İSTANBUL UNIVERSITY PRESS

*Public and Private International Law Bulletin,* 42(2): 777–790

**DOI:** 10.26650/ppil.2022.42.2.011001
http://ppil.istanbul.edu.tr/tr/_

**Public and Private International Law Bulletin**

**Submitted:** 01.11.2022
**Accepted:** 15.12.2022
**Published Online:** 22.12.2022

**RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ**

# Procedural Aspects of the European Court of Human Right's Assessment under Article 3 of the European Convention on Human Rights in Removal Cases

## Avrupa İnsan Hakları Mahkemesi'nin Geri Göndermeye İlişkin Davalarda Sözleşme'nin 3. Maddesi Kapsamındaki Değerlendirmesinin Usuli Boyutu

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**Abstract**
The European Court of Human Rights has developed important procedural protections under Article 3 of the European Convention of Human Rights in the context of removal cases. Alongside the substantive aspects of the Court's assessment under Article 3, these procedural aspects are crucial for the maintenance of the absolute character of the prohibition of treatment contrary to Article 3 of the Convention.

In tracing the notable evolution of the procedural aspects of Article 3 in removal cases within the Court's case-law, it is argued that this can be understood by reference to three main phases. The first phase involved the commencement of the Court's engagement with procedural aspects of Article 3 in the removal context, which established foundations within the jurisprudence for procedural protections in this area. During the second phase, the Court harnessed *M.S.S. v. Belgium and Greece* to robustly adopt a multi-dimensional and structural approach towards procedural protections under Article 3 in cases concerning removal. Finally, the most recent and third phase of this evolution has witnessed the application of the developed jurisprudence to contemporary issues and contexts, which underline emerging areas of the case-law.

**Keywords**
European Convention on Human Rights, European Court of Human Rights, Article 3, Removal

**Öz**
Avrupa İnsan Hakları Mahkemesi geri göndermeye ilişkin davalarda Avrupa İnsan Hakları Sözleşmesi'nin (AİHS) 3. maddesi kapsamında önemli usuli güvenceler geliştirmiştir. AİHM'in Sözleşme'nin 3. maddesi kapsamındaki değerlendirmesinin maddi boyutunun yanı sıra, usuli boyuta ilişkin geliştirdiği bu yaklaşım, Sözleşme'nin 3. maddesine aykırı muamele yasağının mutlak niteliğinin korunması açısından son derece önem arz etmektedir.

Geri göndermeye ilişkin davalarda Mahkeme'nin Sözleşme'nin 3. maddesinin usuli boyutu altında geliştirdiği yaklaşım üç ana safhada ele alınarak incelenebilir. İlk aşama, Mahkeme'nin geri gönderme bağlamında Sözleşme'nin 3. maddesinin usuli boyutunu inceleme altına almaya başlamasıdır. İkinci aşamada Mahkeme'nin, M.S.S. / Belçika ve Yunanistan içtihadı ile geri göndermeye ilişkin davalarda Sözleşme'nin 3. maddesinin usuli boyutu altında geliştirdiği bu korumayı çok boyutlu ve yapısal bir çerçeveye oturttuğu gözlemlenmektedir. Son olarak, bu evrimsel gelişimin üçüncü aşamasında ise, Mahkeme'nin bu alanda geliştirdiği içtihadını yenilik arz eden güncel meselelere uyguladığı görülmektedir.

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**To cite this article:** Yuksel S, "Procedural Aspects of the European Court of Human Right's Assessment under Article 3 of the European Convention on Human Rights in Removal Cases" (2022) 42(2) PPIL 777. https://doi.org/10.26650/ppil.2022.42.2.011001

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## I. Introduction

This article seeks to provide some insight into the Convention jurisprudence regarding the procedural aspects of the European Court of Human Right's assessment under Article 3 of the European Convention on Human Rights in removal cases, and the manner of its development. In doing so, it will firstly address the general principles which provide the very justification for procedural obligations under Article 3. Secondly, and for the main part, the article will address the evolution of the case-law in this area. It will divide the evolutionary trajectory into three phases, namely: (i) the commencement of the Court's engagement with procedural aspects of Article 3 in the removal context, and the establishment of foundations within the jurisprudence for procedural protections; (ii) the turning point of *M.S.S.* and the consequently emboldened structural approach; and finally (iii) the recent application of established principles to contemporary issues and contexts.

## II. General principles and overview

Before tracing the evolution of the Court's case-law, it would be worth outlining some general principles that structure this body of jurisprudence and illuminate its importance as an integral aspect of Article 3. The Court reiterates that although Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.[1] It has been said that the 'claim of absoluteness' underpinning the prohibition of removals contrary to Article 3 is necessarily accompanied by the requirement that any procedure used to decide the question of whether a removal is compliant with Article 3 must be 'extremely robust'.[2] In other words, the absolute character of Article 3 in the removal context turns on both substantive[3] and procedural dimensions. Thus, under Article 3 itself the Court has concluded that where there is a

1 *Hirsi Jamaa and Others v. Italy* (No. 27765/09, 23 February 2012), paras. 113-114. For a recent reiteration of this principle in a case concerning expulsion, see *M.A. and Others v. Lithuania* (No. 59793/17, 11 December 2018), para. 102, stating that 'the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 of the Convention where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment of punishment in the receiving country.'

2 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 403.

3 The Court has recently in *Sanchez-Sanchez v. the United Kingdom* (No. 22854/20, 3 November 2022), while emphasising that the prohibition of Article 3 ill-treatment remained absolute, held that in extradition cases, the applicant must firstly adduce evidence capable of proving there are substantial grounds for believing there is a real risk of being given a sentence of life imprisonment without parole upon extradition, which constitutes treatment contrary to Article 3. See *Sanchez-Sanchez v. the United Kingdom*, paras. 97-99.

'lack of legal framework providing adequate safeguards' in the domain of examining whether an individual's return would put them at risk of treatment prohibited under Article 3, there are substantial grounds for believing they risk a violation of their rights under Article 3 - such that an expulsion would actually be in breach of Article 3.[4] Additionally, the Court has taken Article 13 in conjunction with Article 3 to include a right to an effective remedy for potential breaches of the prohibition of returns contrary to Article 3, which 'imperatively requires … independent and rigorous scrutiny that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3'.[5]

It has been stated that the strength of this aspect of the Court's jurisprudence is the ability of the Court to find a violation of Article 13 when taken in conjunction with Article 3, without finding a violation of the substantive aspect of Article 3.[6] In the case of *Mwanje v. Belgium*, the Court found a violation of Article 13 taken in conjunction with Article 3,[7] but rejected the complaint that the substantive aspect of Article 3 would be violated if the applicant were to be removed to Cameroon.[8] The operation of Article 13 in this manner has been welcomed on account of the influence of such complaints on domestic procedures and future cases, as well as the importance of ensuring these procedures do not go without scrutiny.[9]

## III. Evolution of the case-law

### A. Commencing engagement with procedural aspects of Article 3

The first phase of the evolution of the Court's case-law in respect of procedural aspects under Article 3 in removal cases may be characterised generally as a period of commencing engagement with these aspects and establishing jurisprudential foundations under the Convention for procedural protections. The landmark judgment and apt starting point in this regard is *Chahal v. the United Kingdom*, decided in 1996. In that case, the Court found a violation of Article 13 taken in conjunction with Article 3, primarily due to the absence of possibility of review of the relevant removal

4 *Auad v. Bulgaria* (No. 46390/10, 11 October 2011), paras. 106-107. It may be important to note that while the Court has stated that decisions regarding the entry, stay and deportation of aliens, as well as asylum proceedings, do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention, it has developed 'minimum guarantees in non-refoulement procedures at the national level' under Article 3 of the Convention. See *Maaouia v. France* (No. 39652/98, 5 October 2000), paras. 38-40; and *Onyejiekwe v. Austria* (dec.) (No. 20203/11, 9 October 2012), para. 34. For more information *see* Nuray Ekşi, 'İnsan Hakları Avrupa Sözleşmesi'nin 6. Maddesinin Yabancıların Sınırdışı Edilmesine Uygulanıp Uygulanmayacağı Sorunu' [Application of Article 6 of the Human Rights Convention to the Expulsion Cases], 2009 29(1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 121, 121-141; Fanny de Weck, *Non-refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill Nijhoff 2017), 271.

5 *M.S.S. v. Belgium and Greece* (No. 30696/09, 21 January 2011), para. 293.

6 Dembour (n 2) 426.

7 *Yoh-Ekale Mwanje v. Belgium* (No. 10486/10, 20 December 2011), para. 107.

8 Ibid, paras. 78-86.

9 Dembour (n 2) 425-426.

decision 'with reference solely to the question of risk, leaving aside national security considerations', leaving Mr. Chahal without an effective remedy for his Article 3 complaint.[10] The decisive importance of the lack of domestic review which focused exclusively on the applicant's risk of exposure to treatment contrary to Article 3 should be seen as testament to the absolute character of that provision. While noting that its own assessment of the risk of treatment contrary to Article 3 must be 'rigorous',[11] the Court in *Chahal* established the principle that an effective remedy under Article 13 with Article 3 requires 'independent scrutiny' by the removing state of a claim that there are substantial grounds for fearing a real risk of treatment contrary to Article 3.[12]

A few years after *Chahal*, the Court in *Jabari v. Turkey* strengthened this position, through observing that under the heads of Article 3,[13] and Article 13 taken with Article 3, there must be an 'independent *and rigorous* scrutiny [emphasis added]' of an individual's claim that there exist substantial grounds for fearing a risk of treatment contrary to Article 3 upon removal.[14] In a further show of the firmly principled approach demonstrated in *Chahal*, the Court in *Jabari* stated: 'the automatic and mechanical application of such a short time-limit [of five days] for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3'.[15] Shortly after *Jabari*, the 2002 case of *Čonka v. Belgium* has been noted as marking another milestone, whereby the Court found a violation for a procedural reason in an asylum-related case under Article 13, but in this instance taken with Article 4 of Protocol No. 4.[16]

The Court continued to manifest the sensitivity demonstrated in *Jabari* towards the particular difficulties faced by asylum seekers towards the end of its first phase of case-law evolution. This is evinced by the 2009 case of *Abdolkhani and Karimnia v. Turkey*, where the Court found that while a temporary asylum procedure had been provided for in law, in practice the national authorities prevented the applicants raising Article 3 allegations within that framework.[17] This was because they failed to consider the applicants' requests for temporary asylum, to notify them of reasons for not taking into consideration their asylum requests, and to authorise access to legal assistance.[18] Significantly, in finding that there was a lack of 'rigorous scrutiny',

10 *Chahal v. the United Kingdom* (No. 22414/93, 15 November 1996), paras. 153-155.

11 *Ibid*, para. 96.

12 *Ibid*, para. 151.

13 *Jabari v. Turkey* (No. 40035/98, 11 July 2000), para. 39. In relation to an alleged violation of Article 3, the Court 'observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society … a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3.'

14 *Jabari v. Turkey*, para. 50.

15 *Ibid*, para. 40.

16 *Čonka v. Belgium* (No. 51564/99, 5 February 2002), para. 85; see also Dembour (n 2) 428.

17 *Abdolkhani and Karimnia v.* Turkey (No. 30471/08, 22 September 2009), para 115.

18 Ibid.

the Court stated it was 'struck by the fact that both the administrative and judicial authorities remained totally passive' in the face of the applicants' serious Article 3 allegations.[19] This illustrates the firm stance taken by the Court towards the end of its first phase of engagement with procedural protections in removal cases under Article 3, and its readiness to trace barriers to the implementation of these protections all the way to the attitudes of domestic authorities. Through judgments like *Abdolkhani*, the Court sowed the seeds for the innovative and wide-ranging analysis that became emblematic of its next phase of case-law development.

### B. A new phase of engagement: *M.S.S* onwards

Following what has been described so far as the first phase in the Court's development of minimum procedural obligations under Article 3 in removal cases, the Court in 2011 decided a case that definitively signalled a new phase: *M.S.S. v. Belgium and Greece*. The case was also undoubtedly a turning point for case-law development on substantive aspects of Article 3 in removal cases, although this is beyond the scope of this article. The case has been described as notable for the Court's questioning of the Dublin II[20] mechanism in a way which 'brought most significant innovations to ECHR law'.[21] It has also been viewed to demonstrate 'in an exemplary way which kind of deficiencies can contravene Article 13 in the context of refoulement procedures, specifically for asylum seekers'.[22] To understand the pivotal nature of the *M.S.S.* judgment, and what has been termed its 'resolutely human rights approach' that dealt with key EU legislation,[23] it is instructive to gain an idea of the prior position of the Court's jurisprudence in relation to Dublin transfers. The Court had unanimously decided the lead case of *K.R.S. v. the United Kingdom* in 2008, concerning an asylum-seeker from Iran whom the U.K. wanted to transfer to Greece, their first country of arrival. The applicant argued that such a transfer would be in breach of Article 3, citing the UNHCR's advice that Member States should refrain from returning asylum seekers to Greece. Declaring the case inadmissible, the Court held that the 'presumption must be that Greece will abide by its obligations', and that any application about the applicant's possible expulsion to Iran should be lodged with the Court following his return to Greece.[24] This reasoning followed that of *T.I. v. the United Kingdom*, where in respect of the transfer to Germany, the Court held that it was 'satisfied by the German Government's assurances that the applicant would not

19 Ibid, para. 113.

20 For the Dublin II Regulation *see* 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, OJ L 50 25.2.2003, 1-10.

21 Dembour (n 2) 403.

22 De Weck (n 4) 281.

23 Dembour (n 2) 412.

24 *K.R.S. v. the United Kingdom (*dec.) (No. 32733/08, 2 December 2008).

risk immediate or summary removal to Sri Lanka'.[25] Owing to the inadmissibility of these cases that preceded *M.S.S*, it is argued that the protections for an applicant in the same position as M.S.S. were not extensively developed within the case-law till that case came to be decided.[26]

Turning back to *M.S.S*., the case concerned an Afghan national who had fled Kabul and applied for asylum in Belgium following his arrival.[27] It transpired that the first EU country he had entered was Greece,[28] and subsequently Belgium expelled him there,[29] where the applicant's asylum request had been left unexamined by the Greek authorities.[30] In the Court's view, the applicant had an arguable claim that his removal to Afghanistan would infringe Article 3 of the Convention.[31] Under the main concern of whether effective guarantees existed in Greece against arbitrary *refoulement* to Afghanistan,[32] and whether the applicant had an effective remedy against his expulsion order in Belgium,[33] the Court found that both Greece and Belgium were in violation of Article 13 taken with Article 3.[34] The Court comprehensively outlined the requirements of an effective remedy under Articles 13 and 3, stating that this 'imperatively requires' the following: close scrutiny by a national authority; independent and rigorous scrutiny of a claim of substantial grounds for fearing a real risk of treatment contrary to Article 3; a particularly prompt response; and access to a remedy with automatic suspensive effect.[35] Under this framework of procedural protections under Article 13 taken in conjunction with Article 3, the Court in an innovative and thorough manner was able to examine the shortcomings in the Greek asylum procedures from a structural perspective. Thus, the Court noted the following shortcomings: insufficient information for asylum-seekers about procedures to be followed; no reliable system of communication between authorities and asylum-seekers; a shortage of interpreters and lack of training of staff for individual interviews; a lack of legal aid and consequently legal counsel; and excessively length delays in receiving a decision.[36] Enriching this structural approach, the Court noted its concern that almost all first-instance decisions were negative and drafted in a stereotyped manner,[37] and took note of the extremely low rate of asylum and subsidiary protection granted by Greek authorities compared

25 *T.I. v. the United Kingdom* (dec.) (No. 43844/98, 7 March 2000).

26 Dembour (n 2) 404.

27 *M.S.S. v. Belgium and Greece* (No. 30696/09, 21 January 2011), para. 11.

28 Ibid, para. 12.

29 Ibid, paras. 17 and 33.

30 Ibid, para. 310.

31 Ibid, paras. 295-297.

32 Ibid, para. 286.

33 Ibid, para. 369.

34 Ibid, paras. 267-322, 369-397.

35 Ibid, para. 293.

36 Ibid, para. 301

37 Ibid, para. 302.

with other EU member states.[38] This constituted an important recognition in the case-law that while the 'effectiveness' of a remedy does not depend on the certainty of a favourable outcome,[39] statistics still hold value in other respects when assessing compliance with Article 13 taken together with Article 3 in removal cases – such as in the present case, where they indicated the strength of the applicant's argument concerning a loss of faith in the asylum procedure.[40]

Thus, *M.S.S* invigorated the sensitivity developed by the Court towards asylum-seekers in its first phase of case-law, such as in *Jabari*, with a novel multidimensionality. In turn, this emboldened the protective rigour of procedural obligations under Article 3 in removal cases. This is demonstrated by the subsequent cases of *I.M. v. France* and *Hirsi Jamaa and Others v. Italy*. In *I.M. v. France*, the applicant was only able to register for a priority asylum procedure after receiving a deportation order and being placed in administrative detention.[41] In response, the Court took a broad-brushed approach in examining the obstacles encountered within asylum determination procedures, especially for asylum-seekers detained in immigration centres. Conducting a multi-dimensional analysis, it has been argued that the judgment demonstrated a well-placed scepticism towards the rejection of asylum-seekers on purely procedural grounds, which manifested in the finding that the accessibility in practice of legal remedies that had been available in theory were limited by several factors essentially linked to the automatic closure of the relevant application under the priority procedure.[42] This was in light of factors including the impossibility of gathering the supporting elements of an asylum application while in detention,[43] and the short period of time the applicant had to prepare an appeal[44] - broadly, the material and procedural difficulties stemming from the applicant being in detention.[45]

The holistic approach of *I.M. v. France* manifested again within the same month in *Hirsi Jamaa and Others v. Italy*. As is well-known, that case concerned applicants on intercepted vessels who were handed over to Libyan authorities after heading towards the Italian coast. The Court reiterated the importance under Article 13 taken with Article 3, as well as Article 4 of Protocol No. 4 in that case, of guaranteeing the right to obtain sufficient information for effective access to asylum procedures.[46] It also noted the requirement under Article 13 taken in conjunction with Article 3 of the possibility

38 Ibid, para. 313.

39 Ibid, para. 289.

40 Ibid, para. 313.

41 *I.M. v. France* (No. 9152/09, 2 February 2012), paras. 137-143.

42 *I.M. v. France*, para. 154; see also De Weck (n 4) 273.

43 *I.M. v. France*, para. 146.

44 Ibid, para. 150.

45 Ibid, para. 154.

46 *Hirsi Jamaa and Others v. Italy*, paras. 201-207.

of remedies with suspensive effect.[47] Therefore, among many other noteworthy contributions, it has been stated that the case confirmed a 'core problem' regarding push-backs - a phenomenon which recent case-law indicates the Court is having to deal with increasingly - is 'precisely the unavailability of remedies aboard ships operating on the high seas'.[48] In this way, it may be said that *Hirsi Jamaa* embedded within the case-law of procedural aspects under Article 3 in removal cases the clearly established general principle that the 'special nature of the maritime environment cannot justify an area outside the law' where individuals are devoid of the protection of the Convention.[49] In the next year, the Court clarified in *M.E. v. France* that the mere fact an asylum application is dealt with under a priority procedure and therefore within a limited time period is not in itself incompatible with Article 13 taken with Article 3,[50] for example where an applicant has made a particularly late application for asylum;[51] or, as noted in *Mohammed v. Austria*, where an asylum claimant had access to a substantive examination of their claim in the first instance, given the need for EU Member States to ease the strain of the number of asylum applications received.[52] Indeed, these refinements illustrate the capacity of the jurisprudence, in line with the principle of subsidiarity, to withstand the impact of changing contexts within Member States, a theme that pervades the most recent developments in the Court's case-law.

As a final observation within this second phase of case-law evolution, it is worth noting the development of a related line of case-law during this period that demonstrates a similar level of robustness. Thus, there have been a series of cases occurring around the time of *M.S.S.* that have developed the procedural aspect of Article 3 independently of the right to an effective remedy under Article 13. Accordingly, in *Khaydarov v. Russia*, decided in 2010, the Court held that it was 'unable to conclude that the Russian authorities duly addressed the applicant's concerns with regard to Article 3 in the domestic extradition proceedings.'[53] This was in light of the fact that the domestic courts had failed to study carefully the documents relating to the applicant's extradition case, to the extent that they claimed to have been provided with assurances against ill-treatment when it was clear from the documents that no such assurances were given.[54] The Court more explicitly adopted a focus on procedural obligations under Article 3 in the 2011 case of *Auad v. Bulgaria*, decided after *M.S.S.*. It held that 'the lack of a legal framework providing adequate safeguards in this domain allows the

47 Ibid, para. 198.

48 Violeta Moreno-Lax, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) HRLRev 574, 591.

49 *Hirsi Jamaa and Others v. Italy*, para. 178; *Medvedyev and Others v. France* (No. 3394/03, 29 March 2010), para. 81.

50 *M.E. v. France* (No. 50094/10, 6 June 2013), para. 67.

51 Ibid, paras. 69-70.

52 *Mohammed v. Austria* (No. 2283/12, 6 June 2013), paras. 79-80.

53 *Khaydarov v. Russia* (No. 21055/09, 20 May 2010), para. 114; see also *Abdulkhakov v. Russia* (No. 14743/11, 2 October 2012), para. 148.

54 *Khaydarov v. Russia*, para. 113.

Court to conclude that there are substantial grounds for believing that the applicant risks a violation of his rights under Article 3', and in the same breath reiterated that the 'grave and irreversible' consequences of this therefore 'call for rigorous scrutiny'.[55] Thirdly, in *Mamazhonov v. Russia* the Court expanded upon the rationale behind finding violations of the procedural aspect of Article 3 itself, without taking Article 13 in conjunction, by explaining that a failure to 'rigorously review serious and reasoned claims of the applicant … is in itself an affront to the protection mechanism established under the Convention', given that this failure 'even taken alone is sufficient for finding a violation of Article 3'.[56]

The development of this case-law has been especially important in embedding a fundamental principle within this area of jurisprudence: namely that the absolute character of obligations under Article 3 depend on both its substantive *and procedural* dimensions. Its impact continues to manifest and proves significant for novel scenarios. This can be seen in *O.M. and D.S. v. Ukraine*, which dealt with scenario of an applicant's removal at a transit zone of an international airport and held that the removal of the first applicant without any assessment of their alleged risks of ill-treatment amounted to a violation of Article 3 in itself.[57]

### C. Recent Developments and Contemporary Issues

In recent developments of its case-law involving procedural aspects of its assessment under Article 3 in removal cases, the Court has had to apply the principles established in the first and second phases hitherto discussed in relation to contemporary contexts and issues, which as ever pose both opportunities and challenges.

The first contemporary issue is that of preventions of entry into a territory, as well as summary returns at the border or shortly after entry into a territory (otherwise known as "push-backs"). In 2018, the Court decided *M.A. and Others v. Lithuania*, which concerned a complaint by a family of Chechen origin that the refusal of Lithuanian border guards to accept their asylum application and initiate asylum proceedings on three occasions exposed them to a real risk of ill-treatment in Russia. In that case, the Court found that Article 13 had been violated, by holding that the appeal before an administrative court against refusal of entry, that had been adduced by the Lithuania, did not constitute an effective remedy because it did not have automatic suspensive effect.[58] This was in light of Court's finding that Article 3 had been violated, following the approach in *Hirsi Jamaa and Others*, due to the failure to allow the applicants to submit asylum applications; and their removal to Belarus, without any examination

55 *Auad v. Bulgaria*, para. 107.

56 *Mamazhonov v. Russia* (No. 17239/13, 23 October 2014), para. 161.

57 *O.M. and D.S. v. Ukraine* (No. 18603/12, 15 September 2022), paras. 97-100.

58 *M.A. and Others v. Lithuania,* para. 119.

of their claim that they would face a real risk of return to Chechnya and ill-treatment there.[59]

The Court decided a similar issue in *M.K. and Others v. Poland* in 2020, namely that the lack of automatic suspensive effect of an appeal against refusal of entry constituted a violation of Article 13 taken in conjunction with Article 3, as well as Article 4 of Protocol No. 4 in that case.[60] That case concerned decisions refusing the applicants with arguable claims of risk under Article 3, again of Chechen origin, entry into Poland at the border crossing point and receipt of their asylum applications. The Court has continued to be sensitive towards the particular difficulties faced by asylum seekers in alleged pushback contexts,[61] demonstrated by the 2021 case of *D.A. and Others v. Poland* concerning Syrian nationals. In that case, the Court found a breach of Article 13 taken together with Article 3 (and Article 4 of Protocol No. 4) not only because of the lack of automatic suspensive effect of appeal to administrative courts; but in addition, by establishing that the applicants' claims concerning risk of treatment in breach of Article 3 were disregarded by border control authorities and the applicants' personal situation was not taken into account in their removal to Belarus.[62] The finding of a violation of Article 13 taken with Article 3 in *D and Others v. Romania*, based on the lack of suspensive effect of appeal against deportation orders in Romanian law, corroborates these findings because it flows from the same procedural deficiency - the lack of suspensory effect of appeals in removal cases.[63] This corroboration is especially helpful given that cases decided in the prevention of entry and summary return context deal with transposing established principles, such as the requirement of remedies with automatic suspensive effect, into an emerging and pertinent area of case-law. While the Convention jurisprudence on prevention of entry and summary returns is still in its initial stages, it is clear that procedural obligations under Article 3 established in the removal context apply in these situations – the question rather is *how* they will apply.

The two most recent cases in the area of summary returns, *Akkad v. Turkey* and *D v. Bulgaria*, affirm the broader trend that while the jurisprudence concerning "push-backs" is still evolving, the procedural protections provided for under Article 3 in removal cases do apply in principle. Accordingly, in *D v. Bulgaria*, the Court noted from the perspective of procedural safeguards that the applicant did not benefit from the assistance of an interpreter or translator, receive information on his rights as an asylum seeker, or have access to a lawyer or other assisting representatives.[64] It also noted that the haste with which the removal order was implemented rendered existing

59 Ibid, paras. 114-115; see also, *Hirsi Jamaa and Others v. Italy*, para. 147.

60 *M.K. and Others v. Poland* (Nos. 40503/17, 42902/17, and 43643/17, 23 July 2020), paras. 219-220.

61 *D.A. and Others v. Poland* (No. 51246/17, 8 July 2021), para. 1.

62 Ibid, paras. 89-90.

63 *D and Others v. Romania* (No. 75953/16, 14 January 2020), paras. 129-130.

64 *D v. Bulgaria* (No. 29447/17, 20 July 2021), paras 132-133.

remedies ineffective and therefore unavailable in practice,[65] and ultimately found a violation of Articles 3 and 13.[66] In this way, the *D v. Bulgaria* establishes that in the context of summary returns, states still need to ensure their removal procedures are not overly formalistic, and instead apply a holistic and sensitive approach towards examining the risk of treatment contrary to Article 3 faced by asylum-seekers upon removal, such that legal remedies against such removals remain effective and available to them.

The Court embarked on a similar refinement of how the established principles fall to be applied to this first contemporary issue in *Akkad v. Turkey*. The case concerned the return of the applicant to Syria two days after his arrest at the Turkish border with Greece, under the guise that this was a 'voluntary return'. While the case dealt with the issue of summary returns, similarly to *D v. Bulgaria*, it also entailed a novel feature, in that the applicant held "temporary protection" status.[67] This is significant for two reasons: firstly, the summary return occurred in a scenario where an individual had been living on Turkish territory for a substantial period of time before being returned to Syria and had acquired a legal residence permit, rather than being returned shortly after entry.[68] This semblance of ties with the removing state distinguished the applicant from other asylum-seekers who are usually affected by summary returns. Secondly, the granting of "temporary protection" status indicated in the Court's view that the authorities had already considered that the applicant might face certain risks contrary to the provisions of the Convention in the event of refoulement to Syria.[69] In order to prevent abusive applications, the system under Turkish law of ending "temporary protection" status through voluntary return for Syrians requires a UNHCR representative to sign an individual's voluntary return form.[70] This requirement is a key part of the system, because as noted by the Court it constitutes a 'formal and legal guarantee against any attempt by State agents to misuse their power'.[71] In other words, the status of the applicant in *Akkad* meant that there were a set of specific procedural safeguards provided for by law in the event of his removal or return.

The Court held that there had been a violation of Article 13 taken in conjunction with Article 3, and in doing so made important rulings on the disparity between the safeguards provided for in law under the "temporary protection" system as opposed to in practice. For example, the Court noted that the requirement in Turkish law that a

65 Ibid, para. 134.

66 Ibid, para. 137.

67 *Akkad v. Turkey* (No. 1557/19, 21 June 2022), see paras. 31-33. Temporary protection is regulated in Turkish law by Article 91 of the Law No 6458 on Foreigners and International Protection (Official Gazette Dated 4.11.2013 Number 28613) and Directive on the Temporary Protection (Official Gazette Dated 22.10.2014 Number 29153).

68 *Akkad v. Turkey*, para. 4.

69 Ibid, para. 70.

70 Ibid, para. 33.

71 Ibid, para. 86.

voluntary return form be signed by a UNHCR representative had not been fulfilled.[72] The domestic authorities also failed to apply other legal safeguards – the applicant received no copies of their signed documents or documents attesting to their removal procedure, whereas those subject to a removal were legally meant to be informed of the possibility of challenging their removal and the relevant time-limits.[73] Ultimately, the Court found that the applicant's exercise of the remedies available under Turkish law was hindered by hasty and misleading acts of the authorities; and that the failure to apply all the legal guarantees provided for in Turkish law impeded the conformity of the removal procedure with the Convention.[74] In finding that Article 13 taken in conjunction with Article 3 is violated where domestic authorities deprive individuals of availing themselves of remedies to which they were entitled in law, the Court made clear the inadequacy of a purely positivistic approach towards procedural obligations in the removal context.[75]

The second contemporary issue is that of terrorism, which surfaced in the 2021 case of *K.I. v. France*. In that case, concerning a Russian national of Chechen origin, France had proposed the expulsion of the applicant on the basis of public safety following the ending of his refugee status in domestic law upon further to his conviction on terrorism charges.[76] The Court found that there would be a violation of Article 3 in its procedural aspect if the applicant were returned to Russia without an *ex nunc* assessment by the French authorities of the risk of treatment contrary to Article 3 he claims to face if deported.[77] It is notable that the principle of *ex nunc* assessment of risk under Article 3 was upheld in a situation where the applicant alleged they would be at risk of treatment contrary to Article 3 on account of their criminal conviction for acts of terrorism in the removing State, and where their refugee status had been revoked.[78] Overall, this approach in the area of removal cases can be seen as part of the broader effort of the European Court of Human Rights to uphold human rights standards under the Convention in the sensitive area of counter-terrorism.

## IV. Conclusion

In conclusion, the Court has been at the forefront of developing the backbone of protection in Europe for individuals in removal cases. This article has sought to shine a

72 Ibid.

73 Ibid, para. 87.

74 Ibid, para. 90.

75 Ibid, para. 92.

76 International Treaties (for example Article 1F of the Geneva Convention on the Legal Status of Refugees) and national legislations (for example Article 64 of Law No 6458 and Article 8 of the Directive on the Temporary Protection) exclude individuals from refugee or temporary protection where there are serious reasons to consider that they have committed certain serious crimes. For more information *see* Nuray Ekşi, *Mahkeme Kararları Işığında Suçluların İltica Sistemi Dışında* Bırakılması [Exclusion of Criminals from Asylum System in the Light of Court Decisions], (1st edn, Beta 2015), 1 et seq.

77 *K.I. v. France* (No. 5560/19, 15 April 2021), para. 146.

78 Ibid, para. 129.

light upon this trailblazing role of the Court in relation to the development of procedural protections under Article 3 of the Convention in removal cases, by delineating and traversing three key evolutionary phases. To recount, these are: (i) the establishment of jurisprudential foundations in the first phase, (ii) the multi-dimensional and structural approach following *M.S.S.*, and (iii) recent developments that have applied established principles to contemporary issues. The robust intentionality underpinning these three phases of development has ultimately been driven by an astute sensitivity towards the grave difficulties faced by individuals in removal cases, as well as a discerning eye for the structural changes needed to address these. Furthermore, through unravelling the way in which the Court's case-law on procedural aspects of Article 3 in removal cases has evolved, it becomes clear that the Court has oriented its development of procedural protections towards ensuring that Article 3's claim of absoluteness is not empty. The Court's case-law therefore provides optimism that it will continue to uphold the Convention's protective rigour in respect of ever-changing challenges in the relevant context.

**Peer-review:** Externally peer-reviewed.
**Conflict of Interest:** The author has no conflict of interest to declare.
**Grant Support:** The author declared that this study has received no financial support.

**Hakem Değerlendirmesi:** Dış bağımsız.
**Çıkar Çatışması:** Yazar çıkar çatışması bildirmemiştir.
**Finansal Destek:** Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

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