ON SOME GENERAL THEORETICAL AND PRACTICAL QUESTIONS ARISING FROM THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN ASYLUM CASES

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"*Our task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues... it is to draw out the broad principles which animate the convention*"[1]

I. INTRODUCTION

Neither the European Convention on Human Rights (hereinafter the "ECHR") nor its Additional Protocols contain a provision such as, at a universal level, Article 14 of the Universal Declaration on Human Rights (hereinafter "UDHR") 1948 or Article 33 of the International Convention on the Status of Refugees of 1951 (hereinafter "Geneva Convention") or, at a regional levels, Article 27 of the American Declaration of the Rights and Duties of Man or Article 18 of the Charter of Fundamental Rights of the European Union[2]. This does not signify, however, that the ECHR and its Protocols do not recognize asylum as a subjective right. On the contrary, the European Court of Human Rights has

1. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire* v *Wallbank and another* [2003] UKHL 37, para. 44 at 404j.

2. See GIL BAZO, M.T., "The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law" (2008) 27 *Refugee Survey Quarterly* 33 ff.

given a number of decisions relating to violations of human rights that can have a direct impact on asylum seekers, refugees and internationally displaced persons. For example, when it emphasized the obligation of Contracting States to take measures which guarantee the full and free employ of the rights recognised in the ECHR to *every* individual under its jurisdiction[3]. Again, when it stressed that the principle of equal entitlement is strengthened by Article 14, that forbids discrimination in the enjoyment of Convention rights and freedoms indicated below[4]. Thus it is clear that, in theory, there is little to prevent the application of ECHR rights and freedoms to asylum seekers. Furthermore, unsurprisingly but crucially, in practice, either the Commission and Court of Human Rights have desisted from setting up explicit or general boundaries on the application of the ECHR in asylum cases. On the contrary, they have adopted some dynamic interpretative principles, that have positive repercussions to the protection that the Convention grants to asylum seekers. These are outlined below, alone with a number of the institutions' other more general advances, that are inner to the way in which asylum cases are decided. Nevertheless, the ECHR itself does not provide for asylum seekers based rights.

Why the application of the ECHR in asylum cases is important? To answer this you have to consider, firstly, that international asylum law is disappointingly missing out to protect the vulnerable, that is to say illegitimate asylum seekers and children seeking asylum though these subjects are truly the most at risk, as well as that it is practically unfeasible for those of them escaping maltreatments to find legal and safe means of travel[5]. Secondly, at a more general level, you can not disregard that asylum as well as refugee law have to be considered an essential part of the contemporary debate on human rights[6]. Thirdly, a number of fundamental rights enshrined in the ECHR such as access to social security, health care and work may be of crucial relevance to all asylum seekers. Last but not least, you have to appreciate that the rights to seek and "enjoy" asylum are at the heart of individual autonomy as they enable an individual to enter a State to seek sanctuary. Consequently, the adoption of measures such

3. This obligation implies the duty of State Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the full and free enjoyment of human rights.

4. See *ex multis* Eur Court HR *Chassagnou and Others* v.*France,* Application Nos. 25088/94, 28331/95, 28443/95, judgment of 29th April 1999, Reports 1999, § 89.

5. See MACADAM, J. and PURCELL, K., "Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum" (2008) 27 *Australian Yearbook of International Law* 87 ff.

6. See UÇARER, E.M., *Safeguarding Asylum as a Human Right: NGOs and the European Union* in JOACHIM, J., LOCHER, B. (eds), *Transnational Activism in the UN and the EU: a Comparative Study* (London: Routledge, 2009) 121 ff.

as rejection at the border or if he has already entered the country in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution, all of which have been supported by national authorities of Contracting States in definite circumstances, go to the essence of asylum seekers'choices as to how to live[7]. This article aims to consider the burden of deterring measures to asylum seekers within a human rights framework[8]. Specifically, it is the imposition of such measures under the European Convention on Human Rights that will be analysed. As Nuala Mole recognised, the number of Convention rights which are significant in the asylum field is more than you might presume[9]. The Articles with possible relevance to the rights to seek and enjoy asylum will be considered in turn, with the exceptions of Articles 3 of the ECHR and 3 of the Fourth Protocol[10] as these deserve a separate consideration, following either a short background to the ECHR and an initial analysis of the implication of the general right to be free from persecution under the Convention and its applicability to this issue[11].

2. THE RIGHT TO BE FREE FROM PERSECUTION

The European Convention on Human Rights which has come to be considered as "the jewel in the Council of Europe crown"[12] –drafted in 1950 in a continent still reviving from the last world conflict and against a milieu of considerations over the threat of communism– was a unique development and indeed a true revolution in international law. Even more importantly here, it was the end result of the period and place of its beginning. As such it was not solely pur-

7. See D'ORSI, C., "Asylum and Voluntary Repatriation Applied to the Sub-Saharan African Legal Context: Are they Two Viable Solutions for Refugees?" (2008) 86 *Revue de Droit International de Sciences Diplomatiques et Politiques* 251 ff.

8. The term "asylum seeker" is adopted here to refer to individuals who have not yet been granted refugee status by the receiving State.

9. See MOLE, N., *Asylum and the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2007) 3 ff. Accordingly, EINARSEN, T., "The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum" (1990) 2 *IJRL* 361.

10. Article 3 of the Fourth Protocol prohibits a State from expelling its own nationals.

11. Extended on the meaning of the expression "right to seek and enjoy asylum" one might refer to a UN report (MUBANGA CHIPOYA, C.L.L., *Final Report. The Right of Everyone to Leave ant Country, including His Own, and to Return to His Country,* UN doc E/C.4/Sub. 2/1988/35/ June 1988, at 103-106.) § 7) stating that: "asylum consists of several elements: to admit a person to the territory of a State, to allow the person to remain there, to refuse to expel, to refuse to extradite and not to prosecute, punish or otherwise restrict the person's liberty".

12. See, HARRIS, D.J., "A Fresh Impetus for the European Social Charter" (1992) 41 *ICLQ* 659 ss.

sued at defending fundamental civil and political freedoms and values such as the right to live free from persecution. Its paramount objective was to preserve a definite system of administration in Europe, that is to say democracy. Indeed the ECHR is intended as expressing certain minimum standards to be applied in a democratic society. The inflection on the conservation of democracy during the drafting of the Convention does not impair, however, the relevance of the specific freedoms and rights guaranteed in the ECHR. The freedom to speak, to be free from torture and inhuman and degrading treatments, to live, to education, and so on, can be regarded as indicative of a general right to be free from persecution (or the fear of persecution), a freedom that possibly forms the source of the right not to be "refould" in a quantity of international instruments such as the Convention against torture and other cruel or degrading treatment or punishment (hereinafter "CAT") and the ECHR[13]. Furthermore, democracy as a form of government encompasses, to some extent, this fundamental right to every individual, regardless of his or her race, culture, religion or background[14]. Democracy requests the protection of human rights which make possible individual freedoms and the defence of the set of laws, in addition to the fundamental requisites of an elected government. Democracy and the right to live free from persecution are, thus, concepts which are reciprocally dependable, as it is also positively recalled by the preamble to the ECHR. Finally, on this issue it should be pointed out that, even if democracy did not rely upon this freedom, the value placed on democracy by European governments at the time of the drafting and reception of the ECHR would not sanction the strong protection for the right to be free from persecution which has arisen under the Convention in practice. The inducement for drafting, and reasons for endorsing, an international treaty can be quite distinct from the consequences of the additional protection supplied by that convention subsequently.

Like *inter alia* the right to "enter" per se –that has been ferociously resisted by States which tend to recognize it as an unwelcome intrusion to state sovereignty[15]– the defence of the right to be free from persecution which is inner to the rights protected under the ECHR, is unconditional. Therefore, the freedom from persecution or fear of persecution should not be evaluated against the interests of society. This is unquestionable at least in situations where persecution

13. *Amplius* FELLER, E., VOLKER, T. y NICHOLSON, F., *Refugee protection in international law* (Cambridge: CUP, 2003) 385 ff.

14. See GURU, *Democracy in Search of Dignity*, in UJJWAL KUMAR, S. (ed.), *Human Rights and Peace: Ideas, Laws, Institutions and Movements* (New Delhi, SAGE, 2009) 74 ff.

15. See NOLL, G., "Seeking Asylum at Embassies: A Right to Entry under International Law"(2005) 17 *International Journal of Refugee Law* 542 ff.

or fear of persecution based on the race, nationality, religion, membership of a particular social group or political opinion are a synonyms of torture or degrading treatment or penalty falling within the scope of Article 3 of the ECHR[16].

3. THE APPLICABILITY OF THE ECHR TO ASYLUM CASES

3.1. *The Right to Life in Asylum Cases*

Article 2 ECHR protects the most fundamental of all the rights guaranteed by the Convention, the right to life. It states that: "...Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally…".

It has been described as truly remarkable that Article 2 guarantees that the right to life "shall be protected by law", but, unlike other Convention provisions, it does not recognise the existence of the right to life itself[17]. Insofar as it entails an obligation to protect everyone's right to life, this Article has the potentiality to be broadly interpreted. Its meaning is perfectly clarified by Professor Fawcett's statement, that is the right to life which must be protected by law, and not life itself[18]. Article 2 does not guarantee protection against all threats to life, thus, but safeguards against "intentional deprivation and careless endangering of life". Indeed, under Article 2 there are specific situations where an authority will not be regarded to have breached a person's right to life. These are set out in Article 2 (2) which states that: "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more that absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection". In practice, the limitations in Article 2 (2) are unlikely to apply in asylum claims as well as in medical and suicide claims, in which death would not be caused by lawful or unlawful killing.

16. The various levels of mistreatment prohibited by this Article exist in a hierarchical relationship, as it has been stated by the Commission in *Denmark, Norway, Sweden and the Netherlands* v. *Greece* (*"The Greek Case"*) (1969) 12 Y. B. 1 at 186, where it held that: "all torture must be inhuman and degrading treatment, and inhuman treatment also degrading". For a fuller discussion of these and other issues related to the application of Article 3 of the ECHR in the asylum area see *infra* Ch. .

17. VAN DIJK, P. & VAN HOOF, G.J.H., *Theory And Practice Of The European Convention on Human Rights* (The Hague, Kluwer Law International, 1998) 586 ff.

18. See FAWCETT, J.J., *The Application of the European Convention on Human Rights,* 2nd ed (Oxford: OUP, 1995) 37.

Having been asserted that, you have to consider that this protection of the right to life raises some debatable and difficult questions in respect of asylum cases: respectively the meaning of the "use of force which is absolutely necessary" and the "death in custody", either of particular relevance to this Article. Starting with the "use of force which is absolutely necessary" Article 2 provides that deprivation of life will not amount to a violation if it occurs by "use of force which is absolutely necessary". Clearly enough this term encompasses a commonality of interventions, and can be fully appreciated only if one looks at the specific situations. These are: for purpose of defending someone from unlawful violence, in order to prevent someone lawfully detained from escaping, or to effect a lawful arrest, in a action lawfully taken to quell a riot or insurrection. As the European Court plainly stated in *Mc Cann*[19] and more recently in *Ergi* v. *Turkey*:[20] "The use of the term "absolutely necessary" suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the ECHR[21]. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2". This logically implies the proportionality has to be assessed having regard to the nature of the aim pursued, the dangers to life and limb intrinsic in the situation and the risk that the force employed might result in the loss of life[22].

Death in custody presents less significant problems under Article 2. As the European Court held in *Velikova* v. *Bulgaria*: "where an individual is taken into policy custody in good health but is later found dead, it is incumbent upon the State to provide a plausible explanation of the events leading to his death, failing which the authorities must be hold responsible under Article 2 of the ECHR".[23] It went on to explain that: "beyond reasonable doubt" standard may be met where "events in the issue lie wholly, or in large part, within their control or custody"[24]. In such a case, strong presumptions of fact will arise in respect of injuries and death occurring that detention. Definitely: "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and con-

19. Eur Court HR *Mc Cann, Farrel & Savage*, judgment of 27 Sept 1995, Series A No. 324, 21 EHRR 97.

20. Eur Court HR *Ergi* v. *Turkey*, judgment of 28 July 1998, Reports 1998-IV, § 83.

21. Mc Cann judgment, *op. cit.*

22. HARRIS, D.J. , O' BOYLE, C. WARBRICK, E. and BATES, *Law of the European Convention on Human Rights* (Oxford, OUP, 2005) 34 ff.

23. Eur Court HR, *Velikova* v. *Bulgaria*, judgment of 18 May 2000, ECHR 2000-VI.

24. *Ibid.*

vincing explanation"[25]. Another interesting issue raised under Article 2 is the situation where a Contracting State expel a person (asylum seeker or refugee) to face the death penalty as this Article does not outlaw capital punishment. In *Soering* the Commission correctly provided that it can be a breach of Protocol n. 6 to the Convention to extradite or expel a person to another State where there is a real risk that the death penalty will be imposed[26]. It follows that the asylum seeker who would face capital charges or execution on return will thus be protected from expulsion in a State which has ratified Protocol n. 6. Finally, it is worthy questioning whether a rejection of core public benefits overall lead to degrading or inhuman treatment in contravention of the ECHR. Someone might eventually argue that a broad interpretation of the right to public benefits means that when a country on the whole denies economic and social benefits to asylum seekers, that nation may in fact violate its obligations against engaging in inhuman or degrading treatment under Article 3. This argument is considerably undermined when one considers the framework of Article 3. Indeed, this Article includes language more geared toward a physical obligation by the State, warning against "torture", "cruel, inhuman or degrading treatment or punishment". Defiance by a Contracting State of social and economic rights to asylum seekers may surely have an impact on their civil and political rights[27]; but, it is not likely to reach the severity of physical maltreatment by a nation that is the focus of Article 3. Such a limitation on the understanding of inhuman or degrading treatment creates difficulty in telling that a denial of public benefits will result to something as severe as cruel or unusual punishment. Regard that an argument about an extensive reading of the ECHR can also be made in terms of the country's obligations under Article 2 concerning the right to life and this is precisely the reason of examining it here. Indeed, as the European Court has eloquently pointed out, the right to life should not be interpreted narrowly[28]. In avoiding a strict interpretation of the fundamental right to life, it would be advantageous for Contracting States to take all possible measures to establish support schemes of public benefits. This interpretation of the right to

25. See Eur Court HR, *Kişmir* v. *Turkey,* judgment 31 May 2005, 67 ECTHR, § 69.

26. See Eur Court HR, *Soering* v. *UK,* judgment of 7 July1989, Series A no. 161. Accordingly ECHR *Cruz Varas and Others* v. *Sweden*, judgment of 7 June 1990 [1991] EHRR, I, 1.

27. *Amplius* CHOLEWINSKI, R., "Economic and social rights of refugees and asylum seekers in Europe" (2000) 14 *Georgetown Immig. L. J.* 709, at 711.

28. See Eur Court HR *Osman* v. *United Kingdom,* judgment of 28 October 1998, [1998] ECHR 101. Accordingly, see the Human Rights Committee's General Comment 6 on the right to life (art. 6), U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994), available via the UN treaties bodies website at http//www.unhchr.ch/tbs/doc.nsf

life has led some to dispute that, if one's right to life encompasses public benefits[29], it might well embrace providing asylum seekers with basic social and economic benefits. In other terms, the key to this argument is that without social and economic rights, fundamental civil and political rights such as the right to life can not be fully enjoyed. Truly, restrictions on asylum seeker's ability to access public benefits can seriously intrude upon key rights of asylum seekers in the Contracting States. In fact, allowing only those persons who seek asylum at a port of entry or immediately after entering the Contracting State to apply for public assistance may leave thousands with no help with living costs or access to housing. Whilst this result embodies a reasonable target of the Contracting States to restrain false asylum claims, it seems to arbitrary reject persons who do not instantaneously file for asylum, without objective guidelines to decide what filing asylum really signifies. As an alternative, an extensive interpretation of Article 2 indicates that Contracting States should draw precise guidelines to inform asylum seekers precisely when they would no longer be allowed for support, thereby allowing persons in genuine need of protection with feasible means of providing a claim of need for asylum. Indeed, it would be unfeasible to suppose persons fleeing maltreatment to provide clear and sound information about their condition. While the argument has remarkable implications for the Italian or Maltese schemes which leaves asylum seekers nearly without any social and economic rights, the contention is probably too attenuated to have any real impact on a nation such as Italy. This, however, does not mean, of course, that Italy and Malta should not recognize the relevance of economic and social rights as fundamental human rights of asylum seekers. Clearly, the two sets of rights are strictly correlated to one another, having been so enumerated in the ECHR. Undeniably, it is difficult to predict how one might take advantage of the right to seek asylum, explicitly or implicitly admitted in the prevalence of Contracting States, without being guaranteed at least an adequate standard of living and the right to work while awaiting a decision on whether a grant of asylum has been accepted. Whilst no specific obligations in the ECHR explicitly bind Contracting States to provide economic and social benefits to asylum seekers, the fact that the country's obligation to this exposed group can be questioned under this instrument makes it all the more critical that a government issue a comprehensible reply indicating how its asylum scheme complies with its international obligations.

29. See Eur Comm HR *X v Ireland*, App. No. 6839/74 [1976] 7 Eur. Comm'n H.R. Dec. & Rep 78, where the need for appropriate public health measures to safeguard life, without which Article 2 could be deprived of its efficacy was recognised.

3.2. *The Compatibility of Detention of Asylum Seekers with Article 5*

It is almost a *communis opinio* that the practice of detaining asylum seekers in specialised immigration centres or in the prison system has to be regarded either as a prominent example of a restriction aimed at deterrence and one of the most significant pressure to their well being[30]. Unsurprisingly, therefore, the arbitrary use of detention appears to conflict with a variety of international legal provisions which stem principally from human rights law. A good example of such provisions is Article 5 (1) (f) of the ECHR which establishes that immigration detention can be justified specifically to prevent unauthorised entry and to detain a person against whom action is being taken with a view to deportation or extradition.

In *Saadi* v. *United Kingdom* the Court accepted that a detention of an asylum seeker for 7 days to facilitate the examination of the case was justified under Article 5 (1) (f)[31]. The *rationale* behind this decision, *prima facie* out of line with the Convention, is that this was considered a necessary adjunct to the right of States to control aliens'entry and residence that States are allowed to detain would be immigrants who have applied for permission to enter, whether by way of asylum or not. It follows that until the State has authorised entry, any access is "unauthorised" and detention is thus permissible under Article 5 (1) (f), only provided that such detention is not arbitrary (i.e. carried out in good faith, closely connected to the purpose of preventing unauthorised entry, the place and conditions of detention should be appropriate, and the duration should not exceed that reasonably required for the purpose pursued)[32]. If you apply the same reasoning to the detention of children seeking asylum, you can come to the absurd conclusion, contrary to what is the international consensus that these subjects must not be detained, that the ECHR does not prohibit such treatment unless it is arbitrary or lengthy[33].

Having outlined above that Article 5 (1) (f) permits detention in order to arrest illegal entry to a Contracting State or prior to deportation, even though

30. *Amplius* O'NIONS, H., "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience" (2008) 10 *European Journal of Migration and Law* 149 ff.

31. Eur Court HR *Saadi* v. *UK*, judgment of 11 July 2006, upheld by Grand Chamber judgment of 29 January 2008 [2008] ECHR 79. For a full account of this case see H. O'NIONS, "No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience" (2008) 2 *European Journal of Migration and Law* 149 ff.

32. The Court held that informing the applicant's lawyer of the reason for the detention of his client after 7 hours of detention was in conflict with the requirement under Article 5 (2) to provide such information promptly.

33. See FORTIN, J., "Rights Brought Home for Children" (1999) 62 *Modern Law Review* 350 ff.

subject to some restrictions, the next issue is to establish what the right to liberty and security of a person as embodied in Article 5 of the ECHR implies. Even though very few decisions involving asylum seekers have been brought before the European Court of Human Rights on the basis of this Article, some fundamental principles have been acknowledged in a number of landmark judgements and admissibility decisions. In *Amuur* v. *France* the Court first determined if holding aliens in an airport transit zone could be regarded as a deprivation of liberty. In that decision it clearly explained that: "the mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty"[34]. So, in the case at stake, where the applicants were four Somali nationals who were held in the Paris Orly Airport transit zone for 20 days, the Court observed that: "holding the applicants in the transit zone... was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty"[35]. On the subsequent issue whether such a deprivation of liberty fulfilled the judicial guarantees of Article 5 of the ECHR, including the requirement that this deprivation has a legal foundation in domestic law and be subject to judicial review, in the same decision, it stated that: "... though the applicants were not in France... holding them in the international zone of Paris Orly Airport made them subject to French law as this one does not have extraterritorial status"[36]. Furthermore, and more significantly, by arguing from the circumstance that the internal legislation in force at the time was dealing badly with the issue of detention in the transit zone and thus can not represent a "law" of sufficient "quality" the Court rightly concluded for the existence of a violation of Article 5 (1)[37].

The question of the lawfulness of the detention either on the ground of its length and with regard to the guarantees against arbitrariness provided by the legal system in the UK was duly examined *inter alia* in *Chahal* v. *United Kingdom,* where the European Court, on the specific issue of the lawfulness of detention and its length, pointed out correctly that: "any deprivation of liberty under Article 5 (1) (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 (1) (f)"[38]. Even more interestingly, with regard to the delicate issue "whether the available proceedings

34. Eur Court HR *Amuur* v. *France,* judgment of 25 June 1996, Reports, 1996 III, § 36.

35. *Ibid.*

36. *Ibid.*

37. *Ibid.*

38. Eur Court HR, *Chahal* v. *United Kingdom,* judgment of 15 November 1996, 23 EHRR 413, §113.

to challenge the lawfulness of the applicant's detention and to seek bail provided an adequate control by the domestic courts" it observed that, as national security was involved, the domestic courts were not in a position to review all the elements of the decision to detain the applicant[39]. It either emphasised that: "as the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved"(emphasis added)[40]. Indeed, this is a rather important statement as it allowed the Court to maintain that: "neither the proceedings for habeas corpus and for judicial review of the decision to detain the applicant before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5, par. 4, *which provides that who is deprived of his liberty by detention or arrest shall be allowed to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is unlawful"*(emphasis added)[41]. That said, it is worth underscoring that Article 5 (4) does not clarify in objective terms whether the absence of an oral hearing and the lack of access to the applicant's file in the proceedings he instituted concerning the lawfulness of his detention is equivalent or not to a violation of it. But some clarifications on this issue as well as the meaning and *ratio iuris* of this provision can be found in *Yavuz* v. *Austria,* where the Court ruled out that Article 5 (4) can not be interpreted as imposing on the domestic authorities a duty: "to institute exchanges of documents which *would* render impossible to take a decision within the statutory time-limit" (emphasis added).[42] This is as the: "proceedings for review of an arrest or a detention with a view to expulsion are urgent matters which have to be dealt with speedily"[43].

3.3. *The Rights Of Asylum Seekers To Private And Family Life*

Article 8, paragraph 1, provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence".

The language of this Article shows that it belongs to the category of "qualified rights", that is, rights which may be limited under the conditions spelt out in

39. *Ibid.*
40. *Ibid.*
41. *Ibid.*
42. Eur Court HR, *Yavuz* v. *Austria,* judgment of 18 January 2000, Series A No. 245-C, 41.
43. *Ibid.*

Article 8 (2)[44]. Contracting States have, therefore, a wide margin of appreciation as to the manner in which they implement Article 8[45]. Whilst there is no unified approach regarding a right to family unit or what family protection encompasses in much scholarly literature the right to "family life" or to "family" are treated synonymously with the right to "family unit"[46]. This is compelling as family unit is truly a subset or characteristic of having a family life. Indeed, for many asylum or refugee families, in order to enjoy a family life, the unit of the family is their critical concern. This may require not solely that States desist from action that would result in family divisions, but either that they take measures to maintain the unity of the family and reunite family members who have been separated.

The circumstance that there is no right to enter, reside or immigrate, or to be granted asylum, in European human rights law poses a direct conflict with the right to family life in two particular instances: (a) where an asylum seeker wishes to marry a foreign spouse in order to found a family; or b) where family members are separated during asylum flight. The approach adopted by several Contracting States in carefully securing the entry of non nationals into their territory can be considered as a grave interference with an individual's fundamental right to family life[47]. ECHR refers not solely to families already constitutes, but explicitly protects the right to marriage and to form a family, which is, future families[48].

Moving now to more specific issues, it should be recalled that Article 8 (1) protects the nuclear family structure (children, spouses, parents), but also other forms of family ties[49]. In *Marckx* v. *Belgium* the Court emphasised that: "... family life, within the meaning of Article 8, includes at least the *ties be-*

44. See *ex multis* MOCK, H., "Le droit au respect de la vie privée et familiale, du domicile et de la correspondence (art. 8, Conv. EDH) à l'aube du XXI siècle. Aperçu de la jurisprudence de la Commission et de la Cour européenne des droits de l'homme" (1998) 1 *Rev. Univ. Dr. Homme* 237 ff.

45. On the doctrine of the margin of appreciation see *ex multis* ARAI-TAKAHASHI, Y., *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR* (Antwerp [etc.]: Intersentia, 2002); HUTCHINSON, M.R., "The margin of appreciation doctrine in the European Court of Human Rights" 48 (1999) *ICLQ* 638 ff.

46. ¿¿?¿¿¿

47. See PROBERT, R. (ed), *Family life and the law: under one roof* (Aldershot, Ashgate, 2007) 236.

48. See STALFORD, H., "Concepts of Family under EU Law – Lessons from the ECHR" (2002) 16 (3) *International Journal of Law, Policy and the Family*,410 ff;

49. *Amplius* LIDDY, J., "The concept of Family Lifes Under the ECHR", *European Human Rights Law Review*, 1 (1998), 1, 15 ff; O'DONNELL., "Protection of Family Life: Positive Approaches and the ECHR" (1995) 17(3) *Journal of Social Welfare and Family Law* 261 ff; MCGLYNN, C., *Families and the European Union* (Cambridge: CUP, 2006)16.

tween near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life"[50]. Again, in *Yilamz* v. *Germany* it stressed that the protection of Article 8 applies to adults if it is demonstrated that there is a subsidiary connection, other than the accustomed affective bonds[51]. Furthermore, it maintained that the concept of "family life" could also include "intended" family life, which is, one's fiancé(e)[52]. This is a very broad interpretation of Article 8, § 1 that is, at the outset, questionable. Indeed this is not what you can draw from a literal or systematic reading of this provision which rather suggests that this Article protects vested rights better than prospective ones[53]. Nevertheless, it appears to be perfectly in line with the ECHR as interpreted in the light of its main jurisprudence. More specifically, this is supported by the so called "elsewhere" or "connections" test developed in respect of family reunification cases to this situation[54]. Where the applicant is part of a cultural or a minority ethnic group in the host community, then it is also plausible to expect that she or he will find a suitable spouse in that community. That is, his or her status as an asylum seeker might suggest that without marrying a foreign spouse, he or she will not be able to enjoy the right to marry or to form a family elsewhere. On the contrary, where the "intended" spouse is known to the family before their arrangements for marriage were in place but were interrupted, it is also arguable that residence and entry are required in order to effect the marriage[55].

From asylum seeker and refugee's perspective, the relevance of this provision lies in the fact that the European Court has interpreted Article 8 in a way that protects family members of non nationals durably established in Contracting States against expulsion and allows for their possible reunification[56]. This

50. Eur Court HR, *Marckx* v. *Belgium,* judgment of 13 June 1979, Serie A no. 31, 2 EHRR 330.

51. Eur Court HR, *Yilamz* v. *Germany*, judgment of 17 April 2003 (unreported).

52. Eur Court HR,*Abdulaziz and Balkandali* v. *United Kingdom,* Série A no. 94 (1985) 50.

53. Accordingly ATKINSON SANFORD, D., *European Human Rights Mechanisms*, in FITZPATRICK, J. (ed.), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons* (Ardsley, New York: Transnational Publishers, 2001) 411.

54. See LAMBERT, H., "The European Court of Human Rights and the right of refugees and other persons in need of protection to family reunion" (1999) 11 *IJRL* 427-450.

55. For these remarks see EDWARDS, A., "Human Rights, Refugees, and the Right "To Enjoy" Asylum" (2005) 17 *International Journal of Refugee Law* 317, who, with specific reference to refugees, observes that: "It is not always the case that the country of refuge is the most desirable location, although it would be important that wherever the couple are granted the right to reside, the refugee is able to maintain the level of protection required of his or her status as a refugee".

56. See CLARK, T., "Human Rights and Expulsion: Giving Content to the Concept of Asylum", *IJRL,* 4 (1992), 189 at 193.

interpretation of Article 8 makes this provision potentially applicable *inter alia* to recognised refugees, and to persons enjoying temporary protection or other forms of complementary protection. It must be noted, however, that insofar as family reunification involves immigration issues, the Court has taken a rather restrictive interpretation of the provisions of Article 8 by setting up stringent conditions to its applicability[57]. In short, it will seek to determine whether there is anything preventing the family from returning to life in the country of origin with the other elements of the family who are trying to come in the State party to the ECHR. This "returnability" test is steadily applied[58]. If it is ascertained that the entire family may in reality reunite in the country of origin, the Court will not find a contravention of Article 8. This jurisprudence was also applied in the case of *Gül* v. *The Netherlands,* concerning a Turkish national living in Switzerland with a residence permit delivered on humanitarian grounds[59]. In that case, the European Court found that the refusal to grant family reunification for the child who remained in Turkey did not constitute a violation of Article 8. It consequently ruled out that: "although Mr and Mrs Gül are lawfully resident in Switzerland, they do not have a permanent right of abode *as they do not have a settlement permit* but merely a residence permit on humanitarian grounds, which could be withdrawn, and which under Swiss law *does not give them a right to family reunion*"[60]. However, as the circumstances of the case revealed that the applicant's asylum application was rejected in first instance by the Swiss authorities and that following the issuance of the residence permit on humanitarian grounds he went at least twice to Turkey to visit his son, the Court observed that: "... while acknowledging that the Gül family's situation is very difficult from the human point of view", Switzerland has not failed to fulfil the obligation arising under Article 8 (1), and there has, thus, been no interference in the applicant's family life within the meaning of that Article"[61]. But one can easily argued that asylum seekers as well as other subjects in need of international protection living in a Contracting State of the ECHR will fail the test of "returnability" to the country of origin applied by the Court in such cases. Therefore, if a request for family reunion is withdrawn by national au-

57. See Eur Court HR, *Sen* v. *The Netherlands,* judgment 21 December 2001 (2001) 12 (11-12) *Human Rights Case Digest* 963-965(3).

58. See UNHCR, *Manual on Refugee Protection and the ECHR* (Regional Bureau for Europe Department of International Protection, April 2003), Part. 2.3 – Fact Sheet on Article 8, 4.

59. Eur Court HR, *Gül* v. *The Netherlands,* judgment of 19 February 1996, Appl. No. 10730/84, par. 21.

60. *Ibidem,* par. 41, emphasis added.

61. *Ibidem,* par. 43.

thorities, they might start proceedings before it, demonstrating that the return to the country of origin is rather difficult or more likely impossible[62].

The Court introduced some adjustments to this too restrictive jurisprudence in *Sein* v. *The Netherlands,* where it stated that the refusal to allow a Turkey minor child to join her Turkish parents residing legally in the Netherlands represented a violation of Article 8 of the ECHR[63]. Surely, this decision was justified either by the major obstacles to the return of the whole family to Turkey and the circumstance that in addition to having a long term resident permit, the parents lived in the Netherlands for a long period of time. Nevertheless, it shows the existence of a different attitude of the Court in family reunification cases as demonstrated by the fact that for this to recognize a violation of Article 8 it should carry out a critical survey of the situation of the applicant. In other words, to establish whether or not the family could return to the country of origin to reunite with the member wishing to join them, one has to deem the duration of stay in the host State, the cultural connection and the age of the minor who persisted in being in the country of origin, etc. In *Moustaquin* v. *Belgium* the Court held that the expulsion of long term immigrants and second generation foreigners constitutes an interference with their family life. It significantly stated that: "... in cases where the relevant decisions would constitute an interference with the rights protected by paragraph 1 of Article 8, they must be shown to be "necessary in a democratic society", that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued"[64]. But only in *Amrollahi* v. *Denmark* it gave a record of the criteria that it takes into consideration to ascertain whether an expulsion is proportionate, i.e. necessary in a democratic society. Among these, one may briefly recall the nature and seriousness of the offence committed by the applicant; the time elapsed since the offence was committed and the applicant's conduct during that period; the applicant's family situation, such as the duration of the marriage, the possibility of the family members following the expulsion to the country of destination[65]. The outcome of the aforementioned cases suggests

62. On this issue see the excellent analysis of CLEMENTUCCI, F., *The Right to Family Reunification: between the European Court of Justice and the European Court of Human Rights. A particular attention to the rights of Third Country Nationals* (TCNS) (College of Europe Publishing, 2004) 3 ff.

63. See *supra* note 57.

64. Eur Court HR, *Moustaquin* v. *Belgium,* judgment of 18 February 1991, Application No. 12313/86, par. 43.

65. Eur Court HR, *Amrollahi* v. *Denmark,* judgment of 11 July 2002, Application No 56811/00 (unreported).

that for Article 8 to apply to an expulsion case involving specifically an asylum seeker or more generally a person in need of international protection this would have to be argued on the basis of the consequences of the expulsion measure on the individual's private or family life on the *territory of the contracting party,* if he or she has been there long enough to develop a private or family life. But this implies, as the UNHCR pointed out correctly, that if harmful consequences are feared in the country of origin, it would be better to base the application before the Court on Article 3 of the ECHR[66]. Noticeably, this would leave the question open whether the application of Article 8 in family reunion cases would be useful at the end to asylum seekers. Being the family reunion the only practical means of giving effect to the right to family life in the case of separated asylum or refugee families one could eventually give a positive answer to this query as the: "refusal to allow family reunification may be considered an interference with the right to family life or to family unit, especially where the family has no realistic possibilities of enjoying that right elsewhere"[67]. Indeed, at least in States where family reunion of these categories of aliens is restrictively administered, the demurral to allow such reunion can be regarded a grave hindrance to the right to family life. But a different outcome could be deduced from the general principle, well summarised in *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*[68] and more recently in *Nasri* v. *France,* that: "... a State has the right to control the entry of non nationals into its territory"[69].

Based on the foregoing, one could maintain that claims under Article 8 may be reasonably brought only when the impugned treatment does *not* rise to the level of torture, inhuman or degrading treatment or punishment, but still constitutes an interference with an individual's right to personal and physical integrity. Similar conclusions are suggested by the case of *X and Y* v. *The Neth-*

66. See UNHCR, *supra,* note 57, "Fact Sheet on Article 3", note 18.

67. UNHCR, "Summary Conclusions on Family Unit", Global Consultations on International Protection, Geneva Expert Roundtable 8-9 Nov. 2001, organised by the UNHCR and the Graduate Institute of International Studies, para. 5. See also EDWARDS, A., "Human Rights, Refugees, and the Right "to Enjoy" Asylum", *International Journal of Refugee Law,* 2005, 11, who correctly states that: "this so called "elsewhere" approach, largely developed by the European Court of Human Rights, offers support to the plight of refugee families, either those seeking reunification of separated family members or those facing deportation and or expulsion". ROGERS, N., "Immigration and the European Convention on Human Rights: Are New Principles Emerging?" (2003) 1 *Eur. Hum. Rts. L. Rev.* 53–64.

68. See Eur Court HR, *Abdulaziz, Cabales and Balkandali* v. *United Kingdom,* Application nos. 9214/80; 9473/81; 9474/81, Judgment 28 May 1985, Ser. A, No. 94.

69. See Eur Court HR, *Nasri* v. *France*, judgment of 13 July 1995, Ser. A no. 320-B, p. 25, § 41.

erlands, where the Court held that any forced physical treatment of an individual amounts to an interference with private life[70]. But this is only whether the interference affects the well being of the applicant. Indeed, actions that were expected or impliedly consensual do *not* implicate Article 8. Of tremendous relevance to all asylum seekers, is that this Article may be raised in the context of a medical claim. Despite the fact that the ECHR is silent with regard to the right to an adequate standard of health and health care it is generally accepted that provisions for medical care are implicit in certain norms such as Article 8, which protects the right to physical and psychological integrity as component part of the general right to respect for private life[71]. This, in addition to refraining from interfering with this right, may require the State to take positive measures to respect it. In particular, where the State has an obligation to provide medical care, an excessive delay of the public health service in providing a medical service to which the patient is entitled may raise an issue under the Convention. In order to rely on Article 8 in this way, the patient would have to establish that the delay has, or is likely to have, a serious impact on his/her health[72]. In addition, where the failure to provide medical services would result in a life threatening situation, this might raise an issue under the right to life under Article 2, or under Article 3, which prohibits inhuman and degrading treatment. Compulsory medical treatment, however minor, may constitute an interference with the right to respect for private life[73]. But such treatment will not infringe the Convention as long as there is proportionality between the interference which it creates and the need to protect the public interest that it serves. This might be particularly important where asylum seekers are concerned because they have limited possibilities to protect their own rights.

The issue in an Article 8 foreign case is whether return will result in a real risk of a flagrant denial of an applicant's Article 8 rights in the country of return, usually in respect of the applicant's right to physical and moral integrity. When considering if return would give rise to a risk of a flagrant breach of Article 8 decision makers should take into account related factors as for an

70. See ATKINSON SANFORD, D., *supra* note 11, at 382.

71. WICKS, E., "The Right to Refuse Medical Treatment under the European Convention on Human Rights", *Medical Law Review*, 9 (2001), 17-40; SEATZU, F., "Sulla detenzione ed il trattamento sanitario coattivo di soggetti malati di mente alla luce della Convenzione europea dei diritti dell'uomo", *Rivista della cooperazione giuridica internazionale,* 17 (2004), 40 ff.

72. See Eur Comm. HR, *Passanante* v. *Italy,* Decision of 1st of December 1998, 26 EHRR CD 13.

73. See Eur. Comm. HR, *JR, GR, RR & YR* v. *Switzerland,* Decision of 5th of April 1995, DR 81A, 61.

Article 3 medical claim. But one can not disregard, to quote the House of Lords in *Razgar,* that: "it is not easy to think of a foreign health care which would fail under Article 3 but succeed under Article 8"[74]. This is also because unlike Article 3 Article 8 is a qualified right, which means that interference with the rights set out in Article 8 (1) may only be allowed in certain circumstances. A clear illustration of this is in *Nnyanzi* v. *United Kingdom,* where the European Court established that the rejection of the applicant's asylum application and the ensuring decision to remove her to Uganda would not give rise to a violation *inter alia* of Article 8, guaranteeing the right to private and family life, of the ECHR[75]. This was justified as her proposed removal to Uganda was in accordance with the law and justified by a legitimate aim, namely the maintenance and enforcement of immigration control. Even more interestingly, as to the necessity of the interference, it, unanimously, found in the aforesaid decision that any private life that the applicant had established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render for removal a disproportionate interference[76].

3.4. *Freedom of Religion and Asylum Seekers*

Very little guidance is available from the European Court in relation to the exercise by an individual seeking asylum in a Contracting State of his/her religious freedom, though existing case law shows that it is rather arduous to make out a successful claim under Article 9 of the ECHR which provides that everyone has the right to freedom of conscience, religion and thought. A clear demonstration of this may be found in *Z and T* v. *UK,* where the Court declared the application inadmissible, though it was not evident whether there was the possibility that, in exceptional circumstances, there might be protection against *refoulement* on the basis of Article 9 where the person would run a real risk of flagrant violation of that provision in the receiving State[77]. This finding was echoed in *Aslan* v. *Malta.* Here, the applicant, a Turkish national, who was denied entry in Malta because of an alleged problem with his return visa to Libya,

74. See House of Lords, *R (Razgar)* v. *Secretary of State for the Home Department* (*The Times* June 21, 2004 [2004] 2 AC 368).

75. See Eur Court HR, *Nnyanzi* v. *United Kingdom,* Judgment of 23 April 2008, Application No 21878/06 [2008] 47 E.H.R.R. 17.

76. *Ibidem,* par. 76.

77. See Eur Court HR, *Z. and T. v. UK*, admissibility decision of 28 February 2006 (application declared inadmissible).

claimed that the crucial issues of the intention for denying him leave to enter was on account of his religion[78]. Notwithstanding the circumstance that this plea was not at least *prima facie* ill-founded, the Court considered unnecessary to address this argument as it was clear from the major facts of the case that: "the documentation produced by the applicant at the border control point raised in the minds of the port officials suspicions about the sincerity of his reasons for entering the country"[79].

That said, it is worth underscoring that the freedom of religion includes the right to manifest belief through worship, teaching, observance and practice as well as the freedom to change religion, though a restriction may be placed on the freedom to manifest one's religious beliefs in certain situations[80]. But Article 9 does not lay out any specific restriction on the right of asylum seekers to enjoy such rights. Of inestimable relevance to children seeking asylum is that the ECHR seems to foresee a parental responsibility in the exercise by the child of his/her freedom of religion and in particular, Article 2 of the First Protocol demands Member States to value the religious beliefs of parents in the teaching of their family[81]. Though the purpose of this provision is to defend the infant from religious propaganda by the State, rather than the defence of the religious reliability of individual pupils, it is also considered important that any instruction the infant receives from the State leaves the possibility for parental supervision[82]. In addition, the duty to defence the religious beliefs of parents in the exercise of their children's teaching applies as element of the exercise of parental task. Therefore, the right to decide a child's spiritual schooling is deemed to be an intrinsic part of the fundamental right of custody, which can be surrendered along with other parental responsibilities in certain conditions[83].

Equally of great relevance in the asylum sector is the qualification by the European Court of the prohibition of a particular religious practice under domestic law as an unjustifiable interference with religious freedom[84]. As a result,

78. See Eur Court HR, *Aslan* v. *Malta,* Appl. No. 29493/95, Judgment of 3rd of February 2000.

79. UNCHR, *supra,* note 57,12.

80. See EVANS, C., *Freedom of Religion Under the European Convention on Human Rights* (Oxford, OUP, 2001) 10 ff.

81. See Eur. Court HR, *Olson* v. *Sweden,* Judgment of 24 March 1988, Serie A, n. 130, § 95.

82. See Eur. Court HR, *Kjeldsen, Busk Madsen & Pedersen* v. *Denmark,* Judgment of 7 December 1976, Series A, n. 23, 1 EHRR 711 § 53.

83. See Eur. Comm. HR, *X* v. *UK,* Decision of 14th of December 1972, Collection 44, 66.

84. See Eur. Court. HR, *Leyla Sahin* v. *Turkey,* Judgment of 29 June 2004, Application no. 44774/98 [2005] ECtHR (GC) 819. For a commentary EVANS, C., "The 'Islamic Scarf' in the European Court of Human Rights" (2006) 4 *MelbJIL* 52. See also NIGRO, R., "Il margine di ap-

it is now settled that Article 9 can not be invoked in order to justify a practice that is contrary to national law. Reasoning backward from this point, although the practice of marrying very young undoubtedly reflected the manifestation of a particular religious faith, the fact that the internal legislation consistent with the Convention granted protection for the rights and health of young people in such situations signified that, indirectly, a restriction was placed on the freedom of religion to this end. More generally on the restrictions set out in Article 9, § 2, it is worth underscoring that these apply to the demonstration of religious credence, and *not* to the freedom to choose religion itself.

3.5. *Freedom of Association in Asylum Context*

In addition to Articles 2, 5, 8, 9 and 12, asylum seekers can benefit from other ECHR provisions in order to reinforce their social and economic rights. It is arguable that denying asylum seekers basic social and economic rights and freedoms might represent constructive *refoulement*[85]. Not solely could the lack of social and economic rights in a certain destination country threaten to discourage individuals from seeking asylum from maltreatment there, but it can act as a push issue in which asylum seekers, out of economic necessity, are forced to return to a country in which their freedom or life could be menaced. Having asserted that, and on the same line of reasoning, one can not underestimated that the relationship between economic and social rights and freedoms, on one hand, and civil and political rights, on the other, is of key relevance in the asylum context.

Moving to more specific issues, a plain reading of Article 11 ECHR would suggest that this provision strives for the protection of the right of individuals to: "come together for the expression and protection of their common interests"[86]. It is, therefore, applicable to situations in which the right to demonstrate or to join a trade union are at issue, rather than any right to spontaneously associate with whomever one desires. In *Platform "Artzte für das Leben"* v. *Austria* the Court lucidly explained that Article 11 does not demand Member States to guarantee totally that demonstrations will take place without interference[87]. In

prezzamento e la giurisprudenza della Corte europea dei diritti umani sul velo islamico" (2008) 2 *Diritti umani e Diritto internazionale* 71 ff.

85. See EDWARDS, A., *supra* note 55.

86. See VAN DIJK, P. & VAN HOOF, G.J.H., *supra* note 17, 586 ff.

87. See Eur. Court HR, *Platform "Artzte für das Leben"* v. *Austria,* Judgment of 21 June 1988, Appl. No. 139 [1991] 13 EHRR 204.

the aforementioned decision – though counter-demonstrators interrupted the manifestation in question, as no demonstrators suffered any cruelty to their person – it held that the State had adopted appropriate protective measures within the scope of its discretion to defend the marchers since these measures were "reasonable" to warrant that lawful demonstrations may progress calmly[88]. Again, a literal interpretation of Article 11 also indicates that this encompasses *inter alia* a right for individuals to associate: "in order to attain various ends". It follows that any restriction imposed on the activities of individuals seeking asylum, either by the State or a private party, will be unlikely to raise an issue under this provision unless it is established that their gathering serves a specific aim. Yet, the wording of this provision suggests that the right to association, which embraces freedom to associate and opt not to associate[89], at least in principle, applies to nationals and non nationals alike. This conclusion can be derived either from a plain reading of Article11 and the non discrimination basis of ECHR generally. It is though subject to a number of restricting conditions factors under Article 11 § 2 which need to be narrowly interpreted and applied in light of the specific circumstances in the country of asylum.

While there have been a small number of particular applications brought by asylum seekers challenging their right to association, there is clearly substantial possibilities of implementing Article 11 of the ECHR in this area. Indeed, the positive obligation to adopt "reasonable and appropriate" measures to ensure that lawful demonstrations can proceed peacefully has significant repercussions to asylum seekers in their asylum country. But one can eventually derive the importance of Article 11 to political asylum seekers either from the Court's approach in the case of *Özdep* v. *Turkey*, where this held that: "the fact that... a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself"[90].

88. See CLEMENTS, L. et al., *European Human Rights: Taking a Case under the Convention* (Sweet & Maxwell, London, 1999) 75.

89. See SEATZU, F., "La libertà negativa di associazione e la Convenzione europea dei diritti dell'uomo" *La Comunità Internazionale,* 2008, p. 301 ff; NOVITZ, T., "Negative Freedom of Association: *Gustafsson* v. *Sweden*" (1997) 26 *Industrial Law Journal* 79.

90. See ECHR, *OZDEP v. Turkey,* Judgment of 8 December 1999, App. No. 23885/94 [2001] 27 EHRR 674.

3.6. *The Rights Of Asylum Seekers To Marry And To Found A Family*

Of tremendous significance to all asylum seekers of marriageable age are the rights, encompassed in Article 12 of the ECHR, to marry and to found a family.

Though these can truly regarded as being of special importance in asylum context you can not find detailed case law on these provisions and asylum seekers. At first glance, indeed, this is an unexpected outcome which, however, can be easily understood if one rightly considers that Article 12 refers to marriages contracted according to "national laws". This, in fact, implies that Contracting States have no positive duty to allow marriage in any particular form, nor to uphold it in any way. Furthermore, this is also the true reason as that Article 12 does not require the Contracting State to allow marriages according to a particular religious ceremony[91]. However, as it has been lucidly stated in *Van Oosterwijk* v. *Belgium*, a law that makes for asylum seekers impossible to marry because of the religious, social or ethnic group to which they belong, violates the ECHR if this is arbitrary or eventually deprive the fundamental rights to marry or to found a family of theirs content[92].

Moving to the relationship between Article 12 and the so called "marriages of convenience" it is well known that for some years there has been a growing difficulty with what are normally referred to as "marriages of convenience", which may be classified as marriages concluded between persons in a Contracting State who are subject to immigration control and other persons already present and settled in the same State for the purpose of securing an immigration advantage, i.e. the right to remain in that country. The problem lies that such marriages have been usually perceived as deceptions by registrars celebrating at them by such unconcealed signs as the fact that the two parties did not know each other, that they did not speak the same language or that they gave confused informations of each other's respective personal histories and status. In the *Baiai* case the House of Lords addressed the issue whether section 19 of the Asylum and Immigration Act 2004 breach Article 12 of the ECHR[93]. Art. 19 of the 2004 Act required the superintendent registrar to whom notice of such a marriage was given to satisfy himself: 1 that the person subject to immigration

91. See HARRIS, D.J., O'BOYLE, M., WARBRICK, C. y BATES, E., *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 436.

92. See Eur. Comm. HR, *Van Oosterwijk* v. *Belgium*, Judgment of 16th of July 1979, Appl. no. 7654/76, Serie A, 40 (1980).

93. See House of Lords, *R (Baiai)* v. *Secretary of State for the Home Department* [2009] 1 A.C. 287 (HL).

control had been given entry approval expressly for the reason of enabling him/her to marry in the UK; or 2 that person had the written authorization of the Secretary of State to marry in UK, or 3. that person fell within a class having such a authorization as a result of regulations made by the Secretary of State. On the ground that the discrepancy subsequently established in this section was that it was mandatory in relation to marriages to be solemnised by a superintendent registrar but not in relations to marriages to be solemnised by a minister of the Church of England this section found to be discriminatory in a case prior than the case under deliberation and consequently to that extent mismatched with Article 13 of the ECHR[94]. However, the House of Lords maintained that section 19 of the 2004 Act was not open to objection on the ground of incompatibility with the ECHR rights to marry and to found a family. In the words of Lord Bingham: "It is open to a Member State consistently with Article 12 to seek to prevent marriages of convenience"[95].

3.7. *The Right Of Asylum Seekers To An Effective Remedy Before A National Authority*

Article 13 reads as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The meaning of this provision in asylum cases can be deduced *a contrario* from the circumstance that Article 6 of the ECHR, which provides the right to a fair trial, is not applicable to immigration and asylum issues, as the right to enter and reside in a country is not a "civil right" within the meaning of the provision[96]. Thus, Article 13 remains the only provision that may be applied to reinforce the protections of refugee status determination procedures. Yet, the procedural principles arising from the European Court's case law and its interpretation of Article 13 could be adopted in order to address other issues concerning the refugee status determination procedures, such as expedited pro-

94. For a fuller account of this see MIGRATION WATCH UK LEGAL, *Recent case law involving consideration of the European convention on human rights*, at http://www.migrationwatchuk.com/briefingPaper/document/86

95. *Ibidem.*

96. But see App. no. 10523/02 *Coorplan-Jenny Gmdtt and Hascic* v. *Austria* and App. No. 62539/00 *Jurisic* v. *Austria,* where the Court held that Article 6 ECHR did apply to an immigration related matter, namely the issue of employment permits, as these determined the validity of any subsequent employment contract and hence concern civil rights.

cedures. But before considering how the European Court's jurisprudence on Article 13 could be employed in asylum law, it is appropriate to scrutinize the interpretation that the Court has taken to the different parts of this provision.

It is trite law that Contracting States to the ECHR must set up such mechanisms or open existing ones only with regard to *arguable* claims. This is clearly stated in *Boyle and Rice* v. *United Kingdom,* where the Court tersely provided that: "Article 13 cannot *be interpreted as to require a remedy in domestic law in respect of any supposed grievance* under the Convention that an individual may have, no matter how unmeritorious his complaint may be: *the grievance must be an arguable one in terms of the Convention*" (emphasis added)[97]. But this Article may not be read as to urge any special form of remedy. As the Court commented in *Klass and Others* v. *Germany*: "... the authority referred to in Article 13 *can not necessarily in all instances be a judicial authority* in the strict sense". Nevertheless, as it observed in the aforementioned decision, it is equally evident that: "the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective"[98]. Some problems might arise as Article 13 does not contain a definition of the notion of an "arguable" claim. But these should not be overestimated as the Court has in its jurisprudence drawn a very useful parallel between that notion and the concept of "well foundness". Take, for example, the case of *Boyle and Rice* v. *United Kingdom,* where it established that: "... rejection of a complaint as *manifestly ill founded* amounts to a decision that *there is not even a prima facie case against the respondent State.* On the ordinary meaning of the words, it is difficult to conceive how a claim that is manifestly ill founded can nevertheless be arguable, and vice versa"[99]. Even more explicitly, in *Powell and Reyner* v. *United Kingdom* the Court asserted that: "the term "manifestly ill founded" extends further than the literal meaning of the word "manifest" would suggest at first reading"[100]. Yet, in the aforementioned case it found that: "some serious claims might give rise to a *prima facie* issue but, after "full examination" at the admissibility stage, ultimately be rejected as manifestly ill founded notwithstanding their arguable character"[101]. Self evidently, all these statements of the

97. See ECHR, *Boyle and Rice v. United Kingdom,* judgment of 27 April 1988, Series A no. 131, 23.

98. See ECHR, *Klass and others* v *Federal Republic of Germany,* 6 September 1978, Series A, [1979-80] 2 EHRR 214, par. 67.

99. para. 57 (emphasis added).

100. See ECHR, *Powell And Rayner* v. *The United Kingdom,* Judgment 21 February 1990, Appl. n. 3/1989/163/219, Serie A, 172 [1990] 12 EHRR 355.

101. *Ibidem,* par. 32.

Court lead to the conclusion that an arguable claim is a claim that could have some value and that is founded on an asserted infringement of a liberty or right guaranteed by the ECHR.

In *Klass and Others* v. *Germany* the Court commented that Article 13: "requires that where an individual considers himself to have been prejudiced by *a measure allegedly in breach of the Convention*, he should have a *remedy before a national authority* in order both to have his claim decided and, if appropriate, to obtain redress"[102]. This approach would either suggest that this Article should be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that *his rights and freedoms under the Convention have been violated*" (emphasis added). In this vein, in *Conka* v. *Belgium* the Court held that the procedure followed by the Belgian authorities on the detention of rejected Roma asylum seekers before deportation to Slovakia constituted *inter alia* a violation of this Article as it did not provide an effective remedy in accordance with this provision, requiring guarantees of suspensive effect[103]. Later case law concerning Article 13 has confirmed this trend in approach by the Strasbourg court. Regard, for example, the Court's decision in *Gebremedhin* v. *France,* which is representative: it said that the particular border procedure declaring "manifestly unfounded" asylum applications inadmissible, and consequently refusing the asylum seeker entry into the territory, was incompatible with this Article taken together with Article 3, as that in order to be effective the domestic remedy must have suspensive effect as of right[104]. By the same token, in *Jabari* v. *Turkey,* a case concerning an Iranian national seeking political asylum in Turkey, the Court – requested to review *inter alia* whether the applicant effectively had a proper remedy against the refusal to consider the asylum application, since the appeal procedure did not have suspensive effect – has left no doubt that: "... the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned..."[105]. This finding was reiterated in *Clahal* v. *United Kingdom*. Here, it observed that: "... Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might hap-

102. Para. 64.

103. See ECHR, *Conka* v. *Belgium*, Judgment of 5 February 2002 [2002] 13 (1-2) Human Rights Case Digest 47-53(7) 3.

104. See ECHR, *Gebremedhin v. France,* Judgment of 26 April 2007, appl. 25389/05, 67.

105. *Ibidem,* para 50 (emphasis added).

pen to be secured in the domestic legal order"[106]. As it has been duly recognised in the aforementioned decision, it follows that: "the effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and *to grant appropriate relief...*"[107]. Finally, of particular interest to asylum seekers is either that the lack of a notification of the extradition decision to the applicant who discovered about the extradition in general terms on a TV broadcast the evening before the extradition may infringe the applicant's right to an effective remedy in violation of Article 13 of the ECHR[108]. However, either the language and meaning of this provision shows that this can not be interpreted as to require that an effective remedy should exist whenever an individual claims to be the victim of a violation under the ECHR.

3.8. *The Incompatibility Of Discriminatory Measures With Article 14*

The ECHR also contains a non-discrimination provision whereby it states that the rights embodied in the document: "will be exercised without discrimination of any kind...". Presumably, based on this provision, asylum seekers, as well as nationals, can benefit from the fundamental rights outlined in ECHR, without undue discrimination[109].

The language of Article 14 shows that this does not create a self-supporting right not to be discriminated against, but one connected to the enjoyment of the Convention rights and freedoms. Quoting Gomien et al., it has only an "accessory nature and autonomous status"[110]. Therefore, it exclusively applies where the subject matter of another Convention right has been triggered. But

106. See ECHR, *Chahal v. the United Kingdom,* Judgment of 15 November 1996 [1997] 23 EHRR 413.

107. Para. 145 (emphasis added).

108. See ECHR, *Shanayev and 12 others* v. *Georgia and Russia,* 12 April 2005, appl. n. 36378/02 [2005] EHRC, 4 (1), 23-27.

109. See also Article 1 of Protocol 12 to the ECHR which contains a "General Prohibition of Discrimination". For a commentary on the meaning and scope of this provision, as well as its relationship with Article 14 of the ECHR see amongst others PETTITI, C., "Le Protocole n. 12 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales. Une protection effective contre les discriminations", in *Revue hellenique des droits de l'homme,* 2006, p. 805 ss; SEATZU, F., "Il Protocollo n. 12 alla Convenzione europea per la protezione dei diritti dell'uomo: uno strumento giuridico efficace per la tutela dell'eguaglianza e l'eliminazione delle discriminazioni?", in *Jus,* 2002, p. 483 ff.

110. See GOMIEN, D. et al., *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg, Council of Europe Publishing, 1996) 346.

this does not imply that it is also necessary for the other Convention rights to be breached in order for Article 14 to apply. For example, a law forbidding all asylum seekers of one country from access in a Contracting Party to the ECHR would be surely forbidden under Article 14[111]. Moreover, the effect of Article 14 is not such that all discriminatory treatment will be contrary to the ECHR as such an approach would clearly be unpractical. Instead, the Court has established that a difference in treatment which is capable of objective and reasonable justification will not fall foul of Article 14.

Despite the practical nature of this approach, it is obvious that it may nonetheless be adopted to justify the unequal handling of adults and children seeking asylum under the ECHR. In particular, where there are sound and objective reasons for treating asylum seekers in a different manner, either from nationals or from each other, then the supposed unequal treatment will not be in breach of Article 14. Notwithstanding all these restrictions, the grounds on which discriminatory is forbidden under Article 14 are extensive. The text of the provision requires that ECHR rights be sheltered without discrimination on any grounds, and the following are provided as examples solely: race, language, religion, political or other opinion, sex, property, birth or other status. The broad scope of the provision suggests that there is huge potentiality for interpreting Article 14 in an expansive manner. In relation to asylum seekers, it is relevant that the criteria of race and national origin have been found to fall within the scope of "other status".

The Court has developed its case law on Article 14 in a positive way, and the implications of this for the application of the ECHR to individuals seeking asylum are in brief illustrated here. Firstly, it has found that the provision applies not only to those elements that it chooses to guarantee. In a milestone decision, the so called *Belgian Linguistics Case,* it established that though there was no obligation on the State to provide a particular system of education, where a State chooses to do so, it can not hamper access to it in a discriminatory way[112]. The potential of this approach is clear and it can be useful in seeking to ensure equal access to education by children seeking asylum in a Contracting State for example. Secondly, the scope of the provision being invoked with Article 14 can influence the latter provision's scope of protection. Therefore, if there is a positive duty implicit in the substantive provision, then this can be

111. See FITZPATRICK, J. (ed), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Ardsley, New York, Transnational Publishers, Inc, 2001) 383.

112. See ECHR, *Belgian Linguistic case,* Judgment 23 July 1968, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Court Series A, v. 6 (3-5) 30-2.

translated as an obligation to promote equality, rather than to protect against discrimination when the two provisions are read together. For instance, Article 8 does not provide a duty to grant a proper standard of health and health care. Nevertheless, it is sufficient for the purposes of Article 14 that the measure falls within the scope of respect for family and private life. In this way, a failure to award an adequate standard of health will raise a crucial issue under Article 14, taken together with Article 8. Again, this well exemplifies the further point that regardless of its complementary character, an infringement of Article 14 can take place even if a contravention of a substantive provision is neither demonstrated, nor even designated. As a result, a measure, such as a denial to accord a proper standard of health care will be in breach of Article 14, even though it can be consistent with Article 8, unless it can be reasonably and objectively substantiated. In this way, Article 14 adds a relevant stage to the trial of whether a Convention provision has been infringed, and in the light of the extensive grounds on which discrimination is forbidden, it enlarges the safeguard that the Convention advances to asylum seekers generally.

3.9. *The Right Of Asylum Seekers To Property*

Article 1 of Protocol No. 1 provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

As it is suggested by its wording this Article encompasses two major rights – that is to say the right not to be deprived of one's "possessions" and the right not to have their use controlled. But according to a well established case-law of the European Court also the right to compensation for expropriation or similar measures is interpreted to fit into this provision[113].

The question which arises under Article 1 of Protocol No. 1 is whether it is relevant in the present context. Dealing with the protection of the right to

113. For references on this issue see ALLEN, T., "Compensation for Property under the European Convention on Human Rights" (2007) *Michigan Journal of International Law* 287 ff.

property of asylum seekers and international displaced persons in the *General Recommendation XXII on refugees and displaced persons* the Committee on the Elimination of Racial Discrimination (hereinafter "CERD") tersely stated that these subjects: "have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them..."[114]. Indeed, as displacement frequently entails leaving behind a large amount of one's possessions, asylum seekers, refugees and internationally displaced persons necessitate safeguards, not solely for all they might attain during or after displacement, but also for the possessions they leave behind. The European Court eloquently captured this point in *Kristina Blecic* v. *Croatia,* as it found that the judicial termination of the applicant's tenancy right constitutes a violation *inter alia* of Article 1 of Protocol No. 1 since she was deprived of the possibility to purchase the flat under favourable conditions[115]. Aware of the strong reactions that this interpretation had given rise to, it took the opportunity given by the *Akimova* v. *Azerbaijan* case to better clarify its position. Having outlined that the fundamental right to property applies to non nationals, it further explained that either the deprivation in the interests of refugees of the applicant's tenancy rights to an apartment that she has not moved into as its erection was not completed has to be regarded in violation of the right to property[116]. Self evidently, the same conclusion should apply if the deprivation of the applicant's property is not made in the interests of refugees but asylum seekers.

IV. FINAL REMARKS

The systematic cutback of border controls manifestly indicate that the amount of cases challenging asylum decisions under the ECHR and its additional Protocols is expected to continue to develop. As a result, the risk of opening the accesses to individuals (adults and children) entering Contracting States to seek sanctuary is apt to corroborate the European Court of Human Rights in its rather watchful approach in this sector.

114. See Committee on the Elimination of Racial Discrimination, General Recommendation XXII on refugees and displaced persons (forty nine session) A/51/18 (1996). General Recommendation XXII: Article 5 and refugees and displaced persons (Forty ninth session, 1996), in HRI/GEN/1Rev.4 at 151, § 2 (c).

115. See ECHR, *Kristina Blecic* v. *Croatia*, Judgment of 14 September 2005, Appl. no. 59532/00 [2005] ECHR 600.

116. See ECHR, *Akimova* v. *Azerbaijan,* Judgment of 27 September 2007, Application no. 19853/03 [2007] ECHR 751.

Yet, there are relevant trends appearing in the jurisprudence of the European Court, especially with regard to the meaning of maintaining the affiliation between a minor seeking asylum in a Contracting State and his/her parent, and it is therefore significant that this Court maintain to tackle the needs of minors seeking asylum in this milieu, where the various incompatible interests of person and state are inclined habitually to curb the vital problems of minors entering Contracting States to seek sanctuary. Besides, it has taken a more ethical approach to the concepts of "family" and "family life" in recent decisions and this widens the provision's potential to defend the "intended" family, which is, one's fiancé(e), albeit that it is not easy to demonstrate that interferences with family life caused by asylum measures are untenable. For this raison d'être, it is to be expected that procedures, according to which asylum decisions are taken, will be the subject matter of future judicial judgments in this context. Due to the fact that Article 6 of the ECHR is not normally applicable to asylum cases, the principle under Article 8 which requires adequate participation by the parties in decision making processes concerning the family might have a major role to play in this sector. The treatment of illegal asylum seekers either can raise an issue of compatibility with the ECHR, *inter alia* under Article 5 with regard to detention. In this context, it is arguable that an individual who has illegally entered a Contracting State if arbitrarily detained or detained there under unacceptable conditions, for example in an airport international transit zone, may complain to the Court under this provision[117].

It is essential that all asylum seekers are warranted ECHR rights, especially with regard to the right to enjoy effective freedoms and rights, such as freedom of association, freedom of religion, right to a private and family life, right to an effective remedy before a national authority and rights to health and education. The potential of the ECHR's provisions in this area has so far to be measured by the European Court and the scope of the legal duty to respect private and family life is either vague. But it is possible to maintain that where a minor seeking asylum enters a Contracting State unaccompanied, Article 8 demands the implementation of proper measures to endorse his/her reunification with relatives. The conditions of the case, of course, will establish the subsistence of such a duty and its extent, but an evolutive approach to such minors' cases must not be lined out.

117. See *supra* par. 3.2.

Abstract

This article provides a critical assessment of the corpus of law that the European Court of Human Rights has used for the protection of asylum seekers since its re-foundation in 1999. After presenting a taxonomy of fundamental rights in the European Convention on Human Rights and Fundamental Freedoms (ECHR), I move to detect, and to present a critical appraisal of, the philosophy of the European Court of Human Rights, when called to interpret them in relation to the protection of asylum seekers. The Articles with possible significance to asylum will be considered in turn, with the exceptions of Article 3 of the ECHR and Article 3 of the Fourth Protocol as they deserve a separate consideration.

Key Words

The right to seek and "enjoy" asylum; asylum seekers; illegal asylum seekers; children seeking asylum; political asylum; border guards at the frontiers.