



INTERNATIONAL HUMAN RIGHTS LAW AND BEST PRACTICE FOR LAWYERS IN KAZAKHSTAN

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REFUGEES, ASYLUM AND IMMIGRATION LAW AND POLICY AND THE PROHIBITION ON ILL TREATMENT



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES

QUESTIONS

- a.** Is asylum a human right or a privilege of States?
- b.** Is there a human right to enter or remain in a State?
- c.** Under what circumstances can an individual challenge an order expelling them from the jurisdiction?
- d.** Is the threat of a flagrant violation of human rights, if returned, sufficient to prevent expulsion?

NON-REFOULEMENT AND THE PROHIBITION ON ILL TREATMENT

- *Chahal v UK (1996)*: the ‘protection afforded by Article 3 is ... wider than that provided by Article 33 of the United Nations 1951 Convention’.
- The IHRl protection against *refoulement* is more extensive in scope than the Refugee Convention in a number of ways:
 - it is necessary to be a refugee to benefit from Article 33 of the 1951 Convention, Article 3 (ECHR)/Article 7 (ICCPR) protects everyone irrespective of conduct, nationality or citizenship.
 - Article 7 is absolute in nature; it makes no provision for exceptions and no derogations are permissible.
- *Chahal*: ‘The Court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment, irrespective of the victim’s conduct.’



DOES THE PRINCIPLE OF NON-REFOULEMENT ONLY APPLY TO THE PROHIBITION ON ILL TREATMENT?

- *Right to life?*
- *Arbitrary detention?*
- *Fair trial?*
- *Flagrant denial of other human rights?*

THE TEST TO BE APPLIED

- In order to engage the State's responsibility in an expulsion case it will be necessary for the applicant to establish two elements:
 - that it is reasonably foreseeable for the State that its action or inaction will result in harm;
 - that the harm will reach the threshold of severity of Article 7 treatment.

SCENARIO

S, an 18 year old, was charged with killing his girlfriend's parents in the USA and there was strong evidence to support this. S then fled from the USA to the UK. The UK agreed to extradite A (a national of Germany) to the USA. The USA still applied the death penalty and there was real risk that if S was convicted he could face the death penalty and years on death row.

What rights are involved?

Whose rights?

Which country actually violated a Convention right?



SCENARIO

C is an Indian national and a leading figure in the Sikh community in the UK. He has been detained and released without charge on suspicion of involvement in a conspiracy to assassinate the Indian Prime Minister. C's presence is not considered to be conducive to the public good and moves are made to deport him. C states that if he is returned to India he would be exposed to a real risk of torture. He cites as evidence Amnesty International reports and reports prepared by the UN Special Rapporteur on Torture

Can C be deported under such circumstances?

What weight should be attached to the reports?



SCENARIO

D, a citizen of St Kitts, was arrested shortly after arrival in the UK for possession of cocaine. Whilst serving his six-year sentence, he was diagnosed with AIDS and his health deteriorated significantly. D had been refused leave to remain in the UK and shortly before his release from prison the immigration authorities ordered his removal. D complained that his current medical treatment would not be available to him on St Kitts, that he had no family there and he would likely die under distressing circumstances. He claimed that his expulsion therefore amounted to inhuman treatment.

Was D's claim correct?

Would it matter if D had entered the UK illegally?

Is it significant that the authorities are being held responsible for risk arising from factors outside of their control?

DIPLOMATIC ASSURANCES

- *Agiza v Sweden* (CAT)
- *Mamatkulov & Askarov v Turkey* (ECHR)
- Assurances are unacceptable in circumstances:
 - where there is substantial and credible evidence that torture and prohibited ill-treatment in the country of return are systematic, widespread, endemic, or a recalcitrant or persistent problem;
 - where government authorities do not have effective control over the forces in their country that perpetrate acts of torture and ill-treatment; or
 - where the government consistently targets members of a particular racial, ethnic, political or other identifiable group for torture or ill-treatment and the person subject to return is associated with that group.
- Due process safeguards must also be in place

THE EXTENT TO WHICH HUMAN RIGHTS OBLIGATIONS REGULATE THE TREATMENT OF NON-NATIONALS WITHIN A JURISDICTION

- **Detention of Asylum Seekers**
- **Destitution of Asylum Seekers**
- **Prosecution for false documentation**
- **Suspended appeals**
- **Treatment of minors**

THE EXTENT TO WHICH HUMAN RIGHTS OBLIGATIONS REGULATE THE TREATMENT OF NON-NATIONALS WITHIN A JURISDICTION

Immigration controls which interfere with family life of particular individuals will have to be justified under Article 17, ICCPR.

- Is there family life?
- Has there been an interference with it?
- Is that in accordance with the law?
- Is it necessary in a democratic society and on what basis?
- Is it proportionate to the legitimate aim pursued?

THE POSITION IN A NUTSHELL (SUMMARY)

Where private or family life is established in a contracting state which cannot be transferred to another territory, it is unlawful to interfere with it by removal of one party unless, the interference is justified as a matter of pressing social need, which is necessary and proportionate, for the prevention of crime, defence of the realm or maintenance of immigration control.

