

The interplay between the European Convention on Human Rights and EU law in the field of migration

Prof. Johan Callewaert
Deputy Grand Chamber Registrar
European Court of Human Rights*

European Council on Refugees and Exiles
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*All views expressed are strictly personal

Outline

- I. The legal framework
- II. The main legal instruments in the field of migration
- III. The interplay between EU law and the ECHR: illustrations
- IV. Instructions for use by legal practitioners



I. The legal framework

Double overlap between EU law and the ECHR (« the Convention »):

- *Ratione personae*: the EU Member States are all Contracting States to the Convention
- *Ratione materiae*: the Convention and EU law protect partly the same fundamental rights, but sometimes with different wordings



The legal framework (II)

The Convention sets a **mandatory minimum protection level** and **predates** the creation of the EU (or its predecessor organisations). Consequently:

- The Contracting States “must read and apply the rules of EU law **in conformity with the Convention**” (*Bivolaru and Moldovan v. France*, 40324/16 and 12623/17, § 103)
- Compliance with the Convention when applying EU law can be made the **subject of an application** before the ECtHR (recent example: *M.B. v. the Netherlands*, next slide)
- → Explanations to Art. 52(3) of the EU-Charter: “In any event, the level of protection afforded by the Charter **may never be lower than that guaranteed by the ECHR**”

= protection of domestic judges against well-founded applications in Strasbourg



The legal framework (III)

M.B. v. the Netherlands (71008/16, 23.4.2024)

- The applicant, an asylum seeker, was kept in **detention** during the processing of his application, because that was considered necessary for the **protection of national security or public order**
- Legal basis: a provision of the Dutch Aliens Act which transposed **Art. 8(3)(e) of that Reception Conditions Directive**
- Problem: the Convention does not allow the detention of asylum seekers for that purpose only → = **higher protection level**
- ECtHR: *“Although Article 8 (3) e of the Reception Conditions Directive permits, from an EU-law standpoint, detention when national security or protection of public order so requires, this has no bearing on the fact that Article 5 § 1 (f) of the Convention only allows for immigration detention to prevent unauthorised entry or to effect deportation.”* (§ 72)
- Consequence: finding by the ECtHR of a **breach of Article 5 § 1 f), first limb**, despite the compatibility of that detention with EU law



II. The main legal instruments in the field of migration

A. EU Law instruments

– EU Charter of Fundamental Rights

- Art. 1 (human dignity)
- Art. 4 (prohibition of ill-treatment)
- Art. 7 (private and family life)
- Art. 18 (right to asylum)
- Art. 19 (Protection in the event of removal, expulsion or extradition, including prohibition of collective expulsion)
- Art. 24 (rights of the child)
- Art. 47 (effective remedy and fair trial)

– The Common European Asylum System

- Asylum Procedures Directive (2013/32)
- Reception Conditions Directive (2013/33)
- Qualification Directive (2011/95)
- Dublin III Regulation (604/2013)



The main legal instruments in the field of migration (II)

B. European Convention on Human Rights

- Art. 3 (prohibition of ill-treatment)
- Art. 8 (private and family life)
- Art. 4 of Protocol no. 4 (prohibition of collective expulsion)

C. Different methodologies

- CJEU: secondary law as **starting point** → **textual** approach
- ECtHR: fundamental rights as **only source** → **principled** approach



Interplay between EU law and the Convention: Illustrations

- Procedure
- Qualification
- Dublin



Interplay between EU law and the Convention

Illustrations: Procedure

Convergence on the **main principles**:

- Right of any person to make an **application** for international protection, including at the borders of the State
- **No formalities** required: the expression of the wish to enjoy international protection is sufficient
- Even if the person is **staying illegally** in the country
- Prohibition of **refoulement** and **pushback**

Case-law:

- *N.D. and N.T. v. Spain* (8675/15 and 8697/15)
- *Commission v. Hungary* (C-823/21)



Interplay between EU law and the Convention

Illustrations: Procedure

Divergences:

- No right to asylum under the Convention
- Detention
 - When is there detention?
 - *Ilias & Ahmed v. Hungary* (47287/15)
 - *FMS and Others* (C-924/19 PPU and C-925/19 PPU)
 - When is the detention of an asylum seeker allowed?
 - Reception Conditions Directive, Art. 8: detention of an asylum seeker only if necessary; contrast with *Saadi v. UK* (13229/03)
 - *M.B. v. NL*: no detention of an asylum seeker only for the protection of national security or public order



Interplay between EU law and the Convention

Illustrations: Qualification

There is convergence as regards the conditions for the granting of **subsidiary protection** under Art. 15 of the Qualification Directive, in case of « serious harm »:

- Death penalty
- Ill-treatment
- Indiscriminate violence in situations of armed conflict

Issues: burden of proof, balance between **general** and **individual elements**

Case-law:

- *Staatsecretaris van Justitie en Veiligheid* (C-125/22)
 - Referring to Art. 52(3) EU-Charter and Art. 3 Convention as **minimum threshold**
- *Khasanov and Rakhmanov v. Russia* (28492/15 and 49975/15)



Interplay between EU law and the Convention

Illustrations: Dublin

More problematic, because of differences regarding:

- the **test** to be applied
- the applicable **provisions**

As regards the **test** to be applied:

N.S. and Others (C-411/10 and C-493/10): **general test**

*It cannot be concluded from the above that **any infringement of a fundamental right** by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003. At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice ... (§§ 82-83)*

*By contrast, if there are substantial grounds for believing that there are **systemic flaws** in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision. (§ 86)*



Interplay between EU law and the Convention

Illustrations: Dublin

Contrast: ECtHR approach: **individual test**

Tarakhel v. Switzerland (29217/12):

*The Court considers it necessary to follow an approach similar to that which it adopted in the M.S.S. judgment, cited above, in which it examined the applicant's **individual situation** in the light of the **overall situation** prevailing in Greece at the relevant time.*
(§ 101)

The ECtHR duly takes into account the overall situation, but as **evidence**, not as a **pre-condition** for the application of an individual test.



Interplay between EU law and the Convention

Illustrations: Dublin

As regards the **test** and the applicable **provisions**:

Dublin III Regulation, Art. 3(2), second sub-paragraph:

*Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are **systemic flaws** in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a **risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union**, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.*

= double limitation:

- test: **general test** only
- **scope of exceptions** limited to **risks of ill-treatment**



Interplay between EU law and the Convention

Illustrations: Dublin

Recent issue in this connection: **pushbacks**

CJEU C-392/22 on practice of **pushbacks** and **detention** at the Polish border with Belarus:

- **only systemic flaws** resulting in a **risk of inhuman or degrading treatment** within the meaning of Article 4 of the Charter make [the transfer of the person concerned] impossible (§ 58)
- inhuman or degrading treatment in this context: practices of pushback and detention which would be such as to expose the person concerned “to a **situation of extreme material poverty** that would not allow him to meet his most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that would undermine his physical or mental health or put him in a state of degradation incompatible with human dignity, placing him in a situation of such gravity that it may be equated with inhuman or degrading treatment” (§ 63, implicitly drawing on *M.S.S. v. Belgium and Greece*, 30696/09, §§ 252-264)



Interplay between EU law and the Convention

Illustrations: Dublin

Contrast with ECtHR:

several other fundamental rights issues can arise in the context of such pushbacks

- *Ilias and Ahmed v. Hungary* (47287/15): detention
- *N.D. & N.T. v. Spain* (8675/15 8697/15): collective expulsion
- *C.O.C.G. and Others v. Lithuania* (17764/22, pending before the Grand Chamber), concerning pushbacks at the Lithuanian border with Belarus, with complaints under Articles 2 (right to life), 3 (prohibition of ill-treatment), 5 (right to liberty and security), 13 (right to an effective remedy) and 34 (right to individual petition) of the Convention, as well as Article 4 of Protocol No 4 (prohibition of collective expulsions)

- Is Dublin III creating **two different categories of fundamental rights**, depending on their relevance under the Dublin III Regulation?
- Can Dublin III limit the scope of the EU-Charter?



IV. Instructions for use by legal practitioners

Goal: not uniformity but **cross-system compatibility** of the case-law

Method: **wholistic approach**

Two possible scenarios:

A) There is an **explicit statement** by the CJEU that it has taken account of the **Convention minimum standard** (art. 52(3) Charter)

B) No such statement

Instructions for use by legal practitioners (II)

A) There is an **explicit statement** by the CJEU that it has taken account of the Convention minimum standard (art. 52(3) Charter), as in C-125/22 → implementation of the preliminary ruling does not call for reservations

B) No such statement → 2 steps:

- 1. Starting point: **Convention minimum protection level**
 - The mandatory minimum (also under EU law: Art. 52(3) EU-Charter)
 - The only test applicable in Strasbourg → avoid a violation! (see *M.B. v. NL*)
 - Which however can be raised by the Contracting States

- 2. **Raise** it to the level required by EU law if it is higher than or similar to that of the Convention, but not lower it (risk of violation in Strasbourg)!
 - EU Law cannot legally preclude the application of the Convention minimum protection level
 - If necessary: referral to the CJEU for a preliminary ruling



Thank you!

For more information and more examples: www.johan-callewaert.eu

