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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

Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Boriss CILEVIČS, Latvia, Socialist Group (SOC)

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A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights congratulates the rapporteur of the Committee on Migration, Refugees and Population, Mr David Darchiashvili (Georgia, EPP/CD), on his excellent report and supports by and large the proposed draft resolution and draft recommendation.

2. The committee wishes, however, to make some amendments to further strengthen the draft resolution and draft recommendation, since the report deals with an important subject which requires succinct, clear and precise legal terminology.

B. Proposed amendments to the draft resolution and to the draft recommendation

In the draft resolution:

Amendment A (to the draft resolution)

In the draft resolution, paragraph 5, second sentence, replace the words “the governments and their agents (representatives of the government before the Court)” by the words “the states parties”.

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Amendment B (to the draft resolution)

In the draft resolution, paragraph 6, second sentence, replace the word “decisions” by the word “indications”.

Amendment C (to the draft resolution)

In the draft resolution, paragraph 7, second sentence, replace the words “legally binding” by the word “interim”.

Amendment D (to the draft resolution)

In the draft resolution, paragraph 7, second sentence, after the words “by the Court”, add the words “, and in particular disrespect of the right of individual application as guaranteed by Article 34 of the Convention,”.

Amendment E (to the draft resolution)

In the draft resolution, replace paragraphs 11.1, 11.3, 11.5 and 11.6 with the following new paragraph 11.1:

> *“11.1. guarantee the right of individual petition to the Court under Article 34, neither hinder nor interfere with the exercise of that right in any manner whatsoever and fully comply with the letter and spirit of interim measures indicated by the Court under Rule 39, in particular by:*
>
> *11.1.1. co-operating with the Court and Convention organs by providing full, frank and fair disclosure in response to requests for further information under Rule 39(3) and facilitating to the highest degree any fact-finding requests made by the Court;*
>
> *11.1.2. exercising good faith and record keeping in demonstrating that there was, in exceptional cases of non-compliance, an ‘objective impediment preventing compliance’ and that all reasonable steps were taken to remove the impediment and to keep the Court informed about the situation;”*

Amendment F (to the draft resolution)

In the draft resolution, delete paragraph 11.4.

Amendment G (to the draft resolution)

In the draft resolution, paragraph 11.11, replace the words “ordered and by complying fully with” with the words “necessary and by taking”.

Amendment H (to the draft resolution)

In the draft resolution, paragraph 12, replace the words “invites the Court to” with the words “expresses the hope that the Court will”.

In the draft recommendation:

Amendment I (to the draft recommendation)

In the draft recommendation, at the beginning of paragraph 4.1, add the following words: “consider extending its mandate under Article 46 of the Convention by introducing a competence to”.

Amendment J Amendment J (to the draft recommendation)

In the draft recommendation, replace paragraphs 4.2 and 4.3 with the following paragraph:

> *“fully use its competence pursuant to Article 46 of the Convention in resolving the cases of non-compliance in a way which fully and effectively upholds the Convention, ensure, in collaboration with the Court, that a mechanism or working method is established for follow-up in cases of non-compliance, investigate cases and/or publish statements in this connection;”.*

Amendment K Amendment K (to the draft recommendation)

In the draft recommendation, after paragraph 4.3 insert the following paragraph:

> *"give priority to judgments finding violations of Article 34 of the Convention in cases concerning expulsion and extradition of aliens, while supervising their execution by respondent states according to Article 46 of the Convention;".*

Amendment L Amendment L (to the draft recommendation)

In the draft recommendation, delete paragraph 4.4.

Amendment M Amendment M (to the draft recommendation)

In the draft recommendation, paragraph 4.5, replace the words "interim or final resolution, by way of individual or" with the words "interim resolution calling for individual and/or".

Amendment N Amendment N (to the draft recommendation)

In the draft recommendation, paragraph 4.6, replace the words "co-operate with the Court and other relevant actors in order to make available" with the words "collect and publish".

Amendment O Amendment O (to the draft recommendation)

In the draft recommendation, paragraph 4.7, delete the words "and by the Court".

Amendment P Amendment P (to the draft recommendation)

In the draft recommendation, paragraph 4.7, delete the words "and the Court's practice and procedure".

Amendment Q Amendment Q (to the draft recommendation)

In the draft recommendation, paragraph 4.8, replace the words "the intergovernmental sector" with the words "relevant bodies".

C. Explanatory memorandum by Mr Cilevičs, rapporteur for opinion

1. I can only congratulate Mr Darchiashvili on his excellent report and stress the importance of the application of Rule 39 indications given by the European Court of Human Rights in cases concerning expulsion and extradition of aliens. The respect of these indications is indispensable to prevent irreparable damage to the applicants, in cases in which expulsion or extradition could put them at risk of serious violations of human rights, such as the rights guaranteed in Articles 2 and 3 of the European Convention on Human Rights ("the Convention"). Bearing in mind the importance of this issue for the proper functioning of the Convention system, the Parliamentary Assembly and its Committee on Legal Affairs and Human Rights have already partially addressed this issue in the past.[2] Recently, the Committee of Ministers once again stressed the importance of member states' duty to respect and protect the right of individual application in its Resolution CM/Res(2010)25.[3]

2. I should like, however, to propose a few amendments to the draft resolution and recommendation, with a view to strengthening them by putting emphasis on the language of these texts. I am convinced that this important issue requires succinct, clear and precise legal terminology.

2. Council of Europe member states' duty to co-operate with the European Court of Human Rights: Resolution 1571 (2007), Recommendation 1809 (2007) and Doc 11183, report by Mr Christos Pourgourides, Committee on Legal Affairs and Human Rights, paragraphs 49-53.

3. Resolution CM/Res(2010)25 on member states' duty to respect and protect the right of individual application to the European Court of Human Rights, adopted on 10 November 2010.

1. In the draft resolution

1.1. Amendment A

3. The amendment aims to specify that it is up to states parties, and not only to their governments and their representatives before the European Court of Human Rights ("the Court"), to abide by the interim measures of the latter.

1.2. Amendment B

4. The amendment aims to introduce the appropriate legal term in this context: under Rule 39(1), the Court "indicates" to states parties the interim measures to be adopted, while "decisions" of the Court concern different issues (mainly admissibility of applications), are binding *per se* and are delivered by the Court under the specific provisions of the Convention (Articles 28 and 29). Thus the word "indication" seems more appropriate in this paragraph.

1.3. Amendments C and D

5. The "legally binding" nature of the interim measures, including those ordered by the Court under Rule 39, has given rise to controversy in the doctrine of public international law.[4] Before the Grand Chamber judgment in the case of Mamatkulov and Askarov v. Turkey,[5] the Court had been reluctant to accept that states have to abide by its interim measures, mostly because such an obligation did not result directly from the letter of the Convention. In Mamatkulov and Askarov v. Turkey, the Court finally acknowledged that the non-respect of interim measures could lead to violations of Article 34; the obligation to observe such measures thus stems from this article.[6] I therefore propose to use the term "interim measure" and to make a clear reference to Article 34 of the Convention.

1.4. Amendment E

6. The amendment aims to merge paragraphs 11.1, 11.3, 11.5 and 11.6 (the latter two concerning more specific issues) into one new paragraph 11.1.

7. Moreover, it also aims to replace the word "binding" by "interim": see my comments concerning amendment C.

1.5. Amendment F

8. The idea of collective responsibility for guaranteeing the respect of the Convention is reflected in other paragraphs of the draft resolution and draft recommendation and, besides, it seems unrealistic to ask member states to ensure that other member states respect Rule 39 indications. Therefore I propose to delete paragraph 11.4.

1.6. Amendment G

9. I propose to rephrase paragraph 11.11 to bring it into line with accurate legal terminology concerning the process by which the Committee of Ministers monitors the implementation of the Court's judgments. It should be noted, in particular, that individual measures are not "ordered" by the Committee of Ministers, since the state has a choice of measures to be taken; they are only assessed by the Committee of Ministers on their compliance with the Convention. Therefore, I propose to use the word "necessary" instead of "ordered". Moreover, states do not "comply fully" with general measures, but they "take" them in the process of implementing a judgment.[7] Therefore I also propose a different wording.

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4. See, for instance, the joint partly dissenting opinion of Judges Caflisch, Türmen and Kovler in the case of *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, judgment of 4 February 2005 (Grand Chamber), paragraphs 22 and 23.
5. Ibid.
6. Ibid, paragraph 128: "… A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34."
7. See Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006.

1.7. Amendment H

10. It would be inappropriate for the Assembly to make recommendations to the Court on dealing with Rule 39 requests, by "inviting" it to take certain steps.

2. In the draft recommendation

2.1. Amendment I

11. The Committee of Ministers has no power to monitor compliance of measures taken or not by the states following Rule 39 indications, unless the Court has found a violation of Article 34 due to their non-observance. Therefore I propose that it consider extending its mandate to cover also this competence.

2.2. Amendment J

12. Article 46 of the Convention does not establish co-operation between the Court and the Committee of Ministers, but a procedure for supervising the execution of the judgments of the former by the latter. Therefore I propose to use the words "fully use its competence pursuant to Article 46" instead of speaking about a "co-operation" with the Court. Moreover, it would be better to merge paragraph 4.3 into paragraph 4.2, since the former deals with issues concerned by the latter.

2.3. Amendment K

13. This amendment aims to encourage the Committee of Ministers to give priority to the supervision of judgments finding violations of the right of individual petition due to the non-respect of the Court's interim measures.

2.4. Amendment L

14. This amendment aims to delete paragraph 4.4, in which the terminology concerning the Committee of Ministers is not accurate enough (see my comments concerning "individual measures" under Amendment G). Moreover, paragraph 4.4 is redundant, since the issue of the supervision of the execution of judgments by the Committee of Ministers has been raised in paragraph 4.2.

2.5. Amendment M

15. Final resolutions are adopted by the Committee of Ministers only when all individual and general measures have been adopted, while interim resolutions are adopted in the process of supervising the execution of judgments to speed up this process.[8] The amendment aims to point out the importance of interim resolutions in the process of supervision of the execution of judgments by the Committee of Ministers.

2.6. Amendment N

16. This amendment aims to simplify the text of the draft recommendation by introducing a more general notion of "collecting and publishing" up-to-date data.

2.7. Amendments O and P

17. It would be inappropriate for the Assembly to request the Committee of Ministers to make an assessment of the Court's practice. Furthermore, if a working group is created (see paragraph 4.9 of the draft recommendation), it will certainly examine the practice of the Court and of the member states in dealing with Rule 39 applications.

2.8. Amendment Q

18. This amendment aims to introduce more precise terminology.

8. Ibid, Rules 16 and 17.