In March 2023, the EUAA organised a Thematic Workshop on Legal Assistance and Representation in the Asylum Procedure. Key stakeholders, including lawyers and civil society organisations, participated to share knowledge, good practices and challenges in the functioning of the Common European Asylum System.

The following article is based on a presentation given at the event.

Jurisprudence of the European Court and execution process

By: Musa Khasanov, senior lawyer, Department for the Execution of Judgments of the European Court of Human Rights, Council of Europe

1. Jurisprudence of the European Court of Human Rights (ECtHR)

The ECtHR has extensive jurisprudence on several aspects of the asylum procedure. It approaches issues on asylum proceedings mostly through the viewpoint of Articles 2 and 3 of the European Convention on Human Rights (ECHR), while legal assistance remains an important element.

1.1. Summary returns at the border or shortly after entry into the territory ('pushbacks') – Article 3 of the ECHR alone or in conjunction with Article 13 of the ECHR

Summary returns occur when applicants at the border who intend to lodge an asylum application are removed in a summary manner to the third country from which they had sought to enter the respondent State's territory (*Ilias and Ahmed* v *Hungary* [GC]).

It is to be noted that persons do not have to explicitly request asylum nor express it in a particular form (*Hirsi Jamaa and Others* v *Italy [GC]*, § 133). In this connection, the ECtHR has emphasised the importance of interpreting access to the asylum procedure and training officials to understand asylum requests (*M.A. and Others* v *Lithuania*, §§108-109). The court has also considered when a lawyer has not been present, as this role could help to determine if a person in principle requires international protection (*D* v *Bulgaria*, § 125).

1.2. Prohibition of collective expulsion of foreigners – Article 4 of Protocol No 4

Attempt to legally enter through a border

The ECtHR can assess whether the State provided genuine access to means of legal entry to allow all persons who face persecution to submit an application for international protection under conditions which ensure that the process is consistent with international norms, including the ECHR. If the State provided such access but an applicant did not make use of it, it must evaluate whether there were good reasons for not doing so.

Unauthorised entry to the respondent State's territory

In order to determine whether an expulsion was 'collective', the ECtHR assesses whether the individuals were afforded an effective possibility of submitting arguments against their removal and whether there were sufficient guarantees demonstrating that their personal circumstances had been genuinely and individually taken into account (*Asady and Others* v *Slovakia*, §62). The court must then assess the supporting evidence provided by the parties, independent reports, and whether an identification process was conducted and under what conditions (whether the staff were trained to conduct interviews, if information was provided in a language that the individual understands about the possibility to lodge an asylum application and request legal aid, whether interpreters were present, and whether the individuals were able, in practice, to consult lawyers and lodge an asylum application) (*Khlaifia and Others* v *Italy [GC]*, §§245-254).

The legal situation of minors is linked to that of accompanying adults so that the requirements of Article 4 of Protocol No 4 may be met if the adult was able to raise, in a meaningful and effective manner, arguments against their joint expulsion (*Moustahi* v *France*, §§134-135).

1.3. Immigration detention

Article 5(1f)

The Court reiterated that detention "with a view to deportation" can only be justified as long as the deportation is in progress and there is a true prospect of executing it (*Saadi* v *the United Kingdom*, GC, §72).

Article 5(4)

Article 5(4) entitles a detained person to bring proceedings for a review by a court of the procedural and substantive conditions which are essential for the lawfulness of his/her deprivation of liberty according to Article 5(1) (*Khlaifia and Others* v *Italy* [GC], §131). Detainees must be informed of the reasons for their deprivation of liberty, their right to appeal against the detention (*Khlaifia and Others* v *Italy* [GC], §132) and in a language they understand and are able in practice to contact a lawyer (*Rahimi* v *Greece*, §120).

The proceedings must be adversarial and ensure equality of arms between the parties (*A. and Others* v *the United Kingdom* [GC]). Deportation should be expedited in a manner that allows

the detained person or his/her lawyer to bring proceedings under Article 5(4) (*Čonka* v *Belgium*).

There is also a time element. The ECtHR has ruled 17 days to be excessive (*Kadem* v *Malta*, §§44-45) for deciding on the lawfulness of the applicant's detention. In addition, appeal proceedings lasting 26 days were also found to be excessive (*Mamedova* v *Russia*, No 7064/05, § 96).

The lawfulness of detaining a child and parents in the context of immigration controls should be examined by the national courts with particular expedition and diligence at all levels (*G.B. and Others* v *Turkey*, §§167 and 186).

1.4. Extradition

Article 3

According to Article 3 of the ECHR, a Contracting State must ensure that a person will not risk being subjected to ill treatment if extradited. The ECtHR has found that there were substantial grounds to believe that the applicant in *Soering* v *the United Kingdom*, §§88-91, would fact a risk if extradited to the receiving country.

If a person faces a real risk of being subjected to ill treatment if deported, and where diplomatic assurances have been obtained, the Court has examined whether the assurances obtained in the particular case were sufficient to remove any real risk of ill treatment (*Khasanov and Rakhmanov* v *Russia* [GC], §101; *Othman (Abu Qatada)* v *the United Kingdom*, §187).

Ill treatment contrary to Article 3 in the requesting State may take various forms, including poor conditions and ill treatment in detention (see *Allanazarova* v *Russia*) or conditions in detention that are inadequate for the specific vulnerabilities of the individual (*Aswat* v *the United Kingdom* concerning the extradition of a mentally ill individual).

Articles 2 and 3 of the ECHR and Article 1 of Protocol No 6

Articles 2 and 3 of the ECHR and Article 1 of Protocol No 6 prohibit the extradition, deportation or other transfer of an individual to another State where substantial grounds have been shown that the person would face a real risk of being subjected to the death penalty (*Shamayev and Others* v *Georgia and Russia*, §333).

It may similarly breach Article 3 to extradite or transfer an individual to a State where he faces a whole life sentence without a *de facto* or *de jure* possibility of release (see *Trabelsi* v *Belgium*; see also *Hutchinson* v *the United Kingdom* [GC]).

1.5. Rule 39 – Interim measures

In the context of asylum proceedings, the Court may indicate interim measures to a country only when there is a real and imminent risk of serious and irreparable harm.

Interim measures may consist of requesting a State to refrain from removing individuals to countries where it is alleged that they would face death, torture or ill treatment. They also may include requesting the respondent State to receive and examine asylum applications by persons who arrive at a border checkpoint (*M.K. and Others* v *Poland*, §235). Interim measures may also be indicated in other kinds of immigration-related cases, for example related to the detention of children.

Recent case law in respect of Malta

***S.H.* v *Malta* (No 37241/21), final on 20 December 2022**

This case concerned the procedure which led to refusing a request for asylum by a Bangladeshi national who arrived in Malta by boat in September 2019 and was placed in detention. The Court found a violation of Article 3 if the applicant was to be returned to Bangladesh without a fresh assessment of his claim, since his claim for asylum was not examined with sufficient diligence. In addition, the absence of a lawyer at the first interview deteriorated the situation. The ECtHR also established that an effective remedy did not exist and the Constitutional Court does not have a suspensive effect, which is in a violation of Article 13.

***Feilazoo* v *Malta* (No 6865/19, final on 11 March 2021**

This case concerned a Nigerian national who was placed in immigration detention pending his deportation. The detention lasted about 14 months. The Court held that the applicant had been held alone in a container for nearly 75 days without access to natural light or air, and had no opportunity to exercise during the first 40 days.

Following this period and without indications that he needed to be quarantined, the applicant was moved to other living quarters where new asylum seekers were kept in COVID-19 quarantine, resulting in a violation of Article 3. The ECtHR further held that continued detention when there was no prospect of a deportation violated Article 5(1f). Finally, a lack of confidentiality with the correspondence with the ECtHR and a lack of effective legal representation was contrary to Article 34.

2. Execution process

The principal body responsible for execution is the Committee of Ministers. The committee is composed of Ministers of Foreign Affairs of the 46 Member States. It is the executive and decision-making body of the Council of Europe. The committee supervises the execution by Member States of judgments pronounced by the ECtHR (holds Committee of Ministers Human Rights meetings, since 1995).

The Department for the Execution of Judgments of the ECtHR is an expert body which provides legal assistance to the Committee of Ministers in supervising the measures taken by Respondent States to execute the final judgments of the ECtHR. It assists the States in their execution efforts. The Execution Department also promotes the strengthening of synergies

with other actors of the Council of Europe in their areas of competence, notably the Court, the Parliamentary Assembly and the Commissioner for Human Rights.

2.1. Legal obligation of the Respondent State to take measures

The Respondent State must take both individual and general measures to execute the judgments that become final.

Individual measures

The main principle in undertaking individual measures is *restitutio in integrum*, i.e. to ensure that the injured party is put, as far as possible, in the same situation prior to the violation of the ECHR. At the same time, the violation must be stopped immediately.

Examples of individual measures are compensation, restoration of contacts between children and parents unduly separated, reopening unfair criminal proceedings, and reinstatement of public servants in their previous job.

General measures

The main purpose of general measures is to prevent new, similar violations from happening in future. Examples are translation, publication and dissemination of the judgments, setting up effective remedies, adoption of legislation, change in jurisprudence or administrative practices.

2.2. Supervisory mechanism

Twin-track procedure

The cases which are classified under the **enhanced procedure** require specific indicators:

- Urgent individual measures aimed at preventing an irreparable harm (e.g. measures to prevent an extradition of a person to a third country);
- Pilot judgments that by their nature raise complex and structural problems;
- Judgments disclosing major structural or complex problems, and
- Inter-state cases.

The cases under the enhanced procedure are examined at the one of the Human Rights Committee meetings that are held four times a year.

The remaining cases are classified under the **standard procedure** and supervised in writing.

Within 6 months after the judgment becomes final, the respondent State must provide information about the measures taken or planned to execute the judgment. The action plan indicates all steps that the State intends to take to implement a judgment (both individual and general measures). The plan is regularly updated throughout the execution process.

The action report concerns all steps that the State has taken to implement a judgment with the conclusion that the judgment has been fully executed.

Example of closed case v Malta

Suso Musa group v *Malta* (Case No 42337/12) concerns the detention of asylum seekers at Safi Barracks and Lyster Barracks during different periods between 2007 and 2013. The ECtHR established a violation of Article 5(4) on the grounds that the applicants did not have at their disposal an effective and speedy remedy to challenge the lawfulness of the detention; Article 5(1) for failure to protect the applicants from arbitrary detention; and Article 3 on account of the cumulative effect of the inadequate detention conditions in Lyster Barracks.

Supervision of the group was closed on 21 September 2016 since all the measures were taken. In particular, the applicants were released and just satisfaction was paid (individual measures) and measures were taken to increase the speediness of the asylum procedure, improve the vulnerability assessment procedure, and enabling the Immigration Appeals Board to review the lawfulness of a detention and order a release (general measures).

Closure rate in respect of Malta as of April 2023	
Total number of cases	120 (47 leading cases)
Closed	67 (32 leading cases)
Total pending	53 (15 leading cases: 5 cases under the enhanced procedure and 10 cases under the standard procedure)