passed the judgment on examination of the exception of unconstitutionality of Article 28.a of the Law on Citizenship of the Republic of Moldova (Complaint no. 16g/2012).

Circumstances of the case

The case originated in the complaint lodged with the Constitutional Court on 28 June 2012 by the Supreme Court of Justice on exception of unconstitutionality of Article 28.a of the Law on Citizenship of the Republic of Moldova raised in the file no. 3-4413/11 which is pending in the Court of Appeal.

The case pending in the Court of Appeal concerns the refusal of the Ministry of Information and Communications Technology (hereinafter - MTIC) to submit to the President of the Republic of Moldova the application for acquiring citizenship of Mr. ASLI Mohammed Hadi Mihiddin.

Drawing on the case materials, it results that although the application for acquiring citizenship was addressed to the President of the country, the applicant received a response from the S.E. CRIS "Registru" and MTIC, without that being sent to the presidential institution.

On 31 October 2011, the applicant sued MITC and S.E. CRIS "Register", asking the Court of Appeal Chişinău to recognize their illegal acts and to compel them to forward his application for acquiring citizenship to the Commission on Citizenship and Political Asylum issues by the President of the Republic of Moldova for examination on its substance, so as to receive the answer to his request from the President of the Republic of Moldova.

According to the Supreme Court of Justice, Article 28.a of the Law on Citizenship, which stipulates the competences of the Ministry of Information and Communications Technology with regard to the procedures of acquiring citizenship, shall be applied for settlement of the main lawsuit.

In this context, the author alleged, in particular, that legal rules to be applied for the settlement of the lawsuit contradict the provisions of Article 88.c of the Constitution, according to which the President of the Republic of Moldova is the one who solves citizenship issues of the Republic Moldova and grants political asylum.

Conclusions of the Court

Having heard the parties' arguments, the Court held that the challenged rule according to which in case of meeting all the conditions laid down by the legislation in force, MTIC shall issue a reasoned opinion and along with the opinions of the Ministry of Interior, Information and Security Service and the applicant's request, sends the applicant's request for citizenship to the President of the Republic of Moldova for consideration, empowers MTIC with decision-making competencies related to the request for acquiring citizenship.

The Court held that out of the contents of Article 88 of the Constitution results the duty of the President on settlement of citizenship issues presumes consideration of all matters related to citizenship, from application through to issuing of the final solution which may be both positive either negative.

In this context, the Court concluded that under constitutional norms, the President of the Republic of Moldova is the sole authority that may issue final solutions for each stage of procedure with regard to acquiring of citizenship.

Any other authority, as is the case of MTIC, can only be empowered by law than with purely technical tasks and not of decision-making character, as is it the right to retain the application for granting citizenship without submitting it for consideration to the presidential institution.

The Court noted that divergences arisen in the contentious procedure for granting of citizenship is due to certain gaps and inaccuracies in the concerned normative acts, adopted by the Parliament and the Government, the reason why it has formulated an address.

For these reasons, the Court concluded that the contested norm infringes the provisions of Articles 88.c and 23 of the Constitution.

The Court also ascertained that although the Court of Appeal asked the Supreme Court of Justice to appeal the Constitutional Court on several provisions of the Law on Citizenship of the Republic of Moldova, the Plenum of the Supreme Court of Justice approved the complaint merely with regard to the provision of Article 28.a. The Court held that in this way there had occurred a restraint of the object of exception of unconstitutionality on the part of the Supreme Court of Justice, the reason why it signaled that aspect in the address attached to Court's judgment, as well.

Based on the above arguments, the Constitutional Court accepted the exception of unconstitutionality raised by the Supreme Court of Justice and declared unconstitutional the phrase "In case of meeting all the conditions laid down by the legislation in force, the ministry and its bodies shall issue a reasoned opinion" contained in Article 28.a of the Law on Citizenship.

Recognition of Moldovan citizenship by ICT Ministry - Constitutional

On 6 October 2015, the Constitutional Court ruled on the constitutionality of Article 28.b of Law on citizenship of the Republic of Moldova no. 1024 of 2 June 2000 (Complaint no. 10/2015).

Circumstances of the case

The case originated in the complaint lodged with the Constitutional Court on 31 March 2015 by MPs Ion Casian and Valeriu Munteanu.

According to Article 28.b of Law on citizenship of the Republic of Moldova, the Ministry of Information and Communication Technology (ICT Ministry) "examines applications for acquisition of citizenship by recognition, and takes the decision to recognize or refuse citizenship. In case of persons who hold the citizenship of another country, a decision shall be taken in line with the well-reasoned Note of the Information and Security Service."

The authors claimed that the duties of ICT Ministry infringe upon the competence of the President of the Republic of Moldova "to settle the issues on the citizenship" provided by Article 88.c of the Constitution.

Conclusions of the Court

Hearing the reasoning of the parties and examining the case files, the Court held that under Article 17.1 of the Constitution, the citizenship of the Republic of Moldova can be acquired, maintained or withdrawn only under the conditions provided for by organic law.

Also, Article 88.c of the Constitution provides that the President of the Republic of Moldova “settles the issues on the citizenship of the Republic of Moldova.”

The Court held that this competence of the President of Moldova does not suppose any exclusive duties that would cover the entire spectrum of citizenship procedures.

Given the nature and status of the office of President of the Republic, his competences on citizenship refer to issues involving the sovereign and discretionary right of the State to grant citizenship, such as naturalization and recovery, in cases where citizenship is granted by Presidential decree.

Under Article 10 of Law on citizenship, apart from naturalization and recovery (competences of the President of the Republic of Moldova), citizenship is acquired by birth, recognition and adoption. In these three cases, the citizenship of the Republic of Moldova is only confirmed, based on documents and simplified administrative procedures, with no need for a Presidential decree to be issued in this regard.

The Court noted that the essence of the institution of citizenship recognition is that the State can restore the citizenship of those who had the vocation to possess it due to political and legal circumstances or have lost it as a result of specific historical events (state border changes, deportations, etc.).

Article 12 of Law on citizenship provides that there shall be recognized as citizens of the Republic of Moldova individuals who have expressed their wish to become citizens of the Republic of Moldova, as follows:

a) those born on the territory of Republic of Moldova or those who have at least one of their grand/parents born on the above-mentioned territory;

b) those who before 28 June 1940 resided in Basarabia, North Bucovina, Hertza Region, and the M.A.S.S.R. (Moldovan Autonomous Soviet Socialist Republic encompassing the breakaway region of Transnistria and a number of territories that are now part of Ukraine), their descendants,

c) those who have been deported or those who have fled the Republic of Moldova, since 28 June 1940, and the descendants thereof;

d) those who on 23 June 1990 were residing and keep reside, lawful and habitual in the Republic of Moldova.

In light of the above reasons, the Court concluded that, in this specific case, the ICT Ministry only determines a fact based on supporting documents, with no discretion to grant or deny citizenship if all the conditions provided by law are met, and therefore does not infringe the competences of the President of the Republic of Moldova on citizenship, provided for by Article 88.c of the Constitution.

Stemming from the above reasoning, the Constitutional Court rejected the complaint and declared constitutional Article 28.b of Law no. 1024 of 2 June 2000 on citizenship of the Republic of Moldova.



Migration, citizenship and legal status of aliens in Portugal

Manuela BAPTISTA LOPES, Secretary General, Constitutional Court of Portugal

Intrductory note

Although it began around two years earlier, the current refugee/migrant crisis reached a breaking point in 2015, causing clear and present problems in terms of the immediate issues linked to providing the refugees with a place to live in the European countries that take them in, but also generating reflection and public debates about the future of this particular immigration in the host countries – a discussion predicated on the assumption that a return to the countries of origin will not be easy or immediate, and will not encompass a substantial part of the universe of displaced persons. All these doubts and debates are also being echoed to some extent in legal reflections on these people's human/fundamental rights, and on how the law should treat the questions that are arising out of this situation.

Portugal – the country at the western tip of Europe, currently (perhaps) coming out of a very recent economic and financial crisis, and subject to European Union deficit-reduction procedures – is not an attractive country for these migrants, and this is reflected in the numbers. Portugal is offering

to take more than its quota of refugees under the European agreement¹, but very few are interested. It is said that the reason for this lack of interest is that the refugees prefer rich countries without employment problems, and it is clear that Portugal is not a member of the rich nations' club and does have serious unemployment issues². It is thus natural that these circumstances, which are common knowledge internationally, are putting off, or at least not favouring a positive decision by, people who not only want to escape deplorable living conditions, but would also like their fresh start to happen in the best possible way.

Portugal has traditionally been a country of emigration. The "International Migration Report 2015 – Highlights (Advance copy)"³ cites Portugal as among the twenty countries or areas of origin with the largest diasporas, and the Portuguese Emigration Observatory's (OE)⁴ 2015 Statistical Report on Portuguese Emigration⁵ says that: "Portugal is currently the European Union country with the highest ratio of emigrants to the resident population. More than two million Portuguese are emigrants, which means that more than 20% of all Portuguese live outside their country of birth". The Portuguese represent large immigrant contingents in various countries in and outside Europe. One example is Luxembourg, which is a country with a lot of immigration and where in 2011, persons born in Portugal represented 30% of all immigrants and 12% of the country's entire population.⁶

1 During a visit to the Eleonas refugee camp in Greece on 11.04.2016, the Portuguese Prime Minister said that this country is willing to take 9,000 refugees, with 1,250 places available straight away. However, so far Portugal is thought to have only actually received 149 persons seeking international protection, who were reallocated here from Greece and Italy (data from the Refugee Support Platform [PAR] – www.refugiados.pt/ – with reference to 12.04.16. PAR is a network of Portuguese civil-society organisations that is seeking to complement state support for refugees).

2 According to data from Statistics Portugal (INE), in Q1 2016 the overall unemployment rate was 12.4%, with youth (age 15-24) unemployment at 31.0%.

3 ST/ESA/SER.A/375, United Nations Department of Economic and Social Affairs, New York, 2016.

4 An entity created on the basis of a protocol between the Directorate-General of Consular Affairs and the Portuguese Communities (DGACCP) and the Centre for Research and Studies in Sociology (CIES/ISCTE) at ISCTE – Lisbon University Institute (ISCTE-IUL). Its main goals are to produce information about Portuguese emigration and contribute to the definition of public policies in this field. See <http://observatorioemigracao.pt/np4/observatorio.html>. Last accessed on 27/05/2016.

5 *Relatório Estatístico de 2015 sobre a Emigração Portuguesa*, available in Portuguese on the Emigration Observatory's website: http://observatorioemigracao.pt/np4/?newsId=4447&fileName=OEm_EmigracaoPortuguesa_RelatorioEstatist.pdf.

6 2015 Statistical Report, as above.

We can see that the emigratory peaks in Portugal's recent history⁷ first occurred in the 1960's, and then from 2010 onwards. The profiles of the emigrants differ quite considerably between these two periods, and the second emigratory wave has attained much more substantial numbers than its predecessor. Whereas the first wave was characterised by economic emigrants with low or very low levels of qualification, the second, which has been generated by the economic and financial crisis in the Eurozone, was (and still is) characterised by people with high or even very high levels of academic achievement. In terms of numbers, the second wave has been more than double the size of the first. According to figures from PORDATA,⁸ 32,318 individuals left the country to live abroad in 1960, whereas the figure for 2014 was 134,624.⁹

However, while Portugal has been and continues to be a country of emigration, these days its migratory profile is a mixed one, in that it currently also displays some of the features of a country of immigration. In the recent past there have been successive immigratory waves, starting with that of the "returnees"^{10 11}, in the 1970's, and then that of people from the Eastern

7 Strictly speaking, Portugal has been a country of emigrants since the 15th century, when the Discoveries began and Portuguese then started settling in the territories they discovered (in European terms).

8 PORBASE: Database on Contemporary Portugal, organised and developed by the Francisco Manuel dos Santos Foundation, accessible at www.pordata.pt/Home. Many official entities, including Statistics Portugal (INE), work with PORDATA.

9 www.pordata.pt/Portugal/Emigrantes+total+e+por+tipo-21. Last accessed on 24/05/2015.

10 The "returnees" were Portuguese who settled in Portugal after the decolonisation of the country's overseas territories, following the Revolution on 25 April 1974. Their number is uncertain, varying between five hundred thousand and a million depending on the source. Some of them didn't actually "return", in the sense that they were born in the colonies and their strongest ties were to those territories. However, the fact that many of them had family in Portugal on whom they were able to rely for support made their reintegration process much easier. See Carolina Peixoto, "*Por uma perspectiva histórica pós-colonial, um estudo de caso: A descolonização de Angola e o retorno dos nacionais*". Accessible at www.cd25a.uc.pt/media/pdf/Biblioteca%20digital/Artigos/APP_Cx23_30_Por%20uma%20perspectiva%20historica%20pos-colonial_Carolina%20Peixoto.pdf Last accessed on 25/05/2016.

11 In a country that then numbered less than 9 million inhabitants, the arrival of the returnees represented a population increase of around 10%. See J. Manuel Nazareth, "*Conjuntura demográfica da população portuguesa no período de 1970-80: aspectos globais*" in *Análise Social*, vol. xx (81-82), 1984 nos.2-3.

European countries in the 1980's and '90's (in the wake of the collapse of the Soviet bloc). Brazilian and Chinese immigration has also increased.¹²

Having said this, the appearance of the Eurozone crisis led many immigrants to return to their countries of origin, or move on to others they thought could offer them a better future. This was especially true of Brazilians and Ukrainians, although the political situation in both those countries is now causing some of them to come back to Portugal.

Despite the country's economic and financial situation within the global context, both before and after the Eurozone crisis Portugal has always been a good host to its immigrants. Even though we should remember that a substantial proportion of immigrants come from Portuguese-speaking countries,¹³ which decisively facilitates their immigration, and also that this country benefits from the fact that the relatively modest number of immigrants does not put our social structures under as much stress as those of other places, the majority of immigrants are from nations that don't have a common language and do have major cultural differences with this one. Even so, Portugal has not experienced any notable problems when it comes to integrating immigrants. The Migrant Integration Policy Index (MIPEX) ranks Portugal second among the thirty-eight countries whose immigrant integration policies were analysed: "Immigrant residents in PT still benefit from the 2nd most favourable integration policies in the developed world, ahead of most Nordics and traditional countries of immigration and leading the new destinations".¹⁴

12 In 2014, the Chinese overtook the Angolans to become the fifth most numerous foreign community in Portugal; the largest continues to come from Brazil (data from *Relatório de 2014 de Imigração, Fronteiras e Asilo do Serviço de Estrangeiros e Fronteiras* [2014 Report on Immigration, Borders and Asylum by the Portuguese Immigration and Borders Service] [SEF]). According to data from INE at, at 21 March 2011 the resident foreigners in Portugal represented 3.7% of all the country's residents. The tendency towards a fall in the number of foreign residents, which began in 2010, is continuing. See *Relatório de 2010 de Imigração, Fronteiras e Asilo do Serviço de Estrangeiros e Fronteiras* (SEF).

13 In 2014 (SEF Report, as above), they represented 45.4% of the total.

14 See <http://mipex.eu/portugal>. Last accessed on 25/05/2016.

II – Nationals and foreigners

From the point of view of their rights, how does the Constitution of the Portuguese Republic (CRP) distinguish between Portuguese nationals and foreigners?

Until not long ago (and notwithstanding the recent nature of both concepts),¹⁵ the notion of nationality¹⁶ was a core element of the idea of a nation state. There were nationals and there were foreigners – human dignity apart, they were different realities.

Long after the various international declarations and conventions on human rights were signed, it seems the distinction still makes sense.

Constitutions like the 1976 Portuguese one recognise that every citizen is equal before the Law (Article 13, CRP), and that natural persons are all citizens. Collective persons have nationality but are not citizens. However, our Constitution does distinguish between Portuguese, foreign and stateless persons, albeit it enshrines a principle of equivalence in the form of a general principle that permits exceptions.¹⁷

15 E. J. Hobsbawm, *Nations and Nationalism Since 1780*, Canto Classics, 2nd edition, 2012.

16 Given the modest nature of this text, I will not even try to reflect on what nationality is, or on the ethical legitimacy of the concept in a globalised society and at a time when the dignity of the human person (of all human persons, and not just some) and its recognition are – and should be – the touchstone of a democratic state based on the rule of law. Here I use the term “nationality” in the simple sense – the one we turn to when someone asks us who we are, and when we reply that we are Italian, Norwegian, Portuguese, Chinese or whatever the case may be, we are not saying “something that is irrelevant or bizarre ... it does not say that we are rationally required to make our nationality a constitutive part of our personal identity, or that having a national identity excludes having collective identities of other kinds. Nor does it say that a person’s national allegiances must always have a single object... It says simply that identifying with a nation, feeling yourself inextricably part of it, is a legitimate way of understanding your place in the world”. See David Miller, “On Nationality”, Clarendon Press, Oxford, 1995. On the essence/nature of the term “nation”, at the beginning of the 20th century Georg Jellinek already said: “Das Wesen einer Nation festzustellen, gehört, wie alles Fixieren von Erscheinungen, die in den ununterbrochenen Fluß des geschichtlichen Geschehens gestellt sind, zu den schwierigsten wissenschaftlichen Aufgaben. Es läßt sich nämlich kein feststehendes, für alle Nationen passendes Merkmal angeben”. (Identifying the essence of a nation is a task that falls within one of the most difficult scientific fields – something that is also true of understanding the manifestations that appear in the uninterrupted flow of historical events. In truth it is not possible to point to a certain, stable characteristic that can be adapted to every nation. Retranslated from the author’s Portuguese translation.) See Georg Jellinek, “Allgemeine Staatslehre”, 5th reprint of the 1914 edition, Berlin Verlag von Julius Springer, 1929.

17 See Article 15, CRP.

In one Portuguese constitutional Ruling (599/05^{18 19}), – on a specific question regarding the then requirement for the grant of Portuguese nationality by naturalisation, that foreigners who wanted to acquire Portuguese citizenship had to be capable of providing for their own subsistence (which was not found to be unconstitutional) – the Constitutional Court made a number of observations on the concepts of nationality and citizenship. In particular, it noted that whereas the right to a nationality (the right not to be deprived of a nationality²⁰) is a fundamental right, the right to acquire Portuguese nationality for those who don't possess it as nationality of origin has to be positively granted any other citizen who wants to obtain it, and is “subject to the fulfilment of certain preconditions” which the domestic legislator sees as revealing the existence of a tie that constitutes effective integration into the Portuguese community. In the Court's view, what such citizens enjoy is not a right, but rather a legal expectation.

Is nationality a leftover remnant of an idea that no longer makes sense today? At a time of global citizenship and a global economy, are the terms citizenship and nationality synonymous, as they are indeed very often used in practice?²¹ Taken to the extreme, the principle of non-discrimination based on national origin could imply that these two concepts are synonymous. However, possession of a nationality is internationally – and nationally – recognised as a right in itself, and so that right must be attributed a content of its own.

Almost the first thing the Universal Declaration of Human Rights (UDHR) does (in the first part of Article 2) is to proclaim that everyone – i.e. every human person, which is to say every citizen – is entitled to invoke the rights and freedoms enshrined in the Declaration, and that that right is independent of national origin (among other factors). In Article 14, the European Convention on Human Rights (ECHR) also says that enjoyment of the rights and

18 Ruling of 2.11.2005, handed down in a concrete review case.

19 All the Constitutional Court's Rulings are accessible at www.tribunalconstitucional.pt/tc/acordaos/. The English version of the Court's website at www.tribunalconstitucional.pt/tc/en/acordaos/ includes a selection of translated case law, mostly in the form of summaries, but with a few full texts.

20 As I have already noted, the Portuguese Constitution always uses the term “citizenship”.

21 See William Rogers Brubaker, “Citizenship and Nationhood in France and Germany”, Harvard University Press, 1992; Emma Jones and John Gaventa, “Concepts of Citizenship: a review”, Institute of Development Studies, University of Sussex, 2002, accessible at www.ids.ac.uk/files/dmfile/Db19.pdf. Last accessed on 27/05/2016.

freedoms recognised in the Convention must be ensured without any distinctions, namely in terms of national origin. Articles II and XIX of the American Declaration of the Rights and Duties of Man and Articles 2 and 12 of the African Charter on Human and Peoples' Rights say essentially the same thing.

Nevertheless, the UDHR is more specific with regard to the concept of nationality, in that it also says that every individual has the right to have a nationality, and cannot be arbitrarily deprived of either that right, or the right to change nationality.²² The ECHR, on the other hand, does not expressly refer to a right to nationality, but covers the question in another way, in that it lays down that States Party can place restrictions on political activity by foreign nationals, thereby implying that nationality is a relevant concept.²³

The Portuguese Nationality Law^{24,25}, establishes various criteria for the attribution of Portuguese nationality of origin, which include being born in Portuguese territory and not possessing any other nationality. In other words, Portuguese legislation recognises that in principle, people need to possess a nationality.²⁶ It is also recognised that no one can be arbitrarily deprived of either their nationality, or the right to change nationality.²⁷ So nationality is a necessity, it adds something to the citizenship, it is not an inevitability, and it can also be a choice, albeit one that is certainly limited, in that a person is born with a given nationality, can keep it, cannot be arbitrarily deprived of it, and can change it, but not by a mere declaration of will in the shape of a voluntary act that is not subject to any conditions. People must fulfil conditions if they want to acquire a nationality other than that of origin, and those conditions are defined and imposed by the state whose nationality is desired.

22 See Article 15.

23 See Article 16.

24 Law no. 37/81 of 3 October 1981, with subsequent amendments, the most recent made by Organic Law no. 9/2015 of 29 July 2015.

25 Among the many learned works on Portuguese nationality law, see Rui Manuel Moura Ramos: "A Evolução do Direito da Nacionalidade em Portugal (Das Ordenações Filipinas à Lei n.º 2098)"; "O novo Direito Português da Nacionalidade" *Estudos de Direito Português da Nacionalidade*, Coimbra Editora, 2013; "As alterações recentes ao direito português da nacionalidade: entre a reparação histórica, a ameaça do terrorismo islâmico e a situação dos netos de portugueses nascidos no estrangeiro", *Revista de Legislação e de Jurisprudência*, 145, no. 3994 (Sep–Oct. 2015).

26 This is not to disregard the millions of cases of statelessness, but rather to note that it is commonly accepted that nationality is indispensable and that we should combat situations in which people don't have one. See the 1961 United Nations Convention on the Reduction of Statelessness, which entered into force in Portugal on 30 December 2012.

27 Article 15(2), UDHR; Article 26, CRP.

One can talk about a conditional ability, but not a right. The state to which the desired nationality pertains cannot be forced to grant it to someone who does not meet the requisites laid down in its legislation for its acquisition at birth, or as a derived nationality acquired by mere declaration,²⁸ but who wants to acquire it by choice.

Nationality is the result of an intersection between external factors imposed on the state (*jus sanguinis*, *jus soli* and others, such as nationality derived from effective ties,²⁹³⁰, the consequences of facts such as marriage or adoption, etc.) and voluntary factors regarding the national or would-be national in question. The latter represent a fairly small percentage of the full list of such factors. If an individual doesn't emigrate, has no effective ties to another national community that differs from his/her own, doesn't marry a foreigner, and isn't in any other situation that would make it possible to acquire another nationality (whether or not that of origin is retained as well), his or her will, in the sense of

28 Portugal offers an example of such an acquisition by mere declaration, in that foreigners who have been married to a Portuguese citizen for more than three years can become Portuguese nationals by simply declaring their will to do so.

29 This possibility is recognised in the Portuguese Nationality Law, when it attributes Portuguese nationality of origin to: individuals born abroad with at least one forebear in the second degree of the direct line with Portuguese nationality who has not lost that nationality and who, among other requisites, has effective ties to the Portuguese community; and "individuals who are born in Portuguese territory, are the children of foreigners who are not in the service of the respective state, and declare they want to be Portuguese, on condition that at the moment of birth one of the parents has resided here legally for at least five years" (see Article [1][d] and [e], Nationality Law). In cases of nationality other than of origin (nationality by attribution), the Portuguese Nationality Law also attaches importance to the effective ties criterion. Nationality can be granted by naturalisation, with dispensation from the minimum required period of residence in the case of "individuals who are born in Portuguese territory and are the children of foreigners who have habitually remained here in the ten years immediately before the application" (Article 6[5]). The effective ties criterion takes a different form in the case of the grant of nationality by naturalisation to descendants of Portuguese Sephardi Jews, who can be dispensed from the requirement to have resided in Portuguese territory for a minimum period of time, and even from that of adequate knowledge of the Portuguese language; what must be demonstrated is a tradition of belonging to a Sephardi community with Portuguese origins, in the shape of proof of a link to Portugal that is gauged with reference to a list of factors – particularly direct or collateral descent, and the language spoken by the family (see Article6[7]). This possibility is especially noteworthy in that it is available to modern descendants of people who were forced to leave Portugal half a millennium ago, in the 15th and 16th centuries.

30 See Ayelet Shachar, "Citizenship and Global Inequality", Harvard University Press, 2009; Linda Bosniak, "The Citizen and the Alien – Dilemmas of Contemporary Membership", Princeton University Press, 2006; Sarah Song, "Rethinking Citizenship through Alienage and Birthright Privilege: Bosniak and Shachar's Critiques of Liberal Citizenship", in *Issues in Legal Scholarship*, Vol. 9: Iss. 1, Article 6, 2011; Noah Benjamin Novogrodsky, "The use and abuse of *jus nexi*", accessible at <http://id.erudit.org/iderudit/1012996ar>. Last accessed on 27/05/2016.

a mere desire, is more or less irrelevant. If we add to this the fact that the “external” factors which condition a state are actually to a large extent self-imposed, inasmuch as they result from its own domestic legislation, we can see that the determining factor in nationality issues is the will of the state.

Of course, in saying this we should not forget that a state’s legislation is the product of the actions of those of its organs with the constitutional competence to legislate, and that when sovereignty pertains to the people³¹, who exercise it through those constitutionally designated organs, the way in which a state regulates the question of nationality must be democratically legitimated.

The links between the concepts of citizenship and nationality are piercingly evident at a time of a European migratory crisis that is at the forefront of all our minds, but do the two terms really reproduce identical concepts?³²

The notion of citizenship is intrinsically linked to that of human dignity, which is in turn one of the two fundamental principles on which the Portuguese Constitution is founded,³³ and all human persons are citizens. We know that in the first democracies, not all human persons were citizens – i.e. members of the people, the demos. Among others, slaves and women were excluded. Today, however, there is a generalised acceptance – or at least we aspire to its becoming generalised – that every human person is a citizen. This means that the consideration due to people’s dignity inevitably requires states to respect their fundamental rights. A democratic state based on the rule of law is not allowed not to guarantee the essential core of those rights. However, this does not mean that a right to citizenship necessarily requires recognition of a right to a specific nationality.³⁴ In a recent article, and with regard to the migratory crisis that Europe is currently living through, Peter

31 See Article 2, CRP.

32 Article 9 of the Treaty on European Union (consolidated version) is an example of a fungible use of the two terms: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship” (highlights added). The CRP does not expressly talk about nationality, but rather about citizenship. It employs the expression “national” with regard to “national defence”, “national independence”, “national scope” and “national territory”, but never the term “nationality”. [Translator’s note: the Portuguese term “nacional” can often synonymously be translated as simply “Portuguese”.] In this context, the CRP also attaches relevance to terms linked to geographic location (“find themselves”, “remain”), and residence.

33 The other is the will of the people. See Article 1, CRP.

34 On concepts that merge citizenship and nationality and thus say that immigrants, even illegal ones, should be deemed “citizens in waiting” of the country in which they find themselves, see Gonçalo Saraiva Matias, “Migrações e Cidadania”, in *Ensaaios da Fundação Francisco Manuel dos Santos*, 2014.

Häberle³⁵ argues that defending its borders is one of a state's fundamental tasks, and that a state's territory possesses a constitutional value. The Constitutional State must defend its frontiers, and must act to protect its own cultural identity when threatened, including when the danger comes from mass migrations; albeit in the process it must naturally take the dignity of the human person into account³⁶, and weigh up and fulfil the duties of solidarity that befall it to guarantee.

As a matter of fact, the principle of the dignity of the human person does not seem to imply that a state has to abdicate from its own sovereignty – namely in terms of the right to preserve its territorial integrity by opening its borders under circumstances and in such a way as to possibly lead to serious internal harm. To quote Udo di Fabio,

“a duty to protect that was universally and unlimitedly guaranteed would blow up both the institution of democratic self-determination and, when it came down to it, the system of International-Law norms, whose ability to guarantee peace depends on states that are territorially delimited and capable of action.”³⁷

In line with the fact that nationals – and not every citizen, in a global vision of the concept – possess special ties to the state to which they pertain, and that those ties and that belonging constitute the grounds for rights, is the additional fact that only they are the beneficiaries of an express and generalised prohibition on deportation from their national territory.³⁸

35 See Peter Häberle, *“Fünf Krisen im EU-Europa - weltweite Implikationen, Möglichkeiten und Grenzen der Verfassungstheorie für Europa”*, Archiv des Völkerrechts, Bd. 53, 2015.

36 On the normative content – and its indeterminate nature – of the constitutional principle of the dignity of the human person, see Jorge Reis Novais, *“A dignidade da pessoa humana”*, Edições Almedina, 2015.

37 *“Eine universell verbürgte und unbegrenzte Schutzpflicht würde die Institution demokratischer Selbstbestimmung und letztlich auch das völkerrechtliche System sprengen, dessen Fähigkeit, den Frieden zu sichern, von territorial abgrenzbaren und handlungsfähigen Staaten abhängt”*. Udo di Fabio, former Justice of the German Federal Constitutional Court, *“Migrationskrise als föderales Verfassungsproblem (Gutachten im Auftrag des Freistaates Bayern)”*, 8.01.2016. Retranslated from the author's Portuguese translation. Accessible at www.bayern.de/wp-content/uploads/2016/01/Gutachten_Bay_DiFabio_formatiert.pdf.

38 Article 33(1), CRP: “The deportation of Portuguese citizens from Portuguese territory is not permitted”.

On a normative requirement that all persons, be they Portuguese or foreigners, had to have legally resided in Portuguese territory for at least a year in order to be entitled to the Social Insertion Income (RSI, a form of minimum social income), the Constitutional Court said³⁹ that inasmuch as Portuguese citizens possess a fundamental right to live in the territory which forms the physical and geographic support for the Portuguese community, no Portuguese can ever find him/herself in a situation in which he/she is illegally resident in this country.⁴⁰ As such, the Court declared the applicable norm unconstitutional with generally binding force. Foreigners, on the other hand, do not enjoy a constitutional right to remain or establish themselves in Portugal, or even enter this country. They can be arrested, detained or subjected to judicial control if they enter Portugal or remain here improperly, or if they are the object of pending extradition or deportation proceedings.⁴¹ The right to freedom of movement, which is absolutely guaranteed in the case of Portuguese citizens,⁴² can be subject to restrictions under the terms of Article 2 of Protocol no. 4 to the European Convention,⁴³ in the case of foreigners.

III – The legal status of foreigners in Portugal

As I have already noted, the general constitutional principle is that foreigners are treated in the same way as nationals, such that foreigners and stateless persons who find themselves or reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens. It is worth noting that international legal instruments do not require states to recognise the same rights in relation to foreign citizens as they do with regard to their nationals, but the fact is that the principle of the dignity of the human person, which is derived from the principle of equality, is gradually pushing states to reserve fewer and fewer rights solely to their own nationals.

39 Ruling no. 141/15 of 25.02.2015. Abstract *ex post facto* review case.

40 I am talking about foreigners in general, in the knowledge that there are particularities in specific cases, such as the free movement of European Union citizens; but even for them, there are restrictions linked to questions of public order, security, safety and health.

41 See Article 27(3)(c), CRP.

42 See Article 44 (1), CRP.

43 Strasbourg, 16.09.63.

I will not attempt to address the treatment of foreigners in detail here, but will limit myself to setting out some general ideas on the topic, albeit while noting that there are special statuses under which some non-Portuguese benefit from situations in which the degree of equivalence between their rights and those of Portuguese nationals is even greater: European Union citizenship; citizenship of the European Economic Area, or of countries with which the EU has an agreement on the free movement of persons; citizenship of the other Portuguese-speaking countries; and nationals of other states who reside in Portuguese territory as refugees, recipients of subsidiary protection under the provisions governing asylum, or recipients of temporary protection.

The Portuguese Constitution makes express reference to both EU citizenship and citizenship of the other Portuguese-speaking countries.

In general terms, foreigners do not enjoy: political rights; the right to exercise public functions other than those of a predominantly technical nature; and rights which the Constitution or infra-constitutional law specifically reserve to Portuguese citizens. Having said this, whenever these rights incorporate rights, freedoms or guarantees which are expressly enshrined in the Constitution, or which should be included in that category as a result of a non-typical or open clause which the CRP applies to fundamental rights in general,⁴⁴ the ordinary legislator must comply with the requirements⁴⁵ which the CRP imposes on any law that restricts constitutional rights, freedoms or guarantees: such laws must respect both the principle that the legislation about these matters is reserved to a certain type of legislator and a certain type of normative format, and the principle of proportionality; they cannot violate the essential content of the applicable constitutional precepts; and they must obey the prohibition that such laws cannot have retroactive effects.

The Constitution reserves one position – that of President of the Republic – to citizens with Portuguese nationality of origin.⁴⁶

44 See Article 16, CRP. This clause means that the fundamental rights which are expressly enshrined in the Constitution are not an exhaustive list. Among other things, this in turn means that rights which the UDHR and other International-Law statutes and principles consider can also enjoy this additional protection.

45 See Article 18, CRP.

46 See Article 122, CRP.

Examples of rights that are excluded from the principle of equivalence include the aforementioned political rights: the rights to vote (except in EU and local elections, in the case of EU citizens), form political parties, submit petitions,⁴⁷ and engage in popular action.⁴⁸ They cannot hold the positions of President of the Republic, President of the Assembly of the Republic (Parliament), Prime Minister, or President of any of the Supreme Courts; nor can they serve in the armed forces or the diplomatic service,⁴⁹ be judges or public prosecutors,⁵⁰ or perform public functions that do not possess a predominantly technical nature. Nor are foreigners entitled to the diplomatic protection Portugal provides to its nationals. They do have all the other rights which the Constitution and the ordinary law do not specifically reserve to Portuguese citizens, as well as one right which nationals intrinsically cannot possess – that of asylum.

The following are some rights and related provisions that can be particularly relevant to foreigners:

– **The right of asylum:**⁵¹ the Constitution says that this right is: “guaranteed to foreigners and stateless persons who are the object, or are under grave threat, of persecution as a result of their activities in favour of democracy, social and national liberation, peace among peoples, freedom or the rights of the human person”⁵²

– The right not to be extradited or handed over under any pretext for political reasons, or for crimes that are punishable under the law of the requesting state by death or any other penalty that results in irreversible injury.

47 However, foreigners and stateless persons residing in Portugal do always enjoy the right to petition in defence of those of their rights and interests that are protected by law – see Article 4(2), Law no. 43/90 of 10 August 1990, as republished and renumbered by Law no. 45/2007 of 24 August 2007 (highlight added).

48 Legal doctrine has been arguing that, as with the right of petition, foreigners are entitled to resort to popular action on condition that the purpose is to defend their own legally protected rights and interests, and not for essentially political ends.

49 These exceptions are specifically laid down in the CRP.

50 Exceptions to the principle of equivalence set out in the respective Statutes.

51 The Asylum Law – Law no. 27/2008 of 30 July 2008, as amended by Law no 26/2014 of 5 May 2014 – lays down both the conditions and procedures for granting asylum or subsidiary protection, and the statuses afforded to applicants for asylum, refuge and subsidiary protection. The Law also transposes the applicable European Directives.

52 See Article 33(8), CRP.

The extradition of foreigners is subject to very restrictive criteria, and can only be ordered by a judicial authority.

(Until the fourth revision of the CRP,⁵³ the extradition of Portuguese citizens was absolutely prohibited. In the light of the need to adapt the constitutional text to the provisions of the Convention on Extradition between Member States of the European Union, this revision admitted the possibility of extraditing Portuguese citizens, albeit subjecting it to very restrictive conditions and requisites that include limiting it to cases of terrorism and highly organised international crime.)

– **The right not to be arbitrarily deported:** applicable to persons who have properly entered or remain in Portuguese territory, hold a residence permit, or have submitted an asylum application that has not been refused.

This right is recognised in the CRP,⁵⁴ and deportation can again only be ordered by a judicial authority.

– The constitutional prohibition on inevitable effects of legal penalties, including those handed down for committing certain crimes, is reflected in the grounds on which applications for Portuguese nationality can be refused.⁵⁵

Although the CRP does not allow the inevitable effects of legal penalties to include the loss of any civic, professional or political right, the Nationality Law does say that one of the grounds on which requests for Portuguese nationality can be refused is conviction (albeit only following transit of the sentence in *rem judicatam*) for any crime punishable under Portuguese Law by a maximum prison term of three years or more.⁵⁶

53 Constitutional Law no. 1/97 of 20 September 1997.

54 See Article 33(2), CRP.

55 See Article 30(4), CRP.

56 See Article 9(a).

In its recent Ruling no. 106/16,⁵⁷ the Constitutional Court handed down an interpretative decision⁵⁸ in which it said that it is not constitutionally permissible to interpret the norm in question⁵⁹ in such a way as to ignore the legislator's judgement that, after a certain period of time, the effect of a penal conviction which has been included on the person's criminal record must cease, the record must be cancelled and the person must be deemed legally rehabilitated. The Court considered that any other position would run the risk of being intra-systemically contradictory.

– Access to the law and to effective jurisdictional protection

Every citizen residing in Portugal is entitled to access to the law and the courts in order to defend his or her rights and interests.

As an example, in Ruling no. 316/95⁶⁰ the Constitutional Court found unconstitutionality in a norm that did not recognise the right of foreigners (except if the laws of the respective state attributed the same right to Portuguese citizens) or stateless persons to legal aid in order to contest in court a decision denying them political refugee status, in cases in which those persons either did not hold a valid permit allowing them to reside in Portugal, or did hold one, but had not resided here for at least a year.

It is worth mentioning that the constitutional jurisprudence on access to the law and related procedural rights and guarantees clearly approaches questions of constitutionality from a material and substantive perspective, rather than a formal one. An example of this is Ruling no. 347/02,⁶¹ which the Court gave in a concrete review case in which the appellant argued that a combined interpretation of a number of Code of Criminal Procedure (CPP) norms was unconstitutional. At stake were the adequacy of the time limit for submitting a procedural request in a criminal case,

57 Of 24 February 2016. This case arose when the Public Prosecutors' Office (MP) brought a concrete review request before the Constitutional Court because the court a quo had refused to apply the norm on the grounds that it was unconstitutional – a situation which the MP is responsible for asking to Constitutional Court to clarify.

58 Under the competence given to the Court in its Organic Law – see Article 80(3), Law no. 28/82 of 15 November 1982.

59 Together with the corresponding norm contained in the Regulations governing Nationality (Article 56[2][a], Executive Law no. 237-A/2006 of 14 December 2006).

60 Of 20 June 1995.

61 Of 12 July 2002.

and an allegedly insufficient mastery of the Portuguese language on the part of the accused person, who was a foreigner. The Court disagreed that there was any unconstitutionality in this situation, finding that twenty days was enough time in which to request the procedural act in question (and that the fifty days the accused had asked for was manifestly excessive within a context that only involved European Union countries). It also found that there was no added linguistic difficulty in the concrete case in question, inasmuch as the accused's understanding of the Portuguese language was good enough not to hamper the organisation of her defence.

– **Right to health.** The Law governing the Bases of the Health System⁶² recognises that all EU citizens, all stateless persons residing in Portugal and, subject to reciprocity, all other foreigners living here, possess the status of National Health Service (SNS) beneficiaries.

However, following doubts as to this Law's pertinence, and even its constitutionality when interpreted restrictively in terms of access to the SNS, a 2001 Ministry of Health Order⁶³ specified that such access (to the healthcare and medicines provided by the institutions, departments and services that comprise the SNS) should be available to foreign citizens residing in Portugal, under the same terms and conditions as those applicable to Portuguese SNS beneficiaries. The same Order also granted access to the SNS to illegal immigrants who can provide documentary evidence that they have been in this country for more than ninety days. This solution makes it possible to balance the requirements imposed by the need to respect individuals' right to health (and even to life) and defend public health on the one hand, and the country's need for internal security – particularly by controlling the presence and activities of foreigners in Portuguese territory – on the other.⁶⁴

– **Right to education.** It is entirely clear that immigrants whose legal situation in Portugal is a lawful one are entitled to education. However, in order to prevent any indecision that might arise with regard to illegal

62 Law no. 48/90 of 24 August 1990.

63 Order no. 25360/2001 (Series 2) of 16.11.01, as published in Series II of the *Diário da República* of 12.12.01.

64 See the Organic Law governing the Immigration and Borders Service (SEF, Executive Law no. 252/2000 of 16 October 2000, with subsequent amendments).

immigrants, a 2004 Executive Law⁶⁵ formalised a practice that had already been unofficially implemented by schools, and created a national register of foreign minors whose presence in Portuguese territory is not in conformity with the law. The Law says that the record is intended solely to ensure that such minors have access to both healthcare and preschool and school education, and that its contents cannot serve as grounds for or evidence in any administrative or judicial procedure, while at the same time precluding their use as bases for the legalisation of either the minor, or the foreign citizen(s) who exercise(s) parental responsibilities in relation to him/her. Here too the division between the departments of state with responsibility for tasks linked to guaranteeing different fundamental rights and freedoms⁶⁶ – the Ministry of Education, and the Ministry of the Interior – makes it possible to maintain a compatibility between the different demands imposed by those rights in ways that respect the principle of proportionality.

As such, Law no. 23/2007 of 4 July 2007⁶⁷, which regulates the entry into, presence in and departure and removal of foreigners from Portuguese territory, says that the deadline for voluntary departure from that territory, which is normally between ten and twenty days, can be extended, particularly if the person in question has children who are going to school here.⁶⁸

- Right to exercise public functions whose nature is not predominantly technical.

Characterising functions as predominantly technical or not can be an especially intricate task. However, in line with the idea that this is a fundamental right⁶⁹ and that any restrictions should therefore respect a principle of being kept to a necessary minimum, its interpretation has been expansive. For example, in Ruling no. 345/02⁷⁰ the Constitutional Court declared the unconstitutionality with generally binding force of a norm in the Statute governing the Career Structure of Kindergarten, Basic (primary) and Secondary Teachers, which subjected admission to the career to the possession of Portuguese

65 Executive Law no. 67/2004 of 25 March 2004.

66 See Article 9(b), CRP.

67 With subsequent amendments.

68 See Article 138(3).

69 Included in the category of rights, freedoms and guarantees.

70 Of 11 July 2002.

nationality or the nationality of a country “which, under a normative act of the European Economic Community, an international convention, or a special law,” grants “access to the exercise of public functions in Portugal”. In an area that could be seen as especially touchy, particularly for reasons linked to national identity and linguistic skills, the Court unhesitatingly⁷¹ said that: “in the education sector, the exclusion of nationals of other Member States from all the jobs in this sector cannot be justified by considerations regarding safeguarding national identity. The latter interest – whose protection is legitimate, as Article 6.3 of the Treaty on European Union recognises – can, however, be effectively safeguarded by means other than a general exclusion, and by the fact that, like Portuguese nationals, the nationals of other Member States must in any case fulfil all the conditions for recruitment, namely those concerning training, experience and linguistic knowledge”.

– **Right to a family – right to children’s education**⁷²

In Ruling no. 470/99⁷³ the Constitutional Court found an Executive-Law norm regarding the accessory sanction of deportation of a foreigner for committing a crime to be unconstitutional when applicable to foreign citizens residing in Portuguese territory with their minor children who hold Portuguese nationality. This issue was given a normative solution when Law no. 23/2007 included the existence of minor children of any nationality who reside in Portugal, and in relation to whom the potential deportee effectively exercises parental responsibilities and provides for their upkeep and education, among the restrictions on coercive removal or deportation.⁷⁴

– **Right to social security.** Under the terms of the Constitution and the Law governing the Bases of the Social Security System,⁷⁵ everyone is entitled to social security. This right is subject to a number of general principles, including the principle of equality. Where social security is concerned, this principle consists of: “non-discrimination against beneficiaries, particularly due to... their nationality, in the latter case without prejudice to conditions regarding residence and reciprocity”.⁷⁶

71 The Ruling was unanimous.

72 See Article 36(5), CRP.

73 Of 14 July 1999.

74 See Article 135(c).

75 Law no. 4/2007 of 16 January 2007.

76 See Article 7 of the Law governing the Bases of the Social Security System.

In Ruling no. 354/97 the Constitutional Court found no unconstitutionality in an Executive-Law norm concerning the retirement pensions of former public servants in the overseas territories, when interpreted to mean that people who were civil servants or agents of the Public Administration in the ex-overseas provinces do not have to hold Portuguese nationality in order to be eligible for the award of the retirement pension for which they can apply under the Executive Law. The Court held that what was at issue was the grant of the right to the retirement pension applicable to persons who had performed public functions in that Administration, and that that right should be maintained even in cases in which the applicant had become a foreigner as a result of the decolonisation process.

IV – Final remarks

With these few words I have not sought to give more than a brief and thus necessarily incomplete overview of questions that are not only important in their own right, but are being made even more pressing by the times we are living in.

With geographic origins that lie mainly in Asia and Africa (in the latter case, particularly the sub-Saharan area), the current migratory crisis is generating the largest flow of migrants and applicants for refugee status in Europe since the Second World War, and is putting the values of European solidarity to the test. Many of them are desperately fleeing from especially violent civil wars, others from inhuman living conditions, while others still are economic migrants looking for a better life. The globalisation of the media and means of communication have made the flagrant differences between the life conditions in the various continents and countries evident for everyone in the world to see.

The EU is a combination of countries that want to establish “an ever closer union among them”; those countries have “resolved to share a peaceful future based on common values”; their Union, which “is based on the principles of democracy and the rule of law”, “is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”;⁷⁷ and that Union proclaims that enjoyment of the rights it recognises in its Charter of Fundamental Rights “entails responsibilities and duties with regard to other persons, to the human community and to future generations”.

⁷⁷ See Preamble to the Charter of Fundamental Rights of the European Union.

Without prejudice to the fact that both International and National Laws admit some distinctions in the treatment of national and foreign citizens, those differences must be contained within quite tight limits.

Less than three months ago, Venice commemorated the five hundredth anniversary of its Jewish ghetto.⁷⁸ The original objectives of that quarter were ambivalent, inasmuch as the Venetian ghetto not only isolated, but also protected the Jews in a city state which, in particular, recognised their religious freedom and sheltered them from the Inquisition. We know all too well what other ghettos have represented.

The defence of its borders, its national identity, its fundamental constitutional and political structures,⁷⁹ and its cultural, religious and linguistic diversity⁸⁰ – all of which together constitute Europe’s cultural heritage – is the inalienable right of every state and its national citizens. However, no right – not even the fundamental rights of states and citizens – is absolute. Every right must be exercised with respect for the principle of proportionality. The exercise of its legitimate and even non-renounceable rights cannot mean that any national state can forget the dignity of any human person, or its duties of solidarity to and with all of them.

78 On 29 March 1516 the Venetian Senate passed a law confining Jews to a part of the city called “ghèto”, which they could only leave between sunrise and sunset.

79 In particular, see Article 3(3)§4 and Art. 4(2) of the consolidated version of the European Union Treaties.

80 In particular, see Article 22 of the Charter of Fundamental Rights of the European Union.

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Joint Council on Constitutional Justice

In order to steer cooperation between the constitutional courts and the Venice Commission, the Venice Commission established the Joint Council on Constitutional Justice (JCCJ), which is composed of members of the Venice Commission and the liaison officers, appointed by the constitutional courts. The JCCJ has a double presidency, which means that its meetings are co-chaired. One of the chairs is a member of the Venice Commission, elected by the Commission at a plenary session and the other is a liaison officer, elected by the liaison officers during the meetings of the JCCJ. The mandates of the two co-chairs run for two years each. The constitutional courts and councils and supreme courts with constitutional jurisdiction participating in the Joint Council thus have a very strong role in determining the Venice Commission's activities in the field of constitutional justice.

The geographical scope of the Joint Council covers the Venice Commission member states, associate member states, observer states and states or entities with a special cooperation status which is equivalent to that of an observer (South Africa, Palestine). Within the JCCJ, all participating courts – whether from member or observer states – benefit from the same type of cooperation. The European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights participate in the Joint Council as well.

The meetings of the JCCJ usually focus on the publication of the Bulletin on Constitutional Case-Law, the production of the CODICES database, the Venice Forum (Classic, Newsgroup, Observatory) and on the cooperation with regional and linguistic groups of constitutional courts as well as the World Conference on Constitutional Justice.

The meetings of the JCCJ are generally followed by a “mini-conference” on a topic in the field of constitutional justice, chosen by the liaison officers during which they present the relevant case-law of their courts (e.g. “Migration” in 2016).

The JCCJ meets once a year, at the invitation of one of the participating courts (June 2016: Venice, Italy) every third year the JCCJ meets in Venice, either before or after a plenary session of the Venice Commission.



The Venice Commission

The Venice Commission – the full name of which is the European Commission for Democracy through Law – is an advisory body of the Council of Europe on constitutional matters. Its primary role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also contributes to the dissemination and consolidation of a common constitutional heritage and provides “emergency constitutional aid” to states in transition.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



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