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THE RIGHT TO KNOW

Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland

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Equality, Support, Antiracism

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Executive summary

National security grounds can be a reason for exclusion from, or withdrawal of international protection status; refusal or revocation of residence permits; or expulsion and immigration detention. When someone is considered a threat to national security, the reasons are usually based on classified data.

If there are no sufficient procedural guarantees that would enable the affected foreigners to effectively challenge these decisions by immigration authorities, the actual legitimacy of the existence of the threat becomes questionable. Although a procedure to access the classified data exists in **Cyprus**, **Hungary** and **Poland**, in immigration cases this access is usually denied to the applicant and their representative. The immigration detention procedure in **Poland** is slightly different, because it is governed by a Code of Criminal Procedure that actually provides access to the classified file. It can therefore be assumed that these provisions on access also apply to immigration detention. However, national law provisions do not regulate whether the obtained information can be used in other immigration procedures.

Furthermore, decisions based on national security grounds do not have to contain reasons in **any of the three countries**. Administrative authorities in **Cyprus** and **Poland** have access to classified data, but not in Hungary. On top of this, the opinion of the **Hungarian** security agencies on a national security threat (which also does not have to contain reasons) is binding on the immigration authorities in asylum procedures and in certain immigration proceedings. In **Cyprus,** administrative authorities do not always examine all the classified data based on which the threat to national security was established, and do not include certain documents in the case file. Instead, they rather automatically accept that someone constitutes a threat. In **Poland,** only the summary of all the evidence collected by the security agency is accessible to the authorities. Therefore, the applicants in **all three countries** are unable to effectively contest decisions by immigration authorities that interfere with their fundamental rights, such as the right to asylum, private and family life, right to liberty, etc. Detention on national security grounds is automatic in **all three countries**. In addition, asylum detention in **Cyprus** does not carry any maximum duration.

In **all three countries**, the courts reviewing immigration procedure decisions have access to the classified data. Such information is usually examined in immigration procedures, but not in immigration detention procedures in **Hungary** and **Cyprus;** while in **Poland,** the courts are obliged to assess the classified data *ex officio.* In **Cyprus,** the courts will go no further than to ascertain that the Government gave evidence that it was protecting national security, and the courts will not question whether the steps taken were indeed necessary and proportional. In **Hungary** and **Poland,** the courts cannot refer to the content of the classified data in the judgement. In **Cyprus,** in practice, the courts do not refer to the content of classified information as such in their judgements, but may give an indication as to what it relates to.

In **all three countries**, it is possible to appeal the decision if access to the classified information is denied, but these appeals are not effective. In **Hungary**, even if the applicants would be allowed access to the classified information, they are denied the possibility to use the obtained information in the administrative or judicial proceedings.

In **Hungary** and **Poland**, the courts do not have the possibility to examine and decide whether the classification was lawful. In **Cyprus**, the courts have such a possibility; but in the majority of cases their examination does not focus on this issue.

It could be concluded that the existing systems in **all three countries** are not compatible with relevant EU law and jurisprudence of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR) and violate the rights to defence and the right to an effective judicial remedy.

The study wants to raise awareness of the problem and the human (rights) impact thereof. It illustrates several actual cases where for example:

- the Supreme Court in **Cyprus** took a hard line approach and ruled that no judicial control of decisions denying disclosure of classified data and of ordering detention based on national security grounds is allowed;
- an applicant in **Cyprus** was detained because he was considered a threat to national security due to an entry in the Interpol database by a country from which he was seeking asylum. Political or other motives of such inclusion into databases were not examined in the course of the judicial procedures, and it was not disclosed to the applicant which country made the entry into the Interpol database because it was claimed that disclosure of that information would endanger national security;
- the Metropolitan Court in **Hungary** submitted a preliminary reference to the CJEU on the lack of access to the reasons why someone constitutes a threat to national security in asylum procedures, on the lack of individual assessment of withdrawal of refugee status due to the binding opinion of the security agency, and on the limited judicial review;
- a right to request suspensive effect of an expulsion decision based on national security grounds is denied in **Hungary**;
- detention on national security grounds in high-security detention facilities is automatic in **Poland**; and
- Migrants of Chechen origin in **Poland** were falsely accused of supporting ISIS, but were able to rebut the accusations due to the access to the evidence based on which the accusations were made.

In **all three countries** it is accepted and confirmed by national case law that despite the denial of access to the applicant, the right to a fair trial is ensured because the courts have access to classified data. It is interesting to see that such understanding of the right to a fair trial, the principle of equality of arms and adversarial procedure are not shared by several other Member States, where the parties to the procedure must have the same access to all

the legal and factual reasons and information available to the court. Therefore, there is a clear need to further legislate the matter at the European level.

The study concludes with several recommendations to Cyprus, Hungary and Poland and the European Commission.

Introduction

Evoking national security concerns has become a blanket authorisation for some EU Member States to exclude asylum seekers and refugees from protection, reject or withdraw residence permits of third-country nationals, expel or arbitrarily detain them in immigration detention, sometimes indefinitely, without any meaningful control and without giving them the possibility to know at least the summary of the reasons why they are considered a threat to national security.

Non-disclosure of classified information[1] in the possession of state authorities against persons allegedly posing a threat to national security, and in particular foreigners, occurs in **Cyprus**, **Hungary** and **Poland.** The issue should be addressed as a human rights violation, such as violations of the right to defence and the right to an effective judicial remedy.

In 2020 the Hungarian Helsinki Committee (HHC) noticed an increase in recourse to national security grounds as a reason for exclusion/withdrawal/no prolongation in asylum/immigration cases in **Hungary**.[2] An increase in national security immigration cases has also been noticed in **Poland**. According to the information received by the Polish Helsinki Foundation for Human Rights (HFHR) in 2019, the Border Guard issued 236 return decisions based on security considerations (mainly to citizens of Ukraine, Belarus, North Korea and the Russian Federation).[3] In 2020, the Border Guard issued 564 such decisions (mainly to citizens of Ukraine and Belarus). In **Cyprus,** an increased use of national security grounds for detention of asylum seekers has been noticed since 2019.

In **all three countries**, national security immigration cases are also linked to the Government's negative narrative against migrants and refugees. In **Poland,** migrants used to be scapegoated by the Government (from 2015-2018),[4] however, the Polish Government has since decreased using anti-migration rhetoric. In **Cyprus**, where the Government decided to adopt stringent migration and asylum policies, asylum seekers are still often scapegoated as terrorists or persons dangerous to national security and public order.[5] In **Hungary**, the Government launched a national consultation on immigration and terrorism, portraying migrants, including refugees, as threats to national security.[6]

[1] Classified data is material that a relevant state agency/authority deems to be sensitive information that must be protected.

[2] HHC, Flagrant breach of the right to defence in national security cases, systemic denial of the right to family life, 20 November 2020, https://www.helsinki.hu/wp-content/uploads/National-Security-Risk.pdf.

[3] Letters from the Border Guard Headquarters to the HFHR on 5 February 2021 and 17 January 2020.

[4] https://bit.ly/37DZcdj, https://bit.ly/3iARFlT.

[5] https://bit.ly/3iDfQQz, https://bit.ly/37C1ytu, https://bit.ly/3xFs6V9, https://bit.ly/3fXy2CW, https://bit.ly/3fYLKFH.

[6] https://bit.ly/3xFWJcU, https://bit.ly/3AEza67, Nagy, B. (2018). From Reluctance to Total Denial. Asylum Policy in Hungary 2015-2018. In Stoyanova, V., & Karageorgiou, E. (Eds.). The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis. Brill., pp. 17-65.

National security protection may require classification of data, based on which someone is considered a threat to national security, as for instance, disclosure of that evidence in certain cases is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons; or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities.[7] However, as it will be shown in the next chapter, the complete lack of access (or lack of meaningful access) does not comply with the relevant EU law and jurisprudence of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR).

The lack of access to the classified material in cases of foreigners who have been designated as a threat to national security legitimately raises questions about the legitimacy of the actual existence of the threat. Several such cases have been the subject of a public discussion in recent years in **Poland**. For example,

Iraqi citizen Ameer Alkhawlany, a PhD student at the Jagiellonian University in Krakow, was never disclosed the reasons why he was considered a threat to national security.[8] He was detained, and the Regional Court in Przemyśl, when considering the appeal against the decision extending his detention, drew attention to serious irregularities that had occurred during his detention proceedings. The Regional Court stated that neither the authority ordering detention, nor the courts considering the case had any reliable information in the case files that Mr Alkhawlany posed a threat to national security. Therefore, the Regional Court requested the Internal Security Agency to provide relevant materials. Upon receiving the requested information, the Regional Court stated that they were laconic and the threat indicated by the Security agency was hypothetical. Therefore, it could not constitute the grounds for depriving him of his liberty. The Regional Court decided to release Mr Alkhawlany. However, after being released, he was immediately expelled from Poland under a new decision by the Minister of the Interior and Administration.[9]

In another case, Ukrainian Ludmiła Kozłowska, the President of the Open Dialogue Foundation, and who is also the wife of a Polish national, was considered an unwanted person by the Polish authorities. The Polish authorities issued a decision refusing her stay in Poland. However, the German authorities then issued her a visa and the Belgian authorities issued her a residence permit, thus not recognising that her stay constitutes a threat to national security.[10]

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[7] CJEU, C-601/15 PPU, J. N., 15 February 2016, §66.

[8] Radio Poland, Polish MPs to Probe Iraqi Suspected of Ties with Islamic Radicals: Report, www.thenews.pl/1/10/Artykul/279991,Polish-MPs-to-probe-Iraqi-suspected-ofties-with-Islamic-radicals-report.

[9] Return decisions based on security considerations are immediately enforceable (appeal has no automatic suspensive effect), see p. 43 of this study.

[10] More information about the case: Helsinki Foundation for Human Rights, HFHR issues statement in case of detained head of Open Dialogue Foundation, https://bit.ly/3jNCdSR; wyborcza.pl, Deportowana z Polski Ludmiła Kozłowska z prawem pobytu w Belgii. 'Belgowie nie uwierzyli w propagandę rządu PiS', https://bit.ly/2UbJPpz; polandin.com, Polish-German presidents review of Bundestag hearing on Hungary, Poland, https://bit.ly/3fV106i.

In yet another case, Russian citizens of Chechen origin were accused of supporting ISIS and were declared a threat to national security. They were only able to challenge the accusations, based on falsified evidence (it appeared that the transcripts of their phone calls were mistranslated), because they had access to all case files in their criminal procedure. Since such access is not allowed in administrative immigration proceedings, foreigners do not have the possibility to challenge the evidence on which their threat to national security is based.[11]

In these and many other similar cases, the most important documents indicating why, according to the authorities, a foreigner poses a threat to national security, were classified and consequently not accessible to affected foreigners. In addition, decisions issued in the cases of these foreigners did not contain factual justification. Therefore, neither the foreigners themselves nor their attorneys had any possibility of discovering the reasons for the issued decision.

It is important to emphasise that **the aim of this study is not to defend people that are indeed a threat to national security.** Well-founded national security concerns can lawfully trigger exclusion or withdrawal of international protection status/residence permit or expulsion or detention of a foreigner. However, specific procedural safeguards must be observed. As will be shown in the next chapters, the legislation and practice of **the three Member States** lack basic safeguards in this regard, safeguards that are indispensable in a democratic society. Such complete lack of access to the reasons why someone is considered a threat to national security raises doubts as to whether the affected foreigners are able to effectively exercise their rights of defence and protect themselves against potential arbitrary decisions by the authorities that can have detrimental effects on their lives. Therefore, the primary aim of this report is to argue that **the legislation and practices in three countries are not consistent with international standards**, and **to raise awareness on this issue by producing sound evidence of the problem and the human (rights) impact thereof.**

This study was written in the framework of the 'Right to Know Project' funded by Epim. The Hungarian Helsinki Committee is coordinating the project in collaboration with the Polish Helsinki Foundation for Human Rights and Kisa in Cyprus. The study is based on the national studies written by the project partners that followed a commonly agreed template. The authors explored existing research on the matter, collected relevant case law, analysed relevant national legislation, and reflected on the practices in the respective Member States.

[11] https://bit.ly/3fT8kPJ, see more in details on p. 23 of this study.

Short overview of existing legal standards[12]

The right to defence is declared as a general principle of EU law and is ensured by Article 47 of the Charter.[13] It includes the right to be heard in the context of adversarial procedures and the right to a reasoned decision. The effectiveness of the judicial remedy under Article 47 of the Charter requires that, as a general rule, the applicant is to be provided the information and the grounds related to their person on which the decision on the rejection/withdrawal of their application/status is based.[14]

The CJEU held in the *ZZ* judgment, that **if the parties** to the procedure **cannot have an opportunity to examine the facts and documents on which decisions concerning them are based**, and on which they are therefore **unable to state their views, their right to an effective legal remedy is infringed**.[15]

If, based on national security concerns, the authority refuses the full disclosure of the information; the courts, having gained access to the confidential documentation, should also review the lawfulness of the classification. In case of unjustified classification, they should ensure that the data in question are disclosed to the person concerned. There is **no presumption that the reasons invoked by a national authority exist and are valid.** Thus, **the burden of proof is on the state authorities** to show that precise and full disclosure to the person concerned compromises state security. In case of justified classification, the adversarial principle must be complied with to the greatest possible extent in order to enable the applicant to contest the grounds of the decision, and to make submissions on the evidence relating to it. **The courts should ensure that 'the essence of those grounds' on which the decision at issue was taken is in any event communicated to the person concerned.**[16]

If the disclosure of information would jeopardize national security during the asylum procedure, **Article 23(1) of the Asylum Procedures Directive**[17] states that the courts shall have access to such information [point (a)] and Member States shall establish procedures guaranteeing that the applicant's rights of defence are respected [point (b)]. With regard to the latter the Directive notes as an example that a legal adviser who has undergone security checks might form such a guarantee. Consequently, as it is confirmed by the Directive, the mere access by the courts to the classified data does not guarantee on its own the respect of the rights of defence of the applicant.

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[12] For a more detailed overview of existing legal standards see Right to know legal note, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/09/Legal-Template-Right-To-Know.pdf.
[13] CJEU, C-249/13, Khaled, 11 December 2014, §34; C-166/13, Mukarubega, 5 November 2014, §48.
[14] C-300/11, ZZ, 4 June 2013, §53; C-584/10 P Kadi, 18 July 2013, §100; C-222/86.
[15] CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §56.
[16] C-300/11, ZZ, 4 June 2013, §§57-69; C-584/10 P, Kadi, 18 July 2013, §§126-129.
[17] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

Therefore, even if the decision affecting the foreigner is based on lawfully classified data, the foreigner has a right to a reasoned decision and must have a right to be informed, in any event, of the **essence of the grounds** on which it was concluded that they represent a threat to national security.

Regarding detention based on national security grounds, the CJEU in the *case of J.N.* held that a detention measure cannot be based on this ground without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represent to national security or public order corresponds at least to the gravity of the interference with the liberty of those persons that such measures entail.[18] Furthermore, in view of the requirement of necessity, **detention is justified** on the grounds of a threat to national security or public order **only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned.**[19]

Therefore, where the court merely automatically concludes, relying on the assertions of the executive authority, that the applicant poses a threat to national security without properly taking into account the applicant's personal conduct and the risk posed by that conduct to national security, the Member State does not respect the standard of individual assessment and the principle of proportionality.

ECtHR also developed important procedural safeguards in connection with independent and impartial review of decisions based on classified/confidential information. In expulsion cases based on national security grounds, the Court established that even where an allegation of a threat to national security has been made, the guarantee of an effective remedy requires, as a minimum, that **the court be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable**. In the absence of such safeguards, the police or other public authorities would be able to arbitrary infringe the rights protected by the Convention. Additionally, it set out that there must be some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be, with appropriate procedural limitations on the use of classified information.[20]

With regard to the independent judicial review of a national security allegation, the Court stated that **the review must not have a formalistic approach, thus it must not leave the security agencies full and uncontrolled discretion with regard to the establishment of a national security threat**.[21]

[18] CJEU, C-601/15 PPU, J. N., 15 February 2016, §69.
[19] Idem., §67.
[20] C.G. and Others v. Bulgaria, Appl. no. 1365/07, 24 April 2008, §57; Kaushal and Others v. Bulgaria, Appl. no. 1537/08, 2 September 2010, §§29, 36; Al Nashif v. Bulgaria, Appl. no. 50963/99, 20 June 2002, §§123, 137; Ozdil and others v. Moldova, Appl. no. 42305/18, 11 June 2019, §§68.
[21] Kaushal and Others v. Bulgaria, Appl. no. 1537/08, 2 September 2010, §38; Grabchak v. Bulgaria, Appl. no. 55950/09, 1 June 2017, §§39; Bou Hassoun v. Bulgaria, Appl. no. 59066/16, 6 October 2020, §33.

Regarding applicants being detained on the grounds of national security where the underlying data is classified, the Court established the same standards as in cases concerning expulsion. Proceedings must be adversarial, and must always ensure 'equality of arms' between the parties. Full adversarial procedure can be restricted based on national security considerations. Even in that case though, the Court must have access to the full material on which the national authority based its decision.[22] The lawfulness criterion requires that **evidence on which a detention decision is based be disclosed to the applicants in order to put them in a position to effectively challenge the allegations against them**.[23]

Concerning the procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a state, the Court confirmed in its recent Grand Chamber judgment in the case *Muhammad and Muhammad v. Romania*[24] that Article 1 of Protocol 7 enshrines a right for the alien to be notified of the accusations against him (…) and **it has always found fault with a failure to provide any information to those concerned about the reasons underlying an expulsion decision**" (§127). The applicant must be awarded certain so-called '*minimum procedural guarantees'*, even concerning expulsion decisions on national security grounds. If minimum procedural guarantees are lacking, the decision is deemed to be unlawful and arbitrary. *Inter alia*, the person concerned has the right to:

i) have the reasons constituting the factual grounds of the expulsion disclosed to him or her; and

ii) have access to the content of the documents and information relied on by the national authority having competence to adopt the decision on expulsion (§§126, 128, 136).

Limitations to those minimum procedural standards may only be allowed (§§130-157):

i) if the purpose of the limitation is duly justified by the authorities/courts with respect to the special circumstances of the given case (§§139-146); and

ii) if the authority provides sufficient counterbalance/safeguard for the alien which protects the essence of his or her procedural rights.

However, even in the case of their rights being limited, the applicant must be able to challenge the expulsion in an effective manner, and must be protected against arbitrariness (§§147-157). Without these safeguards, the decision on expulsion and its review procedure violates Article 1 of Protocol 7.

The standards elaborated by the Court under Article 1 of Protocol 7 'must be ensured in relation to the other articles of the Convention too where '*a decision [is] reached in*

[22] A and Others v. the UK, Appl. no. 3455/05, 19 February 2009, §210.

[23] Idem., §223.

[24] Muhammad and Muhammad v. Romania [GC], Appl. no. 80982/12, 15 October 2020, §129. The standards set out therein have been recently reinforced and applied in the case of Hassine v. Romania, Appl. no. 36328/13, 9 March 2021.

accordance with law'[25] because the term *'in accordance with law'* has the same meaning throughout the Convention.'[26]

Comparative overview

Chapter I: Short presentation of relevant legislation, authorities and competent courts dealing with immigration cases in Cyprus, Hungary and Poland

Asylum procedures in **Cyprus** are regulated by the Refugee Law,[27] whereas Chapter 105 of the Aliens and Immigration Act provides the legal framework on immigration. Both pieces of legislation regulate detention. The Asylum Service, a department of the Ministry of Interior, is the authority responsible for asylum procedures. The Civil Registry and Migration Department, together with the Police Aliens and Immigration Unit, its executive branch, is responsible for all other immigration-related procedures, including detention of asylum seekers. The Administrative Court is the competent court of first instance in immigration procedures, and the International Protection Administrative Court (IPAC) is competent for asylum procedures. Depending on the basis of which law the detention was ordered, both courts are also competent for the judicial review of detention. However, the IPAC has broader jurisdiction and can examine the merits of the case and substitute the decision of the authorities in its substance, including performing proportionality test on its own, whilst the Administrative Court only performs the legality review. Judgments of both courts may be appealed to the Supreme Court. The Supreme Court is also competent for habeas corpus applications, provided under Article 155(4) of the Constitution, which challenge the lawfulness of detention on the grounds relating to the length of detention. National security considerations are also invoked in naturalisation decisions taken by the Minister of Interior.

Asylum procedures in **Hungary** are regulated by the Asylum Act.[28] All other immigration procedures concerning third-country nationals are regulated by the Third-Country Nationals Act (TCN Act).[29] Both laws also regulate detention. The National Directorate-General for Aliens Policing (NDGAP) is responsible for conducting immigration-related procedures. The Asylum Directorate (Asylum Authority) of the NDGAP conducts asylum procedures and can order the detention of asylum seekers. The Aliens Policing Directorate (Immigration Authority) of the NDGAP conducts all other immigration procedures, such as residence permit procedures, statelessness determination procedure, expulsion procedures and ordering immigration detention. The NDGAP is a government agency under the Ministry of Interior and operates as a law enforcement body under the Police Act.[30] Immigration cases are dealt with by the first and second instance bodies of NDGAP, while asylum cases are

[25] Muhammad and Muhammad v. Romania [GC], Appl. no. 80982/12, 15 October 2020.
[26] Schabas, W. A. (2015). The European convention on human rights: a commentary. Oxford University Press. p. 1130.
[27] Refugee Law 2000 (6(I)/2000).
[28] Act LXXX of 2007 on Asylum.
[29] Act II of 2007 on the Entry and Stay of Third-Country Nationals.
[30] Act XXXIV of 1994 on the Police.

examined in a single instance administrative procedure. Administrative decisions are reviewed by the administrative branches of the regional courts. In certain immigration cases, the TCN Act provides for the exclusive competence of the Budapest Metropolitan Court. Asylum and immigration-related decisions can be challenged in a single instance judicial review procedure. Under certain conditions judicial review against a final judgement adopted on the merits was possible between 1 April 2020 and 14 May 2021 before the Kúria (Supreme Court of Hungary). Judicial review of detention is performed by district courts. No further appeal is possible.

Asylum procedures in **Poland** are governed by the Act on Protection.[31] Return procedures, as well as cases concerning residence permits of third-country nationals are governed by the Act on Foreigners.[32] The Office for Foreigners conducts the asylum procedure as a first instance authority. Return decisions are issued by the Border Guards. Residence permit decisions on the first instance are issued by the Voivode (Regional Governor). Appeals against Office for Foreigners decisions are considered by the Refugee Board – a second instance administrative authority. Return decisions as well as the decisions in residence permit cases may be appealed to the Office for Foreigners. Migration and asylum decisions may be appealed to the Voivode Administrative Court. First instance Administrative Court decisions may be appealed to the Supreme Administrative Court.

In cases when there is a possibility that the foreigner may conduct terrorist or espionage activities, or is suspected of committing one of these crimes, the return decision is issued by the Minister of Interior and Administration. In these cases, the foreigner may lodge a request with the Minister of Interior and Administration to reconsider the case, or directly lodge an appeal to the Administrative Court.

Immigration detention proceedings are governed by the Code of Criminal Procedure. In detention cases (in asylum and return proceedings), the detention decision is issued by the penal division of the District Court at the request of the Border Guard. The detention decision may be appealed to the Regional Court.

There are also other types of proceedings where security considerations may be at stake, including:

(i) refusal of entry (the first instance decision is issued by the local branch of the Border Guard and it may be appealed to the Border Guard Headquarters); and

(ii) entering and removal of data to/from the national register of foreigners whose residence in Poland is undesirable and/or SIS II.[33] It must be noted that in cases concerning national security, a foreigner's data may be entered into the register without a previous administrative/court decision and without informing the

[31] Act of 13 June 2003 on granting protection to foreigners' on the territory of Poland.

[32] Act of 12 December 2013 on Foreigners.

[33] The data is entered by the Office for Foreigners ex officio or at the request of the Minister of National Defence, Minister for Foreign Affairs, Police, Border Guard, Internal Security Agency, Foreign Intelligence Agency, National Tax Administration, Institute of National Remembrance or Voivode.

foreigner about it. In such cases, the concerned foreigner may only subsequently request to remove his data from the register.[34]

Chapter II: Relevant authorities establishing a threat to national security, content and legal nature of their opinion

In **Cyprus,** there is no special authority in immigration cases that holds exclusive competence in establishing that someone is a threat to national security. This is done by the administrative authority responsible for the relevant procedure. In asylum procedures, the Asylum Service is the responsible authority. The Aliens and Immigration Unit of the Police is the competent authority in other immigration procedures. The opinion that someone is a threat to national security can be formed, for example, based on an interview conducted by the Asylum Service during the asylum procedure; or based on the information from different sources such as the Anti-Terrorist Police Office, Cyprus Intelligence Service or others. Therefore, there is no special 'opinion' issued prior to a decision in the relevant administrative procedure declaring someone as a threat to national security.

The administrative authority is not obliged to give reasons why it considers someone a threat to national security. As precedence puts it: '*When administration invokes reasons of public order and national security, its discretionary powers in allowing or not the stay of a third-country national are even more wide. Risks to public order and national security are of substantial consideration that justify the deportation of a third-country national. Administration is not obliged to give reasons for the deportation or for its decision not to allow the entry to a third-country national on grounds of public order and national security. The only right recognised to the third-country national is that his application will be examined in good faith. The court does not examine the reasons given that pose a threat to national security, the sole judge of that is the executive power'.*[35]

The above case law was confirmed in recent decisions of the Supreme Court in three habeas corpus appeals from Syrian asylum seekers,[36] who continue to be detained for more than two years on national security grounds. The Supreme Court fully endorsed previous case law and the position of the Government. The court was satisfied that as long as the court has access to the relevant secret documents that show the person concerned to be 'involved in dangerous activities', it substitutes the person concerned in the exercise of their rights safeguarding the rights to fair trial and effective judicial remedy. The court did not explain what this substitution entails and how it ensures those rights if the person concerned has no

[34] For more information see: https://bit.ly/3CH3Fuk.
[35] Ivan Todorov v. Republic, no. 109/00, 14 December 2000, Yuri Kolomoets v. Republic (1999), 4 A C.L.R. 443, Karaliotas v. Republic (1987), 3 C.L.R. 1701, cited in Seminar organised by the Supreme Administrative Court of Poland and ACA-Europe 'Public order, national security and the rights of the third-country nationals in immigration and citizenship cases', Cracow, 18 September 2017, Answers to questionnaire: Cyprus.
[36] ABDALLA v. ΚΥΠΡΙΑΚΗ ΔΗΜΟΚΡΑΤΙΑ, ΜΕΣΩ ΥΠΟΥΡΓΟΥ ΕΣΩΤΕΡΙΚΩΝ κ.α., Πολιτική Έφεση Αρ. 96/2020, 8/6/2021, AL LAKOUD v. ΚΥΠΡΙΑΚΗ ΔΗΜΟΚΡΑΤΙΑ, ΜΕΣΩ ΥΠΟΥΡΓΟΥ ΕΣΩΤΕΡΙΚΩΝ κ.α., Πολιτική Έφεση Αρ. 77/2020, 8/6/2021, AL LAKOUD v. ΚΥΠΡΙΑΚΗ ΔΗΜΟΚΡΑΤΙΑ, ΜΕΣΩ ΥΠΟΥΡΓΟΥ ΕΣΩΤΕΡΙΚΩΝ κ.α., Πολιτική Έφεση Αρ. 95/2020, 8/6/2021.

access to any documents. The Supreme Court accepted that the disclosure solely of the fact that the reason of detention is a threat to national security, without providing any access to the evidence supporting this assertion, is enough for the person concerned to be able to exercise the rights of defence.

In **Hungary**, the duty to establish that a third-country national poses a risk to national security is conferred on the security agencies: Counter-Terrorism Office (Terrorelhárítási Központ, TEK) and Constitutional Protection Office (Alkotmányvédelmi Hivatal, AH). The NDGAP then issues a relevant decision in the immigration/asylum procedure based on the opinion of the security agencies.

Whether such an opinion is binding on the NDGAP depends on the type of procedure. The opinion is binding in the asylum procedure[37] and in the following 4 immigration procedures: interim permanent residence permit,[38] statelessness,[39] national permanent residence permit[40] and EU national residence permit,[41] since security agencies have a status of 'expert authorities' in these procedures.[42] In expulsion procedures, security agencies only initiate the expulsion and they do not have an expert authority status.[43] Whether the opinion of the security agencies regarding the threat to national security is binding in expulsion procedures is a subject of divergent legal interpretation. A government decree provides that expulsion on the grounds of national security may be ordered upon the initiative of the security agencies.[44] Section 43(3) of the TCN Act states that when such an expulsion is ordered, the law enforcement agencies delegated under the relevant government decree shall make a recommendation as to the duration of an entry ban. However, the Immigration Authority interprets these provisions in the sense that the Immigration Authority is bound by the security agencies' opinion on expulsion as well, and not just the duration of the entry ban. This interpretation has been upheld by certain judges,[45] while others have rejected it.[46]

There is no legal obligation for the security agencies to provide reasons for their opinions on national security in asylum procedures.[47] In immigration procedures, although the TCN Act requires the Immigration Authority to provide reasoning,[48] this is purely a formality with regard to the assessment of the national security threat as; (i) the expert authorities are not

[37] Section 57(3) Asylum Act.
[38] Section 33(2)(b) Third Country Nationals Act and Section 97(1) Government Decree 114/2007. (V. 24.).
[39] Section 78(4) Third Country Nationals Act and Section 165(1) Government Decree 114/2007. (V. 24.).
[40] Section 35(7) Third Country Nationals Act and Section 97(1) Government Decree 114/2007. (V. 24.).
[41] Section 38(9) Third Country Nationals Act and Section 97(1) Government Decree 114/2007. (V. 24.).
[42] Section 87/B(4) Third Country Nationals Act.
[43] Section 114(4)(b) Government Decree 114/2007. (V. 24.) and Section 43(2)(d) Third-Country Nationals Act.
[44] Section 114(4b) Government Decree 114/2007. (V. 24.).
[45] 15.K.701.402/2021/21., 11.K.706.657/2020/27.
[46] 49.K.701.125/2021/12.
[47] According to Section 57(6) of the Asylum Act, the opinion of expert authorities (which includes the opinion on a national security threat issued by the security agencies) only has to contain the name of the competent authority, data necessary to identify the case, the opinion of the competent authority, the legal basis on which its decision is based, and information on the remedy.
[48] Section 87/M(1) Third-Country Nationals Act.

obliged to provide reasoning,[49] therefore the immigration authority is not able to state substantial reasons; and (ii) the opinions merely refer to the findings of the expert authorities. Therefore, the opinion often consists of the establishment of a threat to national security posed by a third-country national and references to the law based on which security agencies conducted their procedure. Apart from the reference to the classification of the concerned data, there is nothing on the reasoning regarding the national security threat.

In **Poland,** before issuing a decision, the authority conducting a migration/asylum procedure requests information from the Police, Border Guard, Internal Security Agency or Consul on whether the foreigner's entry or stay in Poland poses a threat to defence, national security or the protection of public safety and order. Usually, a return decision based on security considerations is issued at the request of another authority (mainly the Internal Security Agency). On the contrary, subsidiary protection revocation procedures under security reasons are conducted *ex officio* by the asylum authority, usually after receiving information from the Internal Security Agency on the threat to national security posed by the subsidiary protection holder.

The law does not define formal requirements for an opinion on a national security threat. Such opinions are also not binding on the authority conducting the proceedings. Court case law known to the HFHR indicates that opinions contain a summary of information collected by the security agency about a given foreigner. However, as it will be explained in the next chapter, the opinions are not accessible to the applicant or their representative in the administration procedure. In a few cases,[50] the courts overturned administrative decisions because they considered the opinions to be vague or too general. The administrative authorities subsequently obtained additional, more detailed opinions and issued another decision based on these amended opinions. Moreover, if foreigners do not have adequate legal representation, negative decisions remain based on very general evidence. This is of special concern when foreigners do not have legal aid and are expelled immediately after a return decision is issued. They may not be able to even appeal against the decision issued to them.

According to the relevant provisions of the Act on Foreigners and Act on Protection,[51] the administrative authority issuing a decision based on the opinion of a threat to national security may refrain from drafting factual reasoning if it is required by security considerations. It must be noted that this is a general rule and, therefore, is applicable in all asylum/migration-related proceedings. Consequently, in cases involving security considerations, the factual reasons of the decision are limited to formal elements and do not contain any relevant information about the allegations against the foreigner.

[49] Section 87/B(8) Third-Country Nationals Act.

[50] Supreme Administrative Court judgment of 30.5.2019, case no. II OSK 3615/18, Regional Court in Olsztyn decision of 31.3.2021, case no. II K0 1046/21.

[51] Article 6(1) of the Act on Foreigners and Article 5 of the Act on Protection.

While determination that someone poses a threat to national security is done by security agencies in **Hungary** and usually in **Poland**, in **Cyprus** such a determination may come practically from anywhere (from different authorities/agencies). In **Cyprus** and **Hungary**, the authority establishing that someone is a threat to national security is not obliged to give reasons. A justification of the decision may contain one sentence only indicating the legal rather than the factual basis of the decision. Whereas In **Poland,** the opinion on a national security threat does usually contain a summary of information concerning a given foreigner collected by the Security agency, although not accessible to the affected foreigners. In **Hungary,** security agencies' opinions on national security threats are binding for the NDGAP in asylum procedures and in certain immigration proceedings (interim permanent residence permit, statelessness, national permanent residence permit and EU national residence permit). However, legal interpretation differs as to whether or not this is the case in expulsion procedures. In **Poland** on the other hand, such opinions are not binding on asylum or immigration authorities.

Chapter III: Access to classified data based on which a threat to national security is established

1. Data classification and definition of the notion of 'national security threat'

The criteria of what constitutes a threat to national security have been defined in CJEU case law. According to *J.N.* judgement, the concept of 'public security' covers both the internal security of a Member State and its external security and consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.[52]

In **Cyprus**, the treatment of classified information is regulated by the Law on the Security Regulations of Classified Information, Documents and Material and Related Issues of 2021 (Law. 84(I)/2021), and the Decree on the Security of Classified Information of 2013 (KDP 410/2013).[53] Regulation 4 of the Decree categorises the classified information as *'top secret'*, *'secret'*, *'confidential'* and information *'of restricted use'*. Each category is defined with reference to the impact the disclosure of such information to a non-authorised person would have upon *'the vital interests and the stability of the institutions of the Republic'*. The possible impact ranges respectively from *'extremely serious'* to *'being contrary'* to these interests. The level of classification is important to know because it may provide at least an indication as to the seriousness of the alleged threat to national security from disclosure, and also defines the level of access to authorised persons from amongst the public servants. The central authority with competence to ensure the correct implementation of the law and the relevant regulations is the Minister of Defence. The Minister designates the National Security Authority (NSA) with a mandate to monitor and control the implementation of the

[52] CJEU, C-601/15 (PPU) JN, 15 February 2016, §66.

[53] περί Ασφαλείας Διαβαθμισμένων Πληροφοριών Διάταγμα του 2013 (ΚΔΠ 410/2013). The Decree is based on the previous law, but is still in force until replaced.

requirements for classified information and correct classification. At the same time, the competence of the NSA does not extend to powers to order declassification of information, and no procedure is provided for reviewing the classification.

There is no definition of *'national security'* offered by Cypriot legislation or precedence. The interpretation of this term lies within the discretion of the competent authority. The notion of *'national security'* is broadly interpreted by the IPAC as well as the Supreme Court, allowing the authorities particularly broad discretionary power. This is frequently done by invoking the *J.N. case* [54] with respect to the interpretation of *'public security'*, but relying only on the part that recognises the broad margin of appreciation of states to determine the demands of national security.

An indicative example of the approach of the court lies in the following abstract: *As per the jurisprudence of the CJEU, the state has the discretion, but also the obligation according to the aforesaid circumstances, to determine the demands of its national security, however, it does not have the capability to rely on a general practice for substantiating a threat to national security. Consequently, there cannot be one specific interpretation of the concept of national security by member states, neither can they determine the behaviour likely to pose a danger for national security of the state, as each case must be assessed on the basis of its own facts, taking into account the character and/or personal conduct of the asylum applicant.*[55] The court therefore, did not go beyond this point to determine and examine whether national security within the meaning of the CJEU case law would be threatened with disclosure of classified data.

To the knowledge of Kisa, the two administrative courts have not yet departed from the views of the administrative authorities whenever they claim the existence of a threat to national security allegedly posed by disclosure of information and the alleged conduct of the applicants. Therefore, contrary to the theoretically admitted need for a narrow construction of the concept of 'national security', in the context of detention as an exception to the rule prohibiting detention of asylum seekers and third-country nationals in return procedures, experience shows that the concept has been widely interpreted.

In **Hungary**, access to classified data is restricted by the Act on Protection of Classified Data.[56] The legal ground used for justification of the classification of the data by the security agencies is the protection of public interest. *'Public interest'* is defined as activities by the Hungarian State concerning its defence, national security, law enforcement and crime prevention.[57]

[54] C-601/15 (PPU) J.N., 15 February 2016, §§64-67.
[55] Δ.Κ. 9/2020, A.H., 25 May 2020.
[56] Act CLV of 2009 on the Protection of Classified Data.
[57] Section 5(1)(c) of Act on the Protection of Classified Data.

The relevant act, namely the National Security Services Act,[58] does not define the notion of *'national security'*, but instead gives a definition of national security interest in Section 74(a) as follows:

- *'to secure the sovereignty and protect the constitutional order of the Republic of Hungary and, within that framework,*
- *to detect aggressive efforts against the independence and territorial integrity of the country,*
- *to detect and prevent covert efforts which violate or threaten the political, economic, defence interests of the country,*
- *to obtain information of foreign relevance/origin necessary for government decisions,*
- *to detect and prevent covert efforts to alter/disturb by unlawful means the constitutional order of the country ensuring the observance of fundamental human rights, representational democracy based on pluralism and the constitutional institutions,*
- *to detect and prevent acts of terrorism, illegal weapons dealing and trafficking in drugs, and illegal trafficking in internationally controlled products and technologies.*

In **Poland**, grounds for justification of the classification of data are provided in the Act on the Protection of Classified Data.[59] Information may be classified when its unauthorised disclosure would or could cause damage to the Republic of Poland, or would be unfavourable to its interests.

There is no legal definition of *'national security'*. This term is intentionally used as a general clause related to its broad meaning, and at the same time allows for adjusting legislation to changing social, economic and political circumstances that affect its understanding. As there is no definition of national security, the term is specified each time by public administration authorities enforcing the law. The authorities must quote specific grounds that justify a real threat to national security posed by a foreigner. It is a role of administrative courts to control whether public administration authorities in a given case were correct in stating that the existence of specific circumstances fulfils the conditions of a threat to national security.[60]

In **all three countries**, the reasons why someone is considered a threat to national security are usually classified. The notion of 'national security' has no definition in **Poland** and **Cyprus**, and the specification of the notion lies in the discretion of the authorities. On the other hand, **Hungary** defines the notion of 'national security interest'.

[58] Section 74(a) of Act CXXV of 1995 on the National Security Services.

[59] Act of 5 August 2010 on the Protection of Classified Data.

[60] Seminar organised by the Supreme Administrative Court of Poland and ACA-Europe 'Public order, national security and the rights of the third-country nationals in immigration and citizenship cases', Cracow, 18 September 2017, Answers to questionnaire: Poland.

2. Access to the classified data and its usage

In **Cyprus**, any person with a right to be heard also has the right to access the documents included in their administrative file upon written request on the basis of the Freedom of Information Law[61] and/or Data Protection rules.[62] However, the applicant might be deprived of their right to access for reasons relating to the interest of the office, the interest of a third party, or when public interest ought to be protected.[63] The administration must provide reasons why it refused access. Once the case is pending in court, and unless the authorities invoke the protection of national security or public interest to prevent disclosure, there is an obligation to fully disclose the information in the file.

Immigration/asylum authorities have access to the classified data. However, they often do not actually examine all the available classified data, but rather automatically determine that someone is a threat to national security.

Conversely, evidence is always available to the judge for an effective and independent judicial review.[64] As stressed in the cases of *Kyriaki Georgiou v. Republic*[65] and in *FBME BANK LTD*,[66] it is not the administration's role to decide what must be disclosed in court, but rather it ought to fully disclose all documents that led to the administrative decision taken and leave it to the court to evaluate the importance of each document. In the case of *Moyo and Others v. Republic*,[67] the court held that *'despite the fact that matters of national security are sensitive and any disclosure may have catastrophic consequences, the court determines whether there is evidence to reasonably support such a finding of national security jeopardy. Evidence may be admitted in close court (in camera) or through any other kind of procedural measures in order to ascertain and restrain the broadcast of those evidence. Administration cannot be the sole judge of national security grounds and judicial review cannot be excluded. Such exclusion would lead to abuse of power, in unwanted consequences and encroachment of substantial rights and liberties of the person'.*

According to the judge of the Supreme Court, the mere assertion of the Government that they acted on security grounds is not enough. There must be evidence to confirm. But the courts will go no further, and will not question whether the steps taken were indeed necessary to protect national security. What is necessary is a matter on which the executive must have the last word. However, while public authorities enjoy a certain margin of appreciation when determining the 'necessity' of their actions, their decisions are subject to the judicial scrutiny of the court in determining whether these actions are *'necessary in a*

[61] Freedom of Information Law of 2017 (Law No 184(I)/2017).
[62] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[63] Hadjidemetriou v. Republic (1999) 3 C.L.R. 361.
[64] C.D. Hay Properties Ltd v. Republic (1992) 3 C.L.R. 238, FBME BANK LTD v. Central Bank of Cyprus and Others, No. 1024/2014, 18 December 2015.
[65] Case No. 629/2009, 28 September 2010.
[66] BANK LTD v. Central Bank of Cyprus and Others, No. 1024/2014, 18 December 2015.
[67] Moyo and Others v. Republic (1990) 3(C) C.L.R. 1975.

democratic society' when fundamental rights are being *'overlooked'*.[68] According to Kisa's experience, the courts perform this examination rather superficially and the existing case law as described above rather shows that the courts do not exercise the necessity and proportionality tests.

Access to classified data may be also restricted in criminal procedures, where access to all the documents in the possession of the prosecution should be granted to the defence unless the prosecution does not want to disclose it on the grounds of the protection of national security. In such a case, the court should decide whether access should be granted or not.

In **Hungary**, if the security agencies establish that the applicant is a threat to national security, the applicant or their representative are never informed about the reasons for such a conclusion; not even of the essence of the reasons on which the security agency's position is based. According to the security agencies, such summary cannot be provided given the complex and coherent nature of the data.

The Act on Protection of Classified Data provides the person concerned with the possibility to request the classified data from the security agencies.[69] However, as per the experience of the HHC, as well as the statistics provided by the security agencies for 2019, 2020 and first half of 2021, there were no cases when access was granted.[70] The statistics also show that the number of requests filed to access the classified data is extremely low. This demonstrates that most persons concerned are not even aware of their right to request access to such data. In fact, according to the HHC's knowledge, most legal advisors do not even attempt to help their clients submit such claims. It is indeed questionable, if such requests are at all necessary, as it seems that they are always refused. According to the security agency, any disclosure would hinder the efficiency of the national security activity, disrupt security agency's operating order, the exercise of its tasks and powers and therefore indirectly violate Hungary's national security interests.[71] The same reasons used to justify classification are therefore used for denial of access. The need for classification is in itself a sufficient ground for refusing access to classified data and to justify the lawfulness of such a refusal.

Even if the applicant would be allowed access to the classified information, they have no possibility of using it in the ongoing administrative or the judicial proceeding.[72] In that sense, the applicant is excluded from challenging the grounds on which the decision is based.

[68] Seminar organised by the Supreme Administrative Court of Poland and ACA-Europe 'Public order, national security and the rights of the third-country nationals in immigration and citizenship cases', Cracow, 18 September 2017, Answers to questionnaire: Cyprus.
[69] Section 11 of Act on the Protection of Classified Data.
[70] Information received upon Freedom of Information requests from the Counter-Terrorism Office and the Constitution Protection Office on 8 October 2020 and 4, 5 August 2021.
[71] Information received upon Freedom of Information requests from the Constitution Protection Office on 4 August 2021.
[72] Section 13(1) of Act on the Protection of Classified Data.

The NDGAP does not have access to the classified data either. Only the judge adjudicating the appeals against decisions involving classified data can have access to it.[73] Nonetheless, the files are only given to the judge upon request. According to the HHC's experience, the judges usually request access in asylum and immigration cases, but not when reviewing the asylum detention. Even though judges have the right to access the data, they cannot refer to the content of the classified data in the judgement.[74] Consequently, the court can only hand down a decision without reasoning as to whether the classified information relied on by the authority substantiates the security agency's conclusion. Moreover, the court cannot guarantee that the applicant in the main proceedings is disclosed the essence of the reasons on which the security agency's position and the decision on the merits in the asylum/immigration proceedings, reviewed by the court, are based.

For comparison, access to classified data is not fully restricted in criminal proceedings. Defendants may obtain access to the extract of classified information for the purpose of their defence.[75]

In **Poland**, the Act on Protection of Classified Data states that classified information may only be made available to an authorised person in accordance with the provisions of the Act on Access to Specific Security Classification.

In administrative proceedings, neither the person concerned nor his/her lawyer have access to classified case files. Although the Polish Code of the Administrative Proceedings (Article 73) provides the right of the party of the proceedings to access the case files, according to the Article 74(1) of the Code, this right is excluded in relation to case files containing information classified as *'secret'* or *'top secret'*, as well as to other case files excluded due to important state interests. There are no exceptions to this restriction. Case files excluded from access to the party of the proceedings cannot be disclosed even to a representative with a security clearance. The Act on Proceedings before Administrative Courts[76] also stipulates the general right of access to the case files. However, due to the general provisions of the Act on Protection of Classified Data, a third-country national does not have access to classified case files in judicial proceedings.

The administrative authority officers and the judges examining the case have access to classified case files and are obliged *ex officio* to conduct their assessment. However, as mentioned in Chapter II, the opinion of the security agencies, which is part of the case file, is apparently only a summary of all the evidence collected. It follows that the administrative authority and the courts seemingly have access only to a summary, and not the actual source material collected by the security agency. This raises doubts as to whether administrative authorities comprehensively collect and examine all the evidence as required by the provisions of the Polish Code of Administrative Proceedings. Accordingly, since they do not know which evidence in fact served as the basis of the decision, and which facts were

[73] Section 13(5) of Act on the Protection of Classified Data.
[74] Section 13(5) of Act on the Protection of Classified Data.
[75] Section 105 of Act XC of 2017 on Criminal Procedure.
[76] Act of 30 August 2002 on Proceedings before Administrative Courts.

proven by the security agency, neither the second instance authority nor the court are able to conduct a full and effective case assessment.[77]

An appeal and judicial review are based on an assessment of the completeness, consistency and logic of the information presented by the security agency so that its credibility can be assessed. Case law developed two assessment criteria of such information; (i) whether the information provided is sufficiently precise and clear, or hypothetical; and (ii) whether the alleged acts, due to their specific gravity, justify the issuance of such decision.[78] Nevertheless, since the reasons for the decision are not fully available, such judicial review raises doubts as to whether the judicial assessment of the decision is full and effective.

Furthermore, according to the Human Rights Commissioner Act in **Poland**, the Ombudsman has a right to access all administrative and court case files, as well as to intervene in these cases.[79] In practice, an Ombudsman's Office employee with a security clearance can access the files. However, the Ombudsman cannot disclose obtained classified information. Moreover, as with the access of the administrative authorities and the courts, since the opinion of the security agencies, which is part of the case file, is only a summary of all the evidence collected, the Ombudsman does not have access to the source material collected by the security agency either.

In contrast, the parties in criminal proceedings have access to all case files, including the classified ones. Therefore, the Code of Criminal Procedure gives the defendant the possibility to present their point of view and to refute the prosecutor's arguments. This safeguard also prevents the risk of abuse when using classified materials in the proceedings. Furthermore, such a possibility has not been found to constitute a threat to national security by disclosing secret investigative methods to the defendant. An example of exercising such guarantees is a criminal case heard before the Bialystok Regional Court, where

four Russian nationals of Chechen origin were accused of supporting the Islamic State in Syria (ISIS). Translated transcripts from their phone conversations *('summaries')* were used as evidence by the prosecutor. These summaries contained alleged statements by defendants concerning their financial support for ISIS. In turn, the defendants argued that they did not mention ISIS in the wiretapped phone conversations. They argued that the act of indictment was prepared on the basis of improperly translated transcripts of their phone conversations. In its judgment, the Bialystok Regional Court stated that during the proceedings it was revealed that the summaries contained errors, including words or phrases added by the translator but which were not used in the telephone conversation. The Regional Court emphasised that the defendants noticed incorrect translations of their phone conversations.[80] This judgment has been upheld by the Bialystok Court of Appeals.[81]

[77] Moreover, according to ECtHR case law, the administrative authority should have 'access to the totality of the file constituted by the relevant national security body in order to make its case against the alien,' Muhammad and Muhammad v. Romania, §156.

[78] Judgment of the Warsaw Administrative Court of 24 November 2017, case no. IV SA / Wa 1612/17.

[79] Act of 15 July 1987 on Human Rights Commissioner.

[80] Judgment of 7 August 2017, no. III K 113/16.

In this case, access to classified documents guaranteed the defendants a genuine opportunity to express their opinion and challenge the authorities' arguments.[82] The defendants could only effectively challenge the prosecutor's arguments because they possessed knowledge about the evidence on which accusations were based.

According to the Act on Foreigners, relevant provisions of the Code of Criminal Procedure in immigration detention cases are applicable *mutatis mutandis*. Article 156 of the Code of Criminal Procedure provides the right of the parties to access the case files. The court issues a decision indicating who and under what conditions they can access the classified documents (this takes place in a secured room, and the person having access is prohibited from disclosing the information or making copies of the documents).[83] The information obtained in detention proceedings may only be used in those particular proceedings. However, it is not known whether the court has classified files of administrative proceedings at its disposal in all detention cases (see for example the *Ameer Alkhawlany case* described in the Introduction to this study). Although the court always has a right to access classified case files, there is no clear provision obliging the court to access and check all the relevant files (return files for example). In practice, it seems that in most cases the courts only rely on the administrative authorities' position contained in the request for detention. The court's decision may be based solely on the fact that the return decision has already been issued and there is a need to secure its execution; especially in cases concerning extension of detention after 3 months.

In one of the detention cases, where the HFHR lawyers were involved, the Olsztyn Regional Court, considering an appeal against a first instance court decision on detention, stated that the third-country national should have had access to the classified detention case files before the court of first instance issued its decision.[84] The foreigners' representative was then granted access to classified return case files during detention proceedings. However, under a separate Border Guard decision in the return procedure, the foreigner's representative was denied access to the same classified return case files. This is the only case known to the HFHR, where the court reviewing detention granted access to the classified case files to the foreigner's representative. Therefore, it's not known whether other courts in other detention cases would also grant access to these files.

In **all three countries**, access to the classified data based on which a person is considered a threat to national security is not granted to applicants or their lawyer. In **Cyprus,** neither the type of classification itself, nor the authority that performed the classification, nor the actual grounds for classification is revealed to the applicant.

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[81] Judgment of 26 June 2018, no. II AKa 26/18.

[82] More information about this case: Bialystok Regional Court, Wyrok w sprawie czterech obywateli narodowości czeczeńskiej oskarżonych w finansowanie terroryzmu, https://bit.ly/3sa3R04; Polish Radio Bialystok, Białostocki sąd skazał Czeczenów oskarżonych o wspieranie terrorystów, https://bit.ly/37ClEDG; Radio Poland, Polish court finds three Chechens guilty of supporting terrorism, https://bit.ly/3iFnN7T.

[83] Article 165(4) of Code of Criminal Procedure.

[84] Decision of 31 March 2021, case no. VII Kz 148/21.

A procedure to access the classified data exists in **all three countries**. However, access is usually denied in immigration cases. The exception is immigration detention procedures in **Poland**, governed by the Code of Criminal Procedure (CCP), which provides limited access to classified case files. As the CCP provisions are applicable mutatis mutandis to immigration detention proceedings, it can be assumed that these provisions on access also apply to immigration detention. However, national law provisions do not regulate whether the obtained information can be used in other immigration procedures. In **Hungary**, even if the applicants would be allowed access to the classified information (which according to the HHC's knowledge does not happen), they have no possibility of using the obtained information in the administrative or judicial proceedings. This means that affected foreigners cannot rebut the assessment during the procedure, or meaningfully challenge it at court. As a result, serious violations may occur to their right to defence and right to an effective remedy, among others.

Administrative authorities in **Cyprus** and **Poland** have access to classified data, but not in **Hungary**. Nevertheless, the administrative authorities in **Cyprus** do not always examine all the classified data based on which the threat to national security was established and do not include certain documents in the case file, but rather automatically consider that someone constitutes a threat. Although the authorities, as well as the courts and Ombudsman have access to a security agency opinion on why someone is considered a national security threat in **Poland**, this opinion is only the summary of all the evidence collected. Therefore, neither the administrative authority, courts or the Ombudsman have the source material collected by the security agency at their disposal.

In **all three countries**, the courts reviewing decisions in immigration procedures have access to the classified data. The courts usually examine the classified data in immigration procedure cases. However, despite the request of the applicants, the courts reviewing the legality of immigration detention based on national security in **Hungary** and **Cyprus** will not usually check the classified documents. In **Poland,** the courts are obliged to assess the classified data *ex officio.* This assessment examines whether: (i) the information provided by a security agency is sufficiently precise and clear, or hypothetical; and (ii) if the alleged acts justify the issuance of such a decision. In **Cyprus,** the courts will go no further than ascertaining that the Government gave evidence that they were protecting national security, and they will not question whether the steps taken were indeed necessary. In **Hungary** and **Poland,** the courts cannot refer to the content of the classified data in the judgement. In **Cyprus,** in practice the courts do not refer to the content of classified information as such in their judgements, but may give an indication as to what it relates to.

In **Hungary** and **Poland**, certain access to the classified data is allowed in criminal procedures. It is not clear why the same standards of a fair trial do not apply in immigration procedures, especially since immigration proceedings based on classified data might result in sanctioning consequences for the applicants.

3. Legal remedies against denial of access

In **Cyprus**, Procedural Regulations 10(2) and 19 of the Supreme Constitutional Court, also applied with respect to both administrative courts' procedures, empower the courts to order disclosure of information. Regulation 24 of the Decree on the Security of Classified Information provides that in the case of a disclosure request before the court, the court must assess whether such disclosure may harm the vital interests of the Republic and secure the maximum possible protection of these interests; especially when a specific law provides for the confidentiality of such documents.

Case law potentially allows the courts to determine whether documentation or information is indeed classified through the correct procedure or not.[85] However, this is rather rare and the courts might not even engage in it. The courts are only presented with the classified data, but have no information as to the procedure followed for the classification, whether it is classified at the correct level, or on which legal ground, as the classified data are never supported by any report on the reasons for classification. According to Kisa's experience, in the majority of cases where courts examined disclosure requests, they focused on whether disclosure would put national security at risk without engaging in the question of proper procedural classification under the relevant legislation mentioned above.[86]

In practice, neither the type of classification itself is revealed to the parties in judicial procedures, nor the authority that performed the classification, nor the actual grounds of the classification. The Attorney General's Office[87] hardly ever refers to a specific law or the grounds under which such classification is made. The courts themselves also omit to specify the source of classification in the context of judicial procedures relating to a disclosure request. Therefore, at the end of the procedure requesting disclosure of classified or allegedly classified information, the court confirms that there is some sort of classified information without any further specifications and simply rules on its non-disclosure in general terms regarding protection of (mostly) national security.

The Supreme Court however, in some cases of habeas corpus applications, ordered the disclosure of documents, where the information was either already known to the applicant, such as for example photographs from the mobile phone, or where the court decided that the classified information revealed nothing to the effect that the person concerned was dangerous to the national security.[88]

If the security agencies in **Hungary** refuse access to classified data, the applicant can challenge the decision through an administrative lawsuit. The acting judge must have undergone a national security check as defined in the National Security Services Act.[89] In an

[85] For example, Thermaphase Ltd (1990) 3 ΑΑΔ 3951.
[86] For example case no. 1080/2019.
[87] The Attorney General is a legal counsel of the executive authority and defends all decisions of the authorities before the courts.
[88] HA v Chief of Police and Minister of Interior, Civil Application 76/2021, Intermediary judgement of 7/6/2021.
[89] Section 11(3) of Act on the Protection of Classified Data.

appeal procedure against the refusal of access, the court cannot rule on the legality of the classification and cannot declassify the data itself. The court can only examine whether the denial of access to the applicant was lawful (was the ground for refusal provided, which public interest was pursued and whether the interest pursued would be harmed if the data would be disclosed). No substantive necessity and proportionality test takes place, as the decision refusing access under a mandatory legal provision does not even constitute a discretionary decision, the reference to a breach of public interest is a mandatory ground for refusal.

The review of the lawfulness of data classification is regulated in the Freedom of Information Act.[90] This procedure can be only triggered *ex officio* by the Data Protection Authority and cannot be initiated by the applicant. In fact, the applicant cannot take part in the procedure. The HHC is not aware of any such procedure being initiated in the field of immigration with regard to classified data in opinions regarding threats to national security issued by security agencies.

Since the HHC noticed an increase in national security cases, denial of access has been regularly challenged by HHC lawyers. Litigation in this field is difficult. There is already a negative case law from the Kúria which considers the procedural rights of the applicants to be guaranteed by the mere fact that the judge reviewing the administrative decision has access to the security agency's documents containing classified information.[91] The denial of access has so far always been upheld by the Budapest Metropolitan Court. The HHC unsuccessfully challenged one such judgement at the Kúria, which dismissed the request for judicial review, confirmed the previous case law described above, and stated that the right of access is only the right to informational self-determination of the applicant and which can be restricted in an absolute manner. The Kúria rejected the argument that this procedure is closely connected to the asylum procedure and that other fundamental rights of the applicant could also be concerned. It concluded that EU law and the ECHR are not applicable, and that the issue should be decided solely on the basis of the Classified Data Act.[92]

In **Poland**, in administrative cases involving national security grounds, a separate decision on denial of access to classified data is usually issued (either *ex officio* or as a result of a party's request to access case files). Such a decision is subject to appeal and judicial review.[93] However, considering the clear wording of Polish law, such appeals are ineffective (see the next Chapter on Polish Administrative Court case law).

Access to confidential or restricted documents may only be refused if this is justified by significant national interest. The administrative authority must indicate the existence of

[90] Sections 62(3) and 63 of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.
[91] For example: Kfv.VI.37.640/2018/9.; Kfv.III.37.039/2013/6.; Kfv. II. 38.329/2018/10.
[92] Kfv.I.37.127/2021/10., 8 April 2021.
[93] Article 74(2) of the Code of Administrative Proceedings, Article 3(2) of the Act on Proceedings before Administrative Courts.

significant national interest in a statement of reasons for the refusing order. When reviewing such an order, an administrative court takes into account that the authority cannot disclose the contents of the documents in the statement of reasons for the order. Therefore, judicial review is very challenging, and it is required that the court acquaints itself with the content of the classified documents before assessing whether the decision made by the administrative authority was correct.[94]

According to the Protection of Classified Information Act, only the authority which classifies the information has the power to rule on the legality of the classification or declassify the information. The administrative authority or the court conducting the case may only request the security agency to declassify the information.

In **all three countries**, it is possible to appeal the decision if access to the classified information is denied. However, such an appeal has not been found effective in any of the countries.

In **Hungary** and **Poland**, the courts do not have the possibility to examine and decide whether the classification was lawful. In **Cyprus,** the courts have such a possibility, but in the majority of cases they concentrate on the issues of whether disclosure would put national security at risk without engaging in issues of proper procedural classification under the relevant legislation.

Chapter IV: Overview of the main litigation examples in each country in different immigration procedures

Cyprus

1. International protection procedures

Decisions concerning exclusion, cessation or revocation of international protection status because of a threat to national security are frequently based on classified information. Experience shows two issues:

(1) The Asylum Service does not examine the actual classified information deriving, for instance, from police bodies or Interpol/Europol. Instead, it bases its decisions on a single communication with such authorities (usually containing very general findings, e.g. 'involved in terrorist activity'), and automatically adopts their findings without even knowing the reasons for them. This leads to the paradox that the very reasons leading to the status termination decision are not even taken into account by the asylum authority. Further on, the Attorney General representing the Asylum Service in the court procedure would claim that no other classified information than

[94] See judgment of the Supreme Administrative Court of 31 March 2017, II OSK 1914/15 and judgment of 9 September 2016, II OSK 61/15, cited in Seminar organised by the Supreme Administrative Court of Poland and ACA-Europe 'Public order, national security and the rights of the third-country nationals in immigration and citizenship cases', Cracow, 18 September 2017, Answers to questionnaire: Poland.

the communication actually exist, creating confusion as to the information that must reach the court itself.

(2) IPAC limits its examination to the information included in the Asylum Service's file and is reluctant to examine the disclosure of any information allegedly not taken into account or not included in the asylum file.

For example, in one ongoing case[95] the court even exercised informal pressure on the applicant to withdraw the application for disclosure on the grounds that the Attorney General's Office stated that no other information was taken into account when adopting the contested decision; notwithstanding that it was admitted through the procedure on detention that more classified information existed.

In Recourse nos. 72 – 74/2019, concerning an action against exclusion from international protection for reasons of national security, the Attorney General maintained that all classified information was revealed to the applicants. However, more than a year after the submission of such recourse, the Attorney General attempted to submit an entire investigation file concerning preparation of a potential criminal case as a *'classified file'* to the court. The objection of the applicants against such an attempt, as well as a request to submit a preliminary reference to the CJEU, remains to be examined by the IPAC in the following months.

It could also be observed that when the courts do not have to decide on a separate disclosure application, or the matter is not raised at all by the applicant's lawyer, they do not examine the classified information on the basis of which the contested decision was adopted. Very often this information is not even disclosed to the court, and the court does not check whether there is non-disclosed information that should be assessed by the court. The courts take it for granted that the information exists and that it justifies the danger to national security.

Since a number of such applications are now pending before the IPAC, the outcome of applications for disclosure in international protection procedures remains to be seen. So far, the Attorney General Office's objections are that the issue of disclosure has already been determined in the course of other proceedings concerning detention of the same applicant (such as detention under the Refugee Law for national security reasons unsuccessfully challenged at the same court, or prolonged detention challenged under habeas corpus procedures before the Supreme Court). The Attorney General's Office argues for the application of the *res judicata* principle because the courts in these procedures already determined that they will not allow disclosure in the detention review procedure. The counter argument is that compared to detention cases, different legal frameworks apply with respect to international protection decisions. Hopefully, Article 18*bis* of Refugee Law, and the provision corresponding to Article 23(1) of the Asylum Procedures Directive and its interpretation, is expected to play a significant role in the court's determination of such applications.

[95] Recourse no. 1007/2020 H.A.

2. Detention of applicants for international protection

International Protection Administrative Court (IPAC) proceedings

Detention on the grounds of protection of national security is founded on Article 9F (2) (e) of the Refugee Law, corresponding to Article 8(3) (e) of the Reception Conditions Directive.[96] Several applicants for international protection challenged their detention decisions and requested a disclosure of classified or allegedly classified information mentioned in the proceedings.

A series of cases concerned applicants for international protection (mostly Syrians) who were allegedly involved in terrorist activities. Almost all applications for disclosure of classified information were rejected on the basis of CJEU case law (*ZZ,*[97] *Kadi,*[98] and *Varese*[99]*)* and ECtHR jurisprudence, especially *Regner,*[100] as the courts considered that the circumstances of these cases were different because there was no immigration detention involved. Meanwhile, *A and Others*[101] seems to have been afforded minimum or no attention. Disclosure was granted in a few exceptions, but only of the interviews/statements made by the applicants themselves when questioned by the Immigration Police or the Anti-Terrorism Police authorities upon their entry to Cyprus, and the submission of their applications for international protection. Save for these exceptions, the court has consistently held that non-disclosure was justified, and that the appropriate measure in striking a balance between state security requirements and assuring the applicants' right to effective judicial protection under Article 47 of the Charter (and Articles 5(4) and 6(1) of ECHR) was the power of the court itself to fully examine the documents before it and thereby represent the interest of the applicants. The court did not explain under what rules and procedures the court exercised this power, nor in what way the rights of the applicants and the principle of the equality of arms had been respected.

For example,
on the basis of classified information resulting from the exchange of information with cooperating states which included him in their terrorism databases, the applicant in the *M.I. case*[102]was detained as a *'terrorism suspect including operational activity'*. The court held that disclosure of any information concerning the case, including the applicant's own interview, the correspondence of the Attorney General with Anti-Terrorism or other police or immigration services, as well as the Memorandum of Understanding between the Republic of Cyprus and some non-disclosed countries, were not to be disclosed to the applicant. The court confirmed that the information was either *'secret and/or confidential'* and disclosure

[96] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).
[97] C-300/11, ZZ, 4 June 2013.
[98] C-584/10 P, Kadi, 18 July 2013.
[99] C-450/06 – Varec, 14 February 2008.
[100] Regner v. the Czech Republic, Appl. no. 35289/11, 26 November 2015.
[101] A and Others v. the UK, Appl. no. 3455/05, 19 February 2009.
[102] Δ.Δ.Π. 209/2019, M.I. (decision on application for disclosure from 13 November 2019).

would be contrary to the interests of the Republic. However, the classification category of each document, in order to have an indication of the seriousness of the threat from disclosure, was not revealed. The court also stated that classified information did not personally concern the applicant (e.g. the Memorandum of Understanding) as they relate to procedures and the exchange of information which, according to the court, could not assist the applicant in his case. Nevertheless, the authorities relied on them to justify the detention.

In another example,

The applicant in the *H.A. case*[103] was considered a suspect of terrorism on the basis of a statement made by a compatriot. The statement of the latter, and the correspondence between various departments of the police and immigration authorities was not revealed. Neither were the specifics of the allegations against the applicant divulged, other than an incident that concern members of his family but not him personally. Following the rejection of the applicant's first application for disclosure, the Attorney General presented a 'classified' investigation file to the court from a criminal procedure allegedly pending and unknown to the applicant. This led the applicant to a second application for disclosure of classified information. This was also rejected for reasons of national security protection, protection of personal data of the informant (whose name was otherwise revealed), and also because part of the content of the file was deemed not to be of assistance to the applicant.

In most cases concerning detention on the basis of classified information, the hearings were held in complete ignorance of the information on which the detention orders *('for the protection of national security')* were founded. In Kisa's opinion, the adverse effects on the requirement of a fair trial, especially one that complies with the principles of equality of arms and adversarial hearings were very visible.

Another consideration that should be flagged is the possibility that the states which include the applicant in their security database are the very states with respect to which the applicant is seeking asylum. Nevertheless, experience does not indicate that political or other motives of such inclusion into databases were examined in the course of the judicial procedures in Cyprus; procedures which relied on information about the applicant deriving from potentially biased state opinions.

For example,

In the *M.J. case,*[104] the only information disclosed was the interview of the applicant with the Immigration Police upon entry. His detention (which is still ongoing since January 2020) is based entirely on information from Interpol's database for terrorism and correspondence amongst the immigration authority, police and Attorney General. No information was available about which country introduced the information about the applicant into Interpol's database. This means that it could not be excluded that the data entry was made by his country of origin or by another country with similar political beliefs regarding his

[103] Δ.Κ. 2/2020, H.A. (decision on application for disclosure from 10 April 2020.
[104] M.J., Δ.Κ. 16/2020 (decision on application for disclosure from 7 May 2020).

political identity. The applicant is a member of a political movement considered to be *'terrorist'* by specific states, but not by Cyprus, which actually provided international protection to members of this movement. The court upheld the position of the Republic of Cyprus that disclosure of information would endanger national security since it would reveal the methods of handling information from Interpol's databases. Upon the initiative of the applicant, who submitted the request for information to the Commission for Interpol Files, it was disclosed that indeed the country which included a red alert in the Interpol database was his country of origin.

Another issue from the case above must be highlighted. Although the court referred to specific document numbers within files which were *'classified'*, it did not order disclosure of the documents within the same files which were *'not classified'*. In essence, this means that once a file includes both classified and non-classified information, access is denied to all the information contained in the file.

It must be stressed that some such detention cases based entirely on classified information concern asylum applicants who continue to be detained on the same grounds still without any criminal proceedings being initiated against them after more than two years.

Habeas corpus applications (Supreme Court)

As per Article 9(5) of the Reception Conditions Directive, the Supreme Court examines habeas corpus application procedures with respect to the legality of the prolonged duration of detention of asylum applicants.

Although as a rule, classified information concerning allegations of threats to national security are not disclosed, a few exceptions such as in the *Mhammedi case*[105] are to be noted.

In this case (which followed recourse against the legality of the detention order before the IPAC, as well as another habeas corpus application prior to this one), the Supreme Court examined the possibility of disclosure with respect to specific allegedly classified documents submitted to the court. The Supreme Court first excluded from examination those documents of which the non-disclosure had already been decided during other judicial procedures before the IPAC. The court was of the view that the rejection of a disclosure application by the IPAC created a res judicata and, therefore, a new application for disclosure was an abuse of process. The court then examined the additional allegedly classified evidence put forward by the authorities.[106] Having noted that there was no

[105] Mhammedi, no. 4/2020 (decision on application for disclosure from 12 February 2020).

[106] These documents consisted of: correspondence between the Civil Registry and Migration Department and the Attorney General; a note concerning the applicant and some other person and a two-page police diary about the applicant; correspondence which mentioned that re-examination of his detention led to a conclusion that the threat to national security of the Republic persisted (nothing more specific); and correspondence requesting information and stating that the applicant, at some point, expressed his wish to return to his country.

information which could suggest that its disclosure would (even as a possibility) pose a threat to the security of the Republic, the court ordered disclosure of these documents.

In many other habeas corpus applications, some of the judges seemed more willing to disclose part of the classified information, revealing that they were not confidential at all and no danger to national security was posed by their disclosure to the applicant. Other judges seem to adopt a *'hard line'* approach by not allowing disclosure of any of the classified information, and expanding on previous case law in the context of administrative law (which has nothing to do with a habeas corpus procedure). They concluded that it is the prerogative of the State to deny access to information when national security is invoked, and no judicial control is allowed of either decisions on non-disclosure or decisions to detain a person on national security grounds. The hard line approach was recently confirmed by the Supreme Court in three appeals for a habeas corpus,[107] where the court rejected all the appeal grounds in relation to a fair trial; such as the principle of equality of arms and the right to be heard in the context of adversarial procedures. In the view of Kisa, such an approach is at odds with ECtHR and CJEU case law in relation to both disclosure of classified data and detention on the grounds of national security. Those cases are already pending before the European Court of Human Rights, and their outcome remains to be seen. Meanwhile, the persons concerned continue to be detained.[108]

In favourable habeas corpus decisions where the Supreme Court also decided that applicants should be released, judges accepted CJEU case law on the meaning and interpretation of national security; namely that this notion should be interpreted restrictively as an exception to fundamental rights. They also clearly accepted that the burden of proof lies on the State to show that national security is threatened by disclosure of the data and by the release of the applicant.[109] In all those cases, the Government appealed the decisions, but the appeals were rejected by the Supreme Court.

In another habeas corpus application, the Supreme Court rejected the application for disclosure, considering that it was enough that the court had access to the confidential material and therefore accepted the position of the Government that disclosure would endanger the national security.[110] It nevertheless ordered the release of the person concerned[111] on the grounds that the authority made their assessment on the dangerousness of the applicant only at the initial stage but nothing was confirmed after that and no other action was taken, such as criminal procedures.

Despite the fact that both the Refugee Law and the Reception Conditions Directive do not exclude the application of alternatives to detention, when detention of asylum seekers

[107] See footnote no. 36.
[108] Alabdalla and Others v. Cyprus, Appl. No. 24607/20.
[109] Al Maloul v. Chief of Police, Habeas Corpus Application No. 177/20, 24.2.2021; Ismail v. Chief of Police, Habeas Corpus Application No. 49/2020, 17.9.2020; Abdelmogeeth v. Chief of Police, Habeas Corpus Application No. 56/2020, 15.9.2020.
[110] AL MALOUL, Civil Appeal No 177/20, 30/12/2020 (intermediary decision on disclosure).
[111] AL MALOUL, Civil Appeal No 177/20, 24.2.2021 (final decision).

would be based on the national security grounds, the case law of IPAC and the Supreme Court has, in substance, excluded the possibility of alternative measures in such cases. At the same time in habeas corpus cases, where the court found that the length of detention was unlawful because a threat to national security was not confirmed and ordered the release of asylum seekers, the court also ordered alternative measures to detention (such as appearance at a police station certain days of the week) in view of the *'national security grounds invoked by the authorities.'*[112]

3. Citizenship/naturalisation (Administrative Court proceedings)

The problematic approach regarding the disclosure of classified information in a citizenship case can be observed in the *N.T. case.*[113]

The Minister of Interior rejected an application for Cypriot citizenship by a recognised refugee because *'the applicant was not found beyond doubt to be of good character'.* The only justification given was that, according to a specific document in the file (Red 318), the applicant was considered (to his great surprise, as he had never been charged with anything like that) to be involved in *'illegal migration through the occupied areas and drug trafficking'.* Hundreds of pages in the files revealed nothing but favourable information about the applicant. All but one page. The Attorney General's Office maintained that the page, which was removed from the file when it was inspected, was classified and did not specify anything further. The applicant requested disclosure of this document as well as of any other documents from the Cyprus Intelligence Service that were taken into account for the rejection of the citizenship application (potentially outside the file and in some other Government files). The court rejected the request altogether. With respect to the claim for disclosure of any other classified documents not included in the file, the court rejected the application because of the request's inadequate 'specificity'; not taking into account that the applicant could not know what specific documents the Government possessed. As for the document 'Red 318', notwithstanding the fact that the court acknowledged that it was solely on this basis that the contested decision was taken, and that this document was necessary for the court's own judicial review, it refused to disclose it. The court stated that the requested page contained *'nothing more and nothing less'* than what the applicant already knew about the reasons of the rejection of his citizenship application. The court concurred with the views of the Attorney General that the disclosure would be against the interests of the Republic.[114] One wonders that if the document revealed *'no more and no less'* of what the applicant already knew, why it was not disclosed and why its classification was considered to be legal.

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[112] xxx Almuhana, Civil Application No 28/2020, ημερ. 28.7.2020, ISMAIL, Civil Application No. 49/2020, 17/9/2020.

[113] N.T., recourse no. 1080/2019 (intermediate decision from 7 April 2021), https://bit.ly/3s8SOnQ.

[114] The court referred to ZZ,[114] Kadi,[114] Varec[114] and Regner[114] cases, as well as a national court decision D.F. Iacovou Group Ltd;[114] according to which the right of access to information may be restricted if judicial, police or military investigation in relation to the commission of a crime is essentially obstructed by the disclosure.

Hungary

1. Asylum procedure (exclusion, withdrawal of status based on national security)

The opinion of a security agency regarding a threat to national security, usually based on classified data, does not have to justify its reasoning and is binding on the NDGAP. Therefore, as soon as there is such an opinion, the NDGAP denies/withdraws international protection status, including in its decision a mere reference to the Security agency's opinion and an indication of the legislation. The Asylum Authority does not carry out an individual assessment of the case, but instead bases its decision solely on the conclusions of the (national security) expert opinion. Therefore, the consequences of the Hungarian legislation are:

(i) A decision on the merits of international protection is taken by the Asylum Authority which does not know the reasons on which the security agency concluded that the applicant is a threat to national security; and

(ii) a thorough examination of the existence and applicability of the grounds for exclusion/withdrawal in an individual case, taking into account individual circumstances and the assessment of necessity and proportionality is not possible.

This leads us to the conclusion that the examination and the substantive decision on international protection are not ultimately carried out/taken by the competent asylum authority, but *de facto* by the security agencies (AH and TEK) that do not have the conditions and authority for such examination. Furthermore, the security agencies do not carry out their proceedings on the basis of the substantive and procedural provisions of the Asylum Procedures Directive. This deprivation of powers, which appears to be contrary to EU law, may result in a loss of procedural guarantees provided for in EU law.

On 27 January 2021, the Metropolitan Court decided to refer a preliminary reference to the CJEU regarding the issues mentioned above.[115] The facts of the case are the following:

The applicant is a Syrian national with Hungarian family members and over 20 years of stay in Hungary. He was granted refugee status *sur place* by the Budapest High Court in 2012. In 2019, an administrative procedure to withdraw his refugee status was initiated *ex officio*. During the administrative proceedings, the security agencies found in their reports that the applicant's stay in Hungary constituted a danger to national security. On the basis of the foregoing, the Asylum Authority found that a ground for exclusion from being granted refugee or subsidiary protection status was established in the applicant's case. A separate procedure request for access to the classified data on which the security agencies based their opinion was rejected, and this refusal was confirmed by the court.

As explained by the Metropolitan Court in the justification of the request for a preliminary ruling, although the court reviewing the legality of the Security agencies' opinion and NDGAP's decision on asylum is entitled to access the classified information, the court

[115] C-159/21, GM v National Directorate-General for Aliens Policing and Others.

cannot use such data, nor can make any statements about it in the judgement. The court is required to rule in a situation in which neither the applicant nor the applicant's representative has been able to present a defence or any arguments to establish that the ground at issue does not apply in that individual case. The court is only able to decide, without stating reasons for its decision, whether the classified information on which the authority relies justifies the finding made by the national security authority. The court is unable to guarantee that the applicant in the main proceedings is, in any event, provided with the essence of the reasons underlying the national security authority's report and the substantive asylum decision being reviewed by the court.[116]

At the same time, as explained in Chapter II, the jurisprudence of the Kúria in appeals against denial of access to classified data maintains that the right of access is only the right to informational self-determination of the applicant, and this can be restricted in an absolute manner.[117] Therefore, the applicants cannot get access, not even to the essence of the reasoning why they are considered a threat to national security in either of the existing court procedures.

2. Asylum detention based on national security

When an asylum seeker is detained on the grounds of national security, the judge reviewing the detention can have access to the classified data based on which the national security risk was established. However, from HHC's experience, the judges reviewing the legality of asylum detention never request this data; not even when this is explicitly requested by the applicant's representative. As a result, such detention is often automatically prolonged without any chance for the applicant who has no access to the classified data at all to effectively challenge it, and without the court's review of whether the classified data actually justify the detention. A case concerning this issue was recently communicated by the European Court of Human Rights.[118]

3. Lack of family life consideration in residence permit cases

Besides similar issues regarding access to classified data as described above, the immigration procedures suffer from another major shortcoming with regard to the respect of the right to family life. Due to a legislative gap, there is no obligation to assess family life when someone's residence permit is withdrawn/not extended (e.g. if family members are Hungarian citizens or third-country nationals). In cases where a residence permit is withdrawn as a result of national security, public safety or public order reasons, it is not necessary to examine the necessity and proportionality of such withdrawal.

Pursuant to the relevant provisions of the TCN Act, a third-country national may be granted a residence permit only if their entry or stay in Hungary does not represent a threat to the

[116] https://bit.ly/3lVFSRf.
[117] Kfv.I.37.127/2021/10., 8 April 2021.
[118] L. v. Hungary, Appl. No. 6182/20.

country's public policy, public security, national security or public health. There are no exceptions to the above provisions, therefore, a third-country national who does not have a residence permit, or whose residence permit has been withdrawn, cannot oppose their expulsion on the grounds of the right to the protection of their private or family life.

If a third-country national is to be expelled, the obligation to take into account their right to family life prior to expulsion is only applicable to third-country nationals with a status based on the grounds of family relations (if their residence was not yet withdrawn).[119] And even in these cases, their family life is often examined only superficially and there is no meaningful proportionality and necessity test as the data based on which the person is declared a risk to national security is classified. Furthermore, a serious nature of national security risk must only be established for those with a permanent residence permit, or for family members of third-country nationals with a permanent residence permit. For others, the nature of the risk does not even have to be serious.[120] This results in regular violations of the right to family life and in cases where minors are involved, the best interest of the child.

In a permanent residence permit withdrawal case based on national security grounds, the Metropolitan Court decided to refer a preliminary reference to the CJEU on 17 February 2021.[121] However, the decision of referral was later withdrawn, as the Immigration office withdrew its second instance decision challenged at the court. The reference concerned access to, and use of classified data, the unreasoned and binding opinion of the security agencies, and the lack of consideration of the derived right of residence under Article 20 of TFEU (the applicant has Hungarian family members). The judge who decided to refer the reference was removed from the case, and the new judge showed no willingness to maintain the reference. The second instance immigration authority issued a new decision which did not differ much from the one they withdrew, and therefore in the view of the HHC, a reference to the CJEU would still be necessary. The appeal against the new decision is pending. However, the withdrawal of this preliminary reference shows how *'highly political'* this matter is, and casts doubts on the willingness of the Metropolitan Court to have a preliminary reference examined by the CJEU.

The HHC observes that most of the national security immigration cases concern settled migrants who have been living in Hungary for decades and have Hungarian family members. Although the reasons for establishing a threat to national security are not known to the applicants, the following can be observed:

(i) In some cases, applicants are declared a threat to national security without any criminal procedure being initiated against them, or before the criminal procedures against them are terminated and before they are found guilty;

(ii) In other cases, applicants are declared a threat to national security even though they already served the whole prison sentence for the crimes they committed,

[119] Section 45(1) of TCN Act.
[120] Section 45(2) of TCN Act.
[121] 25.K.707.548/2020/23.

and despite the fact that expulsion was not ordered as a sentence in the criminal procedure;

(iii) Certain applicants who are declared a threat to national security have committed, or are only accused of crimes for which a low prison sentence or only a fine is prescribed in the Criminal Code.

In certain cases, the judge reviewing the immigration authority's decision found the threat to national security to be unfounded and thus quashed the decision. This is a clear sign that the security agencies' opinions on national security threats can be arbitrary. The fact that the destiny of the applicants depends on the thoroughness and willingness of one judge, who is the only one with access to the classified data, clearly undermines the applicants' right to a proper defence.

4. No right to request a suspensive effect in expulsion cases based on national security grounds

Making use of its emergency powers and the *carte blanche* authorisation it received due to the COVID-19 pandemic to override any Act of Parliament,[122] the Hungarian Government issued Decree 570/2020. (XII. 9.), which entered into force on 10 December 2020. Section 5 of the Decree removes the right to request an interim measure to suspend the execution of an expulsion until a court judgment is issued on the appeal against the expulsion decision based on the violation of epidemiological rules, or the threat to national security, public security or public order. Since expulsions can be carried out without prior judicial examination of the legality of the expulsion decision, appeals have been rendered ineffective. Expulsion can put certain people at direct risk of refoulement and, if they have family in Hungary, seriously infringes their rights to private and family life. This legislation also has serious consequences for people who have been expelled prior to submitting their asylum application. If their asylum application is rejected in an accelerated procedure, the appeal does not have a suspensive effect and even if it is requested, it does not suspend the expulsion that was ordered prior to the asylum procedure.

In HHC's view, the automatic exclusion of the right to request an interim measure for the suspension of an expulsion decision based on national security grounds clearly violates the ECHR, as well as EU law.[123] In fact, a complaint submitted by the HHC to the European Commission on 26 January 2021 is pending. However, litigation has been unsuccessful until now. The Kúria's judgement on the issue concluded that the Charter only provides for the right to take the case to court (and not the right to request a suspensive effect). Furthermore, it stated that non-refoulement is the question of the merits, not of an interim measure.[124] Strikingly, the ECtHR did not find any violations on this matter either; which in

[122] Hungarian Helsinki Committee, Overview of Hungary's emergency regimes introduced due to the COVID-19 pandemic, 27 January 2021, https://bit.ly/3q7qRdo.
[123] Hungarian Helsinki Committee, Decree justified by pandemic causes immediate risk of refoulement without access to an effective judicial remedy, Information Update, 5 March 2021, https://bit.ly/3jLRpQl.
[124] Kpkf.VI.39.459/2021/2.

the view of the HHC is at odds with its well-established case law on effective remedy under Article 13.[125]

The facts of the case concern an Egyptian citizen who has been lawfully residing in Hungary for more than 20 years and has Hungarian family members. He committed a murder and served his full sentence. Two years after his release from prison, the Immigration Office withdrew his residence permit due to the risk to national security and he was issued an expulsion order with an entry ban. The applicant appealed against the decision and requested suspension of the expulsion pending the results of his appeal, but the immigration authority did not halt the deportation, as according to the new decree, he does not have the right to request the suspension of expulsion. The applicant was detained in order to be deported. Since he would face inhuman and degrading treatment if he returned to his country of origin, he applied for asylum from detention. His asylum application was rejected two days later in an accelerated procedure. The applicant appealed, but appeals in accelerated asylum procedures do not automatically suspend the expulsion, and the applicant was deported before his appeal against the negative asylum decision even reached the court.

5. Statelessness procedure

In relation to statelessness and the threat to national security, it is worth mentioning the following case. The findings raise questions on actual compliance with international law:

In a statelessness procedure case, the judge of the Metropolitan Court initiated a review before the Constitutional Court, on the question of whether it is contrary to the Statelessness Convention and to the Hungarian Fundamental Law to exclude someone from statelessness status based on national security grounds. The Constitutional Court found that the application for statelessness status can be rejected based on a national security threat because states have discretion regarding the statelessness procedure, but this does not mean that the person is not stateless, as this is a declaratory status. If the stay of the applicant violates or endangers national security, the application shall be rejected for procedural reasons without further examination as to whether the applicant is stateless.[126]

Poland

1. Administrative Court case law on access to classified data in national security cases

In Poland, neither the foreigner nor their lawyer (even if they have security clearance) have a right to know the reasons of the decision why someone is considered a threat to national security. Although courts have access to classified information, this is not sufficient to secure a foreigner's rights of defence. The administrative bodies and court decisions are based on the summary of information presented by the security agencies; so the decisions are apparently not based on source material (wiretaps, informer reports, etc.). Therefore, the assessment of the allegations cannot be considered as full and thorough. Given that the

[125] Sayedelhal v. Hungary, Appl. No. 6450/21, 22 April 2021.
[126] V/8/2021, 23 March 2021, https://www.alkotmanybirosag.hu/uploads/2021/03/sz_v_8_2021.pdf.

decisions do not contain reasons, the appeal and judicial oversight of the decision is not effective. The court has no power to declassify or to disclose relevant information to the foreigner.

Despite the shortcomings mentioned above, administrative courts case law remains firm in considering that the limitations provided in the Polish law do not violate constitutional or international human rights standards. As the courts have access to all case files (including classified files), the right of defence is guaranteed and secured by the appeal and judicial oversight of the decision. The courts are also obliged to examine all the circumstances of the case *ex officio*, including the classified documents concluding that the foreigner poses a threat to national security. According to the Supreme Administrative Court, the courts also have the possibility to request the relevant authority to declassify case documents if, in their opinion, such material does not meet the conditions for being classified.[127]

A recent Supreme Administrative Court case law indicates that in migration cases based on EU law, standards based on Article 47 of the Charter and resulting from the CJEU case law[128] should be applied. Therefore, in such cases, the foreigner should be informed of the essence of the grounds on which a decision is based. However, the Supreme Administrative Court stated that the court has wide discretion to decide what constitutes the *'essence of the grounds'*, and accepted the situation in which the foreigner was informed in a very general way (that there are allegations that he may conduct terrorism-related activities, that he travelled to certain destinations, and that he has contacts with other persons staying in another EU country) that his stay in Poland poses a threat to national security.[129] Thus, it seems that despite the change in the case law, the practice has not changed significantly, and the right of a foreigner to effectively challenge a decision has not improved.

In an asylum case where the appeal concerned a violation of Article 23(1)(b) of the Asylum Procedures Directive, the Supreme Administrative Court stated that the right of access to classified documents by the foreigner's lawyer contained in this Article is only an example of possible solutions, and that the right of defence may be ensured in a different way provided by Polish law.[130]

In an expulsion case where the appeal was based on a violation of Article 47 of the Charter due to the limited factual reasons of the decision, the Supreme Administrative Court stated that such possibility is provided by Article 12(1) of the Return Directive, and this *lex specialis* provision excludes the application of the Article 47 of the Charter.[131]

[127] For example: case no. II OSK 2586/14, 29.6.2016, http://orzeczenia.nsa.gov.pl/doc/4FB0E19293; case no. II OSK 3615/18, 30.5.2019, http://orzeczenia.nsa.gov.pl/doc/0E73714244.
[128] C-300/11, ZZ, 4 June 2013.
[129] Case no. II OSK 3002/18, 6 February 2019.
[130] Case no. II OSK 1710/18, 23 November 2018.
[131] Case no. II 61/15, 9.9.2016, http://orzeczenia.nsa.gov.pl/doc/870644DFDD.

The Administrative Court also referred to the judgment of the ECtHR in the case of *Regner v. Czech Republic*,[132] where the Court found that similar solutions provided for in Czech national law do not infringe the guarantees of Article 6 of the Convention. It must be noted, however, that the ECtHR changed its case law in the case of *Muhammad and Muhammad v. Romania*[133] where it held that, in cases of foreigners considered a threat to national security, they should be informed about the essence of allegations against them. In one case before the Warsaw Voivode Administrative Court, arguments were raised based on the *Muhammad and Muhammad* judgment. However, the appeal was dismissed and the court did not made reference to the *Muhammad and Muhammad* judgment. The cassation appeal against this judgment has been lodged to the Supreme Administrative Court. The case is pending.

It should also be added that in several cases the courts, after analysing the case, overturned decisions. In these cases, the courts maintained that classified materials on which the decisions were based were hypothetical,[134] or that the threat posed by the foreigner was not as serious as assessed by the authorities.[135] However, in these cases, the applicants had not been able to exercise effective judicial protection. In the first case, after re-examination of the case and supplementing classified material, the authority again issued a decision refusing to grant a temporary residence permit. In the second case, the foreigner was expelled before the judgment was issued, and his asylum case had to be discontinued.

HFHR also submitted several motions to the Polish courts to refer a preliminary reference to the CJEU. However, the courts dismissed all of them.[136] In these cases, the Supreme Administrative Court argued that Polish national solutions sufficiently meet the standards of international law. In the above mentioned case II OSK 3002/18, the Supreme Administrative Court stated that the principles of Article 47 of the Charter interpreted in the *ZZ* judgment[137] are directly applicable, and that there is no need to refer the case to the CJEU.

2. Expulsion of lawfully staying foreigners

Neither Polish legislation, nor national case law distinguishes between the legal situation of a legally staying foreigner before and after an expulsion based on national security. According to the case law of the Supreme Administrative Court, restrictions of procedural guarantees apply before and after the expulsion.[138] However, such a solution raises doubts as to its compliance with Article 1(2) of Protocol 7, which provides for a different level of protection for lawfully staying foreigners in expulsion cases based on security considerations, depending on whether the foreigner has already been expelled or not.

[132] Regner v. Czech Republic (GC), 19 September 2017, Appl. no. 35289/11, §§151-156.
[133] See p. 11 of this study.
[134] For example, the above mentioned Supreme Administrative Court judgment no. II OSK 3615/18.
[135] Above mentioned judgment of the Supreme Administrative Court no. II OSK 1710/18.
[136] For example, in the above mentioned cases no. II OSK 61/15 and II OSK 1710/18.
[137] C-300/11, ZZ, 4 June 2013.
[138] For example, case no. II OSK 2554/14, 29 June 2016, http://orzeczenia.nsa.gov.pl/doc/9B50C7FC7B.

Although according to Article 1(2) of Protocol 7, states have a right to expel an alien before they have exercised the rights mentioned in Article 1(1) of Protocol 7, when this exceptional measure is necessary for reasons of national security, it results from the Court's jurisprudence, that after the expulsion, the person concerned should be entitled to exercise these rights.[139]

Two cases have already been communicated by the ECtHR concerning the expulsion of lawfully staying foreigners and the lack of procedural safeguards under Article 1 of Protocol 7, and lack of effective judicial remedy under Article 13 - *Poklikayew v. Poland*[140] and *Şener v. Poland*.[141] *Şener v. Poland* also concerns the alleged breach of the right to family life under Article 8 of the Convention.

3. Engagement of the Polish Ombudsman on the matter

The Polish Ombudsman, who has access to the classified files, also dealt with the described lack of access to the classified data problem. He argued that the well established case law of the Polish Administrative Courts, according to which denial of access to case files with classified documents does not violate the principle of proportionality, does not effectively protect foreigners against the arbitrariness of administrative authorities. Decisions issued on the basis of classified documents may deeply interfere with the foreigners' right to private and family life, and as such, should be subject to the effective review by independent state authorities. According to the Ombudsman, denial of access to case files may also violate Article 13 of the Convention because although the foreigner is not deprived of the possibility to challenge the unfavourable decision, without access to case files, the appeal proceedings are not adversarial. The Ombudsman concluded that Polish legislation does not satisfy the European standards because it does not provide foreigners with proper guarantees which would mitigate adverse consequences of denial of access to case files. Therefore, the Ombudsman called upon the Minister of Internal Affairs and Administration to take a position with regard to the signalled problems, and to consider introducing necessary legislative changes; for example the introduction of the institution of *'special representative'* who would have access to classified case files.[142]

The Minister of Internal Affairs responded that he does not consider the proposed changes to be absolutely necessary, but he did announce a further analysis of the Ombudsman's proposal.[143] However, no legislative proceedings aimed at ensuring that Polish law meets the standard of international law have been initiated. Legislative changes proposed by the

[139] See point 15 of the Explanatory Report, Lupsa v. Romania, §53 and Kaya v. Romania, §53.
[140] Poklikayew v. Poland, Appl. no. 1103/16, https://bit.ly/3lWGPsH.
[141] Şener v. Poland, Appl. no. 53371/18, https://bit.ly/3iDL75W.
[142] Commissioner for Human Rights, Letter to the Minister of Foreign Affairs and Administration, 19 August 2016, https://bit.ly/3iCwPmg.
[143] MSWiA w sprawie wprowadzenia do polskiego porządku prawnego instytucji specjalnego pełnomocnika dla cudzoziemców, https://bit.ly/3jLQT4R.

HFHR regarding the repeal of provisions allowing the limitation of the factual reasons of the decision were not accepted by the authorities.[144]

4. Complaint to the European Commission

In September 2018, HFHR lodged a complaint to the European Commission for an alleged breach of EU law by Poland in respect to denial of access to classified data.[145] However, the EC did not agree with the HFHR's allegations and responded that it would not initiate an infringement procedure against Poland. It seems, however, that since the ECtHR issued a judgment in the case of *Muhammad and Muhammad v. Romania*, which shows that solutions such as those adopted in Poland do not meet the Convention standards; there is a need for the European Commission to reconsider its position.

5. No automatic suspensive effect in expulsion cases based on national security and automatic detention

In cases involving national security, the period for voluntary departure is not provided. The return decision is immediately enforceable and an appeal has no automatic suspensive effect. Although according to Article 331 of the Act on Foreigners, an appeal against the return decision accompanied by a request to suspend the decision has an automatic suspensive effect until the Administrative Court issues a decision on such request. This provision is not applicable to return decisions issued by the Border Guard because such decisions have to first be appealed to the second instance administrative authority and not the court.

On the contrary, in cases where a return decision was issued by the Minister of Interior, an automatic suspensive effect may be applicable because a decision issued by the Minister may be appealed directly to the court.[146] According to the authorities, a return decision which is immediately enforceable cannot be suspended by the court. However, the Supreme Administrative Court recently confirmed that it also has the power to immediately suspend an enforceable return decision based on security considerations.[147]

According to the Act on Foreigners, detention is obligatory and alternatives to detention are not applicable in return cases involving national security. According to the HFHR's experience, in detention cases concerning foreigners identified as posing a threat to national security, they are usually kept in high-security detention facilities (arrest for

[144] Helsinki Foundation for Human Rights, Amendments to the Foreigners Act – HFHR comments, https://www.hfhr.pl/en/amendments-to-the-foreigners-act-hfhr-comments/.
[145] Helsinki Foundation for Human Rights, Helsińska Fundacja Praw Człowieka złożyła skargę do KE ws. przepisów przewidujących tajne materiały w sprawach cudzoziemskich, https://bit.ly/3CH24EQ.
[146] According to Polish law, when a decision is made by the top administrative authority, then the party to the proceedings may request the authority to reconsider the case or directly lodge an appeal to the administrative court (Art. 127(3) of the Code of Administrative Proceedings.
[147] See decision of the Supreme Administrative Court of 20.01.2021, no. II OZ 1152/20 where the court held that in return cases involving national security, such a decision may be suspended by the court under Article 13(1) and (2) of the Return Directive, http://orzeczenia.nsa.gov.pl/doc/A1455D03A8.

foreigners, *areszt dla cudzoziemców*). Arrest for foreigners is designated for those foreigners who do not comply with the rules of stay in an 'ordinary' detention centre (i.e. they are aggressive). In cases known to the HFHR, detention decisions concerning foreigners recognised as posing a threat to national security do not contain information that they actually violated rules of stay in an 'ordinary' detention centre.

Conclusions

Laws and practice in Cyprus, Hungary and Poland with regard to the right to defence of foreigners who are considered a risk to national security are very restrictive. Since many EU Member States do not have such limitations, the necessity of such a restrictive approach is questionable. Actually, in France, Germany, Italy, Portugal, Slovenia and Spain there is no possibility to refrain from providing legal and factual reasons for a decision being reviewed only because of national security grounds or public order are involved. Access to evidence in full without any restrictions on the party and their lawyer, and the judicial decision has to mention all the legal and factual grounds on which it is based.[148] These systems with such procedural safeguards do not seem to jeopardise the protection of the national security of these Member States.

For example, in Germany[149] and France,[150] the administrative authority's decision must have legal and factual reasons. The administrative authority may not invoke grounds of national security or public order without giving factual reasons, and cannot refrain from justifying a decision. The administrative authority does not have to disclose all the factual reasons and information at its disposal, as long as it presents sufficient reasons to support the decision. But as soon as the administration refers to certain documents/evidence that are considered secret, they are required to disclose them to the applicant. The judge cannot base its judgements on reasons and facts that were not disclosed to all the parties of the procedure.

Therefore, the principles of equality of arms and adversarial procedure are understood differently among Member States. In some, the principles are understood as guarantees that the court may only consider and use legal and factual information and reasons, if the parties concerned have had the same access to it. In other Member States such as Cyprus, Hungary and Poland, the fact that the court can examine the classified files to which the applicant does not have access represent a sufficient safeguard of the principles of equality of arms and adversarial procedure.

It is evident that in all three countries, for one reason or another, the standards and case law of the CJEU and ECtHR are not implemented and enforced despite their supremacy over national legislation and national case law. This cannot be isolated from the fact that in all

[148] Jacek Chlebny, 'Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases', European Journal of Migration and Law 20 (2018) 115–134, 2018.
[149] http://www.aca-europe.eu/seminars/2017_Cracow/Germany.pdf
[150] http://www.aca-europe.eu/seminars/2017_Cracow/France_fr.pdf

three countries strict immigration policies have been adopted, resulting in jeopardising of the rule of law and protection of human rights.

Even if the judges enjoy full access to all files of the case, such judicial control still cannot be considered effective. The materials presented to the national court by the authorities may not be reliable, or may omit the essential circumstances of the case. It may also contain incorrect information. On the other hand, only the concerned person has full knowledge about the circumstances of his/her case and may correct information provided by the authorities or present those in a different light; and this may affect the judicial assessment of the case. For example, the concerned person may provide exonerating evidence such as an alibi; or an alternative explanation for their presence at places associated with terrorist activities; or indicate that they were unaware that some of their actions may be associated with activities that pose a threat (e.g. they passed information to their friends or relatives without knowing they belong to terrorist organisations), etc.[151] Therefore, the national court may not be able to perform a thorough review of the circumstances of the case which the court does not know about.

The authors of this study firmly believe that it is an undisputed fact that without appropriate procedural safeguards, third-country nationals are not able to effectively defend their fundamental rights in immigration procedures.

Recommendations

Common recommendations to all three countries

1. The administrative authority's decision on grounds of national security has to have legal and factual reasons.

2. A foreigner should be informed in all cases, at a minimum, about the main reasons (essence of grounds) of why they constitute a threat to national security.

3. The essence of grounds should not only contain general information, but factual elements; such as for example the place, date and type of activities undertaken by the foreigner, and an explanation of why these activities pose a threat to national security.

4. It should not be allowed to deprive the foreigner from access to all factual information related to their risk to national security simply because the disclosure of parts of this factual information would actually jeopardise national security; e.g. operational methods used by relevant security agencies, the identity of sources, etc. Such information should be separated from the rest of the information and remain confidential and not disclosed to the foreigner.

[151] A. and Others v. UK, Appl. no. 3455/05, 19 February 2009, §220.

5. Improve the effectiveness of the judicial review on denial of access to classified information.

Additional specific recommendations for Cyprus

1. Procedure at the administrative stage regarding determination that someone is a threat to national security should be regularised. For example, having only one authority to assess a national security threat and prepare a well-justified report before classifying information about a person, and with a clear understanding of the notion of national security.

2. Procedural safeguards governing judicial procedures on disclosure of classified information should be adopted. The Supreme Court should adopt procedural regulations on the matter in line with the procedural safeguards included in CJEU and ECtHR case law. These could also include the methods which can be used in order to safeguard the principle of equality of arms, and the main aspects of the right to a fair trial and access to an effective remedy.
3. Consultations amongst the various stakeholders should take place in order to identify the methods which can be used in order to safeguard the principle of equality of arms, such as for example a special advocate, providing a summary of the main elements, retractions on the text, etc.

4. More training should be provided to administrative officers, police and judges on issues of national security and their impact on human rights.

5. Existing case law should be reviewed in order to be aligned with CJEU and ECtHR case law, and better justified court decisions should explain how the safeguarding principles around disclosure are actually implemented.

6. In asylum cases, the country that entered someone's data in a security database should be revealed, particularly if this is the country against which a person is seeking protection, as it is directly linked and affects the asylum claim of the person concerned, whilst the principle of confidentiality could be at stake in the context of exchange of information with the country of persecution.

7. The courts, when examining the disclosure of classified data requests, should also examine whether a proper classification procedure was followed, and whether the legal basis for classification is correct; not only whether disclosure would put national security at risk.

8. The courts reviewing administrative authority decisions based on national security grounds should examine whether the measures taken were indeed necessary and proportional. The courts should not be satisfied with only ascertaining that the Government gave evidence on protection of national security.

9. The courts performing judicial review of legality of immigration detention based on national security grounds should carefully examine the classified documents and not automatically accept that the applicant represents a threat to national security.

Additional specific recommendations for Hungary

1. Security agencies (TEK, AH) should be obliged to provide the reasons for their opinion that someone is a threat to national security.

2. Instead of automatically adopting the opinion of security agencies, NDGAP should individually assess all personal circumstances in withdrawal/rejection of granting/extending international protection statuses/residence permits and expulsion cases. The opinions of the security agencies on national security threats should not be binding.

3. When access to classified data is granted to the foreigner, they should also be able to use the information in the relevant procedures.

4. Modify the relevant legislation and give the courts the possibility to examine and decide whether the classification was lawful. In case of unlawfulness, enable the court to lift the classification.

5. The courts performing judicial review of legality of asylum detention based on national security grounds should carefully examine the classified documents, and not automatically accept that the applicant represents a national security threat.

6. Ensure that the right to family life and the best interest of the child are assessed and taken into account in residence withdrawal/expulsion cases, regardless of the migratory status of the person.

7. Repeal Section 5 of Governmental Decree 570/2020. (XII. 9.) which removes the right to request a suspensive effect when appealing an expulsion decision which is issued based on national security grounds, and ensure effective remedy against expulsion decisions of third-country nationals and the principle of non-refoulement.

Additional specific recommendations for Poland

1. In order for the proceedings to be thorough, both the authority conducting the administrative proceedings and the courts should have direct access to the source material collected by the security services, not only to the summary of the information gathered by the security agencies.

2. The courts should be able to disclose the evidence and information of the case to the foreigner to which, in its opinion, the foreigner was unreasonably denied access. The courts should also be able to examine whether the classification was lawful.

3. The criminal court performing judicial review of immigration detention should also be obliged to review the administrative case materials in every detention proceeding. The court cannot base its decision solely on the fact that administrative proceedings are pending against the foreigner, or that a decision has been issued where it is stated that the foreigner poses a threat to national security.

4. Introduction of a special representative should be considered. A foreigner, apart from the possibility of having a legal representative, having essentially the same rights as themselves (thus also not having access to classified materials of the case), should be able to have the assistance of a 'special attorney' who has access to all classified case files and has the right to know the classified part of the reasons of the decision. Such a special representative could be instructed by the foreigner as to the line of defence constructed on the basis of the 'essence of the grounds' provided to the foreigner.

5. Provisions on automatic detention based on national security grounds should be removed, and alternatives to detention should be examined in such cases.[152]

Recommendations for the European Commission

1. Conduct an analysis of the laws and practices of Member States concerning their compliance with EU law, and ECtHR and CJEU jurisprudence on invoking national security grounds in immigration cases, as well as the scope and effectiveness of the remedy provided against administrative decisions in such cases.

2. Propose legislation that provides common standards for disclosure of information in cases where the administrative decision is based on national security grounds in areas governed by EU law; in particular in the areas of asylum, immigration, and large-scale centralised IT information systems, including the methods which can be used in securing the right to a fair trial and access to an effective remedy.

3. Since the proposed amendments to CEAS include detailed modalities of obligatory security screening on arrival (Articles 11 and 12 of the Screening Regulation), new immigration detention grounds based on national security (Article 9(4)b) of the proposal for a recast of the Return Directive), mandatory border procedures for those considered a risk to national security (Articles 41(3) and (5) of the Asylum

[152] According to EU law, in all return cases, regardless of the basis of the return decision, alternatives to detention should be considered (Article 15 (1) of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals).

Procedures Regulation), and no automatic right to remain during the appeal of the decisions to withdraw international protection where the beneficiary is considered a danger to national security (Article 54(3) of the Asylum Procedures Regulation), procedural safeguards regarding access to the classified data based on which someone is considered a threat to national security and procedural safeguards in order to secure the right to a fair trial should also be added to the proposals.