Questions and answers on the case of H.F. and Others v. France

Who are the applicants and what was the substance of their complaints?

The applicants are the respective parents of two French women who left for Syria in 2014 and 2015 with their partners to go to the territory controlled by the so-called Islamic State in Iraq and the Levant (ISIL). The women, with their children, are now being held in camps in north-eastern Syria.

The applicants complained about the living conditions of their daughters and grandchildren in the camps and about the refusal by France to repatriate them.

They relied on Article 3 of the Convention (prohibition of torture) and Article 3 § 2 of Protocol No. 4 to the Convention ("No one shall be deprived of the right to enter the territory of the State of which he is a national").

The Court reiterated that a third party could, in exceptional circumstances, act in the name and on behalf of a vulnerable person, where there was a risk that the direct victim might be deprived of effective protection and where there was no conflict of interest between the victim and the applicant (see *Lambert and Others v. France* [GC], no. 46043/14, 5 June 2015).

The Court found that the applicants' daughters and grandchildren were currently in a situation which prevented them from lodging applications directly. The risk of being deprived of the effective protection of their rights under the Convention and Protocol No. 4 was thus established. They all shared the same objective: repatriation to France.

Lastly, since the exact circumstances in which those concerned were being held in the camps remained unknown, they could be regarded as having expressed, as far as possible – in the light of the few messages sent to their families – their wish to return to France with their children, and as having agreed that the applicants could act on their behalf.

Noting that the applicants' standing to act on behalf of their daughters and grandchildren had never been questioned by the domestic courts, the Court found that there were exceptional circumstances which enabled it to conclude that the applicants had *locus standi* to raise, as representatives of their daughters and grandchildren, the complaints under Article 3 of the Convention and under Article 3 § 2 of Protocol No. 4.

What does Article 3 § 2 of Protocol No. 4 guarantee in practice?

Article 3 § 2 of Protocol No. 4 to the Convention ("No one shall be deprived of the right to enter the territory of the State of which he is a national") provides for a national's right to enter his or her country, and may be relied on only by nationals of the State in question. There are no exceptions to this right. Its absolute nature stems historically from the wish to prohibit the exile of nationals.

However, the right to enter the territory of the State of which one is a national must not be confused with the right to remain on that territory; there is no absolute right to remain and the provision cannot be relied upon to avoid extradition.

In addition, as Article 3 § 2 of Protocol No. 4 recognises this right without defining it, the Court accepts that it may have implicit limitations, in the form of exceptional measures that are merely temporary, for example in the context of the global health crisis caused by the Covid-19 pandemic.

The wording of Article 3 § 2 of Protocol No. 4 is confined to prohibiting a deprivation of the right to enter national territory. According to the generally accepted interpretation of the scope of this prohibition, it corresponds to a negative obligation of the State, which must refrain from depriving its nationals of the right to enter its territory. That said, certain positive obligations inherent in Article 3 § 2 of Protocol No. 4 have long been imposed on States for the purpose of effectively guaranteeing entry to national territory. These correspond to measures which stem traditionally from the State's obligation to issue travel documents to nationals, to ensure that they can cross its border.

What does the judgment say about France's responsibility for the living conditions of the applicants' daughters and grandchildren in the camps?

The Court took the view in the present case that France could not be held responsible for the living conditions in the camps of north-eastern Syria because it was not exercising its jurisdiction there.

As provided in Article 1 of the Convention, the "engagement undertaken" by a Contracting State is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction". The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it.

The concept of "jurisdiction" for the purposes of Article 1 of the Convention essentially refers to the State's national territory. From the standpoint of public international law, a State's jurisdiction is primarily territorial. It is presumed to be exercised normally throughout the territory of the State concerned.

However, the Court has recognised that, as an exception to the principle of territoriality, acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention. In each case, with reference to the specific facts, the Court has assessed whether the existence of special features justifies the finding that the State concerned was exercising jurisdiction extraterritorially (see *M.N. and Others v. Belgium (dec.)* [GC] (no. 3599/18), 5 May 2020*;* and *Georgia v. Russia (II)* [GC], (no. 38263/08), 21 January 2021).

What does the judgment say about repatriation requests?

As the Court explained first of all, there is no general right of nationals to be repatriated, whether under the Convention or international law more generally. There is 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. Thus, French citizens being held in the camps in north-eastern Syria cannot claim a general right to repatriation on the basis of the right to enter national territory.

However, Article 3 § 2 of Protocol No. 4 may impose a positive obligation on the State where, in view of the specific circumstances of a given case, a refusal by that State to take any action would leave the national concerned in a situation comparable, *de facto*, to that of exile. But any such

requirement must be interpreted narrowly and will be binding on States only in exceptional circumstances, for example where extraterritorial factors directly threaten the life and physical well-being of a child in a situation of extreme vulnerability. In addition, when examining whether a State has failed to fulfil its positive obligation to guarantee the effective exercise of the right to enter its territory, the requisite review will be confined to ensuring effective protection against arbitrariness in the State's discharge of its positive obligation under that provision.

In the present case the Court took the view that, as there had been no formal decision by the executive authorities in response to the requests for repatriation or any judicial review of the merits of those tacit refusals, the examination of the requests for repatriation made by the applicants had not been surrounded by appropriate safeguards against arbitrariness. There had therefore been a violation of Article 3 § 2 of Protocol No. 4.

What does the Court require of the French Government?

The Court decided that the French Government would have to re-examine the requests for repatriation promptly and in the process afford safeguards against arbitrariness.

In practical terms the Court found that it must be possible for the rejection of a request for repatriation, in the context at issue, 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.

Press contacts
echrpress@echr.coe.int | tel: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Denis Lambert (tel: + 33 3 90 21 41 09)
Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Inci Ertekin (tel: + 33 3 90 21 55 30)
Neil Connolly (tel: + 33 3 90 21 48 05)
Jane Swift (tel: + 33 3 88 41 29 04)