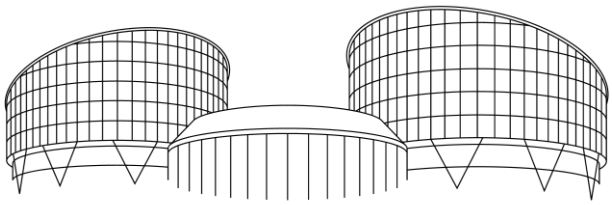

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF DE SOUZA RIBEIRO v. FRANCE

(Application no. 22689/07)

JUDGMENT

STRASBOURG

This version was rectified on 18 December 2012
under Rule 81 of the Rules of the Court

13 December 2012

In the case of de Souza Ribeiro v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Françoise Tulkens,
Nina Vajić,
Lech Garlicki,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Davíd Thór Björgvinsson,
Ineta Ziemele,
Päivi Hirvelä,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Angelika Nußberger,
Paulo Pinto de Albuquerque,
Erik Møse,
André Potocki, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 21 March and 19 September 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 22689/07) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Brazilian national, Mr Luan de Souza Ribeiro ("the applicant"), on 22 May 2007.

2. The applicant was represented by Ms D. Monget Sarrail, a lawyer practising in Créteil and in French Guiana. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged a violation of Article 8 of the Convention, taken alone and in conjunction with Article 13, in particular because he had had no possibility of challenging the lawfulness of a removal order prior to its execution.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 9 February 2009 the President of the

Section decided to give notice of the application to the Government. As provided for in Article 29 § 1 of the Convention and Rule 54A, it was decided to examine the merits of the application at the same time as its admissibility.

5. On 30 June 2011 a Chamber of the Fifth Section, composed of Dean Spielmann, President, Elisabet Fura, Jean-Paul Costa, Karel Jungwiert, Mark Villiger, Isabelle Berro-Lefèvre and Ann Power, judges, and Claudia Westerdiek, Section Registrar, delivered a judgment declaring the application partly admissible and finding, by four votes to three, that there had been no violation of Article 13 of the Convention taken in conjunction with Article 8. The joint dissenting opinion of Judges Spielmann, Berro-Lefèvre and Power was appended to the judgment.

6. On 27 September 2011 the applicant requested the referral of the case to the Grand Chamber (Article 43 of the Convention). A panel of the Grand Chamber granted that request on 28 November 2011.

7. The composition of the Grand Chamber was determined according to the provisions of Articles 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed submissions before the Grand Chamber. In addition, joint written observations were submitted by the Groupe d'information et de soutien des immigrés, the Ligue française des droits de l'homme and the Comité Inter-Mouvements Auprès des Évacués, whom the President had authorised to intervene in the written proceedings (Article 36 § 2 of the Convention and Rule 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 March 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms A.-F. TISSIER, Co-Agent of the French Government,
Head of the Human Rights Section,
Department of Legal Affairs,
Ministry of Foreign and European Affairs, *Agent*,

Mr B. JADOT, drafting secretary, Department of Legal Affairs,
Ministry of Foreign and European Affairs,

Mr S. HUMBERT, Legal Adviser to the Secretary General for
immigration and integration,

Ms C. SALMON, Deputy Head of Legal and Institutional
Affairs, General Delegation for
Overseas Territories, *Advisers*;

(b) *for the applicant*
Ms D. MONGET SARRAIL, lawyer practising
in French Guiana, *Counsel*,
Ms L. NAVENNEC NORMAND, lawyer practising
in Val de Marne, *Adviser*.

The Court heard addresses from Ms Monget Sarrail and Ms Tissier as well as their answers to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born on 14 June 1988 and lives in Remire Montjoly in French Guiana, a French overseas "*département* and region" in South America.

11. He arrived in French Guiana from Brazil in 1992, at the age of four, and attended school there for a year before returning to Brazil in 1994.

12. In 1995, in possession of a tourist visa, the applicant returned to Cayenne in French Guiana, where he joined his parents, both of whom had permanent residence cards, and his two sisters and two brothers, one of whom had French nationality while the other three, having been born on French soil, were entitled to apply for it. His maternal grandparents remained in Brazil.

13. The applicant attended primary then secondary school in French Guiana from 1996 to 2004. As he had no proper residence papers and could not apply for them until he came of age (see paragraph 26 below), he had to leave school in 2004, at the age of 16.

14. On 25 May 2005 the applicant was arrested on suspicion of a drug offence. By an order of 17 May 2006, the Cayenne Youth Court placed him under court supervision and barred him from leaving French Guiana.

15. In a judgment of 25 October 2006, the Cayenne Youth Court sentenced the applicant to two months' imprisonment, suspended, and two years' probation, together with the obligation to report to the authorities and to undergo training, for unauthorised possession of cocaine while under 18 years of age. In execution of that judgment, the applicant began a vocational training course that was scheduled to last from 13 October 2006 to 30 March 2007, as part of the socio-professional guidance and integration scheme in French Guiana.

16. On 25 January 2007 the applicant and his mother were stopped at a road check. As the applicant was unable to show proof that his presence on French soil was legal, he was arrested.

17. The same day, at 10 a.m., an administrative removal order (*arrêté préfectoral de reconduite à la frontière*) and an administrative detention order were issued against him. The removal order stated:

> "– Having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and in particular Articles 3 and 8,
>
> ...
>
> – Whereas, according to report no. 56 of 25/01/2007, drawn up by the DDPAF [*Département* Border Police] of French Guiana, the above-mentioned person:
>
> – is unable to prove that he entered French territory legally;
>
> – has remained in French territory illegally;
>
> – Whereas, in the circumstances of the present case, an administrative removal order must be issued against the alien concerned,
>
> – Whereas that person has been informed of his right to submit observations in writing,
>
> – Whereas, in the circumstances of the present case, there is no disproportionate interference with the person's right to family life,
>
> – Whereas the alien does not allege that he would be exposed to punishment or treatment contrary to the European Convention on Human Rights in the event of his return to his country of origin (or the country of habitual residence to which he is effectively entitled to return),
>
> ...
>
> [The applicant's] removal is hereby ordered."

18. On 26 January 2007, at 3.11 p.m., the applicant sent two faxes to the Cayenne Administrative Court.

One contained an application for judicial review of the removal order, calling for its cancellation and the issue of a residence permit. In support of his application the applicant alleged in particular that the order was in breach of Article L. 511-4 (2) of the Code regulating the entry and residence of aliens and asylum-seekers (*Code de l'entrée et du séjour des étrangers et du droit d'asile* – CESEDA) (see paragraph 26 below), and also, relying on Article 8 of the Convention, that the authorities had manifestly misjudged the consequences of his removal for his personal and family life. He explained that he had entered French territory before the age of 13, that he had lived there on a habitual basis ever since, that both his parents had permanent residence cards, and that one of his brothers had acquired French citizenship and his other brother and sisters had been born on French soil. He further submitted that he was under an obligation to abide, for two years, by the conditions of his probation, failing which he would go to prison, and that, as required by the probation order, he had already begun a course in mechanics.

The other fax contained an urgent application for the court to suspend the enforcement of the removal order in view of the serious doubts about its

lawfulness. In support of his application the applicant again relied on Article 8 of the Convention and repeated the arguments mentioned in the application for judicial review, which showed that most of his private and family life had been spent in French Guiana.

19. On 26 January 2007, at 4 p.m., the applicant was removed to Belem in Brazil.

20. On the same day, the urgent-applications judge at the Cayenne Administrative Court declared the urgent application for a suspension of the applicant's removal devoid of purpose as he had already been deported.

The applicant immediately applied for legal aid to appeal to the *Conseil d'Etat* against that ruling. By a decision of 6 March 2007, the President of the Legal Aid Office of the *Conseil d'Etat* rejected his application for "lack of serious grounds likely to convince the court".

21. On 6 February 2007 the applicant lodged an urgent application for protection of a fundamental freedom (*requête en référé liberté*) with the Cayenne Administrative Court. Referring to the Convention and to the Court's case-law, he complained of a serious and clearly unlawful interference by the authorities with his right to lead a normal family life and his right to an effective remedy. He requested that the prefect of French Guiana be instructed to organise his return there within twenty-four hours of notification of the order, to enable him to defend himself effectively regarding the alleged violations of the Convention, and to be reunited with his family while the prefecture examined his right to stay in French Guiana.

By an order of 7 February 2007, the urgent-applications judge at the Cayenne Administrative Court rejected the application, considering in essence that the measure the applicant sought would to all intents and purposes amount to a permanent measure, whereas the urgent-applications judge could only order interim measures.

22. In August 2007 the applicant returned to French Guiana illegally.

23. On 4 October 2007 the Cayenne Administrative Court held a hearing in which it examined the applicant's earlier application for judicial review (see paragraph 18 above). In a judgment delivered on 18 October 2007, it set aside the removal order. It noted in particular that the applicant claimed that he had returned to France in 1995, at the age of seven, and had resided there on a habitual basis thereafter, and that in support of his claims he had produced school certificates the authenticity of which the prefect did not dispute. It found it established that the applicant's mother had a permanent residence card and that his father also lived in French Guiana. The court further noted that, according to a court supervision order produced by the applicant, he had been arrested in French Guiana in 2005 and prohibited from leaving the territory. It found that the applicant fulfilled the conditions provided for in Article L. 511-4 (2) of the CESEDA, which meant that the removal order should not have been issued against him.

In response to the applicant's request to instruct the prefect of French Guiana to issue him with a residence permit within a month of the judgment being served, the court considered that its decision did not necessarily entail the issue of a temporary residence permit as it concerned only the setting aside of the removal order. The court did, however, set a three-month time-limit within which the prefect was to resolve the question of the applicant's residence status.

24. On 16 June 2009 the prefecture of French Guiana issued the applicant with a "visitor's" residence permit, which was valid for one year but did not allow him to work. An investigation revealed that the authorities had issued the "visitor's" permit by mistake. On 23 September 2009 the applicant was issued with a new residence permit for "private and family life". It was backdated to June 2009, valid for one year and allowed him to work.

That residence permit was not renewed upon its expiry on 15 June 2010 because of a problem with the documents required for its renewal. On 14 October 2010 the applicant was issued with a new residence permit valid from 16 June 2010 to 15 June 2011, subsequently renewed until 15 June 2012. The applicant now holds a renewable residence permit for "private and family life".

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. French Guiana is a French overseas *département* and region. Article 73 of the Constitution stipulates that in the overseas *départements* and regions French laws and regulations automatically apply, although adjustments may be made to allow for the particular characteristics and constraints in those territories. Where immigration laws are concerned, the regime applicable in the overseas territories is that provided for in the Code regulating the entry and residence of aliens and asylum-seekers (CESEDA), with certain distinctions.

A. Provisions governing residence for aliens

26. The relevant provisions of the CESEDA as in force at the material time are as follows:

Article L. 313-11

"Unless their presence represents a threat to public order, a temporary residence permit for 'private and family life' shall automatically be issued:

(1) to an alien, in the year following his eighteenth birthday, ... where at least one of the parents has a temporary or a full residence permit ...;

(2) to an alien, in the year following his eighteenth birthday, ... where he can prove by any means that he has been habitually resident in France, with at least one of his

legitimate, natural or adoptive parents, since the age of 13, filiation having been established in the conditions laid down in Article L. 314-11; the condition provided for in Article L. 311-7 is not required; ...”

Article L. 511-4

“The following persons shall not be required to leave French territory, or made the subject of a removal order, under the provisions of this chapter:

...;

(2) Aliens who can prove by any means that they have been habitually resident in France since at least the age of 13;

...”

27. These provisions are applicable throughout French territory, including France’s overseas territories.

B. Expulsion measures and appeals to the administrative court

1. The law generally applicable

28. At the material time expulsion measures were governed by Book V of the CESEDA, introduced by Law no. 2006-911 of 24 July 2006. They included the obligation to leave French territory (Article L. 511-1-I) and administrative removal (Article L. 511-1-II).

29. An alien who could not prove that he or she had entered France legally, or who had remained there illegally, and who could not be authorised to stay on any other grounds, could be ordered to leave, in particular by means of an administrative removal order (Articles L. 511-1 to L. 511-3 of the CESEDA).

30. If the alien was placed in administrative detention, he or she was informed of his or her rights and was entitled to legal assistance provided by an association in the detention centre. These associations were legal entities which had concluded agreements with the Ministry responsible for asylum and whose purpose was to inform the aliens concerned and help them to exercise their rights. In 2007, the only association present in French administrative detention centres was CIMADE. Since 2010 four other associations have also been present: the Ordre de Malte, the Association Service Social Familial Migrants (ASSFAM), France Terre d’Asile and Forum des Réfugiés.

31. Appeals against administrative removal orders could be lodged before the administrative court within forty-eight hours of their being served (Article L. 512-2 of the CESEDA). The appeal suspended the execution of the removal order but did not prevent the alien from being placed in administrative detention. The alien could not be deported before the time-limit for appealing had expired or – if the matter had been referred to the court – before the court had reached a decision (Article L. 512-3 of the

CESEDA). The decision as to the country of destination was separate from the actual removal order. If that decision was challenged at the same time as the removal order, the appeal also had suspensive effect (Article L. 513-3 of the CESEDA).

32. The appeal took the form of an application for judicial review, with no examination of the issue of compensation. The administrative court's decision therefore focused solely on the lawfulness of the removal order. The court reviewed the proportionality of the public-policy reasons with the fundamental freedom(s) relied on by the alien. When examining an appeal against the decision fixing the country to which the alien was to be removed, the court reviewed compliance with Article 3 of the Convention. It also examined the proportionality of the aims pursued by the removal order in relation to the interference with the alien's private or family life as protected by Article 8 of the Convention.

33. The administrative court was required to reach a decision within seventy-two hours.

34. An appeal against the judgment of the administrative court could be lodged with the president of the administrative court of appeal having territorial jurisdiction, or a person delegated by him. This appeal had no suspensive effect (Article R. 776-19 of the Administrative Courts Code).

35. The consequences of the setting aside of an administrative removal order were covered by Article L. 512-4 of the CESEDA. First of all, it put a stop to any administrative detention or house arrest. The alien was then issued with a temporary residence permit while the administrative authority reviewed his or her case. Lastly, the judge responsible for removal matters did not merely refer the alien back to the administrative authorities; under Article L. 911-2 of the Administrative Courts Code, it also ordered the prefect to decide whether the person was entitled to a residence permit, "regardless of whether he or she had applied for one" and set a time-limit within which the situation of the alien concerned was to be reviewed (see, for example, *Conseil d'Etat*, 13 October 2006, application no. 275262, *M. Abid A.*).

36. However, a judgment of the administrative court setting aside a removal order did not oblige the prefect to issue a residence permit, as it did not concern the setting aside of a refusal to issue a residence permit (see the leading judgment of the *Conseil d'Etat* of 22 February 2002, application no. 224496, *M. Dieng*, followed by others). This applied even when the decision to set aside a removal order was based on substantive grounds, such as a violation of Article 8 of the Convention. According to the case-law, a review of the person's situation sufficed to fully execute a decision to set aside a removal order on substantive grounds. However, the principle of *res judicata* prevents the administrative authority from issuing a new removal order on the same grounds without showing any change in the circumstances.

37. These provisions (see paragraphs 28-36 above) were amended in part by Law no. 2011-672 of 16 June 2011 on immigration, integration and nationality, which harmonised the procedure for removing illegal aliens. The solutions previously adopted in the case-law concerning administrative removal measures are generally transposable to the present situation.

2. The law applicable in French Guiana

38. The relevant provisions of the CESEDA, in the version in force at the material time, read as follows:

Article L. 514-1

"For the purposes of this part, the following provisions shall apply in French Guiana and Saint Martin:

(1) If the consular authority so requests, the removal order shall not be executed until one full day after it has been served;

(2) Without prejudice to the provisions of the preceding paragraph, an alien who has been ordered to leave French territory or against whom an administrative removal order has been issued and who refers the matter to the administrative court may, at the same time, apply for a stay of execution.

Consequently, the provisions of Articles L. 512-1 and L. 512-2 to L. 512-4 [whereby a removal order issued by the prefect may be challenged before the administrative court within forty-eight hours, with suspensive effect on the execution of the removal order] shall not apply in French Guiana or Saint Martin."

39. Unlike in ordinary French law, therefore (see paragraph 31 above), an appeal to the administrative court does not stay the execution of a removal order. This exception, originally introduced for a limited period, was made permanent in French Guiana by the Homeland Security Act (Law no. 2003-239 of 18 March 2003).

40. When asked to review the conformity of this measure with the French Constitution, as provided for in Article 61 of the Constitution, the Constitutional Council approved it. In its decision no. 2003-467 of 13 March 2003, when examining the conformity of the measure with Article 73 of the Constitution, the Constitutional Council noted:

"Sections 141 and 142 [of the Homeland Security Act] make the special provisions ... permanent in French Guiana and in the municipality of Saint Martin in Guadeloupe; under these provisions, refusal to issue a residence permit to certain aliens is not submitted for opinion to the residence-permit committee provided for in section 12 *quater* of the order of 2 November 1945, and an appeal against a removal order has no suspensive effect.

The applicant MPs argue that in making the special regime permanent sections 141 and 142 interfere with 'constitutionally protected rights and guarantees such as the rights of the defence' and go beyond the adjustments to the legislation of the overseas *départements* authorised by Article 73 of the Constitution.

In order to allow for the particular situation and the lasting difficulties encountered with regard to the international movement of people in the *département* of French

Guiana and in the municipality of Saint Martin in the *département* of Guadeloupe, Parliament has maintained the special regime introduced by sections 12 *quater* and 40 of the order of 2 November 1945, mentioned above, without disrupting the balance, required by the Constitution, between the needs of public policy and the protection of the rights and freedoms guaranteed by the Constitution. The persons concerned continue to enjoy the right of appeal against administrative measures, and in particular the right to lodge urgent applications with the administrative court. Bearing in mind the special circumstances, which are directly related to the specific aim of strengthening the fight against illegal immigration, the legislation has not infringed the constitutional principle of equality. The adjustments in question are not contrary to Article 73 of the Constitution. ..."

41. Concerning the removal of aliens, French legislation provides for similar exceptions in another six overseas "*départements* and regions" and communities (Guadeloupe, Mayotte, Wallis and Futuna, Saint Barthélemy, Saint Martin, French Polynesia) and New Caledonia.

C. Urgent applications

42. The legal provisions governing urgent applications for a stay of execution or for the protection of a fundamental freedom (*référé suspension* or *référé liberté*) are automatically applicable in French Guiana just as they are everywhere else in France. The relevant provisions of the Administrative Courts Code read as follows:

Article L. 521-1

"When an application is made to set aside or vary an administrative decision, including a refusal, the urgent-applications judge may order that execution of the decision or certain of its effects be stayed where the urgent nature of the matter warrants it and where grounds are advanced capable of raising serious doubts, as the evidence stands, as to the lawfulness of the decision.

Where an order is made staying execution, a ruling shall be given as soon as possible on the application to have the decision set aside or varied. The stay of execution shall end at the latest when a decision is taken on the application to have the decision set aside or varied."

Article L. 521-2

"Where such an application is submitted to him or her as an urgent matter, the urgent-applications judge may order whatever measures are necessary to protect a fundamental freedom which has been breached in a serious and manifestly unlawful manner by a public law entity or an organisation under private law responsible for managing a public service, in the exercise of their powers. The urgent-applications judge shall rule within forty-eight hours."

43. When examining a case concerning French Guiana, referred to it under Article L. 521-1 of the Administrative Courts Code, the *Conseil d'Etat* pointed out:

"The urgency of the matter justifies the stay of execution of an administrative measure when its execution would, in a sufficiently serious and immediate manner,

undermine a public interest, the applicant's situation or the interests he seeks to defend. It is for the urgent-applications judge to whom an application for a stay of execution of a decision not to issue a residence permit has been referred to assess the urgency and give reasons, taking into account the immediate impact of the refusal to issue the residence permit on the practical situation of the individual concerned. As Article L. 514-1 of the Code regulating the entry and residence of aliens and asylum-seekers stipulates that Article L. 512-1 of the same Code does not apply in French Guiana, an appeal by an alien against a refusal to issue a residence permit, combined with an obligation to leave French territory for a specified country of destination, does not stay the execution of the obligation to leave French territory."

44. The *Conseil d'Etat* went on to consider that, in these circumstances,

"the prospect that an expulsion measure might be implemented at any time ... may be considered to characterise an urgent situation opening the possibility for the urgent-applications judge to stay the execution of the decision to refuse to issue a residence permit, combined with the obligation to leave French territory, in conformity with the provisions of Article L. 521-1 of the Administrative Courts Code". (*Conseil d'Etat*, 9 November 2011, *M. Takaram A.*, no. 346700, *Recueil Lebon*)

D. Opinion no. 2008-9 of the National Commission for Policing Ethics

45. In response to a complaint lodged on 23 January 2008, the National Commission for Policing Ethics (*Commission nationale de déontologie de la sécurité*) examined the circumstances in which Mr C.D., a Brazilian national, had been stopped on 12 November 2007 by the mobile investigation squad of the Border Police of the *département* of French Guiana, taken into custody and detained pending his expulsion, and subsequently died six hours after being hospitalised in Cayenne.

46. In its opinion of 1 December 2008, the National Commission for Policing Ethics noted

"the existence within the Border Police in French Guiana, from 2006 to 30 January 2008 – when the two public highway patrol units of the mobile investigation squad were disbanded – of working methods and data-processing practices which, under cover of formally legitimate procedures, systematically violated all the principles of criminal procedure and in particular the most elementary rights of the people arrested, ... by intentionally falsifying the times mentioned in their reports, or using pre-printed forms whereby people who were taken into custody or detained waived their rights before they had even had a chance to voice their wishes on the matter.

Because of the systematic and long-standing nature of these violations of the law ... the Commission strongly recommends that ...

disciplinary measures be taken against all those ... who instigated or implemented them or allowed them to go on for such a long time ...

More generally, the Commission requests that all those who serve overseas be reminded that:

...

in the fight against illegal immigration the number of effective removals demanded by the central authorities must in no way affect the quality and lawfulness of the procedures;

and whatever the legal steps taken following the arrest – remand in custody, identity check, administrative detention – the people concerned have certain rights of which it is the duty of the police to inform them in practice, in a language they understand, to enable them to exercise their rights effectively and not just for the sake of appearances."

III. RELEVANT INTERNATIONAL INSTRUMENTS AND PRACTICE

A. Council of Europe instruments

1. The Committee of Ministers

47. On 4 May 2005 the Committee of Ministers adopted "Twenty Guidelines on forced return". The relevant guidelines read as follows:

"**Guideline 2. Adoption of the removal order**

Removal orders shall only be issued in pursuance of a decision reached in accordance with the law.

1. A removal order shall only be issued where the authorities of the host State have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

b. a real risk of being killed or subjected to inhuman or degrading treatment by non-State actors, if the authorities of the State of return, parties or organisations controlling the State or a substantial part of the territory of the State, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.

2. The removal order shall only be issued after the authorities of the host State, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.

...

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

2. The remedy shall offer the required procedural guarantees and present the following characteristics:

– the time-limits for exercising the remedy shall not be unreasonably short;

– the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;

– where the returnee claims that the removal will result in a violation of his or her human rights as set out in Guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

3. The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1."

2. The Commissioner for Human Rights

48. The Commissioner for Human Rights issued a Recommendation concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders (CommDH(2001)19). This Recommendation of 19 September 2001 included the following paragraph:

"11. It is essential that the right of judicial remedy within the meaning of Article 13 of the [European Convention on Human Rights] be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the [Convention]. The right of effective remedy must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the [Convention] is alleged."

B. 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 ("the Return Directive")

49. The relevant parts of Articles 5, 12 and 13 of the Return Directive read as follows:

Article 5
***Non-refoulement,* best interests of the child, family life and state of health**

"When implementing this Directive, member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of *non-refoulement.*"

Chapter III
PROCEDURAL SAFEGUARDS

Article 12
Form

"1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

..."

Article 13
Remedies

"1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12 § 1, before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12 § 1, including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

..."

C. Concluding Observations of the United Nations Human Rights Committee on the fourth periodic report of France

50. In accordance with Article 40 of the International Covenant on Civil and Political Rights, on 9 and 10 July 2008 the United Nations Human Rights Committee examined the fourth periodic report of France (UN Doc. CCPR/C/FRA/4). On 22 July 2008, it adopted its Concluding Observations (UN Doc. CCPR/C/FRA/CO/4) on that report, which included the following:

"... no recourse to the courts is available to persons deported from the overseas territory of Mayotte, involving some 16,000 adults and 3,000 children per year, nor from French Guiana ...

The State Party should ensure that the return of foreign nationals, including asylum-seekers, is assessed through a fair process that effectively excludes the real risk that any person will face serious human rights violations upon his return. Undocumented foreign nationals and asylum-seekers must be properly informed and assured of their rights, including the right to apply for asylum, with access to free legal aid. The State Party should also ensure that all individuals subject to deportation orders have an adequate period to prepare an asylum application, with guaranteed access to translators, and a right of appeal with suspensive effect." (The last paragraph appears in bold type in the original text.)

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

51. In their submissions to the Grand Chamber, the Government raised a preliminary objection concerning the complaint under Article 8 of the Convention. In its judgment of 30 June 2011, however, the Chamber declared the complaint about the lack of an effective remedy (Articles 13 and 8 of the Convention taken together) admissible and the complaint concerning unjustified interference with the applicant's right to respect for his private and family life (Article 8 of the Convention taken alone) inadmissible. The Chamber rejected the latter complaint as being incompatible *ratione personae* with the Convention as the applicant could not be considered to be a "victim" within the meaning of Article 34. The Grand Chamber will therefore only examine the complaint declared admissible by the Chamber, as "the case" referred to the Grand Chamber is the application as declared admissible by the Chamber (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII, and *Taxquet v. Belgium* [GC], no. 926/05, § 61, ECHR 2010).

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

52. The applicant complained that he had had no effective remedy under French law in respect of his complaint of unlawful interference with his right to respect for his private and family life as a result of his expulsion to Brazil. He relied on Article 13 of the Convention taken in conjunction with Article 8, which read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

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

A. The Chamber judgment

53. In its judgment of 30 June 2011, the Chamber noted that the Cayenne Administrative Court had set aside the removal order against the applicant as illegal on 18 October 2007, nearly nine months after his removal to Brazil. It also noted that he had not been issued with a residence permit enabling him to live legally in French Guiana until 16 June 2009. On that basis, the Chamber considered that at the time of the applicant's removal to Brazil a serious question had arisen as to the compatibility of his removal with Article 8 of the Convention. It considered that the applicant had an "arguable" complaint for the purposes of Article 13 of the Convention and within the meaning of the Court's case-law. It accordingly went on to examine the merits of the complaint and the effectiveness of the remedy available to the applicant in French Guiana. It found that the remedy of which the applicant had been able to avail himself before the Cayenne Administrative Court had made it possible for him to have the removal order declared illegal and, subsequently, to obtain a residence permit, even though, because it had no suspensive effect, the applicant had been removed before the Administrative Court could examine his case. It went on to note that the applicant's removal had not definitively broken his family ties, as he had been able to return to French Guiana some time after being deported – albeit illegally at first – and had been given a residence permit. Bearing in mind, *inter alia*, the margin of appreciation the States enjoy in such matters, the Chamber held that there had been no violation of Article 13 of the Convention taken in conjunction with Article 8.

B. The parties' submissions before the Grand Chamber

1. The Government

(a) The applicant's victim status

54. The Government contended that the applicant could no longer claim to be a "victim" within the meaning of Article 34 of the Convention or under the Court's case-law.

They submitted that the domestic authorities had acknowledged and then remedied the alleged violation of Article 13 taken in conjunction with Article 8 by issuing the applicant with a residence permit. In addition, in spite of the execution of the removal order, the Administrative Court had ruled that the decision should be set aside rather than simply terminating the proceedings, which showed that the remedy was an effective one.

55. At the hearing, the Government also pointed out that the applicant's illegal status in French Guiana at the time of his arrest was the result of his own negligence, as he had failed to apply to regularise his administrative status even though he was automatically entitled to a residence permit.

According to the Government, this clearly distinguished the present case from that of *Gebremedhin [Gaberamadhien] v. France* (no. 25389/05, ECHR 2007-II), where the applicant, an Eritrean national, had requested admission to France as an asylum-seeker. In that case, however, had it not been for the interim measure ordered by the Court, the fact that the appeal against the decision not to let the person into the country had no suspensive effect would have made it impossible for the domestic authorities to remedy the alleged violation of Article 3 of the Convention. The applicant in that case had accordingly had an arguable complaint, unlike the applicant in the present case.

(b) Compliance with Article 13 of the Convention taken in conjunction with Article 8

56. Referring to the Court's case-law, the Government argued that the effectiveness of a remedy was not, in principle, conditional on its suspensive effect for the purposes of Article 13, except where there might be "potentially irreversible effects" contrary to Article 3 of the Convention and Article 4 of Protocol No. 4. In the present case, the decision to remove the applicant had been challenged before the Administrative Court, which had set it aside, thereby permitting the applicant to return to French Guiana. The applicant had therefore had access to an effective remedy. The Government emphasised that the applicant's family ties had not been definitively broken and that his removal had not had any irreversible effects. At the time of his removal the applicant was 18 years old, single, had no children and was in good health. He had been sent back to the country where his grandparents lived and a few months later he had been able to return to French Guiana and resume his life there without incident. It followed, according to the Government, that the applicant had had an effective remedy.

Furthermore, the Government considered that the Chamber had taken an *a priori* approach, reasoning that an interference by the authorities with an Article 8 right was not, in principle, irreversible, unless the individual concerned came to a tragic end or was particularly vulnerable. The Government submitted, however, that such specific cases would fall within the scope of Article 3 and the remedy would automatically have suspensive effect. The applicant's case indubitably fell within the scope of Article 8, and illustrated the principle of the absence of potentially irreversible effects.

57. In the Government's submission, the applicant had not shown how an interference with the right to respect for one's private and family life could have irreversible effects. While his illegal return to French Guiana might have been risky, the fact that he had broken the law without even waiting for the Administrative Court's decision concerning his appeal could not be seen as anything but the applicant's own responsibility. Lastly, the Government pointed out that following the domestic court's judgment the

applicant had been granted temporary authorisation to stay. The fact that the authorities had been unable to issue the first residence permit until 16 June 2009 had been the applicant's own fault, as he had not seen fit to submit the requisite papers and had made no effort to regularise his situation when invited to do so.

58. The Government contended that the exception applied in French Guiana fell within the margin of appreciation afforded to States as to the manner in which they honoured their obligations under Article 13 of the Convention. The exception to the principle of a suspensive remedy was justified by the particular pressure of illegal immigration in French Guiana. Illegal immigration and the criminal networks that facilitated it were encouraged by the peculiar topography there, which made the borders permeable and impossible to guard effectively. Moreover, considering the large number of removal orders issued by the prefect of French Guiana, introducing an automatically suspensive remedy might overload the administrative courts and adversely affect the proper administration of justice. The exception was also justified by the need to maintain a certain equilibrium in French Guiana and by the close bilateral ties France had with the neighbouring countries.

59. In any event, although there was no automatically suspensive remedy, urgent applications for a stay of execution were widely used, and had been used by the applicant. At the hearing, the Government in fact pointed out that, as the judgment delivered by the *Conseil d'Etat* in the matter was a recent one, its exact scope remained to be defined. The judgment appeared to give the urgent-applications judge the power to stay the execution of a removal order when there was a risk of its being implemented at any time and there were serious reasons to doubt its lawfulness (see paragraphs 43 and 44 above).

60. As to whether the Court's case-law was consistent, the Government submitted that it was. There was no need for a remedy with suspensive effect when Article 13 was taken in conjunction with Article 8. In such cases the Court made a proper assessment of the proportionality of the removal in relation to the aim pursued. In doing this the Court applied the criteria laid down in its case-law (for example, *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX). So the effectiveness of the remedy was not conditional on its having suspensive effect. At the hearing the Government added that a departure from this principle would undermine the consistency and clarity of the Court's case-law.

61. The Government concluded by inviting the Court to uphold the judgment delivered by the Chamber.

2. The applicant

(a) Victim status

62. The applicant argued that, as in *Gebremedhin [Gaberamadhien]*, cited above, he could still claim to be a victim within the meaning of Article 34 of the Convention. According to him, the alleged violation of Article 13 taken in conjunction with Article 8 had already occurred by the time the Administrative Court gave judgment. At the hearing he explained that at the time of his arrest and removal he had just turned 18, and as a result, under French law he should have had until June 2007 to regularise his situation (see paragraphs 26 and 27 above). He had nevertheless been expelled and obliged to run the risk of paying a smuggler to return him to French Guiana illegally.

Referring to the conclusion reached by the Chamber in its judgment, the applicant submitted that his complaint had been arguable and had raised a serious issue at the time of his removal.

(b) Compliance with Article 13 of the Convention taken in conjunction with Article 8

63. The applicant criticised the exception to the law in French Guiana that had deprived him of an effective remedy to defend his complaint under Article 8 of the Convention.

64. He explained that, contrary to what the Chamber had decided, a violation of the right to respect for private and family life could have potentially irreversible effects when foreigners were deported. In his case the consequences could have been irreversible and indeed they had been, at least psychologically. They could not be assessed *ex post facto* in the light of his good fortune in managing to return to French Guiana following his illegal expulsion. Nor was it acceptable that he had had to pay a smuggler to return him to French Guiana, at great risk to himself, when the authorities had taken two years to act on the court's decision instead of the three months they had been given. According to the applicant, the fact that it had taken two years to obtain a residence permit was due to the "tense" relations with the administrative authorities, who had required him to produce numerous documents, not all of which were relevant.

65. The applicant referred to the reality of the situation in French Guiana, where 10,000 of the 40,000 illegal aliens present were removed every year. In the applicant's submission, such figures made it impossible to review each individual situation prior to expulsion. Most of the removal orders were executed within forty-eight hours, with only very cursory formal verification, and were simply signed in bulk, as revealed by an investigation carried out by the National Commission for Policing Ethics (see paragraphs 45 and 46 above). They concerned all sorts of cases, including parents obliged to leave their children behind, who were then

placed in care, irremediably affecting their family life. The potential for irreversible effects was all the greater in that no prior verifications were made by the authorities or the courts.

66. The applicant then referred to the Court's case-law on international child abduction, according to which the passage of time could have irremediable consequences for relations between the child and the parent with whom the child did not live. He submitted that this approach could be transposed to the removal of aliens.

67. Furthermore, he argued, the requirement for a remedy to have suspensive effect in connection with a complaint under Article 8 would be consistent with the general trend in the case-law set by the *Čonka v. Belgium* judgment (no. 51564/99, ECHR 2002-I) and would logically enhance the subsidiarity of the Court's role.

68. The applicant also submitted that the margin of appreciation afforded to member States in the matter could not justify the legal exception applied in French Guiana in the light of France's commitment to protecting Convention rights.

69. Lastly, the applicant submitted that the Chamber judgment was at variance with the European Union's requirements, and in particular Directive 2008/115/EC of the European Parliament and of the Council.

3. Groupe d'information et de soutien des immigrés (GISTI), Ligue française des droits de l'homme (LDH) and Comité Inter-Mouvements Auprès des Évacués (CIMADE), third-party interveners

70. In a joint memorial the third-party interveners explained that France's overseas territories were characterised by exceptions to the law applicable in mainland France where the rights of immigrants were concerned. These territories were in fact a testing ground for immigration policies and police practices. In French Guiana, for example, unlike in mainland France, the police could carry out general identity checks without the prior authorisation of the public prosecutor. The conditions at holding facilities were unsatisfactory, and expulsions from French Guiana were carried out swiftly and on a massive scale. In 2010, for example, 6,073 people had been placed in the administrative holding centre, which had a capacity of 38 places, and 4,057 had been expelled after being held for 1.4 days on average. In that same year only 717 (11.8%) of the 6,073 people held there had been brought before the liberties and detention judge. In the submission of the third-party interveners, such results were entirely due to the lack of a suspensive remedy, to the detriment of the fundamental rights and freedoms protected by the Convention. This lack of a suspensive remedy applied even to aliens alleging violations of Articles 2 and 3 of the Convention or Article 4 of Protocol No. 4 – in disregard of the Court's case-law.

71. The purpose of the exceptions to the suspensive effect of the procedure – and also of the police methods used – was to make it easier to expel illegal aliens. The methods used by the police had been criticised by the National Commission for Policing Ethics, which had examined several serious cases in 2008 (including the death of a person who had been held in police custody and administrative detention). The expulsion rate for the Cayenne holding centre was 80% (compared with 20-30% in mainland France). Often, expulsion was simply a matter of ferrying the illegal aliens across the river, so it took no time at all (less than four hours). Brazil was the only country with which France had concluded an agreement on readmission from French Guiana, which made it possible to expel Brazilian nationals without any formalities. Departures for Brazil were organised every day and the individuals concerned were held for such a short time that it was difficult for CIMADE to assist them with the legal formalities.

72. In practice the vast majority of expulsions were carried out without judicial oversight and the removal orders were served on the persons concerned and executed in the absence of any real safeguards ensuring a review of their lawfulness. CIMADE observed, for example, that some persons were removed – after lodging an appeal accompanied by an urgent application for a stay of execution – before, or in some cases even after, the holding centre had received notice of a hearing. Once the person concerned had been removed, the urgent application became devoid of purpose and the court discontinued the proceedings.

73. The detainees often applied to the prefecture to reconsider its decision. Although the prefecture had full discretion in the matter, this was one of CIMADE's main means of action and produced good results, the personal situation of the detainees often being serious.

74. In that context CIMADE had observed multiple cases of interference with detainees' private and family lives: children separated from their parents and hurriedly entrusted to the care of strangers, schooling interrupted, households broken up, parents wrenched from their children, mothers of small children forced to stop breastfeeding, and so on. It also mentioned thousands of children who had been placed in ill-suited holding centres and deported, with or without their parents.

75. In conclusion, according to the third-party interveners, the introduction of a suspensive appeal against expulsion measures was an urgent necessity. The lack of such a remedy placed the persons concerned at risk of significant and sometimes irreversible infringements of their fundamental rights and freedoms and allowed the existence of exemptions from the law in a French territory that fell within the jurisdiction of the Court.

C. The Court's assessment

1. The applicant's victim status

76. The Court considers that the preliminary objection raised by the Government that the applicant is no longer a victim is so closely linked to the substance of the applicant's complaint that it must be joined to the merits of the application.

2. Compliance with Article 13 of the Convention taken in conjunction with Article 8

(a) Applicable general principles

77. In cases concerning immigration laws the Court has consistently affirmed that, as a matter of well-established international law and subject to their treaty obligations, the States have the right to control the entry, residence and expulsion of aliens. The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society (see *Boultif*, cited above, § 46, and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII).

By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

78. The Court has reiterated on numerous occasions that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they are secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. The States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII). However, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudła*, cited above, § 157).

79. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective (see *Klass and Others v. Germany*, 6 September 1978, § 67, Series A no. 28). When the "authority" concerned is not a judicial authority, the Court makes a point of verifying its independence (see, for example, *Leander v. Sweden*, 26 March 1987, §§ 77 and 81-83, Series A no. 116, and *Khan v. the United Kingdom*, no. 35394/97, §§ 44-47, ECHR 2000-V) and the procedural guarantees it offers applicants (see, *mutatis mutandis*, *Chahal v. the United Kingdom*, 15 November 1996, §§ 152-54, *Reports of Judgments and Decisions* 1996-V). Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Rotaru v. Romania* [GC], no. 28341/95, § 69, ECHR 2000-V).

80. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV).

81. In addition, particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X).

82. Where a complaint concerns allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), and reasonable promptness (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV). In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Gebremedhin [Gaberamadhien]*, cited above, § 66, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012). The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention. Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for

complaints under Article 4 of Protocol No. 4 (see *Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206).

83. By contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see *M. and Others v. Bulgaria*, no. 41416/08, §§ 122-32, 26 July 2011, and, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 133, 20 June 2002).

(b) Application of these principles to the present case

84. The Court notes that the question in issue concerns the effectiveness of the remedies used by the applicant in French Guiana, at the time of his removal, to defend a complaint under Article 8 of the Convention. In this regard the Court considers it necessary to reiterate that where immigration cases are concerned, such as that of the applicant, its sole concern, in keeping with the principle of subsidiarity, is to examine the effectiveness of the domestic procedures and ensure that they respect human rights (see, *mutatis mutandis*, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-87, ECHR 2011, and *I.M. v. France*, no. 9152/09, § 136, 2 February 2012).

85. The Court further reiterates that Article 13 of the Convention does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in this regard (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 122, Series A no. 215, and, among other authorities, *G.H.H. and Others v. Turkey*, no. 43258/98, § 36, ECHR 2000-VIII).

86. In the present case the applicant made use of the remedies available to him prior to his removal under the system in force in French Guiana: he lodged an application with the Administrative Court for judicial review of the removal order, as well as an urgent application for a stay of its execution; he also subsequently lodged an urgent application with the same court for protection of a fundamental freedom.

87. The Court must accordingly determine whether the applicant had the benefit of effective safeguards to protect him against the execution of a removal order allegedly breaching Article 8.

88. The Court is bound first of all to note the chronology of the present case: after the applicant was arrested on the morning of 25 January 2007, an order was issued for his removal, and he was placed in administrative detention at 10 a.m. the same day and deported at 4 p.m. the following day. He was therefore removed from French Guiana less than thirty-six hours after his arrest.

The Court notes, like the applicant, that the reasoning given in the removal order issued by the prefect of French Guiana was succinct and stereotyped (see paragraph 17 above). The Court also notes that notice of the order was served on the applicant immediately after his arrest. These elements appear to demonstrate the cursory nature of the examination of the applicant's situation by the authorities.

89. The Court also notes that the parties disagreed as to the reason why the applicant's removal was ordered. According to the Government, the applicant's illegal situation in French Guiana was due to his own negligence, as he had failed to take steps to regularise his administrative status. The applicant, on the other hand, alleged that as he was in the year following his eighteenth birthday he was still entitled to apply to regularise his status, and in any event he was protected from any form of removal from French territory.

90. The Court notes that, as the applicant alleged when he first appealed to the domestic courts (see paragraph 18 above), regardless of the reason for his illegal situation at the time of his arrest, he was protected under French law against any form of expulsion (see Article L. 511-4 of the CESEDA). This was the conclusion reached by the Cayenne Administrative Court, which, after examining the evidence initially adduced by the applicant, proceeded to declare the removal order illegal (see paragraph 23 above).

91. Clearly, then, by 26 January 2007 the French authorities were in possession of evidence that the applicant's removal was not in accordance with the law and might therefore constitute an unlawful interference with his rights under Article 8 § 2 of the Convention (see paragraph 18 above). Like the Chamber, the Grand Chamber therefore considers that at the time of the applicant's removal to Brazil a serious question arose as to the compatibility of his removal with Article 8 of the Convention, and that he had an "arguable" complaint in that regard for the purposes of Article 13 of the Convention (see paragraph 53 above).

92. Turning next to the possibilities open to the applicant to challenge the decision to remove him, the Court observes that with the assistance of CIMADE he was able to apply to the Cayenne Administrative Court. In the Court's view the court to which his application was made fulfilled the requirements of independence, impartiality and competence to examine the complaints under Article 8.

93. However, it reiterates that, without prejudice to the issue of its suspensive nature, in order for a remedy to be effective and to avoid any

risk of an arbitrary decision, there must be genuine intervention by the court or "national authority".

94. In the present case the file submitted to the competent "national authority" cannot be said to have been particularly complex. The Court would reiterate that the applications lodged by the applicant contained clearly explained legal reasoning. In challenging the removal order the applicant alleged that it was both contrary to the Convention and illegal under French law. He referred, *inter alia*, to Article L. 511-4 of the CESEDA and presented detailed proof that most of his private and family life had been spent in French Guiana (see paragraph 18 above), thereby demonstrating that his case was sufficiently meritorious to warrant proper examination (see, *mutatis mutandis*, *I.M. v. France*, cited above, § 155).

Next, and above all, the Court is obliged to observe that, after applying to the Administrative Court on 26 January 2007[1] at 3.11 p.m., the applicant was deported to Brazil the same day at 4 p.m. In the Court's view the brevity of that time lapse excludes any possibility that the court seriously examined the circumstances and legal arguments in favour of or against a violation of Article 8 of the Convention in the event of the removal order being enforced.

The result is that at the time of his removal the applications lodged by the applicant and the circumstances concerning his private and family life had not been effectively examined by any national authority. In particular, bearing in mind the chronology of the facts of the present case, the Court cannot but note that no judicial examination was made of the merits of the applicant's pleadings or of his urgent application for interim measures.

95. While the urgent proceedings could in theory have been an opportunity for the court to examine the applicant's arguments and, if necessary, to stay the execution of the removal order, any possibility of that actually happening was extinguished because of the excessively short time between his application to the court and the execution of the removal order. In fact, the urgent-applications judge was powerless to do anything but declare the application devoid of purpose. So the applicant was deported solely on the basis of the decision of the administrative authority.

Consequently, in the circumstances of the present case the Court considers that the haste with which the removal order was executed had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. While the Court is aware of the importance of swift access to a remedy, speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness.

96. In the light of the above the Court considers that the manner in which the applicant's removal was effected was extremely rapid, even

1. Rectified on 18 December 2012: the text read: "26 January 2011".

perfunctory. In the circumstances, before he was deported, the applicant had no chance of having the lawfulness of the removal order examined sufficiently thoroughly by a national authority offering the requisite procedural guarantees (see paragraph 79 above).

97. As to the geographical location of French Guiana and the strong pressure of immigration there, the Government contended that these factors justified the exception to the ordinary legislation and the manner in which it was applied there. In view of the circumstances of the present case, the Court cannot subscribe to that analysis. It is certainly aware of the need for States to combat illegal immigration and to have the necessary means to do so, while organising domestic remedies in such a way as to make allowance for certain national constraints and situations.

However, while States are afforded some discretion as to the manner in which they conform to their obligations under Article 13 of the Convention, that discretion must not result, as in the present case, in an applicant being denied access in practice to the minimum procedural safeguards needed to protect him against arbitrary expulsion.

98. Lastly, concerning the danger of overloading the courts and adversely affecting the proper administration of justice in French Guiana, the Court reiterates that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements. In that connection, the importance of Article 13 for preserving the subsidiary nature of the Convention system must be stressed (see, *mutatis mutandis*, *Kudła*, cited above, § 152, and *Čonka*, cited above, § 84).

99. In the light of all the foregoing considerations, the Court finds that the applicant did not have access in practice to effective remedies in respect of his complaint under Article 8 of the Convention when he was about to be deported. That fact was not remedied by the eventual issue of a residence permit.

100. The Court must therefore dismiss the Government's preliminary objection concerning the applicant's loss of "victim" status within the meaning of Article 34 of the Convention, and holds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

102. The applicant claimed 32,000 euros (EUR) in respect of pecuniary damage, explaining that this covered the cost of living in Brazil for seven months and returning to French Guiana illegally. He also included damages in this sum for the fact that he had been unable to attend the training course he was supposed to undergo at the time of his removal as part of the requirements of court supervision, and for the fact that he had been unable to work until he obtained a residence permit for "private and family life".

103. He also claimed EUR 10,000 in respect of non-pecuniary damage.

104. The Government considered these sums manifestly excessive. Regarding pecuniary damage, they pointed out that the alleged violation concerned the applicant's removal to Brazil and not the residence permit issued to him. They therefore submitted that there was no link between the fact that the applicant had not been allowed to work and the alleged Convention violation. The Government explained that at the material time the applicant had not been employed or seeking employment.

105. As to the alleged non-pecuniary damage, the Government submitted that the finding of a violation would in itself constitute sufficient just satisfaction.

106. The Court sees no causal link between the violation found and the pecuniary damage allegedly sustained, and rejects the corresponding claim.

107. However, the Court considers that in the circumstances of the case the applicant must have experienced genuine distress and uncertainty which cannot be compensated solely by the finding of a violation. In consequence, ruling on an equitable basis, as required by Article 41, it awards the applicant the sum of EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

108. The applicant claimed EUR 2,500 for the costs and expenses incurred before the domestic courts. He submitted no documents in support of this claim. As to the proceedings before the Court, the applicant's counsel pointed out that his client had been without income and deprived of the possibility of working until 2009. His counsel had therefore advanced him the costs and fees and drawn up the corresponding invoices – one for the proceedings before the Chamber and one for the proceedings before the Grand Chamber. He submitted both invoices to the Court, each giving a detailed provisional breakdown of the expenses. The first invoice totalled EUR 14,960 and the second EUR 7,120, making a grand total of EUR 22,080. The applicant also explained that he had been granted legal aid for the proceedings before the Court.

109. The Government considered these sums disproportionate. Concerning the proceedings before the domestic courts, they submitted that

the sums sought did not correspond to the criteria laid down by the Court's case-law. As to the costs and expenses before the Court, the Government considered that EUR 3,000 was a reasonable amount to cover the costs incurred, minus the legal aid already received.

110. According to the Court's case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum. In the instant case the Court dismisses the claim for costs and expenses incurred in the domestic proceedings, as no receipts were submitted.

111. Next, in view of the applicant's situation, first after he was deported to Brazil and then when he had no residence permit allowing him to work in French Guiana until 2009, the Court has no doubt that he was impecunious during that period. It considers, in the circumstances, that the applicant should be awarded a sum in respect of the fees advanced to him by his counsel. That sum should make allowance, however, for the fact that the Court has found a violation of the Convention in respect of only one of the applicant's complaints before it, namely the complaint under Articles 13 and 8 of the Convention taken together. Under Article 41 only those costs and expenses which are reasonable as to quantum and were actually and necessarily incurred by the applicant in order to have the Court establish a violation of the Convention may be reimbursed. The Court dismisses, therefore, the remainder of the claim for costs and expenses (see, *mutatis mutandis*, *I.M. v. France*, cited above, § 171).

112. In view of the above and having regard to the documents in its possession, the Court considers it reasonable to award the applicant the sum of EUR 12,000 for the costs and expenses incurred in the proceedings before it. As to legal aid, the Court notes that although the applicant initially submitted a claim for legal aid, he failed to complete the necessary formalities. Consequently, as no legal aid was paid for the proceedings before the Court, no corresponding deduction need be made.

C. Default interest

113. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins to the merits* the Government's preliminary objection concerning the complaint under Article 13 of the Convention taken in conjunction with Article 8 and *dismisses* it;

2. *Holds* that there has been a violation of Article 13 of the Convention taken in conjunction with Article 8;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

(i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 December 2012.

Michael O'Boyle
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of the Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Kalaydjieva;

(b) concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić.

N.B.
M.O'B.

CONCURRING OPINION OF JUDGE KALAYDJIEVA

The present case raises no issue as to whether or not there existed a domestic remedy that should have allowed the applicant to defend his arguable claim under Article 8. The domestic law formally envisaged procedures for the judicial review of the expulsion order and acknowledged the competence of the domestic courts to suspend its execution in the face of risks of arbitrariness or violations of basic individual rights protected by the Convention.

The question of the effectiveness of these remedies arises only as a result of the discretion left to the police authorities to deport the applicant less than an hour after his attempt to avail himself of them. This hasty action effectively pre-empted any meaningful judicial review of the applicant's situation, leaving no reasonable chance for the courts to prevent potential violations of his rights by imposing an interim measure.

The question is not whether the applicant's rights deserved an interim measure. His situation could have involved any or no risk at all, but in the absence of any examination or possible review there is no reason to believe that the applicant's situation would have been examined more carefully had he risked exposure to torture and not "only" a violation of his rights under Article 8 of the Convention.

I have misgivings about the helpfulness, for the purposes of execution, of the finding in paragraph 93 of the judgment that "in order for a remedy to be effective and to avoid any risk of an arbitrary decision, there must be genuine intervention by the court or 'national authority'".

How "genuine" can the intervention be where there are lawful opportunities to disregard and pre-empt the competence of the relevant national authority? In my view only a statutory requirement to refrain from deporting the subject, at least until the courts have had a reasonable chance to decide whether or not the circumstances warrant a stay of execution, is capable of preventing this situation from recurring. Failing that, the individuals concerned will have to make do with a theoretical right to lodge urgent applications with the administrative court, which "may" in turn decide to exercise its theoretical power to suspend the measure (see paragraph 42 of the judgment).

As regards the consequences of the above politely formulated findings, I fully share the views of my learned colleagues Judges Spielmann, Berro-Lefèvre and Power, who stated in their joint partly dissenting opinion appended to the Chamber judgment:

> "At a time when the Court is faced with a sharp increase in Rule 39 requests (interim measures) – and is increasingly being expected to do the job of the domestic courts, albeit reluctantly – the introduction of suspensive remedies could reverse this trend: it would oblige the States to strengthen the guarantees they offer, and to strengthen the role of the domestic courts, thereby reinforcing the subsidiary nature of

the Court's role called for in the Interlaken Declaration and further emphasised in the İzmir Declaration (section A 3)."

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGE VUČINIĆ

The *De Souza Ribeiro* case concerns the control of undocumented migrants and the protection of their family life. At the heart of the dispute is the legal status of those who live on the margins of society and have nothing but the dream of a piece of land[1]. The applicant claimed that his right to an effective remedy against a breach of his right to family life was violated because of the lack of a suspensive remedy against his removal from French Guiana. The Government argued that no suspensive remedy was needed since at the time of the applicant's removal there was no danger of irreversible damage for him. The Government further reasoned that the specific geographical situation of French Guiana justified the inexistence in the law of a remedy with suspensive effect against the removal of undocumented migrants. Finally, the Government considered that the European Convention on Human Rights ("the Convention") did not guarantee migrants a right to a remedy with suspensive effect against their removal in order to safeguard their family life.

I share the Grand Chamber's conclusion that the applicant's claim is essentially right, but I am obliged to explain my own views on the case for two reasons. On the one hand, the judgment rejects, in its crucial paragraph 83, a standard of protection of migrants which is consistent with international human rights law and international migration law[2]. And on the other hand, the judgment does not provide a clear and defined standard for national authorities to comply with, leaving the door half open to the casuistic exercise of discretion by national authorities in cases of expulsion or removal with the risk of irreversible damage for the migrant's family life.

1. The image is drawn from the remarkable passage in John Steinbeck's "Of Mice and Men", 1937, where Crooks speaks about the dream of George and Lennie, two dispossessed migrant field workers: "I seen hundreds of men come by on the road an' on the ranches, with their bindles on their back an' that same damn thing in their heads ... every damn one of 'em's got a little piece of land in his head." With a very strong allegorical power, these two characters portray the tireless pursuit of migrants for a better future.

2. The term "migrant" is used in its strict legal meaning, to distinguish it from the term "refugee" (on the legal meaning of "refugee", see my separate opinion in *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012). A migrant is a third-country national or stateless person who entered a foreign country in order to live there permanently. If the migrant has been engaged in a "remunerated activity", he or she is a migrant worker. When the entrance or subsequent residence in the foreign country has been duly authorised, he or she is called a documented migrant. When the migrant's entrance or residence has not been authorised or is no longer authorised, he or she is called an undocumented migrant. The expression *sans papiers* ("without papers") is commonly used in some countries, mainly to designate migrants who have lost their legal status. That was the case of the applicant at the material time.

Thus, my opinion will be divided into two parts: in the first part I will discuss the nature of the effective remedy against the expulsion or removal of undocumented migrants in international human rights law and international migration law and establish the Convention standard; in the second part I will assess the facts of the case against the benchmarks which have been identified, taking into special account the particular personal circumstances of the applicant at the relevant time, the specific features of the respondent State's policy of removal of migrants in French Guiana, from both a legal and a *de facto* perspective, and the alleged exceptional geographical situation of French Guiana.

The expulsion of undocumented migrants in international law

In times of unemployment and fiscal constraints, States refrain from granting migrants equal access to civil and social rights and give preference to nationals over migrants. This policy not only challenges social cohesion in European countries, but goes to the heart of the principle of equality. By failing to acknowledge the civil and social rights of undocumented migrants, States become morally responsible for the commodification of those persons who live at the very bottom of the social ladder. This responsibility is not only moral, but also legal. As Cicero once put it, *Meminerimus autem etiam adversus infimos iustitiam esse servandam*[1].

In fact, undocumented migrants are not ignored by international law. Migrants have been gradually included in the core protection afforded by the main human rights treaties, under the auspices of the Committee on the Elimination of Racial Discrimination[2], the Human Rights Committee[3], the Committee on the Rights of the Child[4] and the Committee on Economic,

1. Marcus Tullius Cicero, *De officiis*, 1, 13 (41): "Let us not forget that justice should also be done to the most humble."

2. CERD General Recommendation No. 30: Discrimination against non-citizens, 1 October 2004, UN Doc. CERD/C/64/Misc.11/rev.3 (2004), paragraph 7, which states that legislative guarantees against racial discrimination apply to non-citizens "regardless of their immigration status".

3. HRC General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, paragraph 10, according to which the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness.

4. CRC General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, UN Doc. CRC/GC/2003/5, paragraph 1, and General Comment No. 6: Treatment of unaccompanied and separated children outside their countries of origin, 1 September 2005, UN Doc. CRC/GC/2005/6, paragraph 12, according to which the rights granted by the Convention must be available to all children, including migrant children.

Social and Cultural Rights[1,2]. Moreover, there is a clear trend in international law supporting an emerging legal status of undocumented migrants, with a large array of rights protected and duties imposed on persons who, for one reason or another, have migrated to or have remained without authorisation in the host country[3].

Within the United Nations, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("the Migrants Convention"), adopted by General Assembly Resolution 45/158 of 18 December 1990, sets the most important standard in international migration law[4]. The rationale of this Convention is

1. CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights, 2 July 2009, UN Doc. E/C.12/CG/20, paragraph 30, according to which the ground of nationality should not bar access to the rights enshrined in the International Covenant on Economic, Social and Cultural Rights, since it applies to everyone, including migrant workers, regardless of their legal status.

2. Based on a review of international human rights law, the Special Rapporteur on the human rights of non-citizens concluded that "all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective", in "The rights of non-citizens", Final report of the Special Rapporteur, Mr David Weissbrodt, UN Doc. E/CN.4/Sub.2/2003/23, 26 May 2003, p. 2.

3. There is no single comprehensive international instrument regulating migration and establishing the rights and duties of migrants. Six universal instruments provide the legal architecture for the protection of migrants' human rights as well as for international cooperation to regulate migration. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adapts the rights provided for in the 1966 International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights to the specific situation of migrant workers. The International Labour Organization (ILO) Migration for Employment Convention (Revised), 1949 (C-97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (C.143), and the two related Recommendations, and the ILO Multilateral Framework on Labour Migration endorsed by the ILO Governing Body in March 2006, establish the principles for a rights-based approach to labour migration. Based on these international instruments, a scientifically autonomous branch of international law was born: international migration law.

4. The Migrants Convention sets a universal standard of non-discriminatory treatment of working migrants, although the major migrant-receiving countries have not yet ratified it. This standard is also valid for Europe, in spite of the non-ratification of the Convention by the majority of the Council of Europe's member States, including the respondent State in this case. A parallel could be established with the Convention on the Rights of Persons with Disabilities or the Convention on the Legal Status of Children born out of Wedlock. In *Glor v. Switzerland* (no. 13444/04, § 53, ECHR 2009), the Court referred to the Convention on the Rights of Persons with Disabilities as the basis of "a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment", despite the fact that the relevant facts took place before the adoption of the Convention by the General Assembly and the respondent State had not ratified the Convention at the time of the Court's judgment. In *Mazurek v. France* (no. 34406/97, § 49, ECHR 2000-II), the Court invoked the Convention on the Legal Status of Children born out of Wedlock, which at that time had been ratified by only a third of the member States of the Council of Europe, but not by France, as evidence of the "great importance" attached by member States to the

explicitly stated in its Preamble, which recognises that undocumented migrants face serious human rights violations, that appropriate action should be encouraged to prevent and eliminate clandestine movements and trafficking in migrant workers and that recourse to the employment of undocumented migrants will be discouraged if the fundamental human rights of all migrant workers are recognised. With those challenges on the horizon, the Migrants Convention boldly acknowledged a wide range of civil, political, economic and social rights for migrant workers and their relatives, documented as well as undocumented, including the right of access to the courts and the right of appeal against an expulsion decision[1]. According to Article 22, paragraph 4, of the said Convention: "Except

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equal legal treatment of children born out of wedlock. In other words, the universality of human rights standards set out in treaties and conventions which aim to put an end to situations of discrimination does not necessarily depend on the number of ratifying parties. Moreover, the universality of the Migrants Convention is further reinforced by the previous Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by the General Assembly in Resolution 40/144 of 13 December 1985. This Declaration, which paved the way for the Convention, embodies basic principles for the protection of human rights without discrimination based upon nationality or residence status. In particular, Article 5 lists some basic civic rights, such as the right to protection against arbitrary or unlawful interference with privacy, family, or correspondence and the right to equality before the courts, and Article 7 provides that a migrant lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority.

1. In comparative law, there are three systems regulating the legal effect of an appeal against a decision of expulsion, deportation, removal or any other similar measure. States can establish that the appeal has a suspensive effect on the impugned measure or that it only has a devolutive effect (*appellatio in devolutivo*). In the second case, the appeal merely devolves on the appellate authority the competence to take cognisance of, and also to decide, the case in question, without any stay of the effects of the appealed decision while the review is carried out. The appeal may be lodged from outside the host country and the review may thus occur *in absentia*. In the first case, States have two alternatives: the remedy can be accompanied by an automatic suspensive effect or by a discretionary suspensive effect on the impugned decision. The difference is not without significance. If the appeal has automatic suspensive effect, it immediately stays the execution of the impugned decision. If the suspensive effect of the appeal is discretionary, the appellant must request the suspension of the expulsion order and the reviewing authority has the option, at the outset of the appeal proceedings, to stay the impugned decision until it completes its review. In this case, the impugned decision cannot be executed before the reviewing authority has taken a decision on the request to stay. The standard set in the present Grand Chamber judgment's reasoning is not clear, since paragraph 83 does not require an automatically suspensive appeal against expulsion orders when interference with family life is alleged, but paragraph 96 criticises the applicant's removal prior to the examination of the "lawfulness of the removal order" by an independent authority, which implies that until the removal order is examined on its merits there should be no removal.

where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion."[1]

Non-working migrants enjoy the same protection, according to international human rights law. The International Covenant on Political and Civil Rights prohibits arbitrary or unlawful interference with the migrant's family[2] and provides for the right of access to a court, including the right to a suspensive appeal against the expulsion, deportation or removal of undocumented migrants. In 2008 the Human Rights Committee examined specifically the situation in French Guiana and vehemently censured the respondent State in this case in the following terms: "In addition, no recourse to the courts is available to persons deported from the overseas territory of Mayotte, involving some 16,000 adults and 3,000 children per year, or in French Guiana or Guadeloupe (Articles 7 and 13). The State Party should ensure that the return of foreign nationals, including asylum-seekers, is assessed through a fair process that effectively excludes the real

1. The case-law of the Committee on Migrant Workers has been very attentive to the effective guarantee of an appeal against expulsion and removal orders (see Concluding Observations on Argentina, UN Doc. CMW/C/ARG/CO/1, 2 November 2011, paragraph 25; Concluding Observations on Chile, UN Doc. CMW/C/CHL/CO/1, 19 October 2011, paragraphs 28-29; Concluding Observations on Guatemala, UN Doc. CMW/C/GTM/CO/1, 18 October 2011, paragraphs 22-23; Concluding Observations on Mexico, UN Doc. CMW/C/MEX/CO/2, 3 May 2011, paragraph 10; Concluding Observations on Ecuador, UN Doc. CMW/C/ECU/CO/2, 15 December 2010, paragraphs 29-30; Concluding Observations on Albania, UN Doc. CMW/C/ALB/CO/1, 10 December 2010, paragraphs 23-24; Concluding Observations on Algeria, UN Doc. CMW/C/DZA/CO/1, 19 May 2010, paragraphs 22-23; Concluding Observations on El Salvador, UN Doc. CMW/C/SLV/CO/1, 4 February 2009, paragraphs 27-28; Concluding Observations on Bolivia, UN Doc. CMW/C/BOL/CO/1, 2 May 2008, paragraphs 29-30; Concluding Observations on Colombia, UN Doc. CMW/C/COL/CO/1, 22 May 2009, paragraphs 27-28; Concluding Observations on Ecuador, UN Doc. CMW/C/ECU/CO/1, 5 December 2007, paragraphs 25-26; and Concluding Observations on Mexico, UN Doc. CMW/C/MEX/CO/1, 20 December 2006, paragraph 13). From this case-law it is apparent that the appeal should have an automatic suspensive effect, since migrant workers and members of their families should only be expelled from the territory of the State Party pursuant to a decision taken by the competent authority in conformity with the law, and reviewed on appeal. Accordingly, the Committee recommends that States Parties "extend temporary residence permits for the period during which an appeal against decisions of the DNM [Dirección Nacional de Migraciones] on the legality of a migrant's stay is pending before the competent administrative or judicial authorities".

2. Human Rights Committee in *Madafferi v. Australia*, Communication No. 1011/2001, 26 August 2004, UN Doc. CCPR/C/81/D/1011/2001, paragraph 9.8; *Bakhtiyari v. Australia*, Communication No. 1069/2002, 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002, paragraph 9.6; and *Winata v. Australia*, Communication No. 930/2000, 6 August 2001, UN Doc. CCPR/C/72/D/930/2000, paragraph 7.3.

risk that any person will face serious human rights violations upon his return. Undocumented foreign nationals and asylum-seekers must be properly informed and assured of their rights, including the right to apply for asylum, with access to free legal aid. The State Party should also ensure that all individuals subject to deportation orders have an adequate period to prepare an asylum application, with guaranteed access to translators, and a right of appeal with suspensive effect. ... The State Party should exercise the utmost care in the use of such assurances and adopt clear and transparent procedures allowing review by adequate judicial mechanisms before individuals are deported, as well as effective means to monitor the fate of the affected individuals."[1] This position of the Human Rights Committee is evidently valid not only for asylum-seekers, but also for all undocumented migrants who face a decision of expulsion, deportation or removal or any similar measure, as the Committee itself has stated. In other Committee decisions, the protection of all migrants, irrespective of their legal status, has been stressed even more clearly. The most striking example is the Concluding Observations of the Human Rights Committee on Belgium, of 12 August 2004, where the Committee affirmed in a straightforward way that "[t]he State Party should extend the deadline for lodging complaints and give complaints a suspensive effect on expulsion measures. ... It should give suspensive effect not only to emergency remedies but also to appeals accompanied by an ordinary request for suspension filed by any migrant against an expulsion order concerning him or her"[2]. The same firm approach was sustained in the Concluding Observations on Ireland, of 30 July 2008, where the Committee recommended that the State "should also introduce an independent appeals procedure to review all immigration-related decisions. Engaging in such a procedure, as well as resorting to judicial review of adverse decisions, should have a suspensive effect in respect of such decisions"[3].

In fact, this position of the Committee is in line with its own interpretation of the legal status of migrants within the Covenant, expressed in its General Comment No. 15, where the Committee established that "Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law', its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, Article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by

1. UN Doc. CCPR/C/FRA/CO/4, 31 July 2008, paragraph 20.
2. CCPR, Concluding Observations on Belgium, UN Doc. CCPR/CO/81/BEL, 8 December 2004, paragraphs 21 and 23.
3. CCPR, Concluding Observations on Ireland, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, paragraph 19.

further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of Article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when 'compelling reasons of national security' so require. Discrimination may not be made between different categories of aliens in the application of Article 13". Although these considerations were aimed at migrants lawfully present on the territory, the Committee also added that whenever the legality of a migrant's presence on the territory was in dispute, the guarantees of Article 13 should apply[1].

In its General Recommendation No. 30 on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination expressed the same concern that non-citizens should have equal access to effective remedies, including the right to challenge expulsion or removal orders, and be allowed effectively to pursue such remedies. Non-citizens should not be returned or removed to a country or territory where they are at risk of being subjected to serious human rights abuses, and expulsions of non-citizens – especially long-term residents – that would result in disproportionate interference with the right to family life should be avoided[2].

The Committee on the Rights of the Child also addressed the issue of expulsion or removal of alien children. In its General Comment on the treatment of unaccompanied and separated children outside their country of origin, the Committee stated that States Parties should not return children to a country where there are substantial grounds for believing that there is a

1. CCPR General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, UN Doc. HRI/GEN/1/Rev.6 at 140 (2003), paragraph 9. Referring to the case-law of the Human Rights Committee, and specifically to *Hammel v. Madagascar*, no. 155/1983, *Giry v. Dominican Republic*, no. 193/1985, and *Canon Garcia v. Ecuador*, no. 319/1988, Manfred Novak summarised the position of the Committee in the following terms: "These decisions and formulations make it clear that the Committee interprets Article 13 in such a way that States Parties must suspend an expulsion decision pending appeal, so long as this is not opposed by compelling reasons of national security" (Manfred Novak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised edition, 2005, p. 299). This summary has been confirmed by other renowned commentators of the Covenant, like Pieter Boeles, *Fair Immigration Proceedings in Europe*, Martinus Nijhoff, The Hague, 1997, p. 124; and Sarah Joseph, Jenny Schutz and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, second edition, OUP, 2004, p. 382: "it does not seem that reviews *in absentia* conform to the need to provide potential deportees with 'full facilities for pursuing' remedies against expulsion, in accordance with paragraph 10 of General Comment 15."

2. CERD General Recommendation No. 30, quoted above, paragraphs 25 and 27-28, and CERD, Concluding Observations on the Dominican Republic, 16 May 2008, paragraph 13.

real risk of irreparable harm to the children, "such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention [on the Rights of the Child]", namely the right to life, physical integrity and liberty[1].

Regional human rights protection systems in Africa, America and Europe have confirmed the trend described above. In the African system, the right to a fair trial, including the right to appeal before a judge and the right to be provided with a reasoned decision, has also been applied to expulsion, deportation or removal procedures. In *ZLHR and IHRD v. Republic of Zimbabwe*, the African Commission on Human and People's Rights found it clear that the respondent State had not wanted the applicant to be heard by the Supreme Court while deportation proceedings were pending. The respondent State had deported him before the date scheduled for the hearing, thus effectively preventing him from being heard. The Commission added that the applicant could still have proceeded against the respondent State from wherever he was deported to, but by immediately deporting him the respondent State had frustrated the judicial process that had been initiated[2].

In the American human rights protection system, the Inter-American Court of Human Rights took a position of principle in its Advisory Opinion OC-18-03 on the juridical condition and rights of undocumented migrants, of 17 September 2003. There, it affirmed the fundamental principle that "non-discrimination and the right of equality are *jus cogens* applicable to all residents regardless of immigration status". Thus, the right to due process of law should be recognised as one of the minimum guarantees that should be offered to any migrant, irrespective of his or her migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination. The migratory status of a person cannot constitute a justification in depriving him or her of the enjoyment and exercise of his or her human rights, and upon taking up a work-related role the migrant acquires rights by virtue of being a worker that should be recognised and guaranteed independently of his or her regular or irregular situation in the State of employment[3]. In addition, the Inter-American Court

1. CRC General Comment No. 6, quoted above, paragraph 27.

2. *ZLHR and IHRD v. Republic of Zimbabwe*, no. 294/04, paragraphs 106-09; and, similarly, *Kenneth Good v. Republic of Botswana*, no. 313/05, paragraphs 179-80 and 194-95; *IHRDA v. Angola*, no. 292/04, paragraphs 58-59; *Amnesty International v. Zambia*, no. 212/98, paragraphs 41, 50 and 59-61; *OMCT and others v. Rwanda*, nos. 27/89, 46/91, 49/91 and 99/93 (1996), paragraph 34; *UIADH (on behalf of Esmaila Connateh & 13 others) v. Angola*, no. 159/1996, paragraphs 39-40 and 61-65; and *RADDH v. Zambia*, no. 71/1992, paragraph 27.

3. Advisory Opinion on Undocumented Migrants, paragraphs 124-27; and in the same vein, *Raghda Habbal and son v. Argentina*, report no. 64/08, case 11.691, 25 July 2008, paragraph 54; *Riebe Star and Others v. Mexico*, report no. 49/99, case 11.160, 13 April 1999, paragraph 71; *Juan Ramón Chamorro Quiroz v. Costa Rica*, report no. 89/00,

acknowledged that neither the text nor the spirit of the American Convention established a restriction as to whether the irreparable damage should be against life or physical integrity, and consequently other rights should be subjected to protection similar to that afforded to life and personal integrity. In other words, the risk of irreparable damage to a migrant's right to family life, for instance, should be assessed with the same guarantees of due process as any other risk of irreparable damage to a Convention right[1].

In the European human rights protection system, different views have clashed on the issue. Many years after the approval of the European Convention on the Legal Status of Migrant Workers[2], the Council of Europe still takes a divided position on the ambit of the procedural guarantees against the expulsion, deportation or removal of migrants, the Committee of Ministers, the Parliamentary Assembly and the European Commission against Racism and Intolerance having expressed different points of view. On the one hand, Guideline 5 of the 2005 Committee of Ministers Twenty Guidelines on forced return provides: "In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution. ... The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1." In its Commentary to the Guidelines, the Committee explained that "[t]he requirement according to which the exercise of the remedy should have the effect of suspending the execution of the removal order when the returnee has an arguable claim that he or she is likely to be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1 is based on the judgment delivered by the European Court of

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case 11.495, 5 October 2000, paragraphs 34-36; and *José Sánchez Guner Espinales and others v. Costa Rica*, report no. 37/01, case 11.529, 22 February 2001, paragraphs 43-45; the report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraphs 401 and 409; the Annual Report of the Commission on Human Rights 2001, 16 April 2001, OAS Doc. OEA/Ser./L/V/II.114, Third Progress Report of the rapporteurship on migrant workers and their families, paragraph 77; and the Report of the Commission on the situation of human rights in the Dominican Republic, 7 October 1999, OAS Doc. OEA/Ser.L/V/II.104, paragraphs 325-34, 350-62 and 366.

1. Inter-American Court Orders of 18 August 2000, 12 November 2000 and 26 May 2001, proferred in the case of Haitians and Dominicans of Haitian origin expelled from the Dominican Republic.

2. ETS no. 93, 24 November 1977. This Convention, which provides for an important set of inter-State obligations in regard to working migrants, but only applies to migrants who are nationals of other Contracting Parties "lawfully resident and working regularly", and on the basis of reciprocity, does not comprise a specific rule on expulsion or removal proceedings.

Human Rights in the case of *Čonka v. Belgium* (no. 51564/99, § 79, ECHR 2002-I)". Hence, the Committee of Ministers does extend the reasoning in *Čonka* to all situations of risk to life, physical integrity or "other situations which would, under international law or national legislation justify the granting of international protection". Accordingly, a remedy with an automatic suspensive effect should be provided for in regard to the human rights of those in need of international protection (as established in Guideline 5, paragraph 3) and a remedy with a discretionary suspensive effect should be foreseen in all other cases (as provided for in Guideline 5, paragraph 1).

The Parliamentary Assembly, on the other hand, has always stressed the automaticity of the suspensive effect of the remedy against the expulsion or removal of all migrants. It is significant that this broader approach was expressed before and after the Guidelines of the Committee of Ministers. In its Resolution 1509 (2006) on the human rights of irregular migrants, the Parliamentary Assembly stated: "international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights. ... an irregular migrant being removed from a country should be entitled to an effective remedy before a competent, independent and impartial authority. The remedy should have a suspensive effect when the returnee has an arguable claim that, if returned, he or she would be subjected to treatment contrary to his or her human rights ... the right to respect for private and family life should be observed. Removal should not take place when the irregular person concerned has particularly strong family or social ties with the country seeking to remove him or her and when the removal is likely to lead to the conclusion that expulsion would violate the right to private and/or family life of the person concerned."[1,2]

1. In a preparatory document, the rapporteur of the Committee on Migration, Mr van Thijn, left no doubt about the intention of the Parliamentary Assembly to include the right to family life among those rights which should be protected by a mechanism of review with a suspensive effect (Parliamentary Assembly, Doc. 10924, 4 May 2006, "Human rights of irregular migrants", Report of the Committee on Migration, Refugees and Population).

2. This broader position is consistent with PACE Recommendation 1504 (2001) on non-expulsion of long-term immigrants, which provided that States should "grant persons subject to expulsion the right to an appeal with suspensive effect, because of the irreversible consequences of enforcing the expulsion", and PACE Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, which foresaw that States should "introduce into law the legal guarantees necessary for persons whose rights are violated during an expulsion procedure to be able to effectively exercise their right to appeal, namely: ... the presence of the victim in the State which decided to expel him or her throughout the duration of the proceedings brought about by the appeal, if necessary by means of: the suspension of an expulsion

In the same vein, the European Commission against Racism and Intolerance (ECRI) has often tackled the rights of undocumented migrants in various country reports and criticised the fact that "appeals against negative decisions do not have a suspensive effect on deportations"[1]. A clear link between the threat to migrants' family life and the suspensive effect of review of deportation orders was established in the Second Report on Slovenia, 8 July 2003, paragraph 53: "ECRI is very concerned to learn that, although some of the persons were born in Slovenia or have been living since their childhood in the country and/or have close family links in Slovenia, it appears that they might have been deported. ECRI draws attention to Article 8 of the European Convention on Human Rights and the case-law of the European Court of Human Rights according to which deportation of a foreigner should not infringe his/her right to family life. ECRI also considers that any non-citizen who is deported or threatened with deportation should be given the possibility of exercising all the rights guaranteed by national and international law, including a suspensive appeal against deportation before a court and all means of defence before this court such as the right to a free interpreter and to free legal aid if needed."[2]

Finally, within the European Union, the preamble of Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals states that expulsion decisions have to be adopted in accordance with the rights enshrined in Articles 3 and 8 of the Convention, not only in regard to migrants suspected of having committed serious crimes, but also to migrants who broke national rules on the entry and residence of aliens. Furthermore, 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

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procedure against a person still present in the State from which he or she is to be expelled; or the return of an expelled person to the State which expelled him or her".

1. See ECRI's Third Report on Italy, 16 May 2006, paragraph 105. In this report, the Commission also referred to Italian Constitutional Court judgment no. 222 of 8-15 July 2004, which declared unconstitutional the provision contained in Article 13, subsection 5-*bis* of the Consolidated Text on Immigration (as introduced by Decree Law No. 51 of 2002, converted into Law No. 106 of 2002) inasmuch as it did not provide for validation of the deportation in a proper hearing, before the execution of the order and with due defence guarantees.

2. Similar concerns were expressed in the Fourth Report on Spain, 8 February 2011, paragraph 190; the Third Report on Ireland, 24 May 2007, paragraph 69; the Third Report on Portugal, 13 February 2007, paragraph 80; the Third Report on Romania, 21 February 2006, paragraph 115; the Third Report on Estonia, 21 February 2006, paragraph 71; the Third Report on Sweden, 14 June 2005, paragraph 50; the Third Report on Belgium, 27 January 2004, paragraph 29; the Second Report on Lithuania, 15 April 2003, paragraph 50; the Second Report on Portugal, 4 November 2002, paragraph 30; the Second Report on Finland, 23 July 2002, paragraph 50; the Second Report on Estonia, 23 April 2002, paragraph 32; and the First Report on the Russian Federation, 26 January 1999, paragraph 38.

third-country nationals has a specific provision on the existence of an appeal against removal. Article 13 provides for the possibility of the suspensive effect of the appeal being determined by the appeal body. In other words, European Union member States should at least provide for a review with discretionary suspensive effect[1]. A refusal by the reviewing authority of the request for a stay of execution runs the risk of error and consequently of causing irreversible damage, unless the case is manifestly ill-founded; but if that is the case, the appeal should be immediately disposed of for lack of any plausible grounds. When the case is not manifestly ill-founded, a stay of execution of the appealed decision is called for by the very nature of the review proceedings. In other words, either the appeal against an expulsion or removal order is manifestly ill-founded and therefore the reviewing authority is in a position to take an immediate decision on it, making the suspension of the effects of the appealed expulsion order otiose; or the appeal is not manifestly ill-founded, and a refusal of suspensive effect could seriously compromise the very aim of the review proceedings and deprive the guarantee provided to the appellant of its meaning. Other than the inadmissible margin of risk of irreversible damage, it should be kept in mind that when an application for review has to be made outside the host country it cannot be made in as fair a way as within the country, mainly because of the obvious practical difficulties that migrants face to keep in

1. The critique of this solution has already been made with sound arguments: "In practice, the lack of information or the short delay between the issuing of the removal order and its application may lead to a situation in which migrants are removed before reaching the end of the appeal procedure. The suspensive effect of appeal against a return or removal order should be automatic in order to allow migrants to stay in the territory of member States before a final decision about their removal is taken", in Caritas Europa, the Churches' Commission for Migrants in Europe, the Commission of the Bishops' Conferences of the European Community, the International Catholic Migration Commission, the Jesuit Refugee Service Europe, and the Quaker Council for European Affairs, Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM(2005)391, March 2006; in the same vein, see also the Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)391 final); and the Platform for International Cooperation on Undocumented Migrants, Comment on the Green Paper on a Community return policy for illegal residents presented by the European Commission (COM(2002)175 final). Before the House of Lords, the Refugee Council and Amnesty International expressed their views that all those subject to a removal order should have an in-country right of appeal and be able to raise fears of treatment on return contrary to Article 8 of the Convention. The Immigration Law Practitioners' Association went even further, considering that only in exceptional circumstances should a remedy not have suspensive effect. The House of Lords European Union Committee, in its 32nd Report of Session 2005/06, "Illegal Migrants: proposals for a common EU returns policy", concluded that "[i]t is unacceptable that the important question whether or not the lodging of an appeal should suspend the return process is left entirely to the discretion of member States".

touch with their lawyers or the authorities in the host State and to put forward the evidence capable of substantiating their case. The hard reality of the minimal number of cases of expelled aliens who successfully appeal from overseas and return to the host country is overwhelming evidence that a non-suspensive appeal against an expulsion, deportation or removal order is nothing but a self-fulfilling prophecy[1].

Summing up, it is apparent that international human rights and international migration law do impose at least a twofold procedural guarantee in respect of undocumented migrants: firstly, they have the right to access to courts in the host country in order to uphold their human rights, including their family rights, and, secondly, they have the right to an automatic suspensive review of any order of expulsion, deportation, removal or any similar measure when they face the risk of alleged irreversible damage to their family lives. The underlying substantive principle is that family unity precludes any public interest in expulsion, deportation, removal or the like, and should therefore be maintained as far as possible[2].

The expulsion of undocumented migrants under the Convention

According to the Court's well-established case-law, a State is entitled to control the entry of migrants into its territory and their residence there. If the Convention does not guarantee *per se* the right of a migrant to enter or to reside in a particular country, immigration policies are not outside the ambit

1. See the House of Lords European Union Committee, in its 32nd Report of Session 2005/06, "Illegal Migrants: proposals for a common EU returns policy", paragraph 93.

2. This conclusion is shared by the International Commission of Jurists (ICJ). In its Practitioners Guide No. 6 on "Migration and International Human Rights Law", 2011, the Commission argues that "to provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed" (p. 142). "Furthermore, particularly in cases of expulsions, the remedy must have the power to suspend the situation of potential violation when the lack of suspension would lead to irreparable harm/irreversible effects for the applicant while the case is being considered" (p. 262). Therefore, the obvious conclusion is that "non-suspensive rights of review are unlikely to provide effective protection" (p. 134). The work of the ICJ Eminent Jurists Panel on terrorism, counter-terrorism and human rights is also worth mentioning. In its final report, the Panel stated that there is "no doubt that, particularly when a deportation decision affects a long-term or permanent resident, and where there is a serious risk of the deportee being subjected to serious human rights violations upon return, only a hearing by an independent judicial body constitutes an acceptable process. Such an appeal should have a suspensive effect, particularly where irreparable harm is at stake" ("Assessing Damage, Urging Action", Report of the Eminent Jurists Panel on terrorism, counter-terrorism and human rights, International Commission of Jurists, Geneva, 2009, p. 119).

of the Court's jurisdiction[1]. Moreover, migrants do have rights protected by the Convention, regardless of their legal status in the host country. The fact that a migrant has not been authorised to enter or reside in a country does not deprive him or her of his or her human rights, including the right to family life.

The Court has also repeatedly sustained that a remedy against the expulsion, deportation or removal of migrants or any similar measure is only effective if it has a suspensive effect, at least in cases where the measure would allegedly put the migrant in danger of irreversible damage. Irreversible damage is usually linked to physical damage, such as that resulting from torture and ill-treatment[2]. But the Court gave up this link in *Čonka*. There, the notion of irreversible damage was derived from the prohibition of the collective expulsion of aliens, regardless of their legal status[3]. Thus, *Čonka* set a principle according to which potential irreversible damage may be invoked without the simultaneous allegation of danger of torture or ill-treatment. Moreover, the Court reasoned that an effective remedy requires full suspensive effect, but discretionary suspensive effect is inconsistent with the required effectiveness of the remedy. Two arguments supported this statement: firstly, "it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly" (see *Čonka*, cited above, § 82), and, secondly, "it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement" (ibid., § 83). A suspensive effect which depends "in practice" on the discretion of national authorities does not replace the procedural guarantee offered by a remedy with automatic suspensive effect, even if the risk of error is in practice negligible. When national authorities are not necessarily required to defer execution of the expulsion, deportation or removal order while an appeal is pending, the guarantee of an effective remedy is no longer real, but virtual.

For the sake of a consistent interpretation of the Convention, the instant case should be resolved in the light of these same principles on the necessary automaticity of the remedy against any expulsion, deportation or removal order whose execution would cause irreversible damage[4]. In

1. See the groundbreaking judgments of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI.
2. See *Jabari v. Turkey*, no. 40035/98, ECHR 2000-VIII.
3. See *Čonka*, cited above, §§ 77-79 and 85, reiterated in *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 58, ECHR 2007-II, and *Hirsi Jamaa and Others*, cited above, § 206.
4. The Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, 6 September 1978, § 68, Series A no. 28, and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 47, ECHR 2005-X).

addition, the Court has affirmed many times that the separation of the members of a family may cause irreversible damage to them, involving a possible violation of Article 8, which should be avoided through a Rule 39 measure[1]. Here again, the consistency of the Court's jurisprudence requires that the same broad understanding of the notion of "irreversible damage" be upheld in the interpretation of Article 13[2].

The principle of subsidiarity itself also points in that direction. Member States should assume their responsibility in dealing fully and as swiftly as possible with migrants' claims of breaches of Convention rights, including Article 8 claims, in order to avoid putting the Court in the situation of a first-instance court for the protection of the family life of alleged

1. See, for instance, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010, and *Nunez v. Norway*, no. 55597/09, 28 June 2011. The very same line of reasoning has been upheld by the Inter-American Court of Human Rights in regard to provisional measures to safeguard the right to family life in the Haitian migrants' case mentioned above.

2. There is no plausible reason for a double-standard policy which requires a remedy with automatic suspensive effect when there is a risk which affects an Article 2 or 3 right or an Article 4 of Protocol No. 4 right and only requires "examination with sufficient procedural safeguards and thoroughness" when there is a risk which affects an Article 8 right (see paragraph 83 of the present judgment). Neither is there a convincing reason for a double standard which imposes an automatic suspensive review in cases of expulsion or removal of documented migrants (Article 1 of Protocol No. 7) and accords a mere devolutive or even a discretionary suspensive review in cases of expulsion or removal of undocumented migrants. The judgment does not present any reason for these double standards. Article 8 rights are not minor rights which deserve less protection. As the third parties in this case have shown in their observations to the Grand Chamber, undocumented migrants in French Guiana face very serious problems which may lead to the destruction of their families and to long-lasting, profound and irreversible psychological damage to the persons involved. We should take the right to family life very seriously. Therefore, an equal guarantee should be provided to an expelled applicant with an Article 8 claim. Furthermore, the criterion of "examination with sufficient procedural safeguards and thoroughness" is vague. It is particularly regrettable that the judgment did not provide a definition of "sufficient procedural guarantees". Instead, it equates them with the prerequisite of "thoroughness". In reality, the concept of "thoroughness" is equivalent to the time the national authorities took to examine the applicant's appeal. According to the judgment, the examination was not "thorough" because it was "cursory" (paragraph 88), "excessively short" (paragraph 95) and "extremely rapid, even perfunctory" (paragraph 96). In other words, the majority's repeated, indeed sole, point of criticism of the domestic authorities' conduct is the "haste with which the removal order was executed" (paragraph 95) and the "brevity of [the] time lapse" (paragraph 94) between the filing of the application to the Administrative Court and the execution of the removal order by the domestic authorities: as the Court was keen to emphasise, it took no more than thirty-six hours to remove the applicant from French Guiana after his arrest. The majority's interpretation leads to an obvious question: when will the examination be "thorough" enough? After forty-eight hours, three days, four days ... With this extremely volatile time criterion, a shadow of uncertainty clouds the application of the Convention guarantee of an effective review of the removal order. The line between effective and ineffective review becomes blurred, and the minimum procedural prerequisites that must be fulfilled for a review to qualify as an effective remedy in expulsion or removal procedures are unclear.

undocumented migrants. Hence, they should provide for an effective remedy against removal, expulsion, deportation or any similar measure where the measure would allegedly put the migrant in danger of irreversible damage to his or her right to family life. By so doing they would make it possible for many founded complaints based on Rule 39 to be dealt with in good time at the national level.

Thus, in the light of these two fundamental tenets of interpretation of the Convention – the principle of a systematically consistent interpretation and the principle of subsidiarity – one has to conclude that Article 13 read in conjunction with Article 8 does impose the necessity of an automatic suspensive remedy against expulsion, deportation, removal or any other similar measure when it would allegedly put migrants in danger of irreversible damage to their family lives[1]. Only this conclusion gives the right to family life the place it deserves in the European human rights protection system[2].

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1. In reality, the lack of a remedy with a suspensive effect casts doubt on the effectiveness of the applicant's defence in the removal procedure, and thus on its basic fairness. In other words, this is a question that falls within the scope of Article 6, since the removal procedure directly affects the applicant's civil right to family life. As I mentioned in my concurring opinion appended to *Hirsi Jamma and Others*, the arguments exposed by the majority in *Maaouia v. France* ([GC], no. 39652/98, ECHR 2000-X) do not convince me (for further criticism of the *Maaouia* case-law and the Court's "narrow positions on migration-related cases", see "The European Court of Human Rights and the Rights of Migrants Affected by Deportation Policies, Procedures and Jurisprudence", International Federation for Human Rights & Migrants Rights International, 2011, pp. 29-30). I have serious reservations about accepting the narrow interpretation of the Convention system of protection of migrants according to which Article 6 does not include immigration issues and only Article 1 of Protocol No. 7 affords some limited procedural guarantees to migrants lawfully resident. On top of those arguments already exposed in my concurring opinion in *Hirsi Jamaa and Others*, it should be retained that such a restrictive interpretation of the right of access to courts unfoundedly discriminates between migrants and nationals, since Article 1 of Protocol No. 7 affords documented migrants ("migrants lawfully resident") fewer procedural guarantees than those set by Article 6 for nationals and, even worse, imposes a groundless differentiation among migrants, since it leaves undocumented migrants outside the scope of both Article 6 and Article 1 of Protocol No. 7. To avoid this self-created legal gap, the Court has ingeniously provided undocumented migrants with a minimum degree of protection of their right of access to courts, based on Article 13 applied in conjunction with Article 2, 3 or 8. The same legal avenue was taken in the case at hand.

2. This has been the persistent position of many human rights NGOs and migrants' rights associations and movements for many years. According to the Common Principles on Removal of Irregular Migrants and Rejected Asylum Seekers, set by Amnesty International, Caritas Europa, the Churches' Commission for Migrants on Europe, the European Council for Refugees and Exiles, the Human Rights Watch, the Jesuit Refugee Service Europe, the Platform for International Cooperation on Undocumented Migrants, the Quaker Council for European Affairs, Save the Children, CIMADE France, the Iglesia Evangelica Española, the Federazione delle Chiese Evangeliche in Italia, and SENSOA Belgium, "Every person subject to a removal order or a deportation order should have the right to an individual in-country suspensive appeal against these decisions before an

The particular circumstances of the applicant

The applicant was submitted to a psychologically very stressful procedure which could potentially have caused him irreversible damage, since he was stopped in the street and expelled from one moment to the next to another country with which he had no ties, leaving his entire core family behind him, with the prospect of never coming back[1]. The abrupt severance of all ties with his or her core family is admittedly one of the most harmful causes of psychological distress to which one can subject a child or young person.

The mere fact that the applicant was 18 years old at the time of his removal does not affect the conclusion reached. For the purposes of international law, childhood includes the period of time up until the age of 18[2]. Although the applicant could not be considered a child at the time of his removal, the fact that he had barely come of age and had been living uninterruptedly with his core family for the last seven years should not be ignored[3].

The applicant was given a suspended prison sentence, under the conditions of which he had certain duties and obligations during a two-year probation period. This probation period was still in force when the applicant was removed, so the administrative authorities' removal order ignored the conditions of probation the courts themselves had imposed on the applicant.

Finally, although himself undocumented, the applicant was a dependent member of a documented migrant family and had a legal right to reside in

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independent judicial body, including the possibility to raise fears of *refoulement* or ill-treatment upon return contrary to Article 3 of the European Convention on Human Rights and the Convention Against Torture, or potential breaches of Article 8 of the ECHR. A sufficient delay to make this appeal effective should be provided by law".

1. It is not admissible to try this case with the prejudice of hindsight, as the Government themselves recognise. The fact that the applicant returned to French Guiana by his own means and now lives with his family is irrelevant for the purpose of trying this case. What is decisive is the existence or not, at the time of his removal, of an effective remedy against interference with the applicant's right to respect for his private life.

2. See Article 1 of the United Nations Convention on the Rights of the Child and Articles 9 and 10 specifically for the right not to be separated from one's family except where a court decides otherwise.

3. Moreover, scientific literature has already established that the abrupt separation of a young person from his or her family can cause irreversible, long-lasting, painful psychological damage, especially when that physical separation implies the severance of all ties with the core family (mother, father and brothers and sisters). Separating a young son or daughter from their parents can have profoundly negative effects, such as low self-esteem, a general distrust of others, mood disorders, including depression and anxiety, socio-moral immaturity and inadequate social skills (see, for instance, Caye, J., McMahon, J., Norris, T., and Rahija, L. (1996), "Effects of separation and loss on attachment", Chapel Hill: School of Social Work, University of North Carolina at Chapel Hill).

French Guiana, which was only acknowledged to him after he had been removed to Brazil.

The respondent State's removal policy in French Guiana

The Court must take into account that this is not a unique case in French Guiana. This is a daily occurrence. The police and the administrative authorities treat all migrants in the same way, regardless of their personal stories and needs[1]. No distinction is made between urgent cases where removal may entail irreversible damage and non-urgent cases where removal entails no such risk.

It is true that there can be a judicial control of the mistakes made by the police and the administrative authorities, but this control takes place months or even years after the person was removed. This policy of *fait accompli* does not provide migrants with any effective means of remedying violations of their human rights prior to removal. Migrants are *de facto* at the mercy of the unfettered discretion of the police and administrative authorities. This situation did not change with the recent judgment of the *Conseil d'Etat* on the removal of a migrant from French Guiana, where the court ruled that there was a presumption of urgency which justified the applicability of Article L. 521-1 of the Administrative Courts Code[2]. According to this rule of ordinary administrative law, the *juge des référés* has the power to suspend the enforcement of any administrative decision when urgency so requires and there is serious doubt about the legality of the impugned decision. Evidently, this new jurisprudence does not absolve the respondent State, in general terms or in the present case. The reason is simple: the request under Article L. 521-1 of the Administrative Courts Code is not suspensive itself, which means that the remedy in question does not automatically entail the suspension of the removal. The removal decision can be enforced by the administration between the lodging of the appeal and the decision of the judge on the suspension of the removal order[3]. Therefore,

1. For the police and the administrative authorities it is irrelevant whether the removal may put the migrant in danger of torture or ill-treatment or damage to his family and private life, as the practice shows (see the very enlightening report of the third parties and the authorities mentioned in it).
2. See the judgment of the *Conseil d'Etat* of 9 November 2011.
3. UN Doc. CAT/C/FRA/CO/3, 3 April 2006, paragraph 7: "the Committee is concerned that these procedures are non-suspensive, in that 'the decision to refuse entry may be enforced *ex officio* by the administration' after the appeal has been filed but before the judge has taken a decision on the suspension of the removal order (Article 3). The Committee reiterates its recommendation (A/53/44, paragraph 145) that a *refoulement* decision (refusal of admission) that entails a removal order should be open to a suspensive appeal that takes effect the moment the appeal is filed." The same critique was made in "Note de l'association CIMADE à l'attention des rapporteurs", presented to the Human Rights Committee during its fourth periodic review of France, 93rd session, 7-25 July

the new jurisprudence still does not satisfy the requirements laid down by the Court in the landmark *Čonka* judgment in order to prevent potentially irreversible infringements of the rights and freedoms guaranteed by the Convention. Since it was incumbent on the Government to prove that national law complied with the requirements provided for in *Čonka*, and they have failed to meet this burden of proof in a satisfactory manner, I cannot but conclude that the deficiencies of the national legal framework, as applied in French Guiana, have not been overcome by the decision of the *Conseil d'Etat* of 9 November 2011.

The alleged "exceptional" situation of French Guiana

The specific geographical situation of French Guiana does not justify this system of administrative and police discretion. The respondent State reiterated the argument made by the *Conseil Constitutionnel* in its decision no. 2003-467 of 13 March 2003, which refers to the particular situation and the lasting difficulties of the *département* of French Guiana (*la situation particulière et les difficultés durables du département de la Guyane*). This argument is similar to the one used by Belgium in *Čonka* and by the Dominican Republic in the case of expulsion of Haitian migrants[1]. It is based on the practical impossibility of upholding human rights. When no other argument is valid, one is tempted to resort to the argument of the force of facts. But then the rule of law does not prevail over facts – instead facts dictate the rule.

The argument, inadmissible as a matter of principle, is also unacceptable from the strict point of view of the specific regime for situations of exceptional public order disturbances or public danger envisaged in Article 15 of the Convention. The respondent Government did not apply Article 15 to French Guiana. In fact, it did not even suggest that the situation in French Guiana was of such an exceptional nature that Article 15 was applicable. However, if the respondent Government do want to depart from the principles of the Convention in a part of their territory because of an exceptional situation that part of the territory is facing, the only way to do it is by applying Article 15. In other words, if the respondent Government want to depart from the principle of a suspensive remedy against the removal of migrants in the territory of French Guiana, then they

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2008, pp. 12-14. In spite of the *Conseil d'Etat*'s judgment of 9 November 2011, there is still no remedy with an automatic suspensive effect against expulsion or removal of migrants in French Guiana, as the third parties GISTI, LDH and CIMADE rightly noted in their submissions to the Court.

1. The argument of the representative of the Dominican Republic before the Inter-American Court in the case of the expulsion of Haitian migrants was that "the number of persons repatriated does not compensate even remotely for the number of persons who come into the country illegally".

have to comply with the strict requirements of Article 15 and justify the exceptional nature of the measures taken under Article 15. They have not done so to date.

In sum, there should not be any carte blanche for States to "excise" a part of their territory from their international obligations under the Convention. Were the Court to accept this situation, it would place itself at odds not only with its own jurisprudence but also with the actual standard of international human rights law and international migration law, creating a legal black hole in a territory where the Convention should be fully applied but is not.

Conclusion

Nothing in the Convention legitimises the illegal entry into and illegal presence in a member State of any migrant, or restricts the right of any State to promulgate laws and regulations concerning the entry of migrants and the terms and conditions of their stay, or to establish non-discriminatory differences between nationals and migrants. However, such laws and regulations must not be incompatible with the international legal obligations of that State, including those in the field of human rights. Today, international human rights law prevails over a rigid understanding of the nation-State's absolute sovereign power over its territory.

In the light of the above, member States must provide the "tired", "poor" and "huddled" masses that stand at Europe's "golden door"[1] with an automatic suspensive remedy against expulsion, deportation, removal or any similar measure when it would allegedly put the migrant in danger of irreversible damage to his or her right to family life. In view of the lack of an effective remedy in French Guiana to avoid such danger, I find that the respondent State violated Article 13 of the Convention taken in conjunction with Article 8.

1. The words quoted are those of Emma Lazarus, in her sonnet "The New Colossus", written in 1883 and engraved on the pedestal of the Statue of Liberty in 1903: "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"