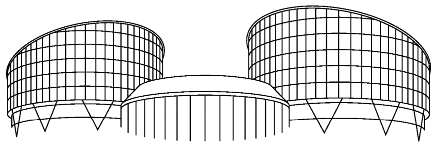

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SEMINAR

European Convention on Human Rights and international refugee law compliant procedures at state borders
Jurisprudence of the European Court of Human Rights and measures taken in the context of the execution of judgments

Speech by Clare Brown,
Strasbourg, 25 October 2024

Background
I think it would be useful to start with a little background about how the implementation system works: what happens after the Court issues a judgment? As you no doubt know one of the most significant features of the Convention system is that it includes a mechanism for reviewing compliance. Little is known about that mechanism.

Under Article 46 of the Convention, the High Contracting Parties undertake to abide by a final judgment of the Court, which is transmitted to the Committee of Ministers tasked with supervising its execution. The Committee is of course the executive body of the Council of Europe, made up of representatives of 46 member states: as such its work has a political character. Nonetheless, it should be underlined that in exercising its functions under Article 46, it is firmly guided by legal principles. As recognised by the Court, the Committee has developed an extensive acquis in this area after years of practice examining supervision.

In common with the entire Convention system, the execution process is founded on the principle of subsidiarity. The State is, in principle, free to choose the means by which to comply with a judgment in which the Court has found a breach.

The whole structure of the Convention resting on the general assumption that public authorities in member States act in good faith, **includes the supervision procedure**. The execution of judgments should also involve good faith by the authorities and take place in a manner compatible with the "conclusions and spirit" of the judgment.

Basic procedures
Under the Committee's Rules of Procedure, once a judgment finding a violation becomes final, the respondent State has six months to inform the Committee through an action plan or report of the measures it has taken or intends to take **in addition to the payment** of any monetary compensation awarded by the Court. To comply with Article 46, there are two types of measures expected.

Individual measures are measures to erase the consequences of the violation for the applicant who brought the case : to put the applicant, **to the extent possible**, in the position in which they would have been had the requirements of the Convention not been disregarded. In the cases at hand,

depending on the violations found by the Court, the Committee is likely to want to have information on the situation of the applicant:
Where are they? Have the expulsion orders been revoked and have they now had access to asylum procedures in the member state?

Has their asylum claim been re-examined in a Convention compliant procedure?

In certain cases, if a substantive violation was found about risks that they would face on expulsion, have they been granted refugee status or another form of subsidiary protection from refoulement?

If the applicants had also been unlawfully detained (at borders or during asylum proceedings), have they been released from detention?
If the applicants were found to have been ill-treated at the border, has an investigation been launched into that ill-treatment?

In some cases, unfortunately the applicants may no longer be traceable (further to a collective expulsion that may have taken place years before and where the representatives have lost contact with them). The Committee will seek to ascertain what measures the authorities have taken measures to locate them? Some states have provided assurances about their treatment and potential processing of asylum claims should they present themselves to the border in the future which have been accepted by the Committee.[1]

General measures serve to put an end to the violation found by the Court and to prevent repetition of the violations more generally. In other words, where necessary to change the situation on the ground and to protect other potential victims : to stop them needing to turn to the European Court in future for redress which should be available at domestic level. In the types of cases at hands, respondent States are likely to need to take a range of complex measures, which may involve :

- reforms of the asylum system to afford **effective access** to means of legal entry; changes in relevant legislation; provision of remedy with suspensive effect;
- changes in case-law of domestic courts to ensure application of the relevant framework in a manner compliant with the Convention and the Court's case-law;
- changes in policy to terminate practices of, for example removal of asylum seekers to a third country without identification or examination of their individual situation;[2]
- enhancing national capacity: proper training, circulars, guidelines, toolboxes for the border guards and asylum authorities who are in the front line to ensure due process, early ID and effective registration of asylum claims;
- improved safeguards : provision of multilingual information materials, interpretation services and/or legal services at border points to enable those arriving to understand steps to take to access asylum proceedings and/or
- effective monitoring and reaction capacity at domestic level (by CSO, NHRI, NPM) if allegations of pushbacks/arbitrary actions by border guards etc : to ensure that the procedures, often officially set out in law, are followed in practice.

Human rights meetings and transparency of information
The Committee meets four times a year to consider the execution of individual cases in its Human Rights Meetings which take place in March, June, September and December. The products of these

[1] MK and Others v. Poland
[2] Ilias and Ahmed v. Hungary

meetings are public decisions and resolutions in which the Committee expresses its view on the state of execution of an individual case. You have some examples of these in the bibliography prepared for this meeting. The element of encouragement, constructive or harsh criticism, and political pressure coming from other Member States can assist in pushing forward the execution process.
Despite the fact that Human Rights meetings, like all Committee meetings, are held in private, the execution process itself is becoming increasingly transparent. States' action plans are all published on the HUDOC-EXEC database.[3]

Rule 9
The Committee's Rules for supervision[4] allow submissions from the applicant, from civil society, from national human rights institutions.

These are actively encouraged and are published. They are important and provide a an objective source of information and critical counter-balance to the information submitted by the state; help create discussion at national level; help trigger a response from a state that might otherwise not submit information on particular points; and keep the Secretariat and the Committee informed so that where necessary it can ask for more information from the State and push for additional measures (used in analyses and decisions).

Further to changes in the rules in 2017, the Committee can also consider any communication from an international intergovernmental organisation or its bodies or agencies whose aims and activities include the protection or the promotion of human rights. **This includes UNHCR whose submissions throughout the years in different cases have proved to be of invaluable assistance to the Committee when fulfilling its supervisory role.**

Last year, in order to increase the efficiency and transparency of the supervision process and enable NHRIs and CSOs to plan ahead their interventions, the Committee decided to make public its indicative annual planning of cases for Human Rights meetings.

Measures taken in cases where the Committee has closed supervision
There are a number of relevant cases where the Committee of Ministers has been able to close its supervision, satisfied that similar violations would be prevented and that the state has complied with its obligations under Article 46, due to a change in legislation coupled with the direct application by the domestic courts of the Convention and the principles taken from the Court's caselaw. These just go to show the key role of the judiciary both in terms of prevention but also remedying violations found by the Court in individual cases **and** on a more general level: to prevent similar violations in future:

Mohammed v. Austria : to remedy the lack of suspensive effect of second asylum applications against forced Dublin transfers, the relevant provision of the Asylum Act was repealed and amended. This was further to a judgment from the Constitutional Court which referring to the Court's judgment found that a general absence of protection against expulsion was contrary to the rule of law and therefore unconstitutional. The authorities reported to the Committee that the provisions meant that asylum seekers no longer risked a forced transfer until the domestic courts had examined the risks under Articles 3 and 8.[5]

Salah Sheekh v. Netherlands : In response to the Court's finding of a violation of Article 3 due to the authorities' rejection of the asylum claim of the applicant, who belonged to the minority *Ashraf* group

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[3] https://hudoc.exec.coe.int
[4] CM/Del/Dec(2006)964/4.4-app4consolidated
[5] Case of Mohammed Against Austria [CM;ResDH(2018)376]

in Somalia, the authorities reported that the modalities for assessing an alleged risk of ill-treatment in asylum procedures were changed in 2007 by a directive of the Minister of Justice. Individuals were still required to show that they have been singled out for persecution, but the overall situation in a country, including general circumstances (i.e., the fact of being a member of a minority), were included in the assessment. Furthermore, specific groups of asylum seekers ("vulnerable minority groups", including, the *Ashraf* in Somalia) were identified where the general situation in their country of origin suggested that upon their return they would be at risk of ill-treatment. After a decision from the Council of State which clarified the position further, asylum seekers only had to demonstrate being part of that minority to qualify for a residence permit for asylum purposes under the Aliens Act 2000. Finally, in response to the Court's criticism about the use of country-of-origin information, the authorities reported that assessments were no longer based solely on the country reports of the Ministry of Foreign Affairs but also increasingly on other sources.[6]

FG v. Sweden : in response to the Court's finding that the applicant's expulsion to Iran without an adequate *ex nunc* examination of the implications of his conversion to Christianity after his arrival in Sweden would lead to violations of Articles 2/3, the applicant was granted refugee status and a residence permit. The authorities reported that the judgment had been disseminated to the domestic courts who applied the principles directly in examining future appeals.

Sufi and Elmi v. the UK : in response to the Court's findings of risk of exposure to ill-treatment in Somalia that time, the authorities undertook that removal action would not be taken and granted the applicants discretionary leave to remain. Furthermore, the authorities submitted domestic case law from and operational guidance issued to asylum case workers / decision makers demonstrating that the Court's conclusions about the risks and how to assess those risks were being followed.[7]

Measures taken or awaited in cases still pending before the Committee of Ministers

There are a number of key relevant cases that are still under the supervision of the Committee. Some of these have been pending for many years, mainly due to the fact that the necessary general measures have not been fully adopted. This is of course a real concern as that can mean that the reality on the ground has not changed and similar violations are not being prevented for asylum seekers arriving at borders and trying to claim asylum. Bearing in mind the time that it takes for an application to get to the Court, for the Court to decide and for the Committee to be seized of the matter, this means that violations can be continuing for others for many years before resolution.

It must be underlined that the fact that a case remains under the supervision of the Committee does not mean that the judgment is being ignored by a respondent state or that the process of execution is not under way or even, in some cases, advanced.

Time for a few examples of measures on both sides of the spectrum to show that whilst the Committee is faced with real challenges to move things forward, there has been some concrete progress.

Croatia

In *MH v Croatia,* mentioned earlier, the Court found a multitude of violations[8] related to the treatment of an Afghan family at the Croatian Serbian border (the family was allegedly ordered to return to Serbia along train tracks and their six-year-old child was hit by a train and died) requiring

[6] Case of Salah Sheekh Against The Netherlands [CM;ResDH(2010)10].

[7] Cases of Sufi And Elmi Against The United Kingdom [CM;ResDH(2013)197].

[8] Lack of effective investigation into death; inadequate conditions of detention of migrant children; lack of administrative and court diligence and expedition concerning asylum seeking applicants' detention and asylum proceedings; collective expulsion; hindrance of the effective exercise of right of individual application.

comprehensive and multi-faceted actions by the authorities to ensure genuine and effective access to asylum procedures at the border.

An interesting measure taken, which was welcomed by the Committee,[9] was the establishment of an **independent border monitoring mechanism**, being the first of its kind in all member States. As noted by the European Agency for Fundamental Rights, it should be a practical tool to help monitor the actions at the border and ensure that Croatian police and border guards are not preventing access to asylum procedures. The Committee is still following its functioning closely, given ongoing reports concerning recent incidents of collective expulsions and other concerns, and has asked the authorities to do more to ensure that individuals in the applicants' situation are systematically provided with genuine and effective access to procedures for legal entry into Croatia. The Committee is also following a number of other measures being taken by the authorities to make the asylum procedure more accessible, (including IT solutions and the translation of the asylum information in various languages) as well as to prevent delays in asylum proceedings before the administrative courts and the Ministry of the Interior. In **2023 an Instruction** was issued by the Head of Police Directorate to all police departments and administrations throughout Croatia instructing them to act with diligence and expedition in the asylum related proceedings. The Committee is likely to next examine this case in 2025.

Greece

The *M.S.S.* case concerns multiple violations[10] including also living conditions and unlawful detention of asylum seekers. I will focus here on the violation found by the Court related to deficiencies in the system of registration and examination of the asylum applications as well as lack of effective remedy against expulsion at the time (pre-2010) (violations of Article 13 taken in conjunction with Article 3). In the judgment, the Court criticised the asylum procedures at the time which were not accessible in practice and were excessively lengthy. It also noted that UNHCR had reported a success rate at first instance of 0.04% for refugee status under the Geneva Convention and 0.06% for humanitarian reasons or subsidiary protection. There was a tiny success rate on appeal.

Since the Committee has been supervising this group cases, the Greek authorities have made sustained efforts to enhance the national asylum system. As the Committee has noted in decisions adopted throughout the years,[11] Greece has set up an asylum service and appeal committees (comprised of judges) and has worked on improving quality of decisions. In addition, the following efforts have been reported by the authorities:

- increased staffing levels of the asylum service and training of the staff by the European Asylum Support Office;
- the time taken to decision asylum claims significantly reduced (on average to around two months);
- significant increase in recognition rates (in 2022/early 2023, there was a reported 69% recognition rate);
- changes to the appeal process and safeguards with introduction of automatic suspensive effective of remedies challenging negative asylum decisions ;
- increased availability of legal assistance.

[9] M.H. and Others v. Croatia

[10] *M.S.S.*: Shortcomings in the examination of asylum requests entailing risk of life or degrading treatment in case of direct or indirect return to the country of origin; poor detention conditions of asylum seekers and absence of adequate support when they are no longer detained; absence of an effective remedy.

[11] M.S.S. v. Greece

There are still some concerns about the length of the asylum procedures, access to them, the context of an online system for registration of asylum applications, as well as certain obstacles in obtaining legal assistance; which the Committee continues to follow and will examine again in 2025.

Hungary
The *Ilias and Ahmed* group of cases concerns violations of the procedural obligation under Article 3 to examine, before the removal of the asylum-seeking applicants to Serbia without the examination of their asylum requests on the merits, the question of whether there is a real risk of asylum-seekers being denied access in that country to an adequate asylum procedure, protecting them against refoulement. This was due to a legislative presumption of Serbia being a "safe third country" which presumption, according to the Court, had not been sufficiently substantiated.
The *Shahzad* group of cases concerns the collective expulsion of the asylum seeker applicants due to the "apprehension and escort" measure which was introduced by the State Borders Act in 2016 authorising police to apprehend, within an 8-km strip of land from the external borderline, foreign nationals present illegally in Hungarian territory and to remove them to Serbia without a decision or examination of the applicants' individual situation. This measure was extended to the whole territory of the country in 2017.

Following the facts of these cases, as you may know, the legal situation in Hungary has further changed with the introduction of the "Embassy procedure" in 2020 which provides that the only lawful way for a person to enter Hungary for the purpose of seeking asylum or international protection is first to submit a "statement of intent" at the Hungarian embassy in Belgrade or Kyiv. Only after the approval of this initial request will the authorities issue a document allowing entry to Hungary to make a full asylum application.

Unfortunately, these are examples of groups of cases where no progress at the stage of implementation has been seen, despite the strong decisions and resolutions adopted by the Committee which examines these cases regularly. Most recently in September 2024,[12] the Committee strongly exhorted the authorities to reform the asylum system in order to afford effective access to means of legal entry, in particular border procedures in line with Hungary's international obligations and to stop the practice of collective expulsions. The authorities have been called upon to ensure that, before the removal of any asylum-seeker from Hungary to Serbia, a thorough and up-to-date assessment is carried out in every case of whether they would have access to an adequate asylum procedure in Serbia and if the principle of non-refoulement is respected.

The Committee will next examine the cases in September 2025. Some progress might be hoped for by then given that the CJEU in a similar case has imposed a *lump sum* fine of 200 million euros on Hungary and a penalty payment of one million euros per day until the date of compliance with that judgment.
Challenges

The groups against Hungary are not the only ones on this topic without progress and which present a particular challenge in the current political climate. The Committee will continue to follow the developments closely and push for full implementation.

The adoption of the Reykjavík Declaration[13] by the Heads of State and Government of the Council of Europe in 2023 should be a key milestone, as member states at the highest-level expressly reaffirmed their unwavering commitment to the Convention system **and underlined the importance of the full, effective and prompt execution of the Court's judgments.**

[12] Ilias and Ahmed v. Hungary
[13] 4th Summit of Heads of State and Government of the Council of Europe - Committee of Ministers

To this end, and following the guiding framework set out in that Declaration to develop a **more co-operative, inclusive and political approach based on dialogue**, the Department for the Execution of Judgments has intensified work to assist states with increasing missions and bilateral meetings with national authorities, including immigration authorities and parliamentarians to try to find ways forward.

Targeted co-operation programmes can also play a crucial role in facilitating ongoing discussions with decision-makers at domestic level, promoting experience-sharing, enhancing national capacity-building, and disseminating relevant knowledge from various expert bodies within the Council of Europe, such as the CPT, the SG Special Representative on Migration and Refugees (who we heard from this morning) and Venice Commission. These programmes can be essential in ensuring the adoption of appropriate and sustainable measures to address the issues highlighted in the European Court's judgments. As called for by Reykjavik, the Committee clearly needs to coordinate and create systems of support and synergies with other CoE institutions and monitoring bodies to help it fulfil its supervisory role.

Conclusion

In conclusion, I hope that this brief overview has not only shed light on some of the key challenges but also demonstrated some progress that the Convention system has brought about across the Council of Europe, in helping to advance the rights of asylum seekers and refugees. In the current very difficult political climate, the work of the Committee to push for full and effective implementation of the Court's judgments and to uphold values and rights for this particularly vulnerable population group in need of special protection is especially important.

Unlike the case-law of the Court, not much is written by academics about the execution process, but there is a great deal of information to be found on the HUDOC-EXEC website, including submissions from applicants, civil society, UNHCR and respondent States as well as the decisions taken by the Committee of Ministers. There is also a lot of information available on the website of the Department of the Execution of Judgments.[14] I would be very happy to give you any additional information if you are interested.

[14] https://www.coe.int/en/web/execution