COUNCIL OF EUROPE STANDARDS AND GUIDELINES IN THE FIELD OF HUMAN RIGHTS PROTECTION OF IRREGULAR MIGRANTS

Strasbourg, 2011
I. INTRODUCTION

1. This document sets out the essential Council of Europe standards, notably those emanating from the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights as well as from the European Social Charter (RESC) and the case-law of the European Committee of Social Rights (ECSR) relevant to various situations concerning irregular migrants. It also recalls certain key recommendations made by the Committee of Ministers, the Parliamentary Assembly, the Council of Europe Commissioner for Human Rights and the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT). It presents these standards in summary form, with links to further documentation providing additional detail.

II. COUNCIL OF EUROPE STANDARDS AND RECOMMENDATIONS

A. Reception

2. Whenever exercising jurisdiction, States are required to ensure that the principle of non-refoulement is effectively respected. In other words, the State may not act in such a way that the person concerned is exposed to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment, persecution, or serious violation of other fundamental rights which would, under international or national law, justify granting protection. This includes returning a person to a transit country (which may be categorised as a “safe country”) that does not itself offer sufficient guarantees against refoulement. In case the principle of non-refoulement is not respected, a state might risk to violate Article 3 of the ECHR (‘Prohibition of Torture, Inhumane and Degrading Treatment’).

3. Arriving migrants (including irregular migrants and asylum-seekers) shall be treated with full respect for their human dignity. They shall be provided with necessary social and medical assistance, including emergency treatment. Accommodation facilities (e.g. reception or detention centres), food and living conditions provided to migrants must meet basic standards of decency. Persons should be provided with suitable means for sleeping, granted access to their possessions and to suitably-equipped sanitary and washing facilities, and allowed to exercise in the open air on a daily basis.

B. Vulnerable persons

4. The vulnerability of certain categories of persons, such as unaccompanied and/or separated minors/children, women, victims of torture, sexual violence or human trafficking and persons with mental and/or physical disabilities should be duly taken into account at all stages, including in accordance with international human rights obligations as regards the rights of specific vulnerable groups. In the case of children, their best interests are paramount. In DCI v. Netherlands, Collective

---

1 See the Guidelines on Accelerated Asylum Procedures, “VII. Non-refoulement and return.”
2 See e.g. T.I. v. United Kingdom, App. No. 43844/98, decision of 07/03/00.
6 The Parliamentary Assembly, for example, has raised many issues and made a number of recommendations related to the situation of female asylum-seekers in its Resolution 1765(2010) on Gender-based claims for asylum.
Complaint No. 47/2008, the European Committee of Social Rights held that under Article 31§2 RESC adequate shelter must be provided to children whatever their residence status, for as long as they are in the jurisdiction of a country. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children. The Committee also found a violation of Article 17§1.c RESC (appropriate and necessary measures to provide the requisite protection and special aid to children temporarily or definitively deprived of their family’s support) on the same ground. Children, including those of irregular migrants, should have right to free education (ECCHR, Protocol 1) as well as the right to social, legal and economic assistance (RESC, Article 17).

C. Detention of migrants

5. Migrants are not criminals and, if detained, certain conditions should be satisfied. The detention of irregular migrants and asylum seekers should be the exception and is lawful only if in accordance with the Article 5 of the ECHR, which allows for the arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Immigration detainees should not in principle be held in prisons (2006 European Prison Rules). Detention with a view to deportation or extradition remains lawful only for so long as proceedings to that end are underway and being pursued with due diligence.

6. Since the principle of non-refoulement prevents the deportation or extradition of persons making claims for protection on relevant grounds (see paragraph 2 above) until their claims have been fully processed, such persons should therefore only exceptionally be detained. Children, including unaccompanied minors, should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance. In those cases where other vulnerable persons are detained they should be provided with adequate assistance and support.

7. When detained, irregular migrants shall be informed promptly, in a language that they understand, of the legal and factual reasons for their detention and the available remedies. They should be given the immediate possibility of contacting a person of their own choice to inform him/her about their situation, as well as availing themselves of the services of a lawyer and a doctor. They shall have ready access to an effective remedy against the decision to detain them, including legal assistance. Article 5.4 of the ECHR guarantees the right of irregular migrants to challenge the decision to detain them as well as their access to legal aid and relevant information on procedures and deadlines.

D. Detention conditions

8. Detention conditions must be compatible with respect for human dignity (Article 3 of the ECHR). The manner and method of execution of the measure of detention must not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent

---

8 Decision on the merits of 20 October 2009, in particular para. 64.
9 Ibidem, paras. 70-71. In FIDH v. France, Collective Complaint No. 14/2003, decision on the merits of 8 September 2004, the Committee found a violation of Article 17 RESC because medical assistance to children of irregular migrants was limited to life-threatening situations and admission to the medical assistance scheme was only possible after a certain time, see paras. 36-37.
10 See the Guidelines on Accelerated Asylum Procedures, “XI. Detention.”
11 See e.g. Saadi v. U. K., App. No. 13229/03, Grand Chamber judgment of 29/01/08, para. 72.
12 See e.g. Rahimi v Greece, App No. 8687/08, Grand Chamber judgment of 05/07/11.
13 See the Guidelines on Accelerated Asylum Procedures, “XI. Detention.” The Parliamentary Assembly has also made recommendations to member States in its Resolution 1707 (2010) on detention of asylum seekers and irregular migrants in Europe.
in detention. The health and well-being of detained migrants must be adequately secured, given the practical demands of detention.\textsuperscript{14}

9. Detained irregular migrants and asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.\textsuperscript{15}

10. Detainees should be systematically provided with information which explains the rules applied in the detention facility and the procedure applicable to them and sets out their rights and obligations. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees.\textsuperscript{16} Independent monitoring of detention facilities for migrants and asylum seekers is an important element in the prevention of ill-treatment and, more generally, of ensuring satisfactory conditions of detention.\textsuperscript{17}

11. Inadequate detention conditions may attain the minimum level of severity required to constitute ill-treatment in violation of art. 3 ECHR on account of circumstances such as the duration of detention, its physical or mental effects and, in some cases, the sex, age and state of health of the person concerned. Such ill-treatment is “inhuman” if premeditated, applied for hours at a stretch and causing either actual bodily injury or intense physical or mental suffering. It is “degrading” if it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance. It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.\textsuperscript{18}

12. Article 13 of the ECHR (right to an effective remedy) enables persons that have an arguable claim that the conditions of their detention amount to an ill-treatment to complain to an authority capable to provide redress.

\textbf{E. Non-detained persons – living conditions}

12. The ECHR does not oblige States Parties to provide everyone within their jurisdiction with a home, or to give refugees financial assistance to enable them to maintain a certain standard of living. Nevertheless, a situation in which an a migrant or an asylum seeker is left in a situation of extreme material poverty may raise an issue under Article 3 of the ECHR, for instance where an individual finds him/ herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity. In this respect it may be noted that the scope of Article 13§4 RESC (right to emergency social and medical assistance) covers also persons who are unlawfully present in the territory.\textsuperscript{19}

\textbf{F. Return}

14. States should take measures to promote voluntary returns, which should be preferred to forced returns.\textsuperscript{20}

\textsuperscript{14} See \textit{M.S.S. v. Belgium & Greece}, App. No. 30696/09, Grand Chamber judgment of 21/01/11, para. 221.
\textsuperscript{16} See the Committee of Ministers’ 20 Guidelines on Forced Returns, doc. CM(2005)40 final; Guideline 10.
\textsuperscript{18} See e.g. \textit{M.S.S. v. Belgium & Greece}, op. cit., paras. 219-220.
\textsuperscript{19} See footnote 10 above. See also Digest of the Case Law of the European Committee of Social Rights at www.coe.int/socialcharter.
\textsuperscript{20} See the 20 Guidelines on Forced Returns, Guideline 1.
15. Removal orders should be individualised and only issued in pursuance of a decision reached in accordance with the law. The issuing authority must first consider all relevant, readily available information and satisfy itself, as far as can reasonably be expected, that compliance with or enforcement of the order will not violate the principle of non-refoulement (see para. 6 above).

16. In all cases, the return must be enforced with respect for the integrity and human dignity of the person concerned, excluding any torture or inhuman or degrading treatment or punishment. Collective expulsion of aliens is prohibited.

III. RELEVANT COUNCIL OF EUROPE MONITORING INSTRUMENTS

A. The European Court for Human Rights (ECtHR) monitors the respect by the member states of the ECGR and the execution of relevant judgements is supervised by the Committee of Ministers. The judgments of the ECtHR are binding on the respondent State concerned; but they are also authoritative as interpretations of the ECHR.

B. The European Committee on Social Rights (ECSR) is entrusted with monitoring of the compliance of the member states with the their obligations under the European Social Charter (RESC). Committee of Ministers of the Council of Europe decides on the follow-up to be given to the decisions and conclusions of the ECSR.

C. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT) is the main and unique monitoring mechanism active in the field of detention at the European level. CPT’s action identifies cases of non-compliance of existing detention conditions to human rights standards and formulates recommendations on how the situation can be improved.

D. The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in the Council of Europe member states. Since migration has an important human rights dimension, it is prioritized by the Commissioner, who often identify problems faced by irregular migrants in accessing fundamental rights.

IV. PRINCIPAL COUNCIL OF EUROPE STANDARDS THAT APPLY IN THE CONTEXT OF IRREGULAR MIGRATION

- European Convention on Human Rights (ECHR)
- Revised European Social Charter (RESC)
- Committee of Ministers’ 20 Guidelines on Forced Returns, doc. CM(2005)40 final;
- Guidelines on human rights protection in the context of accelerated asylum procedures (adopted by the Committee of Ministers on 1 July 2009);

---

21 Ibid, Guideline 2.
22 See the Guidelines on Accelerated Asylum Procedures, “VII. Non-refoulement and return.”
• Committee of Ministers’ Recommendation CM/Rec(2006)2 on the European Prison Rules