Migrants' Rights Before the European Court of Human Rights

Dana Schmalz

07.12.2025 doi: 10.59704/314607c356bb42dc

As we are celebrating the 75th anniversary of the European Convention on Human Rights (ECHR), the topic of migration stands at the center of concerns about the Convention's state of health. In this blogpost adapted from my remarks at a Conference in the Federal Ministry for Justice and Consumer Protection, I argue that those attacking the European Court of Human Rights (ECtHR) for an over-reaching jurisprudence regarding migrants' rights misconstrue the actual case law. It is worth looking back at the early landmark cases to understand that the interpretation of Article 3 in relation to expulsion and deportation cases developed cautiously. While a critique of the Court's decisions is the legitimate task of legal scholarship, simplistic narratives about an activist Court fail to engage with its doctrinal stringency.

Open threats to the Convention

One of the foremost birthday wishes is the wish for good health. So, as we are celebrating the ECHR's 75th anniversary, I would like to wish good health to the European Convention on Human Rights. To take care of someone's health, wishes are not enough though – it also needs doctor visits. In some way, interrogating the area of migration and the ECHR resembles a doctor visit, because in no other area is the health of the Convention so much at risk as it is in the area of migration.

A most evident threat to the Convention's health is the "lettera aperta", the open letter initiated by Denmark and Italy and signed by a total of nine European heads of state. The letter openly calls for a politically motivated restrictive interpretation of migrants' rights and, in its assumptions, breaks with the spirit of universality of human rights. One of the many astonishing misconceptions of the lettera aperta is that it tells a story about two groups of migrants: those who come regularly, integrate well and contribute to the societies, and those who come irregularly, don't integrate and in some cases commit crimes. To juxtapose those categories is out of touch with the reality, in which irregular pathways are the only possibility and therefore normal for most of those seeking international protection. Already the 1951 Refugee Convention reacts to this reality with its principle of non-penalization. The persisting attempt to denigrate asylum seekers for the irregularity of their arrival is at odds with the core of international refugee law. And of course, persons don't lose their human rights because of an irregular arrival. The lettera aperta also repeatedly refers to "our citizens" whose opinions it claims to represent. This misses the idea of the Convention which is not about democratic majorities but about human rights: rights that are independent from someone's citizenship and that are not at the discretion of the majority. Finally, the plea that there should be "more room nationally to decide on when to expel criminal foreign nationals" misses the nature of human rights protection: The basic limitations that the Convention sets for expelling persons are the limits of Article 3 ECHR, the prohibition of torture and inhuman or degrading treatment. This prohibition applies regardless of a criminal record. It is hard to see how "more room to decide" can be understood other than wishing to depart from this universal and unconditional prohibition of torture and inhuman or degrading treatment.

The successive interpretation of Article 3 ECHR in the field of migration

In defense of the lettera aperta and in other criticism of the Court, the argument is sometimes made that the

jurisprudence in the field of migration has been expansive. Common knowledge about the Article 3 ECHR case law is that protection against expulsion goes back to the Soering case from 1989. Soering, a German national, was facing extradition from the UK to the USA for charges of murder. The ECtHR ruled that the potential exposure to death row would constitute inhuman or degrading treatment and that the Convention therefore prohibited an extradition. With this ruling, the Court made clear that Article 3 prohibits delivering persons under the jurisdiction of a Convention state to another state where the person faces torture or inhuman or degrading treatment. The scope of the prohibition extends beyond direct acts of the state – which is also recognized for scenarios in which the state is responsible if it fails to prevent attacks from non-state actors.

Soering was not a case of migrants' rights, but it created the ground for Article 3 ECHR jurisprudence regarding expulsions. It should not be surprising that this jurisprudence began several years after the Convention entered into force. Firstly, the Court did not hear many cases during the existence of the European Commission of Human Rights. Secondly, the late 1980s and early 1990s were the period in migrants' rights gained a practical relevance as defense against the "emerging politics of non-entrée" (Hathaway 1992). During the 1990s, a few cases followed in which the Court interpreted the protection against expulsion under Article 3 ECHR.

The first case after Soering was the case Cruz Varas and Others v. Sweden (1991). It concerned a Chilean family of three who had applied for political asylum in Sweden. Their claim had been rejected and they faced expulsion, when the case was brought before the ECtHR. The Court confirmed that Article 3 ECHR is applicable in expulsion cases, but did not find a violation, arguing that there was not sufficient evidence that the applicants faced torture or inhuman or degrading treatment if deported. Judge de Meyer dissented with the majority and suggested that Article 3 ECHR had been violated, relying also on the general situation in Chile in 1989.

In another decision from 1991, in the case Vilvarajah and Others v. the United Kingdom, the Court equally confirmed the applicability of Article 3 ECHR to asylum seekers while finding no violation. The applicants were Tamils who had fled Sri Lanka and applied for protection in the UK. The ECtHR held that the situation they faced when returned did not meet the threshold of Article 3 ECHR, with Judge Russo dissenting.

The next decision about protection against expulsion was in the case Chahal v. the United Kingdom in 1996. It concerned a family of four, the parents being Indian citizens and the adult children being British citizens. The parents had been in the UK since 1974 and 1975, and the father, Mr. Chahal, was a leading figure in the Sikh community. He had been charged for terrorist activities but not convicted; nonetheless, a deportation order was based on the fight against terrorism. The Court, sitting as the Grand Chamber, held that the deportation would amount to a violation of Article 3 ECHR because as a politically active Sikh, Mr. Chahal, would face inhuman or degrading treatment in India.

After this first decision in which a violation of Article 3 ECHR prohibited a deportation, an inadmissibility decision followed in the case T.I. v. the United Kingdom in 2000. The applicant was a Sri Lankan national to be removed from the UK to Germany. The Court held that the removal order from the UK without consideration of the asylum claim in substance did not give rise to an admissible claim under Article 3 ECHR because the applicant would be able to again claim asylum in Germany and did not risk immediate removal to Sri Lanka.

In Saadi v. Italy (2008), the ECtHR, sitting as Grand Chamber, held that the expulsion of Mr. Saadi, a Tunisian national, would violate Article 3 ECHR because of the risk of torture in Tunisia. Mr. Saadi had been prosecuted and jailed in Italy. The Italian government had sought assurances from Tunisia that he would not face torture or inhuman or degrading treatment. Such assurance was not given and the Court stressed that even if given, this would not have been

sufficient alone because Italy had to assess the risk of a violation of Article 3 ECHR based on all available facts.

Returning to - when?

When I read the call for "more room" to decide nationally about the expulsion of criminal foreign nationals, I wonder if the authors mean that they disagree with the ruling in the Saadi case, and I would like to hear why and how they think the case should have been decided. When I hear a colleague suggest we should return to an earlier state of interpretation of Article 3 in the area of migration, I wonder to which state and why? The Court did not "invent" the protection against deporting someone to conditions of torture or inhuman or degrading treatment with Soering, nor did it invent it with Chahal or with Saadi. The Court interpreted the Convention. One can disagree with the interpretation but that would require some doctrinal legal arguments. Criticism of the Court's jurisprudence should have some basis in the Convention's text and rules of interpretation.

Judicial decisions are not taken in a political vacuum, but they also cannot be reduced to political choices. If political leaders try to reduce them to such, there should be collective resistance of all who believe in the worth of an independent judiciary.

And yes, there can be reasonable disagreement about legal interpretations. But we can only have a viable discussion based on concrete cases and interpretative alternatives, not based on abstract calls for a "more restrictive approach". Do those calls refer to protection against deportation in cases of severe illness? Do they disagree with the ruling in case D. v. the UK (1997)? Did they notice the restrictive decisions in the cases B.B. v. France (1998) and N. v. the UK (2008)? Does the disagreement begin with later decisions in Paposhvili or Savran, and if so why?

Silent threats to the Convention's health

Besides the open threats to the Convention, there is also the more silent disregard of the Convention's requirements and the Court's rulings. The ECtHR continuously holds states such as Hungary and Greece accountable for the violations of migrants' rights, in particular due to arbitrary detention and due to inhuman and degrading treatment in camps. The numerous decisions per year do not make headlines, they do not advance new interpretations but simply apply, again and again, the Convention's standards against state actions that violate them. I have written before about the problem of this disregard for the ECHR requirements. The Court cannot resolve this problem, it requires a broad coalition of legal and political institutions as well as civil society that uphold pressure for the Convention to be respected. This broad coalition is the Convention's immune system.

The 75th anniversary is a helpful occasion to recall these urgent contributions we can all make to protect the European Convention on Human Rights: reaffirm the universality of its guarantees, rebut attacks on judicial independence and call for respect of the Convention, pressing states to address structural violations.

ABOUT THE AUTHOR

Dana Schmalz
Dana Schmalz is a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg/Berlin.

SUGGESTED CITATION

Schmalz, Dana: Migrants' Rights Before the European Court of Human Rights, Verfassungsblog, 07.12.2025, doi: 10.59704/314607c356bb42dc.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20251208-172136-0.