The Regime of European Court of Human Rights in Migration and Terrorism

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Abstract

The paper will examine the European Court of Human Rights regime towards the issues of migration and terrorism. It will argue that the Strasbourg regime in migration is satisfactory contrary to the terrorism regime proven to be lacking to some extent. Article 1 provided significant protection towards migrant applicants in widening the extension of the ECtHR jurisdiction. In this regard, the Court have also demonstrated a substantial degree of protection for migrants by widening the scope of Article 3.

Although, human trafficking is not directly tackled in the ECHR, the ECtHR in its caselaw criminalised it according to Article 4. The application of the Article 8 'family life' has resulted in a wider protection for immigrants. While in terrorism, the regime was displeasing as the two limbs of Article 15 failed to be shown as barriers that protect human rights.

Nevertheless, The ECtHR makes it difficult for states to satisfy the exceptions under Article 2(2) and merely allows interferences under strict conditions. Therefore, on this basis, the approach held by the ECtHR proved to be adequate in migration but displeasing in terrorism. The methodology of the paper is desk research. The importance of the paper is due to two main reasons: i) Europe is facing a crucial problem regarding significant number of refugees which may raise human rights violations within the ECtHR and ii) terrorism has become a controversial subject to discuss due to the tragic events of September 11, 2001.

The aim of the paper is to highlight the ECtHR caselaw regarding to migration and terrorism. The paper will be divided into two sections. The first section will discuss the migration issue by defining the term 'migration' and then examining the means of access to protection under European Convention of Human Rights Art.1, as well as under Articles 3, 4, 5 and 8. It will also consider migration's impact on terrorism. The second section, terrorism, will first define the term 'terrorism' both internationally and nationally (the UK), followed by elaborating ECHR Articles 2 and 15 in the field of terrorism. The

reason for selecting the UK to define terrorism is due to the controversy that surrounds the term.

Keywords: human rights, The European Court of Human Rights, The European Convention of Human Rights, criminal justice, the Universal Declaration of Human Rights 1948, refugee, international law.

Introduction

There is no doubt that Europe is currently experiencing a serious crisis. This issue is known as the European refugee crisis that goes to the year of 2015, when over 1.2 million individuals came to Europe to request asylum, the highest number since World War II(1). By the end of 2016, approximately 5.2 million migrants and refugees arrived at European coasts, undertaking dangerous journeys from Syria, Iraq, Afghanistan and other states destroyed by war and oppression(2).

The Syrian refugee crisis, for instance, is considered as the prominent example of the European migration crisis. This is due to the fact that 6.7 million people were evacuated, and 6.8 million Syrians are asylum-seekers and refugees since the beginning of the Syrian civil war in 2011(3). This demonstrates that 13.5 million Syrians in total are compulsorily displaced within Syria – more than half of the state's population(4). This clearly shows that Europe is facing a crucial problem that may raise human rights violations within the ECtHR due to the significant number of refugees. In depicting the various issues surrounding migration relating to asylum seekers, one can argue that migration may play a role in the increased volume in terrorism.

On the other hand, terrorism has become a controversial subject, especially in the last two decades due to the tragic events of September 11, 2001. As such, the human rights society faced a different level of fear: that the international community in a post-9/11 may undermine or at least weaken its protection of human rights(5). David Luban argued that the world, led by the United States,

(1) Melani Barlai and others, The Migrant Crisis: European Perspectives and National Discourses, Lit Verlag, Zürich, 2017.

(2) William Spindler, 'Refugee Crisis in Europe: Aid, Statistics and News | USA For UNHCR' (UnRefugees, 2021) https://www.unrefugees.org/emergencies/refugee-crisis-in-europe/, accessed 9 November 2021.

(3) Kathryn Reid, 'Syrian Refugee Crisis: Facts, Faqs, and How to Help | World Vision› (World Vision' 2021) https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts, accessed 9 November 2021.

(4) Ibid.

(5) Michael Ignatieff, 'Opinion | Is the Human Rights Era Ending?' (Nytimes.com, 2002) https://www.

had moved from criminal justice to a war paradigm in tackling terrorism[6], and this will create a threat to international human rights because it is impossible, both practically and theoretically, to safeguard human rights during war[7].

Joan Fitzpatrick expressed similar concerns as she stated that the war paradigm threatens human rights in a way that it allows nations to justify human rights violations under an anti-terrorism umbrella[8]. For instance, a detention without judicial supervision of persons was labelled as terrorists. This clearly indicates that scholars in post-9/11 concerned that states would minimise their commitment to human rights under the name of anti-terrorism which may affect international institutions to weaken human rights standards. Thus, on this basis, the author will focus on the issues of migration and terrorism within the ECtHR jurisdiction.

The paper will be divided into two sections. The first section will discuss the migration issue by defining the term 'migration' and then examining the means of access to protection under European Convention of Human Rights Art.1, as well as under Articles 3, 4, 5 and 8. It will also consider migration's impact on terrorism. The second section, terrorism, will first define the term 'terrorism' both internationally and nationally (the UK), followed by elaborating ECHR Articles 2 and 15 in the field of terrorism.

The Role and Values of European Court of Human Rights

In 1948 at the Hauge, the British Prime Minster, Winston Churchill, said, 'In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law'[9]. It was from this meeting that the European Convention of Human Rights (ECHR) started to take form. The ECHR was formally drafted by the Council of Europe in Strasbourg, signed in 1950 in Rome, and came into force in 1953. The aim of this convention is to protect human rights. The establishment of the ECHR led to the creation of the European Court of Human Rights (ECtHR). The ECtHR, also known as the Strasbourg Court, exists to safeguard the rights and guarantees laid down in the ECHR.

nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html, accessed 14 November 2021.

(6) David Luban, 'The War on Terrorism and The End of Human Rights', Philosophy & Public Policy Quarterly, Institute for Philosophy and Public Policy, Georgetown Law Faculty Publications and Other Works, USA, Volume 22, Issue 9, (2002), p. 892.

(7) Ibid, p. 13.

(8) Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights›' European Journal of International Law, Oxford University Press, UK, Volume 14, Issue 2, (2003), pp. 242 – 246.

(9) Natasha Holcroft, 'How British is the European Convention on Human Rights?' (EachOther, 2016) https://eachother.org.uk/wrote-european-convention-human-rights/.

As established earlier, the role of the ECtHR is to promote human rights principles. Its interpretation should be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'(10). Therefore, regard should be provided to its special nature as a treaty for the collective implementation of human rights and fundamental freedoms(11).

The ECHR encompasses institutions on both a regional and international scale. For instance, the ECHR, in its Preamble, affirmed fundamental freedoms founded in the Universal Declaration of Human Rights 1948. Merrills identified that the international treaties and courts played a crucial role in the development of the ECtHR regime(12).

He stated that international treaties had been used for three types of the Court's interpretation: i) Indicating omissions, ii) clarifying the Convention and, iii) providing evidence of contemporary developments(13).

This briefly demonstrates that the ECtHR as a human rights instrument plays an important role in promoting the ideals and values of a democratic society. It also shows that international treaties including, the Universal Declaration of Human Rights enhanced the ECtHR's interpretation.

As for the values demonstrated in the ECtHR, these can be illustrated within the Articles that account for human rights in the ECHR. Various scholars have written about the history of ECtHR and how it was established to tackle important global problems and to 'safeguard against tyranny and oppression'(14). The ECtHR holds states accountable for their conducts that are in violation of the ECHR rights(15). As such, Article 13 ECHR provides an effective remedy for individuals whose rights have been violated by state officials.

Furthermore, it was established that the ECtHR is the only institution that can 'uniformly establish the meaning of fundamental rights and to define a minimum level of fundamental rights protection that must be guaranteed in

(10) Soering v UK [1989] Application No 14038/88, para 87.

(11) Ireland v UK [1978] Application No 5310/71.

(12) J. G. Merrills, The Development of International Law by the European Court of Human Rights, Manchester University Press, UK, 1993, pp. 218-226.

(13) Ibid.

(14) Ed Bates, 'British Sovereignty and the European Court of Human Rights', Law Quarterly Review, Sweet & Maxwell, UK, Volume 128, (2012), p. 385.

(15) Article 1 ECHR.

all the states of the Council of Europe'[16]. This illustrates that the ECtHR provides essential values in promoting human rights such as, holding states accountable for breaching ECHR and establishing the minimum level of fundamental rights that are provided to EU states.

1. The Migration Perspective

The movement of individuals, or 'migration', has been called the third wave of globalisation, following goods and capital. This issue is increasing in range, difficulty and effect. Unlike the term 'refugee', which is defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the term 'migrant' is not defined in the context of international law. Douglas and others state that the term 'migrant' refers to individuals moving between or within states to enhance their social and economic conditions[17].

In basic terms, migration means a movement of individuals, involving conditions where persons may be obliged to move[18]. The International Organization for Migration delivers a precise definition of 'migrant', which is: any person who is moving or has moved across an international border or within a state away from his/her habitual place of residence, regardless of the person's legal status, whether the movement is voluntary or involuntary, what the causes for the movement are, or what the length of the stay is; this includes economic migrants as well as those who have been forcibly displaced[19].

From the above definition, it can be established that the term 'migrant' can also refer to a refugee. Therefore, this section will illustrate cases that are concerned with refugees.

A. Access to Protection Under Article 1

Western democracies publicly acknowledge the idea of asylum but use fair means and foul to prevent as many asylum seekers as possible from reaching their borders where they can claim its protections[20]. Therefore, the ECtHR has afforded a forum in which to contest countries' attempts to designate certain

(16) Janneke Gerards, 'The Prism of Fundamental Rights', European Constitutional Law Review, Cambridge University Press, UK, Volume 8, Issue 2, June 2012, p. 173.

(17) P. Douglas, M. Cetron and P Spiegel, 'Definitions Matter: Migrants, Immigrants, Asylum Seekers and Refugees', Journal of Travel Medicine, Oxford University Press, UK, Volume 26, Issue 2, (2019).

(18) Ibid.

(19) Marie McAuliffe and Martin Ruhs (Eds), IOM, World Migration Report 2018 http://publications.iom.int/system/files/pdf/wmr_2018_en.pdf.

(20) Matthew J. Gibney, The Ethics and Politics of Asylum: Liberal Democracy and the Politics of Asylum, Cambridge University Press, UK, 2004, p. 229.

regions as outside their jurisdiction in order to escape legal responsibility. For instance, in Amuur v France[21], the ECtHR rejected the idea that the Paris airport can be considered as an extra-territorial zone and held that since it was on French soil the ECHR responsibilities applied.

Even if de facto effective dominance is in dispute, the Court has held the official regional sovereign to have jurisdiction, as established in Ilascu and Others v Moldova and Russia[22]. This is clearly exemplified in D v United Kingdom[23], where the ECtHR stated that, irrespective of whether the claimant ever entered the UK in a technical sense, in fact he has been physically present there and, therefore, Article 1 applied. These cases clearly show that states cannot excise territory in order to avoid accountability under the ECHR.

The ECtHR has not just prevented states from carving out ad hoc exceptions to their de jure territory, it also has exercised its jurisdiction in truly 'extra-territorial' cases. In Bankovic and Others v Belgium and Others[24], the Court held that the exercise of extra-territorial jurisdiction can be established where the accused state has active control over the relevant region as a result of military occupation or through the consent, request or acquiescence of the Authority of that region.[25] This was confirmed in Cyprus v Turkey[26], where the Court held that Turkey had effective control by the engagement of its local authority and, therefore, Turkey's responsibilities under Article 1 extended to northern Cyprus. This indicates that states can also be held accountable under ECtHR for acts committed outside their territory.

The principle of extra-territorial jurisdiction has also been debated in the UK courts. In Al-Skeini v Secretary of State for Defence[27], the House of Lords held that held that although the UK was the dominant power in southern Iraq, it did not have efficient general power. However, the ECtHR rejected this reasoning in Al-Skeini v United Kingdom[28]. The Court held that all the claimants were under UK jurisdiction, not because of its power over the area of southern Iraq, but rather because of the UK's exercise of public powers usually employed by a sovereign government[29].

(21) 1996-III; 22 EHRR 533.

(22) 2004-VII; 40 EHRR 1030.

(23) 1997-III; 24 EHRR 423.

(24) 2001-XII; 44 EHRR SE5.

(25) Para 71.

(26) [2001] Application No 25781/94.

(27) [2007] UKHL 26.

(28) [2011] Application No 55721/07.

(29) Para 149.

Although, the decision in Al-Skeini can be considered as a human rights victory since the ECtHR extended its jurisdiction over human rights violations, the judgement has received many criticisms. In his separate Opinion, Judge Bonello criticised the Court's approach as it failed to provide a 'coherent and axiomatic regime'(30). This decision illustrates that the ECtHR adopted the principle of 'de facto jurisdiction', which means that human rights law does not always follow the state's traditional scope of entitlement to act under public international law but establishes distinct forms of accountability for human rights violations(31).

The wide reach of ECtHR jurisdiction as illustrated in the previous caselaw indicates that the ECHR can be an impressive device for securing protection. Thus, it can be an important tool to be used in the context of migration, as the ECHR does not differentiate between immigrants and citizens. This is confirmed by Hirsi Jamaa v Italy(32), related to migrants who were taken on board an Italian military vessel and brought to Libya. The Court held that the persons were under the de facto power of Italy because the incidents happened on Italian armed forces vessels(33). This demonstrates that Art.1 can be also triggered in the context of migration.

B. Article 3

It is suggested that Art.3 is the most applicable provision to be raised by a migrant in the context of expulsion. Article 3 prohibits torture, inhumane or degrading treatment, or punishment. Therefore, it is important to mention Rule 39 ECHR - the interim measures rule - which is to prevent severe harm to individuals who are in a position of extreme gravity and urgency. This because interim measures are only applied in restricted circumstances including situations where there is ill-treatment as prohibited by Article. 3(34).

On this basis, asylum seekers may invoke the interim measures rule to prevent their expulsion(35). For example, in Soering v UK(36), the Court held that contracting members are liable under Art.3 for any probable consequences

(30) Para 4.

(31) Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', Human Rights Law Review, Oxford University Press, UK, Volume 12, Issue 2, (2012), pp. 287-298.

(32) [2012] Application No 27765/09.

(33) Para 77-81.

(34) Askarov v Turkey [2005] Applications No 46827/99.

(35) Ibid, para 128.

(36) [1989] Application No 14038/88.

from an extradition that occur outside their jurisdiction. Therefore, if responsibility is or might be incurred, it is incurred by the deporting member state, not by the country of destination(37).

Thus, Art.3, read in conjunction with Art.1, has led the ECtHR to advance the legal obligations and responsibilities of member states in a manner akin to the principle of non-refoulement(38). This demonstrates that Art.3 imposes a legal obligation upon member states to take all necessary and reasonable means to protect individuals from harms of which they knew or ought to have known(39).

One of the ways to invoke Art.3 is by showing degrading treatment that satisfies the minimum level of severity(40). The ECtHR expounded upon this notion in Pretty v UK(41). The Court stated that where treatment humiliates a person, demonstrates a lack of respect for his human dignity, or triggers feelings of inferiority or fear capable of breaching a person's physical and moral resistance, this would be categorised as degrading treatment(42).

The Court further stated that the pain which flows from certainly resulting illness, mental or physical, might fall within Art.3, where it results from a detention or expulsion for which the government is liable(43). Also, in T.I. v UK(44), the Court found that the repeated refoulement of an asylum seeker to countries that refuse to accept responsibility for him may constitute degrading treatment. This shows that the Court has established a broad definition of degrading treatment.

Furthermore, in Peers v Greece(45), the Court held that a breach of Art.3 can be established even without the intention to humiliate the individual in question. Also, in Ocalan v Turkey(46), the court considered the question of whether the treatment in fact affected the applicant's personality in a way that is incompatible with Art.3. This clearly indicates that causing feelings of harsh

(37) Para 91.

(38) Hélène Lambert, 'The European Convention on Human Rights and The Protection of Refugees: Limits and Opportunities', Refugee Survey Quarterly, Oxford University Press, UK, Volume 24, Issue 2, (2005), p. 41.

(39) This was established in both A v. UK (1998) 2 FLR 959 and Osman v. UK (1998) ECHR 101.

(40) Ireland v. UK (1978) Application No 5310/71, para 162.

(41) [2002] Application No 2346/02.

(42) Para 52.

(43) Ibid.

(44) [2000] Application No 43844/98.

(45) [2001] Application No 28524/95.

(46) [2005] Application No 46221/99.

humiliation in the individual concerned can constitute degrading treatment even without genuine physical harm.

In the context of migration, the direct effects of an expulsion order may cause a breach of Art.3 in the situation where a migrant is subject to removal to a state where there is good cause for believing that the migrant will face a material risk of degrading treatment(47). For instance, the European Commission of Human Rights has declared that the application of an expulsion mandate which might expose the migrant to a danger of losing his eyesight could constitute a breach of Art.3(48).

Furthermore, in Fadele v UK(49) the Court held that poverty and poor living conditions in the state of destination might also trigger Art.3. The ECtHR took even a broader approach in its judgement in D v UK(50). It asserted that due to the lack of adequate treatment and care in the country of destination for a person who was in the final stages of AIDS, the expulsion of the applicant would be considered inhumane treatment.

However, the ECtHR has carefully stressed that this principle only applies in 'very exceptional circumstances' and because of the 'compelling humanitarian considerations at stake'(51). This limitation was confirmed in Bensaid v UK(52), where the Court rejected the migrant's claim that deportation would infringe Art.3 because Algeria lacked the medical treatment that he was accustomed to receiving in the UK. The Court held that the risk that the migrant could suffer a decline in his health if he was deported was 'speculative'(53).

As can be seen, the ECtHR has imposed a duty on states to protect migrants against refoulement by widening the scope of Art.3(54). Nevertheless, it is difficult to establish a violation of Art.3 in the case of medical treatment issues(55).

(47) This was established in Chahal v UK [1996] Application No 22414/93.

(48) Tanko v Finland [1994] Application No 23634/94.

(49) [1990] Application No 13078/87.

(50) Note 38, supra.

(51) Paras 53-54.

(52) [2001] Application No 44599/98.

(53) Paras 38-40.

(54) Note 21, supra.

(55) Ibid.

C. Article 4 – Human Trafficking

The issue of modern slavery in regard to human trafficking is important to address because it highlights the problem of migration and shows how asylum seekers can be exploited. At the outset, it should be noted that the probability of a decision being made on a trafficking case within the Council of Europe was not at all clear since the ECHR does not involve an express prohibition of human trafficking as Article 4 ECHR prohibits only slavery and forced labour. Nevertheless, the ECtHR eventually decided to discuss this pressing issue in Siliadin v France but in a very broad manner(56).

Ms Siliadin was a 15-year-old girl who was brought from Togo to France with the intention to study but was instead put to work for 15 hours a day without any day off for many years. The Court held that Ms Siliadin was exposed to forced labour and servitude(57) because the individuals for whom she was forced to work did not practice a genuine right of legal ownership over her(58). This judgement has been widely criticised by several commentators as the decision did not amount to the act to slavery.

Piotrowicz claimed that no one could ever be condemned for slavery within the Court's interpretation because it is highly unlikely to find individuals liable under Art.4(1) ECHR in the modern-day life(59). Cullen argued that Ms Siliadin should be considered as a 'trafficked child worker' as Art.4 imposes positive obligations to prohibit any form of slavery(60). He also stated that the Court should go much further than the mere implementation of criminal penalties by providing protection from deportation and rehabilitation measures i.e. education and rehousing(61). This narrow ruling has been followed in later decisions regarding forced labour cases(62). As can be seen, it is difficult to find individuals to be liable for slavery under Siliadin restrictive approach.

(56) [2005] Application No 73316/01.

(57) Para 120, 129.

(58) Para 122.

(59) Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings', International Journal of Refugee Law, Oxford University Press, UK, Volume 24, Issue 2, May 2012, p. 189.

(60) Holly Cullen, 'Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights', Human Rights Law Review, Oxford University Press, UK, Volume 6, Issue 3, (2006), p. 590.

(61) Ibid.

(62) C N and V v France [2012] Application No 67724/09 and C N v United Kingdom [2012] Application No 4239/08.

Although, the ECHR does not directly articulate the trafficking issue, the established 'living-instrument' doctrine necessitates that the interpretation of the Convention should be consistent with present day conditions(63). Due to this, the Court considered for the first time human trafficking as a phenomenon of concern(64). The case of Rantsev concerned Russian woman who entered Cyprus on artiste visa and was forced to into prostitution.

The ECtHR concluded that trafficking, within the meaning of the European Trafficking Convention and Palermo Protocol, falls within the scope of Art.4 ECHR. While this judgement is undoubtedly welcomed as it states trafficking is prohibited under the Convention, the Court did not provide any clarification on how trafficking violated the ECHR from a legal perspective.

The decision stated that trafficking 'is based on the exercise of powers attaching to the right of ownership'(65), but did not identify whether it constitutes slavery, servitude, or forced labour(66). For that reason, Allain critiqued the judgement implied that trafficking is a form of slavery which is a restrictive definition of trafficking because it includes other forms of exploitation separate from slavery(67). This demonstrates that the judgment of Rantsev is flawed due to the ambiguity regarding how human trafficking is considered a violation of Article 4. Nevertheless, the case outcome was satisfactory as it criminalises human trafficking.

D. Article 5

ECHR Art.5 delivers an unambiguous assertion regarding the right or freedom which is to be safeguarded. Here, the 'right to liberty and security of the person' is to be extended to everyone within the territories over which the country exercises power and jurisdiction. Nonetheless, the ECHR enumerates an exhaustive list of circumstances in which detention is permitted, including two forms of immigration detention(68). Article (5)(1)(f) allows detention 'to prevent unauthorised entry into the country', and 'of a person against whom action is being taken with a view to deportation or extradition'. Both forms

(63) Tyrer v UK [1978] Application No 5856/72.

(64) Rantsev v Cyprus and Russia [2010] Application No 25965/04.

(65) Para 142.

(66) Para 282.

(67) Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery›, Human Rights Law Review, Oxford University Press, UK, Volume 10, Issue 3, September 2010, p. 554

(68) Art.5(1)

of detention should be 'in accordance with a procedure prescribed by law'[69].

It appears that the Strasbourg Court is narrowly interpreting the exceptions found in Art.5(1), in a manner that the Court makes it difficult for member states to comply with the exceptions[70]. This was seen in Shamsa v Poland[71], where the Court found the detention of two brothers unlawful on the ground that an ambiguity existed regarding the process of detention. This violated the above-noted requirement that the procedure be 'prescribed by law'[72]. Also, in Brogan v UK[73], the Court found the detention of suspected terrorists for periods of seven days to breach Art.5. This clearly shows that the ECtHR requires states to meet a high standard in order to satisfy the exceptions laid down in Art.5(1).

Nevertheless, the Strasbourg Court seems to take a different approach when the matter relates to immigration issues. In the leading case of Chahal v United Kingdom[74], the Court considered whether the periods during which the applicant was detained was excessive and thus not justified by Art.5(1)(f). The Grand Chamber held that the administrative detentions satisfied the exception and stated that Art.5(1)(f) does not require that such a detention should be 'reasonably considered necessary' to prevent a foreigner from committing a crime[75]. Although the detentions were considered to be an 'extremely long period duration'[76], the Court found that the duration was not excessive, because the administration acted with due diligence throughout the deportation process[77].

The judgement in Chahal has been criticised by various scholars and courts. Judge ValtiIcos, in his concurring opinion, stated that Art.5(1)(f) had not been interpreted either in good faith nor with common sense because 'a period of four or five years' of detention cannot satisfy the requirement of Art.5(1)(f)[78].

(69) Ibid

(70) Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience', European Journal of Migration and Law, Brill | Nijhoff, Leiden, Netherlands, Volume 10, Issue 2, (2008), pp. 149-185.

(71) [2003] Application No 45355/99.

(72) Ibid.

(73) [1988]11 EHRR 117.

(74) [1996] Application No 22414/93.

(75) Para 112.

(76) Ibid, para 119.

(77) Para 123.

(78) Page 41.

Judge De Meyer argued that the Court cannot justify the length of the detention any more than the complexity of criminal proceedings[79]. Nevertheless, the writer argues that the opinions of both Judges Valtilcos and De Meyer may be flawed, as they failed to acknowledge that 'national security would be put at risk'[80] and, therefore, that Mr. Chahal's detention can be construed as reasonable and not arbitrary.

Additionally, the majority in Chahal provided a restrictive interpretation of Art.5(1)(f), focused on a reading of the right to liberty within a confining and limited framework of the ECHR[81]. This was confirmed when the Strasbourg Court failed to provide a solid justification for disregarding multilateral treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Vienna Convention on the Law of Treaties (VCLT), and the Geneva Convention Relating to the Status of Refugees[82].

Thus, this decision appears to have induced the Court to minimise the significance of the VCLT, even though various ECtHR judgements affirmed that the rights and freedoms protected under the ECHR should be understood in accordance with the principles of treaty interpretation enumerated in the VCLT[83]. Therefore, the meaning of the ECHR's provisions must be determined not only by their purpose, object, wording and context but also with reference to authoritative principles of international law[84]. This shows that the decision in Chahal is defective to a large extent as it fails to acknowledge multilateral treaties.

Another leading case that concerns Art.5(1)(f) is Saadi v UK[85], where the meaning of 'unauthorised entry' is discussed in depth by the Strasbourg Court. The Court held that the detention of those whose entry had not been authorised was a 'necessary adjunct' to the 'undeniable sovereign right to

(79) Page 45.

(80) Ibid, para 112.

(81) Peter Langford and Ian Bryan, 'The Lawful Detention of Unauthorised Aliens Under the European System for The Protection of Human Rights', Nordic Journal of International Law, Brill| Nijhoff, Leiden, Netherlands, Volume 80, Issue 2, (2011), p. 201.

(82) Ibid.

(83) See generally: Wemhof v Germany (1968) 1 EHRR 55; Golder v. United Kingdom 1975 ECHR 21; Klass v Germany (1978) 2 EHRR 214; Johnston v. Ireland (1986) 9 EHRR 203; Marckx v. Belgium (1979) 2 EHRR 330.

(84) Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', European Journal of International Law, Oxford University Press, UK, Volume 19, Issue 1, February 2008, pp. 125-159.

(85) [2008] Application No 13229/03.

control aliens entry into and residence in their territory'[86]. Thus, the detention of any asylum-seeker who does not have the requisite authorisation could fall under Art.5(1)(f)[87]. This decision affirmed the House of Lords' judgement, in which Lord Slynn held that under Art.5(1)(f) the entry can be seen as unauthorised until such time as the administration authorises the entry[88]. Thus, the state has authority to imprison an asylum-seeker until the entry is officially authorised[89].

The decision in Saadi has been highly criticised by various commentators. Justice Collins articulated that if the applicant had taken all reasonable steps that he could to inform the administration and did not show a risk of misconduct, he could not be viewed as effecting unauthorised entry[90]. Christine argues that the judgement in Saadi affirms the distinction suggested in Chahal, namely that asylum-seekers have even less of a right to liberty than those suspected of criminal offences[91].

The writer argues that Lord Slynn's decision in Saadi is flawed because asylum-seekers are entering to exercise a legitimate right to seek and enjoy asylum, and thus it is not reasonable to regard them as illegitimate intruders. This was affirmed by the UNHCR in Saadi, which asserted that a clear distinction should be drawn between asylum-seekers and other classes of illegal entrants[92].

E. Article 8

The Strasbourg Court, as a matter of well-established principles of international law, has affirmed that a state has the power to control immigration as a matter of national policy[93]. As such, the ECtHR has granted states wide latitude in implementing immigration controls. As a result, the ECtHR caselaw, as it applies to issues regarding immigration and respect for family and private life as stated in Art.8, has been inconsistent[94]. Thus, it is problematic to attempt to

(86) Para 23-25.

(87) Para 65.

(88) R (on application of Saadi) v SSHD [2002] UKHL 41.

(89) Ibid.

(90) [2001] 4 All ER 961 para 29.

(91) Bacon Christine, "The evolution of immigration detention in the UK" RSC Working Paper no 27 (2005), Refugee Studies Centre, University of Oxford, UK.

(92) Grand Chamber [2008] para 54.

(93) Omoregie v Norway [2008] ECHR 761, para 54.

(94) Nicola Rogers, 'Immigration and The European Convention on Human Rights: Are New Principles Emerging?', European Human Rights Law Review, Sweet & Maxwell, UK, Volume 53, Issue 1, (2003).

infer precise principles identifying the application of Art.8. This lack of limpid direction has produced a degree of confusion and the ECtHR has been subject to criticism, for both the deference it has shown to state officials, and to the lack of stable principles on which these cases have been adjudged(95).

Nevertheless, recent caselaw indicates that the relationships and connections of long-term migrants to the host state implicates the protections afforded by Art.8 regardless of whether family ties have been established(96). This was confirmed in Üner, where the Court held that the entirety of social links amongst settled migrants and the community in which they are living constitutes part of the notion of 'private life' within the meaning of Art.8(97).

However, post-Üner, the Court has allowed the removal of second-generation migrants, as demonstrated in Kilic(98) and Kaya(99). Nevertheless, the expulsions in both cases were decided on the ground that the offences in which the migrants committed were sufficiently serious to justify the removal. This shows that the seriousness of the offences plays a major role in justifying the expulsion of settled immigrants. If the offence is grave, the Strasbourg Court will probably understate the connections between the host state and the migrant. These cases therefore do not necessarily detract from the rule that a long-term migrant has the right not be removed from a member state, a right which is part and parcel of the more general right to family and private life as established in Art.8(100).

Furthermore, the Strasbourg Court has indicated that whether or not there is 'family life' amongst persons is primarily a question of fact subject to the existence in practice of close personal ties(101). The flexibility of this formulation has caused the Court to hold, in non-migrant issues, that family life under Art.8 goes beyond just children and parents and includes ties among other close relations such as grandchildren and grandparents(102).

In non-migrant cases involving adult siblings, a protection under Art.8 may arise depending on the circumstances of a particular case(103), while in migration

(95) Ibid.

(96) Slivenko v Latvia [2003] App no 48321/99.

(97) (2007) 45 EHRR 421, para 59.

(98) Kilic v Dania [2007] Application No 20277/05.

(99) Kaya v Germany [2007] Application No 31753/02.

(100) Ibid, Separate Concurring Opinion, para 3.

(101) K. & T. v Finland [2001] Application No 25702/94.

(102) Marckx v. Belgium [1979] Application No 6833/74 para 45.

(103) Ibid.

cases, the Court has been quite restrictive in terms of the relationships that can establish protection under Art.8[104]. In general, an adult migrant's relationships do not entitle such protection without more evidence of dependency than the standard emotional ties[105]. This demonstrates that the definition of family life under Art.8 is ambiguous, especially in adult migrants' cases, and varies between migrant and non-migrant.

Nonetheless, in Maslov v Austria[106], the Grand Chamber explicitly stated that the relationship of young adults to their parents and other close family members created family life in the circumstances where those young adults had not yet established a family of their own. Although this decision seems to provide a common-sense and flexible approach that acknowledges that the power of family bonds do not automatically attenuate upon attainment of the age of majority, it has created some uncertainty among scholars[107].

This is because the Court still does not want to define family life in narrow terms, particularly in cases involving migration applicants[108]. Desmond argues that the lack of clarity regarding the Strasbourg Court's definition of family life is understandable, given the extended discussion of family life in the 'many dozens of deportation cases it has heard'[109].

F. The Impact of Immigration on Terrorism

In the last two decades, the world has seen a significant increase in global migration. Currently, it is believed that there are more than 231 million worldwide migrants, or more than 3% of the world's population[110]. This issue may challenge the national state as a limited entity with a visibly demarcated population and territory[111]. While international migration is not a new issue for decision makers and academics alike, it has become a crucial security issue

(104) Ursula Kilkelly, The Child and The European Convention on Human Rights, 1st edition, Routledge, London, 1999.

(105) Franz Matscher, Herbert Petzold and Gérard J Wiarda, Protecting Human Rights: The European Dimension, Carl Heymanns Verlag, Zürich, 1988, pp. 658–59.

(106) [2008] Application No 1638/03.

(107) Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants Under Article 8 Of The ECHR?', European Journal of International Law, Oxford University Press, Volume 29, Issue 1, February 2018, p. 267.

(108) Pieter Boeles and others, European Migration Law, Intersentia, Cambridge, 2014, p. 204.

(109) Note 107, 267.

(110) Department of Economic and Social Affairs, 'Trends in International Migrant Stock: The 2013 Revision' (UN, Geneva 2013).

(111) Fiona Adamson, 'Crossing Borders: International Migration and National Security', International Security, Volume 31, No. 1, Summer 2006, p. 175.

for various states[112]. Accordingly, the participation of migrants in terrorist activities in the last decades has prompted a debate on whether immigration has an impact on terrorism.

Various scholars argue that there is such a link between migrants and terrorism, in which immigration leads to terrorism. A report issued by the International Organisation for Migration, for instance, stated that increased migration into a state is highly likely to induce national security risks[113]. However, this report also warned against drawing too close a relationship between terrorism and migration[114]. Leiken similarly argues that terrorism and immigration are linked; not because all migrants are terrorists, but because most of the terrorists in the West have been migrants[115].

A study conducted by Bove and Böhmelt illustrates that migrants are a key component for the diffusion of terrorism from one state to another[116]. At the same time, they say, immigration per se is unlikely to negatively affect terrorism[117]. Camarota asserts that 'there is probably no more important tool for preventing future attacks on U.S. soil than the nation's immigration system'[118]. Brown and Korff argue that restrictive procedures such as profiling programmes and surveillance should be implemented to prevent the diffusion of terrorism[119]. Malkin agrees, and suggests a variety of discriminatory actions against migrants[120]. This analysis indicates that there is clearly a relationship between migrants and terrorism, which suggests that immigration induces terrorism.

(112) Christopher Rudolph, 'Security and the Political Economy of International Migration', American Political Science Review, American Political Science Association, Northwest Washington DC, USA, Volume 97, No. 4, November 2003, pp. 603-620.

(113) 'International Terrorism and Migration, 2nd ed.', International Organization for Migration, Geneva, 2010.

(114) Ibid.

(115) Robert S Leiken, Bearers Of Global Jihad?, The Nixon Center, USA, 2004.

(116) Vincenzo Bove and Tobias Böhmelt, ‹Does Immigration Induce Terrorism?›, The Journal of Politics, The University of Chicago Press, USA, Volume 78, No. 2, April 2016, p. 584.

(117) Ibid.

(118) Steven A Camarota, The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001, Center for Immigration Studies, Washington, D.C., USA, 2002, p. 5.

(119) Ian Brown and Douwe Korff, 'Terrorism and The Proportionality of Internet Surveillance', European Journal of Criminology, SAGE publications and the European Society of Criminology, Volume 6, Issue 2, pp. 119-134.

(120) Michelle Malkin, Invasion, Regnery Pub, Washington, USA, 2002.

Sandler and Enders contend that Camarota's argument is flawed, because in the vast majority of cases cited by Camarota immigrants who commit terrorism have lived in the state they assault for a lengthy period of time, and did not enter with the intent to commit an immediate attack(121). Therefore, most migrants do not have the intention to become terrorists when they arrive in the host country, and the reason for their conversion to radicalism is contact with terrorists groups in the host state or when returning to their state of origin for business or holiday(122). Nevertheless, Sandler and Enders' claim can be seen as a confession that migrants are more exposed to joining terrorists' groups, even if they do not have an immediate intention to participate in terrorist activities, and thus, establishing stricter immigration laws can be justified to prevent the diffusion of terrorism.

Studies such as Leiken & Malkin, which establish that there is a close link between the two issues, may be flawed because they do not assess total flows of migration but only those occasions in which migrants have engaged in terrorist activity(123). Thus, these analyses do not demonstrate a precise correlation between terrorism and migration(124). Dreher and others have argued that both Brown's and Malkin's arguments are defective because they are based on opinion analysis(125). Dreher further established those harsher policies, such as segregating immigrants already livening in a state, lead to isolation and conflict, which increases the risk of terrorism rather than reducing it(126). Therefore, constraints on immigrants' rights and harsher immigrations law increase the likelihood of migrant terrorism, and do not reduce it.

2. The Terrorism Perspective

Terrorism is not a new phenomenon. The origin of the word 'terrorism' goes back to the French Revolution of 1789. Although, this term has a long history, there is no international consensus on its definition. It has been established that

(121) Walter Enders and Todd Sandler, 'Distribution of Transnational Terrorism Among Countries by Income Class and Geography After 9/11', International Studies Quarterly, Oxford University Press, UK, Volume 50, No. 2, June 2006, pp. 367-393.

(122) Ibid.

(123) Axel Dreher; Martin Gassebner and Paul Schaudt, The Effect of Migration on Terror - Made at Home or Imported from Abroad?, No 12062, CEPR Discussion Papers, C.E.P.R. Discussion Papers, (2017).

(124) Ibid.

(125) Ibid.

(126) Ibid.

there are more than 200 different definitions of terrorism across the world[127]. Thus, it is important to lay out the extensive domestic and international efforts to define terrorism before analysing the ECtHR approach to this issue.

A. The International Definition

The need for a universally accepted definition of terrorism is self-evident. Although there is no universally accepted definition of terrorism, many conventions do provide a definition. For instance, the EU Council implemented the lawfully binding Framework Decision on Combating Terrorism, which in Article 1 laid out a comprehensive meaning of terrorist offences[128]. The Arab League, the Organization of African Union and the Conference of Islamic States have similarly established their own definitions, each of which is to a significant extent in line with the others. For example, all the three groups define terrorism as any act or threat of violence regardless of its motives or intentions that is committed for the advancement of a personal or collective criminal plan with the purpose of intimidating individuals. Moreover, both the UN Convention for the Suppression of the Financing of Terrorism (UNCSFT) 1999 and numerous UN General Assembly resolutions encompass comparable definitions.

From the above, it can be asserted that the term 'terrorism' includes an act or threat:

(i) usually forbidden under any state penal system, or providing assistance to the commission of such act;

(ii) which is expected to incite a state of terror amongst individuals or to force a state to take some sort of action, and lastly

(iii) which is ideologically or politically motivated (for instance, not based on the pursuit of private ends)[129].

This clearly demonstrates that there is a generally agreed definition on terrorism, but it has yet to become a universally binding definition[130]. This can be confirmed by the decision of the Supreme Court of Canada in Suresh[131],

(127) Jeffrey D Simon, The Terrorist Trap, Indiana University Press, USA, 2001.

(128) Council Framework Decision 2002/475 on Combating Terrorism (2002).

(129) Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', Journal of International Criminal Justice, Oxford University Press, UK, Volume 4, Issue 5, November 2006, pp. 933–958.

(130) Ibid.

(131) [2002] 1 SCR 3.

where the Court held that the definition of terrorism founded in UNCSFT 1999 catches the essence of what the world recognises as terrorism.

B. The Domestic Definition (UK)

The term 'terrorism' in the UK is defined in s.1 of the Terrorism Act (TA) 2000, which defines 'terrorism' as an act aimed to affect the government or to threaten individuals for the purpose of advancing a political end, with such act creating a grave risk to public security. The definition was debated in R v Gul[132], where the Supreme Court held that the definition of terrorism was undoubtedly intended to be wide, and will only be narrowed if it conflicts with the ECHR or other international obligations of the UK[133].

Correspondingly, in Suresh[134], the Supreme Court of Canada held that the term of terrorism 'provides a sufficient basis for adjudication and hence is not unconstitutionally vague'[135]. Despite the Canadian Immigration Act defined terrorists as persons who are participated in 'terrorism' or 'terrorist organizations'[136]. This shows that national legislations or the UK, in particular, law does not provide a precise definition of the term. Accordingly, the 2000 Act has been exposed to a much criticism.

Anderson has critiqued the statute's interpretation, maintaining that the principle founded in R v Gul can 'criminalise certain activities carried out overseas that constitute lawful hostilities under international humanitarian law'[137]. He also states that the definition is 'remarkably broad, absurdly so in cases'[138]. This criticism was shown to be valid in Miranda v Secretary of State for the Home Dept. In that case the Court of Appeal convicted Miranda notwithstanding the lack of intention (mens rea) in the 2000 Act[139]. This demonstrates that the 2000 Act can encompass acts that may not unambiguously constitute terrorism.

(132) [2013] UKSC 64.

(133) Para 38.

(134) [2002] 1 SCR 3.

(135) Ibid, para 93.

(136) S.9(1).

(137) David Anderson, 'The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000', The Stationery Office, London, 2012, at [3.2].

(138) Ibid at [4.3].

(139) [2016] EWCA Civ 6 paras 53-54.

Additionally, Greene argues that the 2000 Act does not differentiate between terrorists and combatants in regards to counter-terrorism responses(140). This was established in R v F(141), where the Court of Appeal rejected a narrow definition of terrorism, holding that the meaning of 'government' is obvious and can include governments that lack democratic legality. Greene further argues that the lack of precision in TA 2000 could be considered as a violation of the ECHR principles(142). This is because in Gillan v UK, the Strasbourg Court indicated that a law 'must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise'(143). This clearly demonstrates that the Act has been broadly interpreted in a manner that suits policy-makers.

Nevertheless, some argue that this definition of terrorism is useful because it is fit for purpose. McNulty claims that the present definition is operative and inclusive, and that there is no indication that it has produced complications by the way it has functioned(144). This is because over six years, the Act showed to be efficient in covering terrorism activities(145). Additionally, Lord Carlile argues that a broad definition is needed because it allows the government to take effective action in regard to violations of s.1 TA 2000(146).

The author argues that McNulty's claim is flawed, because caselaw shows the definition is completely vague and has caused various disagreements amongst scholars and judges. This was confirmed by Lord Berwick, who argued that the definition is both too restrictive and too broad(147). He further states that the Act contains expressions such as 'serious violence', which ought to be changed to 'serious disruption'(148) because the term 'serious violence' can involve crimes committed by persons other than terrorists, such as blackmail(149).

(140) Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism: R v Gul', Modern Law Review, John Wiley & Sons, USA, Volume 77, Issue 5, (28 August 2014), pp. 780-793.

(141) [2012] EWCA Crim 280.

(142) Note 140, p. 19.

(143) [2010] ECHR 28 para 41.

(144) Lord Carlile of Berriew QC, The Definition of Terrorism, Cm 7052 (2007), para 27.

(145) Ibid, p. 22.

(146) Ibid, para 12.

(147) Lord Berwick, 'Government Consultation on Lord Berwick's report 1998 - Terrorism Act 2000', The Stationery Office, London, 1998, Chapter 3.

(148) Ibid.

(149) Ibid.

C. Article 2

Article 2 ECHR states 'Everyone's right to life shall be protected by law' but this right is not absolute as Art.2(2) illustrates exceptions where a Member State is allowed to use force that might result in the deprivation of life. Therefore, the obligation is on the contracting state to prevent the taking of individuals' lives by any individual or state agent, and where a life is taken, it must then fall into Art.2(2) exceptions. The best illustration of Art.2 regarding terrorism cases can be found in McCann v UK(150).

The case involved the death of three soldiers of Provisional Irish Republican Army (IRA) alleged of having remote-control device to detonate a bomb in Gibraltar(151). Subsequently, it became clear that that the information on the alleged bomb detonation had been incorrect(152).

The Court established that the killing was not 'absolutely necessary' since the operation could have been controlled and planned without the need to kill the suspects(153). On this basis, the ECtHR found the UK in violation of Art.2 ECHR. This indicates that the Court based its decision upon a finding of insufficient planning by the authorities(154). The Court appears to hold a heavy burden on the state in arranging matters in order to minimise the risk of life in any anti-terrorist activities(155).

The jurisprudence established in McCann was followed in Finogenov and others v Russia(156). The case involves 100 individuals that have been left dead after Russian authorities intended to kill terrorists and free the hostages with gas. The Court found Russia in violation of Article 2 not due to the fact that the use of violence held by the Russian authorities to liberate the hostages, but rather due to negligence in the planning of the operation(157). This demonstrates that the Court still carefully subjects the interferences with the right to life in the name of security to a very rigid= scrutiny.

(150) [1995] Application No 18984/91.

(151) Ibid, para 196, 197.

(152) Ibid, para 219.

(153) Ibid, para 213.

(154) Jan Sikuta, 'Threats of Terrorism and the European Court of Human Rights', European Journal of Migration and Law, Centre for Migration Law of the University of Nijmegen, in co-operation with MPG. A Martinus Nijhoff journal published by Brill, Volume 10, Issue 1, January 2008.

(155) Ibid.

(156) [2011] Application No 18299/03.

(157) Christina Binder, 'Liberty Versus Security? A Human Rights Perspective in Times of Terrorism', Anuario Espanol de Derecho Internacional, Spain, Volume 34, (2018), p. 582.

D. Article 15

States can face crises, wars, problems, significant disturbances or natural disasters that are deemed 'exceptional dangers', that threaten the safety, general welfare and security of their citizens(158). These circumstances may result in a 'state of emergency' or a 'state of siege'(159). Thus, a state may be required to act in an extraordinary way in order to face the threat and safeguard both its citizens and itself. Reflecting the wording used in Art.4 ICCPR, Article 15 ECHR therefore permits states to derogate from their obligations under the convention when a state of emergency is in effect.

However, a state must be in compliance with two major components in order to establish a lawful derogation: i) There must exist a 'war or other public emergency threatening the life of the nation', and ii) the measures which are in derogation should not go further than is 'strictly required by the exigencies of the situation'(160).

The first case to consider the declaration of a state of emergency under Art.15 is Lawless v Ireland(161). This was also the first case to be heard by the Strasbourg Court and, according to Dickson, this might have been an important factor in the Court's unanimous judgement(162). Lawless was a member of the Irish Republican Army (IRA), a terrorist organisation in the UK and an illegal organisation in Republic of Ireland, who was detained under the Offences Against the State Act 1940. Lawless asserted that measures and conditions that has been taken against him constituted a violation of Art.5 and 6 ECHR. The Strasbourg Court had two matters to decide: Whether a 'state of emergency' existed in Ireland as defined by Article 15, and if so, whether the measures taken were proportionate to the exigencies of the situation.

The Court held that a state of emergency that threatened the life of the nation did indeed exist(163), because: i) the IRA was a hidden army that was functioning unconstitutionally, ii) the army had also engaged in activities outside of the state, endangering the relationship between Ireland and its neighbours, and iii) there was a significant increase in terrorist activities between 1956 and1957(164).

(158) Jaime Oraa, Human Rights in States of Emergency in International Law, Don Mills: Oxford University Press, UK, 1992.

(159) Ibid.

(160) Art.15.

(161) Judgment of 1 July 1961, 3 Eur. Ct. H.R (ser. A, 1961).

(162) Brice Dickson, The European Convention on Human Rights and The Conflict in Northern Ireland, Oxford University Press, UK, 2010.

(163) Para 28.

(164) Ibid.

The decision in Lawless has been exposed to significant criticism, yet the judgement has never been overruled, and indeed has been endorsed(165). Gross and Aoláin assert that the reasons the Strasbourg Court applied to support its affirmation of the existence of a state of emergency stand quite out of line with the ordinary meaning of the words 'public emergency threatening the life of the nation'(166).

This is because the Siracusa principles relied upon similar language to that found in Art.4 ICCPR, which states that in order to establish a threat to the life of nation, there must be a situation of exceptional and actual or imminent danger(167). Gross and Aoláin further criticise the idea that a state of emergency could arise because of the worsening of foreign affairs with another country(168). This implies that there was, in fact, no emergency that threatened the life of the nation, but rather, a threat to public order that could have been dealt with by other measures that could be less harmful to individual rights(169).

This was confirmed by the dissenting opinions in Lawless, stating that the threat posed by the IRA's activities had been internal, affecting the life of specific groups of the public and not the public as whole(170). Thus, the judicial deference to 'national authorities' in this matter indicates that the final determination of the existence of a state of emergency will often be left to the political sphere(171).

However, ElZeidy argues that Greene failed to acknowledge the fact that the Lawless case was decided in 1961, eight years after the ECHR entered into force, meaning that the Court had to judge in light of then-existing political considerations(172). This is because not all European states had by then ratified the ECHR or approved the mandatory jurisdiction of the Court. Thus, applying the ECHR in a strict manner could have raises fears amongst states which

(165) Ireland v The United Kingdom, Judgment of 18 January 1978, 25 Eur. Ct. H.R. (ser. A, 1978).

(166) Oren Gross and Fionnuala Ní Aoláin, Law in Times Of Crisis, Cambridge University Press, UK, 2006.

(167) Ibid.

(168) Ibid, p. 271.

(169) Note 158.

(170) Para 56.

(171) Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of The European Convention on Human Rights', German Law Journal, Cambridge University Press, UK, Volume 12, Issue 10, October 2011, p. 1778.

(172) Mohamed ElZeidy, 'The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations', San Diego International Law Journal, University of San Diego, California, USA, Volume 277, Issue 4, (2003), p. 305.

might lead them to withdraw from the ECHR.

Another leading case is A v UK[173], known as the Belmarsh case, where after the 9/11 attacks suspected terrorists were detained by the UK authorities under to the Anti-Terrorism, Crime, and Security Act 2001. In Belmarsh, the Strasbourg Court stated that the national political powers are, in principle, better placed than the Court to determine whether an emergency existed[174]. The Court built its decision on the finding in Lawless that a terrorist attack could establish a state of emergency. This decision was already elaborated by the House of Lords decision, which held that the threat of international terrorists' groups against and within the UK was enough to support the a conclusion that a public emergency threatening the life of the nation existed[175].

Nevertheless, Lord Hoffmann, in his famous dissent, argued that "This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community"[176]. This elegantly demonstrates that the threat of terrorism should not necessarily be regarded as a threat to the life of a nation.

The ECtHR held that the measures taken by the UK government were disproportionate as they irrationally distinguished between national and non-national suspected terrorists. Therefore, the UK government's derogation was quashed as they failed to satisfy the second limb of Art.15. This shows that the second limb of Art.15 is here to protect and ensure human rights are not violated.

Conclusion and Proposal

To sum up this paper, the term 'migration' has been broadly defined in a way that includes refugees. The wide extension of the ECtHR jurisdiction, in both

(173) Application No 3455/05, 19 February 2009.

(174) Para 173.

(175) A(FC) & Others v. Secretary of State for the Home Department [2004] UKHL 56.

(176) Ibid, para 96.

migration and non-migration context, has resulted in significant protection of applicants. The Court has gone far in its interpretation of what constitutes degrading treatment by widening the scope of Art.3. This has led to a substantial degree of safeguard to migrants. The ECtHR provided a widely accepted judgement regarding Article 4 because it criminalises human trafficking even though it was not directly prohibited by the ECHR.

The jurisprudence of the ECtHR regarding the right to liberty under Art.5 ECHR provides a minor degree of protection when it comes to migrants. Thus, it seems more favourable to states' interest in securing their borders against 'unauthorised' migrants. The ECtHR caselaw in regard to Art.8 demonstrates a vague and complex approach in the field of migration.

However, there is a little clarity when the matter concerns long-term migrants, as they have the right not to be deported from a member state, but this right is not absolute. The undefined term 'family life' in Art.8 has 'translated into a diminution of human rights protection' for immigrants(177). The question whether immigration has impacted terrorism is unclear and is still being debated.

Furthermore, the term 'terrorism' lacks a universal definition, even though there is an indirect consensus on the main elements that constitute terrorism. Thus, a legally binding international definition is required. The definition of terrorism in the UK is widely interpreted and this has led the application of TA 2000 to be subjected to various criticisms amongst scholars and judges. The ECtHR makes it difficult for states to satisfy the exceptions under Article 2(2) and merely allows interferences under strict conditions. The two limbs of Article 15 failed to be shown as barriers that protect human rights.

However, the second limb as demonstrated in A v UK does little to safeguard human rights. Ideally, a clear delineation should be drawn between emergency and normalcy, acknowledging the former to be present only when there is a real situation threating the life of the nation. As can be seen from the above analysis, the Strasbourg regime in migration is satisfactory contrary to the terrorism regime proven to be lacking to some extent. Finally, we propose further papers to be written about the ECtHR jurisprudence on migrants in regard to Articles other than the discussed above.

(177) Note 105, p. 276.

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Table of content