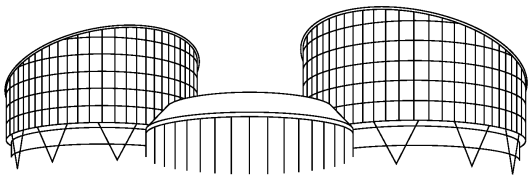

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Judicial Seminar 2017

Non-refoulement as a Principle of International Law and the Role of the Judiciary in its Implementation

Background Document

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Contents

A. Introductory Session 3
J.K. and Others v. Sweden [GC], no. 59166/12 3
Khlaifia and Others v. Italy [GC], no. 16483/12, 15 December 2016 14
B. Workshop 1 20
F.G. v. Sweden [GC], no. 43611/11, ECHR 2016 20
C. Workshop 2 28
1. Expulsion of settled migrants: Safeguards and remedies 28
2. Claims of settled migrants 39

A. Introductory Session

J.K. and Others v. Sweden [GC], no. 59166/12

This Grand Chamber judgment, delivered on 23 August 2016, contains a detailed restatement of the jurisprudential principles relevant to the principle of non-refoulement.

Summary of the facts

The application was brought by a married couple and their son, nationals of Iraq. They sought asylum in Sweden on the grounds that they risked persecution in Iraq by al-Qaeda, in view of the fact that J.K. worked for American clients and operated out of a US armed forces base in Iraq for many years. He and his family were the subject of serious threats and violence from Al-Qaeda in the years 2004 to 2008. There were attempts on their lives. J.K. was wounded twice. His brother was kidnapped in 2005. His daughter was died of injuries sustained when shots were fired at the car in which she and J.K. were travelling, in October 2008. After that J.K. stopped working and the family moved between different locations in Baghdad. Although his business stocks were attacked four or five times by al-Qaeda members, there were no further threats to the family after 2008 due to the fact that they repeatedly moved around. In 2010 J.K. left Iraq and travelled to Sweden, where he was joined the following year by the other members of his family.
The Swedish Migration Agency rejected the application for asylum. Its decision was upheld by the Migration Court in 2012, which considered that as the alleged events took place in the distant past it was difficult to see why there would still be a threat to the family since J.K. no longer worked for the Americans. If there remained any threat to them, it considered that the Iraqi law-enforcement authorities would be willing and able to provide the necessary protection.

Chamber judgment

The application was decided by a Chamber in June 2015. It held, by five votes to two, that deporting the applicants would not give rise to a violation of Article 3.

The case was referred to the Grand Chamber in October 2015.

Grand Chamber judgment

The Grand Chamber set out relevant information about the situation in Iraq, referring to the situation there since 3 April 2014 (date of judgment of a case in which the Court had considered in detail the situation in Iraq - *A.A.M. v. Sweden*, no. 68519/10). It examined the situation in Iraq under four headings:

A. General Security Situation
B. Situation of persons who collaborated with foreign armed forces
C. Ability of the Iraqi authorities to protect their citizens
D. Internal relocation in Iraq

It drew on numerous sources of information in assessing each of these aspects:

- Amnesty International
- UNHCR
- Human Rights Watch
- German Federal Office for Migration and Asylum, Information Centre Asylum and Migration
- US State Department
- IraqiNews.com

- United Kingdom Home Office
- Norwegian Country of Origin Information Centre (Landinfo)
- Swedish Migration Agency
- Amnesty International Deutschland

From European Union law the judgment cites the text of Articles 4 and 7 of the Qualification Directive (Directive 2011/95/EU of 13 December 2011). It also refers to the following judgments of the Court of Justice of the European:

- *M.M. v. Minister for Justice, Equality and Law Reform and Others,* Case C‑277/11, judgment of 22 November 2012;
- *X, Y and Z,* Joined Cases C-199/12 to C-201/12, judgment of 7 November 2013;
- *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, judgment of 2 March 2010, ECR I-1493.

This part of the judgment is completed by extracts from the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims and the 2011 edition of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status.

The Grand Chamber then reviewed the relevant principles of Convention case-law:

"1. General principles

(a) General nature of obligations under Article 3

77. The Court noted the following in *Labita v. Italy* ([GC], no. 26772/95, § 119, ECHR 2000-IV):

> "As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999‑V, and the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § 93). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79)."

(b) Principle of non-refoulement

78. The Court has on many occasions acknowledged the importance of the principle of *non-refoulement* (see, for example, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 286, ECHR 2011, and *M.A. v. Cyprus*, no. 41872/10, § 133, ECHR 2013 (extracts)). The Court's main concern in cases concerning the expulsion of asylum-seekers is "whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled" (see, among other authorities, *M.S.S. v. Belgium and Greece*, cited above, § 286; *Müslim v. Turkey*, no. 53566/99, §§ 72-76, 26 April 2005; and *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III).

(c) General principles concerning the application of Article 3 in expulsion cases

79. The general principles concerning Article 3 in expulsion cases have been set out in *Saadi v. Italy* ([GC] no. 37201/06, §§ 124-133, ECHR 2008) and, most recently, in *F.G. v. Sweden*

([GC], no. 43611/11, ECHR 2016). The relevant paragraphs of the latter judgment read as follows:

> "111. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012; *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *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). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008).
>
> 112. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires the Court to examine the conditions in the destination country in the light of the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards entail that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this level is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

(d) Risk of ill-treatment by private groups

80. Owing to the absolute character of the right guaranteed, Article 3 of the Convention applies not only to the danger emanating from State authorities but also where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see *NA. v. the United Kingdom*, no. 25904/07, § 110, 17 July 2008; *F.H. v. Sweden*, no. 32621/06, § 102, 20 January 2009; and *H.L.R. v. France*, 29 April 1997, § 40, *Reports of Judgments and Decisions* 1997-III).

81. In this context, the possibility of protection or relocation of the applicant in the State of origin is also of relevance. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 141, 11 January 2007; *Chahal v. the United Kingdom*, 15 November 1996, § 98, *Reports* 1996-V; and *Hilal v. the United Kingdom*, no. 45276/99, §§ 67-68, ECHR 2001-II).

82. However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (see *Salah Sheekh*, cited above, § 141, and *T.I. v. the United Kingdom* (dec.), cited above). Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment (see *Salah Sheekh*, cited above, § 141, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 266, 28 June 2011).

(e) Principle of ex nunc evaluation of the circumstances

83. In the Court's case-law the principle of *ex nunc* evaluation of the circumstances has been established in a number of cases. This principle has most recently been set out in *F.G. v. Sweden* (cited above):

> "115. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case (see *Chahal*, cited above, § 86). A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see, for example, *Maslov v. Austria* [GC], no. 1638/03, §§ 87-95, ECHR 2008 and *Sufi and Elmi v. the United Kingdom*, cited above, § 215). This situation typically arises when, as in the present case, deportation is delayed as a result of the indication by the Court of an interim measure under Rule 39 of the Rules of Court. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007; and *Vilvarajah and Others v. the United Kingdom*, cited above, §§ 107 and 108)."

(f) Principle of subsidiarity

84. In *F.G. v. Sweden* (cited above), the Court described the nature of its examination in cases concerning the expulsion of asylum-seekers as follows:

> "117. In cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-287, ECHR 2011). The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or third States, agencies of the United Nations and reputable non-governmental organisations (see, among other authorities, *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).
>
> 118. Moreover, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see, among other authorities, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 179-80, 24 March 2011; *Nizomkhon Dzhurayev v. Russia*, no. 31890/11, § 113, 3 October 2013; and *Savriddin Dzhurayev v. Russia*, no. 71386/10, § 155, ECHR 2013 (extracts). As a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned (see, for example, *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010)."

(g) Assessment of the existence of a real risk

85. In *Saadi v. Italy* (cited above, § 140) the Court held:

> "... for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (…)."

86. In *F.G. v. Sweden* (cited above), the Court found the following concerning the assessment of the existence of a real risk:

> "113. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports* 1996-V, and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see, for example, *Saadi v. Italy*, cited above, § 129, and *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). ...
>
> 114. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215). In this connection, and where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination (see *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 216, 28 June 2011).
>
> ...
>
> 116. It is for the Court to consider in an expulsion case whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk 'in the most extreme cases' where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *Sufi and Elmi*, cited above, §§ 216 and 218. See also, among others, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, § 108, 15 October 2015; and *Mamazhonov v. Russia*, no. 17239/13, §§ 132-133, 23 October 2014)."

87. With regard to the assessment of evidence, it has been established in the Court's case-law that "the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion" (see *F.G. v. Sweden*, cited above, § 115, quoted at paragraph 83 above). The Contracting State therefore has the obligation to take into account not only the evidence submitted by the applicant but also all other facts which are relevant in the case under examination.

88. In assessing the weight to be attached to country material, the Court has found in its case-law that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations (see *Saadi v. Italy*, cited above, § 143; *NA. v. the United Kingdom*, cited above, § 120; and *Sufi and Elmi*, cited above, § 230).

89. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question (see *Sufi and Elmi*, cited above, § 231). The Court appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on (see *Sufi and Elmi*, cited above, § 232).

90. In assessing the risk, the Court may obtain relevant materials *proprio motu*. This principle has been firmly established in the Court's case-law (see *H.L.R. v. France*, cited above, § 37; *Hilal*, cited above, § 60; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 116, ECHR 2012). In respect of materials obtained *proprio motu*, the Court considers that, given the

absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *F.G. v. Sweden*, cited above, § 117, quoted at paragraph 84 above). In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned, without comparing these with materials from other reliable and objective sources (see *Salah Sheekh*, cited above, § 136).

(h) Distribution of the burden of proof

91. Regarding the burden of proof in expulsion cases, it is the Court's well-established case-law that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it (see *F.G. v. Sweden*, cited above, § 120; *Saadi v. Italy*, cited above, § 129; *NA. v. the United Kingdom*, cited above, § 111; and *R.C. v. Sweden*, cited above, § 50).

92. According to the Court's case-law, it is incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail (see *Said v. the Netherlands*, no. 2345/02, § 49, ECHR 2005-VI). The Court, however, acknowledges the fact that with regard to applications for recognition of refugee status, it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive *per se* (see *Bahaddar v. the Netherlands*, 19 February 1998, § 45, *Reports* 1998-I, and, *mutatis mutandis*, *Said*, cited above, § 49).

93. Owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions (see *F.G. v. Sweden*, cited above, § 113; *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *S.H.H. v. the United Kingdom*, no. 60367/10, § 71, 29 January 2013). Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim (see *Said*, cited above, § 53, and, *mutatis mutandis*, *N. v. Finland*, no. 38885/02, §§ 154-155, 26 July 2005).

94. As a general rule, an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination.

95. Moreover, although a number of individual factors may not, when considered separately, constitute a real risk, the same factors may give rise to a real risk when taken cumulatively and when considered in a situation of general violence and heightened security (see *NA. v. the United Kingdom*, cited above, § 130). The following elements may represent such risk factors: previous criminal record and/or arrest warrant, the age, gender and origin of a returnee, a

previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad (see *NA. v. the United Kingdom*, cited above, §§ 143-144 and 146).

96. The Court notes that it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings. Asylum-seekers are normally the only parties who are able to provide information about their own personal circumstances. Therefore, as far as the individual circumstances are concerned, the burden of proof should in principle lie on the applicants, who must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection. This requirement is also expressed both in the UNHCR documents (see paragraph 6 of the UNHCR Note on Burden and Standard of Proof in Refugee Claims and paragraph 196 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status…) and in Article 4 § 1 of the EU Qualification Directive, as well as in the subsequent case-law of the CJEU (…).

97. However, the rules concerning the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence (see *Bahaddar*, cited above § 45, and, *mutatis mutandis*, *Said*, cited above, § 49). Both the standards developed by the UNCHR (paragraph 12 of the Note and paragraph 196 of the Handbook, both cited in paragraphs 53-54 above) and Article 4 § 5 of the Qualification Directive recognise, explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection.

98. The Court notes that, as far as the evaluation of the general situation in a specific country is concerned, a different approach should be taken. In respect of such matters, the domestic authorities examining a request for international protection have full access to information. For this reason, the general situation in another country, including the ability of its public authorities to provide protection, has to be established *proprio motu* by the competent domestic immigration authorities (see, *mutatis mutandis*, *H.L.R. v. France*, cited above, § 37; *Hilal*, cited above, § 60; and *Hirsi Jamaa and Others*, cited above, § 116). A similar approach is advocated in paragraph 6 of the above-mentioned Note issued by the UNHCR, according to which the authorities adjudicating on an asylum claim have to take "the objective situation in the country of origin concerned" into account *proprio motu*. Similarly, Article 4 § 3 of the Qualification Directive requires that "all relevant facts as they relate to the country of origin" are taken into account.

(i) Past ill-treatment as an indication of risk

99. Specific issues arise when an asylum-seeker alleges that he or she has been ill-treated in the past, since past ill-treatment may be relevant for assessing the level of risk of future ill-treatment. According to the established case-law, in the evaluation of the risk of future ill-treatment it is necessary to take due account of the fact that the applicant has made a plausible case that he or she was subjected to ill-treatment contrary to Article 3 of the Convention in the past. For example, in *R.C. v. Sweden*, in which the applicant had already been tortured, the Court considered that "the onus rest[ed] with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded" (see *R.C. v. Sweden*, cited above, § 55). In *R.J. v. France*, while sharing the French Government's doubts as to the claims made by the applicant, a Tamil from Sri Lanka, concerning the conditions of his detention and his financial support for the Liberation Tigers of Tamil Eelam (LTTE), the Court found that the Government had failed to effectively rebut the strong presumption raised by the medical certificate of treatment contrary to Article 3 (see *R.J. v. France*, no. 10466/11, § 42, 19 September 2013). In the case of *D.N.W. v. Sweden* the Court concluded that "the applicant ha[d] failed to make it plausible that he would face a real risk of being killed or subjected to ill-treatment upon return to Ethiopia" even though it accepted that

the applicant had been detained and subjected to ill-treatment by the Ethiopian authorities in the past (see *D.N.W. v. Sweden*, no. 29946/10, §§ 42 and 45, 6 December 2012).

100. This issue has also been touched upon in the EU Qualification Directive and in the UNHCR documents. In particular, Article 4 § 4 of the Qualification Directive (…) provides – as regards the assessment of refugee status or other need for international protection by the authorities of European Union member States – that "[t]he fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".

101. Furthermore, this issue, which is closely linked with the general questions of assessment of evidence, is addressed in paragraph 19 of the UNHCR Note on Burden and Standard of Proof in Refugee Claims, dealing with indicators for assessing the well-foundedness of a fear of persecution, which states as follows: "While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin" (…). The Court considers that the UNHCR's general approach to the burden of proof is also of interest in the present context: while the burden of proof lies with the asylum-seeker, the State official examining the asylum claim shares the duty to ascertain and evaluate all relevant facts with the asylum-seeker (see paragraph 6 of the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims and paragraph 196 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status …). Moreover, as regards the assessment of the overall credibility of an asylum claim, paragraph 11 of the Note on Burden and Standard of Proof in Refugee Claims states that credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed (…).

102. The Court considers that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it will be for the Government to dispel any doubts about that risk.

(j) Membership of a targeted group

103. The above-mentioned requirement that an asylum-seeker is capable of distinguishing his or her situation from the general perils in the country of destination is, however, relaxed in certain circumstances, for example where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment (see *Salah Sheekh*, cited above, § 148; *S.H. v. the United Kingdom*, no. 19956/06, §§ 69-71, 15 June 2010; and *NA. v. the United Kingdom*, cited above, § 116).

104. Moreover, in *Saadi v. Italy* (cited above) the Court held:

> "132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-49)."

105. In those circumstances, the Court will not then insist that the applicant demonstrate the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh*, cited above, § 148; and *NA. v. the United Kingdom*, cited above, § 116)."

Applying these principles to the case, the Grand Chamber affirmed that its assessment must be based on present-day conditions in Iraq. It considered that the information available indicated that the general security situation there was not so severe as to constitute, in itself, a real risk of treatment contrary to Article 3 of the Convention.

An assessment of the personal circumstances of the applicants was therefore required.

"112. The Court notes first of all that, in the present case, the alleged threats have concerned several members of the applicant family, including the first and second applicants' daughter and the first applicant's brother. As these threats were mainly due to the first applicant's actions, the Court will therefore focus on his situation. The first applicant claimed that he would run a real risk of ill-treatment if returned to Iraq, on two grounds: on the one hand, his alleged persecution by al-Qaeda on account of his business relationship with the American forces until 2008 and, on the other hand, the possible persecution by the Iraqi authorities on account of a televised public debate in which he had participated.

113. The Court reiterates that it is assessing the applicants' situation from the present-day point of view. The main question is not how the Swedish immigration authorities assessed the case at the time (that is, when the Migration Agency and the Migration Court took their decisions on 22 November 2011 and 23 April 2012 respectively) but rather whether, in the present-day situation, the applicants would still face a real risk of persecution for the above-mentioned reasons if removed to Iraq (see *F.G. v. Sweden*, cited above, § 115).

114. From the outset, the Court sees no reason to cast doubt on the Migration Agency's findings that the family had been exposed to the most serious forms of abuses (*ytterst allvarliga övergrepp*) by al-Qaeda from 2004 until 2008 (see … *F.G. v. Sweden*, cited above, §§ 117-118, quoted in paragraph 84 above), which do not seem to have been questioned in the Agency's submissions to the Migration Court, or in the conclusions of the latter, and which appear to be undisputed in the Convention proceedings. The Court also notes that the applicants alleged in the proceedings before the Migration Agency that indirect threats against them and attacks on the first applicant's business stock had continued after 2008, that they had only escaped further abuses by going into hiding and that they had been unable to avail themselves of the Iraqi authorities' protection as the latter were infiltrated by al-Qaeda. The Court sees no reason to question this account. Thus, on the whole, the Court is satisfied that the applicants' account of events which occurred between 2004 and 2010 is generally coherent and credible. This account is consistent with relevant country-of-origin information available from reliable and objective sources (…). Having regard to the fact that the applicants had been subjected to ill-treatment by al-Qaeda, the Court finds that there is a strong indication that they would continue to be at risk from non-State actors in Iraq (…).

115. It is therefore for the Government to dispel any doubts about that risk. In this connection the Court notes that the Government submitted before it that the Migration Agency had argued before the Migration Court that the documents submitted by the applicants in respect of the alleged events in September and November 2011 were of a simple nature and of little evidentiary value; the Government also questioned why the applicants had not made more detailed submissions concerning the continuing abuses after 2008 at an earlier stage in the asylum proceedings. They argued that this state of affairs lessened the applicants' credibility, as

did the timing and manner of their reliance on the DVD containing the audiovisual recording of the television debate in which the first applicant had participated (…), whereas the applicants disputed that contention (…). However, the Court observes that the Migration Agency did not comment on the applicants' credibility or the DVD. Nor did the Migration Court specifically address these issues in its reasoning.

In the absence of further concrete reasoning on these issues in the Migration Authority's and the Migration Court's respective findings, the Court does not have the benefit of their assessment in this regard.
However, the Court does not find it necessary to resolve the disagreement between the parties on these matters since, in any event, the domestic decisions do not appear to have entirely excluded a continuing risk from al-Qaeda.
Instead they appear to have supported the view that – at the time of their decisions – the ability of al-Qaeda to operate freely had declined, as had that group's infiltration of the authorities, and that conversely, the authorities' ability to protect the applicants had increased (…).

116. It appears from various reports from reliable and objective sources that persons who collaborated in different ways with the authorities of the occupying powers in Iraq after the war have been and continue to be targeted by al-Qaeda and other groups. The United Kingdom Home Office's Country of Origin Information Report on Iraq of 2009 stated that civilians employed or otherwise affiliated with the Multi-National Force in Iraq were at risk of being targeted by non-State actors. Similarly, the Home Office's report of 2014 stated that persons who were perceived to collaborate or had collaborated with the current Iraqi Government and its institutions, the former US or multinational forces or foreign companies were at risk of persecution in Iraq. The reports single out certain particularly targeted groups, such as interpreters, Iraqi nationals employed by foreign companies, and certain affiliated professionals such as judges, academics, teachers and legal professionals (…).

117. The first applicant belongs to the group of persons systematically targeted for their relationship with American armed forces. The Court is mindful of the fact that the level and forms of involvement in "collaboration" with foreign troops and authorities may vary and that, consequently, the level of risk can also vary to some extent. In this connection attention must be paid to the fact that it has already been established that the first applicant was ill-treated until 2008. Moreover, another significant factor is that his contacts with the American forces were highly visible as his office was situated at the United States military base referred to by the applicants as "Victoria Camp". The above-mentioned reports provide little or no support for the assumption – which transpires from the domestic decisions – that threats from al-Qaeda must have ceased once the first applicant terminated his business relationship with the American forces. In the light of the particular circumstances of this case, the Court finds that the first applicant and the two other members of his family who are applicants in this case would face a real risk of continued persecution by non-State actors if returned to Iraq.

118. A connected question is whether the Iraqi authorities would be able to provide protection to the applicants. The applicants contested this, whereas the Government contended that a properly functioning judicial system was in place in Baghdad.

119. The Court notes in this connection that, according to the standards of European Union law, the State or entity providing protection must meet certain specific requirements: in particular, it must be "operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution of serious harm" (see Article 7 of the Qualification Directive…).

120. It appears from the most recent objective international human rights sources that there are deficits in both the capacity and the integrity of the Iraqi security and legal system. The system still works, but the shortcomings have increased since 2010 (…).

Moreover, the US Department of State has noted that widespread corruption at all levels of government and society has exacerbated the lack of effective human rights protections and that the security forces have made limited efforts to prevent or respond to societal violence (…). The situation has thus clearly deteriorated since 2011 and 2012, when the Migration Agency and the Migration Court respectively assessed the situation and the latter found that, in the event that threats still existed, it appeared likely that the Iraqi law-enforcement authorities were both willing and able to offer the applicants the necessary protection (…). Lastly, this issue is to be seen against a background of a generally deteriorating security situation, marked by an increase in sectarian violence and attacks and advances by ISIS, as a result of which large areas of the territory are outside the Iraqi Government's effective control (…).

121. The Court considers that, in the light of the above information on matters including the complex and volatile general security situation, the Iraqi authorities' capacity to protect their people must be regarded as diminished. Although the current level of protection may still be sufficient for the general public in Iraq, the situation is different for individuals, such as the applicants, who are members of a targeted group. The Court is therefore not convinced, in the particular circumstances of the applicants' case, that the Iraqi State would be able to provide them with effective protection against threats by al-Qaeda or other private groups in the current situation. The cumulative effect of the applicants' personal circumstances and the Iraqi authorities' diminished ability to protect them must therefore be considered to create a real risk of ill-treatment in the event of their return to Iraq.

122. As the Iraqi authorities' ability to protect the applicants must be regarded as diminished throughout Iraq, the possibility of internal relocation is not a realistic option in the applicants' case.

123. The Court therefore finds that substantial grounds have been shown for believing that the applicants would run a real risk of treatment contrary to Article 3 if returned to Iraq. Accordingly, the Court considers that the implementation of the deportation order in respect of the applicants would entail a violation of Article 3 of the Convention."

Khlaifia and Others v. Italy [GC], no. 16483/12, 15 December 2016

This is the most recent judgment of the Grand Chamber concerning the treatment of migrants (who were not asylum-seekers).
The facts of the case were summarized in the Registry press release on the case as follows:

> Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar, are three Tunisian nationals who were born in 1983, 1987 and 1988 respectively. Mr Khlaifia lives in Om Laarass (Tunisia); Mr Tabal and Mr Sfar live in El Mahdia (Tunisia).
> In September 2011 they left Tunisia with others on makeshift boats heading for the Italian coast. Their vessels were intercepted by the Italian coastguard, which escorted them to a port on the island of Lampedusa. The applicants were transferred to an Early Reception and Aid Centre ("CSPA") on Lampedusa at Contrada Imbriacola, where the authorities proceeded with their identification. The applicants claimed to have been held in overcrowded and dirty conditions.
> On 20 September 2011 a violent revolt broke out among the migrants in the CSPA. The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa. They then managed to evade police surveillance and reach the village of Lampedusa, from where, with about 1,800 other migrants, they started a demonstration through the streets of the island. After being stopped by the police, the applicants were taken first back to the reception centre and then to Lampedusa airport.
> On 22 September 2011 Mr Khlaifia, Mr Tabal and Mr Sfar were flown to Palermo. After disembarking they were transferred to ships that were moored in the harbour there. Mr Khlaifia was placed on the *Vincent*, with some 190 other people, while the other applicants were put on board the *Audace* among about 150 other migrants. The applicants remained on the ships for a few days.
> On 27 September 2011 Mr Tabal and Mr Sfar were taken to Palermo airport pending their removal to Tunisia; Mr Khlaifia was removed on 29 September. Before boarding the planes for Tunisia, the migrants were received by the Tunisian Consul, who, according to the applicants, merely recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011. The applicants also asserted that at no time during their stay in Italy had they been issued with any document. Annexed to their observations, the Government, however, produced three refusal-of- entry orders that had been issued in respect of the applicants. Those orders were accompanied by a record indicating that the addressee had refused to sign or receive a copy. On their arrival at Tunis airport, Mr Khlaifia, Mr Tabal and Mr Sfar were released.
> A number of anti-racism associations filed a complaint about the treatment to which the migrants had been subjected on board three ships in Palermo harbour. Criminal proceedings for abuse of power and unlawful arrest were opened against a person or persons unknown. In a decision of 1 June 2012 the Palermo preliminary investigations judge dropped the charges.
> Two other migrants in respect of whom a refusal-of-entry order had been issued challenged those orders before the Agrigento Justice of the Peace, who annulled them. The judge observed that the complainants had been found on Italian territory on 6 May and 18 September 2011 respectively and that the orders at issue had been adopted only on 16 May and 24 September 2011. While acknowledging that the law did not indicate any time-frame for such orders, the judge found that a measure which by its very nature restricted the freedom of the person concerned had to be taken within a reasonably short time after his or her identification, otherwise the *de facto* detention would be permitted in the absence of any reasoned decision of the authority.

Of particular note in this lengthy judgment, which examines many Convention complaints, is the following passage in relation to Article 3:

"**(a) The existence of a humanitarian emergency and its consequences**

178. The Court finds it necessary to begin by addressing the Government's argument that it should take due account of the context of humanitarian emergency in which the events in question had taken place (…).

179. In this connection the Court, like the Chamber, cannot but take note of the major migration crisis that unfolded in 2011 following events related to the "Arab Spring". As the PACE *Ad Hoc* Sub-Committee noted on 30 September 2011 (see, in particular, §§ 9-13 of its report…), following uprisings in Tunisia and Libya there was a fresh wave of arrivals by boat, as a result of which Italy declared a state of humanitarian emergency on the island of Lampedusa and appealed for solidarity from the member States of the European Union. By 21 September 2011, when the applicants were on the island, 55,298 persons had arrived there by sea. As indicated by the Government (…), between 12 February and 31 December 2011, 51,573 nationals of third States (of whom about 46,000 were men and 26,000 were Tunisian nationals) landed on the islands of Lampedusa and Linosa. The arrival *en masse* of North African migrants undoubtedly created organisational, logistical and structural difficulties for the Italian authorities in view of the combination of requirements to be met, as they had to rescue certain vessels at sea, to receive and accommodate individuals arriving on Italian soil, and to take care of those in particularly vulnerable situations. The Court would observe in this connection that according to the data supplied by the Government (...) and not disputed by the applicants, there were some 3,000 women and 3,000 children among the migrants who arrived during the period in question.

180. In view of the significant number of factors, whether political, economic or social, which gave rise to such a major migration crisis and taking account of the challenges facing the Italian authorities, the Court cannot agree with the applicants' view (…) that the situation in 2011 was not exceptional. An excessive burden might be imposed on the national authorities if they were required to interpret those numerous factors precisely and to foresee the scale and timeframe of an influx of migrants. In that connection it should be observed that the significant increase of arrivals by sea in 2011 compared to previous years was confirmed by the report of the PACE Ad Hoc Sub-Committee. According to that report, 15,527, 18,047, 11,749 and 31,252 migrants had arrived on Lampedusa in 2005, 2006, 2007 and 2008 respectively. The number of arrivals had diminished in 2009 and 2010, with, respectively, 2,947 and 459 individuals (see, in particular, §§ 9 and 10 of the report…). That reduction had been significant enough for the authorities to close the reception centres on Lampedusa (see, in particular, ibid., §§ 10 and 51). When those data are compared with the figures for the period from 12 February to 31 December 2011 (…), which saw 51,573 nationals from third countries arriving on Lampedusa and Linosa, it can be appreciated that the year 2011 was marked by a very significant increase in the number of migrants arriving by sea from North African countries on the Italian islands to the south of Sicily.

181. Neither can the Court criticise, in itself, the decision to concentrate the initial reception of the migrants on Lampedusa. As a result of its geographical situation, that was where most rudimentary vessels would arrive and it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants. It was therefore not unreasonable, at the initial stage, to transfer the survivors from the Mediterranean crossing to the closest reception facility, namely the CSPA at Contrada Imbriacola.

182. Admittedly, as noted by the Chamber, the accommodation capacity available in Lampedusa was both insufficient to receive such a large number of new arrivals and ill-suited

to stays of several days. It is also true that in addition to that general situation there were some specific problems just after the applicants' arrival. On 20 September a revolt broke out among the migrants being held at the Contrada Imbriacola CSPA and the premises were gutted by an arson attack (…). On the next day, about 1,800 migrants started protest marches through the island's streets (…) and clashes occurred in the port of Lampedusa between the local community and a group of aliens threatening to explode gas canisters. Acts of self-harm and vandalism were also perpetrated (…). Those incidents contributed to exacerbating the existing difficulties and creating a climate of heightened tension.

183. The foregoing details show that the State was confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that during this period the Italian authorities were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order.

184. That being said, the Court can only reiterate its well-established case-law to the effect that, having regard to the absolute character of Article 3, an increasing influx of migrants cannot absolve a State of its obligations under that provision (see *M.S.S. v. Belgium and Greece*, cited above, § 223; see also *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §§ 122 and 176, ECHR 2012), which requires that persons deprived of their liberty must be guaranteed conditions that are compatible with respect for their human dignity. In this connection the Court would also point out that in accordance with its case-law as cited in paragraph 160 above, even treatment which is inflicted without the intention of humiliating or degrading the victim, and which stems, for example, from objective difficulties related to a migrant crisis, may entail a violation of Article 3 of the Convention.

185. While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time."

The judgment then assesses the conditions experienced by the applicants during the two days spent on Lampedusa, reaching the conclusion that there was no violation of Article 3 (contrary to the finding of the Chamber in this case).

Another aspect of the case was the applicant's complaint that they had been subject to collective expulsion, contrary to Article 4 of Protocol No. 4. The Chamber considered that the facts of the case disclosed a violation of this provision.
The Grand Chamber came to the opposite conclusion. It stated:

"248. The Court would point out that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State.

249. In the present case, the applicants, who could reasonably have expected to be returned to Tunisia in view of the conditions of their arrival on the Italian coast, remained for between nine and twelve days in Italy. Even assuming that they encountered objective difficulties in the CSPA or on the ships (see, in particular, §§ 49 and 50 of the PACE *Ad Hoc* Sub-Committee's report, …), the Court is of the view that during that not insignificant period of time the applicants had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy.

250. The Court further notes that on 27 and 29 September 2011, before boarding the planes for Tunis, the applicants were received by the Tunisian Consul, who recorded their identities (…); they thus underwent a second identification. Even though it was carried out by a representative of a third State, this later check enabled the migrants' nationality to be confirmed and gave them a last chance to raise arguments against their expulsion. The Government, whose claims on this point are not disputed by the applicants, substantiated them by pointing out that, after details as to their age or nationality had been established during their meetings with the Tunisian Consul, some of the migrants listed by the Italian authorities had not been removed after all (…).

251. The Chamber rightly observed that the refusal-of-entry orders had been drafted in comparable terms, only differing as to the personal data of each migrant, and that a large number of Tunisian migrants had been expelled at the relevant time. However, according to the case-law cited in paragraph 239 above, those two facts cannot in themselves be decisive. In the Court's view, the relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. It is therefore not unreasonable in itself for those orders to have been justified merely by the applicants' nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in Article 10 § 4 of Legislative Decree no. 286 of 1998 (political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds …).

252. It follows that in the particular circumstances of the case, the virtually simultaneous removal of the three applicants does not lead to the conclusion that their expulsion was "collective" within the meaning of Article 4 of Protocol No. 4 to the Convention. It may indeed be explained as the outcome of a series of individual refusal-of-entry orders. Those considerations suffice for the present case to be distinguished from the cases of *Čonka*, *Hirsi Jamaa and Others*, *Georgia v. Russia* (I) and *Sharifi and Others* (all cited and described in paragraph 242 above), such as to preclude the characterisation of the applicants' expulsion as "collective".

253. The Court would observe, moreover, that the applicants' representatives, both in their written observations and at the public hearing (…), were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and preclude their removal. This calls into question the usefulness of an individual interview in the present case.

254. To sum up, the applicants underwent identification on two occasions, their nationality was established, and they were afforded a genuine and effective possibility of submitting arguments against their expulsion.

There has therefore been no violation of Article 4 of Protocol No. 4."

The final point that will be referred to here concerns Article 13 taken together with Article 4 of Protocol No. 4. The Grand Chamber, agreeing with the Chamber, was satisfied that the refusal-of-entry orders served on the applicants could be appealed to the competent Justice of the Peace, who would be in a position to examine whether the expulsion was a collective one. It then considered the lack of suspensive effect, which fact had led the Chamber to find a violation of Article 13, relying on a passage in the *De Souza Ribeiro* judgment[1]. The Grand Chamber disagreed, reasoning as follows:

[1] "82. Where a complaint concerns allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment

"276. The Court observes that, while the last sentence of the above-cited paragraph 82 certainly appears to establish the need for "a remedy with automatic suspensive effect ... for complaints under Article 4 of Protocol No. 4", it cannot be read in isolation. On the contrary, it must be understood in the light of the paragraph as a whole, which establishes an obligation for States to provide for such a remedy where the person concerned alleges that the enforcement of the expulsion would expose him or her to a real risk of ill-treatment in breach of Article 3 of the Convention or of a violation of his or her right to life under Article 2, on account of the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialised. It should also be noted that the last statement in paragraph 82 of the *De Souza Ribeiro* judgment is corroborated by the citation of the *Čonka* (…) and *Hirsi Jamaa and Others* (…) judgments. However, those two cases concerned situations in which the applicants had sought to alert the national authorities to the risk that they might be subjected to treatment in breach of Article 3 of the Convention in the destination countries, and not to any allegation that their expulsion from the host State was collective in nature.

277. The Court takes the view that where, as in the present case, an applicant does not allege that he or she faces violations of Articles 2 or 3 of the Convention in the destination country, removal from the territory of the respondent State will not expose him or her to harm of a potentially irreversible nature.

278. The risk of such harm will not obtain, for example, where it is argued that the expulsion would breach the person's right to respect for his or her private and family life. That situation is envisaged in paragraph 83 of the *De Souza Ribeiro* judgment, which must be read in conjunction with the preceding paragraph, and which reads as follows:

> "By contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see M. and Others v. Bulgaria, no. 41416/08, §§ 122-32, 26 July 2011, and, mutatis mutandis, Al-Nashif v. Bulgaria, no. 50963/99, § 133, 20 June 2002)."

279. In the Court's view, similar considerations apply where an applicant alleges that the expulsion procedure was "collective" in nature, without claiming at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention. It follows that in such cases the Convention does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely requires that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. The Court finds that the Agrigento Justice of the Peace satisfied those requirements.

280. The Court would also point out that the fact that the remedy available to the applicant did not have suspensive effect was not a decisive consideration for the conclusion reached in the

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alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority (…), independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (…), and reasonable promptness (…). In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect (…). The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention. Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol No. 4 …)." Citations omitted.

De Souza Ribeiro case that there had been a violation of Article 13 of the Convention. That conclusion was based on the fact that the applicant's "arguable" complaint, to the effect that his removal was incompatible with Article 8 of the Convention, had been dismissed rapidly, in fact extremely hastily (the applicant had appealed to the Administrative Court on 26 January 2007 at 3.11 p.m., and had been deported to Brazil on the same day at around 4 p.m. – see De Souza Ribeiro, cited above, §§ 84-100, and in particular §§ 93-94 and 96).

281. It follows that the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 of the Convention where, as in the present case, the applicants do not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country.

Accordingly, there has been no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4."

B. Workshop 1

Assessment of the credibility of asylum-seekers: the burden of proof and the limits of the ECtHR's examination

F.G. v. Sweden [GC], no. 43611/11, ECHR 2016

This judgment, delivered on 23 March 2016, details the duties to be observed by the parties in asylum proceedings.

Summary of the facts

The applicant in this case, an Iranian national, entered Sweden in November 2009 and sought political asylum there. Very shortly after his arrival in the country, he converted to Christianity. In the asylum proceedings, he said that he did not wish to rely on the fact of his conversion, as he regarded that as something private. Instead, he relied solely on his fear of persecution in light of his political activities in Iran. The Migration Board considered that since he viewed religion as a private affair, the applicant would not face persecution if returned to Iran for practicing his faith in private. In his appeal, the applicant relied on the fact of his conversion (attested by a certificate of baptism) and explained that he had not relied on this ground earlier as he did not wish to trivialise the seriousness of his beliefs. At the appeal hearing, the applicant stated that he did not wish to rely on his conversion as a ground for asylum as he considered it to be personal, although it would obviously cause him problems in Iran. The Migration Court rejected his appeal based on the political ground. In relation to the religious ground it just noted that he was not relying on this. The applicant sought leave to appeal to the Migration Court of Appeal, stating that he had relied on his conversion before the Migration Court. He explained that he had joined another congregation and that his religious activities were no longer private since he took part in services that were broadcast on the internet. The Migration Court of Appeal refused the request for leave. Subsequently, the Migration Board refused to re-examine the applicant's claim in light of his conversion, since there would have to be a new circumstance and his conversion could not be regarded as one. This refusal was upheld on appeal.

Grand Chamber judgment

The Grand Chamber referred to relevant EU law:

- the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted);

- the Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status), which was in force at the relevant time.

It also referred to two relevant decisions of the Court of Justice of the European Union:

- *Bundesrepublik Deutschland v. Y* (C-71/11) and Z (C-99/11), judgment of 5 September 2012;
- *A* (C‑148/13), *B* (C‑149/13), *C* (C‑150/13) *v. Staatssecretaris van Veiligheid en Justitie*, judgment of 2 December 2014.

It then referred to material from the following sources:

- UNHCR

- United States Supreme Court
- United Kingdom Home Office
- Political Affairs Committee of the Parliamentary Assembly of the Council of Europe
- US State Department
- Danish Immigration Service.

Its reasoning is as follows:

"C. The Court's assessment

1. Introduction

110. At the outset the Court observes that in the context of expulsion, where there are substantial grounds to believe that the person in question, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, both Articles 2 and 3 imply that the Contracting State must not expel that person. The Court will therefore also examine the two Articles together (see, among other authorities, *mutatis mutandis*, *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 314, ECHR 2014 (extracts); *T.A. v. Sweden*, no. 48866/10, § 37, 19 December 2013; *K.A.B. v. Sweden*, no. 886/11, § 67, 5 September 2013; *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009; and *F.H. v. Sweden*, no. 32621/06, § 72, 20 January 2009).

2. General principles regarding the assessment of applications for asylum under Articles 2 and 3 of the Convention

(a) The risk assessment

111. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012; *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *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). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008).

112. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires the Court to examine the conditions in the destination country in the light of the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards entail that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this level is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

113. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports* 1996-V, and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving

that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see, for example, *Saadi v. Italy*, cited above, § 129, and *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). In this connection, the Court acknowledges that, owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *N. v Sweden*, no. 23505/09, 20 July 2010; *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008; and *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007).

114. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215). In this connection, and where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination (see, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 216, 28 June 2011).

115. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case (see *Chahal*, cited above, § 86). A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see, for example, *Maslov v. Austria* [GC], no. 1638/03, §§ 87-95, ECHR 2008 and *Sufi and Elmi, v. the United Kingdom*, cited above, § 215). This situation typically arises when, as in the present case, deportation is delayed as a result of the indication by the Court of an interim measure under Rule 39 of the Rules of Court. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007 and *Vilvarajah and Others v. the United Kingdom*, cited above, §§ 107 and 108).

116. It is for the Court to consider in an expulsion case whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk "in the most extreme cases" where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see, *Sufi and Elmi*, cited above, §§ 216 and 218. See also, among others, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, § 108, 15 October 2015 and *Mamazhonov v. Russia*, no. 17239/13, §§ 132-133, 23 October 2014).

(b) The nature of the Court's inquiry

117. In cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective

guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled. By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-287, ECHR 2011). The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or third States, agencies of the United Nations and reputable non-governmental organisations (see, among other authorities, *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

118. Moreover, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see, among other authorities, *Giuliani and Gaggio v.* Italy [GC], no. 23458/02, §§ 179-80, 24 March 2011; *Nizomkhon Dzhurayev v. Russia*, no. 31890/11, § 113, 3 October 2013; and *Savriddin Dzhurayev v. Russia*, no. 71386/10, § 155, ECHR 2013 (extracts). As a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned (see, for example, *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010).

(c) The procedural duties in the examination of applications for asylum

119. In the context of deportation, the Court has on various occasions set out the obligations incumbent on States in respect of the procedural aspect of Articles 2 and 3 of the Convention (see, *inter alia*, *Hirsi Jamaa and Others v. Italy*, cited above, §198; *M.E. v. Denmark*, no. 58363/10, § 51, 8 July 2014; and *Sufi and Elmi*, cited above, § 214).

120. Regarding the burden of proof, the Court found in *Saadi v. Italy* (cited above, §§ 129-32; see also, among others, *Ouabour v. Belgium*, no. 26417/10, § 65, 2 June 2015 and *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 261, ECHR 2012 (extracts)), that it was in principle for the applicant to adduce evidence capable of proving that there were substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence was adduced, it was for the Government to dispel any doubts raised by it (ibid., § 129). In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the destination country, bearing in mind the general situation there and his personal circumstances (ibid., § 130). Where the sources available describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (ibid., § 131). In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the above-mentioned sources, that there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned (ibid., § 132).

121. As regards asylum procedures, the Court observes that Article 4(1) of the Qualifications Directive (…) provides that member States of the European Union may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection, and that paragraph 67 of the UNHCR handbook (…) states as follows:

> "It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951

Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, for example a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear".

122. The Court also notes that the UNHCR, in its third-party observations (…), submitted that although the burden of proof generally rested on the person making the assertion, there was a shared duty between the applicant and the examiner to ascertain and evaluate all the relevant facts; that in fulfilling this shared duty, examiners might, in some cases, need to use all the means at their disposal to produce the necessary evidence in support of the application.

123. In respect of *sur place* activities the Court has acknowledged that it is generally very difficult to assess whether a person is genuinely interested in the activity in question, be it a political cause or a religion, or whether the person has only become involved in it in order to create post-flight grounds (see, for example *A.A. v. Switzerland*, no. 58802/12, § 41, 7 January 2014). That reasoning is in line with the UNCHR Guidelines on International Protection regarding Religion-Based Refugee Claims of 28 April 2004, which state "that particular credibility concerns tend to arise in relation to *sur place* claims and that a rigorous and in-depth examination of the circumstances and genuineness of the conversion will be necessary ... So-called "self-serving" activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned" (…). See also the Court's finding in, for example, *Ali Muradi and Selma Alieva v. Sweden* ((dec.), no 11243/13, §§ 44-45, 25 June 2013) to this effect.

124. Furthermore, the Court observes that in respect of a first-instance determination of eligibility for international protection, the CJEU, in a judgment (*A, B, C v. Staatssecretaris van Veiligheid en Justitie*, cited above), held, *inter alia*, that Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 had to be interpreted as precluding the competent national authorities, in the context of that assessment, from finding that the statements of the applicant for asylum lacked credibility merely because the applicant had not relied on his declared sexual orientation on the first occasion he had been given to set out the ground for persecution (…).

125. It is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of it, and to adduce evidence capable of proving that there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of exposure to a life-threatening situation covered by Article 2 or to treatment in breach of Article 3.

126. However, in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], cited above, §§ 131-133, and *M.S.S. v. Belgium and Greece* [GC], cited above, § 366).

127. By contrast, in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, the State concerned cannot be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum seekers often find

themselves in, if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned (…)."

The Grand Chamber then applied these principles to the applicant's case.
Regarding his conversion, it reasoned:

"144. In the present case, the Swedish authorities were confronted with a *sur place* conversion. Initially, they therefore had to assess whether the applicant's conversion was genuine and had attained a certain level of cogency, seriousness, cohesion and importance (see, *inter alia*, *S.A.S. v. France* [GC], no. 43835/11, § 55, 1 July 2014; *Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 81, ECHR 2013, and *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011), before assessing whether the applicant would be at risk of treatment contrary to Articles 2 and 3 of the Convention upon his return to Iran.

145. The Court observes that, according to the Swedish Government (…), in asylum cases the Swedish authorities generally follow the UNCHR handbook and the UNHCR Guidelines on International Protection regarding Religion-Based Refugee Claims and make an individual assessment of whether an alien has plausibly demonstrated that his or her conviction *sur place* is genuine in the sense that it is based on genuine personal religious conviction. That includes an assessment of the circumstances in which the conversion took place and whether the claimant can be expected to live as a convert upon return to the home country. Furthermore, on 12 November 2012 the Director General for Legal Affairs at the Swedish Migration Board issued a "general legal position" (…) concerning religion as grounds for asylum, including conversion, based on a judgment by the Migration Court of Appeal (MIG 2011:29), the UNHCR Guidelines and the judgment of the CJEU in *Bundesrepublik Deutschland v. Y* (C-71/11) and *Z* (C-99/11), 5 September 2012. According to the legal position, the credibility of the conversion must be carefully assessed in order to determine whether a genuine conversion has taken place. A person who has undergone a genuine change of faith or who risks being attributed a new religious belief and who therefore risks persecution should not be compelled to hide his or her faith solely in order to avoid persecution. In addition, on 10 June 2013 the Director General for Legal Affairs issued a "general legal position" (…) concerning the methodology for assessing the reliability and credibility of applications for international protection based on, *inter alia*, the assessment by the UNHCR in its report "Beyond Proof: Credibility assessment in EU Asylum Systems" of May 2013.

146. In the original asylum proceedings, before the Migration Board, the applicant did not wish to rely on his conversion. The matter was referred to by the Migration Board, but the applicant explained that he considered his religion to be a private matter and "did not want to exploit his valuable new-found faith as a means of buying asylum". With hindsight, he considered that he had not at the time been provided with sufficient legal advice and support to understand the risk associated with his conversion.

147. The Court notes that the applicant had lived almost the whole of his life in Iran, spoke English well (…) and was experienced with computers, web pages and the Internet. He was also a regime critic. It is thus difficult to accept that he would not have become aware of the risk for converts in Iran by himself or via the congregation in the church where he was baptised shortly after his arrival in Sweden, or via the pastor who furnished him with the declaration of 15 March 2010 to be submitted to the Migration Board. Nor is the Court convinced that the applicant was not provided with sufficient legal advice and support to understand the risk

associated with his conversion. It notes that the applicant never complained about these issues in the domestic proceedings. Moreover, during the hearing before the Migration Board on 24 March 2010 the official even interrupted the meeting so that the applicant could confer with his counsel on this specific point. The applicant stated that his conversion was a private matter, but it does not appear that he found this to be an impediment preventing him from talking about his religion (…). Furthermore, in his appeal to the Migration Court the applicant did rely on his conversion as a ground for asylum, and submitted the baptism certificate of 31 January 2010, explaining that the reason why he had not initially wished to rely on his conversion was that he did not want to trivialise the seriousness of his beliefs. In addition, before the Migration Court on 16 February 2011, although stating anew that he did not wish to rely on his conversion as a reason for asylum, he did state that "it would, however, obviously cause [him] problems upon return".

148. Turning to the Swedish authorities, on 24 March 2010 they became aware that there was an issue of the applicant's *sur place* conversion, when the Migration Board held an oral interview with him, in the presence of his counsel and an interpreter. More specifically, the Board became aware of it because the applicant handed over the declaration of 15 March 2010 from a pastor in his congregation certifying that the applicant had been a member since December 2009 and had been baptised. The Migration Board official therefore actively questioned the applicant about his conversion and encouraged him and his counsel to confer about it, then learned that the applicant did not wish to rely on the conversion as a ground for asylum (…).

149. On 29 April 2010 the Migration Board rejected the applicant's request for asylum. As to the applicant's conversion to Christianity, the Migration Board found that the certificate from the congregation pastor could only be regarded as a plea to the Migration Board that the applicant be granted asylum. It noted that the applicant had not initially wished to invoke his conversion as a ground for asylum and that he had stated that his new faith was a private matter. It concluded that to pursue his faith in private was not a plausible reason for believing that he would risk persecution upon return and that he had not shown that he was in need of protection in Sweden for that reason.

150. Accordingly, despite the fact that the applicant did not wish to rely on his conversion, the Migration Board nevertheless did make some assessment of the risk that he might encounter on that ground upon his return to Iran.

151. In his appeal to the Migration Court the applicant did rely on his conversion and explained why he had not previously wished to rely on it.

152. During the oral hearing before the Migration Court, the applicant decided not to rely on his conversion as a ground for asylum, but added that "it would, however, obviously cause [him] problems upon return". The views of the Migration Board were also heard. It did not question the fact that the applicant, at the time, professed the Christian faith, but it did not find that that fact in itself was sufficient for him to be considered in need of protection. It referred to the British Home Office's operational guidance note of January 2009.

153. However, the Migration Court did not consider further the question about the applicant's conversion, the way he manifested his Christian faith in Sweden at the time, how he intended to manifest it in Iran if the removal order was to be executed, or about what "problems" the conversion might cause him upon his return. In its decision of 9 March 2011 dismissing the appeal, the Migration Court observed that the applicant was no longer relying on his religious views as a ground for persecution. Accordingly, the Migration Court did not carry out an assessment of the risk that the applicant might encounter, as a result of his conversion, upon returning to Iran.

154. In his request for leave to appeal to the Migration Court of Appeal, the applicant alleged that he had relied on his conversion before the Migration Court. Moreover, he maintained that his fear that his conversion had become known to the Iranian authorities had increased. Those submissions were considered not sufficient for leave to appeal to be granted and the Migration Court of Appeal therefore refused the applicant's request to that effect on 8 June 2011, after which the removal order became enforceable.

155. On 6 July 2011 the applicant requested that the Migration Board stay the execution of the removal order. He relied on his conversion. His request was refused by the Migration Board and the Migration Court, which found that the conversion could not be considered a "new circumstance" that could justify a re-examination of his case. On 17 November 2011 the Migration Court of Appeal refused leave to appeal.

156. Thus, despite being aware that the applicant had converted in Sweden from Islam to Christianity and that he might therefore belong to a group of persons who, depending on various factors, could be at risk of treatment in breach of Articles 2 and 3 of the Convention upon returning to Iran, the Migration Board and the Migration Court, due to the fact that the applicant had declined to invoke the conversion as an asylum ground, did not carry out a thorough examination of the applicant's conversion, the seriousness of his beliefs, the way he manifested his Christian faith in Sweden, and how he intended to manifest it in Iran if the removal order were to be executed. Moreover, in the reopening proceedings the conversion was not considered a "new circumstance" which could justify a re-examination of his case. The Swedish authorities have therefore never made an assessment of the risk that the applicant might encounter, as a result of his conversion, upon returning to Iran. Having regard to the absolute nature of Articles 2 and 3 of the Convention, though, it is hardly conceivable that the individual concerned could forego the protection afforded thereunder. It follows therefore that, regardless of the applicant's conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran (…).

157. Moreover, before the Grand Chamber the applicant has submitted various documents which have not been presented to the national authorities, for example, his written statement of 13 September 2014 (about his conversion, the way he currently manifests his Christian faith in Sweden and how he intends to manifest it in Iran if the removal order is executed), and the written statement of 15 September 2014 by the former pastor at the applicant's church (see above §§ 96-97). In light of the material presented before the Court and of the material previously submitted by the applicant before the national authorities, the Court concludes that the applicant has sufficiently shown that his claim for asylum on the basis of his conversion merits an assessment by the national authorities. It is for the domestic authorities to take this material into account, as well as any further development regarding the general situation in Iran and the particular circumstances of the applicant's situation.

158. It follows that there would be a violation of Articles 2 and 3 of the Convention if the applicant were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his conversion."

C. Workshop 2

Reception of migrants: material and procedural guarantees for settled migrants.

1. Expulsion of settled migrants: Safeguards and remedies

(i) Article 8

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

- *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII.

This is the leading case on the subject. It was brought by a Turkish national who moved to The Netherlands in 1981 at the age of 12 with his mother and siblings to join their father, also Turkish, there. In 1988 the applicant was granted a permanent residence permit. He entered into a relationship with a Dutch national, with whom he had two children, the younger one conceived while the applicant was serving a 7-year sentence for manslaughter. When released, the applicant lost his permanent residence permit, was deported to Turkey and forbidden to return to The Netherlands for ten years. Before the Court he argued that this was a violation of his right to respect for family life under Article 8 of the Convention.

> "**1. General principles**
>
> 54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (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 Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Dalia v. France*, 19 February 1998, § 52, Reports 1998-I; *Mehemi v. France*, 26 September 1997, § 34, Reports 1997-VI; *Boultif*, cited above, § 46; and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).
>
> 55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non-expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, *inter alia*, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (…). While a number of Contracting States have

enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (…), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.

56. The aforementioned Parliamentary Assembly Recommendation also advocates that long-term immigrants, with the exception of the category referred to in paragraph 55 above, who have committed a criminal offence should be subjected to the same ordinary-law procedures and penalties as are applied to nationals and that the "sanction" of expulsion should be applied only to particularly serious offences affecting State security of which they have been found guilty (…). The Court considers nevertheless that, even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the above-mentioned power of the Contracting States to expel aliens (see *Moustaquim v. Belgium*, 18 February 1991, § 49, Series A no. 193) for one or more of the reasons set out in paragraph 2 of Article 8 of the Convention. It is, moreover, of the view that a decision to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty does not constitute a double punishment, either for the purposes of Article 4 of Protocol No. 7 or more generally. Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society – provided, of course, that, to the extent that those measures interfere with the rights guaranteed by Article 8, paragraph 1, of the Convention, they are necessary in a democratic society and proportionate to the aim pursued. Such administrative measures are to be seen as preventive rather than punitive in nature (see *Maaouia v. France* [GC], no. 39652/98, § 39, ECHR 2000-X).

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, *Moustaquim*, cited above; *Beldjoudi v. France*, 26 March 1992, Series A no. 234-A; and *Boultif*, cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yilmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, no. 32231/02, 27 October 2005). In *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

– the nature and seriousness of the offence committed by the applicant;

– the length of the applicant's stay in the country from which he or she is to be expelled;

– the time elapsed since the offence was committed and the applicant's conduct during that period;

– the nationalities of the various persons concerned;

– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

– whether the spouse knew about the offence at the time when he or she entered into a family relationship;

– whether there are children of the marriage, and if so, their age; and

– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in *Boultif*:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

– the solidity of social, cultural and family ties with the host country and with the country of destination.

As to the first point, the Court notes that this is already reflected in its existing case-law[2] (see, for example, *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, and *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (…).

As to the second point, it is to be noted that, although the applicant in *Boultif* was already an adult when he entered Switzerland, the Court has held the "*Boultif* criteria" to apply all the more so (*à plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v. France*, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country, the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there.

59. The Court considered itself called upon to establish "guiding principles" in *Boultif* because it had "only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin" (*ibid.*, § 48). It is to be noted, however, that the first three guiding principles do not, as such, relate to family life. This leads the Court to consider whether the "*Boultif* criteria" are sufficiently comprehensive to render them suitable for application in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction. It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and can sometimes embrace aspects of an individual's social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I), it must be accepted that the totality of social ties between

[2] For more recent affirmations of this principle see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010, and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013.

> settled migrants and the community in which they are living constitute part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect."

In light of the circumstances of the case, the Court found no violation of the applicant's right to respect for his family life.

* * * * * *

(ii) Article 13 in conjunction with Article 8

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

- *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012.

The applicant was a Brazilian national who lived in French Guiana with his family from the age of 4 to 18 years. He was stopped at a road check in January 2007 by French police and found not to possess any document confirming the lawfulness of his presence on French territory. He had not yet obtained the temporary residence permit that he was entitled to in view of the fact that both his parents had permanent resident status in France. A removal order was issued against the applicant the same day, and executed the following day less than an hour after he had applied to the Administrative Court for judicial review of the order and also suspension of its enforcement. Later that year, the Administrative Court ruled that the removal order was illegal. The applicant was able to return to French territory, and was issued a renewable residence permit. Given this acknowledgment of a violation of the applicant's rights under Article 8 and the redress afforded to him, he no longer had victim status to pursue the Article 8 complaint before the Court.

There remained however his complaint that there had been no effective remedy available to him – Article 13 in conjunction with Article 8.

In its consideration of the case the Court referred to the guidelines of the Committee of Ministers on forced return[3], quoting this text as follows:

> "**Guideline 2. Adoption of the removal order**
>
> Removal orders shall only be issued in pursuance of a decision reached in accordance with the law.
>
> 1. A removal order shall only be issued where the authorities of the host State have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

[3] "Twenty Guidelines on forced returns", adopted by the Committee of Ministers on 4 May 2005.

a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

b. a real risk of being killed or subjected to inhuman or degrading treatment by non-State actors, if the authorities of the State of return, parties or organisations controlling the State or a substantial part of the territory of the State, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.

2. The removal order shall only be issued after the authorities of the host State, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.

...

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

2. The remedy shall offer the required procedural guarantees and present the following characteristics:

– the time-limits for exercising the remedy shall not be unreasonably short;

– the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;

– where the returnee claims that the removal will result in a violation of his or her human rights as set out in Guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

3. The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1."

The relevant passage of the Court's reasoning reads:

"a) Applicable general principles

77. In cases concerning immigration laws the Court has consistently affirmed that, as a matter of well-established international law and subject to their treaty obligations, the States have the right to control the entry, residence and expulsion of aliens. The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States

have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society (see *Boultif*, cited above, § 46, and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII).

By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

78. The Court has reiterated on numerous occasions that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. The States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII). However, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudła*, cited above, § 157).

79. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective (see *Klass and Others v. Germany*, 6 September 1978, § 67, Series A no. 28). When the "authority" concerned is not a judicial authority, the Court makes a point of verifying its independence (see, for example, *Leander v. Sweden*, 26 March 1987, §§ 77 and 81-83, Series A no. 116, and *Khan v. the United Kingdom*, no. 35394/97, §§ 44-47, ECHR 2000-V) and the procedural guarantees it offers applicants (see, *mutatis mutandis*, *Chahal v. the United Kingdom*, 15 November 1996, §§ 152-54, Reports of Judgments and Decisions 1996-V). Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Rotaru v. Romania* [GC], no. 28341/95, § 69, ECHR 2000-V).

80. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV).

81. In addition, particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X).

82. Where a complaint concerns allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the

complaint be subject to close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), and reasonable promptness (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV). In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Gebremedhin [Gaberamadhien]*, cited above, § 66, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012). The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention. Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol No. 4 (see *Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206).

83. By contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see *M. and Others v. Bulgaria*, no. 41416/08, §§ 122-32, 26 July 2011, and, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 133, 20 June 2002).

(b) Application of these principles to the present case

84. The Court notes that the question in issue concerns the effectiveness of the remedies used by the applicant in French Guiana, at the time of his removal, to defend a complaint under Article 8 of the Convention. In this regard the Court considers it necessary to reiterate that where immigration cases are concerned, such as that of the applicant, its sole concern, in keeping with the principle of subsidiarity, is to examine the effectiveness of the domestic procedures and ensure that they respect human rights (see, *mutatis mutandis*, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-87, ECHR 2011, and *I.M. v. France*, no. 9152/09, § 136, 2 February 2012).

85. The Court further reiterates that Article 13 of the Convention does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in this regard (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 122, Series A no. 215, and, among other authorities, *G.H.H. and Others v. Turkey*, no. 43258/98, § 36, ECHR 2000-VIII)."

The Court went on to find that the applicant did not have access in practice to effective remedies in respect of his complaint under Article 8 of the Convention when he was about to be deported.

* * * * * *

(iii) Article 1 of Protocol No. 7

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

- *Lupsa v. Romania*, no. 10337/04, § ECHR 2006-VII

This was the first case in which the Court found a violation of this provision. The Court observed that "in the event of deportation, in addition to the protection afforded by Articles 3 and 8 of the Convention taken in conjunction with Article 13, aliens benefit from the specific guarantees provided for in Article 1 of Protocol No. 7" (paragraph 51). The reasoning continues:

> "53. In the present case the Court notes that it is not disputed that the applicant was lawfully resident on Romanian territory at the time of the deportation. Accordingly, although he was deported urgently for reasons of national security, which is a case authorised by paragraph 2 of Article 1, he was entitled, after being deported, to rely on the guarantees contained in paragraph 1 (see the explanatory report to Protocol No. 7).
>
> 54. The Court notes that the first guarantee afforded to persons referred to in this Article is that they shall not be expelled except "in pursuance of a decision reached in accordance with law".
>
> 55. Since the word "law" refers to the domestic law, the reference to it, like all the provisions of the Convention, concerns not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and also afford a measure of protection against arbitrary interferences by the public authorities with the rights secured in the Convention (…).
>
> 56. The Court reiterates its finding in respect of its examination of the complaint under Article 8 of the Convention, namely, that Emergency Ordinance no. 194/2002, which formed the legal basis for the applicant's deportation, did not afford him the minimum guarantees against arbitrary action by the authorities.
>
> 57. Consequently, although the applicant was deported in pursuance of a decision reached in accordance with law, there has been a violation of Article 1 of Protocol No. 7 in that the law did not satisfy the requirements of the Convention.
>
> 58. In any event the Court considers that the domestic authorities also infringed the guarantees to which the applicant should have been entitled under paragraph 1 (a) and (b) of that Article.
>
> 59. In that connection, the Court notes that the authorities failed to provide the applicant with the slightest indication of the offence of which he was suspected and that the public prosecutor's office did not send him the order issued against him until the day of the only hearing before the Court of Appeal. Further, the Court observes that the Court of Appeal

dismissed all requests for an adjournment, thus preventing the applicant's lawyer from studying the aforementioned order and producing evidence in support of her application for judicial review of it.

60. Reiterating that any provision of the Convention or its Protocols must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory, the Court considers, in the light of the purely formal review by the Court of Appeal in this case, that the applicant was not genuinely able to have his case examined in the light of reasons militating against his deportation.

61. There has therefore been a violation of Article 1 of Protocol No. 7."

* * * * * *

(iv) Article 4 of Protocol No. 4

"Collective expulsion of aliens is prohibited."

❖ *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014

"1. General principles

167. The Court reiterates its case-law according to which "collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken following, and on the basis of, a reasonable and objective examination of the particular case of each individual alien of the group" (see *Čonka*, cited above, § 59). The Court has subsequently specified that "the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis" (see, among other authorities, *Sultani*, cited above, § 81, and *Hirsi Jamaa and Others*, cited above, § 184). That does not mean, however, that where there has been a reasonable and objective examination of the particular case of each individual "the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4" (see *Čonka*, cited above, *ibid*.).

168. With regard to the scope of application of Article 4 of Protocol No. 4, the Court notes that the wording of the provision does not refer to the legal situation of the persons concerned, unlike Article 1 of Protocol No. 7 which the Court will examine below (…). Moreover, it can be seen from the commentary on the draft of Protocol No. 4 that, according to the Committee of Experts, the aliens to whom Article 4 refers are not only those lawfully residing within the territory, but also "all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality" (Article 4 of the Committee's final draft, p. 505, § 34).

169. In accordance with that interpretation, in the cases that have been brought before it the Court has applied Article 4 of Protocol No. 4 to persons who, for various reasons, were residing within the territory of a State or were intercepted on the high seas on ships

flying the flag of the respondent State and returned to the originating State (see, *inter alia*, *Čonka*; *Sultani*; and *Hirsi Jamaa and Others*, cited above)."

2. Application of these principles

170. In the present case Article 4 of Protocol No. 4 is therefore applicable independently of the question whether or not the Georgian nationals were lawfully resident within the territory of the Russian Federation.

171. On the merits, the Court must determine whether the expulsion measures were taken following, and on the basis of, a reasonable and objective examination of the particular situation of each of the Georgian nationals whilst having regard to the general context at the material time.

172. In that connection it refers here as well to the concordant description given by the Georgian witnesses and international governmental and non-governmental organisations of the very summary procedures conducted before the Russian courts (…).

Thus, the PACE Monitoring Committee said that the "routine of expulsions" followed a recurrent pattern all over the country: "Georgians stopped in the street under the pretext of examination of their documents were detained no matter whether their documents were in order or not and taken to the Militia stations where they were gathered in large groups and delivered to courts, where decisions on administrative penalty with expulsion of the territory of Russia were made in accordance with preliminary agreement with the courts, with no lawyers and without the courts looking into individual circumstances, the entire procedure taking from two to ten minutes. Often people, subjected to these measures, were not admitted to the trial room, detainees were kept in corridors or even in cars in which they were delivered there" (PACE report, § 59).

173. Furthermore, the international organisations indicated that the mass arrests and expulsions of Georgian nationals had started at the beginning of October 2006 and referred to coordination between the administrative and judicial authorities (…).

174. In the Court's view, the present case more closely resembles the above-cited case of Čonka, in which it found that there had been collective expulsion having regard to all the circumstances surrounding the implementation of the expulsion orders, than the case of Sultani, in which it held that the relevant authority had taken account of the personal situation of the applicant – an asylum seeker of Afghan nationality – and the alleged risks in the event of his return to his country of origin.

175. The particularity of the present case lies in the fact that during the period in question the Russian courts made thousands of expulsion orders expelling Georgian nationals (…). Even though, formally speaking, a court decision was made in respect of each Georgian national, the Court considers that the conduct of the expulsion procedures during that period, after the circulars and instructions had been issued, and the number of Georgian nationals expelled – from October 2006 – made it impossible to carry out a reasonable and objective examination of the particular case of each individual.

176. Furthermore, the conclusion reached by the Court regarding the implementation in the Russian Federation of a coordinated policy of arresting, detaining and expelling Georgian nationals from October 2006 (…) also shows that the expulsions were collective in nature.

177. That finding does not call into question the right of the States to establish their own immigration policies. It must be pointed out, however, that 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, mutatis mutandis, Hirsi Jamaa and Others, cited above, § 179).

178. Having regard to all the foregoing factors, the Court considers that the expulsions of Georgian nationals during the period in question were not carried out following, and on the basis of, a reasonable and objective examination of the particular case of each individual and that this amounted to an administrative practice in breach of Article 4 of Protocol No. 4."

2. Claims of settled migrants

(i) Article 14 in conjunction with Article 8

- *Biao v. Denmark* [GC], no. 38590/10, ECHR 2016

This case was about Danish rules on family reunification. Under these rules, the grant of a residence permit to a foreign spouse was subject to an "attachment requirement", meaning that it must be shown that on aggregate the couple had stronger ties to Denmark than to another country. The policy behind the rule was to promote the integration into Danish society of foreign nationals permitted to live in the country on the ground of family reunion. An exception was made for those who had held Danish nationality for at least 28 years, or who had been resident in the country for the same length of time from birth or early childhood. The applicant, then a national of Togo, entered Denmark in 1992 at the age of 23. He later married a Danish national and on that basis was granted permanent residence in 1997. By 2002 he had fulfilled the criteria for the grant of citizenship and he became a Danish national. The following year he married a national of Ghana. She was not granted a residence permit for Denmark, as her husband did not satisfy the 28 year rule. He complained that this was discriminatory, preventing his wife from joining him in Denmark until the year 2030.

In the domestic proceedings, his challenge to the law was rejected by a majority decision of the Supreme Court. Before the Court, he claimed to be the victim of indirect discrimination based on ethnic origin. The Court framed the matter in the following way:

> "96. It is not in dispute that the applicants were in a relevantly similar situation to that of other couples in which a Danish national and a foreign national seek family reunification in Denmark. Moreover, the Government acknowledged, as did the domestic courts, that the 28-year rule did treat Danish nationals differently, depending on how long they had been Danish nationals. If the person had been a Danish national for 28 years, the exception to the "attachment requirement" applied. If the person had not been a Danish national for 28 years, the exception did not apply. The crux of the case is therefore whether, as maintained by the applicants, the 28-year rule also created a difference in treatment between Danish-born nationals and those who acquired Danish nationality later in life, amounting to indirect discrimination on the basis of race or ethnic origin."

It established that:

> "113. …[T]he 28-year rule had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish."
>
> 114. The burden of proof must shift to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin (…). Having regard to the fact that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society and a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons (…), it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 taken in conjunction with Article 8 of the Convention."

On the question of justification of the aims pursued, the Court said:

"122. The Court observes that one of the aims of introducing the 28-year rule (…), was that the previous amendment of the Aliens Act in July 2002, extending the attachment requirement to apply also to Danish nationals, had been found to have unintended consequences for persons such as Danish nationals who had opted to live abroad for a lengthy period and who had started a family while away from Denmark and subsequently had difficulties fulfilling the attachment requirement upon return. It was found that there would normally be a basis for successful integration of Danish expatriates' family members into Danish society, since they would often have maintained strong ties with Denmark, which in addition would also have been passed on to their spouse or cohabitant and any children of the union.

123. It will be recalled that the preparatory work in respect of the 28-year rule underlined that the "fundamental aim of tightening the attachment requirement in 2002", namely securing better integration of foreigners would not be forfeited by introducing the said exception. The "fundamental aim" of tightening the attachment rule in 2002 was set out in the preparatory work to that amendment (…).

124. In the Court's view the materials concerning the legislative process show that the Government wished, on the one hand, to control immigration and improve integration with regard to "both resident foreigners and resident Danish nationals of foreign extraction", whose "widespread marriage pattern" was to "marry a person from their country of origin", and, on the other, to ensure that the attachment requirement did not have unintended consequences for "persons such as Danish nationals who opted to live abroad for a lengthy period and who started a family while away from Denmark" (…).

125. The Court considers that the justification advanced by the Government for introducing the 28-year rule is, to a large extent, based on rather speculative arguments, in particular as to the time when, in general, it can be said that a Danish national has created such strong ties with Denmark that family reunion with a foreign spouse has a prospect of being successful from an integration point of view. The answer to this question cannot, in the Court's view, depend solely on the length of nationality, whether for 28 years or less. Therefore, the Court cannot follow the Government's argument that because the first applicant had been a Danish national for only two years when he was refused family reunion, the consequences of the 28-year rule could not be considered disproportionate as regards his situation. It points out that this line of reasoning seems to overlook the fact that in order to obtain Danish nationality the first applicant had resided in Denmark for at least nine years, had proved his proficiency in the Danish language and knowledge of Danish society, and met the requirement of self-support.
More concretely, in August 2004, when Mr Biao was refused family reunion, not only had he been a Danish national for approximately two years, he had lived in Denmark for more than ten years, had been married there to a Danish national for approximately four years, had participated in various courses and worked there for more than six years, and had had a son on 6 May 2004, who was a Danish national by virtue of his father's nationality. None of these elements was or could be taken into account in the application of the 28-year rule to the applicant, although in the Court's opinion they were indeed relevant when assessing whether Mr Biao had created such strong ties with Denmark that family reunion with a foreign spouse had any prospect of being successful from an integration point of view.

126. The Court finds that some of the arguments advanced by the Government in the course of the preparatory work relating to the Act which extended from 1 July 2002 the attachment requirement to residents of Danish nationality (…), reflect negatively on the lifestyle of Danish nationals of non-Danish ethnic extraction, for example in relation to their "marriage pattern", which, according to the Government, "contributes to the retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society. The pattern thus contributes to hampering the integration of aliens newly arrived in Denmark". In this connection, the Court would refer to its conclusion in *Konstantin Markin v. Russia* [GC] (no. 30078/06, §§ 142-143, ECHR 2012 (extracts)), that general biased

assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment on the ground of sex. The Court finds that similar reasoning should apply to discrimination against naturalised nationals.

127. Thus, so far, the arguments and material submitted by the Government before the Court have not shown that the difference in treatment resulting from the impugned legislation was based on objective factors unrelated to ethnic origin.

128. In the judicial review of the application of the 28-year rule to the applicants, the majority of the Danish Supreme Court found that the exception was based on an objective criterion and that it could be considered objectively justified to select a group of nationals with such strong ties to Denmark, when assessed from a general perspective, that it would be unproblematic to grant family reunion. The rationale being that it would normally be possible for the foreign spouse or cohabitant of such a person to be successfully integrated into Danish society. Moreover, they found that the consequences of the 28-year rule could not be considered disproportionate for the first applicant (…).

129. The majority relied heavily on the *Abdulaziz, Cabales and Balkandali* judgment (cited above), as they considered that the factual circumstances of the present case in most material aspects were identical to those of Mrs Balkandali's situation. Both the latter and Mr Biao arrived in the country as adults. Mr Biao's application for spousal reunion was refused when he had resided in Denmark for eleven years, two of which as a Danish national. Mrs Balkandali's application was refused after she had resided in the United Kingdom for eight years, two of which as a British national. Further, relying, *inter alia*, on the statement (*ibid*, § 88) that "there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it", the majority in Supreme Court found, as stated above, that "the criterion of 28 years Danish nationality had the same aim as the requirement of birth in the United Kingdom, which was accepted by the Court in the 1985 judgment as not being contrary to the Convention: to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with the country".

130. The Court would point out, however, that it has found that the 28-year rule had the indirect discriminatory effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish (…). The Supreme Court on the other hand found that the discrimination at issue was based solely on the length of citizenship a matter falling within the ambit of "other status" within the meaning of Article 14 of the Convention. Accordingly, the proportionality test applied by the Supreme Court was different from the test to be applied by this Court, which requires compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule (…).

131. In the field of indirect discrimination between a State's own nationals based on ethnic origin, it is very difficult to reconcile the grant of special treatment with current international standards and developments. Since the Convention is first and foremost a system for the protection of human rights, regard must also be had to the changing conditions within Contracting States and the Court must respond, for example, to any evolving convergence as to the standards to be achieved (see *Dhahbi v. Italy*, no. 17120/09, § 47, 8 April 2014; *Konstantin Markin*, cited above, § 126; and *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013 (extracts)).

132. The Court notes in this connection that the applicants relied on Article 5 § 2 of the European Convention on Nationality. It is noteworthy that it has been ratified by 20 member States of the Council of Europe, including Denmark (…). Moreover, in respect of Article 5 § 2 of the European Convention on Nationality, the Explanatory Report (…) states that although

not being a mandatory rule to be followed in all cases, the paragraph was a declaration of intent, aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons. This suggests a certain trend towards a European standard which must be seen as a relevant consideration in the present case.

133. Furthermore, within the member States of the Council of Europe there is a degree of variation as regards the conditions for granting family reunion (…). However, it would appear from the 29 countries studied that there are no States which, like Denmark, distinguish between different groups of their own nationals when it comes to the determination of the conditions for granting family reunification.

134. In relation to EU law it is relevant to point out that the Court's conclusions in, inter alia, *Ponomaryovi* (cited above, § 54) and *C. v. Belgium* (7 August 1996, § 38, Reports 1996-III), that "the preferential treatment of nationals of member States of the European Union ... may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship" concerned preferential treatment on the basis of nationality; not favourable treatment of "nationals by birth" as compared to "nationals by acquisition later in life" or indirect discrimination between the country's own nationals based on ethnic origin. The Court also notes that in EU law on family reunification no distinction is made between those who acquired citizenship by birth and those who acquired it by registration or naturalisation (…).

135. The rules for family reunification under EU law did not apply to the applicants' case in August 2004 (…). However, it is instructive to view the contested Danish legislation in the light of relevant EU law. Given that the first applicant has moved to Sweden, by virtue of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States, and in the light of the CJEU's judgment of 25 July 2008 in *Metock v. Minister for Justice, Equality and Law Reform* (…), the applicants and their child now have a prospect of success in applying from Sweden for a residence permit in Denmark.

136. In addition, it is noteworthy that various independent bodies have expressed concern that the 28-year rule entails indirect discrimination. Reference is made, for example, to the reports cited by the European Commission against Racism and Intolerance (ECRI) in which it stated (…) that "ECRI is deeply concerned by the fact that the 28 years' aggregate ties with Denmark rule amounts to indirect discrimination between those who were born Danish and people who acquired Danish citizenship at a later stage."; and "the rule that persons who have held Danish citizenship whether it be for over 28 or 26 years, or who were born in Denmark or came to the country as a small child or have resided legally in the country, whether it be for over 28 or 26 years, are exempt from these requirements, also risks disproportionately affecting non-ethnic Danes." (…). The Committee on the Elimination of Racial Discrimination (CERD), expressed a similar concern (…).

137. The Council of Europe Commissioner for Human Rights also expressed his concern as regards the operation of the 28-year rule (…) and found that it placed naturalised Danish citizens at a considerable disadvantage in comparison to Danish citizens born in Denmark and stated that "the dispensation from the aggregate ties conditions for a naturalised citizen, for whom the condition will, inevitably, be harder to meet by virtue of his or her own foreign origin, at so late an age constitutes, in my view, an excessive restriction to the right to family life and clearly discriminates between Danish citizens on the basis of their origin in the enjoyment of this fundamental right...".

(iv) The Court's conclusion

138. In conclusion, having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

139. It follows that there has been a violation of Article 14 read in conjunction with Article 8 of the Convention in the present case."

❖ *Dhahbi v. Italy*, no. 17120/09, 8 April 2014.

It concerned the claim by a Tunisian national working in Italy for a particular type of family benefit. He maintained that although he did not hold Italian nationality he was eligible for the benefit by virtue of the EU-Tunisia Association Agreement. In the domestic proceedings his claim was rejected on the basis that the payment in question was not part of social security but of social assistance and therefore not covered by the Association Agreement.

Finding that the situation came within the scope of Article 8, thereby engaging Article 14, the Court reasoned as follows:

"(a) General principles

45. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see X and Others v. Austria [GC], no. 19010/07, § 98, ECHR 2013, and Vallianatos and Others v. Greece [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013). The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 82, Series A no. 94).

46. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see X and Others v. Austria, cited above, § 98, and Vallianatos and Others, cited above, § 76). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the observance of the Convention's requirements rests with the Court. A wide margin is usually allowed to the State when it comes to general measures of economic or social strategy (see Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008; Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, ECHR 2010; Şerife Yiğit v. Turkey [GC], no. 3976/05, § 70, 2 November 2010; and Stummer v. Austria [GC], no. 37452/02, § 89, ECHR 2011). However, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (see Gaygusuz, cited above, § 42; Koua Poirrez v. France, no. 40892/98, § 46, ECHR 2003-X; Andrejeva v. Latvia [GC], no. 55707/00, § 87, ECHR 2009; and Ponomaryovi, cited above, § 52).

47. Since the Convention is first and foremost a system for the protection of human rights, the Court must also have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see Konstantin Markin v. Russia [GC], no. 30078/06, § 126, ECHR 2012, and Fabris v. France [GC], no. 16574/08, § 56, ECHR 2013).

(b) Whether there was a difference in treatment between persons in similar situations

48. In the Court's view, it is beyond doubt that the applicant was treated differently compared with workers who were nationals of the European Union and who, like him, had large families. Unlike them, the applicant was not entitled to the family allowance provided for by section 65 of Law no. 448 of 1998. Moreover, this was not disputed by the Government.

49. The Court further observes that the refusal to grant the allowance was based exclusively on the nationality of the applicant, who at the time was not a national of a European Union Member State. It was not alleged that the applicant did not satisfy the other statutory conditions for entitlement to the benefit in question. Hence, it is clear that he was treated less favourably than others in a relevantly similar situation, on account of a personal characteristic (see, mutatis mutandis, Ponomaryovi, cited above, § 50).

(c) Whether there was an objective and reasonable justification

50. The Court notes that in several cases cited above which were similar to the present case (Niedzwiecki; Okpisz; Weller; Fawsie; and Saidoun), and which also concerned welfare benefits for the families of non-nationals, it found a violation of Article 14 taken in conjunction with Article 8 on the ground that the authorities had not provided any reasonable justification for the practice of excluding non-nationals lawfully settled in the countries concerned from entitlement to certain allowances on the sole basis of their nationality.

51. In particular, in the cases of Fawsie and Saidoun, cited above, which like the present case concerned allowances for large families, the Court's finding of a violation was based especially on the fact that the applicants and the members of their families had been granted political refugee status and that the criterion chosen by the Government (which had focused mainly on whether the persons concerned were Greek nationals or of Greek origin) in order to determine eligibility for the allowance did not appear to be relevant in the light of the legitimate aim pursued (namely to deal with the country's demographic situation).

52. The Court is of the view that similar considerations apply, mutatis mutandis, in the present case. It notes in that connection that at the relevant time the applicant had been in possession of a lawful residence and work permit in Italy and had been insured with the INPS (…). He paid contributions to that insurance agency in the same capacity and on the same basis as workers who were European Union nationals (see, mutatis mutandis, Gaygusuz, cited above, § 46). He was not an alien residing in the country for a short period or in breach of the immigration legislation. Hence, he did not belong to the category of persons who, as a rule, do not contribute to the funding of public services and in relation to whom a State may have legitimate reasons for curtailing the use of resource-hungry public services such as social insurance schemes, public benefits and health care (see, mutatis mutandis, Ponomaryovi, cited above, § 54).

53. As to the "budgetary reasons" advanced by the Government (…), the Court recognises that protection of the State's budgetary interests constitutes a legitimate aim of the distinction at issue. Nevertheless, that aim cannot by itself justify the difference in treatment complained of. It remains to be determined whether there was a reasonable relationship of proportionality between the above-mentioned legitimate aim and the means employed in the present case. The Court points out in that connection that the national authorities' refusal to grant the family allowance to the applicant was based solely on the fact that he was not a national of a European

Union Member State. It is not disputed that a citizen of such a State in the same position as the applicant would receive the allowance in question. Nationality was therefore the sole criterion for the distinction complained of. However, the Court reiterates that very weighty reasons would have to be put forward before it could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (…). In these circumstances, and notwithstanding the wide margin of appreciation left to the national authorities in the field of social security, the arguments submitted by the Government are not sufficient to satisfy the Court that there was a reasonable relationship of proportionality in the instant case that would render the impugned distinction compatible with the requirements of Article 14 of the Convention (see, mutatis mutandis, Andrejeva, cited above, §§ 86-89).

(d) Conclusion

54. In view of the foregoing, the justification advanced by the Government does not appear reasonable and the difference in treatment that has been established is thus discriminatory for the purposes of Article 14 of the Convention. There has therefore been a violation of Article 14 taken in conjunction with Article 8 of the Convention."

* * * * * *

(ii) Article 14 in conjunction with Article 2 of the First Protocol

- *Ponomaryovi v. Bulgaria*, no. 5335/05, ECHR 2011

The applicants were two Russian nationals lawfully resident in Bulgaria. They complained that they were not eligible for free secondary education, but were required to pay a significant fee. The Court considered that the situation came within the scope of Article 2 of the First Protocol, thereby engaging Article 14. The Court found that in comparison with Bulgarian nationals, the applicants were treated less favourably than others in a relevantly similar situation, on account of a personal characteristic.

"3. Did the difference in treatment have an objective and reasonable justification?

51. Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations; in other words, there is discrimination if the distinction at issue does not pursue a legitimate aim or the means employed to achieve it do not bear a reasonable relationship of proportionality to it (see, among many other authorities, D.H. and Others v. the Czech Republic [GC], no. 57325/00, §§ 175 and 196, ECHR 2007-IV).

52. The States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background (see, among other authorities, Rasmussen, cited above, § 40). Thus, the States are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy (see Stec and Others v. the United Kingdom [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI; Runkee and White v. the United Kingdom, nos. 42949/98 and 53134/99, § 36, 10 May 2007; Burden v. the United Kingdom [GC], no. 13378/05, § 60 in fine, ECHR 2008; Andrejeva, cited above, § 83; Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, ECHR 2010; Clift v. the United Kingdom, no. 7205/07, § 73, 13 July 2010; and J.M. v. the United Kingdom, no. 37060/06, § 54, 28 September 2010). On the other hand, very weighty reasons would have to be put forward before the Court could regard a difference of treatment

based exclusively on the ground of nationality as compatible with the Convention (see Gaygusuz v. Austria, 16 September 1996, § 42, Reports of Judgments and Decisions 1996-IV; Koua Poirrez v. France, no. 40892/98, § 46, ECHR 2003-X; Luczak v. Poland, no. 77782/01, § 48, 27 November 2007; Andrejeva, cited above, § 87; Zeïbek v. Greece, no. 46368/06, § 46 in fine, 9 July 2009; Fawsie v. Greece, no. 40080/07, § 35, 28 October 2010; and Saidoun v. Greece, no. 40083/07, § 37, 28 October 2010).

53. The Court would emphasise at the outset that its task in the present case is not to decide whether and to what extent it is permissible for the States to charge fees for secondary – or, indeed, any – education. It has in the past recognised that the right to education by its very nature calls for regulation by the State, and that this regulation may vary in time and place according to the needs and resources of the community (see the "Belgian linguistic" case, cited above, p. 32, § 5; Campbell and Cosans v. the United Kingdom, 25 February 1982, § 41, Series A no. 48; Çiftçi v. Turkey (dec.), no. 71860/01, ECHR 2004-VI; Mürsel Eren, cited above, § 44; and Konrad v. Germany (dec.), no. 35504/03, ECHR 2006-XIII). The Court must solely determine whether, once a State has voluntarily decided to provide such education free of charge, it may deny that benefit to a distinct group of people, for the notion of discrimination includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 82, Series A no. 94; Ünal Tekeli v. Turkey, no. 29865/96, § 51 in limine, ECHR 2004-X; Zarb Adami v. Malta, no. 17209/02, § 73, ECHR 2006-VIII; Kafkaris v. Cyprus [GC], no. 21906/04, § 161 in limine, ECHR 2008; and J.M. v. the United Kingdom, cited above, § 45 in fine).

54. Having thus clarified the limits of its inquiry, 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. For instance, the preferential treatment of nationals of member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union (…) – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship (see, mutatis mutandis, Moustaquim v. Belgium, 18 February 1991, § 49 in fine, Series A no. 193, and C. v. Belgium, 7 August 1996, § 38, Reports 1996-III).

55. Although similar arguments apply to a certain extent in the field of education – which is one of the most important public services in a modern State – they cannot be transposed there without qualification. 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 (see Nitecki v. Poland (dec.), no. 65653/01, 21 March 2002, and Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005-I, regarding health care; Budina v. Russia (dec.), no. 45603/05, 18 June 2009; Carson and Others, cited above, § 64; Zeïbek, cited above, §§ 37-40; and Zubczewski v. Sweden (dec.), no. 16149/08, 12 January 2010, regarding pensions; and Niedzwiecki v. Germany, no. 58453/00, §§ 24 and 33, 25 October 2005; Okpisz v. Germany, no. 59140/00, §§ 18 and 34, 25 October 2005; Weller v. Hungary, no. 44399/05, § 36, 31 March 2009; Fawsie, cited above, §§ 27-28; and Saidoun, cited above, §§ 28-29, regarding child benefits), education is a right that enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1 (see the "Belgian linguistic" case, cited above, pp. 30-31, § 3). It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal

functions. Indeed, the Court has already had occasion to point out that "[i]n a democratic society, the right to education ... is indispensable to the furtherance of human rights [and] plays ... a fundamental role" (see Leyla Şahin, cited above, § 137). Moreover, in order to achieve pluralism and thus democracy, society has an interest in the integration of minorities (see Konrad, cited above).

56. In the Court's view, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which to this day remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries (see Konrad, cited above).

57. Secondary education, which is in issue in the present case, falls between those two extremes. The distinction is confirmed by the difference of wording between sub-paragraphs (a), (b) and (c) of Article 28 § 1 of the United Nations Convention on the Rights of the Child, the first of which enjoins States to "[m]ake primary education compulsory and available free to all", whereas the second and the third merely call upon them to "[e]ncourage the development of different forms of secondary education ... and take appropriate measures such as the introduction of free education and offering financial assistance in case of need" and to "[m]ake higher education accessible to all on the basis of capacity by every appropriate means" (…). It is also confirmed by the differentiation between those three levels of education in the International Covenant on Economic, Social and Cultural Rights (…). However, the Court is mindful of the fact that with more and more countries now moving towards what has been described as a "knowledge-based" society, secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being.

58. These considerations militate in favour of stricter scrutiny by the Court of the proportionality of the measure affecting the applicants.

59. In assessing that proportionality the Court does not need, in the very specific circumstances of this case, to determine whether the Bulgarian State is entitled to deprive all unlawfully residing aliens of educational benefits – such as free education – which it has agreed to provide to its nationals and certain limited categories of aliens. It is not the Court's role to consider in the abstract whether national law conforms to the Convention (see, among other authorities, McCann and Others v. the United Kingdom, 27 September 1995, § 153, Series A no. 324; Pham Hoang v. France, 25 September 1992, § 33, Series A no. 243; Etxeberria and Others v. Spain, nos. 35579/03, 35613/03, 35626/03 and 35634/03, § 81, 30 June 2009; and Romanenko and Others v. Russia, no. 11751/03, § 39, 8 October 2009). It must confine its attention, as far as possible, to the particular circumstances of the case before it (see, among other authorities, Wettstein v. Switzerland, no. 33958/96, § 41, ECHR 2000-XII, and Sommerfeld v. Germany [GC], no. 31871/96, § 86, ECHR 2003-VIII). The Court will therefore have regard primarily to the applicants' personal situation.

60. On that point, the Court observes at the outset that the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling (…). Even when the applicants found themselves, somewhat inadvertently, in the situation of aliens lacking permanent residence permits (…), the authorities had no substantive objection to their remaining in Bulgaria and apparently never had any serious intention of deporting them (see paragraphs 13 and 14 above and the final admissibility

decision in the present case; compare also, mutatis mutandis, Anakomba Yula v. Belgium, no. 45413/07, § 38, 10 March 2009). Indeed, at the material time the applicants had taken steps to regularise their situation (…). Thus, any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case (contrast, mutatis mutandis, 15 Foreign Students v. the United Kingdom, nos. 7671/76 and 14 other applications, Commission decision of 19 May 1977, Decisions and Reports 9, p. 187; Sorabjee v. the United Kingdom, no. 23938/94, Commission decision of 23 October 1995, unreported; Dabhi v. the United Kingdom, no. 28627/95, Commission decision of 17 January 1997, unreported; and Vikulov and Others v. Latvia (dec.), no. 16870/03, 25 March 2004).

61. Nor can it be said that the applicants tried to abuse the Bulgarian educational system (see, mutatis mutandis, Weller, cited above, § 36). It was not their choice to settle in Bulgaria and pursue their education there; they came to live in the country at a very young age because their mother had married a Bulgarian national (…). The applicants could not realistically choose to go to another country and carry on their secondary studies there (…). Moreover, there is no indication that the applicants, who were fully integrated in Bulgarian society and spoke fluent Bulgarian (…), had any special educational needs which would have required additional financing for their schools.

62. However, the authorities did not take any of these matters into account. Indeed, since section 4(3) of the 1991 National Education Act and the fee-setting decision of the Minister of Education issued on 20 July 2004 pursuant to that section (…) made no provision for requesting exemption from the payment of school fees, it does not seem that the authorities could have done so.

63. The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1."