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

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Requests for repatriation of applicants' daughters and grandchildren held in camps in Syria rejected without any formal decision or judicial review ensuring lack of arbitrariness: violation of Article 3 § 2 of Protocol No. 4 to the Convention

In today's **Grand Chamber** judgment[1] in the case of H.F. and Others v. France (application nos. 24384/19 and 44234/02) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 3 § 2 of Protocol No. 4 ("no one shall be deprived of the right to enter the territory of the State of which he is a national") to the European Convention on Human Rights.

The case concerned the refusal to grant the applicants' requests for the repatriation by the French authorities of their daughters and grandchildren, who are being held in camps in north-eastern Syria run by the Syrian Democratic Forces (SDF). Before the Court they complained that the refusal exposed their family members to inhuman and degrading treatment in breach of Article 3 of the Convention and entailed a violation of their right to enter national territory under Article 3 § 2 of Protocol No. 4.

The Court began by finding that the family members in question were not within France's jurisdiction for the purposes of the Article 3 complaint but that in the particular circumstances of the case there was a jurisdictional link between them and France, within the meaning of Article 1 of the Convention, as regards the complaint under Article 3 § 2 of Protocol No. 4.

On the merits, the Court first found that the French women and their children did not enjoy a general right to repatriation on the basis of the right under Article 3 § 2 of Protocol No. 4 to enter national territory.

It went on to explain that the protection afforded by that provision might, however, give rise to positive obligations of the State in exceptional circumstances relating to extraterritorial factors, such as those which endangered the health and life of the nationals in the camps, in particular the children. In such a situation, in fulfilling its positive obligation to enable the effective exercise of the right to enter its territory the State had to afford appropriate safeguards against the risk of arbitrariness in the relevant process. There had to be a review by an independent body of the lawfulness of the decision denying the request for repatriation, whether the competent authority had merely refused to grant it or had been unsuccessful in any steps it had taken to act upon it. Such review should also enable the person concerned to be made aware, even summarily, of the grounds for the decision and thus to verify that those grounds had a sufficient and reasonable factual basis and that there was no arbitrariness in any of the justifications that might legitimately be relied upon by the executive authorities, whether compelling public interest considerations or any legal, diplomatic or material difficulties. Where a request for repatriation was made on behalf of minors, the review had to ensure in particular that the competent authorities had taken due account of the children's best interests, together with their particular vulnerability and specific needs. In the present case the Court found that there were exceptional circumstances, as regards the situation of the daughters and grandchildren, which triggered the obligation to afford safeguards against arbitrariness in the decision-making process. However, the absence of any formal decision on the

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

part of the competent authorities to refuse to grant the applicants' requests, and the jurisdictional immunity invoked by the domestic courts in respect of the matter, had deprived them of any possibility of meaningfully challenging the grounds relied upon by those authorities and of verifying that those grounds were not arbitrary.

The Court concluded that the examination of the requests for repatriation made by the applicants on behalf of their family members had not been surrounded by appropriate safeguards against arbitrariness and that there had been a violation of Article 3 § 2 of Protocol No. 4.

The Court added that in executing the judgment the French Government would be expected to promptly re-examine the applicants' requests and, in doing so, afford them appropriate safeguards against any arbitrariness.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicants, H.F. and M.F., born in 1958 and 1954, and J.D. and A.D., both born in 1955, are French nationals. They are the parents of their respective daughters, who left France for Syria with their partners, to go to the territory controlled by the so-called Islamic State (also known as Daesh), and the grandparents of children subsequently born there.

In 2017 Daesh lost control of the city of Raqqa, its capital, to the SDF, the local force engaged in the fight against Daesh dominated by the Kurdish militia of the People's Protection Units (YPG). From March 2019 onwards, the SDF controlled all Syrian territory east of the Euphrates River. The SDF offensive caused tens of thousands of men, women and children to flee, the majority of them families of Daesh fighters. Most of them, including the applicants' daughters, were reportedly arrested by the SDF during and following the final battle, and taken to al-Hol camp between December 2018 and March 2019. The camps of al-Hol and Roj were placed under the military supervision of the SDF and are run by the "Autonomous Administration of North and East Syria" (the "AANES").

According to the International Committee of the Red Cross (ICRC), 70,000 people were living in al-Hol camp as of July 2019. At that time the ICRC regional director described the situation in the camps as "apocalyptic". According to a press release issued on 29 March 2021, following a visit by its president, this figure was reduced to 62,000, "two thirds [of whom] [were] children, many of them orphaned or separated from family". The press release further stated that those children were growing up in harsh and often very dangerous conditions.

According to reports by the NGO Rights and Security International (RSI), published on 25 November 2020 and 13 October 2021, the children being held in the camps of al-Hol and Roj were suffering from malnutrition, dehydration, sometimes war injuries and post-traumatic stress and were reportedly at risk of violence and sexual exploitation; the weather conditions were extreme; the detention conditions were inhumane and degrading; the detainees were exposed to treatment that could be characterised as torture; there was an atmosphere of violence, caused by tensions between women still adhering to Daesh and others, as well as by the violent conduct of the camp guards.

Between March 2019 and January 2021 France organised the repatriation of children from camps in north-eastern Syria on a "case-by-case" basis. It sent five missions to Syria and repatriated thirty-five French minors, "orphans, unaccompanied minors or humanitarian cases".

In a press release of 5 July 2022, the French Foreign Ministry announced that France had organised the return to national territory of a further thirty-five minors of French nationality and sixteen mothers. In a letter of 13 July 2022, the lawyer for the applicants informed the Court that their daughters and grandchildren were not among the French nationals repatriated, as confirmed by the Government in a letter of 28 July 2022.

The situation of the applicants' family members since their departure for Syria

Application no. 24384/19

The applicants' daughter, L., who was born in 1991 in Paris, left France on 1 July 2014 together with her partner to travel to the territory in Syria then controlled by the so-called Islamic State. On 16 December 2016 a judicial investigation was opened against her on a charge of criminal conspiracy to commit acts of terrorism, and a warrant was issued. L. and her partner, who died in February 2018, had two children in Syria, born on 14 December 2014 and 24 February 2016.

According to the applicants, L. and her two children were arrested on 4 February 2019 and were initially held in al-Hol camp. The applicants stated that they had not received news of L. since June 2020. She was thought to be held in one of the two camps or with her two children in an "underground prison".

Application no. 44234/20

The applicants' daughter M., who was born in 1989 in Angers, left France in early July 2015 with her partner to travel to Mosul in Iraq and then, a year later, to Syria. M. gave birth to a child on 28 January 2019. Mother and child were thought to have been held in al-Hol camp from March 2019 onwards then transferred in 2020 to Roj.

On 26 June 2020 the applicants' counsel sent an urgent e-mail to the justice adviser of the French President and to the Foreign Ministry, without receiving any reply, in which she expressed the concern of the families following the transfer of several French nationals and their children by the guards of al-Hol camp to an unknown location.

Proceedings seeking repatriation

Application no. 24384/19

In an e-mail sent on 31 October 2018 to the Foreign Ministry, which remained unanswered, the applicants requested the repatriation of their daughter, who was "very weak", together with their grandchildren.

In an application registered on 5 April 2019 they called upon the urgent applications judge of the Paris Administrative Court to enjoin the Foreign Ministry to organise the repatriation of their daughter and grandchildren to France. In support of their application they produced their request for repatriation of 31 October 2018 and the requests submitted to the French President a few months earlier by their counsel, on behalf of several women and children who were held in the camps in north-eastern Syria, together with the response of the President's chief of staff. This response stated that the individuals concerned had deliberately left to join a terrorist organisation at war with the coalition in which France was participating, and that it was up to the local authorities to decide whether they were liable for any offences.

In a decision of 10 April 2019 the urgent applications judge dismissed the applicants' case.

In two letters dated 11 April 2019, counsel for the applicants again wrote to the French President and to the Foreign Ministry seeking the repatriation of L. and her two children.

The applicants appealed against the decision of 10 April 2019 before the *Conseil d'État*, which, in a decision of 23 April 2019, dismissed their case.

Application no. 44234/20

In two letters of 29 April 2019, which remained unanswered, to the Foreign Ministry and the French President, the applicants' lawyer sought the urgent repatriation of M. and her child to France. They submitted an application to that effect to the urgent applications judge of the Paris Administrative Court.

In a decision of 7 May 2020 that judge dismissed their request on the grounds that the court did not have jurisdiction to examine it, as the requested measure was indissociable from France's international relations. In a decision of 25 May 2020 the judge gave a similar ruling on a request to set aside the Ministry's tacit refusal to organise the repatriation. The case was similarly dismissed on the merits by a decision of the same date.

On 15 September 2020 the *Conseil d'État* declared inadmissible an appeal on points of law lodged by the applicants against the decision of 7 May 2020.

In parallel the applicants brought an action before the Paris *tribunal judiciaire* (general first-instance court) to establish the existence of an illegal administrative act, on the grounds that the French authorities had wilfully omitted to put an end to the arbitrariness of the detention of their daughter and grandson and had refused to arrange their repatriation. In a judgment of 18 May 2020 the court declared that it had no jurisdiction to examine the matter.

Complaints, procedure and composition of the Court

The applicants alleged that the refusal by the respondent State to repatriate their daughters and grandchildren from camps in north-eastern Syria had exposed those family members to inhuman and degrading treatment prohibited by Article 3 of the Convention, and had breached their right to enter the territory of the State of which they were nationals as guaranteed by Article 3 § 2 of Protocol No. 4 to the Convention, also interfering with their right to respect for their family life under Article 8 of the Convention (only application no. 44234/20 as regards the latter provision). They further complained, under Article 13 taken together with Article 3 § 2 of Protocol No. 4, that they had had no effective domestic remedy by which to challenge the decision not to organise the requested repatriations.

The applications were lodged with the European Court of Human Rights on 6 May 2019 and 7 October 2020. On 16 March 2021 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A public hearing was held on 29 September 2021.

The Council of Europe Commissioner for Human Rights exercised her right to intervene in the proceedings before the Grand Chamber and submitted written comments. Observations were also received from the Belgian, British, Danish, Dutch, Norwegian, Spanish and Swedish Governments, United Nations Special Rapporteurs, Reprieve, Rights and Security International, *Avocats sans frontières* (ASF), the National Advisory Commission on Human Rights, the *Défenseur des droits*, the *Clinique des droits de l'homme* and Ghent University Human Rights Centre, the President of the Grand Chamber having granted them leave to submit written comments as third parties.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Síofra **O'Leary** (Ireland),
Georges **Ravarani** (Luxembourg),
Ksenija **Turković** (Croatia),
Ganna **Yudkivska** (Ukraine),
Krzysztof **Wojtyczek** (Poland),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania),
Erik **Wennerström** (Sweden),
Lorraine **Schembri Orland** (Malta),

Peeter **Roosma** (Estonia),
Mattias **Guyomar** (France),
Ioannis **Ktistakis** (Greece),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 1

The Court began by addressing the question whether the applicants' family members could be regarded as falling within the jurisdiction of France for the purposes of Article 3 of the Convention and of Article 3 § 2 of Protocol No. 4.

It first observed that France was not exercising any "effective control" over the territory of north-eastern Syria and had no "authority" or "control" over the applicants' family members who were being held in the camps in that region. It further found that the opening of proceedings at the domestic level, whether by the French authorities or by the applicants, did not trigger France's jurisdiction in respect of those concerned.

As to the bond of nationality between the applicants' family members and France, neither domestic law nor international law required the State to act on behalf of its nationals and to repatriate them. Moreover, the Convention did not guarantee the right to diplomatic or consular protection.

Even assuming that the situation of the applicant's family members did not fall within the classic scenarios of diplomatic and consular protection, and that only France was capable of providing them with assistance, those circumstances were not such as to establish France's jurisdiction over them.

In conclusion, the Court was of the view that the applicants could not validly argue that the mere decision of the French authorities not to repatriate their family members had the effect of bringing them within the scope of France's jurisdiction as regards the ill-treatment to which they were subjected in Syrian camps under Kurdish control. Such an extension of the Convention's scope found no support in the case-law.

The Court thus held that the applicants' daughters and grandchildren did not fall within the jurisdiction of France in respect of the complaint under Article 3 of the Convention. That complaint was therefore inadmissible.

As regards the complaint under Article 3 § 2 of Protocol No. 4, the Court began by finding that nationality was not an autonomous basis of jurisdiction and did not suffice to establish a jurisdictional link within the meaning of Article 1.

In addition, the refusal to grant the applicants' requests had not formally deprived their family members of the right to enter France, and thus the refusal did not fall within the exercise by the State of its ordinary public powers in policing the national border, a circumstance which would have sufficed to bring those concerned within its territorial jurisdiction. That being said, both the subject matter and scope of the Convention right implied that it should benefit a State Party's nationals who were outside its jurisdiction.

The Court also emphasised that increasing globalisation was presenting States with new challenges in relation to the right to enter national territory. The absolute prohibition on the expulsion of nationals and the corresponding absolute right of entry had stemmed from an intention to prohibit exile once and for all, as it was seen to be incompatible with modern democratic principles. Since then, international mobility had become more commonplace in an increasingly interconnected world, seeing many nationals settling or travelling abroad. Accordingly, the interpretation of the provisions of Article 3 of Protocol No. 4 had to take account of this context, which presented States

with new challenges in terms of security and defence in the fields of diplomatic and consular protection, international humanitarian law and international cooperation.

The right to enter a State lay at the heart of current issues related to the combat against terrorism and to national security, as shown in particular by the enactment of legislation to govern the supervision and handling of the return to national territory of individuals who had travelled abroad to engage in terrorist activities. If Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrived at the national border or who had no travel documents it would be deprived of effectiveness in the context of the contemporary phenomena mentioned above.

In the light of the foregoing, it could not be excluded that certain circumstances relating to the situation of individuals who wished to enter the State of which they were nationals might give rise to a jurisdictional link with that State for the purposes of Article 1 of the Convention.

In the present case, the Court considered that it was necessary to take into account, in addition to the legal link between the State and its nationals, the following special features, which related to the situation of the camps in north-eastern Syria. First, the applicants had addressed a number of official requests to the French authorities for repatriation and assistance. Second, those requests had been made on the basis of the fundamental values of the democratic societies which made up the Council of Europe, while their family members were facing a real and immediate threat to their lives and physical well-being, on account both of the living conditions and safety concerns in the camps, which were regarded as incompatible with respect for human dignity, and of the health of those family members and the extreme vulnerability of the children, in particular, in view of their age. Third, the individuals concerned were not able to leave the camps, or any other place where they might be held, in order to return to France without the assistance of the French authorities, finding it materially impossible to reach the French border or any other State border from which they might be passed back to those authorities. The Court noted, lastly, that the Kurdish authorities had indicated their willingness to hand over the female detainees of French nationality and their children to the national authorities.

Accordingly the Court concluded that in the present case there were special features which enabled France's jurisdiction, within the meaning of Article 1 of the Convention, to be established in respect of the applicants' complaint under Article 3 § 2 of Protocol No. 4.

Article 3 § 2 of Protocol No. 4

Only the nationals of the State concerned were entitled to rely on the right guaranteed by Article 3 § 2 of Protocol No. 4 to enter its territory.

As to whether there was a right to repatriation, the question was whether the French State was required to facilitate the exercise by those concerned of the right to enter national territory as part of its obligations under Article 3 § 2 of Protocol No. 4, and in particular whether it was obliged to repatriate them, regard being had to the fact that they were unable to reach its border as a result of their situation.

The Court pointed out that, according to its case-law, the Convention did not guarantee a right to diplomatic protection by a Contracting State for the benefit of any person within its jurisdiction.

The States themselves remained the protagonists of consular assistance as governed by the Vienna Convention on Consular Relations adopted on 24 April 1963. The rights enjoyed by nationals who were in difficulty or were detained abroad, under Articles 5 and 36 of that convention, were binding only on the "receiving State" and such protection stemmed in principle from a dialogue between that State and the consular authorities (of the State of nationality) present in the relevant area. Individuals such as the applicants' family members, who were being held in camps under the control of a non-State armed group and whose State of nationality had no consular presence in Syria, were not in principle entitled to claim a right to consular assistance. Lastly, the Court found that there was

no consensus at European level in support of a general right to repatriation for the purposes of entering national territory within the meaning of Article 3 § 2 of Protocol No. 4.

The Court noted that there was no obligation under international treaty law or customary international law for States to repatriate their nationals. Consequently, French citizens being held in the camps in north-eastern Syria could not claim a general right to repatriation on the basis of the right to enter national territory under Article 3 § 2 of Protocol No. 4.

In this connection, the Court took note of the concerns expressed by the respondent and intervening Governments about the potential risk, if such a right were to be instituted, of establishing recognition of an individual right to diplomatic protection which would be incompatible with international law and the discretionary power of States.

Even though Article 3 § 2 of Protocol No. 4 did not guarantee a general right to repatriation for the benefit of nationals of a State who were outside its borders, the Court referred to its earlier acknowledgment that this provision might impose on a State certain positive obligations *vis-à-vis* its nationals in order to ensure that their right to enter national territory was practical and effective. This would be the case where, in view of specific circumstances, a refusal by that State to take any action would leave the national concerned in a situation comparable, *de facto*, to that of exile.

As to whether there were exceptional circumstances which might trigger an obligation to ensure that the decision-making process in the present case was surrounded by appropriate safeguards against arbitrariness, the Court made the following points.

In the first place, the camps in north-eastern Syria were under the control of a non-State armed group, the SDF, supported by a coalition of States (including France) and assisted by the ICRC and humanitarian organisations. The only protection afforded to the applicants' family members was under common Article 3 of the four Geneva Conventions and under customary international humanitarian law.

Second, the general conditions in the camps had to be considered incompatible with applicable standards under international humanitarian law.

Third, to date, no tribunal or other international investigative body had been established to deal with the female detainees in the camps, such as L. and M.

Fourth, the Kurdish authorities had repeatedly called on States to repatriate their nationals.

Fifth, a number of international and regional organisations, including the United Nations, the Council of Europe and the European Union, had, in their instruments and statements, called upon European States to repatriate their nationals being held in the camps. The UN Committee on the Rights of the Child had stated that France must assume responsibility for the protection of the French children there and that its refusal to repatriate them entailed a breach of the right to life and the prohibition of inhuman or degrading treatment. In its decision of 8 February 2022 the Committee emphasised that it was important for France to ensure that the best interests of the child, as guaranteed by Article 3 of the International Convention on the Rights of the Child, was a primary consideration in examining requests for repatriation.

Sixth, and lastly, France had officially stated that French minors in Iraq or Syria were entitled to its protection and could be taken into its care and repatriated.

Having regard to those considerations, the Court found that it was incumbent upon the French authorities, under Article 3 § 2 of Protocol No. 4, to surround the decision-making process, concerning the requests for repatriation, by appropriate safeguards against arbitrariness.

The Court took the view that the rejection of a request for repatriation had to give rise to an appropriate individual examination, by an independent body, separate from the executive authorities of the State, but not necessarily by a judicial authority. The examination would ensure an

assessment of the factual and other evidence which had led those authorities to decide that it was not appropriate to grant the request. The independent body in question therefore had to be able to review the lawfulness of the decision denying the request. Such review should also enable the person concerned to be made aware, even summarily, of the grounds for the decision and thus to verify that those grounds had a sufficient and reasonable factual basis. Where, as in the circumstances of the present case, the request for repatriation was made on behalf of minors, the review should ensure in particular that the competent authorities had taken due account, while having regard for the principle of equality applying to the exercise of the right to enter national territory, of the children's best interests, together with their particular vulnerability and specific needs.

In sum, there had to be a mechanism for the review of decisions not to grant requests for a return to national territory through which it could be ascertained that there was no arbitrariness in any of the grounds that might legitimately be relied upon by the executive authorities, whether compelling public interest considerations or any legal, diplomatic or material difficulties.

The Court noted that in the present case the applicants had written, on several occasions, to the President of the Republic and to the Minister for European and Foreign Affairs, in October 2018, April 2019 and June 2020, requesting the repatriation of their daughters and grandchildren. However, neither of those executive authorities had replied to them expressly. Their lawyer had received nothing more than a general policy document explaining the government's position on requests for repatriation from French citizens who had gone to Syria and Iraq.

Ultimately the applicants had not received any explanation for the choice underlying the decision taken by the executive in respect of their requests, except for the implicit suggestion that it had stemmed from the implementation of the policy pursued by France, albeit that a number of minors had previously been repatriated. Nor had they obtained any information from the French authorities which might have contributed to the transparency of the decision-making process.

The Court further observed that the situation could not be remedied by the domestic proceedings brought by the applicants. The French courts had decided that they had no jurisdiction, as the matter before them concerned acts that could not be detached from the conduct by France of its international relations. As regards the application in the present case of the acts of State doctrine, with its constitutional basis, it was not the task of the Court to interfere with the institutional balance between the executive and the courts of the respondent State, or to make a general assessment of the situations in which the domestic courts refused to entertain jurisdiction. The question of sole importance was whether those concerned had had access to a form of independent review of the tacit decisions to refuse their repatriation requests by which it could be ascertained that there were legitimate and reasonable grounds, devoid of arbitrariness, to justify those decisions in the light of the positive obligations stemming in the present case, in the exceptional circumstances set out above, from the right to enter national territory under Article 3 § 2 of Protocol No. 4. That had not been the case, however, in the proceedings before the *Conseil d'État* or before the Paris *tribunal judiciaire*.

In the absence of any formal decision on the part of the competent authorities to refuse to grant the applicants' requests, the jurisdictional immunity raised against them by the domestic courts had deprived them of any possibility of meaningfully challenging the grounds relied upon by those authorities and of verifying that those grounds were not arbitrary.

Accordingly, the examination of the requests for repatriation made by the applicants on behalf of their family members had not been surrounded by appropriate safeguards against arbitrariness and there had been a violation of Article 3 § 2 of Protocol No. 4.

Article 46

The Court had found that neither the form of any examination by the executive authorities of the requests for repatriation, nor the review by the courts of the decisions on those requests, had enabled the existence of arbitrariness to be ruled out. It thus indicated that the French Government would have to re-examine those requests, in a prompt manner, while ensuring that appropriate safeguards were afforded against any arbitrariness.

Just satisfaction (Article 41)

The Court held, by fifteen votes to two, that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage that might have been sustained by the applicants and that France was to pay 18,000 EUR (eighteen thousand euros) to H.F. and M.F. jointly, and 13,200 EUR (thirteen thousand two hundred euros) to A.D. and J.D. jointly, in respect of costs and expenses.

Separate opinions

Judges Pavli and Schembri Orland expressed a joint concurring opinion; Judges Yudkivska, Wojtyczek and Roosma expressed a joint partly dissenting opinion; Judge Ktistakis, joined by Judge Pavli, expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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