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Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights

Motion for a recommendation

tabled by Ms Corien W.A. JONKER and other members of the Assembly

This motion has not been discussed in the Assembly and commits only those who have signed it

Rule 39 of the Rules of the European Court of Human Rights empowers the Court to indicate binding measures to member states to prevent, until further notice, the imminent expulsion or extradition of failed asylum seekers or irregular migrants at risk of harm of a serious, irreparable nature in their country of origin. Failure to comply with these binding measures results in a breach of the state's international human rights obligations and the refugee law principle of *non-refoulement*.

A single instance of non-compliance with a Rule 39 indication is of serious concern but the increased number of such cases in recent years must be addressed as a matter of urgency. The number of requests for Rule 39 received by the Court has risen exponentially, placing an extra burden on its case-load and forcing a response to the changing trends and practice of Rule 39. For example, in 2008, the Court dealt with an unprecedented number of requests for Rule 39 – over 3 000 in total. In 2007, 1 000 requests for Rule 39 were received, but the Annual Report for 2006 did not publish any figures suggesting that they were perhaps much lower. Only in its 2007 report did the Court first include a section on Rule 39 (prior to that such relevant cases were included under the section dealing with Article 34 of the European Convention on Human Rights (ECHR), the right to individual petition).

However, the published figures as regards Rule 39 requests represents the tip of the iceberg in terms of the number of requests which could be made. In many member states individuals are denied access to the asylum procedure. Furthermore, it is impossible for many would-be or actual asylum applicants or migrants to request interim measures from the Court as they lack access to lawyers, free legal aid provision, are not told of their rights or the procedures available or applicable to them in a language they understand and are not given basic access to a telephone or the outside world. This situation is made worse in the context of detention.

Despite the exceptional nature of non-compliance with interim measures, since 2005, and on the basis of available public information, 8 rulings of the Court have raised issues of non-compliance with Rule 39 in extradition/expulsion cases alone. Further cases remain pending the Court or have been referred to by Council of Europe bodies, including the Commissioner for Human Rights. The distribution of Rule 39 cases is not spread equally between different sections of the Court, with some sections receiving large numbers of requests and others none. The Court must be careful and consistent in its practice as regards Rule 39 in order to ensure the continuing and effective operation of the Convention system.

Rule 39 measures are not applied under a specific article of the ECHR but the vast majority of cases concern expulsion/ extradition. The object of interim measures is to preserve and protect the rights and interests of the parties in a dispute before the Court, pending a decision on the admissibility and merits of the case.



In 2005, the Grand Chamber of the Court confirmed that Rule 39 indications are legally binding on the state to which they are made: non-compliance gives rise to a breach of Article 34 ECHR (the right to individual petition). A violation of Article 34 may be found even if the damage the interim measure was designed to prevent subsequently turned out not to have occurred. In other instances, where the damage does occur, a violation of Article 34 is accompanied by a breach of a substantive article of the Convention (e.g. the prohibition of torture under 3 ECHR).

Non-compliance with interim measures must remain truly exceptional. In cases of alleged failure, the Court looks at whether the “letter and the spirit” of the measure was complied with and whether there was an “objective impediment” which prevented compliance and that the state took all reasonable steps to remove the impediment and to keep the Court informed about the situation. Bad faith actions and/or pre-texts to violate the Convention are unacceptable and any instance of non-compliance must be scrutinized and followed up.

In the light of the above, the Assembly recommends the Committee of Ministers to:

- ensure the implementation of minimum standards and procedural safeguards in order that migrants and refugees are able to apply for Rule 39 measures;
- monitor compliance with Rule 39 measures by member states in all cases, but in particular, expulsion and extradition cases;
- ensure that a mechanism or working method is established for follow-up in cases of non-compliance;
- investigate cases of non-compliance and/or publish statements on the issue so that the public and other member states can assist the Council of Europe in maintaining standards;
- in cases of non-compliance, direct that States must take steps to establish the whereabouts and welfare of the individual concerned and bring him/her back to state territory so that his/her case can be properly examined;
- co-operate with the Court in order that up to date information on Rule 39 statistics, in particular, information of alleged non-compliance be made more visible and/or public;
- conduct a comparative study on the basis of available information to consolidate and clarify state practice as regards the Rule 39 mechanism;
- assess current practice by the Court in a response to increased numbers of Rule 39 applications against some states, and examine solutions to improve the efficiency, procedure and consistency of the Court’s practice;
- clarify the acceptable bounds of “objective impediments” to compliance with interim measures.

Signed (see overleaf)

*Signed*¹:

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