Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 1788 (2011)[1]
Final version

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

Parliamentary Assembly

1. The Parliamentary Assembly recalls that the centrepiece of the protection of human rights in Europe is the European Convention on Human Rights ("the Convention", ETS No. 5). Application of the Convention is supervised by the European Court of Human Rights ("the Court"), which plays a unique and central role in upholding human rights in Europe.

2. The Assembly has stated in its Resolution 1571 (2007) on Council of Europe member states' duty to co-operate with the European Court of Human Rights, that "[t]he right of individuals to apply to the Court is a central element of the human rights protection mechanism in Europe and must be protected from interference at all levels".

3. To ensure the effectiveness of this right of individual application, Rule 39 of the Rules of Court provides that the Court may indicate to the parties in a case before it interim measures to be adopted in the interests of the parties or the proper conduct of proceedings. These interim measures are thus ordered pending a decision on the admissibility and merits of the case.

4. The Court can, for example, order interim measures to member states to prevent, until a specified date or further notice, the imminent expulsion or extradition of refugees, failed asylum seekers or irregular migrants showing a prima facie case that they are at risk of harm of a serious, irreparable nature in their country of origin or other third country. These interim measures are binding and failure to comply with them results in a breach of the state's international obligations, as determined by the Court's case law.

5. The Grand Chamber of the Court has clarified the binding nature of interim measures. A failure to comply with interim measures undermines the effectiveness of the right of individual application (Article 34 of the Convention) and the state's undertaking in Article 1 of the Convention to secure the rights and freedoms set forth in the Convention to all within its jurisdiction.

6. Given the fundamental importance of the Court's power to order binding interim measures, the Assembly is concerned at proposals being discussed in the context of the follow-up to the Interlaken Conference on the future of the Court and the Convention's control mechanism, to include the Court's power to order interim measures in an instrument that could be subject to amendment by states through a simplified amendment procedure.

1. Assembly debate on 26 January 2011 (6th Sitting) (see Doc. 12435, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Darchiashvili; and Doc. 12471, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Cilevičs). Text adopted by the Assembly on 26 January 2011 (6th Sitting). See also Recommendation 1956 (2011).

7. Recently, there has been an increase in the number of applications for interim measures, with the Court having to deal with 2 402 such requests in 2009 and 3 680 such requests in 2010. It is appreciated that the increase in numbers puts further pressure on the Court and on the states parties that have to abide by the interim measures. However, pressures linked to numbers of applications and workload should not lead to a dilution of standards and protection offered to the individual.

8. The growing demand for Rule 39 requests is an indication of the problems faced by many of those in need of international protection and in securing respect for their rights and their safety. The shrinking of the asylum space in Europe undoubtedly propels individuals who are refused international or humanitarian protection at national level to seek the subsidiary protection of the Court.

9. Of great concern to the Assembly, however, is not just the increase in numbers, but also a growing number of cases where states have ignored the interim measures ordered by the Court. This has resulted, for example, in persons being deported to countries where they are at risk of torture or ill-treatment, despite clear indications by the Court under Rule 39 not to deport them.

10. While still relatively rare, the growing number of breaches is of grave concern given the harm to the individuals concerned and the impact on the integrity of the Convention system as a whole. The Assembly condemns any disrespect of legally binding measures ordered by the Court, and in particular disrespect for the right of individual application as guaranteed by Article 34 of the Convention, as a blatant disregard for this unique system of protection of human rights.

11. The Assembly underlines that the burden is on states to demonstrate that they have complied with the interim measures in question or, in an exceptional case, that there has been an objective impediment which prevented compliance and that they took all reasonable steps to remove the impediment and keep the Court informed about the situation. States should refrain from using the argument of "objective impediments" as a means of circumventing their obligations.

12. Notwithstanding the rise in the number of requests for Rule 39 measures addressed to the Court, the majority of these requests are directed against a handful of the 47 member states. This shows that in most member states there still exists a lack of awareness among individuals, lawyers or even the authorities of these measures and how they are applied.

13. The number of Rule 39 requests could rise substantially in the future if access to the procedure becomes better known and available in all member states of the Council of Europe. It is currently impossible for many of those seeking international protection, and others, to request interim measures from the Court as they often lack access to lawyers and free legal aid, they are not informed of their rights or the procedures available or applicable to them, in a language which they understand, and they do not have access to a telephone or to the outside world. Furthermore, some of those in need of international protection are effectively denied the time and/or opportunity to request Rule 39 measures. Particular problems in this respect occur when persons are detained, or due to the rapidity of their expulsion.

14. The Assembly recognises that innovative methods need to be adopted to deal with ever-growing numbers of requests for interim measures and notes in this respect the usefulness of Court indications, notwithstanding the non-binding nature of these, to member states where recurrent problems exist, such as has been the case in relation to Dublin II Regulation[2] returns.

15. The Assembly therefore urges the member states of the Council of Europe to:

15.1. 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:

15.1.1. 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;

15.1.2. 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;

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2. Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national.

15.2. guarantee the principle of *non-refoulement* in domestic law as a matter of their obligations under the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 protocol and the European Convention on Human Rights and other international treaties;

15.3. uphold legal representation, assistance and, where appropriate, provide legal aid, as well as access to the Court and to the United Nations High Commissioner for Refugees;

15.4. take steps at national level to reduce the need for interim measures by:

15.4.1. guaranteeing access to a full, fair and efficient asylum determination procedure and implementing minimum standards to ensure quality and consistency in asylum decision making;

15.4.2. implementing and guaranteeing basic human rights protections (including in reception and detention centres, access to legal aid, exceptional use of detention) and procedural safeguards against arbitrary detention and *refoulement* (including a fair and effective asylum determination procedure for asylum seekers and refugees);

15.4.3. guaranteeing access to appeal and effective remedies against removal, including remedies with automatic suspensive effect, and removing strict and automatic time frames (including in accelerated procedures);

15.5. providing appropriate training for judges, domestic authorities and lawyers, using, *inter alia*, the good offices of the United Nations High Commissioner for Refugees and the Practice Direction provided by the Court;

15.6. publish up-to-date information and statistics on Rule 39 and asylum determination procedures and practice;

15.7. co-operate fully with the Committee of Ministers in the execution of judgments, by ensuring *restitutio in integrum* in those cases where individual measures are necessary, by taking general measures, and by working towards speedy final resolution of cases.

16. The Assembly recognises the primary role of the Court in finding solutions for dealing with interim measures under Rule 39 and in this context expresses the hope that the Court will:

16.1. continue its work to ensure a consistent implementation of interim measures and improve the flow of information between its sections;

16.2. organise, with the intergovernmental sector of the Council of Europe, an exchange of views with all relevant actors, including civil society, on the challenges faced by the Court and governments in dealing with interim measures, taking into account the fact that the number of requests could increase greatly in the future;

16.3. examine whether it is appropriate and possible to provide reasoning as to positive and negative decisions in Rule 39 requests, at least in cases where the Court sees a systemic problem;

16.4. publish regular statistics on Rule 39 requests – granted or rejected – and their status, as well as the number of persons deported in cases where a Rule 39 request has been granted (including those where it has been subsequently lifted) and the number of cases in which a substantive violation is subsequently found;

16.5. be sensitive to the needs of vulnerable persons, including survivors of torture, victims of trafficking, lesbian, gay, bisexual and transgender persons, children, women, and elderly and disabled persons;

16.6. carry out an analysis of requests for interim measures and their handling, to identify patterns and practices and analyse lessons to be learned and good practices to follow;

16.7. wherever possible or appropriate, deal with cases in which Rule 39 has been indicated by way of an expedited procedure;

16.8. require, in more cases, the adoption of specific measures by states to remedy harm caused, in order that the Committee of Ministers may more effectively monitor the execution of judgments.

17. The Assembly invites the United Nations High Commissioner for Refugees and the Council of Europe to strengthen their mandate of co-operation in the context of improving the effectiveness of Rule 39 in protecting the rights of refugees and asylum seekers, in accordance with United Nations General Assembly Resolution (A/RES/63/14) and their memorandum of understanding.

18. The Assembly invites the United Nations High Commissioner for Refugees and NGOs to continue to monitor the situation, including the statistics, and to raise awareness about the use of interim measures and provide useful, workable tools for practitioners and applicants.

19. The Assembly invites the Council of Europe's Commissioner for Human Rights to continue to monitor the situation in member states as regards cases of non-compliance with interim measures under Rule 39 and use fully the right of intervention before the Court in appropriate circumstances.