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THE RIGHT TO KNOW

Legal Template on EU and International Law
Regarding Disclosure of Classified Information in
Asylum and Return Procedures Based on National
Security Grounds

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Scope and application of the template

This **legal template** ('**Template**') is applicable in cases of third-country nationals where the decision of the asylum or immigration authority concerns the:

- **exclusion** from, or **withdrawal of international protection** status, as well as **return**;
or
- **detention of third-country nationals in an asylum procedure**; or
- **rejection/withdrawal of a residence permit and return of third-country nationals** ('Decision').¹

The Decision is based on the **opinion (usually) of the security agencies** establishing that the applicant poses a **threat to national security**.

Due to the **classification of the underlying information**, there is **no reasoning** given for the applicant as to why they present a threat to national security (not even summarily), nor does domestic law or practice provide **access** to the classified information for the person concerned.

Recognising the need for a common European approach to address the problem in at least three EU Member States,² this Template provides guidance to national legal practitioners with regard to such Decisions. It presents the relevant EU law and the relevant Court of Justice of the European Union ('CJEU') case law, as well as the pertinent provisions of the European Convention on Human Rights ('ECHR' or 'Convention') and the applicable European Court of Human Rights ('ECtHR') case law. The Template thus provides an overview of the relevant EU and international standards that should be argued before domestic and international courts (CJEU/ECtHR) in order to achieve the EU/international law compliant interpretation/amendment of domestic laws and practice.

The Template briefly presents a pending case referred by a Hungarian court to the CJEU (see Chapter 6), and indicates if and where further interpretation of the EU law is needed. For further developments on CJEU and ECtHR jurisprudence, please refer to the following pending cases:

CJEU (case name and no.):

GM v. Országos Idegenrendészeti Főigazgatóság and Others, no. [C-159/21](#)

ECtHR (case name and no.):

Adin Şener v. Poland, no. [53371/18](#)

L. v. Hungary, no. 6182/20

Oleg Poklikayew v. Poland, no. 1103/16

Alabdalla and Others v. Cyprus, no. 24607/20.³

¹ The cases listed here are not exhaustive. The Template might also be appropriately applicable to other types of cases.

² HFHR, HHC, Kisa, *Right to Know, Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, September 2021.

³ It has not been communicated yet.

1. Overview of potential applicants, and the relevant EU law and ECHR provisions

1.1. Beneficiaries of international protection and asylum-seekers

The Template is applicable to:

- (i) **beneficiaries of international protection** whose status has been withdrawn;
- (ii) **asylum-seekers** whose asylum application has been rejected ('applicant') based on national security grounds, and where no reason was given by the asylum authority regarding the national security threat allegedly posed by the applicant. Furthermore, the underlying information concerning the national security risk is classified, and the applicant has no access to it.

The **general principles of European Union law** such as the right of the defence, which embraces the right to be heard and the right to a reasoned decision, both being also part of the right to good administration as well as the right to an effective judicial remedy, are applicable to both groups of applicants. Furthermore, the **Charter of the Fundamental Rights of the European Union** ('Charter'), the **Procedures Directive**, the **Qualification Directive**,⁴ and the **Return Directive** are all pertinent. In the case of detention of asylum-seekers, the **Reception Directive**⁵ is also relevant.

Regarding the **ECHR**, although it does not contain the right to asylum as such, Arts. 3 and 8, and **Art. 13 in conjunction with Art. 3 and/or 8** may be potentially invoked in the case of **asylum-seekers**; as well as **Art. 5(1) and (4)** in the case of detention. **Beneficiaries of international protection** who are expelled from the country, apart from the articles mentioned earlier, can possibly further rely on **Art. 1 Prot. 7**. However, the above articles are not applicable to those granted leave to stay as a result of status withdrawal, therefore those applicants have no recourse to the ECtHR. Since there is no risk of expulsion, Art. 6 (that could ensure the right to a fair trial for the applicant) is not applicable in asylum and immigration cases pursuant to the standing case law of the ECtHR.⁶ However, the Court could be encouraged to overrule its standing interpretation on the non-applicability of Art. 6; at least in asylum procedures where the underlying information of the decision is classified.⁷

1.2. Third-country nationals under return procedure

The Template is applicable to **third-country nationals**:

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

⁵ 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) ('**Reception Directive**').

⁶ ECtHR, *Maaouia v. France* [GC], no. 39652/98, 5 October 2000, §40.

⁷ Arguments in favour of the applicability of Art. 6 in such asylum cases is provided by this *Legal Toolbox*: <https://helsinki.hu/en/challenging-the-national-security-card-in-asylum-cases/>

- (i) who are served with a **return decision** in the meaning of Art. 3(4) of the Return Directive;
- (ii) whose **residence permit has been withdrawn** or whose residence permit application has been **rejected**, and the **appeal procedure is pending** with the view of removal;
- (iii) whose **residence permit has been withdrawn or their application has been rejected, but they are granted leave to stay** and have an **EU citizen family member** ('applicant').

No reasoning is given by the immigration authority in these decisions regarding the national security threat allegedly posed by the applicant. Furthermore, the underlying information as to the national security risk is classified to which the applicant has no access.

In the case of applicants served with a **return decision**, the applicable **EU law** concerns the **general principles of European Union law** such as the rights of the defence embracing the right to be heard and to a reasoned decision (both being also part of the right to good administration), as well as the right to an effective judicial remedy. Furthermore, the **Charter** and the **Return Directive** must be observed. Pursuant to the Return Handbook⁸ and the *Gnandi* judgment,⁹ the same laws are to be applied in the case of an **appeal against the decision on a residence permit withdrawal if it is still pending**. In the case of long-term resident third-country nationals, the Long-Term Residents Directive¹⁰ is also applicable.

The Template is not addressed to cases of third-country nationals enjoying the right to free movement under the Free Movement Directive.¹¹ However, if the applicant's residence permit has been withdrawn but they have been **granted leave to stay, and the applicant has an EU citizen family member** who is not exercising the right to free movement, EU law, namely the **Charter** and the **general principles** through Art. 20 of the Treaty on the Functioning of the European Union ('TFEU') is applicable. As per the CJEU, in the case of third-country nationals who have EU citizen family members not exercising their right to free movement **Art. 20 TFEU** is applicable. In this case, it concerns *i.a.*, parents of minors, on whom the child is dependent, or who takes care of the child, or, in case of adults in exceptional cases, other family members.¹² Consequently, they have the unconditional right

⁸ Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks.

⁹ CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018, §39, §49.

¹⁰ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

¹² CJEU C-135/08, *Janko Rottman v. Freistaat Bayern*, 2 March 2010; CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 8 March 2011; CJEU, C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011; CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011; CJEU, C-40/11, *Yoshikazu Iida v. Stadt Ulm*, 8 November 2012; CJEU, C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L*, 6 December 2012; CJEU, C-457/12, *S. v. Minister voor Immigratie, Integratie en Asiel und Minister voor Immigratie, Integratie en Asiel v. G. Vorabentscheidungsersuchen des Raad van State (Niederlande)*, 12 March 2014; CJEU, C-87/12, *Kreshnik Ymeraga and Others v. Ministre du Travail, de l'Emploi et de l'Immigration Vorabentscheidungsersuchen der Cour administrative (Luxemburg)*, 8 May 2013; CJEU, C-86/12, *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013; CJEU, C-165/14, *Alfredo Rendón Marín v.*

of residence and the right to work within the territory of Member States, including the Member State of which the child (or the adult in exceptional cases) is a national.

Regarding the **ECHR**, third-country nationals being expelled from an EU Member State might primarily rely on **Arts. 3 and 8**, and **Art. 13 in conjunction with Arts. 3 and 8**, as well as on **Art. 1 Prot. 7 if their prior stay was lawful. As opposed to that**, those third-country nationals who were granted leave to stay as a result of their residence permit withdrawal have **no recourse** to the ECHR since they are not at risk of expulsion.

2. National security threat definition in EU law (key elements)

2.1. Relevance in classified data cases

In the absence of commonly applied definitions for '**national security**', '**public security**', and '**public order**' by the Member States, different written or unwritten thresholds and standards might be established to assess whether a specific applicant constitutes a national security threat. This situation can easily lead to the arbitrary use of these concepts.¹³

Consequently, the CJEU has already stated that the **concepts of 'national security' and 'public order'** found in different EU legal instruments (and having been interpreted by the CJEU) are **universally and uniformly applicable within the interpretation of EU law**; regardless of the directive and the nature of the case where the concepts emerge and where the Court originally provided its interpretation thereto.¹⁴ Accordingly, the interpretation '**public security**' within the meaning of the Free Movement Directive must be taken into account irrespective of the legal status of the person concerned.

Therefore, it is important to review the different cases adjudicated by the Court, and to elaborate the main components of the terms '**national security**', '**public security**', and '**public order**' and the standards of assessment in the case law of the Court.

2.2. Relevant definitions and legal standards of assessment of the risk to national security

So far, there has not been any preliminary reference ruling in CJEU case law concerning **asylum law** which interprets the term '**danger to the security of the Member State**' in the meaning of Art. 14(4)(b) and Art. 17(1)(d) of the Qualification Directive. These provisions provide for the revocation or the rejection of granting of refugee status or subsidiary protection based on national security grounds. However, there has been some guidance given by the Court on Art. 24(1) of the Qualification Directive concerning the rejection of issuance or revocation of a residence permit based on '**compelling reasons of national**

Administración del Estado, 13 September 2016; CJEU, C-304/14, *Secretary of State for the Home Department v. CS*, 13 September 2016; CJEU, C-133/15, *H. C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others Vorabentscheidungsersuchen des Centrale Raad van Beroep*, 10 May 2017; CJEU, C-82/16, *K.A. and Others v. Belgische Staat*, 8 May 2018.

¹³ HFHR, HHC, Kisa, *Right to Know, Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, September 2021.

¹⁴ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §64.; CJEU, C-467/02, *Inan Cetinkaya v. Land Baden-Württemberg*, 11 November 2004, §43.

security or public order'.¹⁵ Regarding **asylum detention**, the CJEU has already interpreted Art. 8(3)(e) of the Reception Directive. This provision provides for the possibility that an applicant may be detained when the protection of national security or public order so requires.¹⁶

No ruling has been provided by the Court on the interpretation of Art. 12(1) of the Return Directive, which prescribes that the information on reasons in fact given by the return decision may be limited '*in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences*'. However, with regard to persons enjoying the right to free movement under the Free Movement Directive, the Court has an extensive jurisprudence on the interpretation of public security and public order for which the definitions are equally applicable to all procedures where EU law is implemented.¹⁷

Based on the jurisprudence of the Court, the relevant terms identified for the Template are defined in EU law as follows:

The term '**public security**' ('**national security**') has been held by the CJEU to cover both a Member State's internal and external security.¹⁸ The Court has stated that a threat to the functioning of the 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.¹⁹ According to the CJEU, internal security may be affected by a '*direct threat to the peace of mind and physical security of the population of the Member State concerned*'.²⁰ It also presupposes the existence of a threat to public security that is of a '*particularly high degree of seriousness*'.²¹

The term '**public order**' has been held by the CJEU to cover the existence of '*a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*'.²² The Court emphasises that this means more than the mere '*perturbation of the social order which any infringement of the law involves*'.²³

'National security' and 'public order' cover cases where an applicant belongs to an association which supports international terrorism or supports such an association.²⁴ Nonetheless, in the case of *H.T.* upon interpreting the 'compelling reasons of national security or public order' in the meaning of Art. 24(1) of the Qualification Directive, the CJEU held that, support of

¹⁵ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014.

¹⁶ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016; CJEU, C-18/16, *K. v. Staatssecretaris van Veiligheid en Justitie*, 14 September 2017.

¹⁷ CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, 23 November 2010; CJEU, C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, 4 October 2012.

¹⁸ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §§65-67.

¹⁹ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §78.

²⁰ CJEU, joined cases of C-331/16 and C-366/16, *K v. Statssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, 2 May 2018, §42.

²¹ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §78.

²² CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §79.

²³ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §79.

²⁴ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §80.

terrorist organisation does not automatically lead to the application of '*compelling reasons of national security or public order*' in the meaning of Art. 24(1).²⁵

The judgment delivered in the case of *J.N.* in the context of asylum detention under Art. 8(3)(e) of the Reception Directive provides for the same definition as laid down by the CJEU in the cases interpreting the Free Movement Directive. It held that it is only justified 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.²⁶ Furthermore, the danger posed by the applicant must be based on consistent, objective and specific evidence.²⁷ Such reasonable grounds must be determined by an assessment of the facts within the knowledge of the authorities of the Member States and in light of the overall examination of all the circumstances of the individual case concerned.²⁸

Member States' administrative authorities and courts are bound by certain procedural requirements concerning the application of the '*public security exception*,' such as the criteria of **individual assessment**, even if in the level of protection against expulsion in a given case is not the same as that guaranteed under the Free Movement Directive.²⁹ Therefore, an individual assessment carried out by the competent authorities concerning the application of the public security exception is also needed with regard to decisions on the exclusion from refugee/subsidiary protection status, rejection of an asylum application, a detention order or a return decision.

In the *H.T.* judgment, the CJEU held that the competent authority, under the supervision of the national courts, is obliged to make an individual assessment of the specific facts regarding the actions of both the organisation and the person concerned in order to decide on the revocation of a residence permit issued for a refugee; even in cases where the applicant provides support for a terrorist organisation.³⁰ Accordingly, it must be ascertained, in particular, whether the applicant has committed terrorist acts; whether and to what extent the applicant was involved in planning, decision-making or directing other persons with a view to committing acts of that nature; and whether and to what extent the person concerned financed such acts or procured for other persons the means to commit them.³¹

In the joined cases of *K.* and *H. F.*, the CJEU stated that the concept of '*measures taken on grounds of public policy or public security*', within the meaning of the first subparagraph of Art. 27(2) of the Free Movement Directive should be interpreted to mean that a threat must

²⁵ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §99.

²⁶ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §67.

²⁷ CJEU, joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and Czech Republic*, 2 April 2020, §159.

²⁸ CJEU, joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and Czech Republic*, 2 April 2020, §159.

²⁹ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 24 June 2015, §77.; CJEU C-371/08, *Nural Ziebell v. Land Baden-Württemberg*, 8 December 2011, §86.

³⁰ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §99.

³¹ CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014, §90.

be based on an individual assessment.³² The latter must take into account the personal conduct of the individual concerned, and in the case of a decision to exclude that individual from refugee status (as in this very case), the domestic authorities must consider the factors on which that decision is based. Specifically, the authorities should deliberate on the '*nature and gravity of the crimes or acts that he is alleged to have committed, the degree of his individual involvement in them, whether there are any grounds for excluding criminal liability, and whether or not he has been convicted*'.³³ The authorities must also take into account '*the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population*'.³⁴

It follows that establishing that the applicant poses a national security threat, and the consequences of this finding, should be decided by the competent authorities. The establishment of the former cannot automatically lead to detrimental consequences for the applicant regarding their loss of status, rejection of application, expulsion or detention, etc. Furthermore, the CJEU held that it is not possible to rely on Art. 72 TFEU to claim that someone poses a national security threat for the sole purpose of general prevention, or without establishing any direct relationship with a particular case.³⁵

3. Individual assessment criteria in EU law versus binding opinions of the security agencies

Basic problem

This issue arises when the opinion of the security agencies establishing the national security threat posed by the applicant is binding over the decision of the asylum and immigration authorities; or even if not binding, usually followed by these authorities.³⁶ In these cases, decisions on the merits in asylum (including the question of detention) and migration procedures are only formally issued by the competent authorities, and are in fact based on the opinions of the security agencies.³⁷ The problem is aggravated by the fact that the latter authorities are not bound by the relevant EU directives and have no competency to carry out asylum or return procedures. This de facto deprivation of power suggests that the relevant domestic legislation and its application in practice contradict EU law.

³² CJEU, joined cases C-331/16 and C-366/16, *K v. Statssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, 2 May 2018, §48, §§65-66.

³³ CJEU, joined cases C-331/16 and C-366/16, *K v. Statssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, 2 May 2018, §66.

³⁴ *Ibid.*

³⁵ CJEU, C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and Czech Republic*, 2 April 2020, §160.

³⁶ This is the case in Hungary. See HFHR, HHC, *Kisa Right to Know, Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, September 2021.

³⁷ This part is not applicable to applicants defined under point (iii) of 1.2. (see above), since in their case there is no procedural rule laid down by EU law as to the issuance of decisions.

3.1. Asylum procedure

According to Art. 2(f) of the Procedures Directive, the '*determining authority*' means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases. Furthermore, in light of Preamble (16) and (17) of that Directive, the personnel of the determining authority must have appropriate knowledge or have been trained in the field of international protection (also prescribed by Art. 4(3) of the Procedures Directive), and must conduct their activities pursuant to the applicable deontological principles.

The determining authority is responsible for an appropriate examination of applications in accordance with the Procedures Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks.³⁸ Even if there are serious national security or public order concerns, Member States shall not jeopardise the adequate and complete examination of the application, and must ensure the applicant's effective access to basic principles and guarantees provided for in the Procedures Directive.³⁹

Apart from the determining authority referred to in Art. 4(1) of the Procedure Directive, another authority might only be designated with a view to either conduct the Dublin procedure or the border procedure under Art. 43. Otherwise, the determining authority is responsible to conduct the procedure. The exclusive power for the determining authority to examine and decide on asylum applications also follows from Art. 10(3)(d) of the Procedure Directive. Accordingly, the determining authority might seek advice from experts on particular issues. This contributes to the decision-making of the determining authority. In the absence of further rules on the procedure of experts, it can be considered that the security agencies fall under the scope of experts in the meaning of Art. 10(3)(d) of the Procedures Directive.

The CJEU has already reinforced that it is the duty of the determining authority alone, acting under the supervision of the courts, to carry out the assessment of the facts and circumstances laid down in Art. 4 of the Qualifications Directive.⁴⁰ It also noted that examination must include an individual assessment, and concluded that the determining authority cannot base its decision solely on the conclusions of an expert's report.⁴¹ Moreover, if an expert's opinion is sought in the course of the assessment of the relevant facts and circumstances (under Art. 4 of the Qualification Directive), the detailed rules on requests for expert opinions should also comply with other relevant provisions of EU law; especially with the fundamental rights enshrined in the Charter.⁴²

Consequently, it seems from the Directives and the relevant judgment of the CJEU cited above, that the determining authority, even when an expert opinion is sought, cannot decide on the merits of an asylum claim by relying solely and automatically on the decision of

³⁸ Art. 4(1) Procedures Directive.

³⁹ Preamble (20) of the Procedures Directive.

⁴⁰ CJEU C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, §40.

⁴¹ CJEU C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, §§41-42 and 45.

⁴² CJEU C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, § 34-35.

another authority competent for assessing a special, particular aspect of the case. The determining authority must also carry out its own examination as required under Art. 4(3) of the Qualifications Directive⁴³ (keeping in mind the exclusion clauses in Qualification Directive Arts. 12, 14, 17 and 19), and conduct a necessity and proportionality assessment.⁴⁴

Accordingly, the powers of the determining authority cannot be delegated to any other authority (including specialised authorities such as security agencies), except when such delegation is authorised under the Procedure Directive in cases listed in Art. 4(2) thereof. Such a delegation of powers and the lack of an individual assessment, as well as the absence of examination of necessity and proportionality, violates the procedural guarantees required by EU law.

3.2. Detention in asylum procedure

Art. 8(2) of the Reception Directive states that Member States may detain an applicant when it proves necessary, and on the basis of an individual assessment of each case if other less coercive alternative measures cannot be applied effectively. The CJEU reinforced the importance of Art. 8(2) in the case of *J.N.* upon interpreting Art. 8 of the Reception Directive, and noted that the ordering of detention must also be reasonable and proportionate to the legitimate purpose.⁴⁵ It held that even if the applicant poses a threat to national security, this mere fact cannot automatically lead to the ordering of detention under Art. 8(3)(e) of the Reception Directive.⁴⁶ It can only be ordered if the national security or public order so requires. The CJEU held that the competent national authorities have the obligation to determine, prior to ordering the detention of the applicant 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 applicant's liberty. Clearly, the national authorities are required to carry out a balancing exercise.⁴⁷ These principles laid down by the Court in the *J.N.* judgment, were reiterated in the *K.* judgment and the *V.L.* judgment.⁴⁸

With regard to the aforementioned, it can be concluded that a detention order based exclusively on the opinion of the security agencies, and lacking any individual assessment of the circumstances of the applicant and his/her individual case, is in conflict with EU law.

3.3. Return procedure

The Preamble (6) of the Return Directive requires a fair and transparent procedure in which decisions should be adopted on a case-by-case basis. Furthermore, Art. 5 of the Return Directive prescribes four factors that must be taken into account upon the delivery of a return

⁴³ CJEU, C-901/19, *CF, DN v. Bundesrepublik Deutschland*, 10 June 2021, §§41-42. The CJEU stated that an application for asylum must be subject to an individual assessment; in respect of which a whole series of factors must be taken into account.

⁴⁴ Article 52(1) of the Charter.

⁴⁵ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §61, §63.

⁴⁶ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §61.

⁴⁷ CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, §69.

⁴⁸ CJEU, C-18/16, *K. v. Staatssecretaris van Veiligheid en Justitie*, 14 September 2017, §48; CJEU, C-36/20 PPU, *Ministerio Fiscal v. V.L.*, 25 June 2020, §102.

decision. These are namely: the best interest of the child, family life, the state of health of the third-country national concerned, and respect for the principle of non-refoulement. Moreover, the best interest of the child and respect for family life are also observed by the Charter (Arts. 24 and 7, respectively).⁴⁹ It follows that even if an expert opinion (*i.e.* the opinion of the security agencies with regard to the national security threat posed by the applicant) is sought, the immigration authority cannot adopt a decision by solely and automatically relying on the decision of another authority. The expert opinion is only concerned with assessing a special, partial aspect of the case without carrying out its own examination as required under EU law. Therefore, a decision that is based exclusively on the opinion of the security agencies establishing that the applicant poses a threat to national security is in violation of EU law if it does not take into account other factors mentioned above during the assessment, and does not apply the necessity-proportionality test regarding the fundamental rights of the applicant.⁵⁰

Based on ECtHR jurisprudence, both asylum and immigration authorities must have access to the '*totality of the file constituted by the relevant national security body in order to make its case against the alien, including to the classified documents*'.⁵¹ This requirement under international law presupposes that the authorities are enabled to make their own, individual decision by applying a proportionality assessment based on all the material provided to them (*i.a.* by the security agencies), as to whether the threat to national security would indeed justify the detrimental measure to be carried out regarding the applicant. It follows that legal systems in which immigration authorities do not have access to reasons (namely to the classified information) why someone is considered a threat to national security are not compatible with ECHR standards.

4. Procedural safeguards - right to an effective remedy, rights of the defence and right to good administration

Basic problem:

Applicants who are deemed to pose a threat to national security by the national authorities do not receive any reasoning (or the reasoning is insufficient)⁵² with regard to that assessment. Therefore, they are not in a position to effectively challenge the decision of the competent national authorities before the courts or second instance authorities, and have no opportunity to submit arguments in order to contest the establishment of a threat prior to the delivery of the administrative decision.

4.1. EU law and CJEU jurisprudence

4.1.1. General safeguards

Three general principles of the EU law should be discussed under the general safeguards with regard to decisions where the underlying data is classified. These are namely, the **rights of the defence** entailing the **right to a reasoned decision** and the **right to be heard**; the **right**

⁴⁹ See CJEU, C-112/20, *M. A. v. État belge*, 11 March 2021, §26.

⁵⁰ Art. 52(1) of the Charter.

⁵¹ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §156 (iii).

⁵² E.g. only a general statement that the applicant is supporting a terrorist organisation.

to an effective remedy; and the **right to good administration**, comprising the right to a reasoned decision and the right to be heard. It follows from the nature of general principles that wherever EU law is applicable, it is to be observed. Furthermore, all the three are enshrined in the Charter (Art. 47 and 41⁵³), and ensure the universal applicability of these fundamental rights in all procedures when Member States implement EU law (except for the right to good administration which applies only to EU institutions).⁵⁴ Although the three principles closely intertwine with each other, we discuss them separately below:

The rights of the defence and the right to an effective remedy (Art. 47 the Charter):

The **rights of the defence**, declared as a general principle of EU law, includes the **right to be heard** and the **right to a reasoned decision. This is ensured by Art. 47 of the Charter.**⁵⁵ The rights of the defence applies not only in a judicial review procedure but also in administrative ones as it aims to enable the person *'to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (...)*'.⁵⁶ In addition, the right to be heard guarantees every person the opportunity to effectively make their views known during an administrative procedure and before the adoption of any decision liable to adversely affect their interests.⁵⁷ On the other hand, the rights of the defence also poses obligations for the authorities. Accordingly, the authorities must pay due attention to the observations submitted by the applicant, carefully and impartially examine all the relevant aspects of the individual case, and give a detailed statement of the reasons for their decision.⁵⁸ The CJEU has held that when the authorities of the Member States take measures which come within the scope of EU law (holds for all the four types of applicants addressed by the Template), they are obliged to observe the rights of the defence of addressees of decisions which significantly affect their interests.⁵⁹

Furthermore, with regard to asylum detention, it can be argued by analogy to the case of *M.G., N.R.*, that before the adoption of a detention decision based on national security reasons (Art. 8(3)(e) of the Reception Directive), an asylum-seeker's right to be heard must be ensured. Otherwise, the applicant would be deprived of the possibility of better arguing their defence to the extent that the outcome of that administrative procedure could have been different.⁶⁰

⁵³ The right to good administration as laid down in Art. 41 of the Charter only applies to EU institutions, whereas the general principle thereof is also applicable to Member States.

⁵⁴ Art. 51(1) of the Charter.

⁵⁵ CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, §34; CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §48.

⁵⁶ CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §47; CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, §37; CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §35.

⁵⁷ CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §46.

⁵⁸ CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §48; CJEU, C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 21 November 1991, §14.

⁵⁹ CJEU, C-383/13 PPU, *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, §35.

⁶⁰ CJEU, C-383/13 PPU, *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, §45.

The right to an **effective remedy** and to a fair trial constitutes the general principle of EU law. **It is ensured by Art. 47 of the Charter.** Significantly, it is not confined to disputes relating to civil rights and obligations or to criminal matters, as in the ECHR. In fact, as established in the judgment of *Les Verts v. the EP*, its applicability is universal in the field where Member States implement EU law since the EU is based on the rule of law.⁶¹

The right to an effective remedy in asylum procedures is provided by Art. 46(3) of the Procedures Directive which provides for a full and *ex nunc* examination of both facts and points of law. The CJEU has already ruled that the characteristics of the remedy provided in Art. 46 must be determined in a manner that is consistent with Art. 47 of the Charter, and which constitutes a reaffirmation of the principle of effective judicial protection.⁶² The Court emphasised that the principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements, in particular the rights of the defence; the principle of equality of arms; the right of access to a tribunal; and the right to be advised, defended and represented.⁶³

In return procedures, Art. 13 of the Return Directive provides for an effective remedy against a return decision. According to CJEU case law, the requirements of an effective remedy provided for in Art. 13(1) of the Return Directive must be laid down in compliance with Art. 47 of the Charter.⁶⁴

Right to good administration as a general principle of EU law:

The general principle of the **right to good administration** includes the **right to be heard** and the **right to a reasoned decision**.⁶⁵ It is enshrined in Art. 41 of the Charter, however, that article is addressed exclusively to EU institutions.

In the *YS* judgment the CJEU established that Art. 41 'is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union'.⁶⁶ The Court recalled the *Cicala* judgment where the CJEU first came to this conclusion in 2011.⁶⁷ It then continued by referring to the *HN* judgment which stated that 'the right to good administration (...) reflects a general principle of EU law'.⁶⁸ Judgments such as those issued in the cases of

⁶¹ CJEU, Case 294/83, *Les Verts v. European Parliament*, 23 April 1986, [1986] ECR 1339, §23.

⁶² CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §31.

⁶³ CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §§30-32.

⁶⁴ CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, §127.

⁶⁵ CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, §33-34.

⁶⁶ CJEU, joined cases C-141/12 and C-372/12, *YS, M, S v. Minister voor Immigratie, Integratie en Asiel*, 17 July 2014, §67.

⁶⁷ CJEU, C- 482/10, *Teresa Cicala v. Regione Siciliana*, 21 December 2011, §28. See A. M. Reneman, G. Beck, N. Mole, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>, p. 30.

⁶⁸ CJEU, joined cases C-141/12 and C-372/12, *YS, M, S v. Minister voor Immigratie, Integratie en Asiel*, 17 July 2014, §68. See A. M. Reneman, G. Beck, N. Mole, *The application of the EU Charter of Fundamental Rights to*

*Mukarubega*⁶⁹ and *Boudjlida*⁷⁰ in the field of immigration, were closely followed in time by the *YS* judgment and confirmed the non-applicability of Art. 41 to national authorities. Therefore, the duty to state reasons in case law is not connected to the right to good administration under Art. 41 of the Charter, but rather to the right to an effective remedy. Consequently, it is discussed in close relation to Art. 47. The reasoning for that seems quite evident: the person concerned must know the reasons of a decision in order to decide whether or not they want to submit an appeal. Once they decide to request judicial review, its effectiveness can only be ensured if the person is able to submit their arguments against the decision at issue.⁷¹

Consequently, when it comes to the conduct of national authorities, individuals have to count on the general principle of EU law (and Art. 47 of the Charter) relating to the right to a reasoned decision, rather than relying on Art. 41 of the Charter.⁷²

4.1.2. Access and use of classified information in administrative procedures: scope and conditions (essence of the information and 'special representative')

The CJEU has already settled the minimum safeguards regarding access and use of classified information by the applicant in administrative procedures, where classified data is referred to in the administrative decision as the basis of the national security threat assessment.⁷³ Even though the case of *ZZ* concerned an Algerian-French family member of an EU citizen, the CJEU established standards therein as derived from Art. 47 of the Charter. Moreover, the standards were reiterated by the CJEU in its subsequent judgments by referring to the *ZZ* judgment, also in cases not concerning migration or aliens.⁷⁴ Consequently, these standards apply to all cases concerning classified information, based on EU law, where Art. 47 of the Charter is applicable. This includes asylum cases (regardless of being a decision on the merits or a decision ordering asylum detention) and return procedures, regardless of the legal status of the person concerned.⁷⁵

asylum procedural law, October 2014, <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>, p. 30.

⁶⁹ CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014.

⁷⁰ CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014.

⁷¹ CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, §48.

⁷² A. M. Reneman, G. Beck, N. Mole, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, <https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>, p. 31.

⁷³ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013.

⁷⁴ CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Kadi*, 18 July 2013, §§100; a case not concerning migration or asylum: CJEU, C-437/13, *Unitrading Ltd. v. Staatssecretaris van Financiën*, 23 October 2014, §§20-21.

⁷⁵ Note that it is not applicable in cases concerning temporary stay of third-country nationals as the relevant regulation primarily falls outside the scope of EU law (field of application is determined by the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof).

In the ZZ judgment, the CJEU held that the failure to precisely and fully disclose the grounds on which a decision taken must be assessed in conformity with the requirements under Art. 47 of the Charter, and with respect to the requirements according to which limitations of rights, shall genuinely meet the respective objectives and shall be subject to the principles of necessity and proportionality as set out in Art. 52(1) of the Charter.⁷⁶

According to the CJEU, 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.⁷⁷

In light of the ZZ judgment, the applicant must be able to put forward an effective defence, i.e. to contest any specific information with regard to the alleged threat to national security. It follows logically that the applicant is able to enjoy their rights of the defence if the specific information is at least partially disclosed to them.

The effectiveness of the judicial remedy under Art. 47 of the Charter requires that, as a general rule, the applicant must 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. The cognisance of that information is necessary to make it possible for the applicant *'to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (...)'*.⁷⁸ Once the case is at the court, the applicant *'must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them'*.⁷⁹

However, if the authority refuses full disclosure of the information based on national security concerns, the judiciary must accommodate both the state's security considerations as well as the applicant's procedural rights.⁸⁰ However, an applicant's right to effective remedy can only be limited to the extent that is strictly necessary.⁸¹ In that regard, 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. Therefore, the applicant ***'must be informed, in any event, of the essence of the grounds'*** on which the rejection of the application or withdrawal of status is based.⁸²

Importantly, the CJEU makes the distinction between the 'essence of the grounds' on which the decision is based, and the evidence underlying the grounds. With regard to the former,

⁷⁶ CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §§ 50-54.

⁷⁷ CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §56.

⁷⁸ CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §53; CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission v. Kadi, 18 July 2013, §100; See CJEU, C-222/86, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others, [1987] ECR 4097, §15.

⁷⁹ CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §55.

⁸⁰ CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §57.

⁸¹ CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §64.

⁸² CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013, §65.

the mere allegation of national security threat is insufficient. In the *ZZ judgment*, the CJEU merely mentioned that the person concerned must be informed of the 'essence of the grounds' which constitute the basis of the decision in question. However, in the *Kadi II judgment* it has given some guidance on what the 'essence of the grounds' might entail; *i.e.* which information provided to the person concerned is satisfactory for the protection of his/her rights of the defence.⁸³ According to that, **firms, persons** and **exact time of events** or any other allegation concerning the applicant's conduct giving rise to the threat of national security must be **unequivocally identified** by the authorities.⁸⁴

Consequently, the CJEU held in the *Kadi II* judgment that the allegation that Mr Kadi had been the owner of several firms in Albania which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden, is insufficiently detailed and specific. No indication was given of the identity of the firms concerned, when the alleged conduct took place, or the identity of the 'extremists' who allegedly benefitted from that conduct.⁸⁵

In contrast, such a partial disclosure is not applicable to the evidence underlying the grounds if that would '*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*'.⁸⁶

The *ZZ* judgment also provides some direction with regard to the involvement of a special advocate in the procedure.⁸⁷ The CJEU delivered its judgment regarding the compulsory state obligation to provide at least the essence of the grounds, despite the fact that under the domestic law concerned in the procedure the special advocate had the right to request directions from the competent authority to authorise the communication with the client after the classified material had been served to them. Therefore, it follows that the mere possibility that the special advocate might be able to communicate with the client does not suffice to ensure the right to an effective remedy of the applicant.

Asylum procedure:

If disclosure of information would jeopardise national security, **Art. 23(1) of the Procedures Directive** prescribes that the courts shall have access to such information [point (a)] and Member States shall establish procedures guaranteeing that the applicant's rights of the defence are observed [point (b)]. With regard to the latter, the Directive notes as an example that a legal adviser who has undergone a security check might form such a guarantee. Consequently, as 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 the defence of the applicant.

⁸³ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §§68-69; CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Yassin Abdullah Kadi*, 18 July 2013, §141, §143, §145, §147, §149.

⁸⁴ CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Yassin Abdullah Kadi*, 18 July 2013, §141, §143, §145, §147, §149.

⁸⁵ CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Yassin Abdullah Kadi*, 18 July 2013, §141.

⁸⁶ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §66.

⁸⁷ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §27 and §44.

The right to be provided with the information underlying the decision in asylum procedures is provided by Arts. 12(1)(d) and 11(2) of the Procedures Directive. With regard to the ordering of asylum detention, Art. 9(2) of the Reception Directive requires that the detention of the applicant be ordered in writing and it shall state the reasons in fact and in law on which it is based. Furthermore, Art. 9(4) sets out that the detained applicant shall immediately be informed in writing of the reasons for their detention and the procedures laid down in national law for challenging the detention order; as well as of the possibility to request free legal assistance and representation.⁸⁸ Importantly, the above mentioned articles do not allow for derogation from the obligation of the asylum authority to provide the applicant with a decision in writing of the reasons in fact and in law. Therefore, any deviation from these rules amounts to a violation of EU law.

Furthermore, the right to be heard is an inherent element of the asylum procedure and it is provided by Arts. 14 and 16 of the Procedures Directive in conjunction with Art. 4 of the Qualification Directive ('Assessment of facts and circumstances') so that the '*applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 of Directive 2011/95/EU as completely as possible*'. (Art. 16, Procedures Directive) The same right applies to the applicant during the procedure for the withdrawal of international protection in accordance with Art. 45 of the Procedures Directive.

Return procedure:

Art. 12(1) of the Return Directive establishes that the information on reasons in fact provided for the return decision might be limited in order to, for example, safeguard national and public security. Besides that, Art. 13 of the Return Directive provides for an effective remedy against the return decision issued under the aforementioned article. The precise content of Art. 12(1), i.e. if the limitation of the reasons of fact could be absolute, has not yet been interpreted by the CJEU. However, one can argue that under the standing CJEU case law, the requirements of an effective remedy provided for in Art. 13(1) of the Return Directive must be established in compliance with Art. 47 of the Charter.⁸⁹ Thus, it follows that in light of the ZZ judgment, full limitation of the reasoning would impair the essence of the right to an effective remedy. Therefore, under Art. 12(1) of the Return Directive, it is not permissible by a Member State. In order to obtain clarification on the issue from the CJEU, a question could be referred for a preliminary reference ruling.

4.1.3. The nature and scope of the judicial review with regard to the legality of the classified data

Pursuant to the ZZ judgment, **effective judicial review** with regard to the reasons invoked by the national authority regarding State security and the legality of the decision must entail the following measures described below.⁹⁰

⁸⁸ See CJEU, C-601/15 PPU *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016 and CJEU, C-18/16, *K. v. Staatssecretaris van Veiligheid en Justitie*, 14 September 2017.

⁸⁹ CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, §127.

⁹⁰ See CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §58.

The national court must verify whether the data in question were lawfully classified as 'confidential' information. It must examine if state security stands in the way of disclosure. The domestic court examines all the grounds and the related evidence based on which the decision was taken.⁹¹ The court must determine whether state security reasons block such disclosure by carrying out an independent examination of all the matters of law and fact relied upon by the competent national authority. There is no presumption that the reasons invoked by a national authority exist and are valid.⁹² If the Court concludes that state security does not obstruct disclosure, it orders the national authorities to disclose the information.⁹³ If the authority does not disclose the information despite the instruction of the court, the court examines the legality of the decision by disregarding the undisclosed information.⁹⁴

Provided that state security stands in the way of disclosure, i.e. the disclosure of information would genuinely jeopardise state security, the court must ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question, and to draw conclusions from any failure to comply with that obligation to inform them.⁹⁵

Asylum procedure:

The right to an effective remedy is provided by Art. 46(3) of the Procedures Directive, which provides for a full and *ex nunc* examination of both facts and points of law. The CJEU has already ruled that the characteristics of the remedy described in Art. 46 must be determined in a manner that is consistent with Art. 47 of the Charter which constitutes a reaffirmation of the principle of effective judicial protection.⁹⁶ The Court emphasised that the principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements, in particular: the rights of the defence; the principle of equality of arms; the right of access to a tribunal; and the right to be advised, defended and represented.⁹⁷

Return procedure:

Art. 13 of the Return Directive provides for an effective remedy against a return decision. According to CJEU case law, the requirements of an effective remedy provided for in Art. 13(1) of the Return Directive must be laid down in compliance with Art. 47 of the Charter.⁹⁸

⁹¹ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §59.

⁹² CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §§60-61.

⁹³ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §64.

⁹⁴ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §63.

⁹⁵ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §68.

⁹⁶ CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, § 31.

⁹⁷ CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §32.

⁹⁸ CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, §127.

4.2. International Standards

4.2.1. ECHR and ECtHR jurisprudence

The obligation to ensure procedural safeguards similar to EU law and CJEU jurisprudence outlined under 4.1 above is also required by the ECHR in connection with the judicial review of decisions based on classified/confidential information. It must be highlighted that according to standing ECtHR case law, alleged violations regarding decisions on the entry, stay and deportation of aliens do not fall under Art. 6(1) of the Convention.⁹⁹ Therefore, in migration related procedures, Arts. 3, 5(1) and (4), 8 and 13 in conjunction with Art. 3 and 8, as well as Art. 1 Prot. 7 might be applicable.

There have been several cases adjudicated by the ECtHR that concerned the expulsion of an alien on national security grounds. In these cases the Court, in finding a violation, 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 must be competent to reject the executive's assertion that there is a threat to national security** where it finds it arbitrary or unreasonable.¹⁰⁰ Additionally, it set out that there must be **some form of adversarial proceedings**, if need be through a **special representative** with security clearance.¹⁰¹ Regarding the latter, the Court established that concerning an allegation of Art. 13 in conjunction with Art. 8, that at least the legal representative of the applicant must be aware of the specific facts alleged against the applicant.¹⁰² This standard was also reinforced under Art. 5(4), where the Court stated that the applicant must be in the position to effectively challenge the allegations made against them. A special advocate could only effectively perform their function if the applicant is provided with sufficient information about the allegations against them to enable them to give effective instructions to the special advocate.¹⁰³

With regard to the judicial review of the national security allegation, the Court stated that the review must not have a formalistic approach. The review must not leave the security agencies full and uncontrolled discretion with regard to the establishment of a national security threat.¹⁰⁴ If the minimum degree of protection against arbitrariness is not observed, interference with the applicant's right to family and private life is not *'in accordance with the law'* in the meaning of Art. 8(2), and thus results in a violation of Art. 8 of the Convention.¹⁰⁵

⁹⁹ ECtHR, *Maaouia v. France* [GC], no. 39652/98, 5 October 2000, §40.

¹⁰⁰ ECtHR, *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008, §40; ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010, §29; *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002, §§123-124.

¹⁰¹ ECtHR, *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008, §57; ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010, §36; ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, [GC], no. 8139/09, 17 January 2012, §217.

¹⁰² ECtHR, *Bou Hassoun v. Bulgaria*, no. 59066/16, 6 October 2020, §39.

¹⁰³ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §220.

¹⁰⁴ ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010, §§31-32; ECtHR, *Bou Hassoun v. Bulgaria*, no. 59066/16, 6 October 2020, §§33-34.

¹⁰⁵ ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010, §33; ECtHR, *Bou Hassoun v. Bulgaria*, no. 59066/16, 6 October 2020, §35.

Regarding applicants being detained on the grounds of national security where the underlying data is classified, the Court set out the same standards as in cases concerning expulsion. Being similar to Art. 13, the Court stated under Art. 5(4) ECHR,¹⁰⁶ that it entails the requirement of procedural fairness according to which the judicial review must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. The proceedings must be adversarial and must always ensure 'equality of arms' between the parties. However, full adversarial procedure can be restricted based on national security considerations. Even in that case though, the domestic court must have access to the full material on which the national authority had based its decision.¹⁰⁷ It follows that even in the case of national security considerations, the applicant's procedural justice must be observed as opposed to the legitimate security concerns of the state. Regarding the accommodation of both, the Court referred to the Canadian example where the deportee is provided with a statement summarising the case against them and they have the right to be represented and to call evidence.¹⁰⁸ The confidentiality of the security material is maintained by the fact that a security-cleared council takes part at its examination and a summary of the evidence is provided to the applicant. The applicant or the legal representative has no direct access to the material.¹⁰⁹ Furthermore, '*the authorities must disclose adequate information to enable the applicant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able to participate effectively in court proceedings concerning continued detention*'.¹¹⁰

Under Art. 1 Prot. 7 ECHR, the Court has recently set out a more detailed guide regarding the permissible restrictions of the procedural rights of a legally staying person under an expulsion procedure related to national security grounds. These standards must also be ensured in relation to the other articles of the Convention where '*a decision [is] reached in accordance with law*' because the term '*in accordance with law*' has the same meaning throughout the Convention.¹¹¹

Based on the *Muhammad and Muhammad* judgment, Art. 1 Prot. 7 entails the right to be informed of the relevant factual elements leading to the consideration that the applicant represents a threat to national security, and the right to have access to the content of the documents and the information in the case file on which the authorities relied on when deciding on their expulsion.¹¹² These rights can be limited on the grounds of national security.

¹⁰⁶ 'Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13' see ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §202.

¹⁰⁷ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §210; ECtHR, *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996, §§130-131.

¹⁰⁸ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §210; ECtHR, *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996, §131; UN Human Rights Committee, *Mansour Ahani v. Canada*, communication no. 1051/2002, 15 June 2004.

¹⁰⁹ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §210.

¹¹⁰ ECtHR, *Sher and Others v. the UK*, no. 5201/11, 20 October 2015, §149.

¹¹¹ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.; W. A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015, p. 1130.

¹¹² ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §129. The standards set out therein have been recently reinforced and applied in the case of ECtHR, *Hassine v. Romania*, no. 36328/13, 9 March 2021.

The Pakistani nationals resided in Romania with student visas. The Intelligence Service initiated a procedure at the Prosecutor's Office for them to be declared 'undesirable persons'. According to the classified

However, even in the event of limitations, the alien must be offered an effective opportunity to submit reasons against their expulsion and be protected against any arbitrariness. Arbitrariness is prevented if the limitations are (i) **duly justified** and (ii) **sufficiently counterbalanced**. Regarding the latter, there were four factors laid down by the Court.¹¹³ Based on these factors and the findings of the Court in that particular case, the following standards can be concluded:

1. Information as to the factual reasons for the expulsion must be provided to the applicants, and in this regard, the indication of the legal provisions is not sufficient;¹¹⁴
2. Information must be provided to the applicant about the conduct of the proceedings and the domestic mechanism aiming at counterbalancing the rights limitations (e.g. access to lawyers having clearance);¹¹⁵
3. Effective access to representation during the procedure must be provided by the domestic law and practice to the applicants. The representative must have access to the documents, and thereafter, the communication of the representative with the applicant must be ensured. Additionally, the state must facilitate the applicants' access to lawyers who have security clearance and therefore access to the files. The presence of the lawyers without access did not ensure an effective defence;¹¹⁶ and
4. An independent authority (court) must be involved in the procedure having access to the '*totality of the file constituted by the relevant national security body*'.¹¹⁷ The court must verify whether the expulsion was substantiated by the supporting evidence and verify the credibility of the document submitted to them. The mere indication that the court can see the evidence in the files is not enough with regard to the assessment of the national security threat. The nature and the degree of scrutiny must transpire from the reasoning of the court's decision.¹¹⁸

It follows that the expulsion procedure, decision and its review procedure under Art. 1 of Protocol No. 7 requires the observation of the safeguards set out above in points (1)-(4) in order to be compliant with the Convention.

Information provided in a Convention-compliant manner to the applicant has been addressed in ECtHR case law. Accordingly, it must be sufficiently specific.¹¹⁹ An outline of the national security case against the applicant, or the mere enumeration of the numbers of legal

documents, the applicants intended to engage in activities capable of endangering national security. The applicants were summoned to court without providing them with documents. At the hearing, they were presented only by legal provisions and were not represented by lawyers. Consequently, the court declared them undesirable for 15 years, and ordered their administrative custody and deportation. A day later, the Intelligence Service's finding was published in the press saying that the applicants were preparing a terrorist attack. They were only represented by lawyers in the appeal procedure. The lawyers did not have access to the classified files. The High Court rejected their appeal and they subsequently left Romania.

¹¹³ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §§147-157.

¹¹⁴ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §168, §175.

¹¹⁵ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §153, §§182-183.

¹¹⁶ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §§154-155, §189, §191.

¹¹⁷ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §155(iii).

¹¹⁸ ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §156(v), §§194-196, §199-201.

¹¹⁹ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §220.

provisions about the accusations against them cannot suffice.¹²⁰ In the judgment of *A. and Others*, the Court gave an example for such a specific information that is at least to be shared with the applicant in order to enable them to provide his representatives and the special advocate with information with which to refute them without them having to know the details or sources of the evidence which formed the basis of the allegations: the allegation that the applicant had attended a terrorist training camp at a stated location between stated dates; the naming of suspected terrorists and their supporters with whom the applicant had allegedly met; or a detailed account of the applicant's activities satisfies the requirement of sufficient specificity.¹²¹ The provision of the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects, and meetings with named terrorist suspects with specific dates and places also proves to be sufficiently detailed.¹²² The link between the evidence such as large sums of money moving through the applicant's bank account or the involvement in raising money through fraud and terrorism must be disclosed to the applicant.¹²³

4.2.2. UNHCR Standards

The argumentation of the ECtHR is also shared by the UNHCR. It prescribed in its note on exclusion that the fairness of the asylum procedure must be guaranteed through procedural safeguards provided to the applicant even in exclusion procedures.¹²⁴ Accordingly, there is a need for individual consideration of each case. The applicant must be provided with the opportunity to consider and comment on the evidence on the basis of which exclusion may be made. Furthermore, the reasons for exclusion must be given in writing and the right to appeal an exclusion decision to an independent body must be provided to the applicant. The suspensive effect of a judicial procedure is reinforced by the UNHCR as it notes that no removal of the individual concerned shall take place until all legal remedies against a decision to exclude have been exhausted.¹²⁵ By referring to ECtHR case law, the UNHCR emphasises that national security interests may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.¹²⁶ As such, the UNHCR notes a safeguard that whereas the general content of the sensitive material should be given to the

¹²⁰ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §210 and ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §168.

¹²¹ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §220; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 2 10112/16, 25 June 2019, §25, §121.

¹²² ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §222.

¹²³ ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §223.

¹²⁴ UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, <https://www.refworld.org/docid/3f5857d24.html>, para. 98.

See also UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, HCR/GIP/03/05, <https://www.refworld.org/docid/3f5857684.html>, para. 36.

¹²⁵ UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, <https://www.refworld.org/docid/3f5857d24.html>, para. 98.

¹²⁶ UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, <https://www.refworld.org/docid/3f5857d24.html>, para. 113 and the referred §131 of the *Chahal* judgment (ECtHR, *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996).

applicant, the details of it can be reserved to the legal representative; provided that the latter had gone through a security clearance check.¹²⁷ The UNHCR further notes that expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.¹²⁸

Concluding remarks:

Based on EU law and the ECHR, the relating jurisprudence of the CJEU and the ECtHR as well as the guidelines of the UNHCR, the applicant (or the legal representative acting on his/her behalf and provided that their communication is not restricted) must have access to at least the essence of the factual grounds of the decision containing information that is specific enough to enable the person to effectively challenge those allegations made against them in all circumstances; i.e. even in the event of national security considerations. As noted above (see Chapter 4.1.2), such information must be provided to the applicant to the greatest possible extent, and only a specific part thereof might be kept undisclosed for well circumscribed, particular reasons.¹²⁹ It follows from all the aforementioned, that the domestic law and practice according to which access to the classified information during the proceedings is only provided to the court, and the applicant is left without any information about the grounds of the decision regarding the reasons for the national security consideration, contradicts EU and international law standards.

5. Direct application of EU law in national security cases

Basic problem:

This section is relevant if national authorities tend to refuse to apply EU law by invoking national security or public order concerns as a justification why the Member State can disregard EU law or interpret/apply EU law as allowing them to act in such a way.

5.1. Invoking national security or public order gives no exemption from the application of relevant EU law

In several judgments, the CJEU has already established that Member States cannot waive the application of binding EU law by relying on grounds of state security, public or national security on the basis of Art. 72 TFEU, Art. 4(2) TEU or Art. 346(1)(a) TFEU.¹³⁰ The CJEU held that Art. 72 TFEU, read in conjunction with Art. 4(2) TEU does not confer on Member States the power to automatically depart from secondary EU law without authorisation from EU

¹²⁷ UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, <https://www.refworld.org/docid/3f5857d24.html>, para. 113.

¹²⁸ UN High Commissioner for Refugees (UNHCR), *Addressing Security Concerns without Undermining Refugee Protection, UNHCR's Perspective, Rev. 1.*, 2001, https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/UNHCRs_perspective_addressing_security_concerns_eng.pdf, para. 28.

¹²⁹ CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §§65-66.

¹³⁰ *i.a.* CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §38; CJEU, C-387/05, *European Commission v. Italian Republic*, 15 December 2009, §45.

institutions.¹³¹ Nor can it depart from the provisions of EU law based on reliance on the interests linked to the maintenance of law and order and the safeguarding of internal security.¹³² It also follows from these judgments that Member States cannot introduce or apply national laws contrary thereto that would undermine the effective application of relevant EU law by invoking those grounds.

5.2. The application of the relevant EU law is binding for domestic authorities

The CJEU has recently confirmed the principle of direct effect, the mandatory application of the principles of effectiveness, the primacy of EU law in the field of asylum,¹³³ and the full practical effect (*'effet utile'*) of EU law,¹³⁴ which are equally binding on administrative authorities and courts.¹³⁵ The Court stated that *'it should be emphasized, first, that, in the light of the principle of primacy of EU law, where it is impossible for it to interpret national legislation in compliance with the requirements of EU law, any national court, acting in the exercise of its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case before it (...).'¹³⁶ (...) The duty to disapply, if necessary, national legislation that is contrary to a provision of EU law which has direct effect is owed not only by the national courts but also by all organs of the State, including the administrative authorities, called on, in the exercise of their respective powers, to apply EU law (...).'*¹³⁷

6. Pending preliminary reference procedure before the CJEU

On 27 January 2021, the Metropolitan Court in Hungary stayed the judicial review procedure and referred five questions to the CJEU to be interpreted in a preliminary reference ruling. The CJEU registered the case under no. C-159/21. The applicant of the case is a Syrian national who was granted refugee status in 2012. Nonetheless, the asylum authority withdrew his status in 2019 based on the opinion of the security agencies, according to which he posed a threat to national security. However, he was granted leave to stay due to non-

¹³¹ CJEU, joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and Czech Republic*, 2 April 2020, §§141-152; CJEU, C-808/18, *European Commission v. Hungary*, 17 December 2020, §215.

¹³² CJEU, joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and Czech Republic*, 2 April 2020, §§141-152; CJEU, C-808/18, *European Commission v. Hungary*, 17 December 2020, §215.

¹³³ CJEU, C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 9 March 1978, §24; CJEU, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG.*, 19 January 2010, §51; CJEU, C-144/04, *Werner Mangold v. Rüdiger Helm*, 22 November 2005, §§76-78.

¹³⁴ CJEU, C-336/00, *Republik Österreich v. Martin Huber*, 19 September 2002, §61; CJEU, joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General*, 8 March 2001, §85.

¹³⁵ CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, §§145-147, §301.

¹³⁶ CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, §139.

¹³⁷ CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, §183.

refoulement. The justifications on which the security agencies' opinion was based were not known to the asylum authority, and it relied on classified data. Furthermore, the opinion of the special agencies, by virtue of Hungarian law, is binding for the asylum authority, and unreasoned regarding the existence of a 'threat to national security'. Thus, the binding opinion of the security agencies ultimately constitutes a deprivation of asylum authority powers that appears to be contrary to EU law. Moreover, by not being made known to the applicant, neither he nor his legal representative had the opportunity to comment on the reasoning of the security agencies' opinion, nor could they dispute its substantiation in the administrative procedure. Under the Classified Data Act, the applicant submitted a request to both security agencies to have access to the classified information concerning himself. However, his requests were denied. Even if he would have been allowed access, he would not have had any possibility of using the classified data in the administrative or the judicial proceedings. Furthermore, by virtue of the relevant legislation, the security agencies have no possibilities to fulfil an access request in a limited scope, i.e. by providing the essence of the reasons on which their opinion is based.¹³⁸ As a result, the Hungarian court stayed the procedure and referred five questions to the CJEU (see **Annex I**).

Due to the pending preliminary reference procedure before the CJEU, it is advisable if legal practitioners of Member States request their national courts to suspend the domestic procedure until the delivery of the preliminary ruling by the CJEU.

¹³⁸ See more on the Hungarian legal background of the case here: HFHR, HHC, Kisa, *Right to Know, Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, September 2021.

Annex I

Questions Referred to CJEU Preliminary Reference Procedure (no. C-159/21)

1. Must Article 11(2), Article 12(1)(d) and (2), Article 23(1)(b) and Article 45(1) and (3) to (5) of the Asylum Procedure Directive – in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('Charter') – be interpreted as meaning that, where the exception for reasons of national security referred to in Article 23(1) of that directive applies, the Member State authority that has adopted a decision to refuse or withdraw international protection based on a reason of national security and the national security authority that has determined that the reason is confidential must ensure that it is guaranteed that in all circumstances the applicant, a refugee or a foreign national beneficiary of subsidiary protection status, or that person's legal representative, is entitled to have access to at least the essence of the confidential or classified information or data underpinning the decision based on that reason and to make use of that information or those data in proceedings relating to the decision, where the responsible authority alleges that their disclosure would conflict with the reason of national security?
2. If the answer is in the affirmative, what precisely should be understood by the 'essence' of the confidential reasons on which that decision is based, for the purposes of applying Article 23(1)(b) of the Asylum Procedure Directive in the light of Articles 41 and 47 of the Charter?
3. Must Articles 14(4)(a) and 17(1)(d) of the Qualification Directive and Article 45(1)(a) and (3) to (4) and recital 49 of the Asylum Procedure Directive be interpreted as meaning that they preclude national legislation according to which refugee or foreign national beneficiary of subsidiary protection status may be withdrawn or excluded by a non-reasoned decision which is based solely on automatic reference to the – likewise non-reasoned – binding and mandatory report of the national security authority and finds that there is a danger to national security?
4. Must recitals 20 and 34, Article 4 and Article 10(2) and (3)(d) of the Asylum Procedure Directive and Articles 14(4)(a) and 17(1)(d) of the Qualification Directive be interpreted as meaning that they preclude national legislation according to which that national security authority examines the ground for exclusion and takes a decision on the substance in a procedure that does not comply with the substantive and procedural provisions of the Asylum Procedure Directive and the Qualification Directive?
5. Must Article 17(1)(b) of the Qualification Directive be interpreted as meaning that it precludes an exclusion based on a circumstance or crime that was already known before the judgment or final decision granting refugee status was adopted but which was not the basis of any ground for exclusion in relation to either the grant of refugee status or to subsidiary protection?

Annex II

List of Case References

CJEU:

- CJEU, C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 9 March 1978
- CJEU, C-283/81, *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 6 October 1982
- CJEU, Case 294/83, '*Les Verts*' v. *European Parliament*, 23 April 1986, [1986] ECR 1339
- CJEU, C-222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v. Georges Heylens and others*, [1987] ECR 4097
- CJEU, C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, 21 November 1991
- CJEU, joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd. and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General*, 8 March 2001
- CJEU, C-336/00, *Republik Österreich v. Martin Huber*, 19 September 2002
- CJEU, C-224/01, *Gerhard Köbler v. Republik Österreich*, 30 September 2003
- CJEU, C-467/02, *Inan Cetinkaya v. Land Baden-Württemberg*, 11 November 2004
- CJEU, C-144/04, *Werner Mangold v. Rüdiger Helm*, 22 November 2005
- CJEU, C-387/05, *European Commission v. Italian Republic*, 15 December 2009
- CJEU, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG.*, 19 January 2010
- CJEU C-135/08, *Janko Rottman v. Freistaat Bayern*, 2 March 2010
- CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, 23 November 2010
- CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 8 March 2011
- CJEU, C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011
- CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011
- CJEU C-371/08, *Nural Ziebell v. Land Baden-Württemberg*, 8 December 2011
- CJEU, C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatrešnite raboti*, 4 October 2012
- CJEU, C-40/11, *Yoshikazu Iida v. Stadt Ulm*, 8 November 2012
- CJEU, C-356/11 and C-357/11, *O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L*, 6 December 2012
- CJEU, C-87/12, *Kreshnik Ymeraga and Others v. Ministre du Travail, de l'Emploi et de l'Immigration Vorabentscheidungsersuchen der Cour administrative (Luxemburg)*, 8 May 2013
- CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013
- CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission v. Kadi*, 18 July 2013
- CJEU, C-383/13 PPU, *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013
- CJEU, C-86/12, *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013
- CJEU, C-457/12, *S. v. Minister voor Immigratie, Integratie en Asiel und Minister voor Immigratie, Integratie en Asiel v. G. Vorabentscheidungsersuchen des Raad van State (Niederlande)*, 12 March 2014

CJEU, joined cases C-141/12 and C-372/12, *YS, M, S v. Minister voor Immigratie, Integratie en Asiel*, 17 July 2014
 CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 11 September 2014
 CJEU, C-437/13, *Unitrading Ltd. v. Staatssecretaris van Financiën*, 23 October 2014
 CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014
 CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014
 CJEU, C-160/14, *João Filipe Ferreira da Silva e Brito and Others v. Estado português*, 9 September 2015
 CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016
 CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado*, 13 September 2016
 CJEU, C-304/14, *Secretary of State for the Home Department v. CS*, 13 September 2016
 CJEU, C-133/15, *H. C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others, Vorabentscheidungsersuchen des Centrale Raad van Beroep*, 10 May 2017
 CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017
 CJEU, C-18/16, *K. v. Staatssecretaris van Veiligheid en Justitie*, 14 September 2017
 CJEU C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal*, 25 January 2018
 CJEU, joined cases of C-331/16 and C-366/16, *K v. Statssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, 2 May 2018
 CJEU, C-82/16, *K.A. and Others v. Belgische Staat*, 8 May 2018
 CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018
 CJEU, joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and Czech Republic*, 2 April 2020
 CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, 14 May 2020
 CJEU, C-36/20 PPU, *Ministerio Fiscal v. V.L.*, 25 June 2020
 CJEU, C-808/18, *European Commission v. Hungary*, 17 December 2020
 CJEU, C-901/19, *CF, DN v. Bundesrepublik Deutschland*, 10 June 2021

ECtHR:

ECtHR, *Chahal v. the United Kingdom*, no. 22414/93, 15 November 1996
 ECtHR, *Maaouia v. France* [GC], no. 39652/98, 5 October 2000
 ECtHR, *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002
 ECtHR, *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008
 ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009
 ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010
 ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, [GC], no. 8139/09, 17 January 2012
 ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 2 10112/16, 25 June 2019
 ECtHR, *Bou Hassoun v. Bulgaria*, no. 59066/16, 6 October 2020
 ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020
 ECtHR, *Hassine v. Romania*, no. 36328/13, 9 March 2021