

The Unfairness of the Absence of Analysis of Discrimination by the European Court of Human Rights and its Impact on Children

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Cecilia M. Bailliet, Professor, Faculty of Law, University of Oslo



European Convention of Human Rights

Article 14

- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

H.F. and others v. France (2022)

- *Denial of repatriation- Exceptional Circumstances- threat to right to life of the children*
- There must be a mechanism for the review of decisions not to grant requests for a return to national territory through which it can be ascertained that there is *no arbitrariness*
- Article 3(2) of Protocol 4
- See EJIL Talk! Blog by [Annick Pijnenburg](#) – *Concern that procedural safeguards may not change outcome*





Alleleh v. Norway (2022)

- Possibility of having two year re-entry ban revised in the event of any negative development or unforeseen change and to apply for brief visits during ban (Compare Kaplan and Others v Norway App no 32504/11 (ECHR, 24 July 2014) 5 year ban excessive)
- Immigration Control identified as *weighty interest*
- State considered to act within margin of appreciation
- *No Exceptional Circumstances- High Threshold*

UN Convention on the Rights of the Child

Article 2- Non-Discrimination as a Positive Duty

- 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, *irrespective* of the child's or *his or her parent's* or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or *other status*.
- 2. States Parties shall *take all appropriate measures* to ensure that the child is protected against all forms of *discrimination* or punishment *on the basis of the status*, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

UN Committee on the Rights of the Child General Comment 14 (2013)

- The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires *appropriate proactive measures taken by the State* to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.

Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration- Non-discrimination regarding status of parent

- *The principle of non-discrimination is fundamental* and, in all its facets, applies with respect to children in the context of international migration
- Any differential treatment of migrants shall be *lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards*. . . children of migrant parents are at risk of violation of their right to have their best interest assessed in cases involving return or expulsion of a parent *on account of discrimination against the status of the parent*

CERD General Recommendation XXX on Discrimination Against Non_Citizens (2005)- Avoid Expulsion-Interference with Family Life

- Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party *do not discriminate in purpose or effect among non-citizens on the basis of race, color or ethnic or national origin*, and that non-citizens have *equal access to effective remedies*, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.
- Avoid expulsions of non-citizens especially of long-term residents, that would result in disproportionate interference with the right to family life.

Human Rights Committee General Comment No. 15 The Position of Aliens under the Covenant (1986)

- *Aliens are entitled to equal protection by the law.* There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.
- Alien enjoy the protection of the Covenant in relation to entry or residence when considerations of *non-discrimination*, prohibition of inhuman treatment and *respect for family life* arise.
- Aliens may not be subjected to *arbitrary or unlawful interference with their family*
- *Equality before the law in relation to deportation/expulsion/entry processing*
- Discrimination may not be made between different categories of aliens in the application of article 13.

Inter-American Court of Human Rights Advisory Opinion on Child Migrants Rights (2014)

- The State's obligation to respect and ensure the human rights of "all persons subject to [the] jurisdiction" of the State in question, that is, of every person in the territory or who is in any way subjected to its authority, responsibility or control – *in this case upon trying to enter the territory – and without any discrimination for the reasons stipulated in the norm*
- **Guiding Principles:**
- **The principle of non-discrimination,**
- **The principle of the best interest of the child,**
- **The principle of respect for the right to life, survival and development, and**
- **The principle of respect for the opinion of the child in any procedure that affects her or him in order to ensure the child's participation'**
- In situations in which the child has a right to the nationality of the country from which one or both of her or his parents may be expelled, or the child complies with the legal conditions to reside there on a permanent basis, States *may not expel one or both parents for administrative immigration offenses, as the child's right to family life is sacrificed in an unreasonable or excessive manner*
- **Judge Cancado Trindade- State immigration processes that do not abide by human rights are arbitrary**

M.A. v. Belgium, C-112/20, ECJ 11 March 2021

- **Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in conjunction with Article 24 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that Member States *are required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father.***

Opening the Black Box: Overview of rights to prevent arbitrary processing

- Non-Discrimination-

- Positive right in relation to children

- Relevant to Status of Parent

- Legality

- Objective and Reasonable Aim

- Proportionality in Means- Consider Impact, Effects on Child, Social/Family, Cultural ties with country, bond with parent

- Best Interests of the Child-

- Paramount in relation to state interest in immigration control

- Sequential Precedence to evaluation of ban/deportation of parent

- Exceptional Circumstances should be dropped as criteria-misuse as high threshold to protect state interests

- Equal Protection of the Law-

- Systematic revocation reviews based on only on nationality or generalized security concerns disguising racial, ethnic, religious discrimination in violation

- Equality before the Law

- Family Life- Deportation of parent of citizen child unreasonable/excessive, use alternatives (IACTHR)

- State should analyze aim of enjoyment of family life and necessity of measure taken (Klaasen)

Recommendations to National Immigration Bodies Strengthen Fairness

- End systematic revocation investigations of asylum cases based on nationality
- End revocation review of cases extending back over 5 years.
- States should conduct a non-discrimination review of their immigration rules and policy.
- National Caseworkers should learn about non-discrimination in the context of revocation, best interests of the child, and right to family unity.