

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Guide on Article 3 of Protocol No. 4 of the European Convention on Human Rights

Prohibition of expulsion of nationals

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Table of contents

Note to readers 4

I. Introduction 5

II. Personal scope of application: the definition of "nationals" 6

A. Reference to national law 6

B. Denial or revocation of citizenship and link with Article 8 7

III. Specific issues of territorial application 7

A. Overseas territories 7

B. Territorial entity not recognised by the international community 8

C. Policing State borders 8

IV. The notion of expulsion and scope of protection 8

V. Right to enter one's own country 9

A. State nationals as right holders 9

B. Extraterritorial application of Article 3 § 2 of Protocol No. 4 10

C. Rights outside the scope of protection 11

1. No right to remain in one's own country 11

2. No right to repatriation 11

3. No right to diplomatic protection or consular assistance 11

a. General points 11

b. Territory under the control of a non-State armed group 12

D. Absolute nature of the right to enter one's own country and its historical background 12

1. Absolute nature of the right and its historical basis 12

2. Cases concerning members of royal houses 12

E. Implied limitations 13

F. Principles of interpretation 13

1. Dynamic and evolutive approach 13

2. Systemic approach to ensure rights that are practical and effective 13

G. Scope of negative obligation 13

H. Scope of positive obligations 14

1. General points 14

2. Obligation to issue travel documents 14

3. Scope of positive obligations in the context of a refusal to repatriate 15

a. General points and applicable test 15

b. Existence of exceptional circumstances 16

c. Safeguards against arbitrariness 16

List of cited cases 19

Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter "the Court", "the European Court" or "the Strasbourg Court") to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 3 of Protocol No. 4 of the European Convention on Human Rights (hereafter "the Convention" or "the European Convention") until 15 January 2021. Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court's judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012). Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020).

Protocol No. 15 to the Convention recently inserted the principle of subsidiarity into the Preamble to the Convention. This principle "imposes a shared responsibility between the States Parties and the Court" as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto (*Grzęda v. Poland* [GC], § 324).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a List of keywords, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The HUDOC database of the Court's case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court's reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the HUDOC user manual.

* The case-law cited may be in either or both of the official languages (English or French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (*).

I. Introduction

1. Article 3, Protocol No. 4 guarantees two distinct rights: the right not to be expelled from - and the right to enter - the territory of the State of which one is a national.

2. Equivalent provisions are also found in the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the American Convention on Human Rights (1969), the African Charter on Human and Peoples' Rights (1981) and the International Convention on the Rights of the Child (1989).

3. Protocol No. 4 distinguishes between the expulsion of nationals, which is governed by Article 3, and the expulsion of aliens (including stateless persons), a matter addressed in Article 4.

4. The collective expulsion of nationals is prohibited in the same way as the collective expulsion of aliens referred to in Article 4 of Protocol No. 4 (Explanatory Report to Protocol No. 4, § 20; Case-Law Guide on Article 4 of Protocol No. 4).

5. The adoption of Article 4 and paragraph 1 of Article 3 cannot be interpreted as in any way justifying measures of collective expulsion that may have been taken in the past (Explanatory Report to Protocol No. 4, § 33; *Hirsi Jamaa and Others v. Italy* [GC], 2012 § 174).

6. The expulsion of nationals, whether individuals or groups, is often inspired by political motives (Explanatory Report to Protocol No. 4, § 21).

7. Article 3 of Protocol No. 4 only prohibits a Contracting State from expelling, or refusing an entry to, its own nationals (*H.F. and Others v. France* [GC], 2022, § 245; *Maikoe and Baboelal v. the Netherlands*, Commission decision, 1994; Explanatory Report to Protocol No. 4, § 29).

8. Article 3 of Protocol No. 4 can therefore be invoked only in relation to the State of which the victim of any alleged violation of this provision is a national (*M. and S. v. Italy and United Kingdom* (dec.), 2012, § 73; *Gulijev v. Lithuania*, 2008, § 51; *Roldan Texeira and Others v. Italy* (dec.), 2000; *X. v. Sweden*, Commission's decision, 1969).

9. Guarantees provided for by this provision extend only to nationals of a State that has ratified Protocol No. 4. Four States have not ratified Protocol No. 4: Greece, Switzerland, Turkey and the United Kingdom.

10. Expulsion from – or inability to enter - the territory of the State of which one is a national may, in certain circumstances, give rise to an issue under other provisions of the Convention or its Protocols. For example, legislation imposing restrictions on admission to the United Kingdom of citizens of the United Kingdom and Commonwealth resident in East Africa, which discriminated against persons of Asian origin on the ground of race and colour, was found to amount to degrading treatment within the meaning of Article 3 of the Convention (*East African Asians v. the United Kingdom*, Commission decision, 1973; see also Case-Law Guide on Article 8).

11. The Court has, for the first time, found a breach of Article 3 of Protocol No. 4 to the Convention in the case of *H.F. and Others v. France* [GC], 2022.

Article 3 of Protocol No. 4 to the Convention

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

HUDOC keywords

Prohibition of expulsion of a national

Prohibition of collective expulsion of nationals

Enter own country

II. Personal scope of application: the definition of "nationals"

12. Article 3 of Protocol No. 4 refers only to natural persons who are nationals of a State that has ratified Protocol No. 4, or who may at least claim to be so, on the basis of plausible arguments (*Association "Regele Mihai" v. Romania* (dec.), 1995).

A. Reference to national law

13. For the purposes of Article 3 of Protocol No. 4, the applicant's "nationality" must be determined, in principle, by reference to national law (*Slivenko and Others v. Latvia* (dec.) [GC], 2002, § 77; *Nagula v. Estonia* (dec.), 2005; *Fedorova and Others v. Latvia* (dec.), 2003; *Shchukin and Others v. Cyprus*, 2010, § 144).

14. Personal circumstances, such as birth on the territory of the respondent State, prolonged residence or the existence of strong family ties, are of no relevance for the purposes of establishing the applicant's nationality, including in the context of the dissolution/succession of States (*Gribenko v. Latvia* (dec.), 2003; *Nagula v. Estonia* (dec.), 2005; *Shchukin and Others v. Cyprus*, 2010, § 145).

15. The burden is on the applicant to prove that he/she is, or may arguably claim to be, a national of the respondent State within the meaning of the domestic law of that State (*Fedorova and Others v. Latvia* (dec.), 2003; *Nagula v. Estonia* (dec.), 2005), including by exhausting relevant domestic remedies (*L. v. Federal Republic of Germany*, Commission decision, 1984).

16. In the context of the right to enter the territory of a State, paragraph 2 of Article 3 of Protocol No. 4 does not relieve persons who wish to enter of the obligation to prove their nationality of the State concerned, if so required (Explanatory Report to Protocol No. 4, § 26).

17. Where the domestic proceedings with a view to recognising one's citizenship of a given State or obtaining it through naturalisation are pending, this fact is insufficient to trigger the application of guarantees for which Article 3 of Protocol No. 4 provides (*L. v. Federal Republic of Germany*, Commission decision, 1984; *S. v. Federal Republic of Germany*, Commission decision, 1986).

B. Denial or revocation of citizenship and link with Article 8

18. Denial of citizenship for the sole purpose of expelling the applicant may raise an issue under Article 3 of Protocol No. 4. The existence of a causal link between the two decisions can create the presumption that the denial of citizenship was solely intended to make the expulsion possible. In such a situation, the Convention bodies examined whether this presumption was corroborated by the particular circumstances (*X v. Federal Republic of Germany*, Commission decision, 1969).

19. As regards the revocation of citizenship, when Protocol No. 4 was being drafted, the Committee of Experts did not decide whether Article 3 thereof excluded the possibility for a State to deprive one of its nationals of his or her nationality in order to expel him or her as an alien, or to prevent him or her from returning. That being said, the Court has not ruled out the possibility that deprivation of nationality could be problematic under this provision (*H.F. and Others v. France* [GC], 2022, § 249; (Explanatory Report to Protocol No. 4, § 23). In some cases the revocation of citizenship followed by expulsion may raise potential problems under Article 3 of Protocol No. 4 (*Naumov v. Albania* (dec.), 2005).

20. The Court has also examined issues relating to the denial or revocation of citizenship under Article 8 of the Convention. It has clarified the scope of its supervision of such a measure under the latter provision, to ensure that the measure is not arbitrary (*H.F. and Others v. France* [GC], 2022, § 249; Case-Law Guide on Article 8; the Guide on Immigration; *Karassev v. Finland* (dec.), 1999; *Slivenko and Others v. Latvia* (dec.) [GC] 2002; *Genovese v. Malta,* 2011, § 30; *Ramadan v. Malta*, 2016, § 85-89; in the context of terrorism-related activities, see *K2 v. the United Kingdom* (dec.), 2017, § 49-50 and *Ghoumid and Others v. France*, 2020, § 43-44; see the Guide on Terrorism).

21. The issue whether or not the applicant has an arguable right to acquire citizenship of a State must in principle be resolved by reference to the domestic law of that State (*Fedorova and Others v. Latvia* (dec.), 2003). Similarly, the question whether a person was denied a State's citizenship arbitrarily in a manner that might raise an issue under the Convention is to be determined with reference to the terms of the domestic law (*Fehér and Dolník v. Slovakia* (dec.), 2013).

III. Specific issues of territorial application

A. Overseas territories

22. When applying Article 3 of Protocol No. 4, regard must be had to Article 5 of this Protocol.

23. Paragraph 1 of Article 5 allows the State to indicate the extent to which Protocol No. 4 shall apply to "such of the territories for the international relations of which it is responsible"[1].

24. Paragraph 4 of Article 5 reads as follows:

> "The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State."

25. In *Piermont v. France*, 1995, by virtue of Article 5 § 4, French Polynesia was regarded as a separate territory, distinct from metropolitan France, for the purposes of the references to the territory of a State in Article 2 of Protocol No. 4 (*Piermont v. France*, 1995, §§ 43-44).

[1] Full list of reservations and declarations submitted to the Secretary General of the Council of Europe in respect of Protocol No. 4

B. Territorial entity not recognised by the international community

26. In *Denizci and Others v. Cyprus*, 2001, the applicants, Cypriot nationals of Turkish origin, were expelled by the Cypriot police to the northern part of Cyprus, the "Turkish Republic of Northern Cyprus" under the effective control of Turkey. They complained that the expulsion was in breach of Article 3 of Protocol No. 4, given that the Republic of Cyprus could exercise authority and control in the southern part only. The Court observed that the applicants had not claimed that they had been expelled to the territory of another State. The Court further noted that the government of the Republic of Cyprus was the sole legitimate government of Cyprus – itself, bound to respect international standards in the field of the protection of human and minority rights. However, the Court considered it unnecessary to determine whether Article 3 applied and, if so, whether it had been complied with, having regard to its finding of a violation of Article 2 of Protocol No. 4 in respect of the monitoring of and restrictions on the applicants' movements between the northern part of the island and the south, and within the south (§§ 323, 410-411).

C. Policing State borders

27. A decision or a measure that falls within the exercise by the State of its ordinary public powers in policing the border suffices to bring an applicant, national of the State concerned, within the territorial jurisdiction of that State, which begins at the line forming the border (*H.F. and Others v. France* [GC], 2022, § 207).

IV. The notion of expulsion and scope of protection

28. Article 3 of Protocol No. 4 secures absolute and unconditional freedom from expulsion of a national (*H.F. and Others v. France* [GC], 2022, § 248; *Slivenko and Others v. Latvia* (dec.) [GC], 2002, § 77; *Shchukin and Others v. Cyprus*, 2010, § 144). The wording of this provision does not provide for any exceptions or possibility to impose restrictions on this right.

29. The absolute prohibition on the expulsion of nationals stemmed from the intention to prohibit exile once and for all, as it was seen to be incompatible with modern democratic principles (*H.F. and Others v. France* [GC], 2022, § 210).

30. According to the drafters of Protocol No. 4, an individual cannot invoke paragraph 1 of Article 3 in order to avoid certain obligations that are not contrary to the Convention, for example, obligations concerning military service (Explanatory Report to Protocol No. 4, § 21).

31. Article 3 of Protocol No. 4 does not require that the proceedings with a view to obtaining or recognising citizenship of a given State should have any suspensive effect on the actual execution of the expulsion orders, as, unlike with regard to the complaints under Articles 2 and 3 of the Convention, there is no danger of irreparable damage. Where such proceedings result in a finding that the applicant in fact possesses the nationality of the respondent State, he/she will have the right to enter the territory of that State and will then be able to challenge the consequences of the expulsion (*L. v. Federal Republic of Germany*, Commission decision, 1984).

32. The word "expulsion" should be interpreted "in the generic meaning in current use (to drive away from a place) (Explanatory Report to Protocol No. 4, § 21; *Hirsi Jamaa and Others v. Italy* [GC], 2012, § 174).

33. The term "expulsion" means that a person is obliged permanently to leave the territory of the State of which he is a national without being left the possibility of returning later (*A. B. v. Poland* (dec.), 2003; *X v. Austria and Germany*, Commission decision, 1974).

34. The existence of an order for expulsion amounts to a continuing situation for the purposes of the examination under Article 3 § 1 of Protocol No. 4 (*X v. Federal Republic of Germany*, Commission decision, 1969).

35. The following measures, not comprising any formal or substantive expulsion order against the individual concerned, do not amount to an "expulsion" within the meaning of Article 3 of Protocol No. 4:

- a court order, in accordance with the Hague Convention on the Civil Aspect of International Child Abduction, to return a child to a country of which he/she is not a national, and fines imposed by bailiffs in an attempt to enforce this order (*A. B. v. Poland* (dec.), 2003; *Stetsykevych v. Ukraine* (dec.), 2015);
- a residence ban against, or refusal to grant a residence permit to, a foreign spouse of the applicant (*Schober v. Austria* (dec.), 1999; *Sadet v. Romania* (dec.), 2007);
- an expulsion order against a foreign parent of a minor child, resulting in the child having to leave the country of which he/she is a national and to accompany his/her parent abroad (*Maikoe and Baboelal v. the Netherlands*, Commission decision, 1994);

36. Article 3 § 1 of Protocol No. 4 prohibits only the expulsion of nationals and not their extradition (*H.F. and Others v. France* [GC], 2022, § 247).

37. Extradition, the transfer of a person from one jurisdiction to another for the purpose of his standing trial or for the execution of a sentence imposed upon him/her (*I.B. v. The Federal Republic of Germany*, Commission decision, 1974; *X v. Austria and Germany*, Commission decision, 1974), is outside the scope of Article 3 of Protocol No. 4. Indeed, the right not to be extradited by the State of which one is a national is also not guaranteed by any other provision of the Convention or its Protocols (*I.B. v. the Federal Republic of Germany*, Commission decision, 1974; *X v. Austria and Germany*, Commission decision, 1974; Explanatory Report to Protocol No. 4, § 21; for more detail regarding relevant principles concerning extradition, see Case-Law Guide on Article 8; Case-Law Guide on Article 2; the Guide on Immigration).

V. Right to enter one's own country

A. State nationals as right holders

38. Article 3 § 2 of Protocol No. 4 secures to a State's nationals a right to enter its national territory. Only the nationals of the State concerned may rely on the right guaranteed by Article 3 § 2 of Protocol No. 4 to enter its territory. The corresponding obligation to respect and secure this right is incumbent only upon the State of which the alleged victim of any violation of this provision is a national (*H.F. and Others v. France* [GC], 2022, §§ 244-245).

39. The words "no one shall be deprived of the right ..." imply that all citizens must be treated equally in exercising the right to enter (*H.F. and Others v. France* [GC], 2022, § 244).

40. Article 3 of Protocol No. 4 was informed by the rules of international law concerning the general right to enter one's own country, which encompasses nationals coming to the country for the first time (*H.F. and Others v. France* [GC], 2022, § 246).

41. Article 3 of Protocol No. 4, including its second paragraph, is not confined to cases where there has been a prior "expulsion". Its application is not excluded in situations where the national has either voluntarily left the national territory and is then denied the right to re-enter, or where the person has never even set foot in the country concerned, as in the case of children born abroad who

wish to enter for the first time. There is no support for such a limitation either in the wording of Article 3 § 2, or in the preparatory work (*H.F. and Others v. France* [GC], 2022, § 246).

42. A State is not obliged to admit an individual who claims to be a national, unless he can make good his claim (Explanatory Report to Protocol No. 4, § 26).

43. The right of a person to enter the territory of the State of which he or she is a national, is not, by its very nature, open to being exercised by third parties (*Association "Regele Mihai" v. Romania* (dec.), 1995).

B. Extraterritorial application of Article 3 § 2 of Protocol No. 4

44. The fact that Article 3 of Protocol No. 4 applies only to nationals cannot be regarded as a sufficient circumstance for the purpose of establishing a State's jurisdiction within the meaning of Article 1 of the Convention. While nationality is a factor that is ordinarily taken into account as a basis for the extraterritorial exercise of jurisdiction by a State, it cannot constitute an autonomous basis of jurisdiction (*H.F. and Others v. France* [GC], 2022, §§ 205-206).

45. Article 3 § 2 of Protocol No. 4 inherently implies that the right guaranteed thereby will apply to the relationship between a State and its nationals when the latter are outside its territory or a territory over which it exercises effective control. If the right to enter, secured by that provision, were limited to nationals already in the territory of that State or under its effective control, the right would be thereby rendered ineffective, since Article 3 § 2 of Protocol No. 4 would not in such cases provide any real protection of the right to enter for those who, in practical terms, most need that protection, namely individuals who wish to enter or return to the territory of their State of nationality. Both the subject matter and scope of that right imply that it should benefit a State Party's nationals who are outside its jurisdiction. Thus, neither the wording of Article 3 § 2 of Protocol No. 4, nor the preparatory work in respect of that Protocol, which was informed by other sources of international law, limit the right to enter to nationals who are already within the jurisdiction of the State of nationality (*H.F. and Others v. France* [GC], 2022, § 209).

46. If Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrive at the national border or who have no travel documents it would be deprived of effectiveness in the contemporary context (*H.F. and Others v. France* [GC], 2022, § 211).

47. It cannot be excluded that certain circumstances, relating to the situation of individuals who wish to enter the State of which they are nationals relying on the rights they derive from Article 3 § 2 of Protocol No. 4, may give rise to a jurisdictional link with that State for the purposes of Article 1 of the Convention. These circumstances will necessarily depend on the specific features of each case and may vary considerably from one case to another (*H.F. and Others v. France* [GC], 2022, § 212).

48. The case of *H.F. and Others v. France* [GC], 2022, concerned the French authorities' refusal to repatriate French nationals: the applicants' daughters, who had left France for Syria with their partners in 2014-15, and their children who were born there. After the military fall of the so-called Islamic State ("ISIS"), they had been detained in Kurdish-run camps. While the impugned refusal had neither formally deprived them of the right to enter France, nor prevented them from doing so, they had been physically unable to reach the French border (held as they were in the camps) and France neither exercised "effective control" over the relevant territory nor had any "authority" or "control" over them. In addition to the legal link between the State and its nationals, the following special features enabled the Court to establish France's jurisdiction in respect of the complaint raised under Article 3 § 2 of Protocol No. 4: repatriation had been sought officially and the requests referred to a real and immediate threat to the lives and health of the applicants' family members, including extremely vulnerable young children, on account both of the living conditions and safety concerns in the camps; the impossibility for them to leave the camps in order to reach the French or any other

State border without the assistance of the French authorities; and the willingness of the Kurdish authorities to hand them over to France.

C. Rights outside the scope of protection

1. No right to remain in one's own country

49. The right to enter a State of which one is a national must not be confused with the right to remain on its territory and it does not confer an absolute right to remain there. For example, a criminal who, having been extradited by the State of which he or she is a national, then escapes from prison in the requesting State, would not have an unconditional right to seek refuge in his or her own country (*H.F. and Others v. France* [GC], 2022, § 247; Explanatory Report to Protocol No. 4, § 28).

50. In particular, the right to enter national territory cannot be used to negate the effects of an extradition order (*H.F. and Others v. France* [GC], 2022, § 248).

51. Similarly, a soldier serving on the territory of a State other than that of which he is a national, will not have a right to repatriation in order to remain in his own country (Explanatory Report to Protocol No. 4, § 28).

2. No right to repatriation

52. Article 3 § 2 of Protocol No. 4 does not guarantee a general right to repatriation for the benefit of nationals of a State who are outside its borders. Indeed, 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 (*H.F. and Others v. France* [GC], 2022, §§ 258 and 260).

53. There is no obligation under international treaty law or customary international law for States to repatriate their nationals. Nor can a basis for such a right be found in current international law on diplomatic protection, according to which any act of diplomatic protection falls under a State's discretionary power. In this connection, the Court takes note of the potential risk, if such a right were to be instituted, of establishing recognition of an individual right to diplomatic protection which would be incompatible with international law and the discretionary power of States (*H.F. and Others v. France* [GC], 2022, §§ 257 and 259).

3. No right to diplomatic protection or consular assistance

a. General points

54. The Convention does not guarantee the right to diplomatic or consular protection by a Contracting State for the benefit of any person within its jurisdiction (*H.F. and Others v. France* [GC], 2022, §§ 201 and 255).

55. The States themselves remain the protagonists of consular assistance as governed by the Vienna Convention on Consular Relations, which defines the conditions of its exercise. The rights enjoyed by nationals who are in difficulty or are detained abroad, under Articles 5 and 36 of the Vienna Convention, are binding only on the "receiving State" and such protection stems in principle from a dialogue between that State and the consular authorities of the "sending State" present in the relevant area (*H.F. and Others v. France* [GC], 2022, § 256).

b. Territory under the control of a non-State armed group

56. Individuals, who are being held in camps under the control of a non-State armed group and whose State of nationality has no consular presence in the relevant area, are not in principle entitled to claim a right to consular assistance (*H.F. and Others v. France* [GC], 2022, § 256).

D. Absolute nature of the right to enter one's own country and its historical background

1. Absolute nature of the right and its historical basis

57. The right to enter the territory of which one is a national is recognised in terms that do not admit of any exception. Indeed, it contains no express restrictions (*H.F. and Others v. France* [GC], 2022, §§ 248 and 252).

58. As can be seen from the preparatory work on Protocol No. 4, the object of the right to enter the territory of a State of which one is a national is to prohibit the exile of nationals, a measure of banishment that has, at certain times in history, been enforced against specific categories of individuals (*H.F. and Others v. France* [GC], 2022, § 260).

59. The preparatory work shows that the prohibition of "exile" was supposed to be absolute in the Council of Europe framework, and that the same was therefore true of the right to enter one's country, as the possibility of exile not being arbitrary was not admitted (*H.F. and Others v. France* [GC], 2022, § 126).

60. The absolute prohibition on the expulsion of nationals and the corresponding absolute nature of the right to enter national territory stems historically from the intention to prohibit, once and for all and in an equally absolute manner, the exile of nationals, as it was seen to be incompatible with modern democratic principles (*H.F. and Others v. France* [GC], 2022, §§ 210 and 248).

61. This historical basis is reflected in the long-standing case-law of the Commission and the Court in response to complaints about the compatibility of the banishment of members of royal families with the right of entry under Article 3 § 2 of Protocol No. 4 (*H.F. and Others v. France* [GC], 2022, § 210 ; see below).

2. Cases concerning members of royal houses

62. In *Association "Regele Mihai" v. Romania* (dec.), 1995, the applicant association, which campaigned for the former king of Romania to be allowed to enter the country, did not have standing to lodge a complaint under Article 3 § 2 of Protocol No. 4 in its own name. Nor was it found to have a corresponding right to be able to accept into the territory of the State the persons referred to in this provision.

63. In *Victor-Emmanuel De Savoie v. Italy* (dec), 2001, the Court declared admissible the complaint lodged by the head of the House of Savoy in respect of the constitutional provision prohibiting male descendants of the last king of Italy from entering and staying in the country. When depositing the instrument ratifying Protocol No. 4, the Italian Government expressed a reservation, specifying that Article 3 § 2 could not prevent the application of the impugned constitutional prohibition. The case was eventually struck out, since the said provision had in the meantime been repealed, the respondent Government had withdrawn their reservation and the applicant could eventually enter Italy (*Victor-Emmanuel De Savoie v. Italy* (striking out), 2003).

64. In *Habsburg-Lothringen v. Austria*, Commission decision, 1989, the applicants, descendants of the last Emperor of Austria, complained that, by virtue of a law, they were banished from the country if and to the extent that they did not expressly renounce their membership of their royal

House and all sovereign rights emanating therefrom. When signing Protocol No. 4, Austria made a reservation to the effect that this Protocol shall not apply to the provisions of the law in issue. The Commission rejected the applicants' complaint as incompatible *ratione materiae* with the provisions of the Convention and its Protocols, finding that the reservation was sufficiently precise.

E. Implied limitations

65. Article 3 § 2 of Protocol No. 4 recognises the right to enter one's own country without defining it. There may therefore be room for implied limitations, where appropriate, in the form of exceptional measures that are merely temporary (consider, for example, the situation envisaged in the context of the global health crisis caused by the Covid-19 pandemic) (*H.F. and Others v. France* [GC], 2022, § 248).

66. Temporary measures such as quarantine should not be interpreted as a refusal of entry (Explanatory Report to Protocol No. 4, § 26).

F. Principles of interpretation

1. Dynamic and evolutive approach

67. Increasing globalisation is presenting States with new challenges in relation to the right to enter national territory. A long period has elapsed since Protocol No. 4 was drafted. Since then, international mobility has become more commonplace in an increasingly interconnected world, seeing many nationals settling or travelling abroad. Accordingly, the interpretation of the provisions of Article 3 of Protocol No. 4 must take account of this context, which presents States with new challenges in terms of security and defence in the fields of diplomatic and consular protection, international humanitarian law and international cooperation (*H.F. and Others v. France* [GC], 2022, § 210).

68. The right to enter a State lies at the heart of current issues related to the combat against terrorism and to national security, as shown in particular by the enactment of legislation to govern the supervision and handling of the return to national territory of individuals who had travelled abroad to engage in terrorist activities (*H.F. and Others v. France* [GC], 2022, § 211).

2. Systemic approach to ensure rights that are practical and effective

69. Article 3 § 2 of Protocol No. 4 forms part of a treaty for the effective protection of human rights and the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions. The Court also takes into account the purpose and meaning of this provision and analyses them with due regard to the principle, firmly established in the Court's case-law, that the Convention must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical or illusory (*H.F. and Others v. France* [GC], 2022, § 208).

G. Scope of negative obligation

70. 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 (*H.F. and Others v. France* [GC], 2022, § 250).

71. Taken literally, the scope of Article 3 § 2 of Protocol No. 4 is limited to purely formal measures prohibiting citizens from returning to national territory. That being said, the measure of deprivation

could vary in its degree of formality. It cannot be ruled out that informal or indirect measures which *de facto* deprive the national of the effective enjoyment of his or her right to return may, depending on the circumstances, be incompatible with this provision. Hindrance in fact can contravene the Convention in the same way as a legal impediment (*H.F. and Others v. France* [GC], 2022, § 250).

72. Article 3 § 2 of Protocol No. 4 does not relate to measures that affect an applicant's desire to enter a country, but rather to actual deprivations, which may be more or less formal, of an individual's right to enter the country of which he/she is a national (*C.B. v. Germany*, Commission decision, 1994).

73. Where an applicant decides not to return to the country of which he/she is a national in order to avoid being arrested and confronting the justice system, such situation represents a personal choice not to make use of the right guaranteed by Article 3 § 2 of Protocol No. 4 and, thus, does not amount to a deprivation of that right within the meaning of this provision. In other words, the mere existence of an arrest warrant in the applicant's name does not raise an issue under this provision (*E.M.B. v. Romania* (dec.), 2010, §§ 32-34 and 48-49; *C.B. v. Germany*, Commission decision, 1994).

H. Scope of positive obligations

1. General points

74. 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. Indeed, the effective exercise of the rights guaranteed may, in certain circumstances, require the State to take operational measures (*H.F. and Others v. France* [GC], 2022, §§ 251-252).

75. As regards the implementation of the right to enter guaranteed by Article 3 § 2 of Protocol No. 4, and as in other contexts, the scope of any positive obligations will inevitably vary, depending on the diverse situations in the Contracting States and the choices to be made in terms of priorities and resources. Those obligations must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. As to the choice of particular practical measures, where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for securing Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still have fulfilled its positive obligation by other means (*H.F. and Others v. France* [GC], 2022, § 252).

2. Obligation to issue travel documents

76. Some positive obligations correspond to measures which stem traditionally from the State's obligation to issue travel documents to nationals, to ensure that they can cross the border (*H.F. and Others v. France* [GC], 2022, §§ 251 and 260).

77. In some cases, nationals can be deprived of the right to enter for the reason that the respondent State did not carry out the formalities required by domestic law and international rules to guarantee their entry or because it failed to issue the requisite travel documents to allow them to cross the border and to ensure they could return (*H.F. and Others v. France* [GC], 2022, § 207).

78. At the same time, the authorities' refusal to issue the applicant with a passport does not raise an issue under Article 3 § 2 of Protocol No. 4, in so far as it does not affect the applicant's ability to enter his own country (*Marangos v. Cyprus*, Commission decision, 1997).

79. In *Momcilovic v. Croatia* (dec.), 2002, the Court examined a particular context concerning an applicant's return to his own country namely, following independence and the applicant having spent several years abroad due to the armed conflict which had taken place in Croatia. The

authorities' prolonged failure to issue the applicant with the identification documents was not found to infringe his right to enter the territory of his own country: the applicant had in fact been able to do so without those documents. The unlawfulness of such entry had no bearing on the Court's conclusion, as the applicant had not been prosecuted on this ground.

3. Scope of positive obligations in the context of a refusal to repatriate

a. General points and applicable test

80. The object of the right to enter the territory of a State of which one is a national is to prohibit the exile of nationals. Therefore, even though Article 3 § 2 of Protocol No. 4 does not guarantee a general right to repatriation for the benefit of nationals of a State who are outside its borders, this provision may impose a positive obligation on the State where, in view of the specificities 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 (*H.F. and Others v. France* [GC], 2022, § 260).

81. However, 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, under Article 3 § 2 of Protocol No. 4, where such exceptional circumstances exist, the requisite review will be confined to ensuring effective protection against arbitrariness in the State's discharge of its positive obligation under that provision (*H.F. and Others v. France* [GC], 2022, § 261).

82. In other words, in order to assess the existence of, and compliance with, any positive obligations in a repatriation context, the Court developed a two-tier test:

- in the first place, it will ascertain whether an applicant's situation is such that there are exceptional circumstances in a given case; and
- secondly, it will address the question of whether the decision-making process had been surrounded by appropriate safeguards against arbitrariness (*H.F. and Others v. France* [GC], 2022, § 263).

83. For the purposes of applying Article 3 § 2 of Protocol No. 4, the inability for anyone to exercise his or her right to enter national territory must be assessed also in the light of the State's return policy and its consequences. The Court is aware of the varying approaches adopted by States, which seek to reconcile the imperatives of their governmental policies and respect for their legal obligations under national or international law. However, the Court must ascertain that the exercise by the State of its discretionary power is compatible with the fundamental principles of the rule of law and prohibition of arbitrariness, principles which underlie the Convention as a whole (*H.F. and Others v. France* [GC], 2022, § 262).

84. The Court is acutely conscious of the very real difficulties faced by States in the protection of their populations against terrorist violence and the serious concerns triggered by attacks in recent years. Nevertheless, the Court differentiates between the political choices made in the course of fighting terrorism – choices that remain by their nature outside of such supervision – and other, more operational, aspects of the authorities' actions that have a direct bearing on respect for the protected rights. The examination of an individual request for repatriation, in exceptional circumstances, falls in principle within that second category. The State's undertaking pursuant to Article 3 § 2 of Protocol No. 4 and the individual rights guaranteed by that provision would be illusory if the decision-making process concerning such a request were not surrounded by procedural safeguards ensuring the avoidance of any arbitrariness for those concerned (*H.F. and Others v. France* [GC], 2022, §§ 273-274).

b. Existence of exceptional circumstances

85. The case of *H.F. and Others v. France* [GC], 2022, concerned the French authorities' refusal to repatriate French nationals, including very young children, who had been held in Kurdish-run camps on the territory of Syria, after the military fall of the so-called Islamic State. In the Court's view, this case disclosed exceptional circumstances triggering an obligation to ensure that the decision-making process was surrounded by appropriate safeguards against arbitrariness. The Court had regard to the following extraterritorial factors which had contributed to the existence of a risk to the life and physical well-being of the applicants' family members, in particular their grandchildren, who had been in a humanitarian emergency.

86. In the first place, the situation in the impugned camps under the control of a non-State armed group was distinguishable from classic cases of diplomatic or consular protection and criminal-law cooperation mechanisms; it verged on a legal vacuum. The only protection afforded to the applicants' family members was under common Article 3 of the four Geneva Conventions and under customary international humanitarian law.

87. Secondly, the general living conditions in the camps were incompatible with applicable standards under international humanitarian law. While the Kurdish local authorities were directly responsible for that situation, France as a State party to the four Geneva Conventions was obliged to do everything "reasonably within its power" to put an end to violations of international humanitarian law. France was thus obliged to ensure that the Kurdish authorities complied with their obligations under common Article 3 of the said instruments prohibiting inhuman and degrading treatment.

88. Thirdly and on the one hand, to date no tribunal or other international investigative body had been established to deal with the female detainees in the camps and the creation of an *ad hoc* international criminal tribunal had been left in abeyance. There was also no prospect of these women being tried in north-eastern Syria. On the other hand, the criminal proceedings initiated against the applicants' daughters in France were in part related to that State's international obligations and duty to investigate and, where appropriate, prosecute individuals involved in terrorism abroad.

89. Fourthly, the Kurdish authorities had repeatedly called on States to repatriate their nationals, citing their inability to ensure proper living conditions, organisation of detention and trial, and the security risks. They had also demonstrated, in practice, their cooperation in this regard, including with France.

90. Fifthly, a number of international and regional organisations had called upon European States to repatriate their nationals being held in the camps and the United Nations Committee on the Rights of the Child had, for its part, stated that France must assume responsibility for the protection of the French children there and that its refusal to repatriate them entailed a breach of the right to life and the prohibition of inhuman or degrading treatment. Lastly, France had officially stated that French minors in Iraq or Syria were entitled to its protection and could be repatriated (*H.F. and Others v. France* [GC], 2022, §§ 264-267).

c. Safeguards against arbitrariness

91. The concepts of lawfulness and the rule of law in a democratic society require that there must be a mechanism for the review of decisions not to grant requests for a return to national territory (*H.F. and Others v. France* [GC], 2022, § 276).

92. Such review mechanism is all the more important where the decision-making process presents shortcomings, for example, a lack of transparency or a lack of a formal individualised and reasoned decision. In such a case, the Court will examine whether the impugned shortcomings have been remedied by the review proceedings (*H.F. and Others v. France* [GC], 2022, §§ 279-281).

93. The review must be surrounded by the following procedural safeguards (*H.F. and Others v. France* [GC], 2022, §§ 275-276).

i. Review by an independent body

94. It must be possible for the rejection of a request for repatriation to give rise to an appropriate examination, by an independent body, separate from the executive authorities of the State, but not necessarily by a judicial authority (*H.F. and Others v. France* [GC], 2022, § 276).

ii. Nature and scope of the review

95. The decision not to repatriate should be subject to some form of *adversarial* proceedings (*H.F. and Others v. France* [GC], 2022, § 275).

96. An applicant must have an opportunity to submit any arguments that he considers useful for the defence of his interests and those of his family members that are concerned by the repatriation request (*H.F. and Others v. France* [GC], 2022, § 278).

97. The requisite review must take the form of an *individual* examination by a body competent to review the *reasons* for the decision and relevant *evidence*, if need be with appropriate procedural limitations on the use of classified information where national security is at stake. Situations involving the imperatives of protecting international peace and security are not exempt from that requirement.

98. This examination must ensure an assessment of the factual and other evidence which led those authorities to decide that it was not appropriate to grant the request. The review body must therefore be able to review the lawfulness of the decision denying the request, whether the competent authority refused to grant it or has been unsuccessful in any steps it has taken to act upon it.

99. The review must allow to ascertain that there is no arbitrariness in *any* of the grounds that may legitimately be relied upon by the executive authorities, whether derived from compelling public interest considerations or from any legal, diplomatic or material difficulties (*H.F. and Others v. France* [GC], 2022, §§ 275-276).

100. In other words, it must be possible to meaningfully verify that there are legitimate and reasonable grounds, devoid of arbitrariness, to justify the decisions not repatriate (*H.F. and Others v. France* [GC], 2022, § 281).

101. However, the possibility of such a review would not necessarily mean that the court in question would then have jurisdiction to order, if appropriate, the requested repatriation (*H.F. and Others v. France* [GC], 2022, § 282).

iii. Due account of children's best interests

102. Where the request for repatriation is made on behalf of minors, the review should ensure in particular that the competent authorities have taken due account, while having regard for the principle of equality applying to the exercise of the right to enter national territory, of the children's best interests, together with their particular vulnerability and specific needs (*H.F. and Others v. France* [GC], 2022, § 276).

iv. Information to the applicant

103. Such review should also enable the applicant to be made aware, even summarily, of the grounds for the decision and thus to verify that those grounds have a sufficient and reasonable factual basis (*H.F. and Others v. France* [GC], 2022, §§ 276 and 280).

v. Case-law examples

104. In *H.F. and Others v. France* [GC], 2022, the Court found that the examination of the applicants' repatriation requests in respect of their family members, who were held in Kurdish-run camps in Syria after the military fall of the so-called Islamic State, had not been surrounded by appropriate safeguards against arbitrariness.

105. In the first place, the Court noted the absence of a formal decision. There was no evidence that the refusals to repatriate the applicants' family members could not have been dealt with in specific individual decisions or have been reasoned according to considerations tailored to the facts of the case, if necessary complying with a requirement of secrecy in defence matters. The applicants had not received any explanation for the choice underlying the decision taken by the executive in respect of their requests, except for the implicit suggestion that it stemmed from the implementation of the policy pursued by France, albeit that a number of minors in the same situation had previously been repatriated. Nor had the applicants obtained any information which might have contributed to the transparency of the decision-making process.

106. Secondly, the Court observed that the above shortcomings could not be remedied by the proceedings brought by the applicants before the domestic courts. Indeed, the latter had raised jurisdictional immunity on the grounds that the repatriation requests concerned the conduct by France of its international relations. The applicants had therefore had no access to a form of independent review of the tacit decisions to refuse their requests. They had consequently been deprived of any possibility of meaningfully challenging the grounds relied upon by the authorities and of verifying that those grounds were legitimate, reasonable and not arbitrary. France had therefore failed to comply with its procedural obligations under Article 3 of Protocol No. 4 to the Convention (*H.F. and Others v. France* [GC], 2022, §§ 277-284).

List of cited cases

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Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

Chamber judgments that are not final within the meaning of Article 44 of the Convention are marked with an asterisk in the list below. Article 44 § 2 of the Convention provides: "The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43". In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (http://hudoc.echr.coe.int) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), and of the Commission (decisions and reports) and to the resolutions of the Committee of Ministers.

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