



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

NON-REFOULEMENT AS A PRINCIPLE OF INTERNATIONAL LAW AND THE ROLE OF THE JUDICIARY IN ITS IMPLEMENTATION

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1. Introduction

Allow me first of all to thank the Court for inviting me to this prestigious seminar and for doing me the honour of giving me the floor at the concluding session, an honour which I share with Judge Ranzoni.

The title of the seminar encourages us to reflect on the lessons learned and accordingly the conclusions that can be drawn from the general reports and from those presented at the two workshops.

Time does not permit me to go into the details of the very interesting avenues for reflection that have been proposed to us and which would merit a wider and more thorough assessment than we have time for at this session.

I will therefore concentrate my remarks on Workshop 2, which was devoted to the reception of migrants, and make a few comments on the general subject of *non-refoulement* (Workshop 1 was devoted to an assessment of the credibility of asylum-seekers: the burden of proof and the limits of the ECHR's examination). If we are referring both to asylum-seekers and to migrants, *non-refoulement* can be regarded as a sensitive, or even a delicate, subject which engages lawyers from both a theoretical and a practical point of view.

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2. General comments

I will confine myself to making a number of general remarks, before moving on to the reports presented at Workshop 2.

2.1. I would observe first of all that a major development of international law has been brought to light. The protection of human rights is an integral part of international law, not only because treaty rules have become a substantial standard-setting *corpus* on account of the many different aspects concerned, but also because a large part of these essential rights (right to life, security of person in its various forms) are part of customary law. The very principle of *non-refoulement* can be recognised as a human right which all the Member States of the international community guarantee as such to individuals.

2.2. The emergence and affirmation of human rights have placed substantial limits on State sovereignty over time. In this evolving framework it is especially the Universal Declaration of Human Rights and, at European level, the ECHR which have played a fundamental role.

2.3. Migrants and refugees have rights which fall into the category of human rights (this corresponds to a recent development in these rights and is one of the particular features of the protection of individual rights). They are people who are regarded as vulnerable and requiring special protection.

2.4. Migration is not a crime: it must be regulated or managed while having regard to its positive aspects. The eloquent reports of the United Nations Special Rapporteur, Mr Crépeau, and Judge Bianku have emphasised this point.

Affirmation of these rights has been a very recent phenomenon, and has received often varying attention from the international community, international organisations, national governments and public opinion. The courts have played an important role and have contributed to forging a conscience and awareness hitherto unknown.

3. Reception of migrants

3.1. The workshop on the reception of migrants concentrated on the situation of settled migrants, and therefore on the rights of the category of aliens who have already entered and are staying in a State (or living there because they were born in that State). The reports produced by Mr Grabenwarter and Ms Linder examined the problem of material and procedural guarantees. Both reports were very stimulating and constructive, as was the discussion. The national authorities, by virtue of the sovereign right of control vesting in them in accordance with a well-established (and well-known in the case-law) principle of international law, maintain a margin of appreciation which is nonetheless limited in many respects today.

3.2. I would like to point out firstly that the domestic case-law (Swedish in particular) and the case-law of the European Court of Human Rights, cited and explained by the rapporteurs, are very useful for drawing comparisons between different systems. Cross-fertilisation both between national courts and between them and the European Court of Human Rights is a precious asset.

Case-law and practice must take account of the commitments deriving from bilateral or multilateral treaties, and from primary and subordinate legislation of the European Union.

3.3. Secondly, regard must be had to the nature of the ties between the person and the country concerned. Strong and lasting ties may be decisive in establishing a level of integration which puts an alien residing in a State in the same category as a national citizen. The criterion of residence, or, better, integration or social ties, has become important in constructing the notion of nationality or residential citizenship. In my view, this concept must be properly taken into account in all cases where the issue is discrimination on the basis of nationality or ethnic origin (see *Biao v. Denmark*) and difference of treatment justifiable only if the measures provided for, such as extended length of residence, or possession of nationality, are held to be proportionate (in *Biao*, the twenty-eight years of nationality and residence rule was found to be disproportionate, the justification for the aims pursued being considered unacceptable).

Indirect discrimination deriving from national rules or practices is very often insidious: legislation, for example on the acquisition of nationality by birth and by naturalisation, may appear neutral, but its application could lead to discrimination contrary to Article 14 of the ECHR.

3.4. Substantive rights, such as the right to protection of family life (Ms Linder's report), the rights to freedom of expression and of association, the right of property (Mr Grabenwarter's report, which also addressed the subject of political rights and the limits provided for in Article 16 of the ECHR), and procedural safeguards must be effective.

Effectiveness (I fully share the opinion of our rapporteurs) is a *leitmotiv* in this sphere.

Foreign nationals cannot be effectively integrated if family reunification is prevented by obstacles that are not based on objective factors. The logic underlying Article 8 or Articles 5 and 6 of the ECHR would be jeopardised. European Union law, both in terms of Directive 2004/38 and Directive 2003/86 on family reunification by third country nationals, and the Charter of Fundamental Rights (Article 21 prohibiting any discrimination, including that based on race, ethnic origin or membership of a minority, Article 7 on respect for private and family life, and Article 47 on jurisdictional guarantees) constitute confirmation of the State's obligations to guarantee everyone a right linked to conditions of strong ties, from which there can be no derogation other than for compelling reasons. The "ECHR-Charter" logic is the same.

3.5. We must therefore always ask ourselves whether national rules or practices are compatible with the prohibition of discrimination. The State's margin of appreciation gives the government latitude, according to the economic and social context, which may lead it to consider that differences of treatment between foreign nationals and citizens are compatible with that prohibition. In the area of social assistance, family allowances constitute a benefit for the family, protected by Article 8 of the ECHR (Ms Linder's report examined closely, as has been said, the problems relating to Article 8), and where, for example (see *Dhahbi v. Italy*), a foreign national lawfully residing and working in the country was paying contributions to a public insurance scheme, the State could justify a difference in treatment only on compelling budgetary grounds (which require the protection of national interests and, accordingly, justify the measure in question being regarded as proportionate).

3.6. The sphere of economic and social rights, in which it has not been possible to establish a consensus among the States (not only in international law, but also in European Union law), creates numerous difficulties with regard to recognition and enjoyment.

I think that the most important issue is to define, in general, the margin remaining available to the State in economic and social matters, and the justification of objective and reasonable limits. This has been observed with regard to family benefits, but the principle also applies to the right to education, protected by Article 2 of Protocol No. 1 (see, for example, *Ponomaryovi v. Bulgaria*, which is the subject of examination in particular in Mr Grabenwarter's report).

Education ranks among the most important public services provided by a State. If primary-school education, which promotes social integration and experience in living together, is compulsory and free, it must be so for all, both foreign nationals and nationals of the State in question. Where secondary or higher education is concerned and is neither compulsory nor free, the differences in treatment may be regarded as legitimate and justified. Here again, however, it will be necessary to examine the specific circumstances, and thus take account of the degree of integration and ties with the host country (such as length of stay, family ties, knowledge of the language, associative and cultural links established).

4. Procedural guarantees and effective remedy

4.1. A settled migrant should have the benefit of tightened procedural guarantees. Lengthy duration of stay, or birth on the territory of the State where the immigrant lives, studies, works and has family and social relations, are factors militating in favour of treating a foreign national in the same way as a national citizen. The criteria in the *Boultif* case justifying expulsion remain valid for the protection of family life referred to in Article 8 of the ECHR (the same is true of a person's private life, his or her social identity, the links maintained with his or her peers and the outside world).

4.2. A removal order should therefore be exceptional, as can be seen, moreover, from the "guidelines on forced return" of the Committee of Ministers (2005).

4.3. The most frequently asked question, and which represents a real problem for the national courts, concerns the guarantees which a settled immigrant should enjoy, and in particular the right of a foreign national having arguable complaints, based on the ECHR, to assert them, not only in law, but also in practice. The remedies and the possibility of redress must be effective and sufficient. We may well ask ourselves what is the real meaning of these terms, which appear in the Charter of Fundamental Rights of the European Union, in Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), or in Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals: what is the thrust of the effectiveness of a remedy within the meaning of Article 13 of the ECHR?

4.4. A remedy with automatic suspensive effect, in the event of expulsion, would be desirable, but, if it is necessary to balance the competing interests, there is no absolute guarantee. A person exposed to a real risk of infringement of his right to life (Article 2, but also Article 4 of Protocol No. 4) must have access to an effective remedy enabling him or her to obtain close and rigorous scrutiny by a national court (without ruling out the possibility that this scrutiny will be carried out by an administrative authority, in all cases independent and impartial, guaranteeing scrutiny of equal “quality”). In other cases it is the State’s interest which prevails: thus removal of the foreign national. An infringement of private and family life would not be sufficient to guarantee suspensive effect, but effective and sufficient procedural guarantees must be provided (Article 13 taken in conjunction with Article 8 of the ECHR; on Article 8, see Ms Linder’s report; on the procedural guarantees, see, in particular, Mr Grabenwarter’s report).

4.5. The Court has, moreover, specified that in accordance with Protocol No. 7 (Article 1) a deportation is contrary to a person’s human rights even if it has been implemented in conformity with the domestic law, where that law does not satisfy the requirements of the Convention: the Convention and its Protocols “must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory” (see *Lupsa v. Romania*, § 60). The Court also recognises such rights in the event of collective expulsions in its case-law on Article 4 of Protocol No. 4, which prohibits this type of expulsion. Everyone has the right to “a reasonable and objective examination of his or her specific situation”.

States have a sovereign right to establish their own immigration policy, but “problems with managing migratory flows cannot justify a State’s having recourse to practices which are not compatible with its obligations under the Convention” (see *Georgia v. Russia*, § 177, and *Hirsi Jamaa and Others v. Italy*, § 179).

4.6. At a talk he gave last year (14 April 2016) at the Italian Court of Cassation, Judge De Gaetano (the moderator at our workshop) reiterated those principles, and, referring to the *Hirsi Jamaa* judgment, he also highlighted a rule of interpretation of treaty provisions which is a fundamental criterion: these must always be “interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the rule of effectiveness” (§ 179).

4.7. A comment, lastly, on the role of the courts. They have contributed, I repeat, to raising consciousness of and sensitivity towards migration matters, which were unknown in the past. That point deserves recognition in the current context of a serious migration crisis in Europe and dangerous infringements of personal rights.