

J.K. & Others v. Sweden: Human Rights vs. National Security & Sovereignty

I.	OVERVIEW	503
II.	BACKGROUND	505
	A. <i>The Emergence of European Human Rights</i>	505
	B. <i>The Convention's Consequential Effect on Swedish Domestic Law</i>	507
	C. <i>Burden of Proof in Refugee Claims</i>	507
	D. <i>Article 3 of the Convention</i>	508
	E. <i>European Union Law</i>	510
	F. <i>Security Situation in Iraq</i>	511
III.	THE COURT'S DECISION	512
IV.	ANALYSIS	515
V.	CONCLUSION	520

I. OVERVIEW

United States-led coalition forces invaded Iraq in early 2003 and subsequently collaborated with many Iraqi businesspersons.¹ Mr. J.K., an Iraqi citizen living in Baghdad, owned and operated his own construction and transport business with exclusively American clientele.² In October 2004, Al-Qaeda targeted Mr. J.K., attempting to murder him as a result of his dealings with the United States.³ While hospitalized for three months, anonymous men continuously asked hospital staff for his location.⁴ Al-Qaeda then kidnapped Mr. J.K.'s brother in 2005.⁵ They also threatened to kill the brother but released him only after demanding and receiving a bribe.⁶ Shortly after his brother's release, Mr. J.K.'s wife discovered a bomb next to their home.⁷ Iraqi authorities arrested the person responsible for placing the bomb there.⁸ The individual admitted

1. *J.K. v. Sweden*, App. No. 59166/12 Eur. Ct. H.R. para. 9, HUDOC (Aug. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-165442>.

2. *Id.*

3. *Id.* para. 10.

4. *Id.*

5. *Id.* para. 11.

6. *Id.*

7. *Id.* para 12.

8. *Id.*

Al-Qaeda paid him to kill Mr. J.K.⁹ Mr. J.K. and his family then fled to Syria until 2008, when they returned to find their home and business stocks destroyed.¹⁰ That same year, Mr. J.K. and his daughter were targeted in a drive-by shooting that killed his daughter.¹¹ Mr. J.K. stopped working and moved to several new locations to hide from Al-Qaeda. After 2008, he did not receive any more direct threats, but his family lived in fear, evidenced by his son's attendance of school exclusively for final examinations.¹² Mr. J.K. did not ask the Iraqi authorities for protection, claiming he feared they would be unable to protect his family and may eventually disclose their whereabouts to Al-Qaeda.¹³

Mr. J.K. applied for asylum in Sweden on December 14, 2010, but his application was rejected on July 11, 2011 because he no longer resided in Sweden.¹⁴ He reapplied on August 25, 2011, and his wife and son followed with their applications on September 19, 2011.¹⁵ The Swedish Migration Agency (*Migrationsverket*) interviewed the family several times.¹⁶ The agency rejected their asylum applications on November 22, 2011.¹⁷ The Swedish Migration Agency admitted that Al-Qaeda exposed Mr. J.K. and his family to the most serious forms of abuse, but nonetheless, denied their applications because the family had not experienced any abuse since 2008.¹⁸

After Sweden denied asylum, Mr. J.K. submitted a videotape from a 2008 Iraqi political debate in which he discussed the corruption of both the Iraqi government and Al-Qaeda. He feared both groups would use this video footage against him if he were to return to Iraq.¹⁹ Mr. J.K. also submitted his residence certificate and a police report allegedly certifying that a terrorist organization burned down his family's house on November 12, 2011.²⁰ The Migration Agency submitted the materials before the Migration Court, but they ultimately decided that these materials were simplistic and of little evidential value.²¹ By September

9. *Id.*
10. *Id.* paras. 12-13.
11. *Id.* paras. 13-14.
12. *Id.*
13. *Id.*
14. *Id.* para. 14.
15. *Id.* para. 15.
16. *Id.* para. 16.
17. *Id.* para. 17.
18. *Id.*
19. *Id.* para. 18.
20. *Id.*
21. *Id.*

26, 2012, Mr. J.K. and his family had exhausted Sweden's domestic remedies.²²

On September 13, 2012, Mr. J.K. and his family filed an application with the European Court of Human Rights (ECtHR), complaining that deportation to Iraq would entail a violation of Article 3 of the European Convention on Human Rights that prohibits torture and inhuman, or degrading, treatment.²³ On September 18, 2012, the President of the Third Section of the Court decided to apply Rule 39, stating that Mr. J.K. and his family must not be deported back to Iraq for the duration of the proceedings of the court.²⁴ On October 19, 2015, the panel of the Grand Chamber, the highest court of the ECtHR, accepted Mr. J.K.'s appeal and assessed numerous factors: the general obligations under Article 3, the distribution of the burden of proof, the material time of the risk assessment, past ill-treatment as an indication of risk, the general security situation in Iraq, and personal circumstances of the family while being a member of a targeted group and in conferring its decision.²⁵ The Grand Chamber of the ECtHR *held*, by ten votes to seven, that substantial grounds had been shown for believing that the applicants would run a real risk of treatment contrary to Article 3 if returned to Iraq. *J.K. & Others v. Sweden*, App. No. 59166/12 Eur. Ct. H.R. ¶ 123, HUDOC (Aug. 23, 2016).

II. BACKGROUND

A. *The Emergence of European Human Rights*

The devastation and human suffering caused by the Second World War steered Western Europe's governments to adopt the European Convention on Human Rights and Fundamental Freedoms (Convention).²⁶ The Convention aims to secure the universal and effective recognition and observance of rights that are the foundation of justice and peace.²⁷ The Convention was not only designed to create new rights but to create a new international mechanism that would enable

22. *Id.* para. 22.

23. *Id.* para. 1.

24. *Id.* para. 4. The Chamber delivered a judgment on June 4, 2015, and the Court held that deportation of the family would not give rise to an Article 3 violation. *Id.*

25. *Id.* paras. 77-115.

26. See Rancee L.K., 8 DICK. J. INT'L L. 465, 472 (1990) (reviewing J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* (1988)) (discussing the Convention's birth post-World War II).

27. Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 4, 1950, E.T.S. no. 5 [hereinafter ECHR].

individuals to initiate proceedings against States that violated these rights.²⁸ The Convention entered into force in 1953, but Eastern European governments only started implementing it in the 1980s.²⁹

Article 1 of the Convention states: “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”³⁰ Section II, Article 19 of the Convention establishes the ECtHR, and Article 32 gives the court its jurisdiction over contracting states.³¹ The concept that state constitutions are living organisms that continue evolving with time is a familiar ideology for many constitutional societies.³² This same theory arose in the context of the Convention and its case law.³³ If a State has yet to join the Convention or departs from it, the ECtHR no longer has jurisdiction over it.³⁴ Ultimately, the link between the Convention and the sovereign contracting States relies on consent.³⁵

The contracting State’s domestic courts must apply the Convention.³⁶ If they do not, the ECtHR will continually find against the wrongful State when individuals bring successful complaints about the failure of a State to protect their rights.³⁷ The ECtHR cannot simply take up cases on its own; it only has jurisdiction to hear allegations of violations of the Convention brought by individuals or member States against another member State.³⁸ Moreover, when the ECtHR receives an application, it may decide that a State should act a certain way while it examines the case.³⁹ Judgments handed down from the Court are binding

28. Maja Nastic, *ECHR and National Constitutional Courts*, 71 COLLECTION PAPERS FAC. L. NIS 203, 203 (2015).

29. *See id.* at 203-04.

30. ECHR, *supra* note 27, art. 1.

31. *Id.* arts. 19, 32.

32. George Lestas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106 (Andreas Føllesdal et al. eds., Cambridge University Press 2013).

33. *Id.* at 107. The Court openly acknowledges that it is an evolving instrument. Through its case law, the Court has made the Convention a living instrument and has extended rights afforded and applied them to situations unforeseeable. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 3 (2014), http://www.echr.coe.int/Documents/50Questions_ENG.pdf [hereinafter EUR. CT. H.R., 50 QUESTIONS].

34. EUR. CT. H.R., 50 QUESTIONS, *supra* note 33, at 3.

35. *Id.*

36. *Id.* at 3-4.

37. *Id.*

38. *Id.* at 5-6.

39. *Id.* at 9. The Court will usually invoke Rule 39 of the Convention and ask states to refrain from sending refugees back to their country of origin where they could face death or torture. *Id.*

on contracting States and usually result in a State amending its legislation.⁴⁰ Lastly, individuals can bring cases before the Court only after they have exhausted all available domestic remedies.⁴¹

B. *The Convention's Consequential Effect on Swedish Domestic Law*

Sweden, a contracting member of the Convention, enacted the Aliens Act (*Utlänningslagen*, Act no. 2005:716) in 2005 to confront issues concerning the rights of aliens who planned to enter, and remain in, Sweden.⁴² Upon arrival in Sweden, aliens encounter three governmental bodies: the Migration Agency, the Migration Court, and the Migration Court of Appeal.⁴³ The Alien Act states that aliens arriving in Sweden in need of protection are entitled to a residence permit; however, an alien can be sent back to a country if they do not risk persecution there.⁴⁴ The Act also provides that, irrespective of whether the alien's country's authorities are the ones creating the risk to the alien, non-state actors can also create the risk if the authorities are unable to protect the person.⁴⁵ Chapter 12, section 1 declares that an alien must not be sent back to a country where there are reasonable grounds for believing that they will suffer, or be subjected to, inhuman, or degrading, treatment or punishment.⁴⁶

C. *Burden of Proof in Refugee Claims*

Refugee claims are established by adducing oral or documentary evidence in order to decide if the claim of an applicant is credible.⁴⁷ The burden of proof lies with the refugee making the assertion, but the refugee applicant satisfies this burden when they render truthful facts

40. *Id.*

41. *Id.* at 7.

42. 1 ch. 1 § ALIENS ACT (Utlänningslagen [SFS] 2005:716) (Swed.).

43. J.K. & Others v. Sweden, App. No. 59166/12 Eur. Ct. H. R. para. 28, HUDOC (Aug. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-165442>.

44. 5 ch. 1 § ALIENS ACT (SFS 2005:716) (Swed.). The term “refugee” refers to an alien outside of their country who has a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership to a particular social group, and who is unable or, owing to such fear, is unwilling to avail themselves of the protection of their country.” *Id.* 4 ch. 1 §.

45. *Id.* 4 ch. 1 §.

46. *Id.* 12 ch. 1 §.

47. U.N. HIGH COMM’R FOR REFUGEES, NOTE ON BURDEN AND STANDARD OF PROOF IN REFUGEE CLAIMS 2 (Dec. 16, 1998), <http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/unhcr-note-on-burden-and-standard-of-proof-in-refugee-claims-1998.html>.

relevant to their claim.⁴⁸ Facts that need to be proven concern the applicant's background and personal situation that give rise to their fear of persecution and their unwillingness to avail themselves of the protection of their country of origin.⁴⁹ A "well-founded fear of being persecuted is the key phrase of the refugee definition," containing a subjective element (fear) and an objective determination (well-founded), each of which must be evaluated.⁵⁰ Ultimately, an applicant's fear of persecution is considered "well-founded" when they establish, to a reasonable degree, that continued stay in their country of origin is intolerable.⁵¹

Therefore, adjudicators need only decide if the applicant's statements relating to their claim are credible. "Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed."⁵²

D. Article 3 of the Convention

Article 3, section I of the Convention contains the prohibition of torture, stating: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁵³ In *Chahal v. United Kingdom*, the ECtHR held that Article 3 enshrined one of the most fundamental values of democratic societies.⁵⁴ The Court stated that it understood the difficulties States encountered with modern terrorism, but that the Convention, in absolute terms, prohibits torture, inhuman or degrading treatment, or punishment irrespective of the victim's alleged conduct.⁵⁵

48. *Id.*

49. *Id.* Adjudicators may consider minor details such as dates, minor inconsistencies, vagueness, or incorrect statements in terms of credibility but cannot use these minor details as decisive factors. *Id.* at 3.

50. *Id.* at 3. "Fear" means a person believes they will be subject to persecution and is established by the person's state of mind, whereas "well-founded fear" means that a person can show a "good reason" why they fear persecution. *Id.* at 3-4.

51. *Id.* While past persecution or mistreatment would weigh heavily in favor of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin. *Id.* at 4.

52. *Id.* at 3.

53. ECHR, *supra* note 27, art. 3.

54. *Chahal v. United Kingdom*, App. No. 22414/93 Eur. Ct. H.R. para.79, HUDOC (Nov. 15, 1996), <http://hudoc.echr.coe.int/eng?i=001-58004>.

55. *Id.*

The importance of Article 3 was displayed when the ECtHR decided *Soering v. United Kingdom*.⁵⁶ While living in the United States, Soering, a German national, brutally killed his girlfriend's parents.⁵⁷ Soering and his girlfriend fled to Europe, and the United States asked for his extradition from the United Kingdom.⁵⁸ Soering appealed to the ECtHR, and the Court found that Soering's extradition to the United States, a country where he could face the death penalty, would give rise to a breach of Article 3.⁵⁹

Further, in *Selmouni v. France*, the ECtHR held that the Convention exists as a living instrument and must be interpreted in light of present day conditions.⁶⁰ The applicant, a citizen of both the Netherlands and Morocco, was arrested in France for drug trafficking.⁶¹ While in custody, the police raped, beat, threatened to use a blowlamp and syringe on, and urinated on the applicant.⁶² The repeated assaults were severe enough to constitute torture under Article 3.⁶³ The Court further communicated that acts, which had not violated Article 3 in the past, could violate it in the future, finding that the "protection of human rights required greater firmness in assessing breaches of fundamental values of democratic societies."⁶⁴

In *Saadi v. Italy*, the ECtHR unanimously reasserted its existing jurisprudence under Article 3, holding that involvement in terrorism did not alter an individual's Article 3 rights.⁶⁵ Italian authorities deported Nassim Saadi, who was lawfully residing in Italy, to Tunisia.⁶⁶ Tunisian authorities convicted Saadi of terrorism-related offenses and sentenced him to twenty years in prison.⁶⁷ Saadi successfully claimed that he would be at risk in a Tunisian prison, where alleged terrorist mistreatment is well-documented.⁶⁸

Moreover, in *NA v. United Kingdom*, the ECtHR held that authorities could not return a Sri Lankan national of Tamil ethnicity to

56. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 9 (1989).

57. *Id.* at 11.

58. *Id.* at 11-12.

59. *Id.* at 49.

60. *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 183.

61. *Id.* at 156-57.

62. *Id.* at 165.

63. *Id.* at 183.

64. *Id.*

65. *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 207, 242-43.

66. *Id.* at 219.

67. *Id.* at 247-48.

68. *Id.* at 249.

Sri Lanka, because he belonged to a specific group at risk of ill treatment.⁶⁹ In *FG v. Sweden*, the ECtHR held that asylum-seekers are the ones who must initially substantiate a risk of a violation of Article 3.⁷⁰ Lastly, in *Hirsi v. Italy*, the ECtHR pointed to its well-established case law stating contracting States have the right to control the entry, residence, and expulsion of aliens.⁷¹

E. European Union Law

The European Union adopted the *Charter of Fundamental Rights of the European Union*, which reaffirmed the European Convention on Human Rights.⁷² Article 52, section 3, “Scope and interpretation of rights and principles,” states:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.⁷³

Moreover, the European Union has the power to issue binding directives to its member States.⁷⁴ A member State has discretion to determine the means, the best forms, and methods to achieve the intended result of a directive.⁷⁵ Additionally, *Article 4 of Council Directive 2004/83/EC* explains that the “minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons that need international protection.”⁷⁶ Most importantly, Article 4 states that assessments of applications for international protection are to be carried out on an individual basis, which includes considering country of origin, reviewing statements and documentation provided by the applicant, and the personal circumstances of the applicant.⁷⁷ Moreover, the Council

69. *NA v. United Kingdom*, App. No. 25904/07 Eur. Ct. H.R. para. 147, HUDOC (Jul. 17, 2008), <http://hudoc.echr.coe.int/eng?i=001-87458>.

70. *F.G. v. Sweden*, App. No. 43611/11 Eur. Ct. H.R. para. 127, HUDOC (Mar. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-161829>.

71. *Hirsi v. Italy*, 2012-II Eur. Ct. H.R. 97, 140.

72. Charter of the Fundamental Rights of the European Union pmbl., Dec. 18, 2000, 2000 O.J. (C 364) 1.

73. *Id.* art. 52.

74. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 47.

75. *Id.*

76. *J.K. v. Sweden*, App. No. 59166/12 Eur. Ct. H.R. para. 47, HUDOC (Aug. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-165442>.

77. Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC).

noted that the fact that an applicant has already experienced threats or harm in their country of origin indicates a well-founded fear of persecution.⁷⁸

F Security Situation in Iraq

In 2013, the Islamic State of Iraq and al-Sham (ISIS) and its allied forces commenced a major offensive against the Iraqi Government in Northern Iraq, successfully capturing the cities of Samarra, Mosul, and Tikrit.⁷⁹ In 2014, Amnesty International conducted and published a briefing on Iraq stating that ISIS made promises not to harm former members of the security forces, if they repented.⁸⁰ Additionally, Amnesty International found evidence of extrajudicial executions of detainees carried out by Iraqi government forces.⁸¹ The United Nations High Commissioner for Refugees (UNHCR) stated that since issuing its 2012 Iraq Eligibility Guidelines, Iraq had experienced a new surge in violence.⁸² Various forms of violence led to daily civilian deaths.⁸³ UNHCR pushed for States to refrain from returning persons from Iraq until the violence calmed down and further expressed that many of the refugees “fleeing Iraq were likely to meet the 1951 Convention criteria for refugee status.”⁸⁴

The individuals at highest risk of being attacked by non-state actors such as Al-Qaeda and ISIS were Iraqi civilians who worked with the coalition forces during the Iraq War.⁸⁵ Written in 2005, Iraq’s Constitution was drafted to protect its citizens, but the police and legal system had shortcomings.⁸⁶ Citizens were discouraged from reporting

78. *Id.*

79. *J.K.*, App. No. 59166/12, para. 31.

80. AMNESTY INT’L, NORTHERN IRAQ: CIVILIANS IN THE LINE OF FIRE 4 (2014), https://www.amnesty.ca/sites/amnesty/files/northern_iraq_civilians_in_the_line_of_fire.pdf. Public repenting was a risk because it allowed ISIS to collect names, addresses, ID numbers, and other identification details of persons who it could decide to target later. *Id.*

81. *Id.*

82. U.N. HIGH COMM’R FOR REFUGEES, UNHCR POSITION ON RETURNS TO IRAQ 1 (2014), <http://www.refworld.org/docid/544e4b3c4.html>.

83. *Id.*

84. *Id.* at 11. Human Rights Watch World Report also issued a statement in 2015 alleging that pro-government militias killed 109 Sunni men in villages and towns in the “Baghdad Belt.” Pro-government forces also carried out 255 prisoner executions in six different cities. *J.K. v. Sweden*, App. No. 59166/12 Eur. Ct. H.R. para. 34, HUDOC (Aug. 23, 2016), <http://hudoc.echr.coe.int/eng?i=001-165442>.

85. *J.K.*, App. No. 59166/12, para. 39. Three hundred interpreters, who helped coalition forces, have been killed in Iraq since 2003. *Id.*

86. *Id.* para. 43.

crimes due to Iraqi police corruption.⁸⁷ The government's corruption had only "exacerbated the lack of effective human rights protections."⁸⁸ Still, with all the turmoil in Iraq, the Home Office (Immigration Office) of the United Kingdom issued a statement suggesting that relocation to Baghdad was possible, but decision-makers must consider relevant personal factors of the individuals in question.⁸⁹

III. THE COURT'S DECISION

In the noted case, the Grand Chamber of the ECtHR held, by ten votes to seven, that Mr. J.K. and his family showed substantial grounds they would run a real risk of treatment contrary to Article 3 if returned to Iraq.⁹⁰ Accordingly, the Court decided that the family's deportation would violate Article 3 of the Convention.⁹¹ The Court first noted the general nature of obligations under Article 3 and reiterated its core position that the Convention prohibited torture and inhuman or degrading treatment, or punishment, in absolute terms.⁹² The Court then acknowledged the importance of the *non-refoulement* principle, stating that a main concern of expelling asylum-seekers was to ensure effective guarantees of protection.⁹³ The Court relied on its decision in *Hirsi Jamaa v. Italy* to establish that contracting States have the right to control a person's entry, residence, and expulsion, but noted that under *Saadi v. Italy*, the expulsion of a person may give rise to an issue under Article 3, creating an obligation not to deport the person.⁹⁴ Finally, regarding Article 3, the Court relied on *NA v. United Kingdom*, declaring that danger and ill-treatment by non-public officials also applied when considering an Article 3 violation, in instances where the authorities of the state of origin are unable to provide protection.⁹⁵

Next, the Court referred to *F.G. v. Sweden* and determined that the refugee has the burden of proof to present evidence capable of proving substantial grounds for believing that they were exposed to a real risk

87. *Id.*

88. *Id.* para. 44.

89. *Id.* para. 45.

90. *Id.* para. 123.

91. *Id.*

92. *Id.* para. 77.

93. *Id.* para. 78. *Non-refoulement* is the practice of not forcing refugees or asylum-seekers to return to a country in which they are liable to be subjected to persecution. *Id.*

94. *Id.* para. 79.

95. *Id.* para. 80.

contrary to Article 3's protection.⁹⁶ Once a refugee presents substantial evidence distinguishing their individual situation from general dangers faced in the country, it becomes the government of the contracting State's burden to dispel any doubts about that evidence.⁹⁷ The ECtHR decided that Mr. J.K. met his burden of proof and that Sweden had not dispelled Mr. J.K.'s burden because Sweden's domestic decisions did not entirely eliminate a continuing risk from Al-Qaeda.⁹⁸ Citing to *NA v. United Kingdom*, the Court then measured several risk factors in consideration of whether or not a real risk existed.⁹⁹ In addition, the Court looked at the Qualification Directive and found that prior incidents of ill treatment were serious indications of the applicant's well-founded fear of persecution. It also noted that under the *UNHCR Note on Burden and Standard of Proof in Refugee Claims*, past persecution did not conclude a person has future risks.¹⁰⁰ Furthermore, the Court stated that because of the "special situation that refugees find themselves in, it is necessary to give refugees the benefit of the doubt when accessing the credibility of their statements."¹⁰¹

The Court then spoke about the *ex-nunc* evaluation of the circumstances of Mr. J.K. and his family.¹⁰² The Court referred to the *Chahal* decision, which stated that "the material point in time for the assessment of an applicant who had not already been deported must be during the court's consideration of the case."¹⁰³ The Court found that, since Mr. J.K. and his family had not yet been deported, whether they faced a real risk of persecution upon return to Iraq must be examined in light of the country's present-day situation.¹⁰⁴

Due to this finding, the Court concentrated on the existence of a risk, and found that the assessment must focus on foreseeable consequences of a refugee's deportation that derive from both the general

96. *Id.* paras. 83, 91.

97. *Id.* para. 91.

98. *Id.* para. 115.

99. *Id.* para. 95 ("The following elements may represent such risk factors: previous criminal record and/or arrest warrant, the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad . . .").

100. *Id.* paras. 100-01.

101. *Id.* para. 93.

102. *Id.* para. 83.

103. *Id.* In Mr. J.K.'s situation, the Court invoked Rule 39 of the Rules of the Court which prohibited his deportation until after the Court's finding. *Id.* para. 4.

104. *Id.* paras. 106-07.

situation in the refugee's country and personal circumstances.¹⁰⁵ The Court agreed with Sweden's conclusion that the situation in Iraq provided no need for international protection of asylum-seekers.¹⁰⁶ The Court noted that the security situation in Iraq was deteriorating when it referred, *inter alia*, to the United Kingdom's *Home Office* report and *Norwegian Landinfo*.¹⁰⁷ Still, the Court maintained the position that a refugee's deportation to Iraq would not give rise to risks of treatment contrary to Article 3.¹⁰⁸

Since the "general security situation in Iraq did not prevent" Mr. J.K.'s removal, the ECtHR moved to determine whether or not his "personal circumstances" would give rise to an Article 3 violation if deported to Iraq.¹⁰⁹ The Court held that although Mr. J.K. had relatives living in Iraq who had never been targeted, it could not focus on these particular relatives' experience, but rather, must focus on Mr. J.K.'s own situation.¹¹⁰ The Court agreed with the Swedish Migration Agency's opinion regarding Mr. J.K.'s exposure to the most serious forms of abuses from Al-Qaeda from 2004 to 2008, and it deemed his account of events during that time period to be generally coherent and credible.¹¹¹ The Court also found that Mr. J.K. and his family were part of a "systematically targeted group for their relationship with American armed forces," and they faced a real risk of continued persecution by non-state actors, such as Al-Qaeda, if returned to Iraq.¹¹² The ECtHR looked at the connected question of whether Iraqi authorities could protect the applicants, finding that the Iraqi authorities would fail, because, according to the standard of European Union law, Iraq was not "operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution of serious harm."¹¹³ In closing, the Court indicated that the safety of targeted groups, like the group Mr. J.K. and his family belong to, had diminished throughout Iraq, and internal relocation within Iraq was not realistic, despite the fact that the current level of protection may still be sufficient for the general

105. *Id.* paras. 108-11.

106. *Id.* para. 108.

107. *Id.* para. 109.

108. *Id.* para. 110.

109. *Id.* para. 111.

110. *Id.* para. 112.

111. *Id.* para. 114.

112. *Id.* para. 117.

113. *Id.* paras. 118-19.

population of Iraq, irrespective of the current advances and acts of violence by ISIS.¹¹⁴

Several judges of the Grand Chamber dissented from the majority's holding, stating that no future risk existed since threats ceased when Mr. J.K. stopped collaborating with U.S. forces.¹¹⁵ The dissent specifically attacked the majority's decision to not question the family's account of events between 2004 and 2010.¹¹⁶ Due to the Court's *ex nunc* assessment of the case, there was no opportunity to hear directly from Mr. J.K. and his family, and evidence from the domestic proceedings was not presented to the judges.¹¹⁷ Consequently, the dissenting judges questioned the majority's basis for concluding that the family's account of the events was generally credible.¹¹⁸ They also questioned the majority's reasoning for disregarding Sweden's asylum denial, especially when Mr. J.K.'s only new claims following the denial were simple in nature.¹¹⁹ The dissenting judges disagreed that the burden of proof had shifted to Sweden to dispel doubts about the risk of future persecution.¹²⁰ Moreover, Judge Ranzoni wrote a separate dissent where he questioned the clarity and persuasiveness of the existing case law and the international sources used by the majority.¹²¹

IV. ANALYSIS

ECtHR supporters praise this type of accomplishment of innovative and humanistic ideas and its provision of effective international legal protection to individuals, but many contracting States note the Court's shortcomings as well.¹²² The Court's determination that there is a material point in time to assess a non-deported applicant's future risks of ill-treatment presents future consequences for contracting States. The ECtHR invoked Rule 39, preventing Sweden from deporting Mr. J.K. and his family before the conclusion of the proceedings.¹²³ Since their

114. *Id.* para. 121.

115. *Id.* para. 4 (Jäderblom, J., et al., dissenting).

116. *Id.* para. 3.

117. *Id.* para. 4.

118. *Id.* para. 6.

119. *Id.* para. 5.

120. *Id.* para. 7.

121. *Id.* para. 5 (Ranzoni, J., dissenting).

122. See generally Loukis G. Loucaides, *Reflections of a Former European Court of Human Rights Judge on His Experiences as a Judge*, 1 ROMA RTS.: J. EUR. ROMA RTS. CTR. 61, 61 (2010), <http://www.errc.org/cms/upload/file/roma-rights-1-2010-implementation-of-judgments.pdf>.

123. See *J.K.*, App. No. 59166/12, para. 4 (discussing the invocation of Rule 39).

deportation had yet to occur, the Court examined the applicants' risk of persecution considering Iraq's present-day security situation, rather than examine the risk at the time immediately following Sweden's domestic proceedings. This temporal determination for the Court's assessment presents a substantial disadvantage to contracting States who have not yet deported applicants because of the Court's demands. When a country's security is deteriorating, but is not yet severe enough to give rise to an Article 3 violation, the Court's invocation of Rule 39 makes it challenging to return applicants to their home state before that level of severity emerges. Even if a contracting State is correct about the security situation in a particular country in its domestic proceedings, it may have to ultimately refrain from deporting an applicant because the security situation might give rise to an Article 3 violation in the future, at the point in time of the Grand Chamber's adjudication. Moreover, the Court may find in favor of the contracting State and still not allow the deportation of the applicant because of the security situation at the end of ECtHR proceedings.¹²⁴ The ECtHR is already under enormous pressure in terms of its caseload because it is the only human rights court in Europe, a region with almost a billion individuals.¹²⁵ The noted case, similar to many other lengthy proceedings, took six years to conclude, and although Iraq's security situation deteriorated during the proceedings, it was unclear whether the applicants could safely return to Iraq if deported after Sweden's domestic assessment in 2012.¹²⁶

Additionally, the ECtHR decision presents an inconsistent standard by ruling that a contracting State has sovereign rights to control an applicant's entry, residence, and expulsion. Immediately after, the ECtHR undermined a State's right to expel applicants if it might give rise to an Article 3 violation. The ECtHR's initial judgment respected Sweden's decision, but the Grand Chamber of the ECtHR confirmed that it controlled the final determination on the legality of expelling an individual from a contracting State.¹²⁷

Moreover, the Court's ruling that contracting States must give refugees the benefit of the doubt when assessing the credibility of their statements presents potential burdens for a contracting State's courts'

124. See *id.* para. 106 (discussing the present-day examination of Iraq).

125. Loucaides, *supra* note 122, at 61.

126. Zoie O'Brien, *Euro Human Rights Court Overrules Deportation Order and Says Iraqi Family Must Stay*, EXPRESS (Aug. 24, 2016), <http://www.express.co.uk/news/world/703384/Euro-human-rights-court-Iraqi-family-ECHR>.

127. See *J.K.*, App. No. 59166/12, para. 79 (discussing contracting states sovereign rights which may give rise to Article 3 violations).

ability to determine the truthfulness of claims. The Court's judgment notes that it was the contracting State's burden to dispel any doubts concerning a refugee's demonstrated evidence. This analysis shifts the burden of proof from the applicant to the State, which is already obligated to give an applicant the benefit of the doubt when assessing the risk of an Article 3 violation. This conclusion is not only vague, it also presents contracting States, already obligated to give applicant's claims the benefit of the doubt, an increasingly difficult burden in order to disprove a refugee's claim.¹²⁸

A persistent criticism of the Court, a ground that many European nations attack it on, is the burden it creates on domestic decisions.¹²⁹ Most notably, Lord Hoffman, once the United Kingdom's second most senior Law Lord, described the Court's rulings against domestic decisions as "teaching grandmothers to suck eggs."¹³⁰ Lord Hoffman further claimed that the Court was unable to "resist its temptations to increase its jurisdiction while attempting to lay down a new European federal law."¹³¹

Theresa May, the United Kingdom's new prime minister, recently expressed her desire to leave the Convention.¹³² She claimed the Convention "bound Parliament's hands, added nothing to the U.K.'s prosperity and made the country less secure by preventing the deportation of dangerous foreign nationals, and did not affect attitudes of governments like Russia in terms of human rights."¹³³ The United Kingdom's media has called the noted case "[a] controversial case [which] could set a precedent for the remaining member states after the court's refusal to accept the national judgment."¹³⁴ British judges have expressed concern that the United Kingdom will face devastating consequences if the system is not dramatically changed.¹³⁵

128. See *id.* para. 93 (discussing the burden of proof in refugee claims).

129. *Judge Attacks Human Rights Court*, BBC (Apr. 4, 2009), http://news.bbc.co.uk/2/hi/uk_news/7982785.stm.

130. *Id.* An English expression meaning giving someone advice in an area in which they are already familiar with. See generally *Teaching Your Grandmother To Suck Eggs*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/teach-your-grandmother-to-suck-eggs> (last visited Feb. 16, 2017).

131. *Judge Attacks Human Rights Court*, *supra* note 129.

132. Anushka Asthana & Rowena Mason, *UK Must Leave European Convention on Human Rights, Says Theresa May*, GUARDIAN (Apr. 25, 2016), <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>.

133. *Id.*

134. O'Brien, *supra* note 126.

135. *Id.*

Europe's migration crisis spurred a profusion of criticism directed at the ECtHR. Attacks of the Court's jurisdictional reach from the United Kingdom and Russia are nothing new, but other countries, such as the Netherlands, Belgium, Denmark, and Sweden have begun attacks on the ECtHR.¹³⁶ Sweden, like Germany, views the Convention in a generally positive light.¹³⁷ Nonetheless, an increasing number of Swedes are expressing concerns over issues arising with mass-immigration, such as the quantity of homes and jobs available, crime, and more importantly, what "mass-immigration" truly means for Sweden.¹³⁸ Unsurprisingly, due to Sweden's relaxed immigration laws, the country has taken in more refugees per head of population than any other European Union country.¹³⁹ In October of 2015 alone, 40,000 people sought refuge in Sweden, which only has a population of ten million.¹⁴⁰ In 2015, 163,000 refugees were registered as asylum-seekers in Sweden, though only one-fifth were ultimately granted asylum.¹⁴¹

In terms of European countries, Sweden's press system has been one of the most positive towards refugees and migrants.¹⁴² Still, in early January 2016, as a result of the unprecedented migrant flow, the unseen numbers of political refugees and asylum-seekers flocking to Europe and Scandinavia, the government of Sweden imposed border controls over the Øresund Bridge.¹⁴³ Sweden did not necessarily impose border controls because it had adopted an anti-immigrant stance, though it did follow other European nations determined to deny entry to refugees.¹⁴⁴ Europe and the European Union had failed to come up with a response to the refugee crisis, and countries were left to test the waters as best they could.¹⁴⁵ With Denmark's clampdown on non-European Union

136. See MIKE BERRY ET AL., U.N. HIGH COMM'N REFUGEES, PRESS COVERAGE OF THE REFUGEE AND MIGRANT CRISIS IN THE EU: A CONTENT ANALYSIS OF FIVE EUROPEAN COUNTRIES intro. (2015), <http://www.unhcr.org/en-us/protection/operations/56bb369c9/press-coverage-refugee-migrant-crisis-eu-content-analysis-five-european.html>.

137. See *id.* at 117 (discussing Germany and Britain's views of the Convention).

138. *Id.* at 124-25.

139. *Id.* at 137.

140. Sasha Abramsky, *If Sweden and Denmark Are So Progressive, Why Did They Close Their Doors to Refugees?*, NATION (Sept. 27, 2016), <https://www.thenation.com/article/if-sweden-and-denmark-are-so-progressive-why-did-they-close-their-doors-to-refugees>.

141. *Id.* This would be the equivalent of more than five million persons arriving in the United States in a single year. *Id.*

142. BERRY ET AL., *supra* note 136, at 10.

143. Abramsky, *supra* note 140. The bridge connects Sweden and Denmark and has allowed people to freely move between the two countries for several decades. *Id.*

144. *Id.*

145. *Id.*

migration, a greater volume of Swedes gravitated “toward genuinely extremist political organizations.”¹⁴⁶ By the end of 2015, nearly one-in-five Swedish voters supported anti-immigration policies.¹⁴⁷ With the influx of large numbers of refugees came rising crime rates, a multibillion-dollar strain on the country’s welfare system, and a housing shortage, ultimately leading to Sweden walking back on its open-door policy towards refugees.¹⁴⁸

The Convention is supreme over the national legislation of a country, and at times generates major conflicts between States and the Court.¹⁴⁹ Still, contracting States cannot partake in the EctHR, or any supranational institution intended to protect human rights, expecting it to condone violations when it is convenient for the contracting State.¹⁵⁰ The Court’s judgments and judges themselves have been scolded by heads of state, the press, and senior members of the legal profession.¹⁵¹ Although it seems that Sweden is far from denouncing and leaving the Convention, serious deliberations have occurred in both the United Kingdom and Russia about their exits, due to decisions such as that of the noted case that challenge a State’s sovereignty.¹⁵² The current geopolitical transformation of Europe will impact the Court’s authority, although the precise direction of that change, in terms of which States, if any, will opt out of the Convention, remains uncertain.¹⁵³ Arguments persist that the boundary of Europe is being redrawn both geographically and symbolically.¹⁵⁴ The form of the Convention’s regulation of boundary politics and space in its geographical reach and impact on the national level of law and politics is currently observable.¹⁵⁵ The questions going forward remain what impact the Court’s decisions will have on contracting States’ sovereignty in the long run and which States will ultimately opt to leave the Convention.¹⁵⁶

146. *Id.* Denmark reformed its Aliens Act, which had put the country at odds with several of the Convention’s articles. *Id.*

147. *Id.*

148. *Id.*

149. Nastic, *supra* note 28, at 206.

150. *See id.* at 210 (discussing a level playing field for individuals in ECtHR cases against the state).

151. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & CONTEMP. PROBS. 141, 175 (2016).

152. *See id.* at 175-76 (discussing Russia and the United Kingdom).

153. *Id.* at 176.

154. *Id.*

155. *Id.*

156. *Id.*

V. CONCLUSION

Sovereignty is the fundamental principle of international law that gives a State the absolute power to control what happens within its borders, including the power to exclude people from crossing its borders.¹⁵⁷ The right to sovereignty should not be taken for granted and entails responsibilities that must be counterbalanced by values, such as the respect for human rights and the protection of minorities.¹⁵⁸ Immanuel Kant, the once famous German philosopher, dreamt of a cosmopolitan world, one in which States had no right to refuse visitors. Yet, the emergence of radical terrorism, and the ever-growing threat of ISIS, indicate Kant's dream will continue to be only that, a dream.¹⁵⁹

The ECtHR's decisions, which continue to conflict with contracting States' domestic sovereignty, only further aggravates States already displeased with the Convention's jurisdictional reach. The United Kingdom's exit from the Convention seems increasingly likely, especially with the outcome of the Brexit referendum. In a world that seems as dangerous as ever before, States everywhere continue to have conflict between the ideas of human rights and national security. Still, there are massive amounts of people in the world undeserving of such pain and suffering. Mr. J.K. and his family desperately needed help. What will be the outcome of the denial of these fundamental rights from Western countries who have continually promoted democracy, the rule of law, human rights, and equality? If the West starts turning its back now, what will it mean for humanity? Could we see a shift towards more human rights violations common prior to the Second World War if contracting States decide to leave the Convention?

Jake Paul Minster*

157. Lucas Bento, *Sovereignty Cannot Hold Back the Power of Humanity*, HARV. INT'L L. J.: ONLINE J. (Sep. 26, 2015), <http://www.harvardilj.org/2015/09/sovereignty-cannot-hold-back-the-power-of-humanity/>.

158. *Id.*

159. *Id.*

* © 2017 Jake Paul Minster. J.D. candidate 2018, Tulane University Law School; B.A. 2014, Western Michigan University. I would like to thank my mother, father, and stepfather for pushing me to be the best individual I can be. I would also like to thank Adam for his unremitting support. Thanks to the members of the *Tulane Journal of International and Comparative Law* for their assistance and support.