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The Prohibition of Collective Expulsion as an Individualisation Requirement

LUC LEBOEUF AND JEAN-YVES CARLIER

I. Introduction[1]

The prohibition of collective expulsion guarantees the right of aliens not to be expelled without an examination of their individual situation.[2] In Europe it is set out by Article 4 Protocol No 4 to the ECHR and by Article 19(1) of the European Union Charter of Fundamental Rights (EUCFR).[3] The primary objective is to prevent the expulsion of aliens as a group. The prohibition of collective expulsion is a major constraint in the enforcement of the European return policy and it has led to significant developments before the ECtHR.

However, these developments do not seem to resonate within the courts of the EU Member States, where the prohibition of collective expulsion has not instigated

[1] This chapter reflects the state of legal developments as of 10 November 2018.

[2] JFD Alba, 'Prohibition on the Collective Expulsion of Aliens (Article 4 Protocol 4)' in JG Roca and P Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Leiden, Brill Nijhoff, 2012); W Kälin, 'Aliens, Expulsion and Deportation' in *Max Planck Encyclopedia of Public International Law* (October 2010), accessed at opil.ouplaw.com/home/EPIL, para 22; WA Shabbas, *The European Convention of Human Rights: A Commentary* (Oxford, Oxford University Press, 2015) 1075–80.

[3] Outside of Europe, see Art 22 (9) of the American Convention on Human Rights and Art 12 (5) of the African Charter on Human and Peoples' Rights. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights do not explicitly provide for the prohibition of collective expulsion. However, it is widely recognised at international level, as illustrated by Objectives 8 and 21 of the Global Compact for Safe, Orderly and Regular Migration, Final Draft, 11 July 2018. Both objectives mention states' commitment to upholding the prohibition of collective expulsion in the context of search and rescue operations in the seas and the enforcement of their return policies. The Global Compact intends to establish general principles and guidelines that will foster international cooperation through a holistic approach to migration, rather than a strict international legal obligation that would bind states. As the Final Draft states: 'This Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law' (para 7). See also Annex II of the New York Declaration for Refugees and Migrants, UNGA Resolution 70/1 (19 September 2016) and J-Y Carlier and F Crépeau, 'De la "crise" migratoire européenne au pacte mondial sur les migrations: exemple d'un mouvement sans droit?', *Annuaire français de droit international* (Paris, CNRS, 2018). The Global Compacts have not been adopted at the time of writing.

major developments or controversies.[4] National courts do not appear to rely on the prohibition of collective expulsion on a regular basis. The CJEU has never been asked to interpret Article 19(1) EUCFR.[5] One might therefore be tempted to assume that the prohibition of collective expulsion does not provide fertile ground for judicial dialogue. This chapter questions and contextualises that assumption. It is suggested that the fact that national courts and the CJEU have not significantly contributed to discussions on the content and scope of the prohibition of collective expulsion does not indicate a lack of judicial dialogue in the field of European return policies. Rather, it reveals a partial yet wide overlap between the prohibition of collective expulsion and existing guarantees under EU law.

The first part of this chapter seeks to clarify the content of the prohibition of collective expulsion by reference to the case-law of the ECtHR and its relevance for European return policies. The constitutive elements of a collective expulsion in the sense of Article 4 Protocol No 4 ECHR are identified and the evolution of the case-law of the ECtHR is analysed. It is shown that a general individualisation requirement can be deduced from the prohibition of collective expulsion. The second part looks for similar guarantees under EU law. It argues that procedural and substantive EU law protections have the aggregate effect of requiring an individual examination of the situation of every alien prior to their removal from European territory. The prohibition of collective expulsion is not fully redundant with those guarantees, but it is mainly of practical relevance for cases where access to procedures is prevented. This may explain why its added value remains limited in the context of daily judicial practices.

II. The Prohibition of Collective Expulsion in the Case-Law of the ECtHR

The ECtHR has only found a violation of Article 4 Protocol No 4 in specific and exceptional circumstances.[6] The prohibition of collective expulsion used to be

[4] This finding is based on the national synthesis reports and the database set up in the context of the REDIAL Project, neither of which mention significant national case-laws on the prohibition of collective expulsion: Austria (U Brandt), Belgium (J-C Werenne and L Leboeuf), Bulgaria (V Ilareva), Croatia (Ž Zrilić Ježek), Czech Republic (D Kosar), France (J-M Favret, H Labayle and J Pétin), Germany (K Hailbronner in collaboration with D Thym), Greece (C Papadimitriou), Italy (A di Pascale), Lithuania (I Jarukaitis), Poland (J Chlebny in collaboration with BE Mikolajczyk), Spain (C Gortazar Rotaeche), accessed at euredial.eu/publications/national-synthesis-reports/ and euredial.eu/national-caselaw/. With respect to Belgium, a thorough study on the implementation of the EUCFR in the case-law of the Council for Alien Law Litigation also does not document rulings on the prohibition of collective expulsion: see M Maes and A Wijnants, 'Het Handvest van de Grondrechten van de Europese Unie: een nieuwe speler in het vreemdelingenrecht' (2016) 1 *Tijdschrift voor Vreemdelingenrecht* 6 (part I), and (2016) 2 *Tijdschrift voor Vreemdelingenrecht* 158 (part II).

[5] The case-law of the CJEU is focussed on Art 19(2) EUCFR, which establishes the principle of *non-refoulement*. See eg Case C-578/16 PPU *CK* EU:C:2017:127 (on the Dublin regulation); Case C-182/15 *Petruhhin* EU:C:2016:630 (on the European arrest warrant).

[6] At the time of writing, the ECtHR has established a violation of the prohibition of collective expulsion in seven cases.

relatively discreet in the ECtHR case-law. It seems to have gained momentum since 2010 as litigation before the ECtHR addressed the responses by EU Member States to various episodes involving a sudden increase in the arrival of migrants and refugees (such as the one that followed the Arab Spring and the incidents that regularly take place at the Spanish–Moroccan border in Melilla).

Next the constitutive elements of a collective expulsion will be highlighted based on analysis of the case-law of the ECtHR (section II.A). Emphasis will be placed on how the Court revived the prohibition of collective expulsion in the past ten years to prohibit 'push-back' policies, as well as on the concrete difficulties states face in dealing with sudden increases in the arrival of migrants and refugees (section II.B).

A. The Constitutive Criteria of a Collective Expulsion

The ECtHR has consistently defined a collective expulsion as

> any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.[7]

Following this definition, a collective expulsion has two constitutive elements: first, an alien is expelled together with a group of aliens; and second, his or her particular situation was not examined in a reasonable and objective manner.

There is no clear guidance on how large the group of aliens needs to be. In *Conka v Belgium*, a case that concerned the removal from Belgium of Slovakian Roma, the ECtHR was satisfied with a group consisting of few families (around 70 people), which it termed a 'large number of persons of the same origin'.[8] There is also no requirement of homogeneity within the group. As emphasised by a Chamber of the ECtHR in *ND and NT v Spain*, aliens who do not share a common characteristic but are expelled together, during the same period of time, may be expelled as a 'group'.[9] That interpretation is based on the relatively vague wording of Article 4 Protocol No 4, which merely states that 'collective expulsion of aliens

[7] See eg *Andric v Sweden*, App No 45917/99, ECtHR (dec) 23 February 1999; *Conka v Belgium*, App No 51564/99, ECtHR 5 February 2002. This case-law can be traced back to the decisions of the European Commission of Human Rights, eg *Becker v Denmark*, App No 7011/75, EComHR 3 October 1975; *KG v The Federal Republic of Germany*, App No 7704/76, EComHR 11 March 1977; *O and others v Luxembourg*, App No 7757/77, EComHR 3 March 1978.

[8] Conka (n 7) para 61; J-Y Carlier, 'La détention et l'expulsion collective des étrangers. Commentaire de l'affaire Conka' (2003) 14(53) *Revue trimestrielle des droits de l'homme* 198.

[9] *ND and NT v Spain*, App Nos 8675/15 and 8697/15, ECHR 3 October 2017, para 100. This case is referred to the Grand Chamber, see section II.A.iii. The Grand Chamber ruling was delivered after the editing of this chapter, and could not be included within the scope of this study. Worth noting is that the Grand Chamber focused its assessment on the applicants' conduct to overturn the ruling of the Chamber and conclude that there was no breach of Art 4 Protocol No 4. The Grand Chamber emphasised that the applicants were 'members of a group comprising numerous individuals who attempted to enter Spanish territory by crossing a land border in an unauthorised manner, taking advantage of their large numbers and in the context of an operation that had been planned in advance' (*ND and NT v Spain*, App Nos 8675/15 and 8697/15 ECHR GC 13 February 2020, para 206).

is prohibited'. It contrasts with that of another regional instrument, the African Charter on Human and Peoples' Rights. Article 12(5) of the African Charter prohibits 'mass expulsion', defined as one 'aimed at national, racial, ethnic or religious groups'.[10] It requires the group to be of a certain size ('mass', translated as 'collective' in the French version) and character ('aimed at national, racial, ethnic or religious groups').[11]

The ECtHR is concerned with the expulsion of aliens without examination of their individual situations, rather than with the numbers and cohesion of the expelled group. The size of the group and its homogeneity may point to a general policy aimed at expelling aliens collectively, but they do not suffice to conclude to a violation of Article 4 Protocol No 4.[12] ECtHR case-law mainly discusses the requirement of a 'reasonable and objective examination' of the situation of each person concerned. The approach of the Court thus seems to be pragmatic. The ECtHR assesses all relevant facts in a holistic way.

The next sections highlight the main relevant facts. For the sake of clarity, a distinction will be made between the motivation of the expulsion order (section II.A.i), circumstances surrounding the adoption and implementation of the expulsion order (section 2.A.ii) and procedural guarantees (section 2.I.iii). None of these facts are conclusive by themselves. They guide the reasoning of the ECtHR, but do not constitute strict guidelines of systematic application.

i. The Motivation of the Expulsion Order

A stereotyped motivation for an expulsion order will not in itself give rise to a violation of Article 4 Protocol No 4. According to well-established case law:

> [T]he fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.[13]

In *MA v Cyprus*, a case involving Syrian Kurds who were expelled following their involvement in a demonstration advocating for the regularisation of their stay, identical expulsion orders were issued. But that did not suffice to establish a violation of the prohibition of collective expulsion. The ECtHR observed that the applicants' irregular stay resulted from the rejection of their asylum application, which was examined on its merits. It held that:

> [T]he fact that the deportation orders and the corresponding letters were couched in formulaic and, therefore, identical terms and did not specifically refer to the earlier

[10] Art 12(5) of the African Charter on Human and Peoples' Rights.

[11] J-M Sorel, 'Article 12' in M Kamto (ed), *La charte africaine des droits de l'Homme et des peuples et le protocole y relatif portant création de la cour africaine des droits de l'homme* (Brussels, Bruylant, 2011) 307.

[12] See section II.A.ii.

[13] *Sultani v France*, App No 45223/05, ECHR 20 September 2007, para 81; *Andric* (n 7).

> decisions regarding the asylum procedure is not itself indicative of a collective expulsion. What is important is that every case was looked at individually and decided on its own particular facts.[14]

The motivation of the expulsion order is nonetheless relevant, as shown by the ruling in *Conka v Belgium*. The ECtHR referred to the stereotyped motivation of the expulsion order as a circumstance that gives rise to a suspicion of collective expulsion. It held that 'the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months' and that therefore 'the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective'.[15] Additional surrounding circumstances led the ECtHR to find a violation of Article 4 Protocol No 4.[16]

The rulings in *MA* and *Conka* show that the stereotyped motivations of the expulsion orders is a relevant fact, one that gives rise to a suspicion of collective expulsion that other circumstances may confirm or dispel. Stereotyped motivations of expulsion orders are, however, not prohibited per se. They do not suffice by themselves to establish a violation of Article 4 Protocol No 4.

ii. Circumstances Surrounding the Adoption and the Implementation of Expulsion Orders

In the ECtHR case-law, the main relevant circumstances surrounding the adoption and implementation of expulsion orders include the political context. The public acts and declarations of the authorities may establish a general policy aimed at expelling a specific group of aliens. In *Conka v Belgium*, for example, the ECtHR referred to the official declarations of the authorities.[17] A broad police operation targeting Roma people was announced, thus revealing 'a general system intended to deal with groups of individuals collectively from the moment the decision to expel them was made until its execution'.[18]

The political context was an important factor in three rulings concerning the expulsion of Georgian nationals from Russia during the autumn of 2006 following a dispute between the Georgian and Russian governments.[19] Events as documented by international organisations showed a 'routine of expulsions' as

[14] *MA v Cyprus*, App No 41872/10, ECHR 23 July 2013, para 254.

[15] *Conka* (n 7) para 61.

[16] See sectio II.A.ii.

[17] *Conka* (n 7) paras 23 and 62. The Minister of the Interior declared before the Parliament that '[o]wing to the large concentration of asylum-seekers of Slovakian nationality in Ghent, arrangements have been made for their collective repatriation to Slovakia'.

[18] Ibid, para 56.

[19] *Georgia v Russia (I)*, App No 13255/07, 3 July 2014, para 172. See also *Berdzenishvili and others v Russia*, App Nos 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07 and 16706/07, ECtHR 20 December 2016; *Shioshvili and others v Russia*, App No 19356/07, ECtHR 20 December 2016. The Georgian authorities' arrest of four Russian officers on charges of espionage escalated tensions between both countries, which had become tense following the so-called 'Rose Revolution' in 2003.

Georgian nationals were arrested en masse, detained and expelled from Russian territory.[20] Various circulars and instructions were issued by the Russian authorities to organise their swift deportation. Appeals to Russian courts were not prevented, but the guarantees provided by the Russian judicial system could not be applied in practice given the short timeframe and the number of people concerned. According to the ECtHR:

> Even though, formally speaking, a court decision was made in respect of each Georgian national, … the conduct of the expulsion procedures during that period, after the circulars and instructions had been issued, and the number of Georgian nationals expelled – from October 2006 – made it impossible to carry out a reasonable and objective examination of the particular case of each individual.[21]

These three rulings also show that the fact that a particularly large group of aliens was expelled was a relevant circumstance, as it may have indicated a general policy aimed at expelling aliens as a group. The size of an expelled group is not enough to establish a collective expulsion, but it matters within a holistic assessment of the facts.

In other rulings, the ECtHR concluded that no collective expulsion took place because the expulsion orders were issued after a proper examination of the asylum applications, in compliance with the guarantees of Articles 3 and 13 ECHR. For example, in *Sultani v France* on the expulsion of an Afghan national by collective flight, the ECtHR observed that the return decision was adopted after the rejection of the asylum application on its merits. French authorities 'took account not only of the overall context in Afghanistan, but also of the applicant's statements concerning his personal situation and the risks he would allegedly run in the event of a return to his country of origin'.[22] This ruling has particular implications for the EU practice of joint flights, which does not in itself violate the prohibition of collective expulsion.[23]

Other rulings and inadmissibility decisions follow a similar line of reasoning. They reject applications on the grounds that expulsion orders were adopted following the rejection of the initial asylum applications.[24] The ruling in *Conka v Belgium* seems to have deviated from this approach. The ECtHR established a violation of

[20] *Georgia v Russia (I)* (n 19) para 141.

[21] ibid, para 175. The African Commission of Human Rights similarly held that 'the mass expulsions, particularly following arrest and subsequent detentions, deny victims the opportunity to establish the legality of these actions in the courts', Com 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 2009, para 183.

[22] *Sultani* (n 13) para 83. See also *Ghulami v France*, App No 45302/05, ECtHR (dec) 7 April 2009.

[23] Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [2004] OJ L261.

[24] *Alibaks and others v The Netherlands*, App No 14209/88, EComHR 16 December 1988; *Tahiri v Sweden*, App No 25129/94, EComHR (dec), 11 January 1995; *Pranjko v Sweden*, App No 45925/99, ECtHR (dec) 23 February 1999; *Andric* (n 7).

Article 4 Protocol No 4 even though the asylum application was examined prior to the adoption of the expulsion order. It held that

> collective expulsion, … is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group …. That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No 4.[25]

This can be interpreted as implying that a violation of Article 4 Protocol No 4 can be established even where the situation of the concerned alien was individually assessed, due to the general context framing the adoption of the expulsion orders ('the background to the execution of the expulsion orders'). There is no example of this in later case-law.[26] It would therefore seem that this finding is limited to exceptional cases such as *Conka* where a discriminatory policy targeting a specific group of aliens was shown. The mere fact that a group of aliens is being expelled does not imply that a collective expulsion is taking place as long as the particular situation of each member of the group was duly taken into consideration. But the control of the Court is particularly strict when expulsions are the result of discriminatory policies that specifically target a given group of aliens.

iii. Procedural Guarantees

The primary objective of the prohibition of collective expulsion is not to impose strict procedural requirements on states; rather, it is to guarantee individual examinations, irrespective of the specific characteristics of the procedures that states may choose to apply. Some minimal procedural guarantees can, however, be deduced from the case-law of the Court on Article 4 Protocol No 4. The identification of the aliens concerned is a minimal procedural requirement that stands out. In *MA v Cyprus*, for example, the ECtHR ruled that the prohibition of collective expulsion was not infringed, on the grounds that 'the authorities had carried out a background check with regard to each person before issuing the orders and separate deportation and detention orders were issued in respect of each person'.[27]

[25] *Conka* (n 7) para 59. See the partly concurring and partly dissenting opinion of Judge Velaers, who noted that: 'The majority's doubts stem from the fact that the deportation measures were taken pursuant to an order to leave the territory dated 29 September 1999, which referred solely to section 7, first paragraph, point (2), of the Aliens Act, without making any reference to the personal circumstances of those concerned other than to say that they had been in Belgium for more than three months. To my mind, the measures taken on 29 September 1999 cannot be isolated from the earlier decisions regarding the asylum procedure. The applicants' individual circumstances had been examined on two or even three occasions and that had provided sufficient justification for the expulsions.'

[26] See nn 21 and 23.

[27] *MA* (n 14).

Other rulings refer to the lack of identification to establish a violation of Article 4 Protocol No 4. The ruling in *Hirsi Jamaa v Italy* concerned the 'push-back' policy enforced by Italian coastguards, who intercepted vessels bearing migrants in the Mediterranean Sea and sent them back to Libya. The fact that no identification took place weighed heavily in the reasoning of the ECtHR. It observed that 'the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation' and that 'it has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, who restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil'.[28] Similarly, in *Sharifi and others v Italy and Greece*, the ECtHR condemned the immediate and automatic *refoulement*, without prior identification, of asylum seekers arriving from Greece in Italian ports.[29]

However, the issues at stake in *Hirsi Jamaa* and *Sharifi* concern far more than the identification of aliens before their expulsion.[30] The rulings condemn the systematic interception and expulsion of aliens who were prevented from accessing asylum. The emphasis placed on the lack of identification nonetheless shows the importance the Court devotes to that particular procedural guarantee. This emphasis is also found in the later ruling in *ND and NT v Spain*, which concerns the immediate expulsion of migrants intercepted at the Spanish–Moroccan border at Mellila. A chamber of the Court held that:

> [T]he issue whether there were sufficient guarantees demonstrating that the personal circumstances of those concerned had been genuinely and individually taken into account does not even arise in the present case, in the absence of any examination of the individual situation of the applicants, who were not subjected to any identification procedure by the Spanish authorities.[31]

At the time of writing, an appeal against the *ND and NT* ruling is pending before the Grand Chamber of the ECtHR. The Grand Chamber is expected to address the

[28] *Hirsi Jamaa v Italy*, App No 27765/09, ECtHR 23 February 2012, para 185. In *Hirsi*, the ECtHR also aligned the scope of application of Art 4 Protocol No 4 with that of the ECHR. It held that the prohibition of collective expulsion binds states within their 'jurisdiction' in the sense of Art 1 ECHR, ie in every situation falling under their effective control de jure or de facto. According to the ECtHR, migrants intercepted on the high seas and brought on the vessels of coastguards of a state party to the ECHR fall de jure under the jurisdiction of that state, in accordance with the Law of the Sea which establishes the duty of the flag state to exercise its jurisdiction over ships flying its flag (Art 94 of the UN Convention on the Law of the Sea). For a general theory on states' 'jurisdiction' under international human rights law, see, among others, O De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic Yearbook of International Law* 185; E Lagrange, 'L'application de la Convention de Rome à des actes accomplis par les États parties en dehors du territoire national' [2008] *Revue Générale de Droit International Privé* 527; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford, Oxford University Press, 2011).

[29] *Sharifi and others v Italy and Greece*, App No 16643/09, ECHR 21 October 2014, paras 214–25.

[30] See section II.B.i.

[31] *ND and NT* (n 9) para 107.

relationship between Article 4 Protocol No 4 and Article 3 ECHR and clarify the relevance of the prohibition of collective expulsion for aliens who do not apply for asylum.

When it comes to identifying migrants, states have an obligation of means, not results. In *Dritsas v Italy*, a group of Greek militants who intended to attend a summit in Italy were expelled without being issued a decision stating their identity. They complained of a collective expulsion. The application was declared inadmissible by the ECtHR, which observed that the applicants refused to co-operate with the authorities and concealed their identity documents.[32] There is no violation of Article 4 Protocol No 4 when the lack of identification is attributable to the conduct of the aliens concerned.

B. The Renewal of the Prohibition of Collective Expulsion

In its earlier case-law, the ECtHR mainly relied on the surrounding factual circumstances to establish a violation of Article 4 Protocol No 4. The main focus was on the general context in which the contested expulsions took place. The prohibition of collective expulsion was mainly applied in cases where the ECtHR also established a violation of other provisions of the ECHR such as Articles 3, 5 or 13. In each case the Court appealed to the prohibition to highlight a discriminatory policy aimed at expelling a given group of aliens.

This line of case-law is exemplified by the *Conka* ruling on the expulsion of Slovakian Roma and the three rulings on the expulsion of Georgians by Russia in 2006. It closely resembles the case-law of the European Social Committee,[33] the African Commission of Human Rights[34] and the Inter-American Court of Human Rights,[35] which also give prominent weight to the circumstance that an expulsion targets a particular group based on national or ethnic origins. In situations such as this the prohibition of collective expulsion prevents the discriminatory enforcement of a return policy.

The 2010s have seen the emergence of a different yet complementary line of case-law. The ECtHR has reinvigorated the prohibition of collective expulsion with

[32] *Dritsas v Italy*, App No 2344/02, ECHR (dec) 1 February 2011. See also *Berisha and Haljiti v Macedonia*, App No 18670/03, ECHR (dec) 16 June 2005.

[33] *European Roma and Travellers Forum (ERTF) v France* (Collective Complaint No 64/2011) ECSR 5 December 2017, para 66: '[T]he Committee concludes that the administrative decisions whereby, during the period under consideration, Roma of Romanian and Bulgarian origin were ordered to leave French territory, where they were resident, are incompatible with the Charter in that they were not founded on an examination of their personal circumstances, did not respect the proportionality principle and were discriminatory in nature since they targeted the Roma community.'

[34] *Institute for Human Rights and Development in Africa, on behalf of Sierra Leonean refugees in Guinea v Guinea* (Com No 249/02) ACHR 7 December 2004, para 69: '[L]arge scale expulsions … [are] a special threat to human rights [and] the action of a State targeting specific … groups is generally qualified as discriminatory.'

[35] *Expelled Dominicans and Haitians v Dominican Republic* (Com No 282) IACHR 28 August 2014.

a view to adequately regulating European border policies. In the next two sections the concrete consequences of the evolution of ECtHR case-law will be highlighted. The focus will be on how the ECtHR relied on the prohibition of collective expulsion to guarantee access to the relevant procedures (section II.B.i), as well as on the practical difficulties faced by national administrations in dealing with sudden increases in the arrival of migrants (section II.B.ii).

i. The Right to Access the Relevant Procedure

In *Hirsi Jamaa v Italy* and *Sharifi v Italy and Greece*, the ECtHR relied on the prohibition of collective expulsion to strengthen its conclusion that 'push-back' policies violate the ECHR. It held that migrants arrested while attempting to cross the border cannot be sent back without being allowed to apply for asylum. The focus of the reasoning of the ECtHR under Article 4 Protocol No 4 lies on the procedural guarantees, which were non-existent.

In *Hirsi*, the ECtHR observed a lack of 'sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination'.[36] It used a procedural approach to establish a violation of the prohibition of collective expulsion. Various doctrinal comments considered that the aggregate effect of the procedural guarantees established by *Hirsi*, including those deduced from Article 4 Protocol No 4, is such that states have the duty to grant access to the asylum procedure to every asylum seeker under their jurisdiction, including those rescued at sea.[37] In practical terms, it is difficult to conceive how a rigorous examination of the risk of violating Article 3 ECHR – and an effective remedy – could be guaranteed on the sea; how could it reasonably be envisaged that civil servants from asylum authorities, translators, lawyers and judges could perform their duties on a boat?

In *Sharifi*, the ECtHR followed similar reasoning. It relied on the lack of procedural guarantees to rule that the asylum seekers arrested in Italian ports when arriving from Greece and sent back without being given access to the asylum procedure were expelled collectively.[38]

The rulings in *Hirsi* and *Sharifi* give a new meaning to the prohibition of collective expulsion as an essentially procedural protection, one that guarantees access to the relevant procedure. They were adopted in a specific context, where the applicants intended to apply for asylum. But every migrant is entitled to the

[36] *Hirsi* (n 28) para 185. As underlined above, the ECtHR attached particular importance to the fact that the applicants were not properly identified before being sent back to Libya; see section II.A.iii.

[37] M Den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' (2013) 25 *International Journal of Refugee Law* 265; M Giuffre, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and others v Italy*' (2012) 61 *ICLQ* 728; V Moreno-Lax, '*Hirsi Jamaa and others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) *Human Rights Law Reports* 574.

[38] *Sharifi* (n 29).

benefit of Article 4 Protocol No 4, the scope of application of which is wider than that of Article 3 ECHR. There is nothing in the reasoning of the Court that limits the outcomes of *Hirsi* and *Sharifi* to those who risk ill-treatment. Case-law shows, however, that the extent of the applicable procedural guarantees differs depending on whether or not the migrant applies for asylum and is entitled to the additional protection of Article 3 ECHR.

ii. The Absence of Strict Procedural Guarantees

In *Hirsi*, the ECtHR acknowledged the difficulties faced by national authorities in dealing with a large influx of migrants. It emphasised that 'States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers' and that '[it] does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis'.[39] However, the ECtHR stated that such difficulties never justify violations of Article 3 ECHR, as this provision is absolute. It also refrained from outlining exceptions to the prohibition of collective expulsion. The fact that states face substantial difficulties controlling their borders does not justify their blocking access to asylum procedures.

The ECtHR refined that jurisprudence in *Khlaifia v Italy*:

> [W]hile the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.[40]

This finding had consequences for the evaluation under Article 4 Protocol No 4. The applicants were Tunisian migrants, who were intercepted by Italian coastguards while crossing the Mediterranean Sea and brought to the island of Lampedusa. They were detained on unclear legal grounds without access to a judge in violation of Article 5 ECHR, before being sent back to their home country following a fast-track procedure. None of the applicants had applied for asylum or seemed to have had reason to do so. A Chamber of the ECtHR established a violation of the prohibition of collective expulsion on the grounds that the applicants were not heard.[41]

[39] *Hirsi* (n 28) para 122.

[40] *Khlaifia v Italy* (Grand Chamber), App No 16483/12, ECHR 15 December 2016, para 185.

[41] *Khlaifia v Italy* (Chamber), App No 16483/12, ECHR 1 September 2015, para 156. See also H Labayle and F Sudre, 'Jurisprudence de la Cour européenne des droits de l'homme et droit administratif' [2016] *Revue Française de Droit Administratif* 768 and the joint partly dissenting opinion of Judges Sajo and Vucinic, who argued: 'By labelling as "collective expulsion" Italy's attempts to police its borders during an unforeseen emergency, the majority do a grave disservice to an intentionally focused

The Grand Chamber overruled that finding. It deduced from the surrounding circumstances, including the identification procedure and the migrants' option to apply for asylum, that 'the applicants had an opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned'.[42] It held that:

> Article 4 of Protocol No 4 does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State.[43]

The ruling of the Grand Chamber in *Khlaifia* shows that if Article 4 Protocol No 4 can be interpreted as a procedural protection and a right to access the relevant procedure, its autonomous content remains minimal. The Grand Chamber recognised that 'in an expulsion procedure the possibility of lodging an asylum application is a paramount safeguard', but it also refrained from developing additional procedural guarantees that benefit migrants who do not apply for asylum, such as the right to a personal interview. States retain a wide margin of appreciation when it comes to the return procedure. They remain free to determine how to assess the particular situations of aliens to be expelled, as long as those aliens have the opportunity to put forward arguments against their removal.

Khlaifia shows the unwillingness of the ECtHR to deduce a wide body of strict procedural guarantees from Article 4 Protocol No 4 that every return procedure must follow. This approach allows the ECtHR to give due consideration to the difficulties faced by states in dealing with surges in the arrival of migrants without affecting the absolute protection against *refoulement*. Migrants who apply for asylum must be given access to the asylum procedure and the procedural guarantees of Article 3 ECHR.[44] Those who do not apply for asylum must be allowed to

and narrow concept in international law, which is meant to apply only in the most severe of circumstances. To find a violation here misrepresents the reality of the situation faced by the Italian authorities and by the migrants in question. It necessarily dilutes a clear prohibition under international law that has its roots in the national homogenisation and genocidal policies of the twentieth century.' Others welcomed the ruling of the Chamber as setting clear procedural standards that guarantee an individual examination of the personal situation of every migrant irrespective of the introduction of an asylum application; see MR Mauro, 'Detention and Expulsion of Migrants: The *Khlaifia v Italy* Case' (2016) 25(1) *Italian Yearbook of International Law* 85 and 'A Step Back in the Protection of Migrants' Rights: The Grand Chamber's Judgment in *Khlaifia v Italy*' (2017) 26(1) *Italian Yearbook of International Law* 287; L Tsourdi, 'Refining the Prohibition of Collective Expulsion in Situation of Mass Arrivals: A Balance Well Struck?' [2017] *Cahiers de l'EDEM*, available at uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html.

[42] *Khlaifia* (Grand Chamber) (n 40) para 247.

[43] ibid, para 248.

[44] On these guarantees, which stem from the requirement of a 'rigourous scrutiny' of the risk of violating Art 3 ECHR, see J Vedsted-Hansen, 'The Asylum Procedures and the Assessment of Asylum Requests' in V Chetail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Cheltenham, Edward Elgar, 2014) 446. In some instances, the ECtHR also deduced the right to be given access to the asylum procedure from Art 3 ECHR, without additional reference to the prohibition of collective expulsion. See *MA v Lithuania*, App No 59793/17, ECtHR 11 December 2018.

put forward arguments against their expulsion, such as the right to family life, the best interests of the child or other humanitarian considerations. But they do not qualify for the procedural guarantees of Article 3 ECHR and states enjoy significant leeway in dealing with their situation.

The next section will discuss EU law's prohibition of collective expulsion, a protection that extends to aliens who do not apply for asylum. It will show that the harmonisation of the return procedure, as well as other procedures for obtaining residence permits on grounds such as asylum and family reunification, guarantees aliens an examination of their individual situations in conformity with Article 4 Protocol No 4.

III. The Prohibition of Collective Expulsion in EU Law

Article 19(1) EUCFR states: 'Collective expulsions are prohibited.' This is closely related to the principle of *non-refoulement*, which is set out by Article 19(2) EUCFR.[45] The prohibition of collective expulsion is, however, more than simply an expression of the principle of *non-refoulement*. As shown above in section II, the jurisprudence of the ECtHR has given the prohibition of collective expulsion an autonomous meaning, with a wider scope of application than that of Article 3 ECHR. It guarantees the right of to an individual examination of each alien's situation, irrespective of a risk of ill-treatment in the country of destination. This individualisation requirement can also be derived from Article 19(1) EUCFR because of the principle of equivalent protection established by Article 52(3) EUCFR.

The next sections will analyse the extent to which EU migration and asylum law require an individual examination of the situations of aliens before their expulsion. A thorough study of all the expressions of the individualisation requirement would go beyond the scope of this chapter, whose objective is to account for the lack of reference to the prohibition of collective expulsion in the national jurisprudence on returns. The focus will be on the main procedural and substantial guarantees, as they imply that in most cases national courts do not need to rely on the prohibition of collective expulsion to sanction a lack of individual examination. These guarantees are briefly explained in sections III.A and III.B.

[45] Art 19 EUCFR: 'Protection in the event of removal, expulsion or extradition: 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.' See J Jaumotte, 'Article 19. Protection en cas d'éloignement, d'expulsion et d'extradition' in F Picod and S Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article* (Brussels, Bruylant, 2018) 445–67.

A. Individualisation as a Procedural Requirement

The right to good administration established by Article 41 EUCFR requires 'fair and impartial treatment'. It is an essential procedural guarantee that gives every person the opportunity to put forward arguments against administrative decisions that affect them.[46] The Article's scope of application is limited to 'the institutions, bodies, offices and agencies of the Union'. But it is also a general principle of EU law.[47]

The right to good administration includes the right to be heard before the adoption of an individual decision.[48] In *Mukarubega* and *Boudjlida*, the CJEU held that aliens must be heard before the adoption of a return decision, unless it is adopted following the closure of another procedure during which they had the effective opportunity to invoke the reasons to claim a residence permit.[49] In *G and R*, the CJEU ruled that the infringement of the right to be heard does not automatically negate a decision. Such a decision will only be annulled 'if, had it not been for such an irregularity, the outcome of the procedure might have been different'.[50] The alien must show precise factual and legal circumstances that would have resulted in the decision not being taken had they been put forward at an earlier stage of the procedure. With respect to asylum seekers, the right to be heard is set out by the Asylum Procedures Directive. The right to a personal interview on the first asylum application is guaranteed, buttressed by additional requirements such as the adequate training of interviewers.[51]

As well as the right to be heard, the right to good administration requires a reasoned decision. The duty to give reasons is established by Article 12 of the

[46] P Craig, 'Article 41: Right to Good Administration' in S Peers, T Hervey, J Kenner and A Ward, *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014) 1071; F Tulkens, 'Droit à une bonne administration' in Picod and Van Drooghenbroeck (n 45) 873.

[47] Case C-604/12 *HN* [2014] EU:C:2014:302, para 49; S Bogojevic, X Groussot, and M Medzmariashvili, 'Adequate Legal Protection and Good Administration in EU Asylum Procedures: *HN* and Beyond' (2015) 52 *CML Rev* 1635-.

[48] Art 41(2)(a) EUCFR.

[49] Case C-166/13 *Mukarubega* EU:C:2014:2336, para 42; Case C-249/13 *Boudjlida* EU:C:2014:2431, para 34; H Gribomont, 'Ressortissants de pays tiers en situation irrégulière: le droit d'être entendu avant l'adoption d'une décision de retour' (2015) 219(5) *Journal de droit européen* 192. The CJEU based its reasoning on the right of defence, which is a component of the right to good administration (Case C-277/11 *M* EU:C:2012:744, para 82).

[50] Case C-383/13 PPU *G and R* EU:C:2013:533, para 38. For a critical analysis, see P De Bruycker and S Mananashvili, '*Audi Alteram Partem* in Immigration Detention Procedures, Between the ECJ, the ECtHR and Member States: *G & R*' (2015) 52 *CML Rev* 569. The *G & R* ruling concerns the right to be heard prior to the adoption of a detention order with the view to a forced removal. The reasoning of the CJEU is, however, principled. It is founded on a general interpretation of the right to be heard under EU law.

[51] Arts 14 and 15 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180.

Return Directive.[52] It is a general requirement of EU law and is closely linked with the right to an effective remedy. In *Mahdi*, the CJEU held that this obligation

> is necessary both to enable the third-country national concerned to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and also to put that court fully in a position to carry out the review of the legality of the decision in question.[53]

In that case the CJEU ruled that the duty to give reasons also applies to decisions that extend the initial period of detention in accordance with Article 15 of the Return Directive.

The right to effective judicial protection set out by Article 47 EUCFR is another procedural safeguard for individualised decision-making.[54] Aliens are entitled to appeal against return decisions, which can have a suspensive effect when removal would violate the principle of *non-refoulement*. Appellate bodies must also have the competence to order the postponement of a removal pending their decision.[55] Aliens are entitled to minimal social protection pending their removal, as their basic needs must be covered.[56] As stated by the CJEU in *Abdida*, a postponement should also be ordered in cases where the violation of the principle of *non-refoulement* would cause a 'serious risk of grave and irreversible deterioration in [the applicant's] … state of health'.[57] The CJEU also held that Member States must define the 'basic needs' that are covered in cases of postponement, which should include 'emergency health care and essential treatment of illness'.[58]

B. Individualisation as a Substantive Requirement

EU law requires an individual examination of every asylum application. The specific profile of each asylum seeker, including vulnerabilities, must be considered

[52] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348.

[53] Case C-146/14 PPU *Mahdi* [2014] EU:C:2014:1320, para 45. On that ruling, see DA Arazo, 'The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: *Mahdi*' (2015) *CML Rev* 1361.

[54] On the right to an effective remedy in the asylum procedure, see M Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford, Hart Publishing, 2014) 433.

[55] Arts 9 and 13 of Directive 2008/115/EC (n 52).

[56] Art 14 of Directive 2008/115/EC (n 52). On the situation faced by unremovable migrants, see F Lutz, 'Non-Removable Returnees under Union Law: Status Quo and Possible Developments' (2018) 20(1) *European Journal of Migration and Law* 28.

[57] Case C-562/13 *Abdida* EU:C:2014:2453, para 50. See also S Bodart, 'Arrêts *M'Bodj* et *Abdida*: vers une précarisation de l'autorisation de séjour pour motif médical' (2015) 4 *Journal de droit européen* 156; S Peers, 'Irregular Migrants: Can Humane Treatment be Balanced Against Efficient Removal?' (2015) 17(4) *European Journal of Migration and Law* 289.

[58] *Abdida*, ibid.

to assess the level of risk in the country of origin. The Qualification Directive requires 'the assessment of an application for international protection … to be carried out on an individual basis'.[59] A similar requirement can be found under the Asylum Procedures Directive, which requires that 'applications are examined and decisions are taken individually, objectively and impartially'.[60] The *A, B and C* ruling of the CJEU offers an example with respect to persecution based on sexual orientation. The CJEU held that:

> [T}he assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals … does not allow [asylum] authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.[61]

The individualisation requirement is not limited to the assessment of the applicants' risk of persecution. It concerns all aspects of the asylum application, as suggested by the CJEU case-law on subsidiary protection and exclusion from international protection. In *Elgafaji*, the CJEU interpreted Article 15(c) of the Qualification Directive, which states that subsidiary protection must be granted to civilians fleeing a 'serious and individual threat … by reason of indiscriminate violence in situations of international or internal armed conflict'. The CJEU ruled that 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.[62] It established a 'scale' in which the individual situation of the asylum seeker remains relevant even in the face of indiscriminate violence. Additional considerations regarding vulnerability may lead to the granting of subsidiary protection even if the level of violence is not such that it affects every civilian in an indiscriminate way.[63] In *B and D*, the Court emphasised the need to perform an individual assessment of the behaviour of the asylum seeker in order to determine whether

[59] Art 4 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337.

[60] Art 10(3) of the Asylum Procedures Directive.

[61] Joined Cases C-148/13, C-149/13 and C-150/13 *A, B and C* EU:C:2014:2406.

[62] Case C-465/07 *Elgafaji* ECR I-921, para 39. See also C Bauloz and G Ruiz, 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?' in V Chetail, P De Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden, Brill, 2016) 240.

[63] For a concrete example from Belgian case-law, see the rulings nos 195.227 and 195.228 of 20 November 2017 in which the General Assembly of the Council for Aliens Law Litigation ruled that the violence in Baghdad does not reach the level required to affect all Bagdhadis in a similar way, but those who face additional risk factors may benefit from subsidiary protection by application of Art 15(c) of the Qualification Directive. In an example of the latter, in the ruling no 201.900 of 29 March 2018 the Council for Aliens Law Litigation held that a Baghdadi family with a Sunni background, whose house was confiscated by a paramilitary group, had encountered additional risk factors.

there are 'serious reasons for considering' that he committed, incited or otherwise participated in a serious crime as defined by Article 12 of the Qualification Directive, to the extent that he is excluded from international protection. It held that 'the exclusion from refugee status … is conditional on an individual assessment of the specific facts'.[64]

The CJEU also emphasises the individualisation requirement in the field of EU migration law, including the area of family reunification. In *Chakroun*, it ruled that the sufficient resources requirement does not negate the necessity of assessing the individual situation of each sponsor: 'Member States may indicate a certain sum as a reference amount, but not … impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant.'[65] In *K and A*, the CJEU ruled that integration tests must consider 'specific individual circumstances … such as the [applicant's] age, illiteracy, level of education, economic situation or health'.[66] All of these factors can affect an applicant's ability to present or to pass the test. In *KA and others*, the CJEU ruled that an entry ban does not justify the automatic rejection of an application for family reunification. Rather, 'all specific circumstances' must be examined.[67]

Furthermore, it follows from the very structure of the Return Directive that a return decision cannot be adopted without prior examination of the particular situation of the third-country national concerned. The Return Directive prohibits any return in violation of the prohibition of *refoulement*. It also requires that the best interests of the child, the family life and the state of health be considered.[68] At the very least this implies a requirement to assess the individual situation of each third-country national, something also emphasised by the insistence in Recital 6 of the Return Directive that return decisions be adopted 'on a case-by-case basis'. This requirement has found concrete application in the CJEU case-law on the detention of third-country nationals pending their return.[69]

The examples above show that it is inherent in the very structure of EU migration and asylum law that individual assessments of the situations of aliens

[64] Joined Cases C-57/09 and C-101/09 *B and D* [2010] ECR I-10979, para 94. See also Case C-573/14 *Lounani* EU:C:2017:71; P Chatelet, 'Statut de réfugié et lutte contre le terrorisme' [2017] *Revue des affaires européennes* 107; AM Kosińska, 'The Problem of Exclusion from Refugee Status on the Grounds of Being Guilty of Terrorist Acts in the CJEU Case-Law' (2017) 19 *European Journal of Migration and Law* 425; A Pivato, 'L'exclusion du statut de réfugié à l'aune du phénomène terroriste' (2017) 193 *Revue du droit des étrangers* 189.

[65] Case C-578/08 *Chakroun* [2010] ECR I-01839, para 48. See also Case C-558/14 *Khachab* EU:C:2016:285. See also COM(2014) 210 final and, for concrete examples of Belgian national case-law: S Sarolea and J Hardy, 'Le regroupement familial: la jurisprudence belge au croisement des sources internes et européennes' in B Renauld (ed), *Questions actuelles en droit des étrangers* (Limal, Anthémis, 2016) 7.

[66] Case C-153/14 *K and A* EU:C:2015:453, para 58.

[67] Case C-82/16 *KA and others* EU:C:2018:308.

[68] Art 5 of the Return Directive.

[69] Case C-61/11 PPU *El Dridi* EU:C:2011:268, para 39; Case C-554/13 *Zh and O* EU:C:2015:377, para 61.

must be made before their removal. EU provisions on return and the criteria that must to be met to obtain a residence permit – particularly on the grounds of asylum and family reunification – require the officials involved always to give due consideration to the specific situations of the third-country nationals concerned. In most cases a lack of individual examination violates not only the prohibition of collective expulsion but also other provisions of EU law. This may explain why national courts rarely rely on the prohibition of collective expulsion. Indeed, its value seems limited to those cases where access to the relevant procedure has been prevented.

The fact that national courts do not often rely on the prohibition of collective expulsion in their enforcement of the Return Directive can be interpreted in two ways. It may show the strength and efficiency of EU law guarantees, including the Return Directive. Prevention of access to the relevant procedure is such a fundamental breach of EU law that it only occurs rarely. On the other hand it may show that national courts lack the practical means to sanction collective expulsions. When access to the procedure is prevented as a result of a collective expulsion, access to the national courts may also be prevented. Ultimately the reality probably lies somewhere in between.

IV. Conclusion

The prohibition of collective expulsion is relatively absent from national courts' case-law on the return of third-country nationals.[70] The absence of significant national rulings on the prohibition of collective expulsion seems surprising given its wide recognition and the developments it has accrued within the case-law of the ECtHR. Thus, this chapter has reflected on the reasons why the prohibition of collective expulsion features so little in the rulings of national courts. It attempted to clarify the content of the prohibition of collective expulsion under the case-law of the ECtHR, compared to similar guarantees under EU law.

As discussed in the first part of the chapter, the case-law of the ECtHR demonstrates that the prohibition of collective expulsion is infringed by two different kinds of policies. First, discriminatory policies aimed at expelling groups of aliens without considering the individuals' personal situations are prohibited, as exemplified by *Conka* and the rulings in *Georgia v Russia* (I) and *Berdzenishvili* and *Shioshvili*. Second, 'push-back' policies that prevent access to the relevant procedure are prohibited, as illustrated by *Hirsi*, *Sharifi*, *Khlaifia* and *ND and NT*. In each of these cases the ECtHR sought to determine whether the particular situations of the aliens were examined before their expulsion. It assessed all the relevant facts, including the procedural guarantees and the circumstances

[70] This finding is supported by the case-law collected in the REDIAL Project (n 4).

surrounding the adoption and implementation of the expulsion orders. However, it refrained from imposing strict procedural requirements, such as a duty to give adequate reasons for the adoption of an expulsion order or to hear migrants individually.

The second part of the chapter showed that it is inherent in the very structure of EU asylum and migration law that an individual assessment of the personal situation of every alien must be made. Numerous procedural guarantees and substantive requirements help to guarantee this. These guarantees are stronger and more specific than the ones established by Article 4 Protocol No 4 as interpreted by the ECtHR. This may explain why national courts do not often rely on the prohibition of collective expulsion. Judges may have a natural tendency to apply the most specific rule that offers the highest level of legal certainty, as this protects their legitimacy. The prohibition of collective expulsion is therefore of little daily relevance to them, which may explain why they have not engaged in a thorough dialogue with the ECtHR and the CJEU in order to define its scope and content.

However, the prohibition of collective expulsion has not lost its autonomous meaning or usefulness. On the contrary, it can be seen as a general requirement to grant migrants access to an adequate procedure. In that sense, the prohibition of collective expulsion is a generic right that conditions the effectiveness of the whole body of more specific guarantees set out by EU law. As other chapters in this volume demonstrate, it is the definition of these guarantees that generates the most intense judicial dialogue.