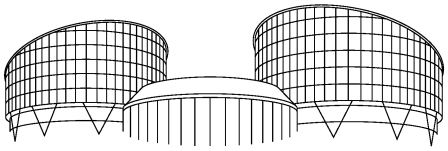

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

RECEPTION OF MIGRANTS: MATERIAL AND PROCEDURAL GUARANTEES FOR SETTLED MIGRANTS

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A. Introduction

Europe is the only continent in the world where national discretion in the field of equal treatment of foreigners is limited by international guarantees controlled by an international Court whose decisions are binding. Before we look at the topic in detail one clarification is necessary.

When we talk about migration in Europe we have to realise that there are at least four types of migrants: people migrating within a country, people migrating between two member States of the European Union, people migrating between two member States of the Council of Europe, and people migrating from outside the European human rights area to one or more member States of the Convention.

In each of the four cases, the situation with regard to particular protection of migrants is different. But of course a family migrating within Russia may be in a similar situation as regards language, education and housing questions to a family migrating from Romania to Sweden. And we have to remember that in quite a few EU member States the number of internal EU migrants equals or even exceeds migration from outside the EU or from Europe as a whole.

The conclusion to be drawn from these figures is that migration is a complex issue, and does not only concern people from Africa reaching southern Europe and heading further north.

The work has been shared out between Judge Linder and myself as follows: she will investigate the issues directly linked to Article 8, while I shall be looking at some of the procedural and material guarantees extending beyond the framework of that provision.

B. Procedural Guarantees

The first procedural guarantee that springs to mind in the context of migration is Article 1 Protocol No. 7. This guarantee, like Article 8 of the Convention, protects against the loss of settled migrant

status. I have therefore not mentioned it in my work here, although I do not overlook the fact that it might be – and in fact is – crucial for migrants.

Homing in on general procedural guarantees, we should first of all remember that, in principle, migrants and citizens enjoy the same level of protection, including in the field of procedural guarantees. In particular, Article 14 also applies in conjunction with Articles 5 and 6 of the Convention. And it protects migrants against discrimination irrespective of their nationality and regardless of whether they belong to a minority or not.

There are, however, some guarantees which go beyond mere formal equality to grant special rights to migrants, although not exclusively to the latter. The reason for this group of special rights is to be foundin the idea that no one under the jurisdiction of a State Party to the Convention should suffer disadvantages in the enjoyment of core procedural guarantuees because they do not speak or understand the official State language used by the authorities. Linguistic issues are of crucial importance because they form the basis, so to speak, for the enjoyment of the right to a fair hearing, or, to be more exact, the right to be heard.

Article 5 § 2 and Article 6 § 3 (a) of the Convention are similarly worded, and indeed their relevant sections are identically worded: everyone who is arrested or charged with a criminal offence has the right to be informed promptly – and I quote – "in a language that he understands". It is commonly agreed today that the requirement of prompt information should have an autonomous meaning extending beyond the realm of criminal-law measures, as the Court has constantly held, beginning with its *Van der Leer* case dating back to 1990. As in many other fields of the Convention the Court has developed detailed case-law which takes into account the different elements of fact in various situations. The legal issue has to be solved as in the other fields of Articles 5 and 6, as well as Articles 8 to 11 – often by weighing different aspects against each other: on the one hand, the severity of the consequences for the applicant, and on the other the extent of State officials' duty to ensure the precision of the request for translation. An excellent example of this is the 2005 *Shamayev v. Georgia and Russia* case concerning the requirements of translation from Russian to Chechen in extradition proceedings. The Court's reasoning is fully consistent in attaching particular importance to the negative consequences of extradition.

In the context of Article 6 § 3 (e) of the Convention, the Court has made it clear from the outset that the right in question is absolute and that it also applies to pre-trial proceedings and, where appropriate, to appeal proceedings, to oral statements as well as to certain written documents. The Court has, over the years, developed a positive obligation on the part of the State to supervise the interpreter to a certain extent, which obligation may extend to scutiny of the adequacy of the interpretation – examples date back as far as 1989 in the *Kamasinski* judgment, as well as in the Grand Chamber Case of *Hermi v. Italy*.

The basic principle guiding the interpretation of Article 6 in general is that the rights under the Convention must be "practical and effective". It is logical for the Court to assimilate its case-law on the importance of an interpreter for the fairness of proceedings with decisions on the presence of a lawyer during any initial questioning in police custody. To put it in a nutshell, the purpose of the special guarantees is not merely to achieve formal equality but to offset any disadvantages resulting from a lack of language skills. In a way, these rights form the strongest possible guarantee in terms of their content and purpose.

Let me move on to some substantive guarantees of the Convention in order to shed light on a few specific case-law issues, which will enable us to draw a number of general conclusions.

C. Substantive guarantees

Taking political rights, the right to education and the right to protection of property as three very different types of rights can help clarify the significance of each.

1. Political Rights

The tendency in the political rights sphere seems to be towards tightening restrictions on the rights of foreigners. Moreover, political rights must be further broken down into voting rights on the one hand, and the rights set out in Articles 10 and 11 of the Convention on the other.

a. Article 3 of Protocol No. 1 to the ECHR

The right to vote and to be elected derive from Article 3 of Protocol No. 1. Although the Protocol does not explicitly refer to citizenship, the Court has never raised the question of requiring States to extend that right to foreigners. This is even more remarkable in the context of a rather dynamic, progressive interpretation of the guarantee as regards the right of prisoners to vote. As the Court held in the *Aziz* case in 2004, States enjoy considerable latitude in establishing rules, within their constitutional order, governing parliamentary elections and the composition of parliament, and that the relevant criteria may vary according to the historical and political factors peculiar to each State. However, "these rules should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States."

Therefore, the European answer provided by the Convention is, in principle, that the integration of migrants as regards electoral rights involves granting citizenship, rather than extension of the guarantee to foreigners. The situation in the European Union is slightly different. As regards voting rights to the European Parliament and to the municipal level, Article 20 TFEU explicitly bans any discrimination against nationals of a different member State.

b. Article 10 and Article 11 ECHR

As regards the set of political rights enshrined in Articles 10 and 11 – freedom of expression, freedom of the media, freedom of assembly, freedom of association – integration is implemented by means of non-discrimination, whereby citizenship is irrelevant. There is no reference to foreigners in the second paragraph of either Article, and none of the legitimate aims mentioned there makes the least allusion to foreigners. The State cannot adopt special measures against foreigners for reasons of national security, territorial integrity or public safety. I mention this because it does not seem to be as self-evident nowadays as it used to be.

Nor does Article 11 , even taken in conjunction with Article 14, provide for a ground of discrimination referring to citizenship capable of justifying such discrimination. To put it in a nutshell, and bearing in mind the complexity of the issue: unlike Article 3 of Protocol No. 1, Articles 10 and 11 of the Convention do not provide any reason for drawing a distinction between foreigners and nationals.

c. Article 16 ECHR

This situation seems to change when it comes to Article 16, which is a special Article in many respects. There is first of all its wording: "[n]othing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens." A simpler wording would have been possible, and would have simplified matters generally, unless

the current wording played a major role in case-law. But so far it has not done so, nor is it likely to in the near future.

When the Convention entered into force in the early 1950s, Article 16 immediately became a kind of "Sleeping Beauty". Her slumber almost ended in 1989, when the Court adjudicated the *Piermont* case. France had carried out nuclear tests in its territories in the Pacific Ocean, and a German Member of the European Parliament tried to enter New Caledonia in order to protest against the test – without success. France relied on Article 16, also unsuccessfully. The Court decided that Sleeping Beauty could continue her slumber. At the time it argued that Article 16 could not be relied upon against a member of the European Parliament. Today, the Court could and should base its argument on European Union citizenship. Instead, the Court went further. In 2015, in the *Perincek* case, concerning Switzerland and a Turkish applicant, therefore involving a non-EU member State and a national of a non-EU member State, the Grand Chamber held:

"Bearing in mind that clauses that permit interference with Convention rights must be interpreted restrictively ..., the Court finds that Article 16 should be construed as only capable of authorising restrictions on "activities" that directly affect the political process. This not being the case, it cannot be prayed in aid by the Swiss Government."

One could say that in *Perincek* the Court sent Article 16 back into a long, if not eternal, beauty slumber – perhaps with a small exception, for example where a foreigner wishes to become the leader of a major party. For all other political activities, it is hard to see today how a measure that fails the necessity test under Article 10 and Article 11 § 2 can be justified under Article 16 in the light of the *Perincek* case.

2. Article 2 of Protocol No. 1 to the ECHR

Let us move on to another Article that plays a vital role for migrants and is crucial for the process of integrating young migrants: the right to education under Article 2 of Protocol No. 1. At a time when we are finding it increasingly difficult to cope with the so-called migration crisis, it is worth noting that the Court in fact found the appropriate language in judgments and decisions back in the first few years of this century, a decade or so ago.

In 2005, in the *Leyla Sahin* case, the Grand Chamber held that:

"[i]n a democratic society, the right to education ... is indispensable to the furtherance of human rights [and] plays ... a fundamental role".

Just a year later, in 2006, in its Konrad decision, the Court emphasised that:

"society has an interest in the integration of minorities in order to achieve pluralism and thus democracy."

Since then the Court has dealt with a good number of applications concerning foreigners' access to schools under Article 14 taken in conjunction with Article 2 Protocol No. 1. This case-law shows that the Court has found a line of argument which:

- is consistent with the principles of interpretation of the Convention and the case-law under other articles,
- has regard to the difficulties and (financial) needs of the States involved,

- takes due account of the situation of young migrants and their potential development in a society which is initially new to them.

While the Court acknowledges a wide margin of appreciation as regards access to public services and the cost of their use by foreigners, it draws a clear distinction in the educational sphere.

Let me quote the decisive part of the 2015 *Ponomaryovy* case concerning school fees to be paid by two Russian schoolchildren whose mother held a permanent residence permit in Bulgaria:

"The Court starts by observing that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory."

The Court goes on to acknowledge that special treatment of foreigners from within the EU is possible, which exception may be said to be based on an objective and reasonable justification in general. It then denies that this idea can be transposed to education without qualification. And it continues:

"It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, and in particular whether or not to charge fees for it and to whom, a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services, education is a right that enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1 .... It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions."

The Court has expanded a guarantee which in the beginning had little signifance outside special cases (such as language questions in schools in and around Brussels or sexual education in school), into a core guarantee for the protection of Human Rights in Europe, particularly as regards the integration of migrants. And it has – with remarkable openness – stressed its value for the development of a democratic society, *even* in times of crisis, or, better still, *particularly* in times of crisis.

If we had more time we could – and should – deal with the religious aspects of education and discrimination against minorities in education – I would just mention the *Folgerø* judgment and the Grand Chamber judgment in the Czech Roma school case *D.H. and Others*, both of which were delivered 10 years ago, in 2007.

3. Article 1 of Protocol No. 1 to the ECHR

I am nearing the conclusion of my address. But before ending I must mention Article 1 of Protocol No. 1, the first paragraph of which refers to "general principles of international law", affirming that international law affords foreigners special guarantees in cases of expropriation. Addressing this and other aspects of the protection of foreigners' property would confront us with a completely new set of issues.

Conclusion

Instead of beginning a new topic I must conclude by returning to our starting point. Europe is the only continent where migrants have access to an international Court which has jurisdiction, in respect of almost all States, to decide on alleged human rights breaches by national authorities. It is possibly this quality which makes Europe so attractive to migrants, whatever their initial motives for migrating. The Strasbourg Court is aware that member States are bound to sustain this quality by governing immigration in a way that is consistent both with human rights and with the needs of peaceful societies. Most national courts, including the Constitutional Courts, are also doing their utmost to achieve that end. To that end, the will to constant cooperation, mutual understanding and mutual trust is needed on all sides – in Strasbourg as well as in Stockholm, Rome, Lisbon or Warsaw.

This has just been a short initial input into a workshop of experts. I hope that I have been able to highlight a few interesting issues that can serve as a starting-point for discussions.