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(CDCJ)

**ACCESS TO JUSTICE FOR MIGRANTS AND
ASYLUM-SEEKERS IN EUROPE**

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The views expressed in this report are the author's and do not necessarily reflect those of the Council of Europe

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I. INTRODUCTION

1. This report is concerned with the issue of access to justice for migrants and asylum seekers within Europe. It deals in particular with the identification of means and measures - both existing and new - for facilitating and ensuring such access for those persons falling into these two categories. The report has been prepared at the request of the European Committee on Legal Cooperation (CDCJ) of the Council of Europe further to the adoption by the European Ministers of Justice of Resolution No 1 on *access to justice for migrants and asylum seekers* at their 28th Conference¹.

2. The importance of the full achievement of access to justice for all persons cannot be understated. Without this the rule of law is undermined because the law concerned favours some over others without any rational and objective justification. Recognition that some sectors of society are particularly disadvantaged and vulnerable is a crucial first step towards achieving access to justice for them. Its actual realisation is, however, much more difficult as it requires not just a change in the rules but also in practice, as well as the provision of resources, whether new or reallocated. This can be particularly difficult where the group facing problems in securing access to justice is comprised of outsiders such as migrants and asylum-seekers, even if the circumstances of many, if not all, makes a compelling case for treatment.. An additional factor in the vulnerability of many migrants and asylum-seekers will be their difficulty in negotiating the requirements of legal processes that they either do not comprehend on account of their age or linguistic incompetence or cannot cope with because of trauma or emotional distress.

3. The report begins by defining the two key terms - access to justice and migrants and asylum-seekers - and then examines the scope of the rights that should be enjoyed. It then looks at the various means and requirements under regional and international law for securing the realisation of those rights and providing remedies where the former does not happen. Thereafter it considers both the shortcomings of regional and international standards, the considerations that lead to the non-implementation of established standards at the national level and some good practices that might be emulated. Finally it suggests what action might usefully be taken by the Council of Europe to improve the present situation.

4. Although there are extensive and important standards concerning access to justice for migrants and asylum-seekers, there are also gaps in their coverage and failures to implement them in practice. The report proposes the adoption of a Recommendation by the Committee of Ministers to clarify and elaborate the requirements concerning access to justice for migrants and asylum-seekers so that these can be more readily appreciated and implemented.

II. DEFINITIONS

5. The terms "access to justice" and "migrants and asylum-seekers" are both subject to a variety of meanings and understandings. It is important, therefore, to clarify the way in which they are being used in this report.

¹ Lanzarote, October 2007.

A. Access to justice

6. There are two main approaches to the use of the term "access to justice". At the very minimum - and indeed as originally conceived - it is a term seen as being concerned with the means for securing vested rights, particularly through the use of courts and tribunals². From this perspective the particular focus has been on developing means of overcoming the obstacles faced by certain groups in making use of the processes established to provide redress where rights are considered not to have been respected. These have included public funding for legal advice and representation, special procedures (such as class actions and public interest litigation), simplified procedures (for smaller claims) and less judicial procedures (such as mediation). It is important, however, that such processes are a means to obtaining respect for rights or appropriate remedies where this has not occurred and do not entail any surrender of entitlements unless this is done pursuant to an act of consent that is both genuine and informed.

7. Concern about the cost of state funding for lawyers in private practice as a means of facilitating access to justice has also led to the awarding on a competitive basis to only certain law firms of contracts for the provision of legal services, the promotion of the use of conditional and contingency fees to finance litigation, the use of paralegals in place of lawyers for certain types of problems and support for the creation and operation of specialist centres (whether public entities with a degree of independence or genuinely non-governmental bodies) to provide advice and representation³

8. Although the attention of those concerned with this view of access to justice was initially given to processes relating to the enjoyment of private law rights, it has come to be seen as equally relevant to the processes dealing with the exercise of constitutional and human rights and the determination of criminal responsibility⁴. The way in which witnesses are treated in administrative, civil and criminal proceedings might also be regarded as an element of access to justice in the procedural sense, particularly as this may impact adversely on rights which they may themselves have.

9. However, the term access to justice has increasingly been defined in a somewhat broader manner than the essentially procedural approach just described, with the focus being more on ensuring that legal and judicial outcomes are themselves "just and equitable". The broader view of access to justice can thus be seen as being particularly concerned with the substantive aspect of justice - notably in the social, economic and environmental spheres and with the use of law as a tool to achieve these objectives⁵. It may thus be concerned as much with the ability to seek and exercise influence on law-making as with ensuring access to law-implementing processes and institutions⁶.

10. At the same time changes to substantive rights may be essential in some instances so that more effective procedural arrangements can be put in place to ensure that some forms of harm that

² See M. Cappelletti and B. Garth. "Access to Justice: The Worldwide Movement to Make Rights Effective - a General Report" in M. Cappelletti and B. Garth (eds) *Access to Justice: A World Survey* (Milan: Dott. A. Guiffre Editore, 1978) (vol. 1, book 1).

³ See, e.g., *Modernising Justice: The Government's Plans for Reforming Legal Services and the Courts*, Cm 4155 (London: Lord Chancellor's Department, 1998).

⁴ *Ibid.*

⁵ See, e.g., UNDP, *Access to Justice: Practice Note*, 9/3/2004, at 6.

⁶ See, e.g., *A Framework for Strengthening Access to Justice in Indonesia* (<http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf>) and the *Access to Justice Round-Table Discussion* (Johannesburg, 2003).

have been suffered will then be remedied on a more widespread basis and at a lower cost. The most notable instance of this has been the replacement of civil liability for motoring accidents by no-fault insurance schemes⁷.

11. Although the broader view of access to justice might be seen as particularly pertinent to the situation of developing countries, it is one that could also be applicable to the situation of various groups - notably the poor, persons subject to systematic discrimination and persons belonging to minorities - in the more developed context of Council of Europe member states. However, it does not seem especially relevant for the purposes of the present report since the difficulties faced by migrants and asylum-seekers in those specific capacities arise generally with respect to rights that they are already guaranteed, at least at the regional or global level. Nonetheless there is some reflection in the report of the broader notion of access to justice since some instances of the need to enhance the scope of their substantive rights are noted as being required in order to ensure that they are treated fairly and with dignity in their capacity as migrants or asylum-seekers.

12. While the more procedural approach to ensuring access to justice understandably tends to focus on overcoming formal and practical barriers to securing redress for wrongdoing, it is important that this should not be done in an entirely abstract manner. Certainly, unless there is also an awareness of the actual needs of those for whom steps to ensure access to justice are being taken, the efforts being made to assist them may well be misdirected and result in a loss of resources⁸. Identifying these needs is, however, often handicapped by the absence of suitable empirical studies and there is often no choice but to rely upon evidence of a more impressionistic character. This is particularly so as regards the position of migrants and asylum-seekers with respect to access to justice and this needs to be kept in mind when adopting reforms. Thus, while impressionistic evidence about the position of persons falling into these categories may point to various solutions of a general character for the problems that would seem to need to be addressed, gathering and taking account of more specific information about the situation in individual countries would be appropriate before implementing them.

13. Success in addressing the problem of access to justice in the more procedural sense is dependent in particular upon those seeking to secure their rights having appropriate and understandable information about the scope of these rights and how to access them, a readily accessible infrastructure - in both the formal and practical sense - for acquiring this information and then acting upon it, the quality in practice of the operation of this infrastructure and the confidence of those needing to have resort to the infrastructure in its utility and integrity⁹.

14. Notwithstanding that courts and lawyers are likely to remain the pre-eminent means of ultimately achieving access to justice, it has already been seen that the manner in which they are provided does not have to be based upon the classical model of private litigation. Moreover awareness of rights and good quality decision-making by the relevant public officials which is understood and recognised as having legitimacy can ensure that justice is achieved without the delay and expense entailed in any form of dispute settlement process.

⁷ See E. L. Lascher and M R Powers (eds), *The Economics and Politics of Choice No-Fault Insurance*, (Dordrecht: Kluwer, 2001).

⁸ See, e.g., H. Genn., *Paths to Justice: What People Do and Think About Going to the Law*. (Oxford: Hart Publishing, 1999).

⁹ See further the *Access to Justice Round-Table Discussion* (Johannesburg, 2003).

15. There may be an especial need for some tailor-made arrangements in the case of migrants and asylum-seekers who will for instance, include persons who have rather limited linguistic capabilities, are subject to restrictions on their liberty and may be the object of proceedings for removal with only short deadlines for possible challenges. Certainly such factors may render more traditional forms of legal advice and representation ineffective in practice

B. Migrants and asylum-seekers

16. Migrants and asylum-seekers are undoubtedly numerous¹⁰, with the former comprising several sub-categories in addition to the latter.

Migrants

17. Migrants are taken to comprise non-nationals of a country who have moved (or are endeavouring to move) there from another one - often but not necessarily the one of their nationality - and whose presence there may or may not be lawful or regular¹¹. Furthermore the move (or attempted move) may not always be voluntary because sometimes the persons concerned will have been brought there by force, improper pressure or deception with a view to their future exploitation and in other instances the compulsion to move may come from economic or natural disasters and environmental catastrophes..

18. The term would not, therefore, include those nationals of a predecessor state habitually resident in the territory over which sovereignty has been transferred to a successor state and who have not acquired its nationality¹².

19. It would also not include diplomats and consular officials whose entry to the country concerned is for the purpose of representation rather than settlement, although they could become migrants if they seek to remain in the country after leaving their posts¹³.

20. However, there is no fixed notion of how long the move from one country to another should be. For many migrants the aim of the move may well be for a very long period, if not a permanent one. On the other hand for some the period could be fairly short, while for others - particularly asylum-seekers - it may be uncertain since it is very likely to depend on circumstances over which they have no control¹⁴. Nonetheless in all cases the notion of a "move" does carry with it a sense of settlement in the country concerned which might well be regarded as excluding persons such as

¹⁰ The UN Commission on Population estimated there to be 65 million migrants in Europe in 2005 (POP/942, 30 March 2006), while the UNHCR considered there to be 1,585,600 refugees in Europe by the end of 2007 and around 165,000 persons awaiting determination of an application for asylum; *UNHCR Statistical Yearbook 2007*, (UNHCR, 2008).

¹¹ The term "irregular migrants" is one that is capable of embracing both those who have entered a country of which they are not a national in breach of the immigration laws and those whose authorisation to enter such a country has ceased to be (or is found never to have been) valid, whether because of the passage of time or because of something that they did in order to gain entry or have done subsequent to their having done so. On the desirability of using the term "irregular" rather than "illegal", see R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, (Council of Europe, 2005), pp 8-9.

¹² Pursuant to Article 20 of the European Convention on Nationality such persons shall have the right to remain in the successor state and shall enjoy equality of treatment with its nationals in relation to social and economic rights but may be excluded from employment in the public service involving the exercise of sovereign powers.

¹³ Their family members would also be excluded while present on that basis. Officials of international and intergovernmental organisations and their family members might, on the other hand, be seen as migrants, notwithstanding that they may benefit from the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with International Law, as they are more akin to others moving country for the purpose of employment.

¹⁴ Such as the political situation in their country of nationality.

tourists whose visit to a country is clearly temporary. However, the use of a tourist visa may either be the basis on which a person puts him or herself in a position to seek asylum and thus become an asylum-seeker or a decision to stay is made only after arriving for what was genuinely intended to be a temporary visit. It would not, therefore, be inappropriate to exclude entirely from the definition of migrants those persons whose visits to a country start as a very temporary one.

21. Although migrants is a term embracing a wide variety of persons in many different situations, a number of categories might be distinguished either because they are recognised in international instruments or because their circumstances require particular attention. The following categories are certainly not intended to be exhaustive.

22. Migrants will certainly include persons who have the benefit of the particular protection afforded to refugees and stateless persons that is respectively afforded by the Convention relating to the Status of Refugees ("the Refugee Convention") and the Convention relating to the Status of Stateless Persons ("the Stateless Persons Convention").

23. The nationals of one European Union country moving to another could also be considered as a particular category of migrants and are treated as such in this report notwithstanding that they are not so regarded under European Union law but rather are seen as citizens exercising their right to freedom of movement.

24. Another category within the term "migrants" that might be distinguished is that of "migrant workers", as a consequence of certain treaty provisions being specifically devoted to them. "Migrant workers" are variously defined as non-nationals who have been authorised to engage in a gainful occupation in a state's territory¹⁵, non-nationals who have been authorised to reside in a state's territory in order to take up paid employment¹⁶ or non-nationals who are engaged or have been engaged in a remunerated activity, whether or not they are "documented or in a regular situation"¹⁷. Those migrant workers who are "documented or in a regular situation" are persons who are authorised to enter, to stay and to engage in a remunerated activity in the state of employment pursuant to the law of that state and to international agreements to which that state is a party¹⁸.

25. In the case of the European Social Charter, the Revised European Social Charter and the European Convention on the Legal Status of Migrant Workers the only non-nationals covered are those from another Contracting Party whereas there is no such qualification of those to whom the International Convention on the Protection of the Rights of All Migrant Workers and Members applies.

26. However, not only does the precise definition of this sub-category differ in the relevant treaties but the provisions of the European Convention on the Legal Status of Migrant Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families do not apply to all who might fall within the definitions that they use.

¹⁵ Article 18 of both the European Social Charter and the Revised European Social Charter.

¹⁶ European Convention on the Legal Status of Migrant Workers, Article 1.

¹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2.

¹⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 5.

27. Thus the European Convention on the Legal Status of Migrant Workers is particularly restrictive as to its application as its provisions do not apply at all to frontier workers, artists, other entertainers and sportsmen engaged for a short period and members of a liberal profession, seamen, persons undergoing training, seasonal workers and workers carrying out specific work in the territory of a state on behalf of an undertaking having its registered office outside its territory. On the other hand the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families includes some of them and certain other migrant workers within its scope - setting some limits on the application of its provisions to them dependent upon the sort of migrant worker concerned¹⁹ - but entirely excludes others and some additional groups from the benefit of its provisions²⁰.

28. The right to assistance and protection afforded by the European Social Charter and the Revised European Social Charter extends to the families of migrant workers without defining the latter in specific terms whereas the provisions in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are made generally applicable to the "members of the family" of a migrant worker, who are defined as persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned²¹. The "families" of migrant workers also have the benefit of most of the rights assured in the European Convention on the Legal Status of Migrant Workers, which regards them as comprising "the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker"²².

29. A further category of migrants are those persons who have or are being brought from one country to another with a view to their exploitation. Their existence is recognised in international and regional treaties directed at slavery, forced labour and the trafficking of persons, notably, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the Abolition of Forced Labour Convention, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and the Council of Europe Convention on Action against Trafficking in Human Beings. These treaties are concerned primarily with preventing this form of migration but to a certain extent they also address the rights and status of those whose migration has been or is being effected in a manner contrary to their provisions.

30. Specific acknowledgement of the situation of family members who may accompany or later seek to join a migrant falling into one of the categories mentioned in the treaties referred to above

¹⁹ Part V deals with the application of the Convention to the following categories of migrant workers: frontier workers, seasonal workers, itinerant workers, project-tied workers, specified-employment workers and self-employed workers.

²⁰ Its provisions do not apply at all to persons sent or employed by international organisations or agencies, persons employed by a state outside its territory whose admission and status are regulated by general international law or by specific international agreements or conventions, persons taking up residence as investors, refugees and stateless persons, students and trainees, seafarers and workers on an offshore installation, persons engaging for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialised skill, persons engaging at their employer's request in work whose nature is transitory or brief and who have to leave at the end of an authorised period of stay or earlier if no longer undertaking the specific assignment work; Article 3.

²¹ Article 4.

²² Article 12 allows, however, for temporary derogation from the right of family reunion which could affect the protection which families have under the Convention.

is limited. However, family members might also be seen as forming a distinct category of migrants, whose position is ultimately underpinned by the right to respect for family life.

31. Although children may often migrate as family members, they also do so alone whether because they are seeking to be reunited with those family members having become separated from them, they no longer have any family members or they have had for some reason to leave them behind. Whatever the reason unaccompanied children are especially vulnerable and it would be appropriate to treat them also as a distinct category of migrants.

32. Another category of migrants that might be distinguished is one that embraces Travellers, Roma, Sinti, Yenish and other groups who have a nomadic or semi-nomadic lifestyle, at least insofar as this leads them to cross, or to attempt to cross, national borders.

33. Persons who are internally displaced within the country of their nationality would not come within the strict definition of migrants given above because they have not actually moved from one country to another. Moreover as nationals of the country concerned they should have - at the formal level - the greatest range of rights and freedoms available under national law and under regional and international treaties, particularly as regards access to justice. Their position is not, therefore, generally addressed in the two following sections on rights and access to justice, although these sections do confirm the extent of their formal entitlement to rights and freedoms. However, it has been recognised that in practice persons who have been internally displaced within the country of their nationality can face similar problems in securing access to justice to those that confront many migrants²³ and some standards applicable to them have been adopted. It would thus be appropriate for any measures taken to deal with the latter problems also to embrace the situation of internally displaced persons and this is the approach adopted in the penultimate section of this report.

Asylum-seekers

34. Asylum-seekers are also a particular category of migrants which strictly speaking only embraces those of them who have specifically sought or are endeavouring to seek the status of a refugee pursuant to the Refugee Convention, whether or not they actually come within the scope of its provisions. For the purpose of the Refugee Convention someone will only be regarded as a refugee if "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"²⁴.

35. However, they might also be regarded as comprising for the purpose of this report, any migrants seeking to resist their removal to another country on the basis that such action would give rise to a serious risk of them losing their lives, being subjected to torture or inhuman or degrading treatment or punishment or even becoming victims of violations of certain other rights

²³ See the *Report presented by the Minister of Justice of Spain* at the 28th Conference of European Ministers of Justice at Lanzarote (25-25 October 2007) (MJU-28(2007)01 E, at pp 7 and 9. See also Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons.

²⁴ Article 1A. Certain people are excluded from having the benefit of the Convention's provisions notwithstanding that they fulfil all the conditions set out in the text, namely, if they have committed crimes against peace, war crimes or crimes against humanity or have committed serious non-political crimes outside the country of refuge prior to admission or have been guilty of acts contrary to the purposes and principles of the United Nations; Article 1F .

and freedoms contrary to the requirements of various human rights treaties²⁵. Where such a risk can be substantiated removal would be a violation of the right to life, the prohibition on torture or inhuman or degrading treatment or the right or freedom concerned²⁶. The protection afforded against removal under the human rights treaties concerned is more extensive than that under the Refugee Convention in that not only does it extend to a wider range of risks that would be faced following removal but it also applies to certain persons who cannot invoke the protection of the Refugee Convention because of past or apprehended conduct²⁷.

36. An asylum-seeker coming within the scope of the provisions of the Refugee Convention is thereby entitled to a range of rights, including one of particular relevance to securing access to justice²⁸ but it will be seen that such a person does not have any significant advantage over a migrant protected against removal through reliance on human rights treaties as rights conferred on him or her by these and other instruments are at least as extensive in their scope²⁹.

37. The requirement to be outside the country of one's nationality in the Refugee Convention's definition of a refugee³⁰ would mean that internally displaced persons could not be asylum-seekers. However, they could come within the scope of protection under human rights treaties against removal to a part of their country where there was a serious risk of them losing their lives, being tortured and so.

38. Although asylum-seekers are migrants they will be specifically referred to in the report because of the longstanding recognition given to them by international law as a group of persons in need of special protection.

C. Conclusion

39. Access to justice and migrants and asylum-seekers are clearly wide-ranging terms and, as will be seen, all the more so when put together.

40. Although there are two different approaches to the concept of access to justice, both are of significance for the situation of migrants and asylum-seekers, even if the procedural one is potentially more important in practice than the substantive one.

41. The different categories of migrants demonstrate the variety of circumstances and motives of those who migrate and also the considerations that may affect the rights and freedoms which those in the receiving countries are willing to grant to them. Some migrants may well fall into more than one category at the same time or they may change the category into which they fall after the passage of time or the occurrence of certain events. Some but not all categories of migrants have attracted special measures either in their favour or for the purpose of controlling them.

42. In the remainder of this report the term "migrants" will be used where the discussion concerns their situation in general or measures and requirements that seem to deal with as a

²⁵ Cf the description by the European Union of such persons as beneficiaries of subsidiary protection; see para 91.

²⁶ See para 221.

²⁷ See para 59 and n24.

²⁸ See paragraph 233.

²⁹ See paragraphs 363-385 and 393-4.

³⁰ Article 1A.

whole. Reference will only be made to specific categories, in particular asylum-seekers, where this is especially relevant to the context or the measure concerned.

III. ACCESS TO JUSTICE IN RESPECT OF WHICH RIGHTS

43. In order to clarify what is the present position of migrants with respect to their access to justice, it is necessary first to establish the substantive rights and freedoms that they may enjoy under regional and international law. Additional rights to these may, of course, be conferred by various national legal provisions. However, those rights which are guaranteed by regional and international law are the minimum that migrants should currently enjoy. Furthermore, the extent to which the specific requirements of regional and international law as regards access to justice are fulfilled will in many instances determine the reality of the exercise of the rights that are supposedly conferred by national law. Nonetheless it does not mean that the rights secured at the regional and international level are sufficient to guarantee access to justice in the substantive sense for all migrants in every circumstance. Moreover the various categories of migrants do not all enjoy the same rights.

44. The rights enjoyed under regional and international law comprise those conferred by treaties concerned solely with the situation of migrants, European Union law and by the more generally applicable human rights treaties³¹, albeit that some of those treaties also contain provisions specifically applicable to them as migrants and/or asylum-seekers.

45. It is important to note that these rights do not relate simply to the process of migration and in particular the possibility of admission to a country and the liability to be expelled from it. They also concern the situation of migrants while in the country to which they have moved (or are seeking to move³²). Such rights may be a concomitant of the acceptance that they can settle in the country concerned but they may also be essential to their survival and dignity pending the resolution of their status and - where that is negative - their departure.

46. Some of the provisions discussed below are framed in terms of obligations for states rather than rights or individuals but the latter is what they should become if properly implemented within national legal systems³³.

47. There are no treaties or European Union measures specifically concerned with Travellers, Roma, Sinti, Yenish and other groups who have a nomadic or semi-nomadic lifestyle³⁴.

³¹ The position of migrants and asylum-seekers is also to an extent safeguarded by certain requirements of customary international law - notably as regards the prohibition on arbitrary detention, the right to a fair hearing and the protection of property interests - but, as these requirements are also found in the treaty undertakings discussed below, they are not considered further in this report.

³² They may be physically present but have not been formally admitted.

³³ The legal effect of treaty provisions expressed as rights depends both on whether the constitutional law of the country concerned treats them as part of its internal law and whether the courts see them as self-executing. Provisions of European Union law that are of direct effect such as those considered below should be capable of being relied upon by individuals in the courts of Member States.

³⁴ However, there have been several Recommendations of the Committee of Ministers of the Council of Europe: Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe, adopted by the Committee of Ministers on 1 December 2004, at the 907th meeting of the Ministers' Deputies; Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, adopted by the Committee of Ministers on 23 February 2005 at the 916th meeting of the Ministers' Deputies; Recommendation Rec(2006)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe Governments of member states, adopted by the Committee of Ministers on 12 July 2006 at the 971st meeting of the Ministers' Deputies; and Recommendation

A. Specialised treaties

48. The treaties of express relevance to many, but not all, migrants are the European Convention on the Legal Status of Migrant Workers, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Refugee Convention and the Stateless Persons Convention, certain treaties aiming to facilitate links between members of the Council of Europe, a treaty concerned with voluntary service by young persons, two treaties dealing with nationality, a number of treaties concerned with the problem of slavery, forced labour, the slave trade and trafficking in persons and a treaty on rights for foreign residents in respect of local authority elections.

Migrant workers

49. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides those covered by its provisions with the most extensive set of guarantees afforded to any category of migrants or asylum-seekers apart from those nationals of one European Union country who move to another such country. Thus it covers not only the broad range of human rights found in various general human rights treaties, tailored in some instances to the specific situation of migrant workers and their families³⁵, but it also includes specific rights for those who are documented or in a regular situation³⁶, underlining that many of its provisions will still apply to migrants whose status is irregular.

CM/Rec(2008)5 of the Committee of Ministers to member states on policies for Roma and/or Travellers in Europe, adopted by the Committee of Ministers on 20 February 2008 at the 1018th meeting of the Ministers' Deputies.

³⁵ Namely, freedom to leave any state, the right to life, the prohibition on torture or cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and forced or compulsory labour, freedom of thought, conscience and religion, the right to hold opinions and freedom of expression, the prohibition on interference with privacy, family, home, correspondence or other communications, the prohibition on arbitrary deprivation of property, the right to liberty and security of person, the right to be treated with humanity and respect or dignity and cultural identity when deprived of liberty, the right to a fair hearing (discussed further under "Access to Justice", paragraph 329-), the prohibition on retrospective criminal liability and increases in penalties, the prohibition on imprisonment for failure to fulfil a contractual obligation, the prohibition on the destruction of identity documents, the prohibition on collective expulsion, the right to recourse to consular assistance, the right to recognition as a person before the law, the right to treatment no less favourable than nationals in respect of remuneration, working conditions and terms of employment, the right to take part in the meetings and activities of trade unions and associations, the right to the same treatment as nationals with respect to social security, the right on the same basis as nationals to receive medical care urgently required for the preservation of life or the avoidance of irreparable harm to health, the right for a child of a migrant worker to a name, to registration of birth and to a nationality, the right of access to basic education on the same basis as nationals, the right to maintain cultural links with one's state of origin, the right to transfer their earnings, savings, personal effects and belongings on the termination of their stay and the right to be informed on the rights under the Convention.

³⁶ As to the meaning of which see paragraph 24. Thus Part IV provides for a right to be fully informed of all conditions applicable to their admission, the possibility of temporary absences, liberty of movement and choice of residence, the right to form associations and trade unions for the promotion of their economic, social, cultural or other interests, the right to participate in public affairs of their state of origin and to vote and to be elected at its elections, the possibility of establishing procedures or institutions through which account may be taken of their special needs, aspirations and obligations, the right to equality of treatment with nationals in access to education, vocational guidance and training, housing, social and health services, co-operatives and self-managed enterprises and cultural life, the taking of appropriate measures to ensure the protection of the unity of their families, exemption from import and export duties and taxes in respect of their personal and household effects, as well as equipment for their work, the right to transfer their earnings and savings to their state of origin or any other state, the right to the same treatment as nationals regarding liability to and deductions or exemptions from taxes, duties or charges, the right to authorisation of residence for the same period as they are authorised to engage in remunerated activity, the possibility of allowing family members to stay where migrant workers die or their marriages are dissolved, the right to seek alternative employment following the termination of the remunerated activity prior to the expiration of a work permit, a qualified right to choose the remunerated activity, the right to equality of treatment with nationals in respect of protection against dismissal, unemployment benefits, access to public work schemes and access to alternative employment, the right to equality of treatment with nationals in the exercise of their remunerated activity and limits on the possibility of expulsion.

50. Moreover, although there are some limitations on the applicability of certain provisions to particular categories of migrant workers and members of their families³⁷, there are a number of commitments to promote sound, equitable, humane and lawful conditions in connection with the migration of all workers and the members of their families³⁸.

51. In addition there is an undertaking in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families to respect and ensure to all migrant workers and their families all the rights provided in it "without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status"³⁹. This provision does not preclude all differential treatment but any such treatment must have a rational and objective justification in order to be acceptable. Furthermore this guarantee is, of course, subject to the previously noted limitations on rights that have been expressly applied by the Convention to certain categories of migrant workers and their families. Moreover the guarantee against discrimination only concerns differences in the treatment of one or more groups of migrant workers and their families in comparison with the generality of migrant workers. It is thus quite distinct from the prohibition on discrimination against migrants and asylum-seekers vis-à-vis nationals which is to some extent secured both by general human rights treaties⁴⁰ and by those provisions in the Convention requiring equal treatment of migrant workers (and their families) and nationals. Indeed the guarantee might be regarded as otiose given that the provisions in the Convention apply to "migrant workers and members of their families" and so - apart from the limitations noted - would not appear to admit the possibility of exclusions affecting certain categories of them. Nonetheless an express prohibition on discrimination undoubtedly removes any scope for argument on this point and serves a useful educational purpose.

52. The European Convention on the Legal Status of Migrant Workers is not quite as wide-ranging in its coverage and it is not applicable to irregular migrants because of the authorisation requirement⁴¹. Nonetheless it guarantees a substantial body of rights, focused essentially on the specific situation of migrant workers. Thus its provisions are concerned with recruitment, medical examinations and vocational tests, the right of exit and admission, formalities and procedure relating to the work contract, the provision of information, travel, work and residence permits, reception, recovery of sums due in respect of maintenance, family reunion, housing, pretraining, schooling and linguistic and vocational training, teaching the migrant worker's mother tongue, conditions of work, transfer of savings, social security, social and medical assistance, industrial accidents and occupational diseases, inspection of working conditions, death, taxation of earnings, expiry of contract and discharge, re-employment, the right of access to the courts, the use of employment services, exercise of the right to organise, participation in the affairs of the undertaking and return home⁴².

³⁷ Part V sets out the extent to which the provisions in Parts III and IV are applicable to frontier, seasonal, itinerant, project-tied, specified-employment and self-employed workers.

³⁸ This entails the maintenance of appropriate services to deal with questions concerning international migration of workers and their families, the authorisation of bodies to undertake recruitment, an undertaking as to the orderly return of migrant workers, collaboration on preventing and eliminating illegal or clandestine movements and the employment of migrant workers in an irregular situation, the taking of appropriate measures to ensure that the situation of migrant workers and members of their families in an irregular situation does not persist, the taking of measures not less favourable than those applicable to nationals to ensure that working and living conditions of migrant workers and their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity and the facilitation of the repatriation of the bodies of deceased migrant workers or members of their families.

³⁹ Article 7.

⁴⁰ See paragraphs 124-5.

⁴¹ See paragraph 24.

⁴² As to the application of these provisions to family members, see paragraph 28.

53. Unlike the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the European Convention does not include any prohibition on discrimination but, as has already been noted, such a prohibition is probably unnecessary at least as regards treatment affecting only certain categories of migrant workers. Moreover the general aim of the Convention is that the migrant workers covered by its provisions should be "treated no less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions"⁴³ even if this is not being set as an absolute standard in every instance.

54. However, the practical significance of the rights guaranteed by these two conventions is rather limited since the level of ratification by European states is quite low. Thus only four Council of Europe member states have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁴⁴, while just two others have signed it⁴⁵. The number of ratifications of the European Convention on the Legal Status of Migrant Workers is somewhat greater - eleven Council of Europe member states have so far ratified it⁴⁶ - but the level of participation is still very much a minority one notwithstanding its specifically European focus; Contracting States must be members of the Council of Europe⁴⁷ and its provisions only apply to migrant workers coming from a Contracting State⁴⁸.

55. The failure to ratify these Conventions could thus deprive migrant workers and their families of full access to justice in its substantive sense, particularly as regards to economic and social rights framed to take account of their particular situation. However, this ought to be at least mitigated by the proper implementation of other general guarantees of such rights.

Refugees and stateless persons

56. The Refugee and Stateless Persons Conventions both provide that those covered by them should have the same or as least as favourable treatment as nationals regarding religious practice and education, acquisition of movable and immovable property, artistic rights and industrial property, any rationing system, education, public relief, labour legislation and social security and fiscal charges.

57. In addition they require that refugees and stateless persons have the most favourable treatment accorded to foreign nationals as regards non-political and non-profit-making associations and trade unions and the right to engage in wage-earning employment⁴⁹, as well as treatment not less favourable than aliens generally as regards self-employment, the practice of liberal professions, housing, freedom of movement, non-political and non-profit-making associations and trade unions and the right to engage in wage-earning employment⁵⁰.

⁴³ Preamble.

⁴⁴ Albania, Azerbaijan, Bosnia-Herzegovina and Turkey.

⁴⁵ Montenegro and Serbia.

⁴⁶ Albania, France, Italy, Moldova, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and Ukraine. The Convention has also been signed by Belgium, Germany, Greece and Luxembourg.

⁴⁷ Article 34(1).

⁴⁸ Article 1(1).

⁴⁹ Only the Refugee Convention.

⁵⁰ Only the Stateless Persons Convention in the case of the last rights.

58. Furthermore the two Conventions have their own specific requirements concerning personal status, access to courts⁵¹, administrative assistance in place of that normally provided by foreign authorities, identity papers and travel documents, transfer of assets, expulsion and naturalisation.

59. Moreover the two conventions impose limits on the possibility of expulsion from the territory of a contracting state. In both instances any such expulsion can only be on grounds of national security or public order⁵². However, in the case of the Refugee Convention there is a further restriction in that the person concerned cannot be sent to a territory where his or her life would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion but this does not apply to all refugees as defined by the Refugee Convention⁵³.

60. Both the Refugee and the Stateless Persons Convention require that their provisions be applied "without discrimination as to race, religion or country of origin"⁵⁴. However, as has been seen, only certain of the substantive provisions require the same or as least as favourable treatment as nationals, with the comparator often being alien and entailing either treatment not less favourable than aliens or the most favourable treatment accorded to foreign nationals.

61. Neither the Refugee Convention nor the Stateless Persons Convention make any general provision regarding family members and there is no right to family reunification. There is, however, an obligation to ensure that they have freedom as regards the religious education of their children⁵⁵.

62. The Protocol to the European Convention on Social and Medical Assistance requires the Contracting Parties undertook to ensure that refugees lawfully present in any part of its territory to which the Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory.

Council of Europe nationals

63. Those nationals of Council of Europe member states who become migrants could also benefit from two treaties only open to ratification by its member states and the provisions of which are applicable on a reciprocal basis..

64. The first is the European Convention on Establishment which establishes a number of requirements regarding the treatment of the nationals of one Contracting Party while on the territory of another Contracting Party. In particular it requires the entry of the former to be facilitated and limits the grounds for the expulsion of those who are lawfully resident, requires that they generally receive equal treatment with nationals of the Contracting Party in respect of both the possession and exercise of private rights whether personal rights or rights relating to

⁵¹ Discussed further under "Access to Justice", paragraphs 233-39.

⁵² Article 31.

⁵³ Article 33. The exclusions apply to those who can be regarded as a danger to the security of the country or its community.

⁵⁴ Article 3 of both conventions.

⁵⁵ Article 4 of both conventions. There is also provision for payment to a beneficiary outside the country in the event of death resulting from employment injury or occupational disease; Article 24 of both conventions.

property and the ability to engage in gainful occupations⁵⁶. The Convention has so far been ratified by twelve member states⁵⁷.

65. The second is the European Convention on Social and Medical Assistance in which the Contracting Parties undertook to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which the Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory⁵⁸. A Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance but can repatriate the person concerned if he or she has not been continuously resident in the territory of that Contracting Party for at least five years if he or she entered it before attaining the age of 55 years (or for at least ten years if he or she entered it after attaining that age), the person concerned is in a fit state of health to be transported and has no close ties in the territory in which he or she is resident⁵⁹.

66. Neither of these treaties would benefit family members who are not nationals of the Contracting Parties.

Young persons

67. The European Convention on the Promotion of a Transnational Long-Term Voluntary Service for Young People - which is not restricted to Council of Europe member states⁶⁰ - provides that those who volunteer should have a number of rights granted within the framework of legislation of the receiving state. These comprise board and lodging from the receiving organisation, an adequate opportunity for relevant linguistic, intercultural and vocational development, one full free day per week and a sufficient amount of pocket money. However, this treaty has not yet entered into force.

Nationality treaties

68. The Contracting States to the Convention on the Nationality of Married Women have agreed that "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife"⁶¹.

69. This requirement also exists in Article 9 of Convention on the Elimination of All Forms of Discrimination against Women and the European Convention on Nationality⁶² also provides that the rules on nationality of each state party shall be based, *inter alia*, on the principle that "neither

⁵⁶ There are also equal treatment requirements concerning participation in elections held by bodies or organisations of an economic or professional nature, acting as arbitrators, access to institutions for primary and secondary education and technical and vocational training, taxation, compulsory civilian services, expropriation and nationalisation.

⁵⁷ Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey and United Kingdom.

⁵⁸ Article 1.

⁵⁹ Articles 6 and 7.

⁶⁰ It has not entered into force since its adoption on 11 May 2000.

⁶¹ Article 1.

⁶² Ratified by Albania, Austria, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Moldova, Netherlands, Portugal, Romania, Slovakia, Sweden, the former Yugoslav Republic of Macedonia and Ukraine.

marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse"⁶³.

70. These provisions provide migrants who have married a national of the receiving state - whether this was the reason for their migration or it occurred subsequently - with an important safeguard regarding the preservation of their nationality and thus the possibility of returning to the state concerned in the event of irresolvable marital problems.

Anti-slavery and anti-trafficking treaties

71. The treaties concerned with slavery, forced labour, the slave trade and trafficking are of particular relevance to the situation of migrants whose presence in the receiving state is involuntary at the outset or subsequently or who are being seriously exploited while there.

72. Pursuant to the Slavery Convention the High Contracting Parties undertook to prevent and suppress the slave trade, to bring about - progressively and as soon as possible - the complete abolition of slavery in all its forms and to take measures to prevent compulsory or forced labour from developing into conditions analogous to slavery. These commitments were reinforced by more specific ones in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. In particular it requires the criminalisation of conveying or attempting to convey slaves from one country to another by whatever means of transport and the act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery⁶⁴, as well as providing that any slave who takes refuge on board any vessel of a state party shall *ipso facto* be free⁶⁵. Furthermore the immediate and complete abolition of certain forms of forced or compulsory labour is required by the Abolition of Forced Labour Convention, although the prohibitions in Article 8 of the International Covenant on Civil and Political Rights ("the International Covenant") and Article 4 of the European Convention on Human Rights ("the European Convention") are undoubtedly more extensive.

73. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others requires the creation of offences in connection with various aspects of prostitution, notably the procuring, enticing or leading away of someone - which could be from one country to another - for the purposes of prostitution, even if that has been with the consent of the person concerned. Furthermore, in order to check the traffic in persons of either sex for the purpose of prostitution, there are undertakings "to make such regulations as are necessary for the protection of immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while *en route*" and as to the supervision of railway stations and ports to prevent international traffic in persons for the purpose of prostitution⁶⁶. Moreover there is an undertaking to make suitable provisions for the temporary care and maintenance of the destitute victims of international traffic in persons pending their repatriation, as well as one to repatriate those aliens who are prostitutes who desire to be repatriated, who may be claimed by persons exercising authority over them or whose expulsion is ordered in conformity with the law⁶⁷.

⁶³ Article 4d.

⁶⁴ Articles 4 and 6.

⁶⁵ Article 5.

⁶⁶ Article 17.

⁶⁷ Article 19.

74. The Council of Europe Convention on Action against Trafficking in Human Beings⁶⁸ provides for the taking of measures to prevent trafficking in human beings, which is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"⁶⁹. The Convention requires the taking of measures to prevent and discourage the demand or trafficking, as well as various measures concerning borders and identity documents. More importantly in the present context there is a requirement to take measures to protect and promote the rights of victims of trafficking. In particular there is a requirement to protect the private life of victims, to assist their physical, psychological and social recovery, to provide them with a recovery and reflection period, to provide them with a residence permit in certain circumstances and to facilitate their return to the state party of which they are nationals or have the right of permanent residence. In addition there are obligations with respect to the criminalisation of trafficking and related activities and the investigation and prosecution of these offences⁷⁰.

The Convention on the Participation of Foreigners in Public Life at Local Level

75. The Convention on the Participation of Foreigners in Public Life at Local Level⁷¹ which applies to persons that it terms "foreign residents", namely, persons who are not nationals of the state concerned and who are lawfully resident on its territory. State parties undertake generally to guarantee to foreign residents not only the right to freedom of expression, the right to freedom of peaceful assembly and association - rights also found in general human rights treaties - but they also undertake to involve them in public inquiries, planning procedures and other processes of consultation on local matters, to encourage and facilitate local consultative bodies for them and to grant them the right to vote and to stand for election in local authority elections after being lawfully and habitually resident in the state concerned for the 5 years preceding the elections.

Conclusion

76. These treaties contain some significant guarantees, although many are linked to the standards to be enjoyed by nationals and thus may not always be truly beneficial if those standards are in practice unsatisfactory. This should not, of course, be the case if the obligations in general human rights treaties are properly implemented. More recent treaties are both more "generous" and more detailed but, insofar as the different categories of migrant have more or less protection, the variation in treatment seems to reflect timing rather than the merits of their respective situations. Ratifications of these instruments is far from comprehensive, the provisions of many of them do not extend even basic protection to irregular migrants and, while some do not

⁶⁸ Ratified by Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, France, Georgia, Latvia, Malta, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Slovakia and United Kingdom.

⁶⁹ Article 4. As with the Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the existence of consent to this exploitation is not relevant.

⁷⁰ The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime has similar provisions to those found in the Convention.

⁷¹ Ratified by Albania, Denmark, Finland, Iceland, Italy, Netherlands, Norway and Sweden.

apply to family members, those that do take different approaches to the way in which these are defined.

B. European Union Law

77. The law of the European Union provides for migration within the Union by nationals of Member States and the members of their families and for the possibility of migration by those nationals and those of the European Economic Area⁷² and Switzerland within their respective territories. It also imposes requirements on the Member States as to the treatment of certain third country nationals⁷³ migrating to the Union, namely, long-term residents, scientific researchers, refugees and persons granted subsidiary protection, asylum-seekers, displaced persons and victims of trafficking.

European Union nationals

78. Freedom of movement within the European Union is a fundamental feature of the legal regime established by its Treaties, Regulations and Directives for the nationals of its Member States. This freedom is based on the guarantee of the free movement of workers, the freedom of establishment and the freedom to provide services in the original treaty establishing the European Communities⁷⁴ which has been reinforced by the insertion into the EC Treaty of a right for citizens of the Union - i.e., the nationals of Member States⁷⁵ - of the right to move and reside freely within its territory⁷⁶. This right extends to the family members of a citizen of the Union, even if they are not nationals of a Member State⁷⁷.

79. The rights of citizens of the Union exercising their freedom of movement have been elaborated in particular in Directive 2004/58/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 States⁷⁸. This establishes a right of residence for up to three months and for longer than that if the citizens are workers or self-employed persons in the host Member State, have sufficient resources for themselves and their family members, are students or are family members of a citizen fulfilling the previous three conditions⁷⁹. The same right of residence applies to non-nationals of a Member State who are family members of a citizen of the Union who fulfils the first three conditions previously noted. There are also provisions for the right of residence by family members in the event of the death or departure of the Union citizen or divorce, annulment of marriage or termination of registered partnership⁸⁰.

80. Citizens of the Union and their family members who have resided legally for a continuous period of five years in the host Member State acquire the right of permanent residence there and this can only be lost through an absence from it for a period exceeding two consecutive years⁸¹.

⁷² Iceland, Liechtenstein and Norway.

⁷³ A term used to describe persons who are not nationals of any European Union Member State.

⁷⁴ Articles 39(ex 48), 43-48 (ex 52-58) and 49 & 50 (ex 59 & 60(3)) EC.

⁷⁵ As defined by the treaties; those linked to certain overseas territories, the Channel Islands and the Isle of Man are not included.

⁷⁶ Article 18(1) (ex 8a(1)) EC.

⁷⁷ They may, however, be subject to the requirement to obtain a visa depending upon their nationality.

⁷⁸ The case law of the European Court of Justice had previously played a major role in this regard and it continues to be of great significance in determining the specific application of both provisions in both the treaties and the Directive.

⁷⁹ Articles 6 and 7.

⁸⁰ Articles 12, 13 and 18.

⁸¹ Article 16. Certain derogations from the requirement of five years' residence in Article 17.

Those having the right of permanent residence must be issued with a document certifying their entitlement⁸².

81. Both the right of residence and the right of permanent residence applies to the whole territory of a Member State and the only territorial restrictions that can be imposed are ones also applicable to its own nationals⁸³.

82. However, the freedom of movement and right of residence of citizens of the Union and their family members may be restricted on grounds of public policy, public security or public health, leading to a bar on their entry, restrictions on their movement or their expulsion⁸⁴.

83. Apart from the right to work, set up businesses and provide services, all persons with the right of residence or permanent residence must enjoy equal treatment with the nationals of the host Member State on all matters within the scope of the EC Treaty, with limited exceptions regarding the time when social assistance can first be sought and support for education and training⁸⁵

84. In addition, and marking the fundamentally different nature of the migration involved, every citizen of the Union residing in a Member State of which he or she is not a national shall have the right to vote and to stand as a candidate at municipal elections and in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State⁸⁶, as well as to the protection by the diplomatic or consular authorities of any Member State when he or she is in a third country in which the Member State of which he or she is a national is not represented⁸⁷.

85. The exercise of freedom of movement for nationals of Member States has been facilitated by the abolition of border controls between 22 of the 27 Member States pursuant to the Schengen Agreement⁸⁸. The abolition of these controls is also of benefit to non-nationals as one visa, if required, applies for all countries covered by the Agreement. However, this does not create any rights of settlement for such persons.

Movement within the European Union, the European Economic Area and Switzerland

86. Freedom of movement with the attendant rights of residence discussed above also apply to movement between Member States of the European Union and of the European Economic Area⁸⁹, as well as between the former and Switzerland⁹⁰, by their respective nationals. There is, however,

⁸² Articles 19 and 20.

⁸³ Article 22.

⁸⁴ Articles 27-29. Member States may also adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience; Article 35.

⁸⁵ Article 24. The latter restriction does not apply to permanent residents.

⁸⁶ Article 19 (ex 8b) EC. See further Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

⁸⁷ Article 20 (ex 8c) EC. See further Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

⁸⁸ This also operates between two associated countries, Iceland and Norway.

⁸⁹ Pursuant to the Agreement on the European Economic Area.

⁹⁰ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.

no provision according those nationals any of the political, diplomatic or consular rights enjoyed by European Union citizens resident in a Member State other than that of which they are nationals.

Long-term residents

87. Pursuant to Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents⁹¹, such persons can acquire a residence permit that is valid for five years which shall be automatically renewable on expiry⁹². Persons who acquire the status of long-term resident in one Member State can thereby acquire the right of residence in another Member State⁹³.

88. The residence permit can only be withdrawn following detection of fraudulent acquisition of long-term resident status, absence from the territory of the Community for a period of 12 consecutive months and the adoption of an expulsion measure because the person concerned is an actual and sufficiently serious threat to public policy or public security⁹⁴. However, before taking a decision to expel a long-term resident, a Member States is required to have regard to the duration of the person's residence in its territory, his or her age, the consequences for him or her and family members and links with the country of residence or the absence of links with the country of origin.

89. Under Article 11 of the Directive long-term residents should enjoy equal treatment with nationals - subject to a few qualifications - as regards: access to employment⁹⁵ and self-employed activity⁹⁶ and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; education and vocational training, including study grants in accordance with national law⁹⁷; recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; social security, social assistance and social protection as defined by national law⁹⁸; tax benefits; access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; free access to the entire territory of the Member State concerned⁹⁹. Apart from work, recognition of qualifications and freedom of movement, equal treatment may be restricted to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he or she claims benefits, lies within the territory of the Member State concerned.

⁹¹ I.e., persons who have resided legally and continuously within the territory of a Member State for five years immediately prior to the submission of the relevant application. Persons who reside for purposes of study or on the basis of temporary or some other form of protection or who are refugees, asylum-seekers, seasonal workers, au pairs, diplomats and consular officials are not included.

⁹² Article 8.

⁹³ Pursuant to Articles 14-23. Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by the Directive but such permits will not confer the right of residence in the other Member States.

⁹⁴ Articles 9 and 12.

⁹⁵ Except where in accordance with existing national or Community legislation, these activities are reserved to nationals or EU or EEA citizens.

⁹⁶ Provided such activities do not entail even occasional involvement in the exercise of public authority.

⁹⁷ Proof of appropriate language proficiency can be required.

⁹⁸ Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

⁹⁹ Within the limits provided for by national legislation for reasons of security.

Researchers

90. Holders of a residence permit pursuant to Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research are to be entitled to equal treatment with nationals as regards: recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures; working conditions, including pay and dismissal; the social security schemes applicable to employed persons, to self-employed persons and to members of their families moving within the Community; tax benefits; and access to goods and services and the supply of goods and services made available to the public¹⁰⁰.

Refugees and beneficiaries of subsidiary protection

91. Certain migrants will benefit from the requirements imposed on Member States by 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. After dealing with the assessment of applications for international protection, the qualification for and grant of refugee status and the qualification and grant of subsidiary protection status¹⁰¹, the Directive sets out the content of the protection to be provided to the beneficiaries of its provisions, which is without prejudice to the rights laid down in the Refugee Convention¹⁰².

92. Member States are required to respect the principle of non-refoulement in accordance with their international obligations, to maintain the family unity of beneficiaries, to grant renewable residence permits, to issue travel documents, to authorise them to engage in employment and self-employed activities, to grant access to education, to ensure that beneficiaries receive necessary social assistance and health care on the same basis as nationals, to grant access to accommodation on the same basis as is granted to their third country nationals, to provide integration programmes and to assist those wishing repatriation¹⁰³. This does not really go beyond the requirements of the Refugee Convention.

93. Unaccompanied minors should be placed with adult relatives, a foster-family, in accommodation centres with special provisions for minors or in other accommodation suitable for minors. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum. There is also an obligation to trace the members of the unaccompanied minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so

¹⁰⁰ Article 15.

¹⁰¹ To be granted where there is a real risk of suffering serious harm, namely, the death penalty or execution, torture or inhuman or degrading punishment or treatment or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict; Articles 5 and 15. This constitutes the wider non-refoulement obligation established by human rights treaties compared to that under the Refugee Convention; see paragraph 34.

¹⁰² Article 20(1).

¹⁰³ Chapter VII.

as to avoid jeopardising their safety¹⁰⁴. This adds to the protection afforded by the Refugee Convention.

94. The requirements in respect of beneficiaries of subsidiary protection are generally at a lower level than for those who are refugees but the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence should always be taken into account in the measures implementing these provisions¹⁰⁵.

95. Furthermore the best interests of the child shall be the primary consideration for Member States when implementing these provisions¹⁰⁶.

96. Within the limits set by the Refugee Convention and the international obligations the benefits to be accorded may be reduced in respect of a person who obtained respectively obtained refugee status or eligibility for subsidiary protection on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions or being recognised as a refugee or a person eligible for subsidiary protection¹⁰⁷.

Asylum-seekers

97. The only explicit provisions dealing with the specific situation of asylum-seekers as opposed to those whose applications have been successful out of all those adopted at the regional and international level are to be found in Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

98. This requires the provision of documentation certifying an applicant's status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined and stating if the holder is not free to move within all or a part of the territory of the Member State¹⁰⁸, The document must be valid for as long as an asylum-seeker is authorised to remain in the territory of the Member State concerned or at the border thereof. There is also a possibility of providing asylum-seekers with a travel document when serious humanitarian reasons arise that require their presence in another state.

99. Pursuant to the Directive asylum seekers may either be allowed to move freely within the territory of the host Member State or required to stay within an area assigned to them by that Member State but, in the latter case, the assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the Directive¹⁰⁹. Member States may, however, decide on the residence of the asylum-seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application. Provision of the material reception conditions may be made

¹⁰⁴ Article 30.

¹⁰⁵ Article 20(3).

¹⁰⁶ Article 20(5).

¹⁰⁷ Article 20(7) & (8).

¹⁰⁸ Article 6. The document must be provided within three days of an application being lodged with the competent authority. This requirement does not have to be fulfilled where an asylum-seeker is in detention or during an examination of the application at the border.

¹⁰⁹ Article 7.

subject to actual residence by the applicants in a specific place, to be determined by the Member States.

100. In addition measures are to be taken by Member States to maintain as far as possible family unity as present within their territory. They must also grant minor children of asylum-seekers and asylum-seekers who are minors access to the education under similar conditions as their nationals for so long as an expulsion order against them or their parents is not enforced. In addition they must ensure a standard of living that is adequate for the health of applicants and capable of ensuring their subsistence, with a specific obligation to ensure that that standard of living is met in the specific situation of persons who have special needs as well as in relation to the situation of persons who are in detention¹¹⁰. Applicants may, however, be required to cover or contribute to the cost of the material reception conditions and of the health care provided if they applicants have sufficient resources. There are detailed provisions governing the modalities for providing the material reception conditions and in certain circumstances they can be lowered but in all instances basic needs must be met. There is a specific obligation to ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness but those who have special needs must receive the necessary medical or other assistance¹¹¹

101. The Directive requires Member States to take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence in the measures implementing its provisions relating to material reception conditions and health care¹¹².

102. In the case of minors generally there is an obligation of Member States when implementing the Directive's provisions to make the best interests of the child a primary consideration¹¹³ but there are also specific obligations in respect of unaccompanied minors and those minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts. In the case of the latter Member States are required to ensure that they have access to rehabilitation services for minors and that appropriate mental health care is developed and qualified counselling is provided when needed¹¹⁴.

103. Furthermore unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed with adult relatives, a foster-family, in accommodation centres with special provisions for minors or in other accommodation suitable for minors. Unaccompanied minors aged 16 or over may, however, be placed in accommodation centres for adult asylum seekers. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum. There is also an obligation to trace the members of the unaccompanied minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those

¹¹⁰ Article 13.

¹¹¹ Article 15.

¹¹² Article 17.

¹¹³ Article 18(1).

¹¹⁴ Article 18(2).

persons is undertaken on a confidential basis, so as to avoid jeopardising their safety. Those working with unaccompanied minors shall be bound by the confidentiality principle in relation to any information they obtain in the course of their work¹¹⁵

104. There is an obligation to ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by these acts¹¹⁶.

105. Conditional access to the labour market and to vocational training may be granted¹¹⁷.

Displaced persons

106. Some provision for the protection of non-European Union nationals and stateless persons who have had to leave their country or region of origin, or have been evacuated in particular in response to an appeal by international organisations has been made with the adoption of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. The requirements in it apply to such persons who are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of the Refugee Convention or other international or national instruments giving international protection, in particular, persons who have fled areas of armed conflict or endemic violence and persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights¹¹⁸.

107. Such persons must firstly be provided with residence permits for the entire duration of the period that the protection is applicable, a document, in a language likely to be understood by them, in which the provisions relating to temporary protection and which are relevant to them are clearly set out¹¹⁹. In addition such persons should be able engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience. For reasons of labour market policies¹²⁰. The general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment should also apply.

¹¹⁵ Article 19(4).

¹¹⁶ Article 20.

¹¹⁷ Articles 11 and 12.

¹¹⁸ Member States may provide that temporary protection cannot be enjoyed concurrently with the status of asylum-seeker while applications are under consideration but, after an asylum application has been examined and refugee status or, where applicable, other kind of protection has not been granted to a person eligible for or enjoying temporary protection, the Member State concerned shall provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of protection; Article 19. Temporary protection may be refused where either (a) there are serious reasons for considering that he or she has committed a crime against peace, a war crime, or a crime against humanity, has committed a serious non-political crime outside the Member State of reception prior to his or her admission to that Member State as a person enjoying temporary protection or has been guilty of acts contrary to the purposes and principles of the United Nations or (b) there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State; Article 28.

¹¹⁹ Articles 8 and 9 respectively.

¹²⁰ Article 12. Member States may, however, give priority to EU citizens and citizens of states bound by the Agreement on the European Economic Area and also to legally resident third country nationals who receive unemployment benefit.

108. Persons enjoying temporary protection should have access to suitable accommodation or, if necessary, receive the means to obtain housing, and they must receive necessary assistance in terms of social welfare and means of subsistence if they do not have sufficient resources, as well as for medical care which shall include at least emergency care and essential treatment of illness¹²¹. In any event the necessary medical or other assistance must be provided to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.

109. Persons under 18 years of age enjoying temporary protection must be granted access to the education system under the same conditions as nationals of the host Member State¹²².

110. There is provision for the reunification of family members enjoying temporary protection in different Member States, with family members being regarded as a spouse or unmarried partner (where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens), minor unmarried children without distinction as to whether they were born in or out of wedlock or adopted and wholly or mainly dependent close relatives who had been part of the family unit at the time of the events leading to the mass influx¹²³. Member States, when applying these requirements, must take into consideration the best interests of the child.

111. During the period of temporary protection Member States should provide for unaccompanied minors to be placed with adult relatives, a foster-family, in reception centres with special provisions for minors, in other accommodation suitable for minors or with the person who looked after the child when fleeing¹²⁴. The views of the child shall be taken into account in accordance with the age and maturity of the child.

Victims of trafficking

112. Certain third-country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration can benefit from the provisions in Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. The Directive applies to those third country nationals who are, or have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member States, and have reached the age of majority set out by the law of the Member State concerned¹²⁵. Member States can also decide to apply the Directive to minors and it can also be applied to those third country nationals who have been the subject of an action to facilitate illegal immigration.

113. The Directive requires the third-country nationals concerned to be granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities¹²⁶. During the reflection period and while awaiting the decision of the competent authorities, the

¹²¹ Article 13.

¹²² Article 14.

¹²³ Article 15. In the case of close relatives extreme hardship in the event of there being no reunification must be established.

¹²⁴ Article 16.

¹²⁵ Article 3.

¹²⁶ Article 6. It is left to national law to determine this period.

third-country nationals concerned who do not have sufficient resources should be granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. The special needs of the most vulnerable should be attended to, including, where appropriate and if provided by national law, psychological assistance.

114. It shall not be possible to enforce any expulsion order against the persons concerned during the reflection period but this period cannot create any entitlement to residence under this Directive and it may be terminated if the competent authorities have established that the person concerned has actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences to facilitate illegal immigration or trafficking in human beings or for reasons relating to public policy and to the protection of national security¹²⁷.

115. After the expiry of the reflection period¹²⁸, Member States should consider the opportunity presented by prolonging his or her stay on its territory for the investigations or the judicial proceedings, whether he/she has shown a clear intention to cooperate and whether he or she has severed all relations with those suspected of acts that might be included among offences to facilitate illegal immigration or trafficking in human beings and can issue a residence permit if these conditions are fulfilled¹²⁹. The residence permit issued on the basis of this Directive shall not be renewed if the conditions just referred to cease to be satisfied or if a decision adopted by the competent authorities has terminated the relevant proceedings¹³⁰. It may also be withdrawn at any time if the conditions for the issue are no longer satisfied. In particular, the residence permit may be withdrawn in the following cases: (a) if the holder has actively, voluntarily and in his/her own initiative renewed contacts with those suspected of committing the offences to facilitate illegal immigration or trafficking in human beings; or (b) if the competent authority believes that the victim's cooperation is fraudulent or that his/her complaint is fraudulent or wrongful; or (c) for reasons relating to public policy and to the protection of national security; or (d) when the victim ceases to cooperate; or (e) when the competent authorities decide to discontinue the proceedings¹³¹.

116. Holders of a residence permit who do not have sufficient resources should be granted at least the same treatment as during the reflection period and necessary medical or other assistance shall be provided to the third-country nationals concerned, who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence and minors¹³². They can also be authorised to have access to the labour market, vocational training and education¹³³ and shall be granted access to existing programmes or schemes, provided by the Member States or by non-governmental organisations or associations which have specific agreements with the Member States, aimed at their recovery of a normal social life, including, where appropriate, courses designed to improve their professional skills, or preparation of their assisted return to their country of origin¹³⁴.

¹²⁷ Article 7.

¹²⁸ Earlier if the competent authorities are of the view that the third-country national concerned has already shown a clear intention to co-operate.

¹²⁹ Article 8.

¹³⁰ Article 13(2).

¹³¹ Article 14.

¹³² Article 9.

¹³³ Article 11.

¹³⁴ Article 12. The issue of the residence permit or its renewal conditional upon the participation in the said programmes or schemes.

117. If the Directive is applied to minors, Member States must take due account of the best interests of the child when applying this Directive. In particular they must ensure that minors have access to the educational system under the same conditions as nationals¹³⁵.

Conclusion

118. The protection for European Union nationals who are migrants within its Member States is substantial. However, although some of the other provisions do not go beyond the existing international obligations of Member States, there are important innovations in the extent of the rights afforded to asylum-seekers, persons who are internally dispersed or at risk of having their human rights violated or victims of trafficking. It is also important to recall that, unlike treaties, European Union Directives are binding upon adoption and do not require a separate act of acceptance.

C. Human rights treaties

119. Although there are now many human rights treaties, the most relevant for the present report are those comprising general catalogues of rights and freedoms, most of which are at least ostensibly applicable to everyone, including migrants¹³⁶. In the European context these comprise the European Convention¹³⁷, the European Social Charter and the Revised European Social Charter, the International Covenant, the International Covenant on Economic, Social and Cultural Rights. However, also of significance are certain treaties dealing with certain groups, namely, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

Exclusions

120. Very few of the rights in these treaties are specifically reserved for nationals¹³⁸ and generally they are applicable to everyone. However, in three instances - the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Racial Discrimination and the European Convention - there is a general express stipulation allowing for non-nationals - and thus most migrants¹³⁹ - to be excluded from the benefit of some or all of the rights which they guarantee¹⁴⁰. Furthermore the guarantees of the European Social Charter and the

¹³⁵ Article 10.

¹³⁶ It is probable that a number of human rights treaties dealing with specific issues - such as the Convention against Discrimination in Education - could benefit migrants but their content tends also to be effectively covered by the treaties comprised of more general catalogues of rights and they are not considered further unless they have particular relevance for access to justice.

¹³⁷ Where required, specific reference is made to particular Protocols adding to the rights and freedoms in the European Convention (e.g., "Protocol No 4") but generally the latter term is intended to include them as well.

¹³⁸ Thus the right of political participation is reserved to citizens by Article 25 of the International Covenant and, while there are no provisions in the European Convention explicitly reserving rights and freedoms to citizens, Article 3 of Protocol No 1 stipulates that High Contracting Parties "undertake to hold elections ... under conditions which will ensure the free expression of the people in the choice of the legislature" and "the people" has been taken to mean either "citizens" (see the statement in respect of this provision that "What must be secured is the principle of equality of treatment of all citizens" in the electoral system in Appl No 11406/85, *Fournier v France* (1988) 55 DR 130 at 140) or as justifying a restriction of voting rights to citizens (Appl No 27614/95, *Luksch v Italy*, (1997) 89 DR 76). Furthermore the right to social security in Article 12 of both the European Social Charter and the Revised European Social Charter only entails the taking of steps to conclude bilateral and multilateral agreements to ensure "equal treatment with their own nationals of the nationals of other Contracting States in respect of social security rights"

¹³⁹ It would not affect internally displaced persons.

¹⁴⁰ It should also be noted that the European Charter on Regional or Minority Languages expressly excludes the languages of migrants from the scope of its provisions; Article 1a ii.

Revised Social Charter are only applicable to nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, thus generally irregular migrants from their application¹⁴¹.

121. The stipulation in the International Covenant on Economic, Social and Cultural Rights is not really relevant in the European context since the provision concerned is only an authorisation for developing countries to determine the extent to which they would guarantee the economic rights recognised in the Covenant to non-nationals¹⁴².

122. Moreover the provision in the European Convention allowing for restrictions to be imposed on the exercise by aliens of the rights to freedom of assembly, association and expression has in practice been given a narrow construction¹⁴³.

123. The provision in the Convention on the Elimination of All Forms of Racial Discrimination might, however, appear to be of potentially of greater significance since it makes it clear that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party ... between citizens and non-citizens"¹⁴⁴.

124. Nonetheless this provision cannot - as the Committee on the Elimination of Racial Discrimination has made clear¹⁴⁵ - be viewed in as an excuse for not performing obligations under other human rights treaties, which are - as has already been noted - generally applicable to non-citizens. Furthermore, the Committee has also emphasised that

"3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;"¹⁴⁶

¹⁴¹ Article 1 of the Appendix to both instruments. See, however, J-F Akandji-Komber, *The European Social Charter and the protection of illegal immigrants*, (AS/Mig/Inf (2005) 17), for an interpretation and analysis of practice that mitigates the scope of this exclusion.

¹⁴² Article 2(3).

¹⁴³ See paragraph 154.

¹⁴⁴ Article 1(2)

¹⁴⁵ Thus in its *General Recommendation No 30: Discrimination Against Non Citizens* the Committee affirmed that "article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights"; CERD/C/64/Misc.11/rev.3, 1 October 2004.

¹⁴⁶ General Recommendation No 30.

125. Indeed, this approach conforms to the approach taken to the application or understanding of the non-discrimination clauses in many human rights treaties¹⁴⁷ which, by including status and national origin in the list of prohibited grounds of differential treatment, are clearly capable of embracing non-nationals within their scope. The differential treatment of non-nationals - including migrants - as regards the human rights not restricted to citizens has thus only been found to be acceptable where there was a rational and objective justification for it¹⁴⁸. Moreover the prohibition of discrimination based on status would ensure that irregular migrants have the benefit of provisions that are not specifically subject to a requirement of lawful presence in the country concerned.

126. Internal displacement is not specifically mentioned within the prohibited grounds of discrimination in human rights treaties and there does not appear to be any ruling that internal displacement is to be regarded as coming within the catch-all ground of "status". However, such displacement is a personal characteristic of those concerned and it is probable that it would be treated as requiring a rational and objective justification where it is used as a ground for differential treatment. This is certainly the approach taken by the Committee of Ministers of the Council of Europe¹⁴⁹.

Particular provisions for migrants

127. Despite the significant population movements that have been occurring throughout the period in which the human rights treaties have been adopted¹⁵⁰, only the European Social Charter, the Revised Social Charter¹⁵¹ and the Convention on the Rights of the Child have any specific provisions regarding migrants - the first two as regards migrant workers and the last as regards the illicit transfer and non-return of children abroad and trafficking - and only the Convention on the Rights of the Child contains any provision dealing explicitly with asylum-seekers and refugees.

128. Apart from the right to engage in a gainful occupation accorded to the migrant workers covered by the European Social Charter and the Revised European Social Charter¹⁵², these two instruments contain undertakings with respect to the provision of adequate and free services to assist them (particularly as regards emigration and immigration), facilitating their departure, journey and reception, promoting cooperation between social services, securing not less favourable treatment than nationals as regards remuneration, employment and working conditions, trade union membership, accommodation, employment taxes, dues or contributions and legal proceedings¹⁵³, facilitating family reunion, security against expulsion, transfer of savings and, in the case of the Revised European Social Charter only, promoting and facilitating teaching both of

¹⁴⁷ Notably Article 26 of the International Covenant, Article 2 of the Convention on the Rights of the Child and Article 5 of the Convention on the Rights of Persons with Disabilities, as well as the European Convention in Article 14 and Protocol No 12.

¹⁴⁸ E.g., this was found to exist in *Moustaquim v Belgium*, 12313/86, 18 February 1981 (with respect to the deportation of non-citizens convicted of offences) but not in *Gaygusuz v Austria*, 17371/90, 16 September 1996 (with respect to the non-provision of emergency assistance to non-citizens despite their contributions to the unemployment insurance fund).

¹⁴⁹ *Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons*, paragraph 2.

¹⁵⁰ Thus, while the European Convention was adopted on 4 November 1950, the Convention on the Status of Refugees was adopted on 28 July 1951 pursuant to a resolution passed by the United Nations General Assembly on 14 December 1950 and was concerned with those who were fleeing from persecution in European countries specifically in mind.

¹⁵¹ Distinguishing them from the International Covenant on Economic, Social and Cultural Rights with which it has many other provisions in common.

¹⁵² Article 18 of both instruments

¹⁵³ Discussed further under "Access to Justice", n 473.

the national language of the receiving state and the migrant worker's mother tongue to his or her children¹⁵⁴.

129. The provisions in the Convention on the Rights of the Child of specific relevance or migrants and asylum-seekers involve commitments by states parties to combat the illicit transfer and non-return of children abroad¹⁵⁵ and to prevent the abduction of, the sale of or traffic in children for any purpose or in any form¹⁵⁶- of particular importance for involuntary migration and family reunification - and a commitment to ensure that a child seeking refugee status or who is considered a refugee receives appropriate protection and humanitarian assistance in the enjoyment of the rights set forth in the Convention and other instruments to which the states parties are also parties¹⁵⁷. The last commitment is of particular importance when children are separated from their parents and undoubtedly entails some positive obligations of relevance for securing access to justice¹⁵⁸.

130. In addition it should be noted that the Council of Europe Convention on Action against Trafficking in Human Beings does stipulate that nothing in it "shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein"¹⁵⁹.

Provisions of general applicability

131. Apart from the treaties referred in the previous sub-section, there are no specific references to "migrants" of any kind in the provisions of the general human rights treaties. However, there are provisions in some of them that have clearly been shaped by their existence.

132. This is evident, for example, in the effective recognition in the European Convention of the right of states under general international law to control the admission of non-nationals to its territory which is to be found in the authorisation in Article 5(1)(f) of deprivation of liberty either "to prevent an unauthorised entry into the country or ... with a view to deportation ..."¹⁶⁰. This right is reaffirmed in the restriction in Article 2 of Protocol No 4 of the liberty of movement and freedom to choose one's residence to those who are "lawfully within the territory of a State"¹⁶¹.

133. Furthermore, although migrants do not feature in the European Convention, there are three provisions in it that explicitly refer to "aliens"¹⁶² which by any definition they will be. Two of these

¹⁵⁴ Article 19 of both instruments.

¹⁵⁵ Article 11.

¹⁵⁶ Article 35.

¹⁵⁷ Article 22.

¹⁵⁸ See paragraph 435-444.

¹⁵⁹ Article 40(4). See paragraph 34.

¹⁶⁰ This recognition can also be seen in the application of various provisions of the European Convention. See, e.g., Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164; *Vilvarajah and Others v United Kingdom*, 13163-5/87, 133447/87 and 13448/87, 30 October 1991; *Ilic v Croatia*, 42389/98, 19 September 2000; and *Poenaru v Romania* (dec.), 51864/99, 13 November 2001.

¹⁶¹ See paragraph 157.

¹⁶² A fourth does so indirectly in that Article 1 of Protocol No 1, by subjecting any deprivation of property to the conditions provided by "the general principles of international law" has incorporated into this property guarantee the international law requirement of prompt, adequate and effective compensation for the expropriation of property of foreigners – see *James and Others v United Kingdom* (8793/79), 21 February 1986 – but in practice this has not added to the protection being provided for aliens, albeit that there might be circumstances in which it could lead to greater compensation being provided for the expropriation of their property than for that belonging to nationals.

might be considered to have some relevance to the position of migrants; the prohibition on collective expulsion in Article 3 of Protocol No 4 and the guarantee of certain procedural safeguards relating to expulsion in Article 1 of Protocol No 7. The last provision is also found in Article 12(1) of the International Covenant but the guarantee in Article 9 of that instrument of the right to liberty and security of the person does not specify any grounds or its deprivation, although these must be established by law and there is no doubt that immigration control can be included in them¹⁶³.

134. However, notwithstanding the potential importance of these provisions for migrants¹⁶⁴, it is the third provision in the European Convention referring to aliens which is perhaps the most significant of the three for them while they are present in a state. This provision - the need for certain restrictions on the political activity of aliens to be expressly authorised by Article 16 - is of particular importance since - it actually underlines the general applicability of the European Convention to everyone, which must therefore include aliens, so long as they are within the jurisdiction of a High Contracting Party¹⁶⁵. Not only is this so regardless of whether there is any legal basis for that jurisdiction¹⁶⁶ but it is now well-established that the unlawful or extra-legal character of a person's situation does not automatically preclude the operation of rights and freedoms under the Convention¹⁶⁷, albeit that that character may in some instances also afford the justification for imposing restrictions on particular rights and freedoms¹⁶⁸. A lawful basis for the presence of a migrant or an asylum-seeker is thus not a prerequisite for the protection afforded by the provisions of the European Convention.

135. A similar conclusion is appropriate in respect of the generally applicable rights guaranteed by other human rights treaties and indeed the Committee on the Elimination of Racial Discrimination has stated that states parties should ensure that "legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status"¹⁶⁹. Moreover the United Nations Human Rights Committee has stated that in respect of the International Covenant that, in general, the rights set forth in it " apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness"¹⁷⁰ and such a conclusion was also reached about human rights guarantees in general in a report for the former United Nations Sub-Commission on the Protection and Promotion of Human Rights¹⁷¹.

136. The European Convention does not contain any guarantee of the rights of minorities but the United Nations Human Rights Committee has concluded that the guarantee of them in Article 27 is not restricted to nationals or citizens or even permanent residents but extends to persons belonging

¹⁶³ The latter guarantee is also found in Article 13 of the International Covenant.

¹⁶⁴ The procedural safeguards concerning expulsion are considered further under "Access to Justice" , paragraphs. 363-385.

¹⁶⁵

¹⁶⁶ See, e.g., *Loizidou v Turkey*, 15318/89, 18 December 1996 and *Bankovic and Others v Belgium and Others (dec.)*, 52207/99, 12 December 2001.

¹⁶⁷ See, e.g., *Buckley v United Kingdom*, 20348/92, 25 September 1996 (the right to respect for a home could still be invoked by an illegal occupant of land) and *Keegan v Ireland*, 16969/90, 26 May 1994 (a family relationship exists between a father and his child even though was not married to the mother and had no relationship with her at the time of the birth).

¹⁶⁸ This is the case with prisoners but their status does not make European Convention rights and freedoms *a priori* inapplicable; *Golder v United Kingdom*, 4451/70, 21 February 1975. Where the character of a person's situation affords a justification for the imposition of certain restrictions, the argument that he or she is subject to discrimination contrary to Article 14 is necessarily precluded; see further paras 163, 204 and 205..

¹⁶⁹ *General Recommendation No 30: Discrimination Against Non Citizens*, CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 7.

¹⁷⁰ *General Comment No. 15: The position of aliens under the Covenant*, (Twenty-seventh session, 11 April 1986).

¹⁷¹ *Final report on the rights of non-citizens*, U.N. Doc. E/CN.4/Sub.2/2003/23 (2003).

to minorities which "exist" in a state party. As a consequence it considered that "migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression"¹⁷². It is incontestable that some migrants would benefit from the protection afforded by Article 27, enabling them "with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

Particular relevance to the situation of migrants and asylum-seekers

137. All the rights in these treaties that are of general application - whether civil and political or economic, social and cultural - can be of significance for migrants as much as for anyone else that has the benefit of them¹⁷³. However, certain aspects of these rights - especially those of a civil and political character - will protect interests especially relevant to the situation of migrants and asylum-seekers¹⁷⁴.

138. This has certainly become evident in the case law of the European Court of Human Rights ("the European Court") and the former European Commission of Human Rights ("the European Commission"), which has already addressed a considerable number of issues bearing on the proper application of the European Convention to migrants and asylum-seekers¹⁷⁵. However, it is inevitable that a case-based system only addresses those issues that have been of concern to particular migrants and there is certainly still some potential for others to be raised in the future. Whether this happens is, of course, dependent upon migrants having the necessary fortitude and support to persist with proceedings before the European Court and their status, as well as the possibility of a ruling only being made after a number of years, may be sufficient to discourage them from even initiating them.

139. Although it is possible to identify the type of situations in which migrants may or may not be able to rely on rights and freedoms in the European Convention, it is important to bear in mind that the specific circumstances of individual cases will always be decisive as to whether this is actually possible. Moreover it is undoubtedly the case that some cases have been unsuccessful because of the manner in which they were presented and there also potentially well-founded claims that were not fully pursued because of a failure to fulfil the admissibility conditions - especially the duty to exhaust domestic remedies¹⁷⁶ - governing access to the European Court.

140. The relevance of certain rights and freedoms for the different aspects of the process of migration and asylum-seeking - admission, stay, detention and removal - is now well-established. Some elements of their applicability to the situation of migrants and asylum-seekers are sketched

¹⁷² *General Comment No. 23: The rights of minorities (Art. 27)*, CCPR/C/21/Rev.1/Add.5, 8 April 1994.

¹⁷³ This is also recognised in the United Nations General Assembly's its Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live (res. 40/144 of 13 December 1985), which lists many civil and political and economic, social and cultural rights found in regional and international treaties as ones that aliens should enjoy.

¹⁷⁴ This is not to minimise the importance of economic, social and cultural rights for them. As to which, see further - R Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights*, (Council of Europe, 2005) and F Akandji-Komber, *The European Social Charter and the protection of illegal immigrants*, (AS/Mig/Inf (2005) 17).

¹⁷⁵ There is case law to similar effect on the part of the United Nations Human Rights Committee in applying the International Covenant but generally only that of the European system is discussed for reasons of space.

¹⁷⁶ Which is concerned more with the use of certain procedures than the certainty of a successful outcome; certainly it is impossible to be certain that, if used, they would actually have been effective.

out below to give some indication of the extent of the protection afforded both by the provisions of the European Convention and by other treaties with similar guarantees¹⁷⁷.

Admission

141. Certainly differential treatment on grounds of race or ethnicity in the criteria governing admission or their application could be regarded as constituting degrading treatment contrary to Article 3, particularly if those affected have particularly strong links with the High Contracting Party refusing to admit them and this decision would result in considerable hardship¹⁷⁸.

142. Furthermore differential treatment as regards admission on these or other inadmissible grounds could also result in a violation of other provisions of the European Convention when the treatment concerns a matter falling within the penumbra of a particular right or freedom, notwithstanding that a complaint based on that right or freedom alone could not succeed¹⁷⁹.

143. Refusal of entry will not be regarded as leading to a break up in the family – and thus a violation of the right to respect for family life under Article 8 - where it would not be unreasonable to expect family members already present in the country to live in the country of which the person seeking admission has nationality¹⁸⁰. However, this assumes that the reason for refusal does not reflect differential treatment based on inadmissible grounds as refusals so tainted have led to a finding of a violation of Article 14 taken with Article 8¹⁸¹. Moreover an expectation that someone lawfully resident in the country should leave it in order to live with the person seeking entry would not be considered reasonable if he or she is already well-established and has other family commitments there¹⁸².

144. There is unlikely to be considered any case for admission of adult children or of a child for whom the parents had ceased to take any moral or financial responsibility¹⁸³, nor one for the admission of a parent who is not financially or otherwise materially dependent on the adult child living in the country¹⁸⁴.

¹⁷⁷ This draws upon J McBride, *Irregular migrants and the European Convention on Human Rights*, (AS/Mig/Inf (2005) 21).

¹⁷⁸ As in Appl Nos 4430/70-4419/70 *et al*, *East African Asians v United Kingdom*, (1973) 78 DR 5, in which the European Commission found such a violation as a result of the differential treatment of certain citizens of the United Kingdom as regards admission. The European Court in *Smith and Grady v United Kingdom*, 33985/96,33986/96, 27 September 1999 and *Cyprus v Turkey* [GC], 25781/94, 10 May 2001 has endorsed the view that racial discrimination could amount to degrading treatment.

¹⁷⁹ *Abdulaziz, Cabales and Balkandali v United Kingdom*, 9214/80, 9473/81 and 9474/81, 28 May 1985, in which the impossibility of female United Kingdom citizens being joined in that country by their husbands who were foreign nationals was found not to be in breach of their right to respect for family life as they were not settled there before their marriages and there was no obstacle to them living elsewhere but choice of residence by married couples did fall within the ambit of the right under Article 8 and a violation of that provision when taken with Article 14 was established because there was no obstacle to male United Kingdom citizens being joined by foreign national spouses despite them not having been settled in the United Kingdom before they got married.

¹⁸⁰ See, e.g., *Abdulaziz, Cabales and Balkandali v United Kingdom*, 9214/80, 9473/81 and 9474/81, 28 May 1985; *Gul v Switzerland*, 23218/94, 19 February 1996; and *Ahmut v Netherlands*, 21702/93, 28 November 1996.

¹⁸¹ See *Abdulaziz, Cabales and Balkandali v United Kingdom*, 9214/80, 9473/81 and 9474/81, 28 May 1985, in which the admission of the spouses differed according to whether they were the husband or wife of a national. A similar violation was found in Appl Nos 4430/70-4419/70 *et al*, *East African Asians v United Kingdom*, (1973) 78 DR 5, where there was differential treatment of citizens on racial grounds as regards admission. See also para 204.

¹⁸² See, e.g., *Sen v Netherlands*, 31465/96, 21 December 2001, in which the parents had been in the country for many years and had one child born there and another living outside it who was refused a residence permit.

¹⁸³ See Appl No 14852/89, *Akhtar, Johangir and Johangir v Netherlands*, (1993) 74 DR 29 and *Kwakye-Nti and Dufie v Netherlands*, 31519/96, 7 November 2000.

¹⁸⁴ Appl No 10375/83, *S v United Kingdom* (1984) 40 DR 196.

145. The differential treatment of children born out of the successive marriages as a result of a bar on polygamous aliens bringing in more than one spouse and the children of that marriage where polygamous marriages are not permitted under the law of a High Contracting Party has been considered to have an objective and reasonable justification so that this did not entail a violation of Article 14 in conjunction with Article 8¹⁸⁵.

146. There can be an expectation that the true nature of the relationship between the person seeking admission to a country and the person already present in it should be disclosed immediately upon arrival and that the authorities should not be blamed for refusing to accept allegations unsupported by evidence where there has been a resort to deceit¹⁸⁶.

147. It is probable that the guarantee of the right to life under Article 2 could give rise to some degree of duty to endeavour to rescue irregular migrants whose attempts to enter a country have put them in a life-threatening situation, such as where their vessel is in danger of sinking. This is likely to be subject to the availability of resources to mount a rescue operation and the extent to which the risk to potential rescuers would be disproportionate¹⁸⁷.

148. Some requirements to disclose personal information as a condition of obtaining entry could be incompatible with the right to respect for private life under Article 8. This is most likely to be the case with attempts to force disclosure of particularly intimate information where what is sought is of doubtful relevance to the immigration decision¹⁸⁸. However, it is unlikely that Article 8 could be invoked to challenge objective data requirements relevant to a person's immigration status¹⁸⁹.

149. The fact that a non-national is refused entry to a country in which he or she has property will not necessarily entail a violation of Article 1 of Protocol No 1. Certainly the rights entailed in that provision do not encompass any right for someone who owns property in a country of which he is not a national to permanently reside in it in order to use this property¹⁹⁰. However, an interference with the property or any taking of it in the person's absence could result in a violation of that provision if its requirements are not observed¹⁹¹ and this would undoubtedly be the consequence of using immigration control to facilitate such objectives.

150. Moreover it is conceivable that a denial of entry (or re-entry) because of a person's irregular status could in some circumstances come to be regarded as a denial of access to the property and

¹⁸⁵ Appl No 14501/89, *A and A v Netherlands*, (1992) 72 DR 118.

¹⁸⁶ *Nsona and Nsona v Netherlands*, 23366/94, 28 November 1996, in which an entry in the passport of one applicant showing the other to be her child was forged and claims that the latter was in fact the former's niece were not subsequently accepted.

¹⁸⁷ See Appl No 11590/85 *Hughes v. United Kingdom*, (1986) 48 DR 258, dealing with a failure to call the emergency services that was said to have resulted in someone's death but in which the existence of an obligation to take steps to protect life was left open.

¹⁸⁸ See the emphasis placed in Appl No 33257/96, *Klip and Kruger v Netherlands*, (1997) 91 DR 66 on the absence of any investigation as to motives for a marriage when finding a requirement to provide information in order to verify a couple's status for immigration purposes did not entail a violation of Article 8. Cf the finding of such a violation in *Smith and Grady v United Kingdom*, 33985/96;33986/96, 27 September 1999, in respect of the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the air force authorities.

¹⁸⁹ Thus disclosure covering name, place and date of birth, current address and telephone number and nationality and proof of identity and proof of residence abroad if applicable required of a couple intending to marry in order to verify immigration status of one of them in view of intended marriage to a Dutch national was not considered in Appl No 33257/96, *Klip and Kruger v Netherlands*, (1997) 91 DR 66 to be of the kind that interfered with private life.

¹⁹⁰ *Ilic v Croatia* (dec), 42389/98, 19 September 2000.

¹⁹¹ There may even be an obligation to protect property that is known to be at risk of being damaged where its owner is not able to have possession of it; see *Raimondo v Italy*, 12954/87, 22 February 1994.

even an effective loss of all control over, as well as all possibilities to use and enjoy, the property and thus a violation of Article 1 of Protocol No 1 but this would probably require much more than one instance of refusing entry and might necessitate a situation in which dealings with the property from outside the country (e.g., for the purpose of sale) were legally or practically impossible¹⁹².

151. The recognition by the European Convention of the right of a state under international law to control the admission of non-nationals to its territory necessarily entails that the use of force to achieve that objective can be admissible. However, any use of force that results in death must satisfy the requirements in the Article 2's guarantee of the right to life, namely, being lawful under national law and absolutely necessary to defend a person from unlawful violence, to effect a lawful arrest (or to prevent the escape of a person lawfully detained) or to quell a riot or insurrection. This is unlikely to be the case where irregular migrants are likely to be killed merely because they are attempting to enter the country¹⁹³.

152. Furthermore efforts to prevent entry or to detain those considered to have entered illegally should always be compatible with the prohibition on inhuman and degrading treatment in Article 3¹⁹⁴.

Stay

153. Aliens regardless of whether their status is in some way irregular can, as has already been noted¹⁹⁵, be denied the right to vote for the legislature and may be subject to some restrictions in respect of freedom of assembly, association and expression on account of their status as aliens. However, the latter restrictions cannot be extensive and there are many instances in which the ability of migrants to invoke these rights and freedoms under the European Convention will be of considerable significance for them so long as they are within the territory of a High Contracting Party.

154. Although Article 16 allows restrictions on the political activity of aliens – both lawfully and unlawfully present - notwithstanding the rights to freedom of assembly, association and expression and the prohibition on discrimination, it is unlikely that ones that amount to a total prohibition on such activity would be considered to be acceptable by the European Court except in the most exceptional of situations¹⁹⁶.

155. Certainly the European Court has taken the view that an irregular migrant's rights under Article 10 are independent of whether he has any right to stay in the country¹⁹⁷. Equally the mere

¹⁹² This possibility did not have to be explored in *Ilic* as the applicant had not availed herself of the possibility of applying for an entry visa which would be valid for three months and could be extended for a year. For an instance of a practical impossibility of dealing with property leading to a violation of Article 1 of Protocol No 1, see *Loizidou v Turkey* [GC], 15318/99, 18 December 1996, which concerned the foreign occupation of a part of a country's territory.

¹⁹³ See *Streletz, Kessler and Krenz v Germany* [GC], 34044/96, 35532/97, 44801/98, 22 March 2001, in which the European Court considered that an approach to border control in which guards were given the order to fire so as to protect borders "at all costs" (albeit to keep people in rather than out) was not compatible with the right to life.

¹⁹⁴ See, e.g., the findings of violation of this provision in respect of the force used to effect arrests in *Ribitsch v Austria*, 188896/91, 4 December 1995; *Rehbock v Slovenia*, 29462/9, 28 November 2000; and *Egmez v Cyprus*, 30873/96, 21 December 2000.

¹⁹⁵ See n 138.

¹⁹⁶ See the generally restrictive approach to the application of this provision in *Piermont v France*, 15773/89, 15774/89, 27 April 1995 albeit in a situation not involving a visitor rather than a migrant.

¹⁹⁷ See *J E D v United Kingdom* (dec.), 42225/98, 2 February 1999, in which it was found that the applicant had not been subjected to any restrictions during his stay on his right to impart information on the situation in the Ivory Coast.

fact that a gathering of persons is comprised of irregular migrants has been found to be an insufficient justification for any interference with the exercise of their right to freedom of assembly, with the European Court emphasising in this regard that peaceful protest against legislation which has been contravened does not constitute a legitimate aim for a restriction on liberty within the meaning of Article 11(2)¹⁹⁸.

156. Similarly it must be doubtful that the irregular status of a migrant could in itself afford sufficient justification to prevent him or her becoming a member of a trade union and enjoying the latter's support. Nevertheless such membership could not provide a basis for resisting a prohibition on the employment of an irregular migrant pursuant to limitations imposed by immigration laws.

157. The liberty of movement and freedom to choose one's residence guaranteed by Article 2(1) of Protocol No 4 has, however, been found inapplicable to irregular migrants because of the condition in the provision that this is a right only for those "lawfully resident within the territory of a State". It thus cannot be invoked to challenge the revocation of a residence permit¹⁹⁹ or the refusal to regularise the position of someone present in breach of immigration laws²⁰⁰ and it cannot be the basis for objecting to conditions that have been imposed on an alien admitted provisionally and conditionally to a country pending examination by the authorities of his request for a residence permit²⁰¹.

158. Furthermore compulsory residence orders can in principle be regarded as necessary in a democratic society for crime prevention and maintaining *ordre public*²⁰² and an order requiring residence in a particular area in substitution for detention pending removal is not likely to be considered a violation of Article 2(1) of Protocol No 4²⁰³.

159. As an alien's right to education under Article 2 of Protocol No 1 is considered to be independent of his or her right to stay in a country, denial of access to it – especially elementary or secondary education, with which the guarantee in Article 2 is principally concerned²⁰⁴ – is unlikely

¹⁹⁸ *Cisse v France*, 51346/99, 9 April 2002. The case concerned action taken by a group of aliens without valid residence permits who decided to take collective action to draw attention to the difficulties that they were having in obtaining a review of their immigration status. The ending of the assembly after a two-month period was, however, found to be justified because of the deterioration of the health of those who were on hunger strike and the wholly inadequate sanitary conditions.

¹⁹⁹ Appl No 21069/92, *A v San Marino*, (1993) 75 DR 245, 249.

²⁰⁰ See Appl No 16698/90, *N v France*, 13 February 1992; *Sisojeva and Others v Latvia* (dec.), 60664/00, 9 November 2000; *Kaftailova v Latvia* (dec.), 59643/00, 23 October 2001; and *Dremlyuga v Latvia* (dec.), 66729/01, 29 April 2003. However, see also para 167.

²⁰¹ See, e.g., Appl No 12068/86, *Paramanathan v Federal Republic of Germany* (1986) 51 DR 237, in which it was held that a fine could be imposed for breach of geographically limited conditions on the applicant's stay within the territory of Germany as he was only "lawfully" there as long as he complied with them. However, in *Bolat v Russia* 14139/03, 8 July 2004, the compatibility with Article 2 of Protocol No 4 of a fine for staying overnight at a friend's house rather than the applicant's registered address was found not to be in accordance with law.

²⁰² Appl No 12541/86, *Ciancimino v Italy*, (1991) 70 DR 103, which concerned such a restriction on a mafia suspect while judicial proceedings were still pending.

²⁰³ Appl No 10078/82, *M v France* (1984) 41 DR 103, in which such a restriction in the case of a person convicted of passing intelligence to agents of a foreign power was accepted as necessary on grounds of national security. However, see the importance attached in *Mehemi v France* (No 2), 53470/99, 10 April 2003 to being able to appeal against a possible refusal of a residence order where Article 2 of Protocol No 4, is applicable.

²⁰⁴ A view reaffirmed outside the context of aliens in Appl No 14524/89, *Yanasik v Turkey*, (1993) 74 DR 14; Appl No 24515/94, *Sulak v Turkey* (1996) 84 DR 98; *Georgiou v Greece*, 45138/98, 13 January 2000 (AD); and 25781/94, *Cyprus v Turkey* [GC], 25781/94, 10 May 2001

to be justified so long as he or she is in the country unless this can be directly linked to measures to control immigration, such as to facilitate the execution of a removal decision²⁰⁵.

160. This would not necessarily mean that all differential treatment of persons by reference to the regularity of their status would be precluded; the crucial consideration would most probably be whether this would effectively prevent irregular migrants from obtaining the essential aspects of the educational level concerned. Thus any attempt to subject access to a requirement that irregular migrants meet some or all of the cost of their education in circumstances where payment of the fees involved was clearly beyond their means would probably be regarded as inadmissible.

161. The seizure of a migrant's passport or identity card might be open to challenge as an interference with the freedom under Article 2(2) of Protocol No 4 of everyone "to leave any country" as there is no precondition of lawful residence to its enjoyment. However, such a seizure as part of the removal process is likely to be a restriction that can be justified under Article 2(3) as being in the interests of national security or public safety, for the maintenance of *ordre public* or for the prevention of crime so long as it does not prevent a voluntary departure by the person concerned²⁰⁶.

162. The irregular status of a migrant could be a legitimate consideration in assessing whether or not there is a risk of flight that could justify his or her detention pending trial pursuant to Article 5(3) where he or she is reasonably suspected of involvement in an offence²⁰⁷. However, it would be inappropriate for this or indeed the fact that person with regular immigration status was a non-national to be an automatic basis for concluding that there is such a risk since the need for pre-trial detention must always be determined by reference to the particular circumstances of the case²⁰⁸. Furthermore, even if irregular status or being a non-national did support the conclusion that there is a risk of flight, consideration should still be given to the possibility of using less restrictive means to deal with it²⁰⁹ and any pre-trial detention must last for no longer than is reasonable²¹⁰.

163. Migrants may find that their foreignness and or irregular status may lead to some obstacles being placed in the way of them marrying a national of the country in which they are present but these should never be such as would prevent the marriage from occurring at all. Thus it has been considered that an alien who alleges that the refusal of a residence permit prevents him from

²⁰⁵ As in Appl No 7671/76, *15 Foreign Students v United Kingdom*, (1977) 9 DR 185, which concerned the removal of persons who had come into the United Kingdom as either students or visitors who had then either remained after the expiry of their residence permits or had not justified regular studies and thus led to the belief that they had no intention of leaving after the completion of their studies. It is thus unlikely that an attempt to establish the immigration status of pupils could be challenged as an inadmissible deterrent to the exercise of the right to education.

²⁰⁶ Cf *Napijalo v Croatia*, 66485/01, 13 November 2003, in which a seizure of the applicant's document was found to violate Article 2 of Protocol No 4 as the failure to pursue the original motivation behind it – proceedings for a customs offence - meant that it was no longer a measure that was necessary in a democratic society. See also *Mogos v Romania* (dec.), 20420/02, 6 May 2004, in which no breach of Article 2 of Protocol No 4 was found where the applicants, who were stateless, had refused to leave the airport despite being offered a document permitting them to enter Romania and where they could have obtained the documentation necessary to travel.

²⁰⁷ On such a risk as an admissible basis for pre-trial detention, see *W v Switzerland*, 14379/88, 26 January 1993.

²⁰⁸ See *Caballero v United Kingdom* [GC], 32819/96, 8 February 2000, with regard to an automatic refusal of bail where the suspect had previously been convicted of certain offences, which may need not be of the same character as the offence of which he or she was currently suspected of having committed.

²⁰⁹ *Wemhoff v Federal Republic of Germany*, 2122/64, 27 June 1968.

²¹⁰ See *Clooth v Belgium*, 12718/87, 12 December 1991 and *Assenov and Others v Bulgaria*, 24760/94, 28 October 1998.

marrying must present his marriage plans in a way that is credible if a violation of Article 12 is to be established²¹¹.

164. Furthermore limitations regarding the exercise of the right to marry that are designed to preclude marriages of convenience with an alien have not been considered to be in themselves objectionable²¹². Moreover differences in treatment between nationals and non-nationals in this regard are likely to be regarded as having an objective and reasonable justification, such as the control of immigration in a densely populated country so long as they are not disproportionate in their effect, and thus will not entail a violation of Article 14 in conjunction with Article 8²¹³.

165. It is unlikely that uncertainty regarding status would of itself be a sufficient basis for finding that the right to marry had been violated²¹⁴.

166. It seems improbable that the irregular status of a migrant is a matter that would be regarded at that point in time as part of his or her private life for the purpose of Article 8²¹⁵ but efforts to establish what was someone's status would still need to conform with the standards found by the European Court to govern the use of surveillance, search of premises and interception of communications²¹⁶. Moreover attempts to obtain information where this was of no relevance to the immigration inquiry would be incompatible with the right to respect for private life under Article 8²¹⁷.

167. Furthermore the failure of a High Contracting Party to regularise the status of irregular migrants could result in a violation of their right to respect for private life in circumstances where this status became precarious after they had spent virtually all their life there and all their personal, social and economic ties were strong enough for them to be regarded as sufficiently integrated into its society. Regularising their status is likely to be regarded as essential for them to be able to lead a normal life and the fact that no steps were being taken to remove them would not be enough to avoid a violation since living in such uncertainty could not be unjustified²¹⁸.

²¹¹ Appl No 7175/75, *X v Federal Republic of Germany* (1976) 6 DR 138; the applicant had not shown credibility of engagement or that removal would prevent him from marrying and leading his married life with the person he wants to marry outside Germany.

²¹² See Appl No 31401/96, *Sanders v France* (1996) 87 DR 160 (a requirement for citizens abroad to obtain a certificate of capacity to marry which merely took the time required to process the application was found not to have impaired the very essence of the right) and Appl No 33257/96, *Klip and Kruger v Netherlands*, (1997) 91 DR 66 (the obligation to submit a statement from Aliens Department on the residence status of a foreigner intending to marry a Dutch national – even if its relevance was questionable – was not considered problematic as there was no evidence that a new statement could or would not have been provided by Aliens Department if the validity of the existing statement – which lasted for two months - would not cover the proposed marriage date).

²¹³ Appl No 33257/96, *Klip and Kruger v Netherlands*, (1997) 91 DR 66.

²¹⁴ An application involving such a claim, as well as one relating to the inability to start a home, was struck out in *Kalantari v Germany*, 51342/99, 11 October 2001 after it was established that the applicant could not be removed.

²¹⁵ Particularly since such a status will be in conflict with the legal requirements of the country in which such a migrant is present. However, it is conceivable that disclosure could in certain circumstances have to be restrained because of the harmful effect it might have on the rights and freedoms of others, particularly the migrant's children if their status is not irregular. Moreover once the migrant's status has been regularised, disclosure of past irregularities could be an unjustified interference with the right to respect for private life; see *De Haes and Gijssels v Belgium*, 19983/92, 24 February 1997, which concerned the disclosure of the conviction of a family member.

²¹⁶ Especially as regards prior judicial authorisation and the scope of the intrusion authorised; see, e.g., *Kruslin v France*, 11801/85, 24 April 1990 and *Van Rossem v Belgium*, 41872/98, 9 December 2004.

²¹⁷ See the emphasis placed in Appl No 33257/96, *Klip and Kruger v Netherlands*, (1997) 91 DR 66 on the absence of any investigation as to motives for a marriage when finding a requirement to provide information in order to verify a couple's status for immigration purposes did not entail a violation of Article 8. Cf the finding of such a violation in *Smith and Grady v United Kingdom*, 33985/96;33986/96, 27 September 1999, in respect of the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the air force authorities.

²¹⁸ *Sisojeva and Others v Latvia* 60654/00, 16 June 2005.

168. It is possible that the European Court might draw upon the positive obligations that arise from European Convention rights and freedoms to conclude that a denial of social security or welfare assistance to migrants on account of their status would be inhuman or degrading contrary to Article 3²¹⁹. This conclusion might be expected where the migrants concerned are especially vulnerable, such as on account of age, illness or accident or conditions or circumstances external to themselves which materially affects their ability to find food and other basic amenities and thus to fend for themselves. Moreover it would not be necessary to wait until the actual onset of illness and destitution before Article 3 is engaged; it is enough to show that such a state is imminent because of a lack of charitable or other non-government support as the Article 3 threshold is crossed when it involves a condition which verges on the degree of severity resulting in actual bodily injury or intense mental or physical suffering²²⁰.

169. Equally denial of emergency medical treatment in a life-threatening situation to a migrant without the means to pay for it at the time would probably entail a violation of the right to life under Article 2²²¹.

170. A situation in which migrants are held against their will and forced to work by private persons will be sufficient for them to be regarded as being subjected to at least forced labour and possibly slavery²²². The behaviour of private persons will of itself not entail responsibility for a High Contracting Party but the latter will be found to be in breach of Article 4 where it has failed to take appropriate action to prevent persons being exploited in this way as a result of the positive obligations arising from this provision. Such action will entail at the very minimum making forced labour and slavery or servitude specific offences in the criminal law of the High Contracting Party concerned²²³ but it is also likely to require the taking of effective steps to investigate and prosecute the commission of these offences once there is some awareness of them occurring²²⁴.

²¹⁹ It is unlikely that the refusal of child or other family benefits to irregular migrants on account their status would be regarded as a distinction between them and others receiving such benefits that lacked an objective and rational justification so that it entailed a violation of Article 14 in conjunction with Article 8. Cf *Niedzwiecki v Germany*, 58453/00 and *Okpiz v Germany*, 59140/00) 25 October 2005, in which such a violation was found where the differential treatment was between migrants with unlimited residence permits and those with only limited residence permits.

²²⁰ See, e.g., *R v Secretary of State for the Home Department, ex p Adam* [2005] UKHL 66, 3 November 2005; the threshold of severity was not considered to have yet been crossed in the case of asylum-seekers denied assistance on account of a failure to make their application within a specified time of arrival in the United Kingdom despite the inadequate charitable provision, but there was an imminent prospect of this occurring.

²²¹ Although this would not necessarily preclude the imposition of a liability to pay for it afterwards.

²²² *Siliadin v France*, 73316/01, 26 July 2005, in which it was held that being forced to work against one's will and without pay would be sufficient to constitute forced labour, while slavery would arise where the person affected had no personal autonomy and had been reduced to the status of an object. This was found to have occurred in this case where the applicant had been brought into country as a minor, had had her passport confiscated, had no independent resources, had been required to work almost fifteen hours a day, seven days a week and had no freedom of movement or free time as a result of being afraid of being arrested by the police. The presence of some form of compulsion is likely to be a more significant factor than the absence of any payment and certainly the giving of some money to the applicant in *Siliadin* (albeit nothing that was intended to be, or could be regarded as, a wage) did not prevent it being concluded that her treatment was in breach of Article 4.

²²³ This was the basis for finding a violation in *Siliadin*; the persons forcing the applicant to work had been acquitted on appeal of the offences of wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person and of subjecting that person to working or living conditions incompatible with human dignity but had been required to pay her some damages and the applicant subsequently obtained an employment tribunal ruling requiring the payment of salary arrears.

²²⁴ On the positive obligation with regard to law enforcement, see, e.g., *Osman v United Kingdom* [GC], 23452/9, 28 October 1998.

171. It is unlikely to be of any significance that the person subjected to forced labour or held in slavery ended up in this position as a result of his or her efforts to enter or remain in the country in breach of the immigration laws²²⁵.

Detention

172. Migrants may find themselves detained pursuant to the express authorisation by Article 5(1)(f) of such a measure where this is adopted either for the purpose of preventing an unauthorised entry into a country or with a view to deportation²²⁶. Article 5(1)(f) might, therefore, be invoked to justify detention at the point of entry where there are doubts about the sincerity of a person's reasons for entering the country²²⁷ or as a step to secure the removal from it of an irregular migrant²²⁸.

173. The confinement of migrants to the international zone of an airport will generally be regarded as only a restriction and not a deprivation of liberty so that it does not have to satisfy the requirements of Article 5(1)(f)²²⁹.

174. However, if this confinement becomes excessively prolonged – going beyond what is required to organise the practical details for repatriation or to consider an application for asylum – it will become a deprivation of liberty and must then comply with the requirements of Article 5(1)(f). No precise indication has been given as to the point at which a restriction turns into a deprivation of liberty but factors such as close surveillance, the absence both of social and legal assistance and of a speedy judicial authorisation for the holding in the transit zone, lack of freedom of movement and being required to remain at the disposal of the authorities have all contributed to findings that this transformation had occurred in the course of a periods lasting between fourteen and twenty days²³⁰.

175. The conclusion that the confinement of migrants to the transit zone is a deprivation of liberty cannot be rebutted by pointing to the fact that they are still free to leave the zone by travelling abroad if their only option is to go to a country that does not offer protection against persecution²³¹.

²²⁵ The status of the applicant in *Siliadin* appears to have become irregular as a result of her undertaking to work in order to pay back the persons who had bought her air ticket and who then "lent" her to the persons found to have kept her in slavery.

²²⁶ 'Deportation' here will cover orders for expulsion and any other measure designed to remove someone from a country on account of an irregularity in his or her immigration status and the omnibus term 'removal' is generally used in this paper.

²²⁷ As in *Aslan v Malta* (dec.), 29493/95, 3 February 2000.

²²⁸ See, e.g., Appl 10400/83, *Z v Netherlands*, (1984) 38 DR 145; Appl No 9088/80, *X v United Kingdom* (1982) 28 DR 160; Appl No 11531/85, *A v Sweden* (1987) 53 DR 128; and Appl 28574/95, *Ullah v United Kingdom* (1996) 87 DR 118.

²²⁹ See *Amuur v France*, 19776/92, 25 June 1996 (the applicants had been refused admission to France because they had falsified passports) and *Shamsa v Poland*, 45355/99 and 45357/99, 27 November 2003 (the applicants had been held there after being returned from an unsuccessful attempt to remove them to the Czech Republic).

²³⁰ See, e.g., *Amuur v France*, 19776/92, 25 June 1996 and *Shamsa v Poland*, 45355/99 and 45357/99, 27 November 2003; the surveillance was a feature of both cases, the lack of assistance and judicial authorisation were features of *Amuur* and the lack of freedom of movement and being at the disposal of the authorities were significant in *Shamsa*.

²³¹ *Amuur v France*, 19776/92, 25 June 1996; appropriate assurances about treatment in Syria were only obtained after diplomatic negotiations. Cf Appl No 19066/91, *S, M and M T v Austria*, (1993) 74 DR 179 (in which no deprivation of liberty was found as the absence of any risk of a violation of Article 3 meant that the applicants could have left the country); *Mogos v Romania*, 20420/02 (dec.), 6 May 2004 (in which the applicants, who were stateless, refused to leave the airport despite being offered a document permitting them to enter Romania and had demanded that they be returned to Germany from where they had been removed. This refusal meant that there was also no breach of Article 2 of Protocol No 4 attributable to Romania; entry there would have enabled to obtain the documentation necessary to travel elsewhere); and *Ghiban v Germany* (dec.), 11103/03) 16 September 2004 (in which the applicant, who was stateless,

176. It is well-established that the decision to deprive anyone of liberty in reliance on Article 5 must, in order to safeguard the individual's right to security of person, conform to the procedural and substantive requirements laid down by an already existing law²³². This necessarily means that the deprivation of liberty must be "lawful", which is something to be determined primarily by reference to national law²³³. However, not only must the detention comply with all the requirements of the provision invoked²³⁴ but the latter must be sufficiently accessible and enable the person concerned to foresee the consequences of his or her acts²³⁵.

177. Moreover the detention decision must not be arbitrary in the light of the facts of the case²³⁶ or actuated by bad faith²³⁷ or an improper purpose such as disguised extradition in the absence of any power allowing such a measure²³⁸. It should also comply with the principle of legal certainty²³⁹ and will need to be judicially authorised²⁴⁰. It has also been suggested by the European Court that

refused to leave the airport despite being offered a document permitting him to travel to Romania, from where he had come, and had demanded that he be allowed to stay in Germany).

²³² See Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164 and *Amuur v France*, 19776/92, 25 June 1996 (there was none in the latter case).

²³³ See, e.g., *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996 and *Slivenko v Latvia* [GC], 48321/99, 9 October 2003.

²³⁴ See *Shamsa v Poland*, 45355/99 and 45357/99, 27 November 2003, in which a violation of Article 5(1) was found after a failure to release irregular migrants as required when the statutory time-limit for enforcing a removal order had expired. Cf *Slivenko v Latvia* [GC], 48321/99, 9 October 2003, in which it was found that there was a statutory basis for the arrest of the applicants notwithstanding the view of the immigration authority that this was premature.

²³⁵ In *Dougoz v Greece*, 40907/98 6 March 2001 it was held that the opinion of a senior public prosecutor – concerning the applicability by analogy of a ministerial decision on the detention of persons facing administrative removal to cases of removal ordered by the courts – could not constitute a "law" of sufficient "quality" within the meaning of the European Court's case-law. Sufficient precision was, however, found in Appl No 9403/81, *X v United Kingdom* (1982) 28 DR 235 (indefinite leave obtained by assuming false identity so the applicant must have been able to foresee the liability to detention with a view to removal if discovered) and Appl No 9174/80, *Zamir v United Kingdom* (1983) 40 DR 42 (legal rule was sufficiently certain even if its particular interpretation was unexpected within the legal community; the failure to disclose marriage meant the admission as a family member of father already present was construed as fraud rendering him liable to removal). The ambiguity of the law governing the validity of the applicant's presence in the country is being contested in *Kambangu v Lithuania* (dec.), 59619/00, 17 March 2005.

²³⁶ The suddenness of the action, with detention being quickly followed by removal and the detained person thus being prevented from speaking to his wife or lawyer was a factor in the conclusion in *Bozano v France*, 9990/82, 18 December 1986 that he had been treated arbitrarily. Cf the conclusion that there was no arbitrariness of the detentions in: Appl No 9174/80, *Zamir v United Kingdom* (1983) 40 DR 42 (reasonable grounds for considering person to be illegal); Appl No 11531/85, *A v Sweden* (1987) 53 DR 128 (not affected by the discontinuance of criminal proceedings that did not affect the ability to remove or the alleged impossibility to remove him to his home country as that was only relevant after the removal decision had been taken); Appl 28574/95, *Ullah v United Kingdom* (1996) 87 DR 118 (no appearance of arbitrariness in the court's decision); *Aslan v Malta* (dec.), 29493/95, 3 February 2000 (there was a clear link between the applicant's documentation and the suspicions raised in the minds of the port officials so there was no need to consider whether the decision was based solely on his nationality or religion); and *Ntumba Kabongo v Belgium* (dec.), 52467/99, 2 June 2005 (the court was considered not to have made a manifestly erroneous application of the relevant statutory provisions or drawn arbitrary conclusions from them when finding that fresh detention measures against aliens who opposed their removal were authorised).

²³⁷ Appl 28574/95, *Ullah v United Kingdom* (1996) 87 DR 118.

²³⁸ See *Bozano v France*, 9990/82, 18 December 1986, where the applicant could have been given the option of being expelled at the nearest frontier with Spain rather than at one twelve hours and several hundred kilometres where the Swiss authorities detained him to facilitate the extradition to Italy that was not possible from France. A claim of disguised extradition was found not to be substantiated in Appl No 32829/96, *Iruretagoyena v France*, (1998) 92 DR 99.

²³⁹ In *Shamsa v Poland*, 45355/99 and 45357/99, 27 November 2003 it was observed that detaining someone in the transit zone for an indefinite and unforeseeable period without any basis in the form of a specific legal provision or valid judicial decision was in itself contrary to the principle of legal certainty. See also the importance attached in *Gonzalez v Spain* (dec.), 43544/98, 29 June 1999 (an extradition case) to the giving of exhaustive reasons for continued detention when finding that the detention was compatible with the requirements of Article 5(1)(f).

²⁴⁰ The importance of this was emphasised both in *Amuur v France*, 19776/92, 25 June 1996 and in *Shamsa*. In the latter the European Court pointed out that detention for several days which has not been ordered by a court or judge or any other person authorised to exercise judicial power cannot be regarded as "lawful" within the meaning of Article 5(1) of the European Convention. The applicants in this case were held by border guards in an airport transit zone for 14 days.

there should be procedures and time-limits for access to legal, humanitarian and social assistance²⁴¹.

178. Nonetheless the existence of certain flaws in a detention order will not necessarily render the concomitant period of detention unlawful within the meaning of Article 5(1), particularly where the putative error is immediately detected and redressed by the release of the persons concerned²⁴².

179. The European Court has effectively ruled out the use of deception as a means of detaining irregular migrants, holding that “a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the removal of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5”²⁴³. An aggravating factor in this case, but probably one sufficient on its own to render a deprivation of liberty arbitrary, was the lack of access to an effective remedy on account of the circumstances surrounding the detention²⁴⁴.

180. In all instances the case of a person deprived of liberty must be handled with due diligence. Where a migrant is detained in order to prevent his or her entry into the country, it will often be the case that detention will only be justified for the time required to put him or her on the boat, bus, plane or train that will take him or her to the place of departure²⁴⁵. More extensive periods of detention may, however, be required where a claim for asylum has to be considered or a safe destination has to be found. Longer periods may also be justifiable in the case of removal if there are no avoidable delays in the proceedings²⁴⁶.

²⁴¹ *Amuur v France*, 19776/92, 25 June 1996, at paragraph 53 but it is not entirely clear whether the absence of these only reinforced the lack of a legal basis for the deprivation of liberty in this case.

²⁴² *Slivenko v Latvia* [GC], 48321/99, 9 October 2003, in which the immigration authority considered that the detention was premature because an appeal against the removal order had been lodged but this may have been a mistaken view of the law and the two periods of detention concerned had lasted for less than twenty-four and for thirty hours respectively. See also Appl 28574/95, *Ullah v United Kingdom* (1996) 87 DR 118, in which the validity of detention was found not to have been retrospectively affected for European Convention purposes by a subsequent finding that court erred under domestic law in making the relevant order.

²⁴³ *Conka v Belgium*, 51564/99, 5 February 2002, at paragraph 41; the applicants had been invited to attend a police station to “enable the file concerning their application for asylum to be completed” and were taken to a closed transit centre a few hours after they arrived there. The European Court in *Bozano v France*, 9990/82, 18 December 1986, also objected to the efforts made to prevent the applicant from finding out about the action planned for him so that he could be presented with a *fait accompli*.

²⁴⁴ The information on the available remedies handed to the applicants in *Conka* on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Roma families who attended the police station in understanding the verbal and written communications addressed to them and, although he was present at the police station, he did not stay with them at the closed centre. This meant that they had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services. Despite all these difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre. Furthermore the applicants' lawyer was only informed of the events in issue and of his clients' situation at 10.30 p.m. on a Friday, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on the following Monday, the case could not have been heard until the Wednesday, a day after the applicants' expulsion. Delay in serving a removal order so that the subject of it was prevented from making effective use of the remedies theoretically available to him was also an important consideration in finding in *Bozano v France*, 9990/82, 18 December 1986 that the deprivation of the applicant's liberty to be neither lawful nor compatible with the right to security of person. On remedies see further paras 395-410.

²⁴⁵ See *Aslan v Malta* (dec.), 29493/95, 3 February 2000, in which detention for ten hours until the next ferry sailing was not considered objectionable.

²⁴⁶ Four and a half months was not considered objectionable in Appl No 32025/96, *Kareem v Sweden*, (1996) 87 DR 173 and neither was nine months in Appl 35984/97, *Medjden v Germany*, 31 October 1997. Moreover the even longer period of three years and nine months in *Chahal v United Kingdom*, 22414/93, 15 November 1996 (covering extensive consideration of an asylum application and judicial review proceedings in three tiers of courts) but in *Samy v Netherlands*, 36499/97, 18 June 2002 there was a friendly settlement in respect of proceedings that lasted nearly seven months. The acceptability of detention for seventeen months prior to removal was not addressed in *Dougoz v Greece*, 40907/98, 6 March 2001 as the European Court found the detention itself to be unlawful. Cf the finding in *Quinn v*

181. However, an unco-operative attitude on the part of the detained person will be considered as relevant to the assessment of whether the proceedings have been conducted with due diligence²⁴⁷. Moreover a complaint about the length of detention is unlikely to be considered admissible if the irregular migrant concerned did not take advantage of an opportunity to bring proceedings to challenge its continuation²⁴⁸.

182. Where the migrants detained are children, the stipulation in Article 37b of the Convention on the Rights of the Child that they should only be detained for “the shortest appropriate period of time” is likely to be taken into account when assessing whether their detention is in conformity with Article 5 of the European Convention²⁴⁹.

183. Notwithstanding the admissibility of depriving a migrant of his or her liberty with a view to removal, the person concerned must always be treated in accordance with the requirements of Article 3²⁵⁰. This provision not only precludes the use of violence, humiliating treatment and racial discrimination or other abuse²⁵¹ but it also sets limits on the acceptability of the conditions in which someone is held.

184. When assessing conditions of detention for this purpose, account will be taken of the cumulative effects of these conditions, as well as of specific aspects of them, and the sex, age and state of health of the person detained could also be relevant. Thus in one case serious overcrowding and the absence of sleeping facilities, combined with detention for seventeen months – considered to be an inordinately long period - in such conditions has been held by the European Court to amount to degrading treatment²⁵². It was particularly significant in this case that the place of detention was unsuitable for this purpose where it lasted for periods in excess of a few days.

185. Furthermore insufficient sanitary facilities and access to fresh air, natural daylight, recreation and contact with the outside world – all the subject of specific allegations in that case – could be considerations in a specific case that would lead to an even more serious breach of Article 3²⁵³.

France, 18580/91, 22 March 1995 that delays after the adoption of an extradition order rendered the total period excessive. See also Appl No 9088/80, *X v United Kingdom* (1982) 28 DR 160, in which the lapse of some time was considered to be explicable by the need to resolve the proof of the applicant's national identity in order that he could travel back to Pakistan and neither he nor the Pakistan Embassy in London had co-operated. However, the bringing of fresh proceedings to test the legality of his detention in view of the delay was also considered as something that the applicant should have done.

²⁴⁷ See Appl 10400/83, *Z v Netherlands*, (1984) 38 DR 145 (over four months OK) and *Ntumba Kabongo v Belgium* (dec.), 52467/99, 2 June 2005 (ten months which was attributable to removal efforts failing as a result of repeated refusals to board the aircraft to be used for this purpose).

²⁴⁸ Appl No 9088/80, *X v United Kingdom* (1982) 28 DR 160.

²⁴⁹ See, e.g., *Assenov and Others v Bulgaria*, 24760/94, 28 October 1998, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, 13178/03, 12 October 2006 and *Nart v Turkey*, 20817/04, 6 May 2008.

²⁵⁰ The fact of detention in itself is unlikely to be enough; see *Ntumba Kabongo v Belgium* (dec.), 52467/99, 2 June 2005 in which it was found that any mental suffering undergone as a result of detention for over ten months did not attain the minimum threshold of seriousness such as to constitute inhuman and degrading treatment. The European Court emphasised that the extension of the applicant's detention over this period had not been intended to humiliate or degrade her and had not infringed her personality rights. However, see also paragraph 189.

²⁵¹ None of these forms of treatment were substantiated in *Aslan v Malta* (dec.), 29493/95, 3 February 2000 nor was a use of force by the police in respect of persons held in an airport transit zone considered to be disproportionate or excessive in *Mogos v Romania*, 20420/02, 13 October 2005.

²⁵² *Dougouz v Greece*, 40907/98, 6 March 2001.

²⁵³ See the similar ruling in *Peers v Greece*, 28524/95, 19 April 2001. However, allegations about conditions of this kind were not upheld in *Sakkopoulos v Greece*, 61828/00, 15 January 2004.

186. However, while being kept in dirty and unsanitary conditions, restricted in the use of toilet facilities and given neither food nor drink for only a matter of hours would probably not be regarded as problematic, being kept in them in isolation could be sufficient to render them unacceptable²⁵⁴.

187. Complete confinement to a cell is likely to be unacceptable and confinement with convicted prisoners will be regarded, at the very least, as undesirable²⁵⁵.

188. There should be efforts to take account of other special needs that a migrant might have, such as obtaining the services of an interpreter for someone with significant communication problems²⁵⁶.

189. Furthermore a failure to provide adequate medical care for a detainee could result in him or her being subjected to inhuman and degrading treatment²⁵⁷. In this regard the mental condition of migrants – some of whom may be afraid of or have suffered from persecution, even if this cannot be established – may be a particular concern since the fact of the detention itself or of certain conditions in which it is endured might exacerbate a risk of suicide or self-harm²⁵⁸.

190. It will be essential that any foreseeable risks for the life, health and physical safety of detainees arising from the design and construction of the place of detention are adequately addressed, whether before they are housed there or as soon as these defects become apparent if

²⁵⁴ No objection was taken to such “unpleasant” conditions in *Aslan v Malta* (dec.), 29493/95, 3 February 2000 when they were alleged to have lasted for ten hours and the European Court emphasised that the applicant had not been segregated from his colleagues and kept in social isolation. See also the emphasis in *Sakkopoulos v Greece*, 61828/00, 15 January 2004 on the detention of an applicant suffering from cardiac insufficiency and diabetes having lasted only a day, even if it had been accepted by the European Court that the conditions were inappropriate for his health. In addition see the failure in *Mogos v Romania*, 20420/02, 13 October 2005 to establish that conditions in an airport’s transport zone had met the threshold of severity required for a violation of Article 3; not only was there was found to be a lack of objective evidence supporting the claims made but also claims regarding the lack of medical treatment were undermined by the categorical refusal of the applicants to be taken to hospital. Moreover see Appl No 19066/91, *S, M and M T v Austria*, (1993) 74 DR 179, in which the conditions of persons held in transit area while under threat of removal was found to be uncomfortable but not to reach requisite level of severity; they had separate bathrooms, living and sanitary areas and the airport social services had constant access. Furthermore the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT) had found the living conditions and standards of hygiene to be acceptable. Another complaint about conditions in the transit zone was considered inadmissible in *Ghiban v Germany* (dec.), 11103/03, 16 September 2004 because his presence there was not found to amount to detention and so his being there was a matter of his own choice. A similar view was taken in *Dragan and Others v Germany* (dec.), 33743/03, 7 October 2004 of the lack of access to medical care where there was no obligation to stay in the transit zone.

²⁵⁵ See *Zhu v United Kingdom* (dec.), 36790/97, 12 September 2000, in which no objection was taken to an irregular migrant being locked in his cell for almost sixteen hours a day and it was recognised that efforts had been made to alleviate his situation in a regular prison.

²⁵⁶ See *Zhu v United Kingdom* (dec.), 36790/97, 12 September 2000, in which it was considered sufficient that one was found after six months’ detention.

²⁵⁷ This was not established in *Sakkopoulos v Greece*, 61828/00, 15 January 2004 but a violation of Article 3 was found in *Shamayev and 12 Others v Georgia and Russia*, 36378/02, 12 April 2005 where there was a failure to provide appropriate medical treatment in good time for injuries suffered when apprehending the applicants for the purpose of extradition. Cf the finding in *Ammari v Sweden* (dec.), 60959/00, 22 October 2002.

²⁵⁸ See *Keenan v United Kingdom*, 27229/95, 3 April 2001, in which the lack of effective monitoring and informed psychiatric input into the assessment and treatment of a prisoner who committed suicide after being segregated in a punishment block was found to be a violation of Article 3. However, there will have to be indications, physical or mental, which render or should have rendered the prison staff aware that the person concerned was subject to severe or acute suffering; in *Bollan v United Kingdom* (dec.), 42117/98, 4 May 2000 this was found not to have been the case where a drug dependent prisoner committed suicide after a disciplinary measure had been imposed. Cf the approval in *Zhu v United Kingdom* (dec.), 36790/97, 12 September 2000 of the placing of an irregular migrant in a special “ligature free” cell for a period of a week under particularly strict supervision after he had attempted to commit suicide. In this case the provision of a sleeping bag but not blankets was not considered inhuman or degrading.

this is after the place begins to be used, as otherwise violations of Articles 2 and 8 are likely to ensue²⁵⁹.

191. There should also be effective screening of all migrants being kept in a particular place of detention so that they are not unnecessarily exposed to risk of harm from those with whom they are being held²⁶⁰.

192. A failure to ensure that the places used for detaining migrants are capable of accommodating families so that members are kept separate is likely to entail a violation of the right to respect for family life under Article 8.

Removal

193. It is clearly implied by the authorisation in Article 5(1)(f) of detention with a view to removal and the prohibition on the expulsion of nationals and the *collective* expulsion of aliens in Articles 3 and 4 of Protocol No 4 that the High Contracting Parties intended to reserve to themselves the power to remove aliens from their territory²⁶¹, whether by an order for deportation or expulsion or under any other procedure which has this objective.

194. The manipulation of internal administrative decisions in order to effect the expulsion of a migrant would be regarded as a violation of the prohibition of abuse of rights in Article 17 where rights and freedoms under the European Convention would be affected²⁶². Furthermore it has been recognised that removal could be a technique to interfere with freedom of expression but this could only be successfully claimed if it were possible to show that such a measure was really a response to an exercise of right to freedom of expression by an irregular migrant²⁶³.

195. Being forced to leave the territory of a High Contracting Party will, of course, result in the loss of the ability to exercise European Convention rights and freedoms there. In most instances this will be regarded as a justifiable consequence of the State concerned exercising its own right under general international law to control the admission of non-nationals to its territory. However, in some circumstances it will be found that such a consequence is disproportionate and thus entails a violation of the relevant right or freedom.

196. Thus particularly strong family or social ties with the country seeking to remove the person and the lack of links with the country to which he or she will be removed are likely to lead to the conclusion that expulsion would violate the right to respect for the family and/or private life of the person concerned²⁶⁴. The presence of the majority of the person's family in the removing country

²⁵⁹ On the duty to respond to such risks that arise from these provisions, see *Taskin v Turkey*, 46117/99, 10 November 2004 and *Oneryildiz v Turkey* [GC], 48939/99, 30 November 2004.

²⁶⁰ The cultural, religious and political differences of detainees could be significant in this regard but so could the mental health of a particular detainee; see *Paul and Audrey Edwards v United Kingdom*, 46477/99, 14 March 2002, which concerned a failure to pass on information about a dangerously unstable prisoner who killed the applicant's son. See also *Zhu v United Kingdom* (dec.), 36790/97, 12 September 2000, in which it was found that an irregular migrant had not been set upon by the convicted prisoners with whom he was being held.

²⁶¹ See Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164

²⁶² See Appl No 9285/81, *X, Y and Z v United Kingdom* (1982) 29 DR 205, in which a change of the applicants' immigration status from illegal immigrant to overstayer was not considered to be such a manipulation but was to be seen as advantageous since it provided them with significant procedural guarantees against removal, including full appeals against the decision to remove someone.

²⁶³ See Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164 and *J E D v United Kingdom* (dec.), 42225/98, 2 February 1999.

²⁶⁴ See, e.g., *Berrehab v Netherlands*, 10730/84, 21 June 1988; *Mehemi v France*, 25017/94, 26 September 1997; and *Boultif v Switzerland*, 54273/00, 2 August 2001. For instances of there being insufficient family life in the removing

(especially close relatives and his or her own children), his or her presence there from early childhood until becoming an adult, limited competence in the language of the receiving country and the lack of frequent visits to that country will be particularly significant considerations in leading to the conclusion that such ties and links outweigh other considerations in favour of expulsion, while the failure to take advantage of an opportunity to regularise his or her status (especially by acquiring the nationality of the removing country) might support the contrary conclusion²⁶⁵.

197. However, the impact on relationships developed when a person's status was or had become irregular are unlikely to lead to the conclusion that expulsion would be in violation of Article 8²⁶⁶.

198. Moreover, even where fairly strong ties with the removing country have been found to exist, there will be situations where these can still be regarded as being outweighed by considerations of public order²⁶⁷ or national security²⁶⁸ and the temporary character of the expulsion could also be significant in this regard²⁶⁹.

199. The expulsion of parents may effectively lead to children with a right to remain in the country concerned having to be taken with them but this consequence will not be considered objectionable where there was no obstacle to the family all living together in the country of the parents' nationality²⁷⁰ or where the separation is not likely to be too disruptive²⁷¹. A similar view has been taken where the spouse and/or children of the person being removed could be expected to have to accompany him or her and there was no obstacle to them all living together²⁷², even where they will face the weaker economic prospects in the country to which they will have to go²⁷³. Such a view has also been taken of a situation where it was the children who had stayed illegally

country, see Appl No 12411/86, *M v Federal Republic of Germany*, (1987) 51 DR 245 and *Taskin v Germany*, 56132/00, 23 July 2002. In addition see the failure to establish that removal entailed a lack of respect for private life in *Ghiban v Germany* (dec.), 11103/03, 16 September 2004, in which a stateless person staying in the transit zone was unwilling to take up the offer of documentation that would allow him to return to Romania. No reliance was placed on a marriage of a few months' duration to a German national.

²⁶⁵ It would be inadmissible to discount a family relationship for this purpose solely because the father was not and had never been married to the mother of the child on which it was based; see *Keegan v Ireland*, 16969/90, 26 May 1994, which concerned the father's participation in adoption proceedings.

²⁶⁶ See, e.g., *Bouchelkia v France*, 23078/93, 29 January 1997 and *Kaya v Netherlands* (44947/98), 6 November 2001. See also the view that there could be no reasonable expectation of cohabitation where the relationship was developed while illegally resident; *S C C v Sweden* (dec.), 46553/99, 15 February 2000. In addition see the doubt in Appl No 11945/86, *Ugurlukoc v Federal Republic of Germany*, (1987) 51 DR 186 as to whether applicants who were respectively present on a tourist visa and a residence permit of limited duration could make a claim under Article 8.

²⁶⁷ Usually because of the commission of offences considered particularly serious such as aggravated assaults, drug trafficking, gun-running, kidnapping, rape and aggravated sexual assaults, robbery or a combination thereof. See, e.g., *Boughanemi v France*, 22070/93, 24 April 1996; *Ekersular v German*, 45504/99, 25 May 1999; *Farah v Sweden*, 43218/98, 24 August 1999; and *Uner v Netherland*, 46410/99, 5 July 2005.

²⁶⁸ Appl No 32025/96, *Kareem v Sweden*, (1996) 87 DR 173; the applicant was suspected of being an Iraqi intelligence officer.

²⁶⁹ *Farah v Sweden*, 43218/98, 24 August 1999 (seven years) and *Uner v Netherlands*, 46410/99, 5 July 2005 (ten years).. Cf the definitive or unlimited exclusions that contributed to the finding of violations of Article 8 in, e.g., *Ezzouhdi v France*, 47160/99, 13 February 2001 and *Keles v Austria*, 32231/02, 27 October 2005.

²⁷⁰ See, e.g., *Sarumi v United Kingdom* (dec.), 43279/98, 26 January 1999. Cf *Keles v Austria*, 32231/02, 27 October 2005, in which a consideration in finding a violation of Article 8 was that the applicant's children would face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools.

²⁷¹ *Uner v Netherlands*, 46410/99, 5 July 2005, in which only one of the applicant's three children had lived with him and that was for only a relatively short period.

²⁷² See, e.g., Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164 and *Amara v Netherlands* (dec.), 6914/02, 5 October 2004. Cf Appl No 6357/7381, *X v Federal Republic of Germany*, 1 DR 77 (a case of extradition), in which it was considered that the applicant's wife and children might have a valid reason for not following him.

²⁷³ Appl No 11333/85, *C v Federal Republic of Germany*, (1985) 43 DR 227 and Appl No 26336/95, *Aboikonie and Read v Netherlands*, (1998) 92 DR 23. This latter point is even stronger where the whole family are being removed as in *Damla and Others v Germany* (dec.), 61479/00, 26 October 2000.

with their mother after entering the country only for visiting purposes or entering it illegally²⁷⁴. However, there has been at least one instance where the inability of a spouse to follow the person being removed because he had no right of entry to the country concerned was insufficient to lead to the conclusion that the expulsion would be unacceptable²⁷⁵.

200. The need to give the fullest consideration to the impact of expulsion is particularly important when the decision is taken against a background of proceedings concerned with child access. Thus the European Court has found that there was a failure to act in a manner which enabled family ties to be developed between the applicant and his son after the divorce of the parents and thus a violation of Article 8 where expulsion following non-renewal of a residence permit took place when the child care authorities were still investigating whether or not the applicant, who had separated from his wife, could have access to their son²⁷⁶.

201. The lack of means for a mother, who was being removed along with her children, to return to visit the husband/father while he was serving a prison sentence has not been considered problematic where they could still communicate through letters and telephone and the husband/father would be released in seventeen months²⁷⁷. A different view might, however, be required to be taken where the sentence to be served was considerably longer.

202. Insisting on family unity as a basis for resisting expulsion is unlikely to be regarded favourably by the European Court in situations where only part of the family was being removed because the remainder had gone into hiding in order to avoid the enforcement of immigration control since this could seriously impede effectiveness of such control²⁷⁸.

203. In the past an attempt to resist expulsion because of its impact on a homosexual relationship has not succeeded²⁷⁹. However, this ruling reflected the view that such a relationship did not form part of a person's private life and, as this is not consistent with the European Court's present view

²⁷⁴ See *Chandra v Netherlands* (dec.), 53102/99, 13 May 2003, in which the mother chose to leave Indonesia and settled with a Netherlands national, leaving her four children behind in the custody of her then husband. The children were then 12, 11, 8 and 7 years' old respectively. On 2 April 1993 she was granted a residence permit in the Netherlands for the specific purpose of living with her partner, which permit did not include any residency rights for the children. It was only on 12 May 1997 that the mother applied for permission for her children to join her in the Netherlands. The children were then 17, 16, 13 and 11 years' old respectively. Prior to joining their mother in the Netherlands on a short stay visa in February 1997, the children had lived in Indonesia all their lives and had been cared for by their father. They must therefore be deemed to have strong links with the linguistic and cultural environment of that country. It is further to be noted that by the time a final decision had been taken on the children's request, two of them had attained the age of majority. The two youngest children had also reached an age – 15 and 13 respectively – where they were presumably not as much in need of care as younger children. It has not been argued that these children could not stay with their father and it further appears that they have other relatives living in Indonesia.

²⁷⁵ Appl No 12461/86, *Y H v Federal Republic of Germany*, (1986) 51 DR 258; the person being removed had been refused asylum and was being removed for theft offences, while her husband was still awaiting an asylum decision.

²⁷⁶ *Ciliz v Netherlands*, 29192/95, 11 July 2000; the removal occurred after first trial meeting and a visa was refused to attend either further trial meetings or the continuation of the access proceedings in the appeal court. In the European Court's view this prejudged the outcome of, and denied all meaningful involvement in, those proceedings. The applicant subsequently obtained a visa but by then the passage of time had resulted in a *de facto* determination of the proceedings for access which he then instituted. The lack of co-ordination between the authorities involved and the haste in the removal were important considerations in finding a violation of Article 8.

²⁷⁷ *Selmani v Switzerland*, 70258/01, 28 June 2001.

²⁷⁸ See *Cruz Varas v Sweden*, 15576/89, 20 March 1991 (complaint that the removal of one applicant had confronted the other members of his family – to whom the removal order also applied - with the choice of remaining in hiding and exercising the right of petition under the European Convention or returning to Chile with him) and Appl 23159/94, *Dreshaj v Finland*, (1994) 77 DR 126 at 131 (several of family members had not shown up, including the applicant complaining about removal of mother and two siblings but this complaint was considered inadmissible as the intention was to remove all of the family).

²⁷⁹ Appl No 16106/90, *B v United Kingdom*, (1990) 64 DR 278.

of the reach of that provision²⁸⁰, it is unlikely to be followed. Moreover, where adoption of children by homosexuals is possible, the resulting family relationship with them could also be invoked as a basis for challenging the adopter's expulsion²⁸¹.

204. Insofar as expulsion affecting a person's family or private life has been motivated by inadmissible grounds for differential treatment, this would either exacerbate a violation of the right under Article 8 or would, where such a violation would not normally be established, give rise to a violation of Article 14 in conjunction with Article 8. However, although one or other has been alleged in a number of cases, a successful claim is likely to require a case that is both blatant and well-documented since the European Court has not been convinced that the allegations brought before it amounted to more than suspicions and conjectures²⁸².

205. Certainly differences in treatment between nationals and non-nationals as regards the respect shown for private and family life are likely to be regarded as having an objective and reasonable justification, such as the control of immigration in a densely populated country, so long as they are not disproportionate in their effect and thus will not entail a violation of Article 14 in conjunction with Article 8²⁸³.

206. However, differences in the treatment of the various categories of irregular migrants could also be problematic. Thus an amnesty for illegal immigrants but not for legal immigrants who have overstayed admissible has been considered not to be a complaint that is manifestly ill-founded²⁸⁴.

207. It has been accepted by the European Court that violations of the prohibition of inhuman and degrading treatment under Article 3 could result from expulsion where this would result in the persons affected being unable to continue medical care or treatment as opposed to having care or treatment that is less favourable than that in the removing country²⁸⁵ but this is only likely to be

²⁸⁰ See, e.g., *Modinos v Cyprus*, 15070/99, 22 April 1993 and *Smith and Grady v United Kingdom*, 33985/96, 33986/96, 27 September 1999.

²⁸¹ Sexual orientation has no bearing on the existence of a family relationship; *Salgueiro da Silva Mouta v Portugal*, 33290/96, 21 December 1999 and a refusal to allow homosexuals to adopt will be a breach of Article 14 in conjunction with Article 8; *E B v France* [GC], 43546/02, 22 January 2008.

²⁸² See, e.g., Appl No 23634/94, *Tanko v Finland*, (1994) 77 DR 133 and Appl No 30913/96, *Slepčik v Netherlands and the Czech Republic* (1996) 86 DR 176.

²⁸³ Appl No 9285/81, *X, Y and Z v United Kingdom* (1982) 29 DR 205.

²⁸⁴ Appl No 8244/78, *Uppal and Others v United Kingdom* (1979) 17 DR 149, but it was also noted that a possible justification for the refusal here could be the abuse of a liberal regime of supervision ie no need to register but they had stayed for many years in clear violation of the immigration laws. For the friendly settlement under which the applicants were allowed to stay, see (1980) 20 DR 29.

²⁸⁵ See *D v United Kingdom*, 30240/96, 2 May 1997 (inhuman treatment would have been inflicted by the removal of an applicant who was in the advanced stages of AIDS where an abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would have hastened his death and subjected him to acute mental and physical suffering). The Court confirmed this to be a very exceptional ruling in *N v United Kingdom* [GC], 26565/05, 27 May 2008 as the following earlier rulings make clear: Appl No 23634/94, *Tanko v Finland*, (1994) 77 DR 133 (not only was there no immediate danger to the applicant's eyesight and so no immediate need for operation but medication was also not shown to be unavailable in the destination country); Appl No 40900/98 *Karara v Finland*, 29 May 1998 (unreported) (illness not at a sufficiently advanced stage); Appl No 43348/98, *M M v Switzerland*, 14 September 1998 (unreported) (although HIV-infected, the applicant was not suffering from any HIV-related illness and the Swiss authorities had offered to meet the cost of his treatment in South Africa, initially for the period of one year, and which would not be required for longer than three years); *S C C v Sweden* (dec.), 46553/99, 15 February 2000 (treatment for AIDS was available in Zambia and the applicant's children and other family members lived there); *Bensaid v United Kingdom*, 4599/98, 6 February 2001 (the applicant would experience difficulties in terms of cost and location in obtaining a medication required for schizophrenia which, together with the stress inherent in returning to an area of his country where there is violence and active terrorism could involve relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning (such as withdrawal and lack of motivation). Nonetheless the fact that access to treatment in that country was not impossible meant that there was no violation of Article 3); *Arcila Henao v Netherlands*, 13669/03, 24 June 2003 (the applicant's illness had not attained an advanced or terminal stage and it was not shown

established where their illness has attained an advanced or terminal stage, or they have no prospect of medical care or family support in his country of origin²⁸⁶. However, the person affected need not be the person being removed²⁸⁷.

208. Expulsion could also result in violations of either this provision or the right to respect for private life under Article 8 where there was a serious risk of the persons concerned suffering an adverse effect on their health²⁸⁸ or their physical or moral integrity²⁸⁹.

209. It is improbable that the expulsion of an irregular migrant would necessarily lead to a violation of Article 1 of Protocol No 1 because, as has been seen the rights entailed in that provision do not encompass any right for someone who owns property in a country of which he is not a national to permanently reside in it in order to use this property²⁹⁰. However, an interference

that he had no prospect of medical care or family support in his country of origin); *Meho and Others v Netherlands*, 76749/01, 20 January 2004 (psychiatric treatment for applicant's condition considered possible in Kosovo, even if not comparable to that in the Netherlands); *Ndangoya v Sweden* (dec.), 17868/03, 22 June 2004 (the applicant's illness had not attained an advanced or terminal stage and it was not shown that he had no prospect of medical care or family support in his country of origin); *Salkic v Sweden* (dec.), 7702/04, 29 June 2004 (health care obtainable even if not as good); *Amegnigan v Netherlands* (dec.), 25629/04, 25 November 2004 (the applicant had not reached the stage of full-blown AIDS and it did not appear that he had no prospect of medical care or family support in Togo, albeit that the treatment would be at a possibly considerable cost); and *Dragan and Others v Germany* (dec.), 33743/03, 7 October 2004 (not shown that treatment could not have been obtained in Romania). See also the friendly settlement in *Tatete v Switzerland*, 41874/98, 6 July 2000, under which an applicant with HIV was allowed to remain rather than be returned to her country of origin.

²⁸⁶ As in *D v United Kingdom*.

²⁸⁷ See Appl No 22802/93, *I F v France*, (1997) 91 DR 10, in which the applicant's child had severe encephalopathy requiring constant care but the case was struck out because of decision not to remove him.

²⁸⁸ See, e.g., *Cardoso and Johansen v United Kingdom*, 47061/99, 5 September 2000 (FS) (impact on health and life expectancy of separation from his long term partner given applicant's health); and *Aronica v Germany* (dec.), 72032/01, 18 April 2002 (not shown that health and fitness to travel was not being properly assessed).

²⁸⁹ It has been envisaged that this could occur in situations such as: adverse effects of discrimination that would be faced (*Tomica v United Kingdom* (dec.), 17837/03, 14 October 2003); family separation (Appl 23159/94, *Dreshaj v Finland*, (1994) 77 DR 126, in which the separation of a child of 16 from part of her family was considered not to amount to the kind of severe ill-treatment proscribed by Article 3); female genital mutilation (*Abraham Lunguli v Sweden*, 33692/00, 1 July 2003, case struck out when not pursued after the applicant being granted a permanent residence permit); lack of care and mental trauma (Appl No 27249/95, *Lwanga and Ali Sempungo v Sweden* (1995) 83 DR 91 and Appl No 27776/95, *A G and Others v Sweden*, (1995) 83 DR 101, in which it was alleged that the removal of certain minors would expose them to a lack of care in their country of origin and that the threat of removal would cause them mental trauma but these risks were addressed by making arrangements for them to be met by an embassy representative and a representative of local child welfare authority and by the need for the prior approval of the chief physician before they could be removed); possible impact on mental health (*Bensaid v United Kingdom*, 44599/98, 6 February 2001, in which the risk based on largely hypothetical factors and dislocation caused by removal after a stay lasting eleven years not considered to have a sufficiently substantial impact on moral integrity of applicant); risk of suicide, especially on account of return to a country in which torture or inhuman and degrading treatment was allegedly inflicted (Appl No 7237/75, *X v Denmark*, (1976) 5 DR 144, Appl No 20547/92, *D and Others v Sweden*, (1993) 74 DR 252, *Andric v Sweden* (45917/99), 23 February 1999, *Pavlovic v Sweden* (45920/99), 23 February 1999 AD), *Maric v Sweden* (45922/99), 23 February 1999, *Andrijic v Sweden* (45923/99), 23 February 1999, *Juric v Sweden* (45924/99), 23 February 1999, *Pranjko v Sweden* (45925/99), 23 February 1999, *Akyuz and Others v Germany* (dec.), 58388/00, 28 September 2000, *Velasquez v United Kingdom* (39352/98), 11 September 2001 (FS), *Ammari v Sweden* (dec.), 60959/00, 22 October 2002, *Dragan and Others v Germany* (dec.), 33743/03, 7 October 2004 and *Ovihangy v Sweden*, 44421/02, 9 March 2004 (struck out as the applicant was allowed to stay)); and the trauma that would result from return to a country where the applicant had allegedly been previously tortured (*Cruz Varas v Sweden*, 15576/89, 20 March 1991). The claims in these cases were either considered not to have been substantiated or, particularly where there was a risk of suicide, there were appropriate precautionary measures (including a medical veto at the relevant time) to prevent removal occurring in the event of there being a real risk. Considerable mental stress was not considered in *Nasimi v Sweden* (dec.), 38865/02, 16 March 2004 to meet the threshold required for a violation of Article 3 but there was also some arrangement to stop removal if serious mental health problems did arise. Moreover in *F v United Kingdom* (dec.), 17341/03, 22 June 2004, the return of the applicant to live in a country where he would have been subject to ban against adult homosexual adult consensual relations was not considered sufficient to establish a violation of Article 3.

²⁹⁰ *Ilic v Croatia* (dec.), 42389/98, 19 September 2000.

with the property, or any taking of it, in the irregular migrant's absence could result in a violation of that provision if its requirements are not observed²⁹¹.

210. A permanent denial of re-entry as a concomitant of expulsion would only ever result in the person concerned losing all effective control over it, thereby giving rise to a violation of Article 1 of Protocol No 1, if this meant that dealings with the property from outside the country (e.g., for the purpose of sale) were legally or practically impossible²⁹².

211. Insofar as an irregular migrant being removed is unable to make arrangements for his or her possessions to accompany him or her, there will be an obligation arising from the right to the peaceful enjoyment of possessions under Article 1 of Protocol No 1 to protect them where they are known to be at risk of being damaged, destroyed or illegally taken following the expulsion until they can be returned to the migrant concerned²⁹³.

212. The mere fact of expulsion is likely to be found to be inhuman and degrading treatment contrary to Article 3 where such a measure can be viewed as no more than an arbitrary, unjustified or disproportionate punishment for something done or not done by the person being removed²⁹⁴. A similar view might be taken of an expulsion that was clearly motivated by racial or religious considerations.

213. Furthermore the removal of migrants will be incompatible with the European Convention where there is a serious risk of its rights and freedoms being violated in the country to which they will have to go following expulsion. Insofar as the removal would run that risk and would also entail differential treatment on inadmissible grounds, there would additionally be a violation of Article 14 in conjunction with the relevant provision²⁹⁵.

214. The European Court has made it clear that a person facing expulsion cannot demand that he or she only be returned to a country which is in full and effective enforcement of all the rights and freedoms set out in the European Convention²⁹⁶. Nevertheless there are a number of situations in which it has accepted that the consequence of expulsion for the enjoyment of these rights and freedoms would be such as to render that expulsion a violation of some of that instrument's provisions. However, it must be emphasised that acceptance of the principle is more common than successful persuasion of the European Court that expulsion would have that effect in the particular applications brought before it. In addition the European Court has made it clear that the case of some rights and freedoms the violation anticipated would have to be of a particularly exceptional character.

215. A mere possibility of a violation of European Convention rights and freedoms in the country to which the person being removed will go would be insufficient to engage the responsibility of the High Contracting Party removing him or her; there must be evidence of a serious risk that such

²⁹¹ There may even be an obligation to protect property that is known to be at risk of being damaged where its owner is not able to have possession of it; see *Raimondo v Italy*, 12954/87, 22 February 1994.

²⁹² This possibility did not have to be explored in *Ilic* as the applicant had not availed herself of the possibility of applying for an entry visa which would be valid for three months and could be extended for a year. For an instance of a practical impossibility of dealing with property leading to a violation of Article 1 of Protocol No 1, see *Loizidou v Turkey*, 15318/99, 18 December 1996, which concerned the foreign occupation of a part of a country's territory.

²⁹³ See *Raimondo v Italy*, 12954/87, 22 February 1994.

²⁹⁴ See Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164, in which it was not shown that the authorities' intention was to punish the applicant rather than to protect national security.

²⁹⁵ See Appl No 40900/98, *Karara v Finland*, 29 May 1998 (unreported), in which this was not established.

²⁹⁶ *F v United Kingdom* (dec.), 17341/03, 22 June 2004.

a violation will occur²⁹⁷. Thus the claims of the person being removed must be sufficiently substantiated and reliable.

216. The material time for assessing the risk will be when the expulsion is actually to take place so that any conclusions reached on this matter when taking the decision to remove someone will always need to be subject to a meaningful review at this later stage²⁹⁸.

217. In assessing the existence of a risk account should be taken of the legislation in the country concerned (are certain penalties or restrictions specifically prescribed?), reliable sources regarding actual practice (including both the findings of international tribunals and monitoring bodies and reports of non-governmental organisations) and the past experience of the person being removed and of his or her family members, as well as of other persons following their expulsion²⁹⁹.

218. The establishment of a risk with regard to one part of a country will not preclude the possibility of none existing in other parts so that the option of some form of internal flight would mean that there is no obstacle to the expulsion of the person concerned. However, a realistic assessment of the availability of such an option must be undertaken³⁰⁰.

219. Some significance in evaluating the degree of risk may also be attached to the fact that the person concerned, if removed, would go to another High Contracting Party and thus have the benefit of the protection afforded by the European Convention machinery³⁰¹.

220. The activities of the individual in question, however undesirable or dangerous, cannot be a material consideration where absolute obligations such as those under Article 3 are involved³⁰².

221. The following risks to European Convention rights and freedoms consequent upon a person's removal could entail a finding that they have been violated, of which those concerned with life, health and well-being, ill-treatment, slavery and family and private life are considered by the European Court to be the most significant:

- *Fair hearing* - it is possible that the expulsion of someone may be followed by him or her being subjected to criminal proceedings in which some of the requirements of a fair hearing in

²⁹⁷ *Vilvarajah and Others v United Kingdom*, 13163-5/87, 133447/87 and 13448/87, 30 October 1991.

²⁹⁸ *Cf Jabari v Turkey*, 40035/98, 11 July 2000, in which there had been an automatic and mechanical application of a short time-limit of five days for submitting an asylum application which was thus rejected as out of time, only the UNHCR who interviewed the applicant about the background to her asylum request and the judicial procedure was unable to go beyond the issue of the formal legality of her removal and examine the substance of her fears; on which see further paragraphs 395-410.

²⁹⁹ Extensive publicity about the person being removed could also be a factor that aggravates any risk suggested by other factors; *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996

³⁰⁰ This was not considered to be a reliable safeguard against ill-treatment in *Chahal v United Kingdom*, 22414/93, 15 November 1996 and *Hilal v United Kingdom*, 45276/99, 6 March 2001; in both cases this was because violations of human rights were generalised but also in *Hilal* because of the possibility of extradition between different parts of the country.

³⁰¹ See, e.g. Appl No 12543/86, *K and F v Netherlands*, (1986) 51 DR 272; Appl Nos 28152/95 and 28153/95, *Popescu and Cucu v France*, 11 September 1995 (unreported); and *Tomic v United Kingdom* (dec.), 17837/03, 14 October 2003. The availability of other international mechanisms – such as under the First Optional Protocol to the International Covenant and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – may be seen as affording less of a guarantee against a violation of rights and freedoms because of disputes as to whether their rulings are legally binding.

³⁰² Appl No 31113/96, *Urrutikoetxea v France* (1996) 87 DR 150; Appl No 32829/96, *Iruretagoyena v France*, (1998) 92 DR 99; *Chahal v United Kingdom*, 22414/93, 15 November 1996; and *Ahmed v Austria*, 25964/94, 17 December 1996. This would equally be the case with a risk that might be considered by some as having been 'self-inflicted', such as the lack of care for an illness contracted by the person being removed as a result of his or her own conduct; see *D v United Kingdom*, 30240/96, 2 May 1997 and also *B B v France*, 30930/96, 7 September 1996, with regard to persons infected with HIV.

Article 6 are not respected. However, it is only where a flagrant denial of justice is the foreseeable consequence of expulsion that the European Court will conclude that allowing this to take place will entail a violation of Article 6 by a High Contracting Party concerned³⁰³. Defects in procedure are particularly likely to involve a flagrant denial of justice where the person is at risk of being sentenced to death but where this is not involved even potentially significant breaches of the standards set by Article 6 may not be enough to satisfy the flagrant denial of justice test³⁰⁴. As with all challenges to expulsion based upon Convention rights and freedoms, the imputability of such an occurrence to the High Contracting Party responsible for the expulsion would be dependent upon it having substantial grounds for believing that the flagrant denial of justice would be the necessary consequence of its action³⁰⁵. This will obviously turn upon the information available to it at the time and the likelihood of someone being denied a fair hearing might be more foreseeable where a person is being returned to a particular country under an extradition arrangement than in proceedings not specifically directed to securing that he or she is brought to trial³⁰⁶;

- *Ill-treatment* - a violation of Article 3 would occur if a person's expulsion would give rise to a serious risk of him or her being intentionally subjected by the authorities in the country to which he or she would be sent to torture or, more commonly, inhuman and degrading treatment contrary to that provision³⁰⁷. This prohibition on expulsion applies notwithstanding that the person concerned is involved in international terrorism and could be a threat to the country wishing to expel him or her³⁰⁸. Amongst the factors to which such a risk is likely to be attributed will be the past or current political activities or beliefs of the person concerned³⁰⁹, his or her membership (or supposed membership) of an armed rebel or separatist group³¹⁰, or his or her race, religion, language or ethnic characteristics³¹¹. It may also be a consequence of reprisals expected to be taken by intelligence or law enforcement agencies³¹² and certainly the list of reasons for ill-treatment can never be regarded as closed. There is no requirement that the risk be posed only by public authorities or those working for them; where it is alleged to arise from the anticipated behaviour of private individuals, the crucial issue will be whether or not the authorities of the receiving State

³⁰³ See, e.g., *Drozd and Janousek v France and Spain*, 12747/87, 26 June 1992 and *Mamatkulov and Askarov v Turkey* [GC], 46827/99, 4 February 2005.

³⁰⁴ See *F v United Kingdom* (dec.), 17341/03, 22 June 2004, *Öcalan v Turkey* [GC], 46221/99, 12 May 2005 and *Bader and Others v Sweden*, 13284/04, 8 November 2005. Cf the finding in *Nivette v France* (dec.), 44190/98, 3 July 2001 of a complaint about the inability to pay for a lawyer in death penalty proceedings because it was considered that there was no danger of the applicant being sentenced to death if extradited.

³⁰⁵ *Mamatkulov and Askarov v Turkey* [GC], 46827/99, 4 February 2005. The risk of an arbitrary and unfair trial was not addressed in *Hilal v United Kingdom*, 45276/99, 6 March 2005 as a result of finding that removal would expose the applicant to risk of ill-treatment contrary to Article 3.

³⁰⁶ As in *Mamatkulov*. Cf *Einhorn v France* (dec.), 71555/01, 16 October 2001 (no risk of a flagrant denial of justice as sufficient procedural safeguards considered to exist); *Tomic v United Kingdom* (dec.), 17837/03, 14 October 2003 (measures had been taken to deal with abuses, the receiving State was a party to the European Convention and there was no concrete indication that the applicant was likely to be arrested as a suspected perpetrator of war crimes); and *F v United Kingdom* (dec.), 17341/03, 22 June 2004 (a lack of evidence that the applicant would be prosecuted for consensual and private homosexual relationship). Where a migrant or asylum-seeker has been convicted of an offence in the removing country, the fact that there is a risk of him or her being tried and punished for the same offence in the country to which he or she has to return is not a basis for objecting to expulsion as the prohibition on double jeopardy in Article 4 of Protocol No 7 does not apply to trial and punishment by the courts of different States; *S R v Sweden* (dec.), 62806/00, 23 April 2002.

³⁰⁷ This is also expressly prohibited with respect to the risk of torture by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁰⁸ *Saadi v Italy* [GC], 37201/06, 28 February 2008.

³⁰⁹ See, e.g., *J E D v United Kingdom* (dec.), 42225/98, 2 February 1999; *Ismaili v Germany* (dec.), 58128/00, 15 March 2001; *Ammari v Sweden* (dec.), 60959/00, 22 October 2002; and *Said v Netherlands*, 2345/02, 5 July 2005.

³¹⁰ See *Ahmed v Austria*, 25964/94, 17 December 1996; *K K C v Netherlands*, 58964/00, 21 December 2001 (FS); and *Tomic v United Kingdom* (dec.), 17837/03, 14 October 2003.

³¹¹ See, e.g., *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996; Appl No 40900/98, *Karara v Finland*, 29 May 1998 and *Pranjko v Sweden* (dec.), 45925/99, 23 February 1999.

³¹² See Appl No 7317/75, *Lynas v Switzerland* (1976) 6 DR 141 and *Chahal v United Kingdom*, 22414/93, 15 November 1996.

are in a position to provide appropriate protection and are in fact willing to do so³¹³. Furthermore due account must be taken of the possibility of such ill-treatment being inflicted in a third country when there is a risk of the onward removal to it of the person concerned from the country to he or she will initially be sent³¹⁴. The circumstances pointing to a risk of ill-treatment must normally concern the individual facing expulsion and so just being member of a group that is generally at risk will not be enough where the situation of the person concerned would be no worse than other members of it³¹⁵. Equally difficult or unsettled conditions, even those arising from a civil war, in the country to which someone being removed would have to go will not be enough to lead to a conclusion that his or her expulsion would entail a violation of Article 3³¹⁶. However, discrimination by reference to ethnic origin, race and religion affecting an enclaved minority who were the object of very severe restrictions curtailing the exercise of basic freedoms (including family and private life and religion) such that the conditions under which the population was condemned to live were debasing and violated the very notion of respect for the dignity of its members has been found to be a violation of Article 3³¹⁷ and expulsion that would put the person in such a situation would probably be similarly characterised. There would also be a violation of Article 3 if expulsion would expose the person concerned to the risk of being subjected to penalties that either entail humiliation going significantly beyond the fact of being convicted or being sent to prison³¹⁸ or involve the use of a method of punishment giving rise to a high level of suffering. Thus expulsion where there is a prospect of being stoned, flogged and whipped has been regarded as contrary to Article 3³¹⁹ and a similar view is likely to be taken of expulsion where this would lead to the person concerned facing a sentence of imprisonment that would truly be for life or indefinite³²⁰. The European Court considers that it may be prevented from finding the implementation of the death penalty to be inhuman and degrading treatment until all High

³¹³ See *Ahmed v Austria*, 25964/94, 17 December 1996 (in which the lack of State authority meant that the person being removed could not be protected against ill-treatment on his return to Somalia) and *N v Finland*, 38885/02, 26 July 2005 (in which it was found the authorities in the Democratic Republic of Congo might not be able or willing to protect someone such as the applicant who had been a member of the special force responsible for protecting the former president from dissidents seeking revenge). Cf *H L R v France*, 24573/94, 29 April 1997, in which it was held that it had not been shown that the Colombian authorities would be incapable of affording the applicant appropriate protection against drug traffickers on whom he had informed. See also Appl No 12461/86, *Y H v Federal Republic of Germany*, (1986) 51 DR 258 (in which it was alleged that the return of the applicant, as the wife of a Palestinian, would expose her to attacks by competing militia); *Vouloffvitch, Oulianova and Vouloffvitch v Sweden*, (1993) 74 DR 199 (alleged persecution on account of collaboration with former intelligence agency); and *Gonzalez v Spain* (dec.), 43544/98, 29 June 1999 (an extradition case, in which a threat from drug traffickers as a result of co-operation with the authorities was found not to have been substantiated).

³¹⁴ See, e.g., *Andric v Sweden* (dec.), 45917/99, 23 February 1999 and *T I v United Kingdom* (dec.), 43844/98, 7 March 2000.

³¹⁵ *Vilvarajah and Others v United Kingdom*, 13163-5/87, 133447/87 and 13448/87, 30 October 1991. See also Appl 23159/94, *Dreshaj v Finland*, (1994) 77 DR 126; *Sinnarajah v Switzerland* (dec.), 45187/99, 11 May 1999; *Damla and Others v Germany* (dec.), 61479/00, 26 October 2000; *Akyuz and Others v Germany* (dec.), 58388/00, 28 September 2000; *Katani v Germany* (dec.), 67679/01, 31 May 2001; *Thampibillai v Netherlands*, 61350/00, 17 February 2004; *Venkadaajalasarma v Netherlands*, 58510/00, 17 February 2004; and *Berisha and Haljiti v "the former Yugoslav Republic of Macedonia"* (dec.), 18670/00, 16 June 2005).

³¹⁶ See Appl 35984/97, *Medjden v Germany*, 31 October 1997 (general situation in Algeria) and *Tomic v United Kingdom* (dec.), 17837/03, 14 October 2003 (reliance on repossession of property by returning refugees and recognition of documents and papers from the period of conflict, which causes difficulties in obtaining pensions and jobs). Although the applicant in *Ahmed v Austria* (25964/94), 17 December 1996 would have had to return to a country in the midst of a civil war, the crucial consideration in finding that his removal would entail a violation of Article 3 was his supposed membership of one of the rival clans involved in that war.

³¹⁷ *Cyprus v Turkey*, 25781/94, 10 May 2001.

³¹⁸ Such as the relatively public infliction of judicially-sanctioned corporal punishment condemned in *Tyrer v United Kingdom*, 5856/72, 25 April 1978.

³¹⁹ *Jabari v Turkey*, 40035/98, 11 July 2000, which concerned the removal of a person who had had a relationship in Iran involving sexual relations with a married man and thus was at risk of being subjected to these penalties if returned there.

³²⁰ See *Gonzalez v Spain* (dec.), 43544/98, 29 June 1999 (an extradition case); *Einhorn v France* (dec.), 71555/01, 16 October 2001; and *Nivette v France* (dec.), 44190/98, 3 July 2001.

Contracting Parties have signed and ratified Protocol No 13³²¹ but this is probably of no great significance given the general commitment of High Contracting Parties not to execute anyone in time of peace under Protocol No 6³²². In any event expulsion would be considered contrary to Article 3 where it would expose the person concerned to a real risk of suffering a long period of strict incarceration with the ever present and mounting anguish of awaiting execution of the death penalty³²³ or uncertainty about when, where and how the execution would be carried out³²⁴. There would also be a violation of Article 3 if there was a risk of the person being removed then being subjected to poor conditions of detention in the country to which he or she would go³²⁵. In addition such a violation is likely to be regarded as occurring where an individual whose identity it was impossible to establish is repeatedly removed to a country where his or her admission is not guaranteed³²⁶. However, such a finding is not likely if the person concerned shows an uncooperative attitude³²⁷ or has returned to the country from which he or she is being repeatedly removed of his or her own free will³²⁸.

- *Liberty* - So far there is no definitive indication as to whether the European Court would regard the removal of someone notwithstanding the prospect of arbitrary detention in another State for the person being removed as entailing a violation of Article 5 for the High Contracting Party concerned. However, such a finding is unlikely to be made other than in those instances where a flagrant breach of the requirements of that provision is clearly foreseeable³²⁹.
- *Life* - The guarantee of the right to life is principally directed to situations in which persons could be deprived of life intentionally or as a consequence of a use of force by the authorities of the State in which a person is present but it is now well-established that Article 2 can be engaged where a High Contracting Party puts someone at serious risk of losing his or her life as a consequence of effecting his removal to another State. It is not a prerequisite for establishing a violation of this provision that the death of the person concerned actually follows the expulsion; it is sufficient that at the time of the expulsion there were substantial grounds for believing that this would be the consequence of such a measure. So far, in the instances where such a consequence has been alleged, the European Court or the European Commission has not been persuaded that the degree of risk required has been demonstrated. Nevertheless it has been recognised as capable of existing in situations where there is a serious risk that the expulsion would result in the loss of

³²¹ *Öcalan v Turkey* [GC], 46221/99, 12 May 2005; cf Appl No 6315/73, *X v Federal Republic of Germany*, (1974) 1 DR 73 (person sentenced to death in country of nationality but ruling unclear whether the alleged risk related to the possibility of execution or other treatment contrary to Article 3) and Appl No 18807/91, *L v France*, (1993) 74 DR 162 (execution for drug trafficking). The issue was not addressed in *Bader and Others v Sweden*, 13284/04, 8 November 2005.

³²² Only Monaco and Russia have yet to convert their signature of the protocol into ratifications. However, such a conclusion might be reached about certain methods of execution which involve a high level of suffering.

³²³ The 'death row phenomenon'; see Appl 10479/83, *Kirkwood v United Kingdom*, (1984) 37 DR 158 and *Soering v United Kingdom*, 14038/88, 7 July 1989 (both extradition cases). Certain characteristics of the individual concerned, such as age and mental state, will be relevant consideration in determining the possible effect of such incarceration.

³²⁴ *Bader and Others v Sweden*, 13284/04, 8 November 2005.

³²⁵ Appl No 9012/80, *X v Switzerland* (1980) 24 DR 205 and *Ismaili v Germany* (dec.), 58128/00, 15 March 2001.

³²⁶ Appl No 7612/76 *Giama v Belgium*, (1980) 21 DR 73; Appl 10400/83, *Z v Netherlands*, (1984) 38 DR 145; and Appl No 10798/84, *Harabi v Netherlands* (1986) 46 DR 112.

³²⁷ Appl 10400/83, *Z v Netherlands*, (1984) 38 DR 145; the applicant had presented seven different identities and nationalities to the authorities.

³²⁸ Appl No 10798/84, *Harabi v Netherlands* (1986) 46 DR 112, in which the European Commission considered that the applicant, who could also have gone to Algeria, was primarily responsible for the situation complained of, notwithstanding that the Dutch authorities had not been very active in trying to find a solution to his problems.

³²⁹ A claim that the system of the receiving State did not even contemplate the legal safeguards of Article 5 was found admissible in Appl No 28038/95, *M A R v United Kingdom*, 16 January 1996 and in *Tomic v United Kingdom* (dec.), 17837/03, 14 October 2003 it was suggested that the flagrant level would be a prerequisite for any finding of a violation of that provision but the issue of whether a violation could occur in the case of removal where there was a risk of arbitrary detention was left open in *F v United Kingdom* (dec.), 17341/03, 22 June 2004.

access to medical treatment that would significantly curtail the span of someone's life³³⁰, extrajudicial execution or killing³³¹ and execution pursuant to sentence to death when Article 2 is taken either with the guarantee of a fair hearing under Article 6³³² or the prohibition on capital punishment in Protocol Nos 6 and 13³³³. The creation of a risk to life as a result of expulsion may also be treated as a violation of the prohibition of inhuman and degrading treatment in Article 3³³⁴.

- *Religion* - It is possible that expulsion to a country where a person could not practice his or her religion might result in a violation of Article 9 but this is also likely to be a consequence of persecution which would probably already entail a violation of Article 3³³⁵.
- *Slavery* - It has also been accepted that the expulsion of a person to a country where there is an officially recognised regime of slavery could raise an issue of compliance with both Articles 3 and 4³³⁶.

222. Admissible restrictions on European Convention rights and freedoms must always be based on legal provisions that meet the requirements of lawfulness established by the European Court. These not only entail that there be a formal legal provision allowing the expulsion but it must be formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct and it must be subject to a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the European Convention. It is essential, therefore, that the law indicates the scope of any discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity.

223. Action taken to remove migrants must not breach the prohibition in Article 4 of Protocol No 4 on the collective expulsion of aliens. Such expulsion will be regarded as occurring where any measure is taken to compel aliens as a group to leave the country unless it has been taken after and on the basis of a reasonable and objective examination of the particular case of each individual

³³⁰ See *Ndangoya v Sweden* (dec.), 17868/03, 22 June 2004, in which it had been submitted that without treatment an applicant who was HIV positive would develop AIDS within 1 to 2 years and be dead within 3 to 4 years. However, his removal to Tanzania was not considered problematic as adequate treatment was available there, albeit at a considerable cost. Furthermore, while it was true that treatment might be difficult to come by in the countryside where the applicant would have preferred to live upon return, he was at liberty to settle at a place where medical treatment is available and it appeared that treatment could probably be obtained in a town where he had once lived. Moreover he had previously resided in Tanzania at a time when he was already carrying the HIV infection. See the similar conclusion in *S C C v Sweden* (dec.), 46553/99, 15 February 2000. See also the friendly settlement in *Tatete v Switzerland*, 41874/98, 6 July 2000, under which an applicant with HIV was allowed to remain rather than be returned to her country of origin.

³³¹ See Appl No 7317/75, *Lynas v Switzerland* (1976) 6 DR 141 (the possibility of reprisal action by an intelligence agency was not substantiated) and *Muslim v Turkey* (dec.), 53566/99, 1 October 2002, in which it was alleged that removal could lead to the applicant being killed by officials of the governing Baath party in Iraq; the matter was not pursued in the judgment on the merits on 26 April 2005 after it was found that it was not substantiated that removal would lead to a violation of Article 3. See also Appl No 28038/95, *M A R v United Kingdom*, 16 January 1996 (in which the matter was considered to require examination of the merits but which did not then occur); *Gonzalez v Spain* (dec.), 43544/98, 29 June 1999 (an extradition case) (threat from drug traffickers as a result of co-operation with the authorities – not substantiated); and *Shamayev and 12 Others v Georgia and Russia*, 36378/02, 12 April 2005 (in which the risk was not substantiated).

³³² *Öcalan v Turkey* [GC], 46221/99, 12 May 2005 and *Bader and Others v Sweden*, 13284/04, 8 November 2005.

³³³ It was not considered necessary to address the issue in *Bader and Others v Sweden*, 13284/04, 8 November 2005 but there is some support for this view in Appl No 16531/90, *Y v Netherlands*, (1991) 68 DR 299; Appl No 22742/93, *Aylor-Davis v France*, 20 January 1994 (unreported); Appl No 22903/93, *D R v France*, (1994) 76 DR 174; Appl No 22408/93, *H v Sweden*, (1994) 79 DR 85; Appl No 32025/96, *Kareem v Sweden*, (1996) 87 DR 173; *Nivette v France* (dec.), 44190/98, 14 December 2000; *Ismaili v Germany* (dec.), 58128/00, 15 March 2001; and *S R v Sweden*, (dec.), 62806/00, 23 April 2002. See also the friendly settlement of such a complaint in *Razaghi v Sweden*, 64599/01, 25 April 2005, whereby the applicant was granted permanent residence.

³³⁴ Appl No 22903/93, *D R v France*, (1994) 76 DR 174,

³³⁵ The latter was the head of complaint considered appropriate in the admissibility decision in *Razaghi v Sweden*, 64599/01, 11 March 2003. The issue had been left open in *Katani v Germany* (dec.), 67679/01, 31 May 2001.

³³⁶ *Ould Barar v Sweden*, 42367/98, 19 January 1999, in which the risk of such treatment was not substantiated.

alien in the group³³⁷. The fact that a number of aliens receive similar decisions will not lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis³³⁸.

224. However, even where this has occurred, the prohibition could still be breached by the manner of the actual expulsion if the circumstances of each individual are not considered³³⁹.

225. As has already been seen³⁴⁰, the use of force where this is not otherwise incompatible with European Convention rights and freedoms can be a legitimate exercise of the right of a High Contracting Party under international law to control admission to its territory and it may, therefore, be used to effect someone's removal. The right to life and the prohibition on inhuman and degrading treatment will, however, operate as important limits on the means of restraint that may be employed. Moreover the particular susceptibilities of individuals to harm as a result of using certain techniques should always be considered before this occurs.

226. It is unlikely that the use of handcuffs, particularly if resistance to removal is anticipated³⁴¹, but this should not occur in circumstances that can be expected to debase or humiliate the person concerned³⁴². This could mean that the person being removed should not be brought onto the boat, bus, plane or train in the view of other passengers while subject to this form of restraint.

³³⁷ See *Conka v Belgium*, 51564/99, 5 February 2002 and *Berisha and Haljiti v "the former Yugoslav Republic of Macedonia"* (dec.), 18670/00, 16 June 2005. See also the friendly settlement, involving compensation and the revocation of decrees of removal, in *Sulejmanovic and Others and Sejdivic & Sulejmanovic v Italy*, 57574/00 and 57575/00) 8 November 2002 after the applicants had been woken and taken from the camp where they were living to a police station to verify their identity and removed after it was established that they were illegally present in the country. Individual consideration of the position of members of groups and the ability to put arguments against removal was found to have occurred in Appl No 7011/75, *Becker v Denmark* (1975) 4 DR 215; Appl No 14209/88, *A and Others v Netherlands*, (1988) 59 DR 274; *Andric v Sweden* (dec.), 45917/99, 23 February 1999; *Majic v Sweden* (dec.), 45918/99, 23 February 1999; *Pavlovic v Sweden* (dec.), 45920/99, 23 February 1999; *Maric v Sweden* (dec.), 45922/99 23 February 1999; *Andrijic v Sweden* (dec.), 45923/99, 23 February 1999; *Juric v Sweden* (4dec.), 5924/99, 23 February 1999; *Pranjko v Sweden* (dec.), 45925/99, 23 February 1999; and *Vikulov and Others v Latvia* (dec.), 16870/03, 25 March 2004.. See also the concession in *Bolat v Russia* (14139/03), 8 July 2004 (AD) that the procedural guarantees in Article 1 of Protocol No 7 were not observed but the consideration by the European Court that an examination of the merits was nonetheless required.

³³⁸ Nor would the making of one decision in respect of two spouses who had jointly made an asylum application on the same grounds and used the same evidence to backup their allegations where the authorities had evaluated the risk of being removed for both of them jointly; *Berisha and Haljiti v "the former Yugoslav Republic of Macedonia"* (dec.), 18670/00), 16 June 2005.

³³⁹ See *Conka v Belgium*, 51564/99, 5 February 2002, in which a violation of Article 4 of Protocol No 4 was found to have occurred when the orders to leave the territory being enforced referred only to a stay in excess of three months and made no reference to earlier orders made following unsuccessful applications for asylum. The European Court considered that: "In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective. That doubt is reinforced by a series of factors: firstly, prior to the applicants' removal, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation ...; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed. In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their removal did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account" (paragraphs 61-63).

³⁴⁰ See paragraphs 151-2.

³⁴¹ See *Ntumba Kabongo v Belgium* (dec.), 52467/99, 2 June 2005, in which the keeping of the applicant in isolation in a cellar on the day before she was supposed to leave and then locking up at airport with her hands tied behind her was not addressed.

³⁴² A limitation recognised in *Raninen v Finland*, 20972/92, 16 December 1997.

227. It is likely that expulsion involving a young child being sent unaccompanied to another country would be found to constitute treatment contrary to Article 3³⁴³, as might a failure to ensure that he or she is met on arrival³⁴⁴. There would need to be particular care to ensure that arrangements for the welfare of such a child should not be handed over to a private company or an individual who is not likely to prove reliable³⁴⁵ and haste in making the necessary arrangements should be avoided because this could exacerbate the possibility of them proving inadequate³⁴⁶.

Conclusion

228. The provisions of general human rights treaties go a considerable way towards securing access to justice in its substantive sense for migrants. It is important to note that the vast majority of their requirements are already binding on members of the Council of Europe. Furthermore many of the provisions can protect the position of even migrants whose position is irregular. Certainly they would be entitled to at least a minimum level of social protection. In addition these provisions have a considerable amount to offer to many in the process of migration or at risk of having their stay in a country terminated. However, the provisions securing these rights for migrants are framed in general terms and often without any specific reference to their situation. Much depends, therefore, on the issues actually raised before the bodies responsible for supervising their application - which may not be dictated by the scale of a particular problem faced by migrants - and the interpretation that those bodies give to the provisions concerned.

D. Conclusion

229. It is evident that at the formal level migrants have a considerable array of rights, many of them in common with the nationals of the country to which they have moved or are seeking to move but their nationality (or lack of it) may exclude them from the enjoyment of certain rights, either indefinitely or subject to their acquiring a certain status (e.g., being recognised as a refugee).

230. However, all these different rights are not universally accepted by Council of Europe member states, whether because certain of them have not ratified particular instruments or because they are not members of a grouping (such as the European Union) that have adopted them.

IV. THE SCOPE OF RIGHTS OF ACCESS TO JUSTICE

231. Some of the regional and international instruments that are specifically concerned with the position of migrants have guarantees relevant to their ability to secure access to justice in the procedural sense. However, apart from the protection afforded to European Union nationals who have exercised their right to freedom of movement as Union citizens, the most significant provisions requiring and facilitating such access are to be found in the more general human rights treaties and, of these, the most substantial in practice is the European Convention on Human

³⁴³ See *Nsona and Nsona v Netherlands*, 23366/94, 28 November 1996, in which it appeared that at some point in the journey a nine-year old girl being removed became separated from the person travelling with her but this could not be attributed to the State removing her.

³⁴⁴ The arrangements were considered adequate in *Nsona and Nsona*.

³⁴⁵ The approach of the Netherlands was considered by the European Court to be open to criticism in *Nsona and Nsona*.

³⁴⁶ As to the contribution of haste over removal in bringing about a violation of European Convention rights, see also n° 277.

Rights. This protection is based both on a general right of access to court and a number of procedural guarantees for specific rights found in these treaties, as well as on the implementation mechanisms established by some of these treaties³⁴⁷. In addition access to justice may be assisted by undertakings made in certain treaties with provisions relating to consular assistance and a number of other Council of Europe treaties.

A. Treaties concerned with migrants

232. In the treaties that are especially concerned with the situation of migrants there is generally a requirement that they be broadly in the same position as nationals as regards legal proceedings. While in some there tends to be a lack of specificity as to the scope of this equivalence, others deal expressly with issues relating to the provision of information, counselling, legal representation and even consular assistance.

The Refugee and Stateless Persons Conventions

233. Both the Refugee Convention and the Stateless Persons Convention provide that the persons covered by them - should have "free access to the courts of law on the territory of all Contracting States"³⁴⁸. In both instances this guarantee is elaborated to provide that in the country in which they have their habitual residence they should enjoy "the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*" but in other countries they should be accorded "the treatment granted to a national of the country of [their] ... habitual residence"³⁴⁹.

234. Such a guarantee is one of equal treatment but does not give any indication of the substantive content of what this entails, other than the rather non-specific reference to "legal assistance" and the more specific exemption from any requirement to provide security for costs. Its scope has not been elaborated in international case law and it will in any event vary from state to state depending upon the extent to which nationals (or nationals from the country of habitual residence) are assured a right of access³⁵⁰. This latter consideration and the absence of much national case law concerned with these two guarantees makes the elaboration of the right of access to court in the case law concerned with general human rights treaties - discussed below³⁵¹ - all the more significant for migrants who are refugees or stateless persons as this will effectively set the standard to be met when fulfilling the requirements of the Refugee Convention and the Stateless Persons Convention regarding such access³⁵².

235. Nonetheless the requirement of same treatment regarding access to court as that of nationals (or nationals from the country of habitual residence) undoubtedly means more than having the

³⁴⁷ The United Nations General Assembly, in its Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live, has also stated that aliens should enjoy "the right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings"; Article 5(1)(c) of resolution 40/144 of 13 December 1985.

³⁴⁸ Article 16(1) of both conventions.

³⁴⁹ Article 16(2) and (3) of both conventions.

³⁵⁰ See, e.g., *Fliegelman v Pinsley and Others*, 1972 ILR 143, in which the Court of Appeal of Paris held that Article 16 did not grant a stateless person a right to require a foreign opponent to furnish security for costs as this was a privilege of nationality. Such a ruling might have to be revisited in the light of other guarantees against discrimination but it highlights the far from comprehensive nature of the guarantee being afforded to refugees and stateless persons.

³⁵¹ See paragraphs 329-50.

³⁵² It should also be noted that nothing in the two conventions is to be deemed to impair any rights and benefits granted by a Contracting State to refugees and stateless persons apart from those two conventions; Article 5 in both cases.

same formal entitlement to bring proceedings; it must extend to the practicalities of instituting them as well. This would certainly have implications for the use of remote areas to house migrants who are refugees or stateless persons³⁵³.

236. It should also be noted that the formulation of the guarantee and its location in a part of both conventions that is concerned with "Juridical Status" point to it being concerned essentially with civil litigation, although the guarantee could well be construed as embracing constitutional and administrative challenges in the courts as well. However, there does not seem to be any systematic analysis of national practice on this point, which may either mean that this wider construction of the relevant provisions has indeed been adopted or that the issue does not arise because national law does not block the bringing of such challenges by non-nationals. Nevertheless it is doubtful whether the access to court guarantee in the two conventions has any relevance to access to justice in the context of criminal proceedings.

237. Furthermore neither the Refugee Convention nor the Stateless Persons Convention provides any explicit guarantees concerning access to court as regards the actual determination by national authorities of the status of refugee or stateless person. The absence of such a guarantee reflects the fact that these conventions are concerned only with the position of persons having that status. Nonetheless such a status should be seen as an objective fact given the international standards as to the entitlement to it. There would, therefore, be a breach of the obligation undertaken in ratifying these two conventions if an asylum-seeker or someone claiming to be stateless actually fulfilled the relevant criteria for either status was not accorded the right of access to court which they provide because their entitlement under them had not yet been recognised by the relevant national authorities. However, national practice does not generally appear to treat applicants for either status as having it until there has been a favourable decision. In any event such an interpretative approach would not assist a migrant who claimed to be a refugee or a stateless person but was not actually one.

238. The Refugee Convention and the Stateless Persons Convention do, however, provide that any decision to expel a refugee or stateless person must be "reached in accordance with due process of law"³⁵⁴ with the elaboration that "Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority"³⁵⁵. This is similar to the right to a hearing that is either expressly provided in provisions of certain human rights treaties or is to be regarded as implied in the protection afforded by other provisions - discussed further below³⁵⁶ - but, as with some of those provisions, the non-absolute character of the requirement could seriously impede access to justice in some instances.

239. There is no provision governing the provision of remedies for non-compliance with the specific rights accorded by the two conventions since disputes about the application of their provisions is provided to be a matter for proceedings to be initiated by one Contracting State

³⁵³ See the concern about the impact of the way a migration zone was drawn on the right of access to court for refugees in Australia; AAP General News (Australia), 10 June 2002.

³⁵⁴ Articles 32(1) and 31(1). This requirement only extends to persons to whom the Refugee Convention and the Stateless Persons Conventions apply; i.e., not those excluded from the definition of such persons pursuant respectively to Article 2C-F and Article 1 of these conventions.

³⁵⁵ Articles 32(2) and 31(2) respectively

³⁵⁶ See paragraphs. 329-50.

against another before the International Court of Justice³⁵⁷. This means that the scope for securing access to justice pursuant to these conventions is dependent upon the breadth of the interpretation of the right of access to court, the treatment of nationals in individual countries and the limited requirement contained in them for judicial control over expulsion decisions.

The Migrant Workers Conventions

240. The European Convention on the Legal Status of Migrant Workers follows the Refugee Convention and the Stateless Persons Conventions in requiring the receiving state to secure to migrant workers "treatment not less favourable than that of its own nationals in respect of legal proceedings"³⁵⁸. The guarantee goes on to provide that:

"1. Migrant workers shall be entitled, under the same conditions as nationals, to full legal and judicial protection of their persons property and their right and interests; in particular, they shall have, in the same manner as nationals, the right of access to the competent courts and administrative authorities, in accordance with the law of the receiving State, and the right to obtain the assistance of any person of their choice who is qualified by the law of that State, for instance in disputes with employers, members of their families or third parties. The rules of private international law of the receiving State shall not be affected by this Article.

2. Each Contracting Party shall provide migrant workers with legal assistance on the same conditions as for their own nationals and, in the case of civil or criminal proceedings, the possibility of obtaining the assistance of an interpreter where they cannot understand or speak the language used in court".

This guarantee is more extensive than that found in the other two conventions in that there can be no question as to its applicability to criminal proceedings given the specific reference to them. Moreover the reference to "judicial protection ...[of] interests" makes the case for a right of access to court in public law matters - including those concerned with the determination of their status as a migrant worker for the purpose of this convention - more certain than is the case under the provision in the other two instruments. Nevertheless the elaboration of the guarantee in this provision with regard to civil disputes probably only serves to clarify the scope of the protection with respect to the ability to bring proceedings and does not actually go beyond the guarantee that is afforded in this regard by the other two instruments.

241. It should also be noted that, unlike many other provisions in the European Convention on the Legal Status of Migrant Workers, there is no specific reference to the families of migrant workers as having the benefit of this guarantee of the right of access to court. There is no indication in the Convention's Explanatory Report as to why they were not expressly included in this provision but it is possible that it will be interpreted as nonetheless impliedly applicable to them as otherwise the protection afforded both by it to migrant workers and by other provisions to their families could be seriously undermined

242. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also provides that migrant workers - as well as the members of their families - should have "the right to equality with nationals of the State concerned before the courts and tribunals"³⁵⁹. The Convention further provides for the more specific guarantees with respect to

³⁵⁷ Articles 38 and 34 respectively.

³⁵⁸ Article 26(1).

³⁵⁹ Article 18.

a fair hearing in the determination of any criminal charge against them or of their rights and obligations in a suit of law that are found in provisions such as Article 6 of the European Convention and Article 14 of the International Covenant³⁶⁰ and, as with the latter two provisions, the focus is primarily on criminal proceedings. However, as the formulation is substantially the same as those two provisions, there is scope for interpreting it as guaranteeing the very extensive right of access to court discussed below³⁶¹ which has been implied in to them by the case law of the European Court and the United Nations Human Rights Committee respectively. Moreover the right of access to justice afforded by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is undoubtedly reinforced by its stipulation that "Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law"³⁶².

243. There is no provision governing the provision of remedies for non-compliance with the specific rights accorded by the European Convention on the Legal Status of Migrant Workers; the application of its provisions is to be monitored by a Consultative Committee³⁶³. Its opinions and recommendations are not binding as a matter of international law but they can lead to a decision by the Committee of Ministers as to the action to be taken. This means that the scope for securing access to justice pursuant to this convention is dependent solely upon the breadth of the interpretation given to the provision concerning access to court and the treatment of nationals in individual contracting parties..

244. By contrast the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families does require state parties to ensure that

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted³⁶⁴.

The implications of such an undertaking for securing access to justice are considered further in discussion below³⁶⁵ of the comparable provisions in the more general human rights treaties.

245. However supervision of the implementation of the International Convention is primarily to be effected through the monitoring by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families of reports submitted by states parties³⁶⁶. In addition there are optional provisions allowing for the determination of communications about

³⁶⁰ Notably as regards an independent and impartial tribunal, the presumption of innocence, prompt notification of any charge, adequate time and facilities for the preparation of their defence, trial without undue delay, legal assistance, the examination and cross-examination of witnesses, the assistance of an interpreter and self-incrimination, as well as the right of appeal following conviction, compensation for a miscarriage of justice and double jeopardy. The protection against double jeopardy in the European Convention is in Article 4 of Protocol No 7.

³⁶¹ See paragraphs 329-50.

³⁶² Article 24.

³⁶³ Article 33.

³⁶⁴ Article 83.

³⁶⁵ See paragraphs 395-410.

³⁶⁶ Article 73-75.

non-compliance with the Convention's requirements by states parties and individuals³⁶⁷. Neither of these provisions is in force and any views expressed by the Committee in this respect would not be binding on states parties as a matter of international law³⁶⁸.

246. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has, however, an additional provision that in some instances could facilitate access to justice, namely, the right of migrant workers and members of their families

"to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right"³⁶⁹.

The duty to permit consular assistance opens up the possibility of a representative of the state of the nationality of migrant workers and their families providing appropriate advice, assisting in finding or securing legal assistance and even intervening with the authorities of the receiving state to ensure that the rights of the persons concerned are respected. The potential contribution of this duty to ensuring access to justice is considered further below in the discussion of the more general duty regarding consular assistance under the Vienna Convention on Consular Relations³⁷⁰.

247. The only references to any form of consular assistance in the European Convention on the Legal Status of Migrant Workers concerns migrant workers being entitled to have the assistance of consular authorities with respect to reception, particularly as regards settlement and adaptation³⁷¹, and the carrying out by national authorities of inspections "in appropriate cases in collaboration with the respective consular authorities" in order "to ensure that standards of fitness of accommodation are kept up for migrant workers as for its own nationals"³⁷². Neither of these possibilities - albeit potentially useful in themselves - can really be regarded as a mechanism for ensuring access to justice for migrant workers.

The European Convention on Establishment

248. The European Convention on Establishment contains some fairly detailed requirements relevant to securing access to justice for at least some migrants.

249. Firstly nationals of any Contracting Party are to enjoy in the territory of any other Party, under the same conditions as nationals of the latter, full legal and judicial protection of their persons and property and of their rights and interests³⁷³. This means in particular that they shall have, in the same manner as the nationals of the latter Party, the right of access to the competent judicial and administrative authorities and the right to obtain the assistance of any person of their choice who is qualified by the laws of the country.

³⁶⁷ Articles 76 and 77 respectively. In each case this would require declarations by 10 states parties allowing for the use of the procedure concerned but none have so far been made.

³⁶⁸ A contested point.

³⁶⁹ Article 23.

³⁷⁰ See paragraphs 418-425.

³⁷¹ Article 10

³⁷² Article 13.

³⁷³ Article 7.

250. Secondly there is a requirement that nationals of any Contracting Party be entitled in the territory of any other Party to obtain free legal assistance under the same conditions as nationals of the latter Party³⁷⁴. The significance of this requirement is, of course, partly dependent on the right accorded to nationals but a minimum threshold is undoubtedly set by the access to justice guarantees in the general human rights treaties discussed below.

251. Thirdly indigent nationals of a Contracting Party shall be entitled to have copies of *actes de l'état civil* issued to them free of charge in the territory of another Contracting Party in so far as these are so issued to indigent nationals of the latter Contracting Party³⁷⁵. The significance of this requirement is also partly dependent on the right accorded to nationals but again a minimum threshold is undoubtedly set by the access to justice guarantees in the general human rights treaties

252. Fourthly no security or deposit of any kind may be required, by reason of their status as aliens or of lack of domicile or residence in the country, from nationals of any Contracting Party, having their domicile or normal residence in the territory of a Party, who may be plaintiffs or third parties before the courts of any other Party³⁷⁶. This right clearly assists the bringing of legal proceedings to safeguard one's rights and interests.

253. Fifthly, and similarly helpful, is the stipulation that the same rule shall apply to the payment which may be required of plaintiffs or third parties to guarantee legal costs³⁷⁷.

254. The preceding two provisions are, however, subject to an important safeguard for the interests of the person who successfully defends proceedings concerned, namely, orders to pay the costs and expenses of a trial imposed upon a plaintiff or third party who is exempted from such security, deposit or payment shall without charge, upon a request made through the diplomatic channel, be rendered enforceable by the competent authority in the territory of any other Contracting Party³⁷⁸.

255. It should also be noted that the Protocol to the Convention has not made the foregoing provisions, unlike many other provisions, expressly subject to compliance with the condition of lawfulness with respect to entry and residence. These particular provisions should, therefore, be capable of being relied upon even by migrants whose status is irregular.

256. Supervision of the implementation of the Convention is effectively left to the Contracting Parties who can submit disputes concerning its interpretation and application to the International Court of Justice in the absence of any agreement to use any other form of peaceful settlement³⁷⁹.

The Convention on the Participation of Foreigners in Public Life at Local Level

257. The sole provision in this convention that is relevant to securing access to justice is the undertaking to "endeavour to ensure that information is available to foreign residents concerning their rights and obligations in relation to public life"³⁸⁰, reflecting the fact that awareness of one's rights is an important preliminary to being able to exercise and enforce them. There is, however, no

³⁷⁴ Article 8(1).

³⁷⁵ Article 8(2).

³⁷⁶ Article 9(1).

³⁷⁷ Article 9(2).

³⁷⁸ Article 9(3).

³⁷⁹ Article 31.

³⁸⁰ Article 8.

specific provision in the Convention to secure implementation of the rights which provides, whether at the national or regional level.

Anti-Slavery and Anti-Trafficking Conventions

258. Generally treaties dealing with slavery and trafficking in persons focus on the criminalisation of such conduct and the creation of undertakings to prosecute and punish those involved in it. As such this affords only limited access to justice for those who suffer pursuant to the commission of the various offences involved.

259. However, in terms of the rights of injured persons - which could be someone procured, enticed or led away, it is important to note that the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others does provide that in cases where such persons are entitled to be parties to proceedings in respect of any of the offences referred to in it, "aliens shall be so entitled upon the same terms as nationals"³⁸¹. This thus requires that at least some victims should have access to a civil remedy for their exploitation but its availability is entirely dependent upon the nature of the legal system concerned.

260. More significant provisions relating to access to justice for victims of trafficking is to be found in the Council of Europe Convention on Action against Trafficking in Human Beings³⁸².

261. In the first place there an obligation to provide victims of trafficking, as part of a broader requirement to assist them, with both counselling and information, particularly as regards their legal rights and the services available to them, in a language that they can understand and with assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders³⁸³.

262. In addition obligations regarding compensation and legal redress require that victims should have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand, as well as the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law, and the right to compensation from the perpetrators³⁸⁴. This last right should be guaranteed through a measure such as a fund for victim compensation or programmes aimed at social assistance and social integration.

263. Furthermore there are obligations to adopt measures to provide effective and appropriate protection from potential retaliation or intimidation, in particular during and after investigation and prosecution of perpetrators, for victims, persons who report offences, witnesses and members of the family of such persons, as well as for groups, foundations, associations and non-governmental organisations which aims at fighting trafficking or protection of human rights³⁸⁵. In this regard there is an express requirement or special protection measures to be adopted for child victims that take into account their best interests.

³⁸¹ Article 5.

³⁸² Broadly similar but less detailed provisions are to be found in the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime.

³⁸³ Article 12(1).

³⁸⁴ Article 15.

³⁸⁵ Article 28.

264. In addition the period of reflection³⁸⁶ can help ensure that choices do not have to be made in haste.

265. There is also a requirement to provide for the possibility of not imposing penalties on victims or their involvement in unlawful activities to the extent that they have been compelled to do so³⁸⁷.

266. Finally there is a requirement in the course of court proceedings to adopt measures to ensure the protection of the private life and identity of victims, as well as their safety and protection from intimidation, with special care of children's needs being taken³⁸⁸.

267. There is no provision in the Convention regarding remedies at the national level for breach of these or other provisions in it. Implementation of the Convention is to be monitored by a group of experts chosen by the states parties but this has no authority to rule on individual complaints about the failure of a state party to fulfil its requirements.

Conclusion

268. The different level of detail in these provisions partly reflects the time at which they were adopted but not always, as the European Convention on Establishment illustrates. The latter instrument is, however, one that is perhaps less concerned with "real" outsiders than the others considered here. The adequacy of the national standard which is often the point of reference is crucial but this ought to be raised by general human rights obligations. However, the lack of certainty as to the proceedings covered and in particular the absence of applicability to proceedings to establish one's status as a refugee or stateless person is of concern. So is the general absence of applicability to irregular migrants. The requirements in some instruments concerning information provision, counselling and protection from the need to take hasty decisions and from intimidation, as well as the concern for the position of children and the importance sometimes of privacy, are ones that could be more generally applicable.

B. European Union Law

269. The European Union has important provisions to secure access to justice not only for its own citizens who migrate but for others who migrate to it, notably asylum-seekers. It also makes some specific provision as regards displaced persons.

Citizens of the European Union

270. There are a number of ways in which European Union law specifically seeks to secure access to justice for Union citizens and their families resident in a Member State other than the one of the citizen's nationality. In addition there are two measures concerned with access to justice in cross-border issues which could in certain circumstances be of use to such citizens and their families.

271. As regards the former, Member States are required in the first place, pursuant to Directive 2004/58/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

³⁸⁶ See para 74.

³⁸⁷ Article 26.

³⁸⁸ Article 30.

Member States, to disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by the Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication³⁸⁹.

272. Secondly this Directive requires that any decision to restrict the freedom of movement and residence of Union citizens and their family members must be notified in writing to the persons concerned in such a way that they are able to comprehend its content and the implications for them. In addition they should be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of state security. The notification must specify the court or administrative authority with which they may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State³⁹⁰.

273. Thirdly the Directive requires that the persons concerned must have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.³⁹¹ Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except where the expulsion decision is based on a previous judicial decision, the persons concerned have had previous access to judicial review or the expulsion decision is based on imperative grounds of public security³⁹². The redress procedures must allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They should also ensure that the decision is not disproportionate³⁹³. Although Member States may exclude the individual concerned from their territory pending the redress procedure, they cannot prevent him or her from submitting his or her defence in person, except when his or her appearance might cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory³⁹⁴.

274. Fourthly both the requirements concerning notification and access to judicial and administrative redress are to apply by analogy both to any decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health and to any measure adopted to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud³⁹⁵.

275. Fifthly as regards compliance by Member States with their other rights under European Union, citizens of the Union and their families should have a national remedy that is effective. This is

³⁸⁹ Article 34.

³⁹⁰ Article 30. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

³⁹¹ Article 31.

³⁹² These are to be defined by Member States; Article 28(3).

³⁹³ This requires in particular account to be taken of considerations such as how long the individual concerned has resided in the Member State's territory, his or her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his or her links with the country of origin. As regards the approach under the European Convention, see paragraphs 196-205.

³⁹⁴ However, persons seeking the lifting of an exclusion order made on grounds of public policy or public security on the basis of a material change of circumstances justifying the decision do not any right of entry to the Member State concerned while their application is being considered; Article 32(2).

³⁹⁵ Articles 15 and 35 respectively.

fulfilled through the remedial system of each Member State but the possibility of seeking a preliminary ruling from the European Court of Justice in the course of national judicial proceedings and the ability of the latter court to rule on the effectiveness of the procedures and remedies available contributes to securing access to justice³⁹⁶.

276. There is no explicit requirement concerning legal aid, which is thus dependent upon the applicable national rules but there can be no discrimination against citizens from other Member States and their families as regards its availability and the inadequacy of the provision made could be regarded as impacting adversely on the effectiveness of the remedy being sought.

277. Finally, in respect of any action taken by European Union institutions directly affecting the rights of Union citizens wherever they may be resident, there is the right to challenge it in the courts of the European Union³⁹⁷. Moreover every citizen has the right to petition the European Parliament and to apply to the European Ombudsman, as well as to write to the Unions institutions in an official language of the Union and have an answer in the same language³⁹⁸.

278. In respect of the preceding two paragraphs it is important to note also that the Union is required to respect fundamental rights as guaranteed by the European Convention³⁹⁹ and observance of its requirements could contribute to securing access to justice in its procedural sense⁴⁰⁰. Although the right to an effective remedy has been secured at least to some extent by the provisions discussed in the preceding paragraphs, this right is expressly guaranteed by the Charter of Fundamental Rights of the European Union⁴⁰¹. The Charter will not enter into force until the Treaty of Lisbon is ratified by all Member States but it can already be considered by the courts of the European Union when interpreting and applying European Union law⁴⁰².

279. The two cross-border measures that could contribute to securing access to justice for nationals of one Member State resident in another one concern legal aid in cross-border disputes and compensation for crime victims.

280. As regards the former Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes requires the provision of legal aid for such disputes to persons - both Union citizens and third-country nationals residing lawfully in a Member State - partly or totally unable to meet the costs of the proceedings as a result of their economic situation⁴⁰³. The grant of legal aid will be considered appropriate to ensure effective access to justice when it guarantees pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings and legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient⁴⁰⁴.

³⁹⁶ See further D Vaughan & A Robertson (eds), *Law of the European Union* (Oxford, 2007), ch 4. Legal aid is a matter for national rules but see paragraph 277.

³⁹⁷ *Ibid.*

³⁹⁸ Article 21 (ex Art 8d).

³⁹⁹ Article 6 EC.

⁴⁰⁰ On the requirements of the Convention, see paragraphs 329-416. Respect for the European Convention's requirements has undoubtedly shaped aspects of the substantive law discussed in paragraphs 77-118 and thus contributed to securing access to justice in the substantive sense.

⁴⁰¹ Article 47.

⁴⁰² Additional rights for Union citizens recognised in the Charter that would contribute to securing access to justice are the right to good administration and the right of access to documents; Articles 41 and 42 respectively.

⁴⁰³ Articles 4 and 5.

⁴⁰⁴ Article 3(1).

281. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case and they may request that legal aid recipients pay reasonable contributions towards the costs of proceedings⁴⁰⁵.

282. Applications for legal aid in respect of actions that appear to be manifestly unfounded can be rejected and it can also be refused or cancelled on grounds related to the merits of the case in so far as access to justice is guaranteed⁴⁰⁶.

283. Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting⁴⁰⁷. It shall also be extended to extrajudicial procedures if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them⁴⁰⁸.

284. Legal aid is to be granted by the competent authority of the Member State in which the court is sitting⁴⁰⁹ but the Member State in which the person concerned is domiciled or habitually resident shall provide legal aid to cover costs relating to the assistance of a local lawyer incurred in that Member State until the application for legal aid has been received and to the translation of the application and of the necessary supporting documents⁴¹⁰. There is specific provision for the legal aid to cover certain costs directly related to them cross-border nature of the dispute, namely, interpretation, translation of documents necessary for the resolution of the case and travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court⁴¹¹.

285. The second cross-border measure is Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. Where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident⁴¹², this requires that the victim should have the right to submit the application to an authority in the latter Member State⁴¹³, but the compensation is to be paid by the competent authority of the Member State on whose territory the crime was committed⁴¹⁴.

286. The Directive requires that Member States endeavour to keep to a minimum the administrative formalities required of an applicant for compensation⁴¹⁵ and to ensure that potential applicants for compensation have access to essential information on the possibilities to apply for

⁴⁰⁵ Article 3(3) & (4). recipients of legal aid may also be required to refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient; Article 3(5).

⁴⁰⁶ Article 6. When taking a decision on the merits of an application Member States shall consider the importance of the individual case to the applicant but may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

⁴⁰⁷ Article 9.

⁴⁰⁸ Article 10.

⁴⁰⁹ Article 12.

⁴¹⁰ Article 8.

⁴¹¹ Article 7.

⁴¹² The right to equal treatment gives Union citizens in a Member State of which they are not a national a right of access to compensation schemes in respect of crimes committed in that Member State.

⁴¹³ Article 1.

⁴¹⁴ Article 2.

⁴¹⁵ Article 3(3).

compensation, by any means Member States deem appropriate⁴¹⁶. Furthermore the assisting authority shall, upon the request of the applicant, provide him or her with general guidance and information on how the application should be completed and what supporting documentation may be required⁴¹⁷.

287. If the deciding authority decides to hear the applicant or any other person such as a witness or an expert, it may contact the assisting authority for the purpose of arranging for the person(s) to be heard directly by the deciding authority through the use in particular of telephone- or video-conferencing; or the person(s) to be heard by the assisting authority which will subsequently transmit a report of the hearing to the deciding authority. A direct hearing may only take place in cooperation with the assisting authority and on a voluntary basis without the possibility of coercive measures being imposed by the deciding authority⁴¹⁸.

288. Services rendered by the assisting authority shall not give rise to a claim for any reimbursement of charges or costs from the applicant or from the deciding authority⁴¹⁹.

289. Although the rules on access to compensation in cross-border situations drawn up by this Directive are to operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories, Member States are required by the Directive to ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims⁴²⁰.

Long-term residents

290. Where an application for long-term resident status for a third country national is rejected or that status is withdrawn, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents requires that reasons be given and the decision to be notified to the person concerned in accordance with the notification procedures under the relevant national legislation, with the redress procedures available and the time within which he or she may act being specified⁴²¹. A third-country national must have the right to mount a legal challenge in the Member State concerned against the rejection of an application for long-term resident status or the withdrawal or loss of that status.

291. Where an expulsion decision has been adopted in respect of a person with long-term resident status, a judicial redress procedure must be available to that person in the Member State concerned⁴²². Furthermore, in the context of protection against expulsion, legal aid shall be given to long-term residents lacking adequate resources, on the same terms as apply to nationals of the State where they reside⁴²³.

⁴¹⁶ Article 4.

⁴¹⁷ Article 5(2).

⁴¹⁸ Article 9(1).

⁴¹⁹ Article 11.

⁴²⁰ Article 12.

⁴²¹ Article 10.

⁴²² Article 12(4).

⁴²³ Article 12(5).

Refugees and beneficiaries of subsidiary protection

292. Specific provisions relevant to access to justice in Directive 2004/83/EC 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 are the requirements to provide beneficiaries with access to information in a language likely to be understood by them on the rights and obligations relating to their status⁴²⁴ and, with respect to unaccompanied minors, to take as soon as possible measures to ensure the necessary representation of them by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation, with regular assessments being made by the appropriate authorities as to whether the minor's needs are being met in the implementation of the Directive by the appointed guardian or representative⁴²⁵.

293. Although there is limited provision for securing access to justice in Council Directive 2004/83/EC of 29 April 2004 but this is addressed more fully in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status as regards those claiming to be refugees⁴²⁶ but not for those asserting eligibility for subsidiary protection which is also dealt with in the former Directive⁴²⁷.

Asylum-seekers

294. There are two European Union Directives dealing with access to justice for asylum-seekers, namely, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers⁴²⁸ and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

295. Council Directive 2003/9/EC imposes on Member States four specific sets of requirements of relevance to asylum-seekers securing access to justice.

296. Firstly asylum-seekers be informed, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any established benefits and of the obligations with which they must comply relating to reception conditions⁴²⁹. This information should be in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally. In addition they should be provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

297. Secondly all negative decisions relating either to the granting of benefits under the Directive or to place of residence and keeping to an assigned area which individually affect asylum-seekers must be capable of being the subject of an appeal within the procedures laid down in the national law concerned⁴³⁰. Furthermore, at least in the last instance, there must be provision for the

⁴²⁴ Article 22.

⁴²⁵ Article 30(1) & (2).

⁴²⁶ Discussed in paras 294-314.

⁴²⁷ See paras 91-96.

⁴²⁸ See paras 97-105.

⁴²⁹ Article 5.

⁴³⁰ Article 21.

possibility of an appeal or a review before a judicial body. In addition it is stipulated that procedures for access to legal assistance in such cases should be laid down in national law but there is no precision as to the basis on which this is to be granted or as to its extent.

298. Thirdly there is a requirement to take appropriate measures to ensure that authorities and other organisations implementing the Directive have received the necessary basic training with respect to the needs of both male and female applicants⁴³¹, which if done properly should ensure good decision-making and thus access to justice for the asylum-seekers concerned. To similar effect is the requirement that those working with unaccompanied minors shall have had or receive appropriate training concerning their needs⁴³².

299. Fourthly, as regards unaccompanied minors, there is also a requirement to take as soon as possible measures to ensure the necessary representation of them by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation, with regular assessments being made by the appropriate authorities⁴³³.

300. There are even more extensive provisions in Council Directive 2005/85/EC aimed at securing access to justice for asylum-seekers⁴³⁴.

301. In the first place asylum-seekers are to be allowed to remain in the Member State pending the examination of their application, although this right does not constitute an entitlement to a residence permit and does not apply while an appeal against a first instance refusal of an application is being determined⁴³⁵.

302. Secondly there are general requirements governing the examination of an application, namely, that they cannot be rejected or excluded because of when they are made, the need for decisions to be reached individually, objectively and impartially, precise and up-to-date information to be obtained as to the general situation in the countries of origin and transit and the knowledge with respect to relevant standards applicable in the field of asylum and refugee law of those responsible for examining applications and taking decisions⁴³⁶. These are meant to govern even procedures used at a border or transit zone but certain derogations from their elaboration below is allowed where a

⁴³¹ Article 24.

⁴³² Article 19(4).

⁴³³ Article 19.

⁴³⁴ These provisions are, however, subject to the operation of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Pursuant to this an applicant for asylum may be transferred from one Member State to another Member State for his or her application to be determined. This will generally occur where members of the family of applicant who is an unaccompanied minor are in the second Member State if this is in his or her best interests, there are family members of the applicant who have been granted or are seeking refugee status in the second Member State if the persons concerned so desire, the applicant has a valid or recently expired residence document or visa from the second Member State and the applicant had first irregularly crossed into the second Member State from a third country; Chapter III. An asylum-seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of the Regulation, its time limits and its effects but the operation of Council Directive 2005/85/EC of 1 December 2005 will be the main means of securing access to justice in respect of its provisions.

⁴³⁵ Article 7. The only exceptions are where they are permitted to refuse to entertain subsequent applications (i.e., where no new evidence or arguments are presented) and where they will surrender or extradite the persons concerned in accordance with a European arrest warrant, to a third country or to international criminal courts or tribunals.

⁴³⁶ Article 8.

Member State already laws and regulations in force before 1 December 2005⁴³⁷ and these are noted where appropriate.

303. Thirdly decisions must be given in writing and, where an application is rejected, the reasons in fact and in law must be stated in the decision⁴³⁸.

304. Fourthly applicants should enjoy the following guarantees with respect to the examination of asylum applications:

- being informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities, as well as the time-frame and the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This information shall be given in time to enable them to exercise the rights guaranteed in the Directive and to comply with the obligations described in Article 11;
- receiving the services of an interpreter - paid for out of public funds - for submitting their case to the competent authorities whenever necessary, which includes when the determining authority calls upon the applicant to be interviewed and appropriate communication cannot be ensured without such services;
- not being denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;
- being given notice in reasonable time of the decision by the determining authority on their application for asylum, although Member States may choose to give the notice to any legal adviser or other counsellor legally representing the applicant instead;
- being informed of the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision unless the applicant had been provided with this information at an earlier stage either in writing or by electronic means accessible to him or her⁴³⁹.

305. Fifthly, before any decision is taken, applicants must be given the opportunity of a personal interview on his or her application with a person competent under national law to conduct such an interview unless a positive decision can be taken without one, there has already been a meeting for the purpose of completing the application or the application is considered to be unfounded in a

⁴³⁷ Article 35(2). The procedures in these laws and regulations must still conform with the core elements bearing on access to justice.

⁴³⁸ Article 9. Reasons are not required if the applicant is granted a status offering the same benefits and rights under national and Community law as refugee status but then the reasons should be in the applicant's file and he or she should have access to it upon request. The need for reasons is also not specifically required for decisions taken at the border.

⁴³⁹ Article 10. Only the requirements concerning being immediately informed of rights and obligations and having access to the services of an interpreter are specifically required at the border; Article 35(3).

limited number of circumstances or an interview is not reasonably practicable⁴⁴⁰. Such an interview must take place under conditions which ensure appropriate confidentiality and which allow applicants to present the grounds for their applications in a comprehensive manner⁴⁴¹. The latter will mean that the person conducting the interview should be sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so, and the interpreter selected should be able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he or she may reasonably be supposed to understand and in which he or she is able to communicate.

306. Sixthly a written report of the interview should be prepared and applicants should have timely access to it. If the applicant's approval of the report is requested and refused, the reasons for this refusal shall be entered into his or her file⁴⁴².

307. Seventhly applicants shall be allowed the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications. More significantly, in the event of a negative decision by a determining authority, free legal assistance and/or representation shall be granted on request, although this may be limited to: procedures before a court or tribunal for the appeal required by the Directive and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; those who lack sufficient resources; legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or cases in which the appeal or review is likely to succeed. It is possible to impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation, and to provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance. Member States are allowed to demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant⁴⁴³.

308. Eighthly the efficacy of the right to legal assistance and representation is to be facilitated by ensuring that a legal adviser or other counsellor who assists or represents an applicant enjoys access to such information in the applicant's file as is liable to be examined by the authorities, insofar as the information is relevant to the examination of the application and insofar as disclosure of information or sources would not jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the

⁴⁴⁰ Article 12. The circumstances allowing an interview to be dispensed with in the case of an application considered to be unfounded are: the applicant having raised issues that are not relevant or only of minimal relevance to the examination of whether he or she qualifies as a refugee; the applicant being from a safe country of origin or safe third country; the applicant having made inconsistent, contradictory, improbable or insufficient representations which make his or her claim unconvincing in relation to him or her having been the object of persecution; the application being a subsequent one which raises no relevant elements with respect to his or her personal circumstances or the situation in his or her country of origin; and the applicant having failed without reasonable cause to make his or her application earlier having had the opportunity to do so. An interview will not be reasonably practicable particularly where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control.

⁴⁴¹ Article 13.

⁴⁴² Article 14.

⁴⁴³ Article 15.

information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In addition a legal adviser or other should have access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant unless a limitation on such access is objectively necessary for the security, public order or administrative management of the area, or in order to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible. Member States may require the presence of the applicant at a personal interview, even if he or she is represented by such a legal adviser or counsellor and they may require the applicant to respond in person to the questions asked. The absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting the personal interview⁴⁴⁴.

309. Ninthly there are particular guarantees for applicants who are unaccompanied minors⁴⁴⁵. In particular measures should be taken to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application⁴⁴⁶ and ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare him or herself for the personal interview. The representative must be allowed to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview, but the presence of the unaccompanied minor at the personal interview may be required, even if the representative is present⁴⁴⁷. In addition the person conducting the personal interview should have the necessary knowledge of the special needs of minors, as should the official who prepares the decision by the determining authority on the application of an unaccompanied minor. Where a medical examination is used to determine the age of unaccompanied minors within the framework of the examination of an application for asylum, they should be informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be so determined. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination. Unaccompanied minors and/or their representatives must consent to the carrying out of such an examination and the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal. In implementing these provisions the best interests of the child shall be a primary consideration.

310. Tenthly a person shall not be held in detention for the sole reason that he or she is an applicant for asylum and, where an applicant is held in detention, there must be a possibility of speedy judicial review⁴⁴⁸.

⁴⁴⁴ Article 16.

⁴⁴⁵ In Article 17.

⁴⁴⁶ This representative can be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; see paragraph 299.

⁴⁴⁷ Member States may refrain from appointing a representative where the unaccompanied minor: (a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or (b) can avail himself, free of charge, of a legal adviser or other counsellor to fulfil the tasks assigned to the representative; or (c) is married or has been married.

⁴⁴⁸ Article 18. This does not apply to applicants at a border; Article 35(3).

311. Eleventhly, there is a requirement that UNHCR be allowed to have access both to applicants for asylum, including those in detention and in airport or port transit zones and to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto, as well as to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Refugee Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure⁴⁴⁹. This requirement is equally applicable in respect of any organisation which is working in the territory of the Member State concerned on behalf of the UNHCR pursuant to an agreement with that Member State.

312. Twelfthly, the examination of an application for asylum must be concluded as soon as possible, without prejudice to an adequate and complete examination⁴⁵⁰. Where a decision cannot be taken within six months, the applicant concerned shall either be informed of the delay or receive, upon his or her request, information on the time-frame within which the decision on his or her application is to be expected, although such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees set out above, including where the application is likely to be well-founded or where the applicant has special needs. However they may also prioritise an examination procedure in accordance with same basic principles and guarantees where: the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he or she qualifies as a refugee; the applicant clearly does not qualify as a refugee or for refugee status in a Member State; or the application for asylum is considered on certain grounds to be unfounded⁴⁵¹. In the case of applications at the border, a decision is required within a reasonable time and if it has not been taken within four weeks the person concerned must be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the generally applicable provisions of the Directive⁴⁵².

⁴⁴⁹ Article 21.

⁴⁵⁰ Article 23.

⁴⁵¹ Namely, the applicant is from a safe country of origin or a safe third country for the applicant; the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; the applicant has filed another application for asylum stating other personal data; the applicant has not produced information establishing with a reasonable degree of certainty his or her identity or nationality, or it is likely that, in bad faith, he or she has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his or her having been the object of persecution; the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his or her particular circumstances or to the situation in his or her country of origin; the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so; the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; the applicant has failed without good reason to comply with obligations under this Directive or Directive 2004/83/EC; the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented him or herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his or her entry; (m) the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with relevant Community and/or national legislation; or the application was made by an unmarried minor, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his or her country of origin.

⁴⁵² Article 35(4). However, in the event of particular types of arrivals or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone making it practically impossible to apply the requirements of the Directive the border procedures can be applied where and for as long as these third country nationals or stateless persons are accommodated normally in proximity to the border or transit zone; Article 35(5).

313. Finally applicants should have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum.. There is also a requirement to make provision for rules in accordance with the international obligations of Member States dealing with: (a) the question of whether the remedy shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome; (b) the possibility of other legal remedy or protective measures where the remedy provided does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and (c) the grounds for challenging a decision that a country is to be treated as a safe third country⁴⁵³. It is also provided that.

314. The requirements for procedures for the withdrawal of refugee status entail: the person being informed in writing that his or her qualification for refugee status is being reconsidered and the reasons for such a reconsideration; the giving of an opportunity to state in a personal interview (in accordance with the provisions above) or in writing the reasons why this status should not be withdrawn; the competent authority being able to obtain precise and up-to-date information as to the general situation prevailing in the person concerned's country of origin; any collection of information on an individual not disclosing the reconsideration to an actor of persecution or jeopardising the physical liberty of the person and his or her family members or the liberty and security of his or her family members still living in the country of origin; and the giving of a withdrawal decision in writing with the reasons in fact and law and information on how to challenge it.⁴⁵⁴.

Displaced persons

315. Under Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Member States are required as soon as possible to take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation⁴⁵⁵. In addition the provisions above on legal assistance and representation, the role of the UNHCR and appeals are applicable⁴⁵⁶.

316. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof requires that persons enjoying temporary protection be able to lodge an application for asylum at any time. Furthermore the examination of any asylum application not processed before the end of the period of temporary protection shall be completed after the end of that period⁴⁵⁷.

⁴⁵³ Article 39. Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC, the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy sought pursuant to this provision is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings

⁴⁵⁴ Article 38.

⁴⁵⁵ Article 16.

⁴⁵⁶ See para 311.

⁴⁵⁷ Article 17.

Students and researchers

317. Limited procedural guarantees are specified in both Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

318. Thus there is a requirement that the competent authorities of the Member State concerned adopt a decision on an application as soon as possible and, where appropriate, provide for accelerated procedures. Where the information supplied in support of the application is inadequate, the consideration of it may be suspended but applicant should be informed of any further information needed. Any decision rejecting an application must be notified to the third-country national concerned in accordance with the notification procedures under the relevant national legislation. The notification shall specify the possible redress procedures available and the time limit for taking action. Furthermore, where an application is rejected, or a residence permit, issued in accordance with this Directive, is withdrawn, the person concerned shall have the right to mount a legal challenge before the authorities of the Member State⁴⁵⁸.

Victims of trafficking

319. Limited provision on access to justice is made also in respect of possible victims of trafficking.

320. When the competent authorities of the Member States take the view that a third-country national may fall into the scope of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, shall inform the person concerned of the possibilities offered under this Directive⁴⁵⁹.

321. Member States may decide that such information may also be provided by a non-governmental organisation or an association specifically appointed by the Member State concerned. In addition there is a requirement to provide the third-country nationals concerned, where appropriate, with translation and interpreting services⁴⁶⁰ 7.3 and they may be provided with free legal aid, if established and under the conditions set by national law⁴⁶¹.

322. If the Directive is applied to minors, Member States must ensure that the procedure is appropriate to the age and maturity of the child. In particular, if they consider that it is in the best interest of the child, they may extend the reflection period. In the case of third-country nationals who are unaccompanied minors, Member States shall take the necessary steps to establish their identity, nationality and the fact that they are unaccompanied. They shall make every effort to locate their families as quickly as possible and take the necessary steps immediately to ensure legal

⁴⁵⁸ Articles 18 and 15 respectively.

⁴⁵⁹ Article 5.

⁴⁶⁰ Article 7(3).

⁴⁶¹ Article 7(4).

representation, including representation in criminal proceedings, if necessary, in accordance with national law⁴⁶².

323. When the residence permit issued on the basis of this Directive expires ordinary aliens' law shall apply⁴⁶³.

Conclusion

324. The concern about the effectiveness of remedies available to citizens of the European Union is an important safeguard to ensure that access to justice really occurs. However, it does not so far seem to have focused on the adequacy of legal aid arrangements within Member States, which may reflect the position of many of those litigating before the courts of the European Union. The provision in respect of cross-border disputes is something to be emulated as these are matters which can be of concern to migrants. The provision in respect of long-term residents is modest but the extensive provision for asylum-seekers is clearly valuable, if properly implemented and there must be concern as to how they are modified in the border context, as well as the act that it is still possible for asylum-seekers to be removed before a final decision in their case is taken. Various requirements concerning information provision, the particular needs of children and the role of specialist organisations, international and non-governmental, are all noteworthy.

C. Human rights treaties

325. The human rights treaties - regional and international - that contribute the most significant guarantee of access to justice are, in alphabetical order, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Rights of the Persons with Disabilities, the European Convention, the European Social Charter and the Revised European Social Charter and the International Covenant.

326. Of all these treaties it is only the Convention on the Rights of the Persons with Disabilities that has a provision - Article 13 - that specifically refers to the concept of access to justice, stipulating that:

"1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff".

However, apart from the specific and important obligations to promote training and to provide procedural and age-appropriate accommodations⁴⁶⁴, this provision does not give any substantive

⁴⁶² Article 10.

⁴⁶³ Article 13(2).

⁴⁶⁴ Matters considered below.

indication as to what is entailed by the requirement to ensure effective access to justice. The meaning of the latter requirement is in fact only to be found through the interpretation and application of a wide range of other provisions in this and other general human rights treaties.

327. Although not expressly mentioned in the other treaties, the scope for access to justice in them arises primarily by virtue of provisions guaranteeing the right to a fair hearing⁴⁶⁵, the right to liberty and security of the person and in particular the right to challenge the legality of detention⁴⁶⁶, the right to the review of an expulsion decision⁴⁶⁷ and the right to an effective remedy⁴⁶⁸. However, elements of access to justice may also be an implicit part of the guarantee by these treaties of certain other rights, such as the right to life⁴⁶⁹, the prohibition on torture and inhuman and degrading treatment or punishment⁴⁷⁰, and the right to respect for private and family life⁴⁷¹ (which are all potentially significant in admission and expulsion decisions and thus especially important for migrants). Moreover the right to an effective remedy is considered an inherent element of states parties' obligations with respect to economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and the Revised European Social Charter to the extent that the rights concerned are justiciable⁴⁷². In addition access to justice may be achieved through the supervisory mechanisms established by these treaties or additional protocols to them.

328. The discussion below of the elaboration of the case law relevant to access to justice secured through the various provisions identified above focuses primarily on that of the European Court as its case law is not only the most comprehensive but in this field it is also effectively being followed by the bodies determining communications in respect of the other instruments.

⁴⁶⁵ Article 15(2) of the Convention on the Elimination of All Forms of Discrimination against Women, Article 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination, Articles 12 and 40 of the Convention on the Rights of the Child (only as regards children capable of forming their own views), Article 14 of the International Covenant, Article 6 of the European Convention and Articles 2-4 of Protocol No 7 and Article 13 of the Convention on the Rights of Persons with Disabilities.

⁴⁶⁶ Article 5(b) of the Convention on the Elimination of All Forms of Racial Discrimination, Article 37d of the Convention on the Rights of the Child, Article 5(4) of the European Convention, Article 9(4) of the International Covenant and Articles 12(4) and 14 of the Convention on the Rights of Persons with Disabilities

⁴⁶⁷ Article 4 of Protocol No 4 and Article 1 of Protocol No 7 to the European Convention and Article 11 of the International Covenant.

⁴⁶⁸ Articles 12-14 of the the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination, Article 13 of the European Convention and Article 3 of the International Covenant (in this provision it is expressed as an undertaking by State Parties rather than a right). This right is not specifically mentioned in the Convention on the Rights of the Child or the Convention on the Rights of Persons with Disabilities

⁴⁶⁹ Article 6 of the the Convention on the Rights of the Child, Article 10 of the Convention on the Rights of the Persons with Disabilities, Article 2 of the European Convention and Protocol Nos 6 and 13 and Article 6 of the International Covenant.

⁴⁷⁰ Articles 19 and 37a of the Convention on the Rights of the Child, Article 15 of the Convention on the Rights of the Persons with Disabilities, Articles 2-9 and 16 of the the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3 of the European Convention and Article 7 of the International Covenant.

⁴⁷¹ Articles 9, 10 and 16 of the the Convention on the Rights of the Child, Articles 22 and 23 of the Convention on the Rights of the Persons with Disabilities, Article 8 of the European Convention and Article 17 of the International Covenant.

⁴⁷² As to the first see General Comment 3: The nature of States parties obligations, E/1991/23, 14 December 1990, para 5 and as to the latter two see respectively the Interpretative Statement of the European Committee of Social Rights of 30 June 2006 in respect of the right in Article 15 of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement (Conclusions XVIII-2 Volume 1) and *Decision on the merits: Collective Complaint no. 33/2006 from International Movement ATD Fourth World v. France*, 2 April 2008, with respect to the right to housing in Article 31.

The Fair Hearing Guarantee

329. The express terms of the fair hearing guarantee in provisions such as Article 6 of the European Convention and Article 14 of the International Covenant are directed only to the actual conduct of legal proceedings⁴⁷³. In particular it is concerned with the independence and impartiality of those adjudicating, the provision of a fair and public hearing and the absence of undue delay, with a number of specific provisions concerning the determination of criminal charges. However, although such a guarantee regarding the conduct of proceedings is clearly important in securing justice, a right of access to court itself - i.e., the very ability to institute and pursue proceedings - has also been inferred from the text and the general commitment made by states parties to the rule of law in the absence of any express provision on the matter⁴⁷⁴.

330. The essential aspect of the obligation concerning access to court inferred into the fair hearing guarantee is that there should not be any hindrance, whether as a matter of law or fact, to the ability to institute proceedings unless this could be justified for a legitimate aim and occurred in a manner that is not disproportionate⁴⁷⁵. This has implications for formal restrictions such as the need for prior authorisation by or court or other body, the use of certain defences and immunities⁴⁷⁶ and even possibly judgments that are unappealable, as well as procedural ones such as time limits and limitation periods, which have been recognised as potentially problematic in cases involving children⁴⁷⁷.

331. The right of access to court also has implications for the more practical restrictions such as those arising from obstacles to meeting or communicating with a lawyer, legal costs - both court fees and those charged by a lawyer - and even the complexity of the legal process⁴⁷⁸. There may even be an obligation to provide the person bringing a civil action with legal aid where this is in the interests of justice despite the express requirement concerning legal aid in Article 6 only applying to criminal proceedings. However, such an obligation has only rarely been imposed and the case law on the point is very limited⁴⁷⁹.

332. The access to court obligation under Article 6 of the European Convention does not extend to all legal interests; its provisions address themselves only to the determination of civil rights and obligations⁴⁸⁰ and the conduct of criminal proceedings. The case law with respect to the meaning of the former has increasingly demonstrated a tendency to greater inclusiveness⁴⁸¹ but, although

⁴⁷³ Those in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination are even less substantive focusing only on respectively "a legal capacity identical to that of men ...[and being treated] "equally in all stages of procedure in courts and tribunals" (Article 15(2) and "the right to equal treatment before the tribunals and all other organs administering justice" (Article 5(a)). There is also a right in the European Social Charter and the Revised European Social Charter - Article 11 - to equal treatment with nationals in regard to legal proceedings.

⁴⁷⁴ The key decision in this regard was the judgment of the European Court in *Golder v United Kingdom* [P], 4451/70, 21 February 1975.

⁴⁷⁵ See further J McBride, 'Access to justice and human rights treaties', (1998) 17 *CJQ* 235-271 and P van Dijk *et al* (eds), *Theory and Practice of the European Convention on Human Rights*, (4th ed, Antwerp, 2006), pp 557-578.

⁴⁷⁶ See, e.g., *Osman v United Kingdom* [GC], 23452/94, 28 October 1998 and *Z and Others v United Kingdom* [GC] 29392/95, 10 May 2001.

⁴⁷⁷ See, e.g., *Stubbings v United Kingdom*, 22083/93; 22095/93, 22 October 1996.

⁴⁷⁸ See, e.g., *Kreuz v Poland*, 28249/95, 19 June 2001 on costs and *De Geouffre de la Pradelle v France*, 12964/87, 16 December 1992.

⁴⁷⁹ See *Airey v Ireland*, 6289/73, 9 October 1979, *McVicar v United Kingdom*, 46311/99, 7 May 2002 and *Steel and Morris v United Kingdom*, 68416/01, 15 February 2005.

⁴⁸⁰ Article 14 of the International Covenant is similarly concerned only with rights and obligations in "a suit at law" and the determination of a criminal charge.

⁴⁸¹ See P van Dijk *et al* (eds), *Theory and Practice of the European Convention on Human Rights*, (4th ed, Antwerp, 2006), pp 524-539.

rights and obligations of a private law character are certainly covered, those in the public law field are likely to be excluded unless there are financial or economic implications or there is some scope for drawing an analogy between the interest concerned and a right of an unquestionably private law character.

333. The general fair hearing guarantee in Article 12 of the Convention on the Rights of the Child⁴⁸² is not restricted to any subject area but concerns all "judicial and administrative proceedings affecting the child". It would, therefore, apply to all proceedings involving migrants who are children. The access to justice guarantee in Article 13 of the Convention on the Rights of the Persons with Disabilities is equally wide-ranging since it applies to "all legal proceedings" but most migrants are unlikely to be able to rely upon it..

334. The notion of access to court under these provisions also has a somewhat limited applicability to criminal proceedings, being effectively restricted to the express guarantees of access to a lawyer for the purpose of preparing a defence (which covers both direct restraints on contact and the obligation to pay for one in certain cases) and the actual conduct of the defence⁴⁸³, as well as the right of appeal against conviction⁴⁸⁴. This is because the ability of the victim of a crime to have the alleged perpetrator prosecuted or to bring criminal proceedings him or herself has not been recognised as an element of access to court - a consequence of the latter right having been seen to be derived only from the right to the determination of one's rights and obligations in the fair hearing guarantee⁴⁸⁵ - despite being an important aspect of access to justice. Indeed such a conclusion has been reached despite the fact that the failure to bring a prosecution may be regarded as a breach of positive obligations arising from the right to life and the prohibition on torture and inhuman and degrading treatment or punishment and a denial of the right under human rights treaties to an effective remedy and may, therefore, result in violations of both that right and the substantive human right affected⁴⁸⁶.

335. Nevertheless, it follows from the approach being adopted that, apart from the specific provision for access to justice already identified, this concept has no general applicability in the field of criminal proceedings; thus, for example, someone whose reputation has been impugned by a criminal investigation or even the institution of a prosecution does not have the right to have the case brought to trial for the purpose of establishing his or her innocence⁴⁸⁷.

⁴⁸² Article 40 is concerned with the conduct of criminal proceedings.

⁴⁸³ Article 14(3) of the International Covenant and Article 6(3) of the European Convention.

⁴⁸⁴ This is an obligation for parties to the International Covenant (Article 14(5)) and also under Article 2 of Protocol No 7.

⁴⁸⁵ *Perez v France* [GC], 47287/99, 12 February 2004. See also *X v. Federal Republic of Germany* (1976) 7 D.R. 91; *T v. Belgium* (1979) 34 D.R. 158; *Wallen v. Sweden* (1985) 43 D.R. 184; *Sciarretta v. Italy* (1986) 50 D.R. 191; *Dujardin v. France* (1991) 72 D.R. 236; *Mecili v. France* (1995) 81 D.R. 102; *Mahaut v. France* (1995) 82 D.R. 31; *Rodriguez v. Uruguay* (1995) 2 I.H.R.R. 112; *Bautista de Arellana v. Colombia* (1996) 3 I.H.R.R. 315; *Danini v. Italy* (1996) 87 D.R. 24; *Rekasi v. Hungary* (1996) 87 D.R. 164; *M N v. Bulgaria* (1996) 87 D.R. 163; *Slimane Kaid v. France* (1997) 89 D.R. 79; and *Dubowska v. Poland* (1997) 89 D.R. 156 as regards the refusal to prosecute someone and *Helmerts v. Sweden*, October 29, 1991 as regards the right to bring a private prosecution. However, if the latter right is conferred by a country's law then it is implicit in the European Court's judgment in *Helmerts* that the scope of the obligation to secure access to justice discussed further below will be applicable since it is decisive for the civil right at issue. The availability of civil remedies might also be a significant factor in concluding that a right of prosecution does not affect access to justice; see *X v. Federal Republic of Germany* (1975) 3 D.R. 57 and *Sciarretta v. Italy*, *loc.cit.*

⁴⁸⁶ See paragraphs 395-410.

⁴⁸⁷ *Deweert v. Belgium*, February 27, 1980; however that decision did recognise that there might be circumstances where a right of access could be improperly restricted if a person reached a settlement with prosecuting authorities whereby a lesser penalty than that possible had the case come to trial was accepted. Nevertheless, it did not consider there to have been any unacceptable pressure in an order which had closed Deweert's business until such a settlement had been reached. Excessively short time limits in which to accept this sort of compromise might also be problematic. The circumstances in which a prosecution is discontinued could, however, have implications for observance of the presumption of innocence; see *Leutscher v. The Netherlands*, March 26, 1996. *X v. Sweden* (1982) 31 D.R. 223.

336. Access to court could, however, be affected and give rise to questions of compliance with international obligations where a person's ability to join criminal proceedings as a civil party is restricted since the claim for compensation involved in that means that the outcome of the prosecution might be decisive for the determination of civil rights and obligations. However, the European Commission, as a corollary of the absence of any right to institute criminal proceedings, has rejected the view that there must actually be a right to join proceedings as a civil party⁴⁸⁸ but the European Court has found the guarantees in Article 6(1) applicable where this is possible⁴⁸⁹. Nevertheless, an arbitrary refusal to allow someone to join criminal proceedings as a civil party would undoubtedly be regarded as an unjustified denial of access to justice⁴⁹⁰.

337. The scope of the right of access to court inferred into the fair hearing guarantee is, notwithstanding these limitations, quite substantial. Moreover it is a right that is to be enjoyed by everyone, whatever their status and can thus be relied upon by migrants even when their presence on the territory of a state party might be in some way irregular.

338. However, although this position provides an important safeguard for the interests of migrants in general, it does not mean that access to justice is formally assured in respect of all matters bearing on their actual situation as migrants. For example, the right to a fair hearing does not apply to admission and expulsion decisions generally and this shortcoming could only be overcome through reliance on the discrete right to an effective remedy if it could be argued that such decisions had an adverse impact on certain other human rights and freedoms enjoyed by migrants⁴⁹¹.

339. Decision-making with regard to allowing or refusing a non-national permission to reside does not have to respect the procedural guarantees set out in Article 6 as this is something that has repeatedly been considered to be a matter of public law and thus not a determination of his or her civil rights and obligations⁴⁹², to which that provision - along with the determination of criminal charges - is stated to be applicable. This has also been the view taken at least once of decision-making with respect to any claim to be granted political asylum⁴⁹³ but the absence of such a

⁴⁸⁸ *Agneessens v. Belgium* (1980) 19 D.R. 172; *Mecili v. France* (1995) 81 D.R. 102; and *Mahaut v. France* (1995) 82 D.R. 31. However, it has recently found admissible a complaint about the rejection of a request to join proceedings as a civil party; *Potier and Coquempot v. France*. Although the absence of one in disputes over the ownership of land (or rights over it) could raise issues about adequate respect for a right to property.

⁴⁸⁹ *Perez v France* [GC], 47287/99, 12 February 2004. In this case the European Court emphasised that any right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently but must be in dissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (paragraph 70).

⁴⁹⁰ In *Agneessens* the object of being joined was not to make a claim against the counterfeiters being prosecuted but to recover the notes from the State which had taken possession of them after they were found by the applicant; he was thus pursuing the wrong remedy. See the succeeding sections for the approach to determining what is arbitrary. Any finding as to whether there has been a violation will also be influenced by the existence of other ways of making the civil claim; see *Slimane Kaid v. France* (1997) 89 D.R. 79. his was recognised by the European Commission in *X v. Austria* (1978) 14 D.R. 171.

⁴⁹¹ See paragraph 340.

⁴⁹² See Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164; Appl No 7902/77, *X v United Kingdom* (1977) 9 DR 224; Appl No 9285/81, *X, Y and Z v United Kingdom* (1982) 29 DR 205; Appl No 30913/96, *Slepcik v Netherlands and the Czech Republic*, (1996) 86 DR 176; Appl No 8244/78, *Uppal and Others v United Kingdom* (1979) 17 DR 149; and *Lahnifi v Netherlands* (dec.), 39329/98, 13 February 2001.

⁴⁹³ See Appl No 12122/86, *Lukka v United Kingdom*, 50 DR 268 and Appl No 13162/87, *P v United Kingdom* (1987) 54 DR 211. However, in *J E D v United Kingdom* (dec.), 42225/98, 2 February 1999 the European Court left open the question of whether the guarantees contained in Article 6 applied to the impugned asylum proceedings or whether the applicant was entitled under that Article to a court procedure to challenge the decision rejecting his renewed asylum request. It did note that it had been possible to seek judicial review of the asylum decision and that there had been no element of unfairness in those proceedings. The matter was also left open in *Kavak v Germany* (dec.), 46089/99, 18 May 1999.

procedure where such a claim is made could result not only in decision-making which failed to safeguard the right not to be exposed to a serious risk to violations of the right to life or the prohibition of torture and inhuman and degrading treatment under Articles 2 and 3⁴⁹⁴ but also in violations of the right to an effective remedy under Article 13 in respect of such violations⁴⁹⁵.

340. It is also well-established that the fair hearing guarantee has no application to removal proceedings as these neither involve the determination of a civil right or obligation nor entail the imposition of a penalty as part of the determination of a criminal charge⁴⁹⁶. Furthermore as not even the penumbra of a European Convention right is involved, it cannot be argued that differential treatment on inadmissible grounds – which has never been established – means that there would be a violation of Article 14 in conjunction with Article 6⁴⁹⁷. Such a restriction should not be applicable to children since the fair hearing guarantee in Article 12 of the Convention on the Rights of the Child applies to all matters affecting the child.

341. The restrictive approach discussed in the preceding two paragraphs would not, of course, apply to the taking of admission and expulsion decisions with respect to migrants who are children or persons with disabilities on account of the unlimited scope of the fair hearing guarantee, already noted⁴⁹⁸, in both the Convention on the Rights of the Child and the Convention on the Rights of the Persons with Disabilities.

342. It is possible that a refusal of entry could be challenged on the basis that this impeded the ability of a migrant to pursue litigation in the courts of the state concerned and thus constitute a denial of the right of access to court guaranteed by Article 6. However, this is only likely to be established where the person's physical presence is really shown to be essential for the purpose of the litigation, or some aspect of it⁴⁹⁹.

343. The determination of someone's immigration status – such as whether their entry to the country was at the outset unlawful or their presence there has subsequently ceased to be lawful – does not as such entail the determination of his or her civil rights and obligations or of any criminal charge against him or her and so the fair hearing guarantee would not be applicable to any proceedings in which this occurs⁵⁰⁰. Nevertheless a dispute over the grant of an employment permit could be decisive for the validity of an employment contract concluded between an

⁴⁹⁴ The absence of a fair hearing could also lead to immigration decisions affecting the right to respect for private and family life under Article 8 being violated; see para 388.

⁴⁹⁵ On this right, see further paras 395-410.

⁴⁹⁶ *Maaouia v France*, 39652/98, 3 October 2000. See also Appl No 7729/76, *Agee v United Kingdom*, (1976) 7 DR 164; Appl No 8244/78, *Uppal and Others v United Kingdom* (1979) 17 DR 149; Appl No 8118/87, *Omkarananda and the Divine Light Zentrum v United Kingdom* (1981) 25 DR 105; Appl No 12364/86, *K v Switzerland*, (1986) 50 DR 280; Appl No 22406/93, *S N v Switzerland*, 10 September 1993 (unreported); Appl No Appl No 30913/96, *Slepčik v Netherlands and the Czech Republic*, (1996) 86 DR 176; Appl No 27794/95, *Sadaghi v Sweden*, 14 October 1996 (unreported); Appl No 31113/96, *Urrutikoetxea v France* (1996) 87 DR 150; Appl No 32025/96, *Kareem v Sweden*, (1996) 87 DR 173; Appl 35984/97, *Medjden v Germany*, 31 October 1997; Appl No 40900/98, *Karara v Finland*, 29 May 1998 (unreported); *Katani v Germany* (dec.), 67679/01, 31 May 2001; *Shebashov v Latvia* (dec.), 50065/99, 9 November 2000; *Aronica v Germany* (dec.), 72032/01, 18 April 2002; *Mogos and Krifka v Germany* (dec.), 78084/01, 27 March 2003; and *Ghiban v Germany* (dec.), 11103/03, 16 September 2004.

⁴⁹⁷ Appl No 30913/96, *Slepčik v Netherlands and the Czech Republic*, (1996) 86 DR 176.

⁴⁹⁸ See para 333.

⁴⁹⁹ See *Ciliz v Netherlands*, 29192/95, 11 July 2000, in which it was concluded that removal of a father and the refusal to allow his re-entry had had a highly deleterious effect on child access proceedings brought by him after a divorce and thus led to a violation of Article 8. Cf *Ibar v United Kingdom* (dec.), 71928/01, 12 March 2002 in which an inability to take proceedings against the United Kingdom authorities from Turkey had not been substantiated.

⁵⁰⁰ See Appl 35984/97, *Medjden v Germany*, 31 October 1997; *Sisojeva and Others v Latvia* (dec.), 60664/00, 9 November 2000; *Kaftailova v Latvia* (dec.), 59643/00, 23 October 2000; and *Dremlyuga v Latvia* (dec.), 66729/01, 29 April 2003.

employer and a foreign employee - involving a civil right - and thus attract the protection of the right of access to court⁵⁰¹

344. However, Article 6 does apply to the handling of criminal proceedings in respect of any offences connected with a person's irregular status⁵⁰² or indeed to any other criminal proceedings brought against him or her. Thus the irregular status of a migrant might be a relevant consideration to the making of any determination as to whether it would be in the interests of justice to provide him or her with legal assistance in any prosecution brought against him or her where he or she has insufficient means to pay for it⁵⁰³. Certainly a limited or a total lack of capacity to use any of the official languages is likely to be a circumstance in which legal assistance in criminal proceedings would be regarded as being in the interests of justice⁵⁰⁴.

345. Such linguistic weaknesses will also require efforts by the state party concerned to ensure that he or she is properly informed of the nature and legal classification of the charge against him or her, has sufficient knowledge of the case against him or her and is in a position to defend him or herself by being able to put forward to the courts his or her version of events. This may necessitate the services of an interpreter but it is unlikely to require the translation of the indictment, witness statements and other documents⁵⁰⁵. The services of the interpreter must provide the accused with effective assistance in conducting his or her defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings.

346. The language difficulties of a migrant - whether or not his or her status is regular or irregular - might also be sufficient to warrant the provision of legal aid in civil proceedings in order to ensure that the right of access to court under the fair hearing guarantee is not improperly impeded but no discrete right to an interpreter in such proceedings has been recognised⁵⁰⁶.

347. Moreover, while in some instances providing the opportunity for a child to be heard may be satisfied by allowing him or her to speak directly, in most instances it is likely - as is recognised in Article 12 of the Convention on the Rights of the Child and undoubtedly an element of the implied right of access to court in other treaties - to have to be through "a representative or an appropriate body". The need for such a representative would certainly be a justification for being granted legal aid in civil and criminal proceedings.

⁵⁰¹ *Juriscic and Collegium Mehrerau v Austria*, 62539/00, 27 July 2006, in which no justification was provided for legislation that prevented the first applicant from bringing his claim for an employment permit before the domestic authorities.

⁵⁰² See, e.g., *Berisha and Haljiti v "the former Yugoslav Republic of Macedonia"* (dec.), 18670/00, 16 June 2005, communicating a complaint about an inability to understand or speak the language of the court, the lack of legal representation, legal aid and of interpretation.

⁵⁰³ See *Biba v Greece*, 33170/96, 26 September 2000 in which a violation of Article 6(1) and (3)(c) was found when an illegal immigrant could not afford legal representation for a cassation appeal and there was no provision for this to be paid for out of public funds.

⁵⁰⁴ See *Daud v Portugal*, 22600/93, 21 April 1998 and *Czekalla v Portugal*, 38830/97, 10 October 2002.

⁵⁰⁵ *Ucak v United Kingdom* (dec.), 44234/98, 24 January 2002.

⁵⁰⁶ No violation of Article 6(1) was found in *Ivanova v Finland* (dec.), 53054/99, 28 May 2002 where, although submissions had to be filed in one of Finland's official languages and there was no absolute right to cost-free proceedings, the applicant (a Russian national) was free to seek a grant to that effect as well as the appointment of a lawyer well-versed in either or both of the official languages and could appeal against any refusal to grant her legal aid. See also *Ihasniouan v Spain*, 50755/99, 28 June 2001 and *Boudraham v Spain*, 49881/99, 13 September 2001 in which (lawful) immigrants were found to be no longer victims of a violation when they became eligible for legal aid pursuant to a treaty with Morocco.

348. The irregular status of a migrant should not, as such, have any bearing on his or her ability to bring proceedings in respect of his or her civil rights or obligations since this would interfere with the right of access to court under Article 6(1)⁵⁰⁷.

349. It has been recognised that the nature of the room in which criminal proceedings have been held, the procedure followed and the lack of comprehension as to what was involved could inhibit the participation of children who are defendants⁵⁰⁸. It is probable that a similar conclusion - leading to a finding that access to court had been denied - would be reached about civil proceedings.

350. The right to a fair hearing is a right of the parties and does not, therefore, protect the interests of witnesses to proceedings. It is not, however, inconsistent with the general obligation that proceedings should be in public to exclude the public from proceedings and failure to do this could in some instances breach the witness's right to respect for his or her private life under Article 8⁵⁰⁹. Furthermore the vulnerability of some witnesses may justify some restrictions on the manner in which they can be examined in court proceedings⁵¹⁰.

351. The need for the state to provide advice on rights and how to exercise them - as distinct from any obligation to secure the assistance of a lawyer in connection with legal proceedings - has not been specifically mentioned as part of any fair hearing guarantee or so far recognised as a crucial element of the implied right of access to court. Such advice is, however, undoubtedly a part of the positive obligations entailed by the requirement in Article 22 of the Convention on the Right of the Child that a child who is seeking refugee status or who is considered a refugee receive appropriate protection and humanitarian assistance in the enjoyment of the rights in that convention and other treaties accepted by the relevant state party. A similar expectation might be considered to be implicit in the access to justice right in Article 13 of Convention on the Rights of the Persons with Disabilities, particularly in view of the express reference to training for certain officials who may have dealings with such persons. It is, of course, possible that in an appropriate case it will also be recognised in at least some instances as important in securing the right of access to court.

The Right to Liberty and Security

352. Any migrant, whether detained to prevent entry, with a view to prosecution or with a view to removal, must always have the benefit of the right under Article 5(2) to be told promptly, in simple, non-technical language that he or she can understand, the essential legal and factual grounds for the deprivation of liberty so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5(4). A written note specifying the legal provision relied upon and the reason for invoking it - e.g., the risk that the person concerned might seek to evade his or her removal - will generally be sufficient but if communication is not possible without the assistance of interpreters then these must be provided⁵¹¹.

⁵⁰⁷ For the unacceptability of a total loss of control over the bringing of proceedings in respect of one's rights, see *The Holy Monasteries v Greece*, 13092/87 and 13984/88, 9 December 1994. This does not preclude the possibility of a need for some form of prior authorisation in order to ensure that legitimate interests are not threatened - see *Ashingdane v United Kingdom*, 8225/78, 28 May 1985, which concerned controls on the bringing of actions by patients in a mental health institution against its staff - but it is not evident that there is any compelling need for this in the case of irregular migrants as a class of would-be litigants.

⁵⁰⁸ See *T v United Kingdom*, 24724/94, 16 December 1999 and *S C v United Kingdom*, 60958/00, 15 June 2004.

⁵⁰⁹ See *B and P v United Kingdom*, 36337/97 and 35974/97, 24 April 2001.

⁵¹⁰ See, e.g., as regards persons at risk of attack *Doorson v Netherlands*, 20524/92, 26 March 1996 and as regards children see *S N v Sweden*, 34209/96, 2 July 2002.

⁵¹¹ As occurred in *Conka v Belgium*, 51564/99, 5 February 2002.

353. The giving of reasons for the deprivation of liberty need not be at the moment it occurs but, except where there are genuine difficulties in finding suitable interpreters, the lapse of more than a few hours is unlikely to be acceptable⁵¹².

354. Furthermore the amenability of any form of detention to independent judicial scrutiny of its legal basis is of fundamental importance for both the protection of the physical liberty of individuals and the safeguarding of their personal security and no exception can be made where migrants are detained⁵¹³, even if their status is in some way irregular.

355. Pursuant to the right to such scrutiny conferred by Article 5(4) of the European Convention and Article 9(4) of the International Covenant, migrants must, therefore, always be able to seek a determination by a court as to whether their detention is lawful so long as it continues⁵¹⁴. This means that they should have access to a court⁵¹⁵ which can review the procedural and substantive conditions that are essential for the “lawfulness” of the deprivation of their liberty⁵¹⁶. The court should be able to examine not only compliance with the procedural requirements set out in domestic law but also the legitimacy of the purpose pursued by the arrest and the ensuing detention⁵¹⁷. In addition it should have the power to order the termination of the deprivation of liberty if it proves unlawful⁵¹⁸.

356. The existence of the remedy must be sufficiently certain, not only in theory but also in practice as otherwise it will be regarded as lacking the necessary accessibility and effectiveness⁵¹⁹. In the present context it will be particularly important that a supposed remedy is one that can actually be invoked by migrants⁵²⁰.

357. In addition the circumstances surrounding access to the court should be such that making use of this remedy is realistic. This is unlikely to be the case if the processing of a person detained with a view to removal is such that there could be no opportunity to mount a challenge before his

⁵¹² The failure to give reasons was also a factor leading to the conclusion in *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002 that there was a violation of Article 5(4) because this prevented the detained person from making an effective legal challenge to the detention decision.

⁵¹³ *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, at para 92. A violation of Article 5(4) was found in *Al-Nashif* as no court was empowered to enquire into the lawfulness of the detention.

⁵¹⁴ See Appl No 9088/80, *X v United Kingdom* (1982) 28 DR 160 (domestic remedies not exhausted in complaint about length of detention as further applications for habeas corpus could have been brought); Appl No 9403/81, *X v United Kingdom* (1982) 28 DR 235 (Article 5(4) could not be invoked after release); and Appl No 9174/80, *Zamir v United Kingdom* (1983) 40 DR 42 (Article 5(4) becomes devoid of purpose after release but in this case unjustified delays meant that the applicant's habeas corpus was only heard after his release and thus there was a violation of this provision).

⁵¹⁵ This is essential; appeals by a person detained pending removal to the discretionary leniency of ministers were found to be inadequate for the purposes of Article 5(4) in *Dougoz v Greece*, 40907/98, 6 March 2001.

⁵¹⁶ However, Article 5(4) does not guarantee a right to a judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority; *Dougoz v Greece*, 40907/98, 6 March 2001.

⁵¹⁷ *Garcia Alva v. Germany*, 23541/94, 13 February 2001, at paragraph 39.

⁵¹⁸ See, e.g., *Musial v. Poland*, 24557/94, 25 March 1999, at paragraph 43 and *Vodeničarov v. Slovakia*, 24530/94, 21 December 2000, at paragraph 33.

⁵¹⁹ See *Vachev v. Bulgaria*, 42987/98, 8 July 2004, at paragraph 71 and *Stoichkov v. Bulgaria*, 9808/02, 24 March 2005, at paragraph 66.

⁵²⁰ *Cf Nasrulloev v Russia*, 656/06, 11 October 2007 and *Ryabikin v Russia*, 8320/04, 19 June 2008 in which a violation of Article 5(4) of the European Convention was found in the case of a person detained pending extradition and judicial review of its lawfulness could not be sought under the provisions of the Code of Criminal Procedure as the person concerned was not recognised as a party to criminal proceedings in Russia.

or her removal from the country⁵²¹. It is also unlikely to be so where the person concerned is practically detained incommunicado and is not allowed to meet a lawyer⁵²². remote place

358. The detained person should always have the opportunity to be heard either in person or through some form of representation⁵²³.

359. Even if confidential material concerning national security has been used as the basis for the detention decision (or the removal decision giving rise to it), effective judicial control of detentions cannot be ousted either as regards the material concerned⁵²⁴ or the decision in its entirety⁵²⁵. Rather there will be a need to employ techniques in the judicial review process which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice. Without ruling on its conformity with the European Convention, the European Court has twice referred in this connection to legislation introduced by the United Kingdom making provision for the appointment of a “special counsel” in certain cases involving national security, allowing the detainee to be represented by an independent lawyer trusted not to disclose the relevant material to the detainee⁵²⁶. Such techniques ought, therefore, to be employed where national security considerations lie behind the detention of irregular migrants and there is a wish to preserve the confidentiality of certain material.

360. Furthermore access to the court for the purpose of challenging the lawfulness of detention must always comply with the speediness requirement in Article 5(4) of the European Convention and 9(4) of the International Covenant, which means that the challenge should be addressed in days rather than weeks following the initial detention⁵²⁷. Thereafter the possibility of being able to make periodic challenges should continue to be available as long as the detention lasts.

361. In view of the foregoing requirements, it is not particularly significant that the European Court has concluded that Article 6 is not applicable to judicial decisions prolonging detention because these do not involve the determination of civil rights and obligations or any criminal charge against the persons concerned⁵²⁸.

362. It should also be noted that the absence of access to legal and social assistance during a prolonged period of confinement - 20 days - of non-nationals to the transit zone at an airport has

⁵²¹ See *Conka v Belgium*, 51564/99, 5 February 2002, in which a consideration in finding a deprivation of liberty to be arbitrary was the timing of the expulsion decision so that a ruling could not be obtained before the expulsion had actually occurred.

⁵²² As in *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002.

⁵²³ *De Wilde, Ooms and Versyp v Belgium*, 2832/66, 2835/66 and 2899/66, 18 June 1971, at paragraph 79 and *Winterwerp v Netherlands*, 6301/73, 24 October 1979, at paras 60 and 61. See also the observation in Appl No 9174/80, *Zamir v United Kingdom* (1983) 40 DR 42 that “it would have been unreasonable to expect the applicant to present his own case in the light of the complexity of the procedures involved and his limited command of English” (p 60).

⁵²⁴ *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996, in which a violation of Article 5(4) was found because national security material could only be examined by an advisory panel before which the detainee was not legally represented.

⁵²⁵ *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, in which there was a violation of Article 5(4) because judicial review had been precluded as a result of national security having been invoked as a matter of the interior minister’s discretion.

⁵²⁶ See *Jasper v United Kingdom*, 27052/95, 16 February 2000, at para 55 and *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, at paragraph 96. The legislation permitting this is the Special Immigration Appeals Commission Act 1997 and the Northern Ireland Act 1998.

⁵²⁷ Cf Appl No 9174/80, *Zamir v United Kingdom* (1983) 40 DR 42 (seven weeks was found to be too long); Appl No 11531/85, *A v Sweden* (1987) 53 DR 128 (10 days was considered acceptable); and *Slivenko v Latvia*, 48321/99, 9 October 2003 (there was no need to rule on a complaint with regard to Article 5(4) where the applicants had been released after periods of twenty-four and thirty hours before judicial review of their detention could take place). See also the finding of a violation of Article 5(4) in *Dougoz v Greece*, 40907/98, 6 March 2001 as a result of the court failing to rule on a claim regarding detention prior to removal.

⁵²⁸ *Vikulov and Others v Latvia* (dec.), 16870/03, 25 March 2004.

been regarded as a significant contributing factor in concluding that they were subject to restrictions equivalent to a deprivation of liberty⁵²⁹.

Challenge to removal

363. The guarantee in Article 1 of Protocol No 7 operates as a constraint on the discretionary power of a High Contracting Party to expel aliens present in its territory but it is only applicable to those persons who are lawfully resident there⁵³⁰. It thus does not apply to those whose presence is unquestionably unlawful, such as in the case of persons who have remained after the expiry of an entry permit⁵³¹, the expiry of a residence permit⁵³² and the ending of an arrangement allowing troops to be present⁵³³.

364. However, Article 1 of Protocol No 7 is still applicable in the case of persons whose lawful permission to be present is being set aside and the procedure required for this purpose has not yet been completed⁵³⁴.

365. Moreover it is possible that deference to national law may not be accorded where the change in a migrant's status was the consequence of arbitrary decision-making but even then it is unlikely that this would result in many irregular migrants being entitled to the protection of the rights in Article 1 of Protocol No 7.

366. The term "expulsion" is regarded by the European Court as an autonomous concept that covers, apart from extradition, "any measure compelling the alien's departure from the territory where he was lawfully resident"⁵³⁵.

367. Article 1 of Protocol No 7 embodies three discrete but linked requirements: (a) an opportunity to submit reasons against expulsion; (b) an opportunity to have the case reviewed by a competent authority; and (c) an opportunity to be represented before either the competent authority or a person designated by that authority⁵³⁶.

368. In applying these requirements the European Court has emphasised the importance of the guarantee being practical and effective rather than theoretical and illusory so that an individual must be "genuinely able to have his case examined in the light of the reasons militating against his deportation"⁵³⁷.

⁵²⁹ *Amuur v France*, 19776/92, 25 June 1996; the applicants wished to seek asylum but were refused admission on the ground that their passports were falsified. They first got legal assistance after 15 days. The European Court also placed emphasis on the act that it was 17 days before their situation was reviewed by a court. Cf the finding of no violation of Article 5 in *Mahdid and Haddar v Austria* (dec.), 74762/01, 8 December 2005, in which the applicants had access to legal and social assistance from the beginning of their stay in the transit zone.

⁵³⁰ See *Lupsa v. Romania*, 10337/04, 8 June 2006, *Bolat v. Russia*, 14139/03, 5 October 2006 and *Kaya v. Romania*, 33970/05, 12 October 2006.

⁵³¹ Appl. No. 19373/92, *Voulofvitch, Oulianova and Voulofvitch v. Sweden*, (1993) 74 DR 199; they had remained after expiry of one-day transit visa.

⁵³² Appl. No. 40900/98, *Karara v. Finland*, 29 May 1998 (unreported)

⁵³³ *Vikulov and Others v. Latvia* (dec.), 16870/03, 25 March 2004.

⁵³⁴ See *Bolat v. Russia*, 14139/03, 5 October 2006, at paragraph. 78. The expulsion decision must always be in accordance with law.

⁵³⁵ *Bolat v. Russia*, 14139/03, 5 October 2006, at paragraph 79.

⁵³⁶ These requirements were considered to have been met in *Vikulov and Others v Latvia* (dec.), 16870/03, 25 March 2004, notwithstanding that the provision was considered in the latter not to be applicable to persons not lawfully resident in the country.

⁵³⁷ *Lupsa v. Romania*, 10337/04, 8 June 2006, at paragraph 60.

369. According to the Explanatory Report to Protocol No 7, the first requirement is the right of the person concerned to submit reasons against his expulsion. The conditions governing the exercise of this right are a matter for domestic legislation but, by including this guarantee in a separate sub-paragraph, the intention is to indicate clearly that an alien can exercise it even before being able to have his case reviewed.

370. The ability to submit reasons entails the persons subject to expulsion being able to "properly explain their own point of view"⁵³⁸.

371. It also entails the persons subject to expulsion being in a position to formulate their reasons so that there is a need for him or her (a) to be apprised of the grounds for the expulsion measure and (b) to have sufficient time to prepare submissions in connection with those grounds⁵³⁹.

372. The second requirement is the right of the person concerned to have his case reviewed by competent authority. The latter should review the case in the light of the reasons against expulsion submitted by the person concerned.

373. There is no explicit requirement that the competent authority be a court and this issue was not addressed in *Bolat v Russia* as such a requirement was imposed by the law of the Russian Federation and the finding of a violation of Article 1 of Protocol No 7 stemmed from the failure to reach a decision in accordance with law⁵⁴⁰. However, in other cases in which the requirements of Article 1 of Protocol No 7 have been found to be satisfied, the existence of proceedings before a court was an important consideration in reaching that conclusion⁵⁴¹.

374. Furthermore the provision in Article 1 of Protocol No 7 of a requirement of representation would also point to the need for the proceedings to be conducted before a court or other body competent to exercise judicial authority. There would seem, therefore, to be no basis for regarding the review of an expulsion decision solely by an official to be sufficient for the purpose of this provision, particularly as there is scope in it for dispensing with the review prior to expulsion in certain urgent cases. In any event the review needs to be a separate process from the taking of a decision to expel someone.

375. There will be no review for the purposes of Article 1 of Protocol No 7 if the examination of the reasons submitted is purely formalistic⁵⁴².

376. There is no explicit requirement that the representative of a person subject to expulsion be legally qualified. However, although the issue of representation was not raised in a number of

⁵³⁸ see Appl No. 23810/94, *B H, T H, R H and R H v Switzerland*, 11 May 1994 (unreported) and Appl No. 35438/97, *Chammas v. Switzerland*, 30 May 1997 (unreported).

⁵³⁹ See *Lupsa v. Romania*, 10337/04, 8 June 2006 in which a violation of Article 1 of Protocol No 7 was found when the authorities failed to provide the applicant with the slightest indication of the offence of which he was suspected, the prosecutor only sent him the order issued against him on the day of the appellate court hearing and the applicant's lawyer was unable to study the order and produce evidence in support of her application for judicial review of it as her requests for an adjournment were dismissed.

⁵⁴⁰ *Lupsa v. Romania*, 10337/04, 8 June 2006, at para. 82.

⁵⁴¹ See Appl. No. 23810/94, *B H, T H, R H and R H v. Switzerland*, 11 May 1994 (unreported), Appl. No. 20002/92, *Charfa v. Switzerland*, 5 April 1995 (unreported), Appl. No. 27794/95, *Sadaghi v. Sweden*, 14 October 1996 (unreported), Appl. No. 33829/96, *Bankar v. Switzerland*, 5 December 1996 (unreported), *Vikulov and Others v. Latvia* (dec.), 16870/03, 25 March 2004, *Naumov v. Albania* (dec.), 10513/03, 4 January 2005 and *Dorochenko v. Estonia* (dec.), 10507/03, 5 January 2006

⁵⁴² See Appl No. 35438/97, *Chammas v. Switzerland*, 30 May 1997 (unreported) and Appl No. 38789/97, *Mosimi v. Switzerland*, 22 January 1998 (unreported), in which such allegations were not upheld

cases⁵⁴³, the assistance of a lawyer was noted with approval in a number of others⁵⁴⁴. Furthermore no significance was undoubtedly attached to certain hearings taken place in the absence of the applicant's legal representative in *Naumov v Albania* as these resulted in the declaration of the orders to be null and void⁵⁴⁵.

377. There will also be no violation of Article 1 of Protocol No 7 if the person being expelled does not complain about the lack of legal representation⁵⁴⁶.

378. It may be that a lawyer need not be the representative in all cases but it is clearly important that the person so acting has the necessary competence and experience to provide effective representation in the proceedings concerned⁵⁴⁷.

379. Furthermore, even if there is an opportunity to submit reasons, review by a competent authority and representation, compliance with Article 1 of Protocol No 7 will not be regarded as having occurred where the law pursuant to which the person being expelled does not satisfy the requirements of the European Convention that it be both accessible and foreseeable⁵⁴⁸. The law must, therefore, provide the person being expelled with the minimum guarantees against arbitrary action by the authorities.

380. The requirements in Article 1 of Protocol No 7 can only be dispensed with prior to the expulsion where this is necessary in the interests of public order or is grounded on reasons of national security, although they must still be observed after this takes place⁵⁴⁹.

381. In any event these rights only apply to expulsion decisions and do not apply to decisions that only render migrants liable to be removed as a result of a change in their status, such as the revocation of a residence permit⁵⁵⁰. It should also be noted that this Protocol has still to be ratified by some of the European Convention's High Contracting Parties⁵⁵¹.

382. Nonetheless, where several nationals from one state are being expelled, the absence of any procedure in which the circumstances of an individual are considered before an expulsion decision is taken and executed, including an opportunity for him or her to respond to allegations or assumptions that provide the basis for removing him or her, is quite likely to lead to the expulsion

⁵⁴³ Appl. No. 23810/94, *B H, T H, R H and R H v. Switzerland*, Appl. No. 27794/95, *Sadaghi v. Sweden*, 14 October 1996 (unreported) and *Dorochenko v. Estonia* (dec.), 10507/03, 5 January 2006.

⁵⁴⁴ *Vikulov and Others v. Latvia* (at 14), Appl. No. 20002/92, *Charfa v. Switzerland* and Appl. No. 33829/96, *Bankar v. Switzerland*, 5 December 1996 (unreported)

⁵⁴⁵ (a similar view was taken in *Charfa* of the lawyer's absence from a successful appeal

⁵⁴⁶ Appl. No. 33829/96, *Bankar v. Switzerland*, 5 December 1996 (unreported)

⁵⁴⁷ cf. *Daud v. Portugal*, 22600/93, 21 April 1998, at paragraph. 50, with regard to Article 6(3)(c).

⁵⁴⁸ *Lupsa v. Romania*, 10337/04, 8 June 2006 (at paragraph. 55) and *Kaya v. Romania*, 33970/05, 12 October 2006 (at para. 27).

⁵⁴⁹ See *Lupsa v. Romania*, 10337/04, 8 June 2006 (at paragraph. 53) and *Kaya v. Romania*, 33970/05, 12 October 2006 (at paragraph. 25).

⁵⁵⁰ Appl No 21069/92, *A v San Marino*, (1993) 75 DR 245. Even if the revocation could have been classified as a removal decision, it was found this had been upheld at the end of judicial proceedings during which the applicant had had the benefit of all the safeguards required under Article 1 of Protocol No 7 and the allegedly unlawful aspects had been examined by the domestic courts which had rejected them in decisions that could not be regarded as arbitrary.

⁵⁵¹ Andorra, Belgium, Germany, Monaco, Netherlands, Spain, Turkey and United Kingdom. The absence of a ratification led to the claims based on Article 1 of Protocol No 7 in Appl No 30913/96, *Slepčik v Netherlands and the Czech Republic*, (1996) 86 DR 176 and *J E D v United Kingdom* (dec.), 42225/98, 2 February 1999 being found inadmissible. It was also a fact cited in *Katani v Germany* (dec.), 67679/01, 31 May 2001 in the course of finding inadmissible a complaint about removal based on Article 13 on the basis that it was only Article 1 of Protocol No 7 that provided a right of appeal against removal See also *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, in which that provision was not available against Bulgaria but Article 13 could be invoked as the removal allegedly affected a European Convention right (respect for family life). On Article 13, see paragraphs 395-410.

violating the prohibition on the collective expulsion of aliens in Article 4 of Protocol No 4 since, as has already been seen⁵⁵², this requires a reasonable and objective examination of the particular case of each individual.

383. The term “collective expulsion” has been considered by the European Court to comprise:

“any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”⁵⁵³

384. However, such an examination is not in itself sufficient to preclude the expulsion of several aliens from the same country as being regarded as collective in nature; the European Court also recognised in *Conka* that the background to the execution of the expulsion orders must also be taken into account for the purpose of determining whether there has been compliance with Article 4 of Protocol No 4⁵⁵⁴.

385. Furthermore the prohibition on collective expulsion is applicable whatever the status in the expelling country of the aliens concerned; in the case of *Conka* the aliens whose expulsion was found to be “collective” had exceeded the period of leave that they had been given to stay in Belgium⁵⁵⁵.

Other rights

386. It is, however, not only the provisions dealing expressly with procedural rights that impose requirements relevant to securing access to justice. A number of provisions ostensibly just guarantee substantive rights and freedoms actually have important implied procedural conditions which can, if they are observed, also facilitate access to justice. The most relevant of these provisions to the situation of migrants is the right to respect for private and family life⁵⁵⁶.

387. Thus, while no objection can be taken to a process to determine whether a person should be allowed to join his or her spouse or relative who has a permanent right of residence in the country which is not unreasonably long⁵⁵⁷, it is imperative that the process must be such that the person seeking the entry of his or her family members must have a fair opportunity to present his or her

⁵⁵² See paragraphs 223-34.

⁵⁵³ *Conka v. Belgium*, 51564/99, 5 February 2002, at paragraph. 59 and *Andric v. Sweden* (dec.), 45917/99, 23 February 1999. A similar understanding of the concept was reached by the former European Commission in Appl. No. 7011/75, *Becker v. Denmark*, 19 Yb 416 at 454.

⁵⁵⁴ 51564/99, 5 February 2002, at paragraph 59.

⁵⁵⁵ Cf the view of the United Nations Human Rights Committee concerning Article 13 of the International Covenant that the “particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13 ... Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions”; *General Comment No. 15: The position of aliens under the Covenant*, (Twenty-seventh session, 11 April 1986), paragraphs 9 and 10.

⁵⁵⁶ Another such provision is the guarantee of the right to the peaceful enjoyment of possessions in Article 1 of Protocol No 1; see, e.g., *Bryan v United Kingdom*, 19178/91, 22 November 1995.

⁵⁵⁷ Six months was not considered excessive for this purpose in Appl No 7048/75, *X v United Kingdom*, (1977) 9 DR 42.

case and the immigration authorities must not act perversely, arbitrarily or otherwise in denial of the applicant's right to family life⁵⁵⁸.

388. Furthermore it has long been recognised that any interference with the right to respect for private and family life posed by expulsion must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence⁵⁵⁹. This will be so even if national security is invoked, although procedural limitations on the use of classified information may be acceptable⁵⁶⁰.

389. The right to respect for private and family life can also be important in securing access to personal files which may be needed for later litigation⁵⁶¹.

390. Moreover, as has already been noted⁵⁶², the appropriate action required by Article 4 to prevent persons being exploited not only entails making forced labour and slavery or servitude specific offences in the criminal law but also the taking of effective steps to investigate and prosecute the commission of these offences once there is some awareness of them occurring⁵⁶³. Thus it is possible that a violation of Article 4 could be found where the obstacle to prosecuting those who subject irregular migrants to forced labour or who hold them in slavery is the absence of sufficient evidence to secure convictions as a result of the migrants concerned not being willing to testify without some guarantee against the risk of reprisals - such as an undertaking not to return them to their country of origin - where the unwillingness of the High Contracting Party to give one is not reasonable.

391. It is also conceivable that the denial to migrants of any right to bring any proceedings in respect of employment matters on account of their irregular status, notwithstanding that they are actually employed, could be regarded as reinforcing a situation of forced labour for which a High Contracting Party could be held responsible.

392. Also potentially of importance for migrants are the procedural obligations that are part of the guarantee of the right to life and the prohibition on inhuman and degrading treatment or punishment in Articles 2 and 3 of the European Convention.

393. Thus the obligation to protect the right to life requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force or in the custody of state agents. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and to ensure the accountability of state agents or bodies for deaths occurring under their responsibility. An investigation will only

⁵⁵⁸ Appl No 8378/78, *Kamal v United Kingdom*, (1980) 20 DR 168.

⁵⁵⁹ *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, in which a violation of Article 8 was found where the law authorised the Ministry of the Interior to remove persons who had never been convicted or investigated on the basis of orders issued without examination of evidence, without the possibility of adversarial proceedings and without giving reasons.

⁵⁶⁰ The European Court insisted in *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, that the individual must be able to challenge the executive's assertion that national security is at stake; "While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary" (paragraph 124). See also *Lupsa v Romania*, 10337/04, 8 June 2006 and *Liu and Liu v Russia*, 42086/05, 6 December 2007.

⁵⁶¹ See, e.g., *Gaskin v United Kingdom*, 10454/83, 7 July 1989, which concerned the refusal of access to the files of a child taken into care which had thereby prevented him from bringing proceedings for negligence against the local authority concerned.

⁵⁶² See paragraph 170.

⁵⁶³ On the positive obligation with regard to law enforcement, see, e.g., *Osman v United Kingdom* [GC], 23452/94, 28 October 1998.

be effective if the persons responsible for and carrying out the investigation are independent and impartial, in law and in practice, and it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. The latter requires, in particular, the reasonable steps available to them to secure the evidence concerning the incident and conclusions that are based on thorough, objective and impartial analysis of all relevant elements⁵⁶⁴. Furthermore there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. Although the degree of public scrutiny required will vary from case to case, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests⁵⁶⁵ and this may require the provision of legal aid to facilitate participation in the relevant proceedings⁵⁶⁶.

394. Similar obligations arise where there has been an express complaint or there are other sufficiently clear indications that someone may have been subjected to torture or inhuman and degrading treatment or punishment⁵⁶⁷.

Effective remedies

395. Migrants ought to be able to challenge any action taken against them where this would arguably lead to a violation of their rights and freedoms under the European Convention or the International Covenant since Articles 13 and 2(3) respectively require that there be available at the national level a remedy to enforce the substance of these rights and freedoms⁵⁶⁸. This is equally true where they are a victim of any act of racial discrimination contrary to the Convention on the Elimination of All Forms of Racial Discrimination⁵⁶⁹

396. The right to an effective remedy necessitates that the substance of an "arguable complaint" can be dealt with under the remedy as a matter of practice as well as of law, whatever the basis on which it scrutinises the decision being impugned⁵⁷⁰. It is thus essential that the body concerned be

⁵⁶⁴ See, e.g., *Nachova and Others v. Bulgaria* [GC], 43577/98, 6 July 2005 and 43579/98, and *Ramsahai and Others v Netherlands* [GC], 52391/99, 15 May 2007

⁵⁶⁵ *Anguelova v. Bulgaria*, no. 38361/97, 13 June 2002.

⁵⁶⁶ *Hugh Jordan v United Kingdom*, 24746/94, 4 May 2001

⁵⁶⁷ See, e.g., *Assenov and Others v. Bulgaria*, 24760/94, 28 October 1998 and *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia*, 71156/01, 3 May 2007

⁵⁶⁸ However, Article 13 cannot be invoked when the only complaint is about the fact of removal. See *Katani v Germany* (dec.), 67679/01, 31 May 2001 (making the point that it was only Article 1 of Protocol No 7 that provided a right of appeal against removal); *Vikulov and Others v Latvia* (dec.), 16870/03, 25 March 2004; and *Bolat v Russia* (dec.), 14139/03, 8 July 2004 (in which Article 1 of Protocol No 7 was stated to be the *lex specialis* with respect to removal procedures). An arguable claim that removal would lead to violations of Articles 2, 3 and 8 was considered to be lacking in *G H H and Others v Turkey*, 3258/98, 11 July 2000.

⁵⁶⁹ This is provided for in Article 6 and the Committee on the Elimination of Racial Discrimination has made it clear that states parties must ensure that non-citizens have in particular access to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of "racially motivated violence"; *General Recommendation No 30: Discrimination Against Non Citizens*, CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 18.

⁵⁷⁰ Thus, although it has been argued that, in judicial review applications, English courts will not reach findings of fact for themselves on disputed issues where their scrutiny took place against the background of the criteria of rationality and perverseness being applied, the European Court has been satisfied that they gave careful and detailed scrutiny to claims that, for example, a removal would expose an applicant to the risk of inhuman and degrading treatment and the use of these criteria thus did not deprive the procedure of its effectiveness. See with regard to judicial review *Soering v United Kingdom*, 14038/88, 7 July 1989, at paragraphs 119-124; *Vilvarajah v United Kingdom*, 13163-5/87, 133447/87 and 13448/87, 30 October 1991, at paragraphs 121-124; *D v United Kingdom*, 30240/96, 2 May 1997, at paragraphs 69-73; *T I v United Kingdom* (dec.), 43844/98, 7 March 2000; *Bensaid v United Kingdom*, 44599/98, 6 February 2001, at paragraph 56; and *Hilal v United Kingdom*, 45276/99, 6 March 2005, at paragraph 78. These requirements of Article 13 were considered to be fulfilled in *Kaftailova v Latvia* (dec.), 59643/00, 23 October 2001; *S R v Sweden* (dec.), 62806/00,

in a position to examine the substance of the applicant's complaint under the European Convention. This would not be possible where, for example, it is not able to scrutinise whether the expulsion of someone solely by reference to whether this would expose the person concerned to the risk of ill-treatment contrary to Article 3⁵⁷¹ or, in the event of a dispute as to the family relationship relevant to admission or expulsion, the court concerned has no jurisdiction to determine a matter of factual appreciation⁵⁷².

397. The body before which the complaint can be brought must also be able to afford the relief being sought, which in many cases may be appropriate reparation but in the case of expulsion decisions is likely to require the authority to quash them and require any fresh decision to be taken in accordance with the relevant substantive and procedural requirements found to have been disregarded⁵⁷³. However, this does not mean that a favourable outcome for the person seeking the remedy must be certain.

398. The authority able to grant the relief sought will not always have to be a judicial authority, although its powers and the guarantees which it affords will be relevant in determining whether the remedy before it is effective⁵⁷⁴. In particular the body concerned must be one that offers adequate guarantees of independence and impartiality⁵⁷⁵.

399. In addition the notion of an effective remedy under Article 13 requires that the remedy is such that it can prevent the execution of measures that are contrary to the European Convention and whose effects are potentially irreversible⁵⁷⁶. It will, therefore, be inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the European Convention, although the European Court does afford High Contracting Parties some discretion as to the manner in which they conform to their obligations under this provision⁵⁷⁷.

400. Moreover in the case of an expulsion order it will be important that there is no confusion as to whether a remedy has a suspensive effect and that the application for relief can be dealt with in the period before the order is to be executed⁵⁷⁸. Thus in a system where stays of execution must be

23 April 2002; and *Dremlyuga v Latvia* (dec.), 66729/01, 29 April 2003. Cf *Jabari v Turkey*, 40035/98, 11 July 2000, in which the applicant was able to challenge the legality of her removal in judicial review proceedings but this course of action did not entitle her to have an examination of the merits of her claim to be at risk of ill-treatment contrary to Article 3 if deported to Iran.

⁵⁷¹ As in *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996, where the risk to the applicant was balanced against the danger to national security.

⁵⁷² *Ibid.* In this case the issue was whether the applicant had exhausted domestic remedies for the purpose of an application under the European Convention but the point is equally applicable for the purposes of the right under Article 13. It was considered that the applicant had no court remedy to establish the identity of his purported wife and son or the latter's legitimacy. In this case it was thought that judicial review was ineffective for this purpose but subsequent case law suggests that this should no longer be regarded as correct; see n 572.

⁵⁷³ Cf *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996, in which a violation of Article 13 was found where an advisory panel could not make a binding decision.

⁵⁷⁴ See, e.g., *Conka v Belgium*, 51564/99, 5 February 2002, in which a complaint about a possible violation of Article 3 was not considered arguable but one with respect to Article 4 of Protocol No 4 was so regarded. See also *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002.

⁵⁷⁵ See Appl No 13718/88, *C v United Kingdom*, 15 July 1988 (unreported); Appl No 22406/93 *S N v Switzerland*, 10 September 1993 (unreported), *Shebshov v Latvia* (dec.), 50065/99, 9 November 2000 and *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002.

⁵⁷⁶ *Jabari v Turkey*, 40035/98, 11 July 2000, in which there was no possibility of suspending the implementation of the removal measure impugned. This view was endorsed in *Conka v Belgium*, 51564/99, 5 February 2002, at paragraph 79.

⁵⁷⁷ *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996, at paragraph 145. See the importance attached to the possibility of seeking an interim measure against removal in the conclusion in *Bahaddar v Netherlands*, 25894/94, 19 February 1998 that the applicant had failed to exhaust the domestic remedies available to him.

⁵⁷⁸ See *Conka v Belgium*, 51564/99, 5 February 2002, in which an application to the *Conseil d'Etat* for a stay of execution under the ordinary procedure was one of the remedies which was available to the applicants to challenge the expulsion

applied for and are discretionary, the risk that it may be refused wrongly, with the applicant being subjected to ill-treatment or being part of a collective expulsion prior to a ruling on the merits that the expulsion is unjustified, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13⁵⁷⁹. Furthermore the European Court has made it clear that, even if the risk of error is in practice negligible, the requirements of Article 13 take the form of a guarantee and not of a mere statement of intent or a practical arrangement so that a system in which an application for stay of execution was not suspensive but a non-binding order for a stay of the expulsion could be issued was considered to be too uncertain for the requirements of Article 13 to be satisfied⁵⁸⁰.

401. It is also imperative to ensure that the relevant authority is not overburdened with a resulting risk of abuse of process since Article 13 imposes on the High Contracting Parties the duty to organise their judicial systems in such a way that their courts can meet its requirements⁵⁸¹.

402. It is unlikely that a remedy would be considered effective in the absence of legal representation where the person is not present in the country⁵⁸². Moreover any remedies that may exist will probably be considered to have been unjustifiably hindered if the lawyers of persons being removed are not informed in sufficient time to act on their behalf⁵⁸³. It is also possible that the absence of appropriate interpretation facilities could prevent a remedy from being effective⁵⁸⁴.

403. A thorough, effective, independent and expeditious investigation will always be required wherever someone dies in detention⁵⁸⁵ or where the circumstances give reasonable cause to suspect that he or she must have been ill-treated⁵⁸⁶, as well as where there is a similar basis to suspect that a person has been the victim of racial discrimination⁵⁸⁷.

decision but, since, according to that decision, they had only five days in which to leave the national territory, applications for a stay under the ordinary procedure did not of themselves have suspensive effect and the *Conseil d'Etat* had forty-five days in which to decide such applications. As a consequence the European Court observed that the mere fact that that application was mentioned as an available remedy was liable to confuse the applicants.

⁵⁷⁹ *Conka v Belgium*, 51564/99, 5 February 2002.

⁵⁸⁰ *Ibid.* Thus the European Court noted that "it appears that the authorities are not required to defer execution of the removal order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the *Conseil d'Etat* to decide the application. Furthermore, the onus is in practice on the *Conseil d'Etat* to ascertain the authorities' intentions regarding the proposed removals and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the *Conseil d'Etat*, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the *Conseil d'Etat* and the authorities will comply in every case with that practice, that the *Conseil d'Etat* will deliver its decision, or even hear the case, before his removal or that the authorities will allow a minimum period of grace", paragraph 83.

⁵⁸¹ *Conka v Belgium*, 51564/99, 5 February 2002; the European Court stressed the importance of Article 13 for preserving the subsidiary nature of the European Convention (paragraph 84).

⁵⁸² The importance of this having been provided was emphasised in *Vikulov and Others v Latvia* (dec.), 16870/03, 25 March 2004, although the European Court did not consider Article 13 was applicable where the complaint was solely about removal and not an alleged violation of European Convention rights and freedoms.

⁵⁸³ *Shamayev and 12 Others v Georgia and Russia*, 36378/02, 12 April 2005 (an extradition case).

⁵⁸⁴ Cf the need for this in the context of the right to a fair hearing under Article 6 discussed in paragraphs 344-45.

⁵⁸⁵ A violation of Article 2 was thus found in *Paul and Audrey Edwards v United Kingdom*, 46477/99, 14 March 2002 when it was established that this had not occurred.

⁵⁸⁶ This overlaps with the positive obligations arising from the right to life and the prohibition on torture and inhuman and degrading treatment or punishment; see paragraphs 393-94. The absence of an effective, independent and expeditious investigation led, e.g., to the finding that the applicant in *Aksoy v Turkey*, 21987/93, 18 December 1996 did not have an effective remedy, as required by Article 13, for the ill-treatment that he had suffered. The need for a prompt and impartial investigation where there is reasonable ground to believe that an act of torture has been committed is also expressly required by Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁸⁷ See, e.g., *Nachova and Others v. Bulgaria* [GC], 43577/98, 6 July 2005. See also the view of the Committee on the Elimination of Racial Discrimination that states parties to the Convention on the Elimination of All Forms of Racial Discrimination should "Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to

404. Furthermore the exercise of a remedy must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State⁵⁸⁸.

405. In addition a remedy will not be considered effective where there is undue delay in providing it⁵⁸⁹.

406. It is possible that a failure to provide clear information about a remedy could in certain circumstances render it ineffective⁵⁹⁰.

407. Where absolute rights are involved, the scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the removing State⁵⁹¹.

408. Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the removal decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must in addition be some form of adversarial proceedings, if need be through a special representative after a security clearance so as to ensure that no leakage detrimental to national security would occur. Furthermore, the question whether the impugned measure would interfere with the individual's rights and freedoms under the European Convention and, if so, whether a fair balance is struck between the public interest involved and the individual's rights and freedoms in the case of those that are qualified must be examined⁵⁹².

409. While it has been accepted that any independent authority dealing with an appeal against a removal decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term "national security"⁵⁹³.

410. Where the European Court has found expulsion to be in violation of the right to respect for family life under Article 8, there will be a duty, based on the mutual enjoyment of each other's company as a fundamental element of family life, to facilitate the return of the person concerned to

independent and effective scrutiny"; *General Recommendation No 30: Discrimination Against No Citizens*, CERD/C/64/Misc.11/rev.3, 1 October 2004.

⁵⁸⁸ See *Aksoy v. Turkey*, 21987/93, 18 December 1996, *Aydin v. Turkey*, 23178/94, 25 September 1997 and *Kaya v. Turkey*, 22729/93, 19 February 1998, where violations of Article 13 arose from failure to conduct effective investigations into the circumstances which were alleged to entail violations of the European Convention.

⁵⁸⁹ This obviously turn on the facts of the individual case; in *Dremlyuga v Latvia* (dec.), 66729/01, 29 April 2003 an interval of one year, seven months and ten days was not considered excessive for proceedings that involved three tiers of courts.

⁵⁹⁰ See n 244.

⁵⁹¹ *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996.

⁵⁹² *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002, in which all appeals filed by the first applicant were rejected without examination on the basis of the Aliens Act, which – as construed by the Ministry of the Interior and the Bulgarian courts in the applicants' case and, later, in an interpretative Act of Parliament – provides that removal decisions citing "national security" as their ground need not state reasons and are not subject to appeal. Where an appeal against such an order is submitted to a court, it is not entitled to enquire whether genuine national security concerns are at stake and must reject it. See also *Chahal v United Kingdom*, 22414/93, 15 November 1996, in which insufficient procedural safeguards were found to be provided where in the proceedings before an advisory panel an applicant being removed on national security grounds was not entitled to legal representation, was only given an outline of the grounds for the notice of intention to remove, the panel had no power of decision and its advice to the minister was not binding and was not disclosed

⁵⁹³ See *Chahal v United Kingdom* [GC], 22414/93, 15 November 1996 and *Al-Nashif v Bulgaria*, 50963/99, 20 June 2002.

be with his or her family and special expedition is required in giving effect to this duty⁵⁹⁴. This may entail an obligation to met the cost of bringing a person who has been removed back to the territory of the High Contracting Party concerned⁵⁹⁵. Such an approach to remedying the consequences of expulsion may also be appropriate where other rights and freedoms are involved⁵⁹⁶.

411. In case of failed asylum-seekers subject to expulsion, the requirements of an effective remedy before a judicial or independent and impartial administrative authority which has competence both to decide on the existence of the conditions provided for by Article 3 of the European Convention and to grant appropriate relief, with the remedy being accessible for the rejected asylum-seeker and the execution of the expulsion order being suspended until a decision is taken, was endorsed in Recommendation No R (98) 13 of the Committee of Ministers to Member States on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the Context of Article 3 of the European Convention⁵⁹⁷.

Regional and international remedies

412. All of these treaties discussed in this section - with the exception of the Convention on the Rights of the Child - provide for the possibility of the determination of applications or communications submitted by individuals⁵⁹⁸ alleging that there has been a failure to fulfil the requirements not only of the provisions in them that particularly guarantee access to justice but also of those guaranteeing all the other rights and freedoms which states parties have undertaken to secure. They can thus contribute to securing access to justice more generally.

413. However, it is only the European Court in determining an application alleging a violation of a provision of the European Convention or one of its Protocols that is clearly authorised to provide a ruling that is binding in international law⁵⁹⁹. Moreover it is only the procedure before the European Court that is obligatory for states parties; in the case of the other instruments either a special declaration or the ratification of an additional instrument is needed⁶⁰⁰.

⁵⁹⁴ *Mehemi v France (No 2)*, 53470/99, 10 April 2003 which followed on from the initial finding of a violation of Article 8 in *Mehemi v France*, 25017/94, 26 September 1997. Delays of three and a half months in issuing the necessary documentation were not considered excessive but it was emphasised that considerations such as administrative difficulties should not be allowed to play more than a secondary role.

⁵⁹⁵ See, e.g., Appl No 2991/66, *Alam and Khan v United Kingdom*, (1960) 11 Yb 478, where in a friendly settlement of a complaint that Article 8 had been violated by a refusal of admission, not only was authorisation to enter given but the government paid the fare for the child to return from Pakistan to the United Kingdom.

⁵⁹⁶ The United Nations General Assembly's Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live also provides that aliens lawfully in the territory of a State may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited"; Article 7 of resolution 40/144 of 13 December 1985.

⁵⁹⁷ Adopted by the Committee of Ministers on 18 September 1998 at the 641st meeting of the Ministers' Deputies.

⁵⁹⁸ Furthermore all of them, except for the Convention on the Rights of the Child and the Convention on the Rights of the Persons with Disabilities, also provide for the possibility of applications or communications from states but this possibility is only operational in the case of the European Convention. The latter instrument is alone in allowing applications to be submitted by non-governmental organisations claiming to be victims of violations of the European Convention or the Protocols thereto.

⁵⁹⁹ Pursuant to Article 46. The rulings of the other bodies are not judgments but are expressed as "determinations of the merits", "reports" containing a statement of facts and submissions and "views", without any clear indication of their formal status.

⁶⁰⁰ A declaration is needed in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for communications from individuals or states to be possible and one is also required for communications from states regarding the International Covenant but protocols to both the latter instruments, the

414. Resort to the regional and international supervisory mechanisms can certainly be seen as the ultimate means of securing access to justice but, given the lengthy period involved in the processing of an application or communication, it is obviously preferable for redress to be secured at the national level. Furthermore, although the regional and international case law interpreting and applying the requirements of the various treaty provisions provides important precision as to what the requirements in them entail, the very existence of this case law is very often an indication of failings at the national level to secure access to justice since the rulings concerned involve a finding of a violation of one or more of the commitments made by the state party concerned.

415. Attempts to use, in particular, the detention of a migrant is not used as an opportunity to subject him or her to any pressure from the authorities to withdraw or modify any complaint that he or she may have made to the European Court about his or her treatment, whether in respect of the detention itself or other matters concerning his or her status, including the proposal to remove him or her, could itself be a violation of the right of individual petition under Article 34. Such a violation can be the consequence not only of direct coercion and flagrant acts of intimidation⁶⁰¹ but also of more indirect acts or contacts designed to dissuade or discourage applicants from pursuing a remedy under the European Convention⁶⁰².

416. Furthermore there would also be a violation of Article 34 if a detainee's ability to present his or her complaint was hindered as a result of interference with his or her correspondence with the European Court and/or his or her legal representative⁶⁰³.

417. In addition a violation of Article 34 would occur if an expulsion decision was executed notwithstanding an indication of interim measures under Rule 39 of the Rules of Court if the effect of such action was to prevent the European Court from conducting a proper examination of complaints submitted to it in accordance with its settled practice in similar cases and ultimately from protecting them, if need be, against potential violations of the European Convention being alleged⁶⁰⁴. This is particularly likely to be so if the expulsion puts the person concerned in a situation where he or she is no longer able to contact his or her legal representatives and/or the European Court, whether on account of detention⁶⁰⁵ or simply as a consequence of the haste in his or her expulsion⁶⁰⁶. While the indication of interim measures does not guarantee that a state will suspend an expulsion measure, it does generally have this suspensive effect and is thus an important element in the achievement of access to justice for many migrants. However, the

Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Persons with Disabilities must take place before communications from individuals can be considered.

⁶⁰¹ As in *Assenov and Others v Bulgaria*, 24760/94, 28 October 1998.

⁶⁰² As in *Tanrikulu v Turkey*, 23763/94, 8 July 1999.

⁶⁰³ As in *Cotlet v Romania*, 38565/97, 3 June 2003, *Shamayev and 12 Others v Georgia and Russia*, 36378/02, 12 April 2005. Such interference with correspondence would also entail a violation of Article 8. No violation of Article 34 was found in *Mogos v Romania*, 20420/02, 13 October 2005 in respect of an alleged interference with correspondence with the European Court where the applicants were in an airport's transit zone but were free to leave it.

⁶⁰⁴ *Mamatkulov and Askarov v Turkey* [GC], 46827/99, 4 February 2005.

⁶⁰⁵ As was the consequence of the extradition of the applicants in *Mamatkulov and Askarov* to Uzbekistan. Cf the finding in *CruzVaras v Sweden*, in which it was found that the exercise of the right of petition had not been hindered in any significant way as a result of the removal of the applicant to Chile; it appeared that he remained at liberty, his lawyer was able to represent him in proceedings before the European Commission despite his absence and his inability to confer with the lawyer had not hampered the gathering of additional evidence or the countering of submissions by Sweden on questions of fact.

⁶⁰⁶ As was found to have occurred in *Shamayev and 12 Others v Georgia and Russia*, 36378/02, 12 April 2005.

growing demand for this remedy is undoubtedly an indication of the scale of the problems faced by many migrants in securing respect for their rights at the national level⁶⁰⁷.

Conclusion

418. There is a considerable degree of protection to be derived from general human rights treaties with respect to access to justice and it is important that much of it is applicable to irregular migrants. However, its scope is - despite the extensive case law - still not sufficiently certain, particularly as regards the provision of legal aid, the provision of information and the exact requirements concerning children, even if the approach required is broadly helpful in both instances. There are important safeguards governing the removal process where there is a risk of human rights being violated in the destination country but, where that risk does not obtain, the need for appeals to have a suspensive effect is not really established and there is no protection for irregular migrants. The availability of recourse to regional and supervisory mechanisms, especially the European Court, is an important additional element in securing access to justice for migrants.

D. Treaties concerned with consular assistance

419. Also of potential significance in securing access to justice for migrants are two treaties on the functions that can be performed by the consular representatives of foreign states, namely, the Vienna Convention on Consular Relations and the European Convention on Consular Functions.

420. A number of the consular functions identified in the Vienna Convention could contribute to securing access to justice. Apart from the general function of helping and assisting nationals of the sending state, those functions comprise, in particular, safeguarding the interests of such nationals in cases of succession *mortis causa* in the territory of the receiving State; safeguarding the interests of minors and other persons lacking full capacity who are nationals of the sending State; representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of their rights and interests, where, because of absence or any other reason, they are unable at the proper time to assume the defence of their rights and interests and transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State⁶⁰⁸.

421. Furthermore, this convention provides that, with a view to facilitating the exercise of consular functions relating to nationals of the sending state, consular officers shall be free to communicate with nationals of the sending State and to have access to them⁶⁰⁹. In addition a national of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State and, if he or she so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to

⁶⁰⁷ In 2008 3,200 requests were received by the European Court of which almost 750 were granted, mostly in sensitive cases concerning immigration law and the right of asylum; Foreword to the Court's *Annual Report 2008*, p 5.

⁶⁰⁸ Article 5.

⁶⁰⁹ Article 36.

custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. Furthermore the said authorities shall inform the person concerned without delay of his rights under this provision⁶¹⁰. Moreover consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

422. Although Convention refers to the right of a national to have his or her consul notified and to communicate with the consul, failure to respect those "rights" can only be the object of proceedings brought before the International Court of Justice by the sending state against the receiving state⁶¹¹.

423. In addition the receiving state should notify the appropriate consular post without delay in the case of the death of a national of the sending State, of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State and of a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State where the relevant information is available to the competent authorities of the receiving State⁶¹².

424. There are similar provisions in the European Convention on Consular Functions, although this has not yet entered into force. They are slightly more elaborate notably as regards assistance with interpretation, the duty of notification about a deprivation of liberty not being dependent upon the request of the person concerned, advice in regard to rights and duties under the law of the receiving State relating to social security and social and medical assistance, and assist them in this connection, acting to protect and preserve the estate of a deceased person⁶¹³. Also of note is the stipulation that The receiving State "shall not be obliged to recognise a consular officer as entitled to exercise consular functions on behalf of, or otherwise to act on behalf of or concern himself with, a national of the sending State who has become a political refugee whether for reasons of race, nationality, political opinion or religion"⁶¹⁴. This provision will be modified by the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees - also not yet in force - in that it provides that "the consular officer of the State where the refugee has his habitual residence shall be entitled to protect such a refugee and to defend his rights and interests in conformity with the Convention, in consultation, whenever possible, with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it"⁶¹⁵.

⁶¹⁰ In the *LaGrand Case* (Germany v United States of America), ICJ Reports 2001, the International Court of Justice found that the failure for 16 years to inform two brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under Article 36.

⁶¹¹ Pursuant to the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963, as in the *LaGrand Case*.

⁶¹² Article 37.

⁶¹³ Article 10 of the General Assembly's Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live also provides that "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides"; resolution 40/144 of 13 December 1985.

⁶¹⁴ Article 47.

⁶¹⁵ Article 2.

425. It should also be noted that the European Convention on Social and Medical Assistance provides that, where repatriation of a Council of Europe national pursuant to its provisions is to occur⁶¹⁶, the diplomatic or consular authorities of the country of origin shall be advised of the repatriation of their national⁶¹⁷.

426. Although they are not likely to be the principal means of securing access to justice for migrants, arrangements for consular assistance will undoubtedly be important for some and arrangements to sustain their contribution are thus essential.

E. Other relevant Council of Europe treaties

427. Certain other Council of Europe treaties (and one Recommendation of the Committee of Ministers), although not mainly concerned about the situation of migrants have provisions which could be of assistance to them. In addition their elaboration of arrangements concerning the provision of children and the protection of the interests of children are ones that could usefully be emulated in other instruments dealing with the situation of migrants.

Transmission of legal aid applications

428. Some limited assistance for migrants with respect to access to justice outside the country in which they are living of residence could be afforded by the implementation of the provisions in the European Agreement on the Transmission of Applications for Legal Aid⁶¹⁸, although these are not specifically directed to them .

429. The Agreement is concerned with the provision of assistance in transmitting applications for legal aid in civil, commercial or administrative matters in another Contracting Party than the one in which the potential applicant has his or her habitual residence. It should thus be possible to submit such an application in the state where he or she is habitually resident and that state is then obliged to transmit the application to the other state⁶¹⁹. This transmission is to be performed by a designated transmitting authority which is supposed to assist the applicant in ensuring that the application is accompanied by all the documents known by it to be required to enable the application to be determined and it is also required to assist the applicant in providing any necessary translation of the documents⁶²⁰. The central receiving authority is then required to transmit the application to the authority which is competent to determine the application and it must also inform the transmitting authority of any difficulty relating to the examination of the application and of the decision taken on the application by the competent authority⁶²¹. All documents forwarded in pursuance of the Agreement are to be exempt from legalisation or any equivalent formality and no charges are to be made by the Contracting Parties in respect of services rendered under it⁶²².

⁶¹⁶ See paragraph 65.

⁶¹⁷ Article 10; if possible, three weeks in advance.

⁶¹⁸ Ratified by Albania, Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and United Kingdom.

⁶¹⁹ Article 1.

⁶²⁰ Article 3(1). The transmitting authority may , however, refuse to transmit the application if it appears to be manifestly not made in good faith.

⁶²¹ Article 3(2).

⁶²² Articles 4 and 5 respectively.

430. Supplementing the provisions of the Agreement are those of the Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid whereby the requested Party is required to ensure either that lawyers appointed to represent such applicants communicate with these applicants in a language readily understood by them or that costs for translation and/or interpretation of the communications between lawyers and applicants are covered⁶²³. Insofar as this is not practicable, the requested Party shall provide appropriate means to ensure the effective communication between lawyers and applicants. In order to facilitate this process it is provided that the form used to transmit applications for legal aid should indicate the languages readily understood by applicants. There is also a requirement that applications be dealt with within a reasonable time and be acknowledged⁶²⁴.

431. The provisions of the Agreement and the Additional Protocol are only of use where there is actually provision for legal aid in the country where the civil, commercial or administrative matters arise and the applicant meets the relevant eligibility criteria⁶²⁵. Nonetheless fulfilment of the provisions in the Agreement and the Additional Protocol could prove beneficial to those migrants who continue to have interests in need of protection in countries other than where they are now habitually resident.

Victims of crime

432. Under the European Convention on the Compensation of Victims of Violent Crime⁶²⁶ - something that would include many of the racist attacks suffered by migrants - there is a requirement for a state on whose territory the crime was committed to contribute, when compensation is not fully available from other sources, to compensate both those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence and the dependants of persons who have died as a result of such crime⁶²⁷. Such compensation is to be awarded in the above cases even if the offender cannot be prosecuted or punished. However, this requirement will not benefit all migrants as it only exists with respect to nationals of the States parties and to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed⁶²⁸.

433. In Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims⁶²⁹ there are some recommendations of relevance to access to justice for all victims of crime, which are to be applied without discrimination and thus could benefit migrants if implemented.

⁶²³ Article 3.

⁶²⁴ Article 4. Six months, provided all necessary information has been provided, is set as the target for a first instance decision, with an additional requirement on progress to the transmitting authority if this is not met and on any difficulties preventing a decision.

⁶²⁵ Although these ought to meet the requirements of the right of access to court elaborated by the European Court and other treaty bodies; see paras 329-351.

⁶²⁶ Ratified by Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland and United Kingdom.

⁶²⁷ Article 2.

⁶²⁸ Article 3. The compensation is to cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance (Article 4). There is also provision for reducing or refusing compensation in certain cases and the setting of deadlines for applications.

⁶²⁹ Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies.

434. These concern firstly assistance measures to facilitate rehabilitation, particularly medical care, material support and counselling which it is recommended be provided free of charge at least in the immediate aftermath of the crime, and protection from secondary victimisation⁶³⁰. It is also recommended that such assistance must take account of the needs of those victims who are particularly vulnerable and should be provided, wherever possible, in a language understood by the victim.

435. Secondly the taking of measures to encourage respect and recognition of victims and understanding of the negative effects of crime amongst those who come into contact with victims is recommended, as is the provision of appropriate information and assistance by embassies and consulates to their nationals who become victims of crime which could be important for some migrants⁶³¹. In addition the recommendation proposes the provision of dedicated services for the support of victims and the encouragement of the work of non-governmental organisations in assisting victims⁶³², as well as the provision of appropriate training for all those involved in this⁶³³.

436. Thirdly there are detailed recommendations concerning the provision of information both about the handling of cases concerning victims and for the protection of their interests and the exercise of their rights. This should cover in particular their role in the criminal proceedings, the outcome of those proceedings, how they can obtain protection and compensation, the availability and cost of legal advice and the availability of legal aid.⁶³⁴

437. Fourthly it is recommended that states take necessary steps to ensure that victims have effective access to all civil remedies and within a reasonable time through the right of access to competent courts and legal aid "in appropriate cases"⁶³⁵. It is recognised that mediation between the victim and offender could be beneficial⁶³⁶ but this should be subject to the ability of the parties to give free consent, confidentiality, access to independent advice, the possibility to withdraw from the process at any stage and the competence of mediators.

438. Fifthly the adoption of compensation schemes for the victims of serious, intentional violent crimes, including sexual violence, and the promotion of access to insurance schemes in respect of criminal victimisation is recommended⁶³⁷. Of particular note for migrants who might return to their country of nationality after becoming a victim is encouragement of co-operation between states to enable victims to claim compensation from the state in which the crime occurred by applying to a competent agency in their own country.

439. Finally, and of particular importance in ensuring that victims actually seek the remedies available to them, it is recommended that various steps be taken to protect the physical and psychological integrity of victims, particularly those giving testimony, to identify and combat repeat victimisation and to avoid as far as possible impinging on the private and family life of victims as well as to protect their personal data⁶³⁸.

⁶³⁰ Para 3.

⁶³¹ Paragraph 4.

⁶³² Paragraph 5.

⁶³³ Paragraph 12.

⁶³⁴ Paragraph 6.

⁶³⁵ Paragraph 7.

⁶³⁶ Paragraph 13. See also Recommendation R (99) 19 on mediation in criminal matters.

⁶³⁷ Paragraphs 8 and 9.

⁶³⁸ Paragraph 10.

Enforcing children's rights

440. Children who are migrants could benefit from the provisions of the European Convention on the Exercise of Children's Rights⁶³⁹ which seeks, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority. However, it is likely to be of limited assistance to them since its provisions are concerned with family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children.⁶⁴⁰

441. Pursuant to the Convention a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, should be granted, and should be entitled to request, the right to receive all relevant information, to be consulted and express his or her views and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision⁶⁴¹.

442. In such proceedings where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter, the child must have the right to apply, in person or through other persons or bodies, for a special representative - i.e., a lawyer, or a body appointed to act before a judicial authority - to be appointed⁶⁴². The representative shall, unless this would be manifestly contrary to the best interests of the child, provide him or her with all relevant information⁶⁴³ if the child is considered by internal law as having sufficient understanding, as well as provide him or her with explanations concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative and determine the views of the child and present these views to the judicial authority⁶⁴⁴.

443. The Convention also requires parties to it to consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular: the right to apply to be assisted by an appropriate person of their choice in order to help them express their views; the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer; the right to appoint their own representative; and the right to exercise some or all of the rights of parties to such proceedings⁶⁴⁵.

444. In proceedings affecting a child, the judicial authority, before taking a decision, must consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it must obtain further information, in particular from the holders of parental responsibilities and, in a case where the child is considered by internal law as having sufficient understanding, it must ensure that the child has received all relevant information, consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly

⁶³⁹ Ratified by Austria, Cyprus, Czech Republic, France, Germany, Greece, Italy, Latvia, Poland, Slovenia, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom.

⁶⁴⁰ Article 1. States must specify at least three categories of family cases before a judicial authority to which the Convention will apply.

⁶⁴¹ Article 3.

⁶⁴² Article 4. States are free to limit this right to children who are considered by internal law to have sufficient understanding

⁶⁴³ "Relevant information" means information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child.

⁶⁴⁴ Article 10.

⁶⁴⁵ Article 5.

contrary to the best interests of the child, allow the child to express his or her views and give due weight to the views expressed by the child⁶⁴⁶. Furthermore in proceedings affecting a child the judicial authority is required to act speedily to avoid any unnecessary delay and to have procedures available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority should have the power, where appropriate, to take decisions which are immediately enforceable.⁶⁴⁷ In addition in proceedings affecting a child the judicial authority should have the power to act on its own motion in cases determined by internal law where the welfare of a child is in serious danger⁶⁴⁸.

445. The Convention also requires the parties to encourage the promotion and the exercise of children's rights through bodies which, *inter alia*, provide general information concerning the exercise of children's rights to the media, the public and persons and bodies dealing with questions relating to children and seek the views of children and provide them with relevant information the functions set out in paragraph 2,⁶⁴⁹. Parties are also required, in order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, to encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties⁶⁵⁰.

Protection of children against sexual exploitation and abuse

446. The protection of the rights of child victims is one of the main purposes of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse⁶⁵¹ and the implementation of its provisions in this regard will facilitate their access to justice. The Convention makes it clear that the implementation of all its provisions, but particularly those intended to protect the rights of victims, are to be secured without discrimination on any ground⁶⁵² and thus it should extend to children who are migrants. The Convention has not yet entered into force.

447. The guiding principles of the Convention's provisions on protective measures and assistance to victims are (a) the establishment of effective social programmes and the setting up of multidisciplinary structures to provide the necessary support for victims, their close relatives and for any person who is responsible for their care and (b) the taking of the necessary legislative or other measures to ensure that when the age of the victim is uncertain and there are reasons to believe that the victim is a child⁶⁵³, the protection and assistance measures provided for children shall be accorded to him or her pending verification of his or her age⁶⁵⁴.

448. States parties are required to take measures to encourage and support the setting up of information services, "such as telephone or Internet help lines, to provide advice to callers, even confidentially or with due regard for their anonymity"⁶⁵⁵. In addition there is a requirement to take measures to assist victims, in the short and long term, in their physical and psycho-social recovery

⁶⁴⁶ Article 6.

⁶⁴⁷ Article 7.

⁶⁴⁸ Article 8.

⁶⁴⁹ Article 12.

⁶⁵⁰ Article 13.

⁶⁵¹ Its other purposes are to prevent and combat sexual exploitation and abuse of children and to promote national and international co-operation against such exploitation and abuse.

⁶⁵² Article 2.

⁶⁵³ Any person under the age of 18 years; Article 3b,

⁶⁵⁴ Article 11.

⁶⁵⁵ Article 13.

and in so doing they are specifically enjoined "to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims"⁶⁵⁶.

449. There is specific provision for measures to be taken to ensure that the investigation and criminal proceedings in respect of offences established in accordance with the Convention⁶⁵⁷ are carried out in the best interests and respecting the rights of the child, treated as priority and carried out without any unjustified delay⁶⁵⁸. Any uncertainty as to the actual age of a victim should not prevent the initiation of criminal investigations⁶⁵⁹.

450. Furthermore the following important measures are to be taken to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings, namely,

- informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases;
- ensuring, at least in cases where the victims and their families might be in danger, that they may be informed, if necessary, when the person prosecuted or convicted is released temporarily or definitively;
- enabling them, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered;
- providing them with appropriate support services so that their rights and interests are duly presented and taken into account;
- protecting their privacy, their identity and their image and by taking measures in accordance with internal law to prevent the public dissemination of any information that could lead to their identification;
- providing for their safety, as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation;
- ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.

451. In addition the Convention requires that state parties ensure that victims have access to (a) information on relevant judicial and administrative proceedings as from their first contact with the competent authorities and (b) legal aid when it is possible for them to have the status of parties to criminal proceedings, provided free of charge where warranted.

452. All information given to victims in conformity with the foregoing requirements is to be provided in a manner adapted to their age and maturity and in a language that they can understand.

⁶⁵⁶ Article 14.

⁶⁵⁷ These cover sexual abuse, child prostitution, child pornography, the corruption of children and their solicitation for sexual purposes.

⁶⁵⁸ Article 30(1) and (3).

⁶⁵⁹ Article 34(2).

453. Moreover states parties are required to provide for the possibility for the judicial authorities to appoint a special representative for the victim when, by internal law, he or she may have the status of a party to the criminal proceedings and where the holders of parental responsibility are precluded from representing the child in such proceedings as a result of a conflict of interest between them and the victim. They are also required to provide for the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with the Convention.

454. There are also a number of requirements governing interviews with children which should help to ensure that they are not overwhelmed by the process and thus fail to secure justice⁶⁶⁰. These include the use of premises designed or adapted for this purpose, interviews being carried out by trained professionals and ideally the same persons conducting all of them, limiting the number of interviews as much as possible and the child being accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person. In addition provision is to be made for the videotaping of interviews and the admissibility of such interviews as evidence during court proceedings. Whenever the age of the victim is uncertain and there are reasons to believe that the victim is a child, the foregoing requirements are to be applied pending verification of his or her age.

455. Particular provision is made in respect of criminal proceedings for the adoption of measures to ensure that training on children's rights and sexual exploitation and sexual abuse of children is available for the benefit of all persons involved in the proceedings, in particular judges, prosecutors and lawyers. Also it should be possible for the judge to order the hearing to take place without the presence of the public and for the victim to be heard in the courtroom without being present, "notably through the use of appropriate communication technologies"⁶⁶¹.

456. There is also a provision allowing for the proceeds of crime or property confiscated as part of the sanctions imposed on persons convicted of the offences established in accordance with the Convention to be allocated to a special fund in order to finance prevention and assistance programmes for victims of any of those offences⁶⁶².

Conclusion

457. The value of the above provisions, if properly implemented, in securing access to justice cannot be underestimated. This is especially so of the arrangements concerning the provision of information, the giving of medical and psychological support to ensure that victims are really in a position to exploit the available remedies and the requirement of special representation for children so that their interests are properly considered. Also important are the arrangements for training and the design of facilities in which proceedings will be conducted.

⁶⁶⁰ In Article 35.

⁶⁶¹ Article 36.

⁶⁶² Article 29(5).

V. SHORTCOMINGS AND REMEDIES

Introduction

A. Shortcoming in standards

458. Despite the considerable array of rights which are formally assured to migrants there are certainly gaps and differences in the substantive and procedural protection which they enjoy. Of course, not all migrants are in the same position or face the same problems and the different context of the migration involved - notably within the European Union by its own citizens - may well justify some being accorded more favourable treatment, particularly as regards substantive rights.

459. The array of specialised instruments for different categories of migrants undoubtedly can have the benefit of focusing the provisions in them on the particular situation of those concerned. However, that is not always the case as the approach is only to require substantive treatment comparable to that of nationals or even the most favoured non-nationals when it may be that neither of those standards are entirely relevant; the special health requirements of at least some refugees does not figure in the Refugee Convention, although their special position in this regard is recognised in some more recent instruments.

460. Furthermore the focus on specialised instruments can lead to the possibly more extensive requirements in general human rights treaties being overlooked, notwithstanding that these should lead to the raising of the standards for nationals as well. Certainly, although some use is being made of these treaties, their actual applicability to the situation of migrants or to ones in particular situations is at times speculative because the issues have yet to be addressed at all, or only partly, in specific cases. The evolving case law can, of course, derive guidance from the content of the more specialised instruments but this may come several years after a need for protection has actually arisen.

461. While specialised instruments do tend to be not only more focused on the particular situation of migrants but also more "generous", the difference in treatment of particular categories of migrant can have less to do with one being more deserving than the other but a reluctance or inability to update older instruments; the special attention given to the victims of trafficking is undoubtedly appropriate but the situation of those involved is often not materially different from that of asylum-seekers and refugees.

462. Moreover, although the deficiencies in some instruments may be remedied by provisions in others, the discrete focus of many instruments may preclude a holistic perspective as to the standards applicable to migrants.

463. In any event the specialised instruments are far from generally accepted by Council of Europe member states and further divergence in European standards arises from the development of standards applicable only within the European Union.

464. Particular weaknesses in the substantive protection concerns the position of irregular migrants and the family members of all migrants, the latter suffering from different approaches to definition and the possibility of reunification. Moreover the particular problems of children are

recognised in only some of the specialised instruments and only fitfully in the case law arising from general human rights treaties.

465. Standards regarding access to justice in the procedural sense are extensive and migrants can benefit from both those that are generally applicable and those more specifically addressed to their situation.

466. This is particularly true regarding entitlements relating to judicial control over decisions affecting migrants, except that irregular migrants really need to be able to point to a possible human rights violation as a consequence of their removal in order to be able to challenge it.

467. Nonetheless it is still the case that the possibility of securing access to justice may sometimes only be assured once the migrant has left the country where the claim arose.

468. Moreover there continues to be some uncertainty as to the nature of the proceedings to which the access to court guarantee is applicable, which could adversely affect migrants.

469. In addition the position concerning advice, assistance and representation by a lawyer is not entirely satisfactory. Certainly there is no entitlement to legal advice, assistance and representation - or any one of these - in all situations where decisions affecting migrants might be challenged. The circumstances of the case (notably the capacity of the individual, the issue in dispute and the gravity of the consequences) will be especially relevant in establishing any such entitlement as far as general human rights treaties are concerned but, even where a criminal prosecution is involved, the scope of any entitlement to legal advice, assistance and representation is dependent upon a far from developed case law. This is equally true of the provision of interpretation in proceedings involving migrants. Although there are good standards on these issues for certain migrants, they are ones that are of concern for the situation of all migrants and clearer direction rather than ad hoc rulings would be more helpful.

470. Also generally lacking - despite noteworthy exceptions - are standards concerning the provision of information, the giving of medical and psychological support to ensure that victims are really in a position to exploit the remedies available to them and the requirement of special representation for children so that their interests are properly considered.

471. There is also an absence of universal requirements in respect of training for decision-makers and the design and suitability of facilities in which proceedings will be conducted, all considerations that impact on the achievement of access to justice in practice.

472. Greater explicit recognition of, as well as a requirement of practical support for, organisations concerned with the situation of migrants is also desirable since they are often the ones who can best assist migrants in seeking access to justice.

B. Shortcomings in practice

473. Even where appropriate rights are guaranteed at the regional and international level, it is evident from both the case law of the European Court noted above⁶⁶³ and studies by official and

⁶⁶³In the cases concerned the applicants may well have ultimately got redress as a result of their application to the European Court but this does not mean that others in a similar situation will have been so fortunate.

non-governmental bodies that access to justice is not being satisfactorily being achieved by many migrants⁶⁶⁴. More empirical data would, of course, be helpful, but the essential elements of the problem are apparent for the key areas in which action is needed.

474. In the first place the proceedings before human rights supervisory mechanisms, and in particular the European Court, indicate that regional and international standards have not always been fully implemented. This may well be partly attributable to the complexity and multiplicity of the particular standards involved but it also reflects a more general failure so far to give effect to regional and international undertakings in the field of human rights in their entirety.

475. One facet of this that is perhaps especially important in an area where the establishment of standards depends at least in part on an evolving case law is the failure by many states to appreciate the significance of rulings that involve other states and then to take appropriate action to remedy defects in rules and procedures which are either actually common to them or at least very similar.

476. Moreover despite the now well-established and well-known right of access to court, special requirements for foreign nationals to litigate - such as the need for a bond, a minimum period of residence or financial requirements for appeals - continue to be retained instead of looking for safeguards for other parties that do not prevent the institution of proceedings.

477. However, although the formal implementation of standards is important, the use and observance of them would seem to be much more significant for the failure of migrants to secure access to justice..

478. The starting point in this connection would seem to be the failure of many migrants to engage with the system of justice available, either at all or to the fullest extent possible.

479. This arises from a number of different considerations relating partly to the physical circumstances of migrants, partly to the speed of measures to which they are sometimes subjected and partly to personal factors relating to the persons concerned.

480. Certainly migrants can have difficulty in getting ready access to appropriate information or to legal advice, assistance and representation. This will sometimes be a matter of resources in that it cannot either be afforded or is not available either at all - particularly if there are no or insufficient skilled providers - or only in a language which they do not understand. It can, however, be a problem of location in that access may be impeded because they are detained - particularly at the border but possibly even in special centres - or are no longer being present in the relevant country. The impediment may be by the detaining authorities - particularly through restrictions on contact with the outside world - but could well have more to do with the ignorance of the migrants concerned as to whom to contact and the absence of suitable advisers at or near the place of detention or in the country to which they have been removed.

⁶⁶⁴ See, e.g., R Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, (Council of Europe, 2005), Daniel Senovilla Hernandez, *Situation and Treatment of Unaccompanied Children in Europe* (International Juvenile Justice Observatory, 2007), Claude-Valentin Marie, *Preventing Illegal Immigration: Juggling Economic Imperatives, Political Risks and Individual Rights*, (Council of Europe, 2004) and the *Report presented by the Minister of Justice of Spain at the 28th Conference of European Ministers of Justice at Lanzarote (25-25 October 2007)* (MJU-28(2007)01 E. See also the *Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Greece, 8-10 December 2008*.

481. Even where the advice and representation may be available and accessible, there may well be either a reluctance to seek and/or act on it or a failure to appreciate that this could be beneficial for them.

482. The unwillingness to take steps to use the available procedures can stem from fear of the consequences of doing so. Thus migrants whose status is irregular - or is mistakenly thought to be so - may worry about this being discovered; a strong likelihood if a passport or other documentation is needed for the purpose but also quite probable simply by virtue of the authorities becoming aware of their existence. There may, however, be fear of abuse or retaliation from their employers or fellow nationals, whether in their country of origin or the one to which they have moved. Such a fear is particularly likely where they are the victims of some form of trafficking but it is not unknown for employers to victimise employees - whether or not they are migrants - who seek to assert their rights at work.

483. However, migrants may also not appreciate that taking advice and/or bringing proceedings of some kind is something that is either able to help them or indeed even open to them. In some instances this may be because of their limited educational and linguistic capabilities or because of their age and level of comprehension but in others it may be the result of their distrust of public authorities - whether because of the culture in their country of origin or concrete experiences there - which are part of the reason for their migration - or in other countries, including the one to which they have migrated. Moreover lack of integration with the society of the country to which they have migrated may simply mean that they do not recognise the justice system as existing for their benefit as much as for that of anyone else.

484. Even where migrants do seek to engage with the justice system or are forced to do so as a result of measures being taken against them (such as at border controls, in the course of the enforcement of the criminal law and the making of rulings to expel them), they can suffer from a poor quality of decision-making which does not either appreciate the rights which they have under the law or does not recognise fully or at all that the facts of their situation brings them within the guarantee afforded by certain rights.

485. This problem stems from a variety of factors, namely, cultural misunderstandings, inadequate interpretation facilities and insufficient capacity to deal effectively with proceedings brought by persons abroad.

486. Thus for many in European countries there may be a lack of recognition that migrants - or at least of them - have any rights and indeed a resistance to the idea of them being granted any. This is particularly serious when this is the view of public officials and even worse when it actually affects the way they perform their functions. Such attitudes endure because of inaction against their manifestation in individual cases, their institutionalisation within the public service and ineffective action against racism and intolerance generally.

487. Although the quality of decision-making at first instance may sometimes be rectified on appeal, this does not always happen, whether because of similar inadequacies in the appellate structures, the failure to make use of them because of a loss of confidence in the system, poor or no advice or they have to be used from outside the country or the inability to make an effective case because of inadequate or no legal advice and representation and difficulties in gathering the evidence required.

488. Apart from prejudice on the part of those taking decisions with respect to migrants, there is also a question of sufficient knowledge of the applicable standards . This may be the result of the limited training given but the multiplicity of instruments dealing with different categories may also lead to confusion on the part of decision-makers as to what entitlements someone should have and all the more so where an evolving situation may lead someone to move from one category to another; an asylum-seeker may become a refugee or a failed asylum-seeker.

489. The appropriateness of personnel who work with migrants is not, however, a matter just about those who detain and judge them. Those who act on their behalf - whether or other forms of representative, especially those for children, need also to be appropriately trained, as well as available in sufficient numbers to provide advice and representation to those who need it when they need it. Appropriate arrangements to meet the cost of this advice and representation is also essential but are not always in place but that can be a reflection of the weakness of the legal aid system as a whole.

490. Just as important as legal knowledge is the capacity to assess the evidence and to have access to all the material that is relevant, particularly as regards the situation in a country of origin or transit but also as regards cultural characteristics which may affect the way an individual's story is presented. This is critical in all processes but especially important at the entry stage/border and adequate arrangements are not always in place to prevent inappropriate decisions.

491. The quality of decision-making as a result of the weakness of the presentation resulting from the need to conduct the proceedings from abroad because an appeal against a removal ruling has no suspensive effect.

492. Problems with facilities can also extend to the suitability of premises for detention, the conduct of interviews and the hearing of cases in courts and tribunals, particularly where the migrant may be suffering from trauma or other inhibiting considerations. Moreover good quality interpretation is not always available even though this is essential if the decision-maker is to have all the information needed available and to explain his or her decision.

493. All these obstacles to accessing justice tend to become more significant where the migrants are unaccompanied minors and separated children, particularly because of a failure to make any special and appropriate provision for them, particularly where the action taken in respect of them does not involve the criminal process, as well as because of a failure to appreciate that a minor or child is involved. The difficulties in assessing age are not to be underestimated - not only because of looks but also because of the loss or destruction of documentation - but there is not always a presumption that the migrant is actually the age he or she claims, which can lead to inappropriate treatment despite suitable arrangements for children being in place.

494. These problems include in particular the use of detention when other arrangements could be devised, the availability of appropriately qualified representatives for children, the use of procedures that do not allow children to participate effectively (either because of their speed or organisation) and the lack of appreciation of their special problems on the part of decision-makers.

495. Children are not, however, the only migrants who can be particularly vulnerable and insufficient account of their needs is also sometimes lacking, both as regards rehabilitation and the ability to look after these interests.

496. All these problems are, of course, not present everywhere but they exist to a sufficient extent to ensure that many migrants do not secure access to justice.

C. Good practices and standards

497. In addressing the problems in securing access to justice it can be helpful both to draw upon national good practices but also on implementing certain regional and international standards of particular relevance to them.

498. There appear to be a number of good practices within member states which, subject to the need to clarify how they actually operate and their suitability for transplantation, could usefully be copied to ensure better access for justice. They include:

- the provision of dedicated advice centres;
- the creation of multilingual information services;
- explicit recognition of an unaccompanied minor as having a special status in immigration law;
- the provision of legal aid to children whatever their status;
- the provision of guardians for all unaccompanied children who are migrants;
- arrangements to ensure child-friendly justice at all stages;
- special arrangements to facilitate communication between a detained migrant and consular officials;
- automatic participation of specialist non-governmental organisations in immigration decision-making procedures;
- the automatic provision of interpretation;
- the making legal status irrelevant to the conduct of legal proceedings
- a permanent system of support for migrants; and
- and provision for the admission of persons to the country concerned where they are parties to legal proceedings⁶⁶⁵.

499. There are, however, many good approaches specified in the various treaties examined in this report. Of particular note are the following:

- the prohibition of any requirement of security or deposit for non-nationals in the European Convention on Establishment;
- the counselling provisions and the protection for victims and witnesses in the Council of Europe Convention on Action against Trafficking in Human Beings;
- the detailed scheme for asylum determinations in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and
- the protection for children in the schemes found in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the European Convention on the Exercise of Children's Rights.

500. Other useful elaborations of standards can be found in particular in three Recommendations of the Committee of Ministers in addition to those already referred to in the report. These are, as

⁶⁶⁵ These have been drawn from the national reports to the 28th European Ministers of Justice Conference on *access to justice for migrants and asylum seekers*, Lanzarote, October 2007.

regards access to justice in both the substantive and procedural sense, Recommendation Rec(2000)15 of the Committee of Ministers to member-states concerning the security of residence of long-term migrants⁶⁶⁶ and Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures off detention of asylum seekers⁶⁶⁷ and, as regards access to justice in the substantive sense only, Recommendation Rec(2002)4 of the Committee of Ministers to member-states on the legal status of persons admitted for family reunification⁶⁶⁸.

501. Consideration also ought to be given to harnessing modern technology to overcome some of the problems identified. Video-conferencing could in some instances be an appropriate means of consulting with a lawyer or making submissions where a migrant is no longer able to be present in a country to protect his or her interests there.

502. While consideration might also be given to the use of alternative forms of dispute resolution - namely, complaints, mediation, reconciliation and arbitration - to deal with problems facing migrants, their use should not displace the ultimate possibility of recourse to the courts as this is the ultimate guarantor of rights and in particular of those assured to migrants by human rights treaties.

D. Possible Action by the Council of Europe

503. There are two steps that could useful be taken by the Council of Europe, having regard to the need to avoid unnecessary duplication and ensure added valid.

504. In the first place it could take appropriate action to promote the ratification by all member states of all relevant standards applicable to them and in particular conventions adopted within the framework of the Council of Europe. Such ratification would be an important step to establishing common minimum legally binding standards with respect to all migrants and asylum-seekers throughout Europe.

505. Secondly, at the normative level, there is an urgent need to clarify and possibly enlarge the scope of the entitlement of migrants and asylum-seekers to have access to justice. Certainly, as has been seen, there is some confusion as a result of all the different instruments involved in contributing to access to justice for migrants and as to their applicability to some but not necessarily all of the persons covered by the report, notwithstanding their broadly similar situation. Furthermore, although some of the confusion may ultimately be resolved through case law development, such a process is slow and unlikely to be either comprehensive or of practical assistance to those dealing with migrants and asylum-seekers on a daily basis.

506. A Council of Europe instrument focused on the specific issue of access to justice for migrants and asylum-seekers, with a particular attention being paid to the situation of unaccompanied minors and separated children, would be a suitable remedy for the present confusion and deficiencies. It would allow for the consolidation of standards in a coherent and readily understandable format, thereby making the implementation of them much more feasible.

507. The appropriate form of such an instrument would be a Recommendation of the Committee of Ministers as this would avoid the complications and delay involved in effectively modifying or

⁶⁶⁶ Adopted on 13 September 2000 at the 720th meeting of the Ministers' Deputies.

⁶⁶⁷ Adopted on 16 April 2003 at the 837th meeting of the Ministers' Deputies.

⁶⁶⁸ Adopted on 26 March 2002 at the 790th meeting of the Ministers' Deputies.

extending some treaty obligations which not all member states have so far accepted. Perhaps more importantly, such a Recommendation and its explanatory memorandum could not only be drafted in a form that would be more accessible to migrants and asylum-seekers and those particularly concerned with their situation but could also provide illustrative structures for ensuring their access to justice in practice. Moreover a Recommendation could more readily be updated to take account of the changing situation with respect to migration and the search for asylum.

508. The European Prison Rules would provide an appropriate model for such an undertaking, with the proposed Recommendation being a consolidation and development of existing ones, drawing upon the entire range of relevant regional and international standards.

VI. CONCLUSION

509. Much has been achieved in the life of the Council of Europe with respect to securing access to justice for migrants and asylum-seekers. However, as this report indicates, there remain significant shortcomings as regards both law and practice. It is important that the good standards are properly implemented but that older ones are updated and that the standards as a whole are harmonised in a manner that is helpful both to those whom they are intended to benefit and those that are expected to give effect to them. At the same time the adoption of such a Recommendation as is proposed could provide the opportunity for an educational campaign to develop greater public awareness of the importance of securing access to justice for all migrants and asylum-seekers.