

Migrant Children and the European Convention on Human Rights

Ledi Bianku



Dealing with asylum and children cases...

... the most difficult situations for a Strasbourg judge

- Vulnerability
 - of asylum seekers (*M.S.S. v. Belgium and Greece*)
 - of children (*Rahimi v. Greece, Tarakhel v. Switzerland*)
- Sensitive and very complex issues at stake (social, emotional, family, personality)

...other difficulties

- **Time element:**
 - The case comes after the exhaustion – too late!!!
 - Sometimes quick decision is crucial
 - The effectiveness of the Strasbourg judgment
- **De facto situations** (*Neulinger and Shuruk, X*) – *irreversibility*
- **Deciding in distance** – no direct and personal access to the child (*Iglesias Casarrubios... v. Spain*)

Time element

- The time of a child is not the same of the time of an adult (*Y.C. v. Royaume Uni*, § 145)
- In cases of this kind the adequacy of a measure is to be judged by the swiftness of its implementation, as the **passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her.**
(*Bajrami v. Albania* § 53)

Kuppinger v. Germany (2015)

“The Court has observed in this respect that the State’s positive obligation to take appropriate measures to ensure the applicant’s right to respect for family life risked becoming illusory if the interested parties only had at their disposal a compensatory remedy, which could only lead to an a posteriori award for monetary compensation ...” Art 13



Irregular migrants... who and how?

An irregular migrant may, in most simple terms, be described as a third-country national present in a particular country without valid leave

- Clandestine entry
- Asylum seekers
- Absconding from a mandatory residential address
- Failure to successfully renew a residence permit
- Curtailment of otherwise valid leave

No specific ECHR provision dedicated to asylum or migration

- No Convention Article specifically mentioning migrants, asylum seekers or refugees
- Very few provisions expressly mentioning third country nationals:
 - *Art. 16 - Restrictions on political activity of aliens*
 - *Art. 4, Prot. 4 - Prohibition of collective expulsion of aliens*
 - *Art. 1, Prot. 7 - Procedural safeguards relating to expulsion of aliens*

Article 18 – EU Charter Right to asylum

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”



No specific ECHR provision dedicated to children

- Mentioned in:
 - Article 5 § 1 (d)
 - Article 6 § 1
 - Article 8 (?)
 - Article 12 (?)
 - Article 14 (?)
 - Article 2, Protocol 1
 - Article 5, Protocol 7

Article 24 - EU Charter

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the **child's best interests must be a primary consideration**.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

How does the ECHR exercises an impact and protects children rights and how?

- ARTICLE 1 - Obligation to respect Human Rights: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
- The case-law of the European Court of Human Rights (the ECHR)

M.N. and Others v. Belgium [GC]
but also Hirsi Jammaa and others v. Italy [GC]

The starting point

- “...as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.” (*Abdulaziz, Cabales and Balkandali* § 67)
- “...it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens” (*Berrehab* § 28)
- “The Court does not in any way underestimate the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens (*Moustaquim* § 43)

Responsibility of States in cases of expulsion (*Hirsi Jamaa v. Italy*)

- From the basic premise...:

“113. According to the Court’s established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to **control the entry, residence and expulsion of aliens** (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, Reports of Judgments and Decisions 1997-VI). The Court also notes that the **right to political asylum is not contained** in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, Reports 1996-VI).”

the required standard... Art. 2 and 3 (*Hirsi Jamaa, Tarakhel* § 93, *J.K.* § 79)

114. However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Soering*, §§ 90-91; *Vilvarajah and Others*, § 103; *Ahmed*, § 39; *H.L.R. v. France*, 29.04. 1997, § 34; *Jabari v. Turkey*, no. 40035/98, § 38,; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11.01.2007).

115. In this type of case, the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Saadi v. Italy [GC]*, no. 37201/06, § 126, ECHR 2008).

the required standard... Art. 8

Üner v. the Netherlands [CG], 2006

54. ...However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued ...



Which Convention Article?

Migration issues most frequently concern:

- Article 2 - Right to life;
- Article 3 - Prohibition of torture;
- Article 5 - Right to liberty and security;
- Article 6 – Right to a fair trial
- Article 8 - Right to respect for private and family life;
- Article 9 – Right of conscience and belief;
- Article 13 - Right to an effective remedy;
- Article 14 - Prohibition of discrimination.
- Art. 4, Prot. 4 - Prohibition of collective expulsion of aliens
- Art. 1, Prot. 7 - Procedural safeguards relating to expulsion of aliens

Two tests

- ❁ Asylum situations – Art. 2 and 3 – strict scrutiny
- ❁ Migration situations – Article 8 – balancing exercise
 - ❖ Those involving the decision to refuse to admit or to expel third country nationals with close family members in the Contracting State, normally on economic interest grounds, or for the maintenance of immigration policy;
 - ❖ Those involving the expulsion of integrated migrants (both second generation and long term residents) normally on public order grounds following a criminal conviction. *Settled immigrant: Jeunesse v. the Netherlands (§§ 104-105)*

How does the Convention enters into play?

□ Principles emerging from the Convention/Court:

- every person
 - Nationality not important
 - Age not important
- **Extraterritorial jurisdiction** (*M.N. v. Belgium*)
- In addition to relevant articles (procedural rights) ... the evolutive interpretation and effective rights concept of the Convention notions (*right to life, torture, ill-treatment, family life, etc*) in the Court's case-law

Methodological questions

- ❑ Sources of information (*Sufi and Elmi v. UK*):
 - Analysis at national level
 - Additional sources (regarding political, health, economic situation, etc.)
 - Diplomatic assurances (*Saadi v. Italy, Othman v. UK*)
- ❑ Analysis *ex nunc* or not?:
 - To what extent the time element is relevant in asylum cases in Strasbourg?! (*Sufi and Elmi v. UK, F.G. v. Sweden*)
- ❑ Individual risk vs. generalised risk (*Sufi & Elmi, M.S.S., Tarakhel*)
- ❑ Strict scrutiny vs. Balancing exercise (asylum seekers vs. migrants)
- ❑ Asylum seekers as vulnerable persons ? (*MSS 251, Tarakhel*)
- ❑ Individual vs. constitutional approach (*S.J. v. Belgium*)

General issues in migration situations affecting children:

- I. Push-backs
- II. Admission
- III. Art. 2 and 3 (detention of children)
 - IV. Protection of Family life
 - V. Protection of Private life
- VI. A right to regularise one's status
- VII. Procedural guaranties
- VIII. Discrimination

I. Push-backs

- The direct impact – practical impossibility for of any individual assessment
- ... A situation which might have an impact over several rights of migrants protected by the Convention
- What does it really mean? *Khlaifia and Others v. Italy!!!!*

N.D & N.T. v. Spain

Potential impact over the rights protected by:

- Art. 2: *Xhavara and others v. Albania & Italy*
- Art. 3: *Hirsi Jammaa v. Italy – (risk of torture if returned)*
- *M.S.S. v. Greece and Belgium, Tarakhel v. Italy – (detention and/or living conditions)*
- Art. 5: *Çonka and others v. Belgium, Popov v. France – (lawfulness, reasons and appeal against detention)*
- Art. 8: *Jeunesse v. Netherlands (family life), Balogun v. UK (private life)*
- Art. 13: *Çonka and others v. Belgium – suspensive effect of remedies*
- Art. 4, Prot. 4: *Hirsi Jammaa ...*
- Art. 1, Prot. 7: *Çonka*

What does it mean?

- *Khalifia and others v. Italy*, GC, December 2016
 - i. Proper identification
 - ii. Individual decision
 - iii. Expulsion
- *N.D. & N.T. v. Spain*, GC, February 2020



Importance for children

- Push-backs do not allow identification of minors

Becker v. Denmark, Commission decision of 1975
Hirsi Jamaa and others v. Italy, 2012

Access to territory in order to make an asylum claim:
(*Gebremedhin v. France*)

III. Admission to a State territory

States have the right to control the entry, residence and expulsion of non-nationals (*Abdulaziz, Cabales and Balkandali; Berrehab; Moustaquim*)

However - Court's case-law imposes certain limitations on the rights of States to turn someone away from their borders

A State may be required to allow entry of an individual where such is a necessity to fulfil the exercise of a particular Convention right, notably Articles 3 and 8 (*M.A. v. Denmark*)



Issues under admission

a) Apply for asylum (III)

b) Family reunification (IV)



III. Art. 2 and 3

- A. Treatment contrary to Art. 2 and 3 in the country of destination (*Soering, etc.*)
- B. Treatment contrary to Art. 3 while in detention pending asylum application assessment or pending removal (*Dougoz, Peers, Muskhadzhiyeva and Others v. Belgium.M.S.S., Tarakhel,)*
- c. Treatment at large pending asylum application assessment (*M.S.S. §§ 250-253*)

A. Return of children

- Protection for children is wider
- Removal of an unaccompanied five-year to the DRC without having ensured that the child would be looked after in her country of origin – violation of Article 3

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006



1. Real risk

- **The treatment must attain a minimum level of severity**
- Personal risk – the applicant must be individually subject of treatments contrary to Art. 3 in the destination country
- Generalised risk – in risk simply because of being in the country
 - Generalised risk in the third country of destination:
 - *N.A. Sufi and Elmi... M.A. v. Denmark [GC], § 146).*
 - Problematic situation in the intermediary destination
 - Systemic deficiencies ?
 - *K.R.S.....MSS NS Abdullahi..... Tarakhel*
- ❖ **A combined analysis of both elements is always present**
- ❖ **Vulnerability – children (*Tarakhel*)**

2. Burden of proof

- “where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country” –
 - *Tarakhel § 93 (systemic problems)*
- The applicant must first establish that he/she is under the risk of being victim of treatment contrary to Art. 3 if removed
- If his/her allegations are credible ...
- ...The burden passes to the Government for dissipating these doubts
- **Is the burden shifted in case of children?**

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006

3. Reason for prosecution

- Differently from the Geneva Convention and the EU law (qualification directive)
- The ECHR does not require any reason for prosecution in order to offer protection
 - It suffices that the treatment reaches the threshold of Art. 3
 - Therefore the scope of Art. 3 protection is wider than GC and EU Law (*H.L.R. v. France*, *ECJ in ABC*, *N. v. Sweden – domestic violence*)

4. The authors of the persecution

- From whichever State
 - *Soering* (death row in the U.S.)
- From whatever source within the destination state
 - Authorities – *Soering*...
 - Third individuals within that state – *Sufi and Elmi* (removal to Somalia), *F.H. v. Sweden* (return to Iran), etc.
 - Simply because of the situation in the destination state – *D. v. UK*, – the medical treatment in St. Kitts. *Paposhvili v. Belgium*

Salah Sheekh v. the Netherlands, § 147

“The existence of the obligation not to expel is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country, and Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials”



5. The Dublin System

Determination of the EU MS responsible for examining an asylum application lodged in one of the Member States by a third-country national

T.I. v. UK (also in KRS and MSS)

- i. Removal to an intermediary Contracting State does not affect the responsibility of the sending State to ensure that the applicant is not exposed to treatment contrary to Article 3;*
- ii. The sending State cannot rely automatically on the arrangements made in the Dublin Convention or Regulation;*
- iii. Where States have established international organisations or agreements to pursue cooperation there could be implications for fundamental rights.*

The road to Dublin passes through...

- *T.I. v. U.K.* (Dublin Convention)
- *K.R.S. v. U.K.* (Dublin II Reg.) – presumption of compliance
- *M.S.S. v. Belgium and Greece* – presumption rebuttable
 - ECJ in *N.S.* – systemic deficiencies (*Abdullahi - 2013*)
 - *Mohammed Hussein v. the Netherlands and Italy*,
 - *Halimi v. Austria and Italy*, *Abubeker v. Austria and Italy*,
Mohammed v. Austria, *Sharifi v. Austria*,
- ❖ EU MS destination and time element (systemic deficiency?)

... Strasbourg

➤ *Tarakhel v. Switzerland* (Dublin III)

- Not the standard of systemic deficiencies but the notion of risk taking into account:
 - the individual circumstances of the applicant(s) - **children**
 - the general situation in the destination MS
 - Conditional violation
-
- *EM (Eritrea) [2014] UKSC*



Best interest under Dublin

ECJ (2013) - *MA, BT AND DA v. Secretary Of The State For The Home Department*

- i. Member State responsible for examining the application is to be that where a member of his family is legally present, provided that this is in the best interest of the minor.
- ii. In the absence of a family member, the Member State responsible for examining the application is to be that where the minor has lodged his application for asylum.



B. Conditions pending removal

- Detention conditions in view of expulsion
 - *Muskhadzhiyeva and Others v. Belgium*
 - *Mubilanzila Mayeka v. Belgium*
 - *Rahimi v. Greece*
 - *Dougoz v. Greece, etc*
 - *R.R. and others v. Hungary – transit zones*
 - *H.M. & others v. Hungary – transit zones*



C. Living conditions at large

- Reception Conditions Directive
 - *M.S.S. v. Belgium and Greece*
 - *Tarakhel and others v. Switzerland*



IV. Family Reunification

- ❖ Existence of family ties:
 - *From Abdulaziz.... To Senchishak* (relevance of Art. 8 case-law concerning the notion of family ties)

- ❖ Access to State territory: a positive obligation to admit a family member to facilitate family life?
 - *Rodrigues da Silva and Hoogkamer v. the Netherlands*
 - *Biao v. Denmark*
 - *M.A. v. Denmark*

Importance in migration context

- *“...the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life”*

• *Tanda-Muzinga v. France, 2014*



The Abdulaziz criteria:

- ✓ a State is entitled, to control the entry of aliens into its territory and their residence there
- ✓ Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory
- ✓ positive and negative obligations and a fair balance but ... the State enjoys a certain margin of appreciation
- ✓ State's obligations...will vary according to the particular circumstances of the persons involved and the general interest
- ✓ the extent to which family life is effectively ruptured, the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion
- ✓ Were they aware from the outset of the precarious situation?

M.A. v. Denmark [GC] (§§ 131-135).

- (i) status in and ties to the host country of the alien requesting family reunion and his family member concerned;
- (ii) whether the aliens concerned had a settled or precarious immigration status in the host country when their family life was created;
- (iii) whether there were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting reunification;
- (iv) whether **children** were involved; *Jeunesse*
- (v) whether the person requesting reunion could demonstrate that he/she had sufficient independent and lasting income, not being welfare benefits, to provide for the basic cost of subsistence of his or her family members

Specific problems related to migrant children

- a) Age-assessment (*ECSC – EUROCEF v. France*)
- b) Who is unaccompanied? (*Rahimi v. Greece*)
- c) “Shelters” (*Rahimi, Tarakhel*)
- d) Deprivation of liberty (*Rahimi v. Greece*)
- e) Guardianship (*Rahimi v. Greece*)
- f) Education (*Ponomaryovi v. Bulgaria*)
- g) Access to information (*Rahimi v. Greece*)
- h) Criminal activities - trafficking, (*Rantsev. Russia & Cyprus*)
- i) Enhanced verification procedure and analysis (*F.G. v. Sweden*)

Entry clearance for children:

- ❖ *Tuquabo-Tekle v the Netherlands; Sen v. the Netherlands; Osman v. Denmark*
- ❖ Four main principles & additional specific issues to be considered when dealing with entry clearance for children:
 - Age
 - Situation in the country of origin
 - Level of dependency on parents
 - Existence of other relatives who could provide care
 - Whether parents could be expected to return to country of origin



IV. Family protection in cases of expulsion

Recalling the principle: *“The Court does not in any way underestimate the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and **expulsion** of aliens (Moustaquim § 43)*

- Still, such an action by the State authorities should not be such as constituting a violation of Art. 8

(Biao v. Denmark)

The *Boultif* criteria

Üner v. the Netherlands; Maslov v. Austria; Jeunesse v. the Netherlands.

- the nature and seriousness of the offence committed by the applicant; (*Omojudi v. UK & Joseph Grant v. UK*)
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period; (*A. A. v. the United Kingdom*)
- the nationalities of the various persons concerned; (*Amrollahi v. Denmark, Ciftci v. Turkey*)
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. (*Beldjoudi v. France*)
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination (*Antwi and Others v. Norway; and Amrollahi v. Denmark*)

The Jeunesse exception (§115-120)

- “... the principle is that the expulsion of the non-national family member will amount to an Article 8 violation “only in exceptional circumstances”

(Rodrigues da Silva and Hoogkamer v. the Netherlands, Nunez v. Norway, B.V. v. Sweden).

- In *Jeunesse v. The Netherlands* the applicant:
 - Knew the situation;
 - Nor unsurmountable difficulties; but hardship
 - The applicant’s automatic nationality *(by treaty not choice)*
 - 16 years in the Netherlands
 - **The best interest of young children ??? (§ 119)**
 - *See al contrario Berisha v. Switzerland???*

V. Private Life

- The expulsion of a person settled in a given country might have adverse effects on his/her private life:
 - *Beldjoudi v. France* (Algerian national living forever in France)
 - *Slivenko v. Latvia* (withdrawal of Soviet troops from Latvia)
 - Passage of time for applying for asylum – especially in children cases – *Kaveh Puid, Tarakhel v. Tarakhel*



VI. A right to regularise one's status

- There is no Convention right to be granted specific status or related documentation
- Where the person concerned is already on the territory of the State often the key issue is that of proportionality
 - *Darren Omoregie and Others v. Norway*
 - *Nunez v. Norway*
- Situations where child family members are citizens of the member State
 - *Sorabjee v. the United Kingdom (cf. Ruiz Zambrano)*
 - *Rodrigues da Silva and Hoogkamer v. the Netherlands*
 - *Jeunesse v. the Netherlands*
 - *Biao v. Denmark*
- There can even be a violation where there is no outright refusal to stay
 - *G.R. v. the Netherlands*
- There may also be a violation if a refusal to grant status/documentation is based on discriminatory grounds (*Kiyutin v. Russia*)

6. Procedural Guaranties

- *Rahimi v. Greece (Art. 5 § 1, 5 § 4 full review of detention's legality)*
- *Al Nashif v. Bulgaria (Art. 5 § 4 – no possibility of appeal against deportation on national security grounds)*
- *Louled Massoud v. Malta, M.A. V. Cyprus and especially Suso Musa v. Malta (Art. 5 § 4 – speedy review of the detention)*
- *Art. 13 analysis – Chahal, Mir Isfahani v. Netherlands*
 - *The relationship with the nature of the analysis by the Court*
 - *Strict scrutiny vs. Balancing exercise*
- **Speedy imigration procedures vs. “de facto” residence**

7. Discrimination

- Even where there is no right to enter under Article 8 of the Convention, States must not operate discriminatory entry clearance policies:
 - *East Asian Africans v. UK*
 - *Abdulaziz, Cabales and Balkandali v. UK*;
 - *Hode and Abdi v. UK*
 - *Biao v. Denmark*
- *Are migrants vulnerable persons ?*
 - *Compare with MSS, and especially Tarakhel*
- Positive discrimination ? – best interest of the child ?
 - Nunez, Berisha, Jeunesse, Tarakhel.

The test to be applied

- States have the right to set up verification procedures which must be fair and in bona fide

Commission decision (8378/78)

- Best interest of the child always as paramount

*A.M. v. Denmark, Jeunesse v. Netherlands,
Berrehab v. the Netherlands, Nunez v. Norway*

- The decision making process has to maintain sufficient flexibility, speed and efficiency

*Tanda-Muzinga and Mugenzi v. France
Senigo Longue and Others v. France
M.A. v. Denmark, § 163*

The guiding principle

Best interest of the child

What does it mean???

Who is to decide???

How???

“Making assessments and determinations about the best interests of the child is not an exact science” – W. Schabas

Neulinger and Shuruk v. Switzerland

- Best interests to be assessed in each individual case - § 138
- In depth examination of the entire family situation - § 139
See also *Cincimino v. Italy*
- Factual, emotional, psychological, material and medical nature - § 139

The intervention in Strasbourg limited to procedural aspects only?!?!?

Best Interest of the child

- Removal (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*)
- Detention conditions (*Rahimi v. Greece*)
- Detention lawfulness (*Rahimi v. Greece*)
- Family reunification (*Osman v. Denmark*, *Berisha v. Switzerland*, *Biao v. Denmark*, *M.A. Denmark*)
- Procedural aspects (*Mugenzi v. France*, *Tanda-Muzinga v. France and Senigo Longue and Others v. France*, *Ly v. France*)
- Effective remedies (*Rahimi v. Greece*)



Thank you for your attention!

