

CONTENTS

EUROPEAN CONVENTION ON HUMAN RIGHTS

1. INTRODUCTION	2
1.1. European Convention on Human Rights - Background	.2
1.2. Human Rights Act - Background	.....3
1.3. Article 3 and the EU Qualification Directive	.....3
2. ECHR RIGHTS INCORPORATED INTO UK LAW BY THE HUMAN RIGHTS ACT	5
3. HOW THE UK BORDER AGENCY'S WORK IS AFFECTED BY THE HUMAN RIGHTS ACT	6
4. CASE CONSIDERATION: GENERAL	6
4.1. General Consideration of human rights issues	.....6
4.2. Addressing human rights issues in RFRs	.....8
5. CONSIDERATION OF ASYLUM CLAIMS RAISING HUMAN RIGHTS: SPECIFIC ISSUES	8
5.1. Engagement of the UK's obligations under the ECHR and HRA	.....8
5.2. Foreign Cases: distinction between Article 3 and the other Articles of the Convention.	.....9
5.3. Sufficiency of Protection/Internal Relocation	...10
5.4. Standard of Proof	.....10
6. ARTICLE 2 AND PROTOCOL 13 ECHR	11
6.1. General	.....11
6.2. Consideration of Article 2 issues	.....11
6.3. Capital Punishment (Article 2 and Protocol 13)	..11
7. ARTICLE 3 ECHR	12
7.1. General	.....12
7.2. Consideration	.....13
8. ARTICLE 8 ECHR	19
9. ARTICLE 14	19
9.1. General	.....19
9.2. Consideration	.....19
10. OTHER INCORPORATED ARTICLES	20
ANNEX A: (ARTICLES INCORPORATED INTO UK LAW BY THE HUMAN RIGHTS ACT)	21

EUROPEAN CONVENTION ON HUMAN RIGHTS

1. INTRODUCTION

This section contains guidance on the consideration to be given to human rights issues which are raised alongside an asylum claim or are inherent in that claim. For additional information see *API chapters on Humanitarian Protection and Discretionary Leave, Appeals- One-Stop Procedure, Further representations and Fresh Claims, Assessing the Claim* and *Article 8*.

A person who cannot be forcibly removed on ECHR grounds will not be eligible for leave on those grounds if the person could return voluntarily without facing a real risk of suffering the harm feared. On that basis a reference in this instruction to a return includes a voluntary and an enforced return.

Guidance on the consideration of non-asylum related claims is contained in the *IDI chapter on Human Rights* and the *API Article 8*.

1.1. European Convention on Human Rights - Background

The Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights (ECHR)) was adopted in 1950 and came into force in 1953. It was designed to give binding effect to the guarantee of various rights and freedoms in the UN Declaration on Human Rights, adopted in December 1948. The Convention is a treaty of the Council of Europe, which was established after the end of the Second World War with the aim of protecting Europe against totalitarianism and a repeat of wartime atrocities.

The Convention is intended to protect human rights in countries which are democratic by seeking to secure a fair balance between the general interest of society and the protection of the individual's fundamental rights. The rights contained within the Convention can be relied upon by any person, non-Governmental organisation or group of individuals and in some cases by companies and other bodies, but not by governmental organisations, such as local authorities, as the Convention is about protecting fundamental rights and freedoms against the power of the State.

1.2. Human Rights Act – Background

Before the Human Rights Act 1998 came into force, an individual who wished to bring a claim against the UK government for acting in breach of the Convention could only do so before the European Court of Human Rights in Strasbourg, having demonstrated that they had exhausted all remedies in the United Kingdom courts. This process (the right of individual petition) is inevitably lengthy and expensive. Parliament decided that this was not acceptable and that the importance of maintaining human rights in this country meant that rights guaranteed by the Convention should be enforceable in domestic courts. Thus the Human Rights Act 1998, which came into force on 2 October 2000, was introduced and allows cases concerning the rights in the Convention to be brought in the United Kingdom courts.

1.3. Article 3 and the EU Qualification Directive

Humanitarian Protection overlaps considerably with Articles 2 and 3 of the ECHR (plus Protocol 13). However, there may be some cases where a person who does not qualify for Humanitarian Protection will still have a successful Article 3 claim and may get Discretionary Leave. Please see the *APIs on Humanitarian Protection and Discretionary Leave* for further guidance.

The Qualification Directive agreed by the European Union in 2004 was implemented with effect from 9 October 2006. As well as establishing common European qualifying standards for refugees, the Directive also defines a category of persons eligible for subsidiary protection.

The Immigration Rules and the Regulations which implement the Directive apply to all live claims in the system on and after 9 October, including cases at the appeal stage.

The provisions on subsidiary protection are similar to the UK's former provisions on Humanitarian Protection, which have been amended and incorporated into the Immigration Rules to meet the new requirements. Decision makers should consult the *API Humanitarian Protection*. In brief, a person is now eligible for Humanitarian Protection if the person is not a refugee and faces a real risk of suffering "serious harm" in the country of return. Under paragraph 339C of the Immigration Rules, serious harm means:

1. the death penalty or execution;
2. unlawful killing;
3. torture or inhuman or degrading treatment or punishment in the country of return; or
4. serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

There is a large overlap between the requirement to provide protection against serious harm under the Qualification Directive and the obligations imposed by article 3 of the ECHR. However, the overlap is not complete and it remains necessary to consider whether there are substantial grounds for believing that, on return, an applicant would be exposed to a real risk of treatment contrary to Article 3 as well as whether there are substantial grounds for believing that the applicant would be exposed to a real risk of serious harm. Contrasting points to note are:

Country of return

The main difference between article 3 and the definition of serious harm is that torture or inhuman or degrading treatment or punishment only amounts to serious harm if the prohibited treatment would occur *in the country of origin*. There is no such restriction in article 3 of the ECHR. There are two main scenarios where this will be relevant:

- **return to a country other than the country of origin.** Where a person could return to a country other than the country of origin but can demonstrate a serious risk of treatment contrary to article 3 in that third country, Humanitarian Protection will be granted as a matter of policy (if the person has nowhere else to go) even though the Immigration Rules and the EU Qualification Directive do not apply. Note that a person who faces a real risk of such treatment in the country of origin but who could reasonably be expected to return to a third country where there is no such risk is not a person who is in need of protection; and
- **risk of ill treatment in the UK.** If removal from the UK would involve ill treatment *in* the UK then removal would be unlawful and cannot proceed, but the policy on Humanitarian Protection does not apply. Unless the claimant can be expected to return voluntarily, Discretionary Leave will be granted.

See the *APIs Humanitarian Protection* and *Discretionary Leave* for further guidance.

Individual threat in situations of armed conflict

This is an area where Article 3 and the definition of serious harm overlap. To qualify for Humanitarian Protection on this basis, the applicant must show that there are substantial grounds for believing that the applicant, if returned to the country of return, would face a real risk of a serious and individual threat to life or person by reason of indiscriminate violence in a situation of international or internal armed conflict.

The main effect of this provision is to **clarify** the instances in which Article 3 of the ECHR can be engaged in a situation of armed conflict. It reflects existing European caselaw in that respect. Article 15(c) makes it clear that, whilst a situation of international or internal armed conflict does not, in itself, give rise to a claim for protection, it **can** provide the basis for such a claim where applicants can show that they are **individually** at risk.

See section 3.5 of the *API Humanitarian Protection* for further guidance.

2. ECHR RIGHTS INCORPORATED INTO UK LAW BY THE HUMAN RIGHTS ACT

See Annex A for Articles of the Convention that are incorporated into UK law by the Human Rights Act. Those that largely refer to the machinery for enforcing rights in Strasbourg are not incorporated.

The Convention sets out a number of civil and political rights which each Contracting Party is required to secure to everyone within its jurisdiction.

One way these rights can be grouped is by the extent to which they can be qualified or limited.

- **Non-derogable rights** - These are rights which a State must guarantee, without exception, at all times, including in time of war or other public emergency. Rights which fall into this category are: Article 3 (prohibition of torture, inhuman or degrading treatment or punishment), Article 4(1) (prohibition of slavery), and Article 7 (no punishment without law). Article 2 (right to life) also falls within this category, except that a derogation is permitted in one limited area - deaths resulting from lawful acts of war. Nor is any derogation permitted to Protocol 13 (abolition of the death penalty).
- **Other absolute rights** - All the non-derogable rights are absolute in that there are never any circumstances which justify the State in some way limiting or curtailing those rights. Some of the other Convention rights contain elements which are also absolute in peace time - for example, Article 5 includes certain rights which must be provided to a person arrested or detained; Article 6 sets out some standards on a right to a fair trial which must be adhered to; and Article 9 provides an unlimited right to freedom of thought, conscience and religion (although there are limitations on how a person's religion or beliefs are manifested). Rights in this category are absolute except that in times of war or other public emergency threatening the life of the nation they may be "derogated from" in limited ways, as provided for by Article 15 of the Convention.
- **Rights with defined limitations** - Other rights such as the right to marry and found a family (Article 12) and parts of Article 5 (right to liberty and security) can be limited in the circumstances defined in the Convention itself. For example, Article 12 is qualified by being subject to national laws governing these rights if, for example, the national law prohibited marriage until a person was 21 years old that would not be a breach of Article 12.

- **Qualified rights** - These rights include the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10) and the right to the peaceful enjoyment of property (Article 1 of Protocol 1). Interference with these rights is permissible subject to various qualifications. These include the requirement that any interference must be in accordance with the law, be necessary in a democratic society (i.e. meets a pressing social need and is proportionate) and be related to one or more of the permissible aims as set out in the relevant Article

3. HOW THE UK BORDER AGENCY'S WORK IS AFFECTED BY THE HUMAN RIGHTS ACT

Section 6 of the Human Rights Act makes it unlawful for a public authority (such as a Government department) to act (or fail to act) in a way which is incompatible with a Convention right, unless, as the result of a provision of primary legislation, it could not have acted differently.

It should be remembered that the Human Rights Act does not create new rights, rather it enables individuals to rely on existing ECHR rights before UK courts. The UK Border Agency has for many years had regard to ECHR rights in considering asylum claims, because of the UK's international obligations under the ECHR.

Experience suggests that the Convention rights most likely to be raised alongside an asylum claim or to be inherent in such a claim are Articles 2, 3, 8 and 14. Article 2, 3 and 14 together with Protocol 13 (death penalty), are dealt with below. For information on Article 8, please refer to the **Article 8 API**.

Of course, applicants will sometimes raise other Articles and the full text of the other ECHR Articles is given in Annex A.

Further Guidance on how to deal with specific articles may be sought from a senior caseworker.

4. CASE CONSIDERATION: GENERAL

4.1. General Consideration of human rights issues

It has been the UK Border Agency's practice to treat asylum claims as implicit human rights claims, but the incorporation of Humanitarian Protection into the Immigration Rules formalises this practice. Where an asylum application has been made, decision makers should consider:

1. whether the applicant qualifies for asylum under paragraph 334 of the Immigration Rules;
2. if not, whether the applicant qualifies for Humanitarian Protection under paragraph 339C of the Immigration Rules (see the **API Humanitarian Protection**);

3. if not, whether the applicant qualifies for Discretionary Leave on other ECHR grounds, including article 3 grounds that fall outside the scope of the Immigration Rules on Humanitarian Protection (see advice elsewhere in this instruction and in the **API *Discretionary Leave***); and
4. if not, whether the individual circumstances of the case are so compelling that a discretionary grant of leave is appropriate. Grants in this category will be rare.

Decision makers should follow this process in asylum cases even where neither the ECHR nor Humanitarian Protection have been mentioned specifically by the applicant. Some applicants will seek consideration of Humanitarian Protection or other ECHR issues without making an asylum claim. Such applications should be considered.

In most cases where ECHR considerations prevent return, the normal course of action will be to grant Humanitarian Protection or Discretionary Leave. However where an applicant is excluded from refugee status (see the **API *Exclusion***), they will also be excluded from Humanitarian Protection under the Immigration Rules (paragraph 339D) and from standard grants of Discretionary Leave (see the **APIs *Humanitarian Protection*** and ***Discretionary Leave***). In such cases, consideration should be given to the possibility of seeking assurances or undertakings from the authorities in the intended country of return with a view to removing the individual in conformity with our obligations under the ECHR and the Immigration Rules. Decision makers who encounter cases in which it may be necessary to seek an assurance prior to a person being able to return (whether enforced or voluntarily) should contact APU via a senior caseworker.

Where it appears that a person's claim for asylum raises human rights issues (or where a SEF or statement of additional grounds under section 120 of the Nationality, Immigration and Asylum Act 2002 either directly refers or alludes to specific human rights issues) these issues should be examined at interview and addressed in the RFRL.

Where human rights issues are involved, decision-makers will need to consider whether the alleged human rights violation will take place within the UK or after return in the country of return (i.e. whether it is a domestic or a foreign case). This will be relevant to how the case is approached. See paragraph 5.1 below on “Engagement of the UK’s obligations under the ECHR and HRA”.

4.2. Addressing human rights issues in RFRLs

If the asylum claim is successful, there is no requirement to address human rights issues in the grant letter. However, where the asylum claim falls for refusal the decision maker must look at whether the applicant will qualify for Humanitarian Protection or Discretionary Leave, following the procedure set out at the beginning of section 4.1 above., **If the applicant does not qualify for either, the Reasons for Refusal Letter must explain why the applicant is not eligible for Humanitarian Protection under the Rules and why the decision is not otherwise in breach of the ECHR as well as why refusal of asylum is not in breach of the 1951 Convention.**

Where the applicant mentions ECHR/human rights during his or her asylum claim the relevant Articles must be addressed in any Reasons for Refusal Letter. If no specific Article is mentioned, it is not necessary to address all of the possible Articles that might conceivably apply. It is only necessary to consider whether it is reasonably clear on the facts that a particular Article may be engaged e.g. Article 3 if the claim is based on torture or inhuman or degrading treatment. If it is considered that there is a clear ECHR right to be addressed, but that it falls to be refused, reasons should be covered in the RFRL whether or not the issue has been raised by the applicant.

5. CONSIDERATION OF ASYLUM CLAIMS RAISING HUMAN RIGHTS: SPECIFIC ISSUES

5.1. Engagement of the UK's obligations under the ECHR and HRA

A person may claim that they should be allowed to remain in the United Kingdom as their removal would be a breach of their human rights and that they cannot reasonably be expected to return voluntarily. A person may alternatively or additionally allege that in taking an immigration decision as defined in section 82(2) of the Nationality, Immigration and Asylum Act 2002 a public authority has breached their human rights. This means that the public authority (i.e. the UK Border Agency) has acted in a way which is unlawful by virtue of section 6(1) of the Human Rights Act 1998 - i.e. acted, or failed to act, in a way which is incompatible with one of the Convention rights

Domestic Cases

The House of Lords in *Ullab and Do* confirmed that the primary focus of the ECHR is territorial, i.e. the UK must respect the Convention rights of those within the UK (see Article 1 of the ECHR which states that signatories to the Convention have obligations to persons "within their jurisdiction"). A domestic case is where an applicant alleges that the UK has acted in a way which infringes the applicant's enjoyment of a Convention right within the territory of the UK. An example of a domestic case would be where a person claims that their removal would separate them from their family in the UK (Article 8). In such cases the sole issue is whether that right has, or will be breached by removal (since

a voluntary return would have the same effect), having regard where necessary to the circumstances in which the ECHR itself provides for limitations or qualifications to that right.

Foreign Cases

A foreign case is one where it is claimed that requiring a person to leave the UK will lead to a violation of the applicant's Convention rights in the country of return, i.e. the alleged violation of the Convention right will occur outside the territory of the UK. For example, an applicant may allege that on return they will suffer inhuman or degrading treatment (Article 3), unlawful detention (Article 5), an unfair trial (Article 6) or restrictions on their freedom of expression (Article 10).

5.2. Foreign Cases: distinction between Article 3 and the other Articles of the Convention.

Decision makers are likely to come across 3 main types of foreign case:

- Humanitarian Protection cases involving a real risk of serious harm (i.e. cases involving Article 2 (right to live), Protocol 13 (prohibition of the death penalty) and many Article 3 cases);
- other Article 3 cases; and
- cases in which a breach of another right under the ECHR is alleged.

All asylum claims should be treated as containing an implied claim for Humanitarian Protection on the ground that the applicant will face a real risk of serious harm in the country of return, and/or a claim for Discretionary Leave on the basis that requiring the applicant to leave the UK will otherwise breach the UK's obligations under Article 3 (see paragraph 4.1 above) because of the ill treatment the applicant alleges he will suffer on return. In other words, all asylum claims should be treated as an implied Article 3 foreign case and if the asylum claim is refused, consideration should be given to whether return would breach the UK's obligations under Article 3, first by reference to the requirements for Humanitarian Protection and then by reference to any residual Article 3 issues that may entitle the applicant to Discretionary Leave.

Just as in a Humanitarian Protection case the applicant must show that there are substantial grounds for believing that return will expose the applicant to a real risk of serious harm, in other Article 3 foreign cases, it is sufficient for an applicant to show that there are substantial grounds for believing that return will expose the applicant to a real risk of a breach of Article 3 for the UK's obligations under Article 3 to be engaged (see section 7 below for details as to what is required to meet the "real risk" test). Where the real risk test is met, return will breach the UK's obligations under Article 3.

In relation to foreign claims arising out of other Articles of the Convention, caseworkers should consider whether there are substantial grounds for believing that there is a real risk that return will expose the applicant to a *flagrant violation* of the relevant Convention right. The House of Lords in *Ullah and Do* held that a flagrant violation is “*where the right will be completely denied or nullified in the destination country*” and emphasised the high threshold required to engage the UK’s ECHR obligations on return in cases alleging a breach of an Article other than Article 3: in order to meet the high threshold, it would be necessary to establish “*at least a real risk of a flagrant violation of the very essence of the right*”.

There will be a real risk of a flagrant violation on return where there is a real risk that conditions in the country of return are such that it will be impossible for the applicant to exercise any meaningful aspect of the ECHR right. Given the very high threshold, treatment in the country of return will only engage the UK’s obligations under ECHR, other than Article 3, in exceptional cases.

When considering a foreign case involving an article other than Article 3, Article 2 or Protocol 13, caseworkers should adopt the following approach:

- assess the likelihood of the alleged treatment/conduct occurring on return and whether such treatment/conduct would be a breach of the ECHR; then
- -consider whether any breach would be sufficiently serious that it would amount to a flagrant violation of the relevant Convention right.

(See the API on Humanitarian Protection and Discretionary Leave).

5.3. Sufficiency of Protection/Internal Relocation

Refer to the *APIs on Assessing the Claim, Internal Relocation and Humanitarian Protection* for guidance.

5.4. Standard of Proof

A person must show that there are substantial grounds for believing that, if they return to their country of origin or other country of return, there is a real risk of their being subjected to serious harm (paragraph 339D of the Immigration Rules or treatment that would otherwise breach their Convention rights. This is in practice the same standard of proof as in asylum cases – i.e. a reasonable degree of likelihood.

6. ARTICLE 2 AND PROTOCOL 13 ECHR

6.1. General

Article 2(1) states that:

" Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

However, under Article 2, there are certain situations where an authority will not be considered to have breached a person's right to life. These are set out in Article 2(2) which states that:

" Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;**
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;**
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection."**

In practice, the limitations in Article 2(2) are unlikely to apply in individual human rights claims.

6.2. Consideration of Article 2 issues

There is limited caselaw on the extent to which the UK's obligations might be engaged by the return of a person to a country where it is alleged that their right to life would be threatened. However, we would not normally seek to return a person to a country where there are substantial grounds for believing that there is a real risk they would be unlawfully killed either by the State or through the State being unable or unwilling to protect them.

Applicants who face a serious risk to life or person arising from an unlawful killing may, subject to certain exclusions, be eligible for a grant of Humanitarian Protection (see the definition of serious harm (paragraph 339C of the Immigration Rules). ***See also API on Humanitarian Protection, or API on Discretionary Leave if the applicant is excluded from Humanitarian Protection.***

Note that Article 2 does not apply in medical and suicide claims, in which death would not be caused by lawful or unlawful killing.

6.3. Capital Punishment (Article 2 and Protocol 13)

Breaches of the right to life (Article 2) and the prohibition of the death penalty (Protocol 13) are defined as serious harm for Humanitarian Protection purposes. The definition of serious harm in paragraph 339C of the Immigration Rules includes the death penalty or execution and unlawful killing.

The details of the claim should be fully considered in order to determine whether there are substantial grounds for believing there is a real risk of the applicant being intentionally deprived of their life or that, on the basis of the available evidence, there is a real risk that a person would be convicted and face the death penalty in the country of return. In death penalty cases it will often be necessary to contact the Country of Origin Information (COI) Service for advice as to whether the death penalty is on the statute books for the crime in question and whether it is actually used in practice and the Country Specific Asylum Policy Team for guidance as to the UK Border Agency's country policy in that context. In some countries the death penalty remains in force but is not in common use.

An applicant may make claims that they have broken laws or that their activities would one day bring them to the attention of the authorities and could, if they returned, lead to the death sentence being imposed. The fact that a person has not yet been sentenced for a crime would not necessarily exclude them from the benefit of Humanitarian Protection. The important question is whether or not there are substantial grounds for believing that there is a real risk that the person will be prosecuted, convicted and face the death penalty as a result of their conviction. Any person who would face a real risk of the death penalty being carried out if removed may be eligible for Humanitarian Protection – and where the applicant falls to be excluded from HP to Discretionary Leave. Please refer to the *APIs* on *Humanitarian Protection* and *Discretionary Leave*.

Decision-makers must not contact authorities abroad to enquire about the risk of an individual facing the death penalty without express permission from the Asylum Policy Unit. The Foreign and Commonwealth Office may be able to help in such circumstances.

All cases raising the death penalty should be seen by a Senior Caseworker. The Asylum Policy Unit should be informed of any cases where there is a real risk of the death penalty being enforced.

7. ARTICLE 3 ECHR

7.1. General

Article 3 states that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

- Article 3 is an **absolute right**, i.e. it cannot be balanced against competing interests like some of the other ECHR rights and it applies even in times of war or other public emergency.

- The absolute nature of Article 3 has led to a high threshold and to reach the Article 3 threshold, ill treatment must attain a ***minimum level of severity and involve actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual, it may be characterised as degrading and also fall within the prohibition of Article 3.*** The same threshold will apply in Humanitarian Protection cases.
- The UK's obligations under Article 3 apply irrespective of any reprehensible/criminal conduct on the part of the applicant. The applicant's conduct may affect the type of leave granted or whether Humanitarian Protection is granted (see paragraph 339D of the Immigration Rules and section 8 of the ***Humanitarian Protection API***).

As set out above, all asylum claims should be treated as a Humanitarian Protection and/or implied Article 3 foreign case and if the asylum claim is refused, consideration should be given to whether return would expose the applicant to serious harm or treatment that would otherwise be contrary to Article 3.

UK Border Agency asylum decision-makers will therefore need to consider and address Humanitarian Protection and Article 3 explicitly in the Reasons for Refusal Letter.

7.2. Consideration

A person's return from the United Kingdom to a country where there are substantial reasons for believing that they face a real risk of serious harm or other treatment contrary to Article 3 would constitute a breach of Article 3 by the United Kingdom and also a breach of the Immigration Rules in Humanitarian Protection cases. In practice, a foreign Article 3 claim, including a Humanitarian Protection claim, will add little to a claim for asylum in the majority of cases, except that it is not necessary to show in an Article 3 or Humanitarian Protection claim that the ill treatment will be for a Refugee Convention reason. There are also no exclusions from Article 3 although there are from Humanitarian Protection (under paragraph 339D of the Immigration Rules).

Examples of treatment contrary to Article 3

(For discussion of the related definition of serious harm under paragraph 339C of the Immigration Rules, see the ***API Humanitarian Protection***.)

Torture

- Consists of deliberate inhuman treatment, causing very serious suffering (physical and/or mental).
- Torture implies deliberately inflicted suffering of particular intensity and cruelty.

Inhuman treatment or punishment

- The threshold is high but the treatment does not have to be deliberately inflicted.
- Whether the treatment attains the required minimum level of severity will depend on the individual circumstances of the case and will be influenced by factors such as age, sex, vulnerability and health of the victim and duration of the treatment or punishment.
- Provided that a threat of torture is sufficiently real and immediate, it may generate enough mental suffering to constitute inhuman treatment under some circumstances.

Degrading treatment or punishment

- Treatment or punishment may be degrading if it arouses in the victim feelings of fear, anguish or inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. Severe discrimination based on race, sex or other grounds is capable of constituting degrading treatment contrary to Article 3 where the minimum level of severity is attained.
- Whether the treatment of punishment is degrading will depend on whether a reasonable person of the same age, sex, health, etc, would have felt degraded.

Ill treatment by the state

- This is where the state is directly responsible for the ill treatment, e.g. the ill treatment is contained within legislation or the state sanctions or condones the ill treatment, or the ill treatment arises where the armed forces are obeying orders.
- The state in this context includes both the government and the machinery of government, e.g. the civil service, the armed forces, the security forces and the police forces (agents of the state).
- It also includes “any party or organisation controlling the state or a substantial part of the territory of the state” (Regulation 3(b) of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006). Note that a person is not a refugee if effective protection is provided by such a body (Regulation 4).

Ill treatment by Rogue state agents

- Although they may be agents of the state, unlike state agents, rogue state agents are not acting in a manner authorised or tolerated by the state but are officials who are acting outside the authorised scope of their duty.
- An example of a rogue state agent would be a police officer or a security agent who beats a suspect out of malice and not as part of any state sanctioned policy.
- Where the treatment emanates from rogue state officials it should not be seen as ill treatment by the state, but the standard of sufficiency of protection required is higher than it is where the treatment is inflicted by non state agents.

Ill treatment by non state agents

Ill treatment that is not inflicted by the state may nevertheless fall within the Humanitarian Protection or Article 3 criteria where there are substantial grounds for believing that there is a real risk that the state will prove unwilling or unable to provide protection against a threat of harm posed by a non-state agent.

- Decision-makers should first consider whether there is a real risk of such treatment.
- Consideration should then be given to whether, in addition to the risk of harm inflicted by non-state agents, there is also a real risk that the state will fail to provide reasonable protection against that harm (**Bagdanavicius (FC) and others [2005] UKHL 38**)

An applicant should avail himself of state protection where it is available before seeking international protection.

Further information on sufficiency of protection is provided in the *API* on *Assessing the Claim*.

Internal Relocation

See the *API* on *Internal Relocation* and paragraph 339O of the Immigration Rules).

Medical claims : see IDI on medical claims

Applicants may claim that they suffer from a serious medical condition and that their return and the consequent withdrawal of medical treatment being received in the UK would amount to inhuman or degrading treatment contrary to Article 3. Medical claims will only reach the threshold for Article 3 in rare and extreme circumstances.

The general principle is that a person cannot avoid return on the basis that they should continue to benefit from medical, social or other form of assistance provided in the UK.

- An improvement in an applicant's medical condition resulting from the interim treatment together with a prospect of serious or fatal relapse on expulsion will not render expulsion inhuman treatment contrary to Article 3.
- Where an applicant's suffering on return will not result from deliberately inflicted harm, the threshold set by Article 3 is particularly high.
- To meet the Article 3 threshold, an applicant will need to show exceptional circumstances that prevent return, namely that there are compelling humanitarian considerations such as the applicant being in the final stages of a terminal illness without prospect of medical care or family support on return.

- The test is “*whether the applicant’s illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity*” (from the case of *N (FC) v SSHD* [2005] UKHL 31).

Article 8 medical claims

Article 8 private life may also be raised in the context of a medical claim. The issue in an Article 8 foreign case is whether return will result in a real risk of a flagrant denial of an applicant’s Article 8 rights in the country of return, usually in respect of the applicant’s right to physical and moral integrity.

In most cases, Article 8 will add little to Article 3 – as the House of Lords said in *Razgar*, “*it is not easy to think of a foreign health care case which would fail under Article 3 but succeed under Article 8.*”

When considering whether return would give rise to a real risk of a flagrant breach of Article 8 (see the **API Article 8**), decision makers should take into account similar factors as for an Article 3 medical claim.

Suicide

Where an applicant claims that return will cause him to self harm or commit suicide in breach of Article 3 or 8, caseworkers should refer to the **Chapter 1 Section 10 of the IDIs for the UK Border Agency’s policy on suicide threats. This section should be read in light of that policy.**

- the risk of a human rights violation must be considered in relation to three stages:
 - (i) when the applicant is informed in the UK of a final decision to remove (domestic case);
 - (ii) during removal, i.e. when the applicant is physically removed (domestic case), or en route in the case of a voluntary return; and
 - (iii) after arrival in the country of return (foreign case)
- the test in domestic cases is whether there are substantial grounds for believing that the person faces a real risk of torture or inhuman or degrading treatment or punishment when required to leave, when informed of a final decision to remove or during return
- the test in foreign cases is whether there are substantial grounds for believing that the person, if returned, faces a real risk of torture or inhuman or degrading treatment or punishment
- when applying the test in foreign cases, caseworkers should consider the following:

(1) An assessment should be made of the severity of the treatment which it is said that the applicant would suffer if removed. It must attain a minimum level of severity and must “necessarily be serious” such that it is “an affront to humanitarian principles to remove an individual to a country where he is at risk of serious ill treatment”

(2) There must be a causal link between the act or threatened act of return or expulsion and the inhuman treatment relied on as violating the applicant’s Article 3 rights. Where there is already a risk of suicide in the UK, it must be shown that the proposed return will significantly increase the already present suicide risk

(3) the Article 3 threshold is particularly high in a foreign case and it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental

(4) an Article 3 claim can in principle succeed in a suicide case

(5) A question of importance in deciding whether there is a real risk of a breach of Article 3 is whether the applicant’s fear of ill treatment in the receiving state upon which the risk of suicide is said to be based is objectively well founded. If the fear is not well founded, that will tend to weigh against there being a real risk that the return will result in serious harm or other treatment contrary to Article 3

(6) A question of considerable relevance is whether the UK and/or the receiving state have effective mechanisms to reduce the risk of suicide. If there are effective mechanisms that too will weigh heavily against a claim that removal will violate Article 3.

- when considering point (6) above, decision makers should take into account the steps to be taken to minimise the risk of suicide or self harm.
- The above factors, except for (3), are equally applicable in domestic cases and the sixth factor is of particular significance. Although someone who is sufficiently determined to do so may commit suicide, the fact that such mechanisms exist is an important, and often decisive, factor when assessing whether there is a real risk of a breach of Article 3

For further guidance on whether a suicide claim reaches the Article 3 or 8 threshold, contact the Social Policy Unit via a senior caseworker.

Prison conditions

Poor prison conditions may reach the threshold for Article 3 where they reach a minimum level of severity. Decision-makers should consider:

1. whether there are substantial grounds for believing that there is a real risk that the applicant will be imprisoned on return;

2. if so, whether the conditions of detention the applicant will face are likely to reach the Article 3 threshold.

Whether the Article 3 threshold is met is fact specific, depending on the conditions of the relevant detention facility. Relevant considerations will include the following, several of which should be present for a significant duration in order for the suffering to reach the minimum level of severity:

- Levels of overcrowding
- Solitary confinement (segregation and isolation)
- Sleep deprivation, e.g. by constant lighting, lack of adequate sleeping facilities
- Complete absence of exercise
- Absence of sanitation
- Absence of ventilation
- Continuous surveillance
- Absence of medical treatment
- Malnourishment
- Vermin infestations
- Absence of natural light

The Article 3 threshold in these cases is high and the IAT has acknowledged that “*recognition has to be had to the situation in individual countries and to the standards that are accepted, and expected, in those countries*” (SF (Article 3 – Prison Conditions) Iran CG [2002] UKIAT 00973).

Therefore, prison conditions which are far from ideal and may not measure up to UK standards will not necessarily reach the Article 3 threshold.

Every Operational Guidance Note has a section on prison conditions and whether or not they are likely to be such as to engage Article 3. Guidance on prison conditions in individual cases may be sought, via senior caseworkers, from the Country of Origin Information (COI) Service. Where a decision-maker thinks that prison conditions breach Article 3, guidance should always be sought from the Country Specific Asylum Policy Team.

Other severe humanitarian conditions meeting the Article 3 threshold

There **may** be some cases (although any such cases are likely to be rare) where the general conditions in the country – for example, absence of water, food or basic shelter – are so poor that removal in itself could, in extreme cases, constitute ill treatment under Article 3.

Decision makers will still need to consider how those conditions would impact upon the individual if removed. Any such cases, if granted, would qualify for Discretionary Leave rather than Humanitarian Protection (because they are not protection-related cases), but leave should not be granted without reference to a senior caseworker. See the **APIs on *Discretionary Leave and Humanitarian Protection***.

For guidance on the appropriate grant of leave in an Article 3 case, decision-makers should refer to the **APIs on *Humanitarian Protection and Discretionary Leave***.

8. ARTICLE 8 ECHR

Article 8 (1) states that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Unlike Article 3, Article 8 is a qualified right, which means that interference with the rights set out in Article 8(1) may be permissible in certain circumstances. For a discussion of the issues surrounding the right to private and family life, see the **API on *Article 8***.

9. ARTICLE 14

9.1. General

Article 14 states that an individual's rights under the ECHR must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 does not create a freestanding right not to be discriminated against, but one linked to the enjoyment of the Convention rights.

9.2. Consideration

Article 14 provides protection from discrimination in the exercise of another Convention right. It ensures equal access to the other Convention rights. Article 14 does not give a general right to protection from differential treatment. Therefore, Article 14 only applies where the subject matter of another Convention right has been activated. NB it isn't necessary for the other Convention right to be breached in order for Article 14 to apply.

Any allegation that return will be a breach of Article 14 must be reviewed by a Senior Caseworker.

Decision-makers should approach Article 14 allegations in the following way:

1. Is the alleged discrimination (i.e. the alleged differential treatment) in relation to a Convention right?
2. Is the alleged discrimination on a ground covered by Article 14?
3. If the answers to 1 and 2 are yes:
 - a. Is there an obvious and relevant difference between the applicant and those with whom he seeks to compare himself such that their situations can't be regarded as analogous?
 - b. If not, is the differentiation in treatment justified, having a legitimate aim and not disproportionate in its adverse impact?

10. OTHER INCORPORATED ARTICLES

Applicants may raise human rights claims based on Articles other than those considered above. Claims based on other Convention Articles most commonly raise issues under Articles 5, 6, 9 and 10. (The text of these articles is set out in full in Annex A). Decision-makers should consider whether an applicant has demonstrated that the alleged treatment in the country of return would be so serious as to amount to a *flagrant violation* or a *flagrant denial* of the protected right. The rights contained in Article 5 (right to liberty and security) and Article 6 (right to a fair trial) are limited rights.

Decision makers may seek further advice on claims in respect of other incorporated Articles from APU via a senior caseworker.

Further Advice: See also the APIs on Humanitarian Protection, Discretionary Leave, Appeals-One-Stop Procedure, Further Representations and Fresh Claims, Assessing the Asylum Claim, Family Reunion and Article 8. See also the IDI on medical claims.

ANNEX A: (ARTICLES INCORPORATED INTO UK LAW BY THE HUMAN RIGHTS ACT)

- **Article 2 - Right to Life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

- **Article 3 - Prohibition of Torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

- **Article 4 - Prohibition of Slavery and Forced Labour**

1. No one shall be held in slavery or servitude
2. No one shall be required to perform forced or compulsory labour
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - a. any work to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - b. any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - d. any work or service which forms part of normal civic obligations.

- **Article 5 – Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;

- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound minds, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

• **Article 6 – Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
 - a. To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

• **Article 7 – No punishment without law**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

• **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

• **Article 9 – Freedom of thought, conscience and religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

- **Article 10– Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- **Article 11 – Freedom of assembly and association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

- **Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

- **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

- **Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

- **Article 17 – Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

- **Article 18 – Limitations on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

THE FIRST PROTOCOL

- **Article 1 – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- **Article 2 – Right to education**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

- **Article 3 – Right to free elections**

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

THE THIRTEENTH PROTOCOL

- **Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

- **Article 2 – Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.