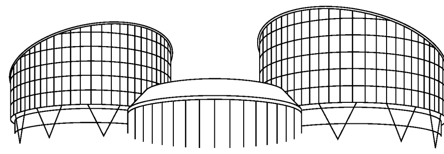

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

IARMJ European Chapter biennial conference

The Principle of Subsidiarity in Migration Cases

Speech by Marko Bošnjak

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Dear Judges,
Dear participants,

It is a great pleasure for me, as President of the European Court of Human Rights, to address you this morning. I would like to thank the organisers of this conference, the European Chapter of the International Association of Refugee and Migration Judges, for this invitation to participate in your biennial event. It is also a great pleasure for me to visit Dublin.

Your association is a global one, with American, African and Asian Pacific Chapters, in addition to this European one. This reflects the stark reality that migration is an issue not merely for our continent but the world in general. Migration is a phenomenon with multi-faceted causes and worldwide we see persons seeking refuge from conflict, persecution, violence and social or environmental threats.

At the outset, it is worth noting that the European Convention on Human Rights and its Protocols does not establish a stand-alone right to asylum. This is the case even though certain Articles refer to "aliens", such as Article 4 of Protocol No. 4 (which prohibits the collective expulsion of aliens), and Article 1 of Protocol No. 7 (which outlines procedural safeguards related to the expulsion of aliens).

However, this does not mean that a lacuna arises in protection for migrants at the Court. In fact, issues related to migration have been brought before the Court in many forms and under many Convention Articles since its inception. We have dealt with complaints that arise at each part of a migrant's journey.

For example, when an individual is looking to gain access to a state's territory, we look at complaints pertaining to visa applications for asylum-seekers, access for family reunification purposes, when individuals have been intercepted or 'pushed back' at sea, and when individuals have been in need of rescue at land borders. After an individual has entered into the territory of the State, we have dealt with cases concerning confinement at 'hotspots', immigration detention and reception conditions, amongst other things. Often, complaints arise in cases where individuals have been expelled or extradited from a state's territory and increasingly, the Court has been requested to grant interim measures under Rule 39 of the Rules of Court where there is a 'real and imminent risk of serious and irreparable harm' to an applicant while their case is being examined.

The significance of the Convention at the national level

Evidently, the Court has a plethora of relevant jurisprudence in cases related to migration. However, I would like to look closer this morning at a key principle present throughout the Court's case-law: namely the principle of subsidiarity and the relationship of shared responsibility between us, as judges at the Strasbourg Court and you, as judges at the national level.

From one judge to another, I cannot overstate the importance of the role of national courts in effectively protecting the rights of migrants in Europe. The Convention system simply cannot function without independent and impartial courts applying the Convention at the national level.

This is where the principle of subsidiarity comes in. It first and foremost allows national authorities the opportunity to protect the rights and freedoms enshrined in the Convention. The principle acknowledges the reality that national authorities are better equipped to evaluate the local needs and conditions as they relate to the Convention's standards. It is certain that national courts should always be the courts of first instance when effective national remedies exist. The European Court of Human Rights is well-positioned to play an external supervisory role when called upon in individual cases.

Subsidiarity has always been a guiding principle for the Court. In Article 1 of the Convention, State Parties secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. In Article 19 of the Convention, the Court's jurisdiction is limited to ensure that the Contracting States observe their engagements under the Convention so that it may not overstep the boundaries of the general powers delegated to it by the States of their sovereign will.

Moreover, after Protocol No.15 was introduced by the 2012 Brighton Declaration, which entered into force in 2021, the Preamble of the Convention now explicitly reaffirms the principle of subsidiarity as long established in the Court's case-law: "[a]ffirming that the High Contracting Parties, in accordance with **the principle of subsidiarity**, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,".[1]

This principle has been central, time and time again, to the Court's judgments concerning migrant-related issues.

For example, in cases brought by asylum-seekers who are facing expulsion, the Court does not itself examine the asylum applications or verify how States honour their obligations under the 1951 Geneva Refugee Convention. That is a task of the domestic courts.[2]

However, this does not lead to an abdication of the Court's responsibility nor a renunciation of all supervision of the results obtained through domestic remedies. It is evident that the rights guaranteed by the Convention would be devoid of any substance if this were the case.

As a general principle, the national authorities are best placed to assess the facts of the case and the credibility of witnesses.[3] However, the Court must be satisfied that the assessment made by the authorities is adequate and sufficiently supported by domestic material as well as by material

[1] Article 1 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms

[2] *Khasanov and Rakhmanov v. Russia* [GC], 2022, § 102; *F.G. v. Sweden* [GC], 2016, § 117; *M.S.S. v. Belgium and Greece* [GC], 2011, §§ 286-287

[3] *Khasanov and Rakhmanov v. Russia* [GC], 2022, § 105; *F.G. v. Sweden* [GC], 2016, § 118; *A.M. v. France*, cited above, § 116; *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010

originating from other reliable and objective sources.[4] For instance, from other States, agencies of the United Nations and reputable non-governmental organisations.[5]

Moreover, in cases where settled migrants face expulsion, the Court has emphasised that where domestic courts have carefully examined the facts and adequately balanced the applicant's personal interests against the general public interest, it is not the Court's place to substitute its own assessment of the merits for that of the competent national authorities. Only in cases where there are strong reasons for departing from the national authorities' decision, will the Court step in.[6]

However, there have been scenarios where the national authorities have not fully discharged their primary obligation to protect the rights of migrants. What I mean by this is that if domestic courts do not adequately provide reasons for their decisions, if they do not take all relevant facts into consideration, or if they examine the proportionality of the expulsion order superficially, then it is the Court's responsibility to act and to protect the human rights of the applicant.[7]

Thus, the correct understanding of subsidiarity is one of give and take, of shared responsibility, of mutual understanding between the national authorities and the Strasbourg Court. The Court will primarily leave the protection of migrant's rights to national authorities but will not hesitate to step in where necessary.

Now, to take a closer look at how the principle of subsidiarity has manifested in recent migrant-related cases, I will highlight a few judgments that have been handed down by the Court recently that mention the subsidiary character of the Convention.[8]

It was central to the Court's inadmissibility decision regarding Articles 3 and 8 in the 2023 case *Camara v. Belgium,* where the applicant complained that he had been forced to live on the street for several months in inhuman and degrading conditions after he had applied for international protection in Belgium and during the period in which he was not entered into the reception network and thus not provided with material assistance like accommodation, meals and clothing.[9] While the Court accepted other arguments of the applicant pursuant to Article 6, the Court held that the applicant had not substantively raised complaints about the alleged inhuman and degrading treatment before the domestic courts. The failure to exhaust domestic remedies meant that if the Strasbourg Court had held the case admissible, it would in fact , and I quote, have "become the first instance to rule on the conformity of the applicant's situation with Article 3, which is not compatible with the rationale of the rule of exhaustion of domestic remedies or with the principle of subsidiarity as expressed in the preamble to the Convention".[10]

Moreover, in the 2022 case *Alleleh and Others v. Norway*, no violation of Article 8 was found by the Court when the domestic authorities carefully examined the facts of a case concerning expulsion and adequately balanced the interests in issue.[11] There, the first applicant gave a false account of her

[4] *Khasanov and Rakhmanov v. Russia* [GC] 2022; *X. v. the Netherlands*, no. 14319/17, § 72, 10 July 2018
[5] *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008
[6] *Savran v. Denmark* [GC], 2021, § 189; Ndidi v. the United Kingdom, 2017, § 76; *Levakovic v. Denmark*, 2018
[7] *I.M. v. Switzerland*, 2019; see also *M.M. v. Switzerland*, 2020, § 54, in respect of the requirement of judicial review of the proportionality of an expulsion order, including in situations where the legislature may seek to suggest situations of "mandatory" expulsion; see *Makdoudi v. Belgium*, 2020 when the applicant's paternity of a child was not considered).
[8] *Alkhatib and Others v. Greece*, no. 3566/16, § 121, 16 January 2024; *H.A. v. the United Kingdom*, no. 30919/20, § 57, 5 December 2023; *Camara v. Belgium*, no. 49255/22, §§ 134-136, 18 July 2023; *Minasian and Others v. the Republic of Moldova*, no. 26879/17, § 51, 17 January 2023; *Thiam v. Italy,* no. 21329/16, § 24, 30 August 2022; *Alleleh and Others v. Norway*, no. 569/20, § 93, 106, 23 June 2022; *Khasanov and Rakhmanov v. Russia* [GC], nos. 28492/15 and 49975/15, §§ 102-105, 29 April 2022; *A.J. v. Greece,* no. 34298/18, §57, 26 April 2022; *T.K. and Others v. Lithuania*, no. 55978/20, § 70, 22 March 2022; *Shenturk and Others v. Azerbaijan*, nos. 41326/17 and 3 others, § 112, 10 March 2022
[9] *Camara v. Belgium*, no. 49255/22, 18 July 2023
[10] Ibid. § 134
[11] *Alleleh and Others v. Norway*, no. 569/20, §§ 106, 23 June 2022

personal history to obtain asylum and was subsequently expelled from Norway with a two-year ban on re-entry, despite having married a Norwegian national and having given birth to children in Norway. The Court did not find any compelling reason to substitute its own assessment for that of the national authorities and reiterated that "where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for the Court to substitute its own assessment of the merits".[12]

On the other hand, in *J.A. and A.A. v. Türkiye* (2024),[13] regarding the threatened expulsion of the applicants and their four children to Iraq and the alleged failure of both the administrative authorities and the courts to conduct a proper assessment of the applicants' allegation that they would be exposed to a real risk of death or ill treatment if removed, the Court found that there would be a violation of Articles 2 and 3 in their procedural aspect if the applicants were to be removed to Iraq without a fresh, *ex nunc* assessment of their claims.

This closer look into some recent migration cases at the Court shows how important having both the opportunity to raise issues substantively at the national level and strong judgments from national courts is to us in Strasbourg. But it also shows that the Court is ready to step in and protect the human rights of migrants where the domestic courts fail to carry out their preliminary role and assess the situation at hand in a Convention-compliant manner.

I would now like to turn to mention some upcoming cases to give you an idea of what is on our docket in relation to migration issues.

As the Court's President and a sitting judge at the Court, you will understand that I can only outline the legal issues which are publicly available through our press releases. I will not comment on the cases as such.

One legal issue which the Court will be presented with shortly relates to the conditions in which a national was returned to their country of origin. The case *Mansouri v. Italy* was relinquished in favour of the Grand Chamber of the Court, which will conduct a hearing on 18 September.[14] The case concerns the complaints of a Tunisian citizen who was refused entry into Italy where he had previously been living on the basis of a temporary residence permit. He was confined for seven days on board the ship being used to return him to Tunisia. The legal issues posed to the Court will include questions on whether the applicant was unlawfully deprived of his liberty on board the ship, whether there was an effective domestic remedy available to him, and whether he was subject to inhuman or degrading treatment, relying on Articles 5, 13 and 3 of the Convention respectively.

Furthermore, there are three cases that have been grouped to be heard together on 12 February 2025 by the Grand Chamber that concern alleged summary returns, also known as 'pushbacks', of individuals to Belarus from neighbouring states. I am sure that you are all aware that 'pushbacks' are not a novel topic for the Court, and you will be interested to know that these cases are indicative of wider allegations that arise in over 30 cases pending before the Court against Lithuania, Latvia and Poland concerning the situation at the Belarusian borders from spring 2021 to summer 2023.

A quick glance at each case provides us with similarities in the factual scenarios despite the different States that the complaints are brought against.

[12] Ibid. § 93
[13] *J.A. and A.A. v. Türkiye*, no. 80206/17, 6 February 2024.
[14] *Mansouri v. Italy*, no. 63386/16

The first to be relinquished to the Grand Chamber in April, was the case *C.O.C.G. and Others v. Lithuania*.[15] On the facts, four Cuban nationals left Russia in 2022 for Belarus with the intention of seeking asylum in Lithuania. The applicants submit that on several occasions between 31 March and 6 April 2022, they attempted to cross the Belarusian-Lithuanian border on foot, with Lithuanian border guards pushing them back into Belarusian territory at gunpoint. After an interim measure had been issued by the Court, the applicants were detained in Lithuania allegedly without the right to leave the premises.

The second case that was relinquished to the Grand Chamber in June, called *R.A. and Others v. Poland*, concerns 32 Afghan nationals who allege that they were pushed back to Belarus by Polish border guards and left stranded in makeshift camps with problematic sanitary and humanitarian conditions.[16]

The third and final case to be relinquished to the Grand Chamber was *H.M.M. and Others v. Latvia*, where 26 Iraqi nationals allege that they were pushed back from Latvia to Belarus without Latvian authorities reviewing their requests for asylum and were left in inadequate conditions.[17]

These cases include a multitude of legal complaints under a variety of Convention Articles.

For instance, the applicants make a number of complaints using Articles 2 and 3 of the Convention about the alleged summary returns, or 'pushbacks', stating that they were returned to Belarus, which is not a safe third country, without being given an opportunity to request asylum in Lithuania. Moreover, the applicants complain that they were exposed to 'collective expulsion' contrary to Article 4 of Protocol No. 4 of the Convention.

Let me now conclude by returning to the central thread of my speech this morning. It has never been clearer that the role of the European Court of Human Rights is subsidiary to the domestic courts.

However, I am here to remind us today that we are collectively responsible for tackling the challenge of migration, and that where the High Contracting Parties of the Convention take the first step in this journey, the Court will be right behind them.

[15] *C.O.C.G. and Others v. Lithuania*, no. 17764/22
[16] *R.A. and Others v. Poland*, no. 42120/21
[17] *H.M.M. and Others v. Latvia*, no. 42165/21