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ECtHR - H.F. and Others v. France

This case concerns the repatriation of the applicants' daughters and grandchildren, French nationals, who were being held in camps in north-eastern Syria after leaving France to join Daesh/ISIS. The applicants alleged that the refusal by France to repatriate their kin exposed those family members to inhuman and degrading treatment prohibited by Article 3 of the Convention and breached their right to enter the territory of the State of which they were nationals as guaranteed by Article 3(2) of Protocol No. 4. The Court dismissed the complaint under Article 3 but found the complaint under Article 3(2) of Protocol No. 4 admissible.

Case name (in original language) : Affaire H.F. et Autres c. France
Case status: Decided
Case number: 24384/19, 44234/20
Citation: H.F. and Others v. France, application nos. 24384/19 and 44234/20, 14 September 2022
Date of decision: 14/09/2022
State: France
Court / UN Treaty Body: European Court of Human Rights
Language(s) the decision is available in: English, French
Applicant's country of residence: France
Legal instruments: Convention on the Rights of the Child (CRC), European Convention on Human Rights (ECHR)
Key aspects: Detention, Protection
Relevant Legislative Provisions:

- European Convention on Human Rights, Article 3, Article 3(2) of Protocol No. 4
- EU Directive 2015/637
- Convention on the Rights of the Child, Article 3
- Council of Europe Convention on Action against Trafficking in Human Beings, Article 16

Facts

The applicants’ daughters travelled to Syria, on their own initiative and with their respective partners, to join ISIS/Daesh. Following offensives by the Syrian Democratic Forces (SDF), both were arrested and imprisoned in camps controlled by the SDF and run by the Autonomous Administration of North and East Syria (AANES), along with their children who had been born in Syria.

Conditions in the camps exposed inhabitants to malnutrition, dehydration, violence and sexual exploitation, inhumane and degrading detention conditions, extreme weather conditions, and post-traumatic stress. The applicants’ daughters and grandchildren suffered from untreated physical and mental health conditions.

There was no prospect of the women being tried in north-eastern Syria. While Syrians were tried according to local law procedures, AANES had requested that foreigners be tried at international tribunals in accordance with international law. No such tribunal had been established. Meanwhile, criminal proceedings against the applicants’ daughters for participation in a terrorist organisation were brought in French domestic courts.

Between March 2019 and January 2021, France organised the repatriation of 35 French minors from north-eastern Syrian camps over 5 missions, on a ‘case-by-case’ basis, followed by the repatriation of 35 minors and 16 mothers in July 2022. The applicants’ family members were not among them.

Domestic courts dismissed the applicants’ requests for their family members’ repatriation on the basis that a court of law had no jurisdiction to hear a case that would necessitate measures indissociable from France’s external action, stating that repatriation fell within the remit of diplomatic action.

Legal arguments by the applicant

The applicants argued that, although France did not exercise effective control over the territory, Convention obligations can be imposed on State actions performed within the national territory but affecting persons outside the national territory. The applicants argued, *inter alia,* that a jurisdictional link was established in lieu of the fact that the applicants' daughters were of French nationality, had expressed their longstanding desire to return to stand trial in France, were not subject to the territorial jurisdiction of any other state, would not stand trial in Syria, and the previous repatriation of children demonstrated the operational capacity of the

Foreign Ministry to repatriate them. The applicants alleged that by not repatriating their family members, France exposed the family members to inhuman and degrading treatment prohibited by Article 3 of the Convention, and, in the case of application no. 44234/20, interfered with the right to respect for private and family life under Article 8 of the Convention.

The applicants also referred to C.B. v. Germany (no. 22012/93) to argue that a deprivation of the right to enter a State of one's nationality (Article 3(2) of Protocol No. 4) results from formal State action, but also from indirect or informal measures or inaction. The applicants argued that France had refused repatriation for purely electoral motives, thus depriving the family members of their absolute right to enter its territory. The decision not to repatriate their family members was arbitrary as it was unfair, unforeseeable, inappropriate, and it had not been established on what criteria other repatriations had taken place, and thus violated Article 3(2) of Protocol No. 4.

They further complained, under Article 13 taken together with Article 3(2) of Protocol No. 4, that they had no effective domestic remedy by which to challenge the decision not to carry out the requested repatriations.

Legal arguments by the opposing party

The French Government argued that the applicants' family members did not fall within France's jurisdiction within the meaning of Article 1 of the Convention.

The Government argued, *inter alia,* that France exercised no effective control over north-east Syria, and the authorities controlling the camps were not dependent on France. It rejected the idea that previous humanitarian repatriations could be used to infer France's capacity to act. It argued that basing jurisdiction on a State's capacity for action would furthermore establish jurisdiction based on qualifications that were relative and subject to change, thus giving rise to significant legal uncertainty.

The Government also argued that there was no 'general principle of repatriation' encompassed by the State's personal jurisdiction over its nationals. To secure Convention rights to an individual based on their nationality would furthermore create a general obligation of France to 2.5 million expatriates, at odds with the Convention system.

The Government did recognise that Article 3(2) of Protocol No. 4 was susceptible to extraterritorial application, but argued that this provision did not apply to the situation of individuals wishing to return to their country but prevented from doing so for material reasons. Article 3(2) of Protocol No. 4 sought to prevent the introduction of legislation in States that would prohibit the return of certain nationals, and therefore did not create any *positive* obligations for States (such as organising repatriation). The Government also argued that it would be unwise to create a new right of this kind due to the burden that an obligation to repatriate would place on States.

Decision & Reasoning

The Court unanimously declared the complaint under Article 3 of the Convention inadmissible. It rejected the argument that the applicants' family members fell within France's jurisdiction. A jurisdictional link was not created by the French nationality by the family members, nor by domestic proceedings against the daughters (this, unlike in cited case-law, did not relate to the violations now alleged before the Court).

The Court found that France's jurisdiction was established in respect of the alleged violation of Article 3(2) of Protocol No. 4, and by a majority declared it admissible. It was the first time that the Court decided on the existence of a jurisdictional link between a State and its nationals in respect of a complaint under Article 3(2) of Protocol No. 4. Again, it rejected the applicants' arguments that the French nationality of their family members, or the domestic legal proceedings against them, constituted a sufficient connection as to establish a jurisdictional link with the State. However, the Court decided that certain circumstances where individuals wish to enter the State of their nationality may give rise to a jurisdictional link between individuals and the State for the purposes of Article 1 of the Convention. In the present case, special circumstances included: official requests to the French authorities for repatriation and assistance; the real and immediate threat to the family members' lives and physical wellbeing and extreme vulnerability of the children; the materially impossibility for the individuals concerned to reach the French border, or any State border, without the assistance of the French authorities; and the willingness of AANES to hand over the female detainees of French nationality and their children to the national authorities.

The Court proceeded to determine the extent and scope of France's positive obligations under Article 3(2) of Protocol No. 4 in these circumstances. The generally-accepted interpretation of the scope of the prohibition corresponds to a negative obligation of the State, that it will refrain from formal measures that deprive nationals of the right to enter its territory. However, *C.B. v. Germany* shows that the measure of deprivation can vary in its degree of formality; it cannot be ruled out that indirect or informal measures which *de facto* deprive the national of the effective enjoyment of the right to return may, depending on the circumstances, be incompatible with this provision. Although the Court reiterated that French nationals in these camps cannot claim a general right to repatriation on the basis of the right to enter national territory under Article 3(2) of Protocol No. 4, it found that the provision may impose on a State certain positive obligations where, in view of the specificities of a given case, a refusal by that State to take any action would leave the national concerned in a *de facto* exile. The Court stated that any such requirement must be interpreted narrowly and will be binding on States only in exceptional circumstances.

The Court found exceptional circumstances in this case. It concluded that it was therefore incumbent upon the French authorities to surround the decision-making process concerning the requests for repatriation by appropriate safeguards against arbitrariness. It found that the safeguards afforded to applicants were inappropriate; the applicants did not receive any explanation for the denial of their requests that would indicate an individual examination of the situation, and that this could not be remedied before the domestic courts. Because the applicants were deprived of challenging the grounds relied upon by authorities and of verifying that those grounds were not arbitrary, the Court by majority found a violation of Article 3(2) of Protocol No. 4.

The Court considered that a finding of the violation was sufficient to compensate for any non-pecuniary damage sustained by the applicants. It considered that the French Government must re-examine those requests. It dismissed the remainder of the applicants' claim.

Separate opinions

A joint concurring opinion considered the violation to be substantive as well as procedural in character. It criticised the limitation of the enquiry to whether the decision-making had safeguarded against arbitrariness, which it warned could create

a category of non-arbitrary exile. It stated that the predominant reason for inaction was related to the desirability of the repatriations, and found this a *de facto* exile that amounted to a substantive violation.

A joint partly dissenting opinion disagreed that the applicants’ request for the repatriation of their family members fell within the provision of Article 3(2) of Protocol No. 4, and criticised the limited substantive right to repatriation that the decision seemed to amount to.

A partly dissenting opinion disagreed that the finding of the violation constituted just satisfaction.

Decision documents

Case of H.F. and Others v. France

Affaire H.F. et Autres c. France in French

Outcome

The Court found a violation of Article 3(2) of Protocol No. 4.

Links to other relevant materials related to the case (blogs, analysis, articles, reports, etc.)

Sanna Mustasaari, The issue of extraterritorial jurisdiction in the repatriation of children detained in Syrian camps: shortcomings in the ECtHR judgment in H.F. and Others v. France (Strasbourg Observers, 1 November 2022)

Caselaw cited

- M.N. and Others v. Belgium, no. 3599/18
- Guzelyurtlu and Others v. Cyprus and Turkey, no. 36925/07
- Markovic and Others v. Italy, no. 1398/03
- Banković and Others v. Belgium and Others, no. 52207/99
- Georgia v. Russia (II), no. 38263/08
- Hanan v. Germany, no. 4871/16, §§ 133-142
- C.B. v. Germany, no. 22012/93
- Ghoumid and Others v. France, nos. 52273/16 and 52285/16, 52290/16, 52294/16 and 52302/16
- Al-Dulimi and Montana Management Inc. v. Switzerland, no. 5809/08

- Soering v. United Kingdom, no. 14038/88
- Gray v. Germany, no. 49278/09
- Magyar Helsinki Bizottság v. Hungary, no. 18030/11
- K2 v. the United Kingdom, no. 42387/13
- Nada v. Switzerland, no. 10593/08
- Al-Skeini and Others v. the United Kingdom, no. 55721/07
- Abdul Wahab Khan v. the United Kingdom, no. 11987/11
- Marangos v. Cyprus, no. 31106/96
- Momcilovic v. Croatia, no. 59138/00
- N.D. and N.T. v. Spain, nos. 8675/15 and 8697/15, § 109
- Muhammad and Muhammad v. Romania, no. 80982/12
- Kurt v. Austria, no. 62903/15
- Sejdovic v. Italy, no. 56581/00
- Stephens v. Malta (no. 1), no. 11956/07
- Y.B. & N.S. v. Belgium, no. 012/2017