



**CHALLENGING THE NATIONAL SECURITY CARD IN ASYLUM CASES: BRINGING  
ARTICLE 6 ECHR INTO PLAY**

by  
Zita Borbála Barcza-Szabó

LL.M. in Human Rights Capstone Project  
Supervisor: Dr. Eszter Polgári, Assistant Professor  
Central European University Private University  
Quellenstrasse 51-55, 1100 Vienna  
Austria

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## ABSTRACT

In asylum procedures where the refugee status is withdrawn based on national security considerations, notably that the refugee poses a threat to national security, there is no reasoning given to the person concerned in Hungary. Consequently, during the judicial review procedure the refugee is not in the position to effectively oppose the national security allegations and thereby his right to a fair trial is violated. If the refugee is expelled at the same time, he has recourse to the ECtHR against such an arbitrariness most obviously under Art. 1 Prot. 7. Nevertheless, if he was granted leave to stay, the Convention does not provide protection at all since according to the standing case-law of the Court, procedures concerning the residence of an alien are excluded from the scope of Art. 6 ECHR. Based on the existing literature and by the analysis of the relevant case-law of the Court, the thesis provides three main arguments in favor of the universal applicability of Art. 6 and comes up with further arguments and trajectories how the Court could include the procedures in question under the scope of the right to a fair trial ensured by the Convention. The research aims to contribute to the human rights protection of refugees and more broadly to the maintenance of the Rule of Law in Europe.

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## INTRODUCTION

Under the Hungarian law the security agencies, namely the Counter-Terrorism Office and the Constitutional Protection Office, are involved in every asylum procedure and entrusted with the task to screen the person under procedure and establish whether they pose a threat to the national security of Hungary.<sup>1</sup> In the case of Hussein, who is a fictitious character and was granted refugee status in 2012 in Hungary, the security agencies assessed that he posed a danger to national security during his status review procedure that was initiated eight years later in 2020 by the Hungarian asylum office. As a consequence, his refugee status was withdrawn but was granted leave to stay based on the principle of non-refoulement. National security reasons might lawfully necessitate the status revocation and even the expulsion of refugees.<sup>2</sup> The problem arises from the fact that Hussein was not provided with any reasoning as to why he posed a threat to national security since the authorities claimed that the underlying data and information are classified. Being not aware of the reasons, Hussein could obviously not effectively challenge the decision before the court.

The challenge of Hussein is not an isolated event. There has been an increasing number of cases registered in Hungary in 2020 concerning people who are either under expulsion or granted leave to stay.<sup>3</sup> The relevance and significance of the issue is also expressed by the continuous litigation activities of other State Parties too, such as that of Poland, Romania and Bulgaria. The European Convention on Human Rights ('ECHR') in light of the interpretation of the European Court of Human Rights ('ECtHR' or 'Court') grants protection regarding the

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<sup>1</sup> Section 57 of the Act LXXX of 2007 on asylum ('Asylum Act').

<sup>2</sup> See Art. 14 of the 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) and Art. 32 of the Geneva Convention relating to the Status of Refugees.

<sup>3</sup> ECRE – European Council on Refugees and Exiles, HHC – Hungarian Helsinki Committee (2021). Country Report: Hungary. [https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU\\_2020update.pdf](https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf), p. 120.

right to a fair trial of aliens, including refugees and asylum-seekers who are under an expulsion procedure (Arts. 3, 8 and Art. 13 in conjunction with Art. 3 or Art. 8 as well as Art. 1 Prot. 7) or are in detention [Art. 5(4)]. However, it excludes those refugees who are not expelled since the sole invocable article in their case, Art. 6 (Right to a fair trial) is not applicable in procedures that concern the entry, stay and deportation of aliens.<sup>4</sup> As a result, Hussein has no recourse to the ECtHR while his right to be heard and right to defense are seriously violated.

The objective of the thesis is to challenge this anomaly and to provide arguments why and how the Court should overrule its standing interpretation on the non-applicability of Art. 6 in asylum procedures where the underlying information of the decision is classified.

The first chapter provides the general context outlining first the facts and the applicable domestic legal background in the case of Hussein. It is followed by the description of legal consequences on the ECHR level, namely the discussion of provisions that provide protection against arbitrariness where classified information is concerned. However, since these articles only apply to expulsion and detention cases, the problem of non-applicability of Art. 6 is also briefly introduced. The second chapter discusses the ECHR standards under Art. 6 on the disclosure of classified data and explains the origins of the current status quo with regard to the exclusion of asylum cases from the scope of Art. 6. The third chapter offers the solution for the conundrum. On the one hand, it brings general arguments in favor of the universal applicability of Art. 6. On the other hand, it gives specific reasons as to why and how to overrule the relevant case-law on the non-applicability of Art. 6 in asylum cases such as that of Hussein. The research methods comprise desk research involving the analysis of the ECtHR case-law and the relevant literature.

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<sup>4</sup> ECtHR, *Maaouia v. France [GC]*, no. 39652/98, 5 October 2000.

‘Art. 6’ uniformly refers to Art. 6(1) of the Convention throughout the thesis – it is denoted as Art. 6§ 1 by the Court.

The practical component of the capstone project took the form of a “Legal Toolbox” (see Annex I). It is addressed to European legal practitioners and lists all the arguments that are to be brought up before the Court in a case similar to that of Hussein.

## CHAPTER 1

### THREAT TO NATIONAL SECURITY AS THE BASIS OF THE REFUGEE STATUS WITHDRAWAL - REASONS UNKNOWN

#### 1.1 Facts and the relevant domestic law

Hussein fled Afghanistan in 2010 due to his fear of persecution from the Taliban and was granted refugee status by the asylum authority in Hungary two years later in accordance with Section 6(1) of the LXXX Act of 2007 on asylum ('Asylum Act').<sup>5</sup> The asylum authority requested the opinion of the security agencies, namely the Counter-Terrorism Office and the Constitution Protection Office (together as 'security agencies') as to whether Hussein's stay poses a threat to national security.<sup>6</sup> None of the security agencies raised any objections. In 2016 Hussein got married with a Hungarian citizen with whom he has been living together since 2014.

In 2017 the asylum authority reviewed and upheld his refugee status. The security agencies had no objections at this time either. In 2018, his first child was born obtaining solely Hungarian citizenship. By this time Hussein had graduated from a Hungarian elementary school finishing 8 classes and spoke already Hungarian on an intermediate level. He was permanently working in an Afghan restaurant in Debrecen. Three years later the asylum authority initiated another procedure for status reviewal. At this time both security agencies established that Hussein poses a threat to the national security of Hungary. Based on that the asylum authority revoked his refugee status but established non-refoulement, thus he was not expelled from the territory of Hungary but was granted leave to stay.<sup>7</sup> Most importantly, neither

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<sup>5</sup> The hypothetical case holds for people with subsidiary protection, as well. For the sake of simplicity, I am going to refer to beneficiaries of international protection as refugees.

<sup>6</sup> The security agencies take part in each asylum-seeker's procedure by examining national security risk posed by the applicant under Section 57 of the Asylum Act. The security agencies are designated by the Government by virtue of Section 2/A(a) of the Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum.

<sup>7</sup> Sections 25/A and 25/B of the Asylum Act.

the opinions of the security agencies, nor the decision of the asylum authority included any reasoning as to why Hussein posed a risk to national security, but they referred to the fact that the underlying information had been classified based on the Classified Data Act.<sup>8</sup>

Hussein requested judicial review against the decision at the domestic court. In the meantime, upon the information and help provided by his legal representative he submitted a request for the obtainment and use of classified data in the judicial procedure based on the Classified Data Act.<sup>9</sup> Both agencies rejected his request arguing that the classification was based on the protection of public interest, namely the activity relating to the national security of Hungary.<sup>10</sup> Furthermore, they claimed that by the disclosure of classified information, the person concerned could draw conclusions in relation to the activity, direction, procedure, and methods of the agencies that would harm the national security interest of Hungary and would hinder the efficiency of the agencies' activities. The security agencies also rejected the request on issuing an excerpt (or summary) of the information. Hussein appealed the decisions, but the competent courts rejected that.

Having exhausted the legal possibility to obtain access to the classified data, the court resumed the judicial review procedure of the asylum decision. The judge had access to the classified information upon which he claimed that the opinions of the security agencies are justified.<sup>11</sup> The court furthermore did not accept Hussein's arguments that the asylum authority was obliged under EU law and the ECHR to provide him at least with a summary (the "essence"<sup>12</sup>) of the reasoning with which he would have been able to challenge the allegations before the court, thereby his right to defense would have been observed. The court argued that

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<sup>8</sup> Section 5(1)(c) of the Act CLV of 2009 on the protection of classified data ('Classified Data Act'). As of 1 January 2018, the security agencies are not obliged to give reasoning for their opinion in accordance with Section 57(6) of the Asylum Act. Prior to that they had been formally obliged to do so however, they had never provided that by referring to the classified nature of the underlying data.

<sup>9</sup> Sections 11 and 14(4) of the Classified Data Act.

<sup>10</sup> Section 5(1) (c) of the Classified Data Act.

<sup>11</sup> Section 13(5) of the Classified Data Act.

<sup>12</sup> CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013.

the applicant's right to defense and to a fair trial were secured by the fact that the judge had access to the files, and thus he was in the position to review whether the data substantiated national security threat or not. The court also stated that the procedure regarding access before the security authorities is provided by the Classified Data Act as an additional guarantee for the person concerned as it is required by Article 23(1)(b) of the Procedures Directive<sup>13</sup>. Therefore, the Hungarian asylum legislation complies with EU law and the decision of the asylum authority is lawful. Hussein requested judicial review from the Curia, but the Hungarian supreme court rejected it and confirmed the arguments of the lower court. Having no further domestic remedies available he submitted an application to the ECtHR claiming a violation of his right under Article 6.

## **1.2 Consequences and the non-applicability of the ECHR**

One could argue that Hussein did not suffer a severe rights violation since he could stay with his family and continue his life in Hungary. However, the real consequences of his refugee status withdrawal are more detrimental than they seem at first sight. Under Hungarian law with tolerated status, with which he was granted as a result of the procedure, he has no right to lawfully undertake employment and to have the attached health insurance in Hungary.<sup>14</sup> Thus, he is deprived of the possibility to continue to work in his previous workplace and cannot provide any financial help to his family. Rather the opposite, he becomes totally dependent on his wife's earnings. He is furthermore not entitled to have a passport anymore, therefore his

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<sup>13</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection ('Procedures Directive').

<sup>14</sup> Lawful employment requires the prior obtainment of a work permit. Nevertheless, in practice, the limited validity of the tolerated status (one year) and the lengthy procedure the issuance of a work permit requires constitute an obstacle of access to employment for persons with tolerated status. With such a status furthermore, one has access only to basic health care services. See Gyulai, G. (2009). Practices in Hungary Concerning the Granting of Non-EU-Harmonised Protection Statuses. [https://helsinki.hu/wp-content/uploads/Non-EU-Harmonised-Protection-Statuses-Hungary-final\\_1.pdf](https://helsinki.hu/wp-content/uploads/Non-EU-Harmonised-Protection-Statuses-Hungary-final_1.pdf), pp. 8 and 36.

stay is constrained permanently to Hungary.<sup>15</sup> His Hungarian address registration gets terminated meaning that he loses all the possibilities to acquire Hungarian citizenship in the future.<sup>16</sup> The list of disadvantages outlined here is not exhaustive. There are definitely many more factors that impact the everyday life of Hussein and his prospects of future.

Provided that he had known the content of the allegations on the national security risk against him, he could have challenged them before the court. In the absence of a minimum reasoning and having been denied access to the necessary information he was not in the position to effectively challenge the decision of the asylum authority. The ECtHR has elaborated detailed safeguards on the disclosure of classified information under Arts. 3 (Prohibition of ill-treatment), 5(4) (Right to liberty and security), 6 (Right to a fair trial), 8 (Right to respect for private and family life), Art. 13 (Rights to an effective remedy) in conjunction with Art. 3 or 8. The most comprehensively it set out standards under Art. 1 Prot. 7 (Procedural safeguards relating to expulsion of aliens) which must be ensured more widely, thus in relation to the other articles of the Convention too where “*a decision [is] reached in accordance with law*”<sup>17</sup> because the term “in accordance with law” has the same meaning throughout the Convention.<sup>18</sup>

The Court in the *Muhammad and Muhammad v. Romania* judgment made it clear that even if not all the information are disclosed to the applicant, an alien must be provided with an effective opportunity to submit reasons against his expulsion and be protected against arbitrariness.<sup>19</sup> It is satisfied if the limitations are duly justified and sufficiently counterbalanced. Regarding the latter there are four main factors that had been laid down by

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<sup>15</sup> Gyulai (2009), p. 8.

<sup>16</sup> His only possibility to acquire nationality through the prior obtainment of a permanent residence permit [see Gyulai (2009), p. 8] is also hindered by the fact that he has been declared a national security threat which disqualifies him for being eligible for permanent residence permit pursuant to Section 33(2)(b) of the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

<sup>17</sup> ECtHR, *Muhammad and Muhammad v. Romania [GC]*, no. 80982/12, 15 October 2020.

<sup>18</sup> Schabas, W. A. (2015). *The European convention on human rights: a commentary*. Oxford University Press. p. 1130.

<sup>19</sup> *Muhammad and Muhammad* judgment, fn. (15), §133.

the Court.<sup>20</sup> According to the first, 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.<sup>21</sup> Secondly, the applicant must be provided with information about the conduct of the proceedings and the domestic mechanism with the view to counterbalance the rights limitations for example via access to lawyers who have security clearance.<sup>22</sup> Thirdly, the applicant must have *de facto* effective access to legal representation throughout the procedure. Effectiveness entails that the legal counsel has access to the documents and that after having access the communication between the representative and the applicant is ensured.<sup>23</sup> Finally, there must be an independent authority to review the decision upon which the applicant must have the possibility to challenge “*allegations against him according to which he represented a danger for national security*” in an effective manner.<sup>24</sup> The courts must have access to the totality of the files, including the classified documents, and they must have the power to verify their credibility and veracity. If the court concludes that the invoking of national security was devoid of any reasonable and adequate factual basis, it must have the power to annul or amend the authority’s decision; lastly the nature and degree of scrutiny must transpire from the reasoning of the court.<sup>25</sup>

Whereas EU law provides for such guarantees in all circumstances,<sup>26</sup> *i.e.* it applies to refugees who are expelled as well as to those who are granted leave to stay at the end of the procedure, the application of ECHR is limited in case of those refugees who are not under an expulsion procedure or in detention. Thus, except for Arts. 6 and 5(4), only refugees who are expelled from the country may benefit from the above listed articles containing comprehensive

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<sup>20</sup> *Ibid.*, §§147-157.

<sup>21</sup> *Ibid.*, §168, §175

<sup>22</sup> *Ibid.*, §153, §§182-183.

<sup>23</sup> *Ibid.*, §§154-155, §189, §191.

<sup>24</sup> *Ibid.*, §156.

<sup>25</sup> *Ibid.*

<sup>26</sup> See for a more detailed explanation in Chapter 3.2.3.

safeguards against arbitrariness stemming from the lack of reasoning of the asylum authorities as to the existence of a national security risk. Consequently, Hussein theoretically might only resort to Art. 6 of the Convention.<sup>27</sup> Nevertheless, the Court has rejected the claims of refugees under Art. 6, so far.<sup>28</sup> The principle according to which procedures concerning the entry, residence and removal of aliens fall out of the scope of the right to a fair trial protected under the Convention was established by the Court in the *Maaouia v. France* judgment issued in 2000.<sup>29</sup> Consequently, as opposed to the protection under the ECHR analyzed above, in the absence of expulsion, applicants whose international protection status has been withdrawn on national security grounds, have no recourse to the Convention to ensure their rights to a fair trial.

All in all, the question arises why the right to a fair trial of refugees in these instances is not protected under the Convention and what are the arguments by which Hussein could ultimately be provided with protection. In the next chapter I am going to present first the relevant standards under Art. 6 regarding the disclosure of classified data. This part will be followed by an analysis of the *Maaouia* judgment, *i.e.* the reasons behind the non-applicability of Art. 6 in asylum cases.

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<sup>27</sup> Art. 5(4) ECHR is irrelevant since he was not deprived of his liberty during the procedure. Even if he was deprived, regarding the withdrawal of his status, Art. 5(4) would not be applicable as it only relates to the detention decision.

<sup>28</sup> ECtHR, *Panjeheighalehei v. Denmark*, no. 11230/07, 13 October 2009.

<sup>29</sup> *Maaouia* judgment, fn. (4).

## CHAPTER 2

### THE APPLICABILITY OF ART. 6 ECHR IN ASYLUM CASES

#### 2.1 Relevant ECtHR standards under Art. 6 regarding the disclosure of classified data

Before exploring the stance of the ECtHR towards the applicability of Art. 6 in asylum and immigration cases, I first briefly outline the meaning of equality of arms and the right to adversarial proceeding as enshrined in Art. 6 of the Convention, the right to a fair trial. Secondly, by the presentation of the *Regner v. the Czech Republic*<sup>30</sup> judgment, where the Grand Chamber of the Court found no violation of Art. 6, I highlight the permissible limitations thereof, *i.e.* the standards under Art. 6 as to the disclosure of classified data.

The Court has already held in several cases that fair hearing encompasses the principles of equality of arms and adversarial procedure.<sup>31</sup> The former is to be understood as a guarantee for both parties to be afforded a reasonable opportunity to present their case “*under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.*”<sup>32</sup> It follows therefrom that the parties must have the opportunity to oppose the arguments put forward by the other party.<sup>33</sup> The right to adversarial proceedings is closely connected to the equality of arms. This principle provides the opportunity for the parties to get cognizance of and comment on all evidence adduced during the procedure.<sup>34</sup> However, according to the Court’s case-law, if it is strictly necessary, limitations on adversarial procedure and equality of arms principle may be allowed.<sup>35</sup> Consequently, the right to the disclosure of relevant evidence is not absolute.<sup>36</sup>

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<sup>30</sup> ECtHR, *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

<sup>31</sup> *Ibid.*, §146.

<sup>32</sup> Schabas (2015), p. 288.; ECtHR, *A. and Others v. The United Kingdom*, no. 3455/05, 19 February 2009, §205.

<sup>33</sup> Van Dijk, P., Van Hoof, F., Van Rijn, A., Zwaak, Leo (2018). *Theory and practice of the European Convention on Human Rights*. Intersentia Ltd, UK. p. 563.

<sup>34</sup> Van Dijk et al. (2018), p. 567.

<sup>35</sup> *Regner* judgment, fn. (27), §147.

<sup>36</sup> European Court of Human Rights (2020). *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)*. Council of Europe/European Court of Human Rights. [https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf), para. 383.

The standards according to which limitations are permissible were laid down by the Court in the case of *Regner*. The case concerned Mr. Regner, an employee of the Ministry of Defense in the Czech Republic. In 2005, the same year as he took up his duties, he was issued with security clearance. However, a year later based on confidential information received from the intelligence service, his security clearance was revoked because the applicant was considered to pose a national security risk. On an administrative appeal the director confirmed the decision concerning the existence of a security risk. In the meantime, he had asked to be discharged for health reasons. A year later, Mr. Regner requested judicial review of the decision revoking his security clearance. The applicant and his representative did not have access to the confidential files, but – according to the Court’s account of facts – the domestic court had full access to them.

The Court emphasized upon recalling the general principles regarding the right to a fair trial that measures that do not affect the very essence of the right to adversarial proceedings and the principle of equality of arms are permissible restrictions.<sup>37</sup> Furthermore, it stated that where evidence is withheld on public interest grounds, the Court scrutinizes “*the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interest of the person concerned.*”<sup>38</sup> The Court put weight on the counterbalancing factors ensured by other procedural safeguards and so applied the ‘overall fairness of the procedure approach’.<sup>39</sup>

On the basis of the *Regner* case, observing of the following criteria results in an Art. 6 conform approach: the domestic courts must have unlimited access to the documents and must duly exercise the powers of scrutiny available to them. They must furthermore give adequate

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<sup>37</sup> *Regner* judgment, fn. (27), §148.

<sup>38</sup> *Ibid.*, §149.

<sup>39</sup> *Ibid.*, §151. This approach is not unique under Art. 6 as the same applies to the right to counsel (see ECtHR, *Ibrahim and Others v. the UK [GC]*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016).

reasoning why the confidentiality of the documents needs to be preserved, and what is the justification for the challenged decision based on the classified document. The domestic courts must have the power to assess the reasons given for not disclosing the documents and order the disclosure if they consider they do not warrant the classification.<sup>40</sup> As opposed to the *Muhammad and Muhammad* judgment, here the Court merely noted that the domestic law could have provided for the applicant to be informed at very least summarily of the substance of the accusation against him and found the judicial supervision sufficient to counterbalance the lack of a summary.<sup>41</sup> According to the Court, the domestic courts should also explain the extent of the review they had carried out.<sup>42</sup>

It follows from the *Regner* judgment that compared to the standards established by the Court under the “in accordance with law” turn *i.a.* enshrined in Art. 1 Prot. 7 of the Convention, Art. 6 provides a lower degree of protection to applicants with regard to their procedural rights. This was also highlighted by the dissenting opinion attached to the *Muhammad and Muhammad* judgment. Judges Paczolay, Yudkivska and Motoc in their joint dissenting opinion notably drew attention to the fact that, as opposed to the *Regner* judgment, the Court did require the information to be provided to the applicant in a summary way, thereby ensuring a higher level of protection under Art. 1 Prot. 7 than under Art. 6 of the Convention.

## **2.2 The status quo in the case-law of the Court regarding the right to fair trial and asylum**

Decisions on granting asylum or on deportation of aliens, *i.e.* procedures concerning the entry, residence and removal of aliens fall out of the scope of the right to a fair trial protected

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<sup>40</sup> *Ibid.*, §152, 154.

<sup>41</sup> *Muhammad and Muhammad* judgment, fn. (15).

<sup>42</sup> *Regner* judgment, fn. (27), §160.

under the Convention.<sup>43</sup> Pursuant to the Court's case-law, the reason behind is that these procedures do not concern the determination of an applicant's civil rights or obligations or of a criminal charge which are constitutive elements of Art. 6.<sup>44</sup> According to Van Dijk et al. procedures concerning the admission and expulsion of aliens are rather left for Art. 1 Prot. 7 of the ECHR.<sup>45</sup> This provision as it had been shown above is restricted though to cases of (lawfully staying) aliens being under an expulsion procedure, *i.e.* presupposing a removal element of the case.

The first judgment establishing the non-applicability of Art. 6 ECHR in aliens' expulsion procedure was issued by the Grand Chamber in the case of *Maaouia v. France* in 2000.<sup>46</sup> The case concerned a Tunisian national, who complained about the excessive length of the procedure of the rescission of an exclusion order issued against him. As a result, the domestic court rescinded his exclusion.

The Court upon examining the applicability of Art. 6 first reiterated that civil rights and obligations have autonomous meaning in the Convention.<sup>47</sup> First, it invoked the Commission's assessment which had already stated in several decisions that the authorization of an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligation of any criminal charge against him within the meaning of Art. 6.<sup>48</sup> The *Maaouia* judgment though did not cite the reasoning of the Commission. From the referred cases though we can reconstruct the following trajectory of the Commission's relevant jurisprudence.

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<sup>43</sup> See eg. in Schabas (2015), p. 275. or Mole, N., & Meredith, C. (2010). *Asylum and the European Convention on Human Rights* (Vol. 9). Council of Europe, p. 124.

<sup>44</sup> *Maaouia* judgment, fn. (4), §40; Van Dijk et al. (2018), p. 502, pp. 507-508.

<sup>45</sup> Van Dijk et al. (2018), p. 517.

<sup>46</sup> *Maaouia* judgment, fn. (4).

<sup>47</sup> *Ibid.*, §34.

<sup>48</sup> *Ibid.*, §35.

The cases referred to by the Court in the *Maaouia* judgment either concern procedures aiming at the deportation of the applicant or asylum procedures.<sup>49</sup> In the case of *Uppal and Singh v. the United Kingdom* the Commission by considering previous cases dealing with deportation matters stressed that “a decision as to whether an alien should be allowed to stay in a country is a **discretionary act** by a public authority (...) therefore they did not involve the determination of civil rights within the meaning of Art. 6§1” [emphasis added].<sup>50</sup> With regard to asylum procedures, the decision issued in the case of *Kareem v. Sweden*,<sup>51</sup> the Commission simply referred to previous cases in its reasoning as to why the case did not fall within the scope of Art. 6. Having reviewed the relevant case-law of the Commission, it can be established that it rendered Art. 6 non-applicable in asylum procedures based on the *Uppal and Singh* decision in the case of *L. v. the United Kingdom*.<sup>52</sup> The Commission stated that the proceedings by which the “United Kingdom authorities refused the applicant political asylum were of an **administrative, discretionary nature** and did not involve the determination of the applicant's civil rights and obligations” [emphasis added].<sup>53</sup> As we see, the reasoning is identical with the one made in the case concerning a deportation procedure. Accordingly, the Commission made no distinction between the asylum and deportation procedures regarding their essence, notably that asylum procedures circle around the fundamental right to asylum and that of non-refoulement.

Secondly, in the *Maaouia* judgment the Court relied on the Explanatory report of Art. 1 Prot. 7 claiming that it aims to afford minimum guarantees to aliens in the event of expulsion.<sup>54</sup> It concluded that “by adopting Article 1 of Protocol No. 7 containing guarantees specifically

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<sup>49</sup> ECmHR, *Bozano v. France*, no. 9990/82, 15 May 1984, DR 39, p. 119; ECmHR, *Urrutikoetxea v. France*, no. 31113/96, 5 December 1996, DR 87-B, p. 151.

<sup>50</sup> ECmHR, *Uppal and Singh v. the United Kingdom*, no. 8244/78, 2 May 1979, Decisions and Reports (DR) 17, p. 157.

<sup>51</sup> ECmHR, *Kareem v. Sweden*, no. 32025/96, 25 October 1996, DR 87-A, p. 173.

<sup>52</sup> ECmHR, *L. v. the United Kingdom*, no. 12122/86, 16 October 1986.

<sup>53</sup> *Ibid.*, §1 para. 6.

<sup>54</sup> *Ibid.*, §67

*concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.*<sup>55</sup> Consequently, it established that the rescission of the exclusion order does not concern the determination of a civil right for the purposes of Art. 6. Regarding its criminal charge nature, the Court emphasized that the exclusion had a preventive and not a punishing effect, therefore it cannot concern the determination of a criminal charge against the applicant for the purposes of Art. 6 either. In its conclusion the Court stated that “*decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.*”<sup>56</sup>

The principles laid down in the *Maaouia* judgment constitute still the prevailing case-law.<sup>57</sup> It has subsequently been reinforced by the Court in deportation cases such as in the case of *Mamatkulov and Askarov v. Turkey* concerning the extradition of two Uzbek citizens to the Republic of Uzbekistan.<sup>58</sup> The most recent Grand Chamber judgment issued with regard to Art. 1 Prot. 7 ECHR, namely the *Muhammad and Muhammad* judgment also took note on the non-applicability of Art. 6 in administrative procedures concerning the expulsion of an alien by explicitly referring to the *Maaouia* judgment.<sup>59</sup>

In asylum related cases the Court has also upheld the non-applicability of Art. 6. In the case of *Panjeheighalehei v. Denmark*, an Iranian applicant claimed for damages against the Danish Refugee Board on the account that the Danish authorities did not grant him asylum in his first-instance procedure.<sup>60</sup> In its reasoning the Court repeated the principles of the *Maaouia*

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<sup>55</sup> *Ibid.*, §37.

<sup>56</sup> *Maaouia* judgment, fn. (4), §40.

<sup>57</sup> Van Dijk et al. (2018), p. 518.

<sup>58</sup> ECtHR, *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, 4 February 2005.

<sup>59</sup> *Muhammad and Muhammad* judgment, fn. (15), §115.

<sup>60</sup> *Panjeheighalehei* judgment, fn. (25), cited by the Guide on Art. 6 as the seminal case concerning “political asylum” being excluded from the scope of Art. 6 [European Court of Human Rights (2020), para. 67.]

judgment but acknowledged that the applicant's "*action for compensation was formulated as an ordinary tort action, rather than an appeal in the context of asylum proceedings.*"<sup>61</sup> Yet, the Court came to the conclusion by agreeing with the Danish Supreme Court that "*the applicant's compensation claim amounted (...) to a challenge to the merits of the decision of the Refugee Board*" which "*cannot be distinguished from the procedures determining »decisions regarding entry, stay and deportation of aliens«.*"<sup>62</sup> Consequently, it declared the application inadmissible under Art. 6. It must be highlighted that the Court did not explicitly state the discretionary nature of the asylum decision issued by the Danish authorities that would have rendered Art. 6 inapplicable in accordance with the Commission's case-law. It rather implicitly invoked the 'fourth instance' doctrine according to which the Court is not a further court of appeal, therefore it cannot decide on failures of fact or law committed by national authorities unless the right concerned is enshrined in the Convention.<sup>63</sup> The right to asylum as such though is not enshrined in the Convention.<sup>64</sup> As a result of the non-applicability of Art. 6 in asylum cases, most of the cases brought before the ECtHR concern the removal of an applicant and cases attached solely to asylum procedure are rare.

In the next chapter, I am going to provide some general as well as specific arguments tailored to the case of Hussein as to why the Court needs to depart from its earlier case-law and adjudicate on the claim of Hussein on the merits.

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<sup>61</sup> *Panjeheighalehei* judgment, fn. (25), p. 10.

<sup>62</sup> *Ibid.*

<sup>63</sup> Harris, D. J., O'Boyle, M., Bates, E., & Buckley, C. (2014). *Law of the European convention on human rights*. Oxford University Press, USA. p. 17.

<sup>64</sup> Mole, N. (2003). *Asylum and the European Convention on Human Rights*. Council of Europe Publishing. [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-09\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-09(2000).pdf), p. 9.

## CHAPTER 3

### ARGUMENTS IN FAVOR OF OVERRULING THE *MAAOUIA* JUDGMENT

It has been shown above (Chapter 1.2) that those articles which could potentially provide Hussein with protection against arbitrariness as to the establishment of national security threat, are not applicable in his case since he is not expelled from Hungary and is not in detention. Although his international protection status has been withdrawn based on national security grounds, he is given leave to stay due to the principle of non-refoulement. Accordingly, his right to be informed of the relevant factual elements leading to the consideration that he represents a threat to national security and his right to have access to the information in the case file on which the authorities relied when deciding on his expulsion are not protected by the Convention. Moreover, as of the *Maaouia* judgment, decisions regarding the entry, stay and deportation of aliens have been excluded from the scope of Art. 6. Thus, Hussein is not provided with any safeguards with regard to the principle of adversarial proceedings and equality of arms as part of the right to a fair trial under the Convention either.

Should Art. 6 apply to asylum procedures, Hussein would not be left without the necessary protection. In order to support my claim that the *Maaouia* approach needs to be revised and abandoned in asylum procedures, I am going to provide first arguments in favor of the universal applicability of Art. 6 (Chapter 3.1). Then, I demonstrate how the Court could overrule the *Maaouia* judgment concerning asylum procedures where the decision is based on classified data that is inaccessible to the applicant (Chapter 3.2).

#### **3.1 Reasons for the universal applicability of Art. 6**

There are at least three main arguments in favor of the universal applicability of Art. 6. First, it follows from the observance of the principle of rule of law supported by a teleological

interpretation of the Convention. Second, a historical interpretation of the wording of Art. 6 might be of help. Finally, by the systemic integration approach the Court could also lean on the relevant EU law as a basis for the general applicability of the right to a fair trial.

### 3.1.1 Rule of law argumentation by teleological interpretation

Rule of law cannot exist without fair trial.<sup>65</sup> The latter entails the right to access to court and all the safeguards regarding its fairness.<sup>66</sup> In the case of *Klass and Others v. Germany* the Court stated that the rule of law “*implies, inter alia, that an interference by the executive authorities with an individual’s rights should be subject to an effective control which should normally be assured by the judiciary (...).*”<sup>67</sup> The principle of rule of law is central to the vision of the Convention and is laid down in its Preamble, therefore it provides a comprehensive ground for the interpretation and application of the ECHR through a teleological interpretation.<sup>68</sup> The dissenting judges, namely Judge Loucaides joined by Judge Traja in the *Maaouia* judgment also emphasized that the requirements of the rule of law as an underlying principle of the Convention should always be taken into account and given weight when it comes to the interpretation of the Convention’s provisions. Therefore, Judge Loucaides and Judge Traja concluded that it is wrong to claim that fair administration of justice should be provided only in respect to certain legal rights and obligations. They argued that the Court should not have followed such a restrictive approach.

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<sup>65</sup> Schabas (2015), p. 265.

<sup>66</sup> See ECtHR, *Golder v. the United Kingdom*, no. 4451/70, 21 February 1975.

<sup>67</sup> ECtHR, *Klass and Others v. Germany*, no. 5029/71, 6 September 1978, §55.

<sup>68</sup> Schabas (2015), p. 265. This teleological interpretation was applied by the Court in the *Golder* judgment, as well, when Court read the access to court into Art. 6(1) by referring to the principle of rule of law. See in Schabas (2015), p. 284. It is also set out in Art. 31 (1) of the Vienna Convention on the Law of Treaties according to which “*a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”

Van Dijk et al. arrived at the same conclusion, by referring to the prominent place that the right to a fair trial holds in the Convention<sup>69</sup> Accordingly, they stated that the principle of the rule of law requires that in *all* cases of government interference with the legal position of a private party, the party affected by the interference should have a right to a fair trial.<sup>70</sup> This inference also follows from the joint reading of Art. 1 and Art. 13 of the Convention according to which any applicant falling under the jurisdiction of a State Party must be provided with recourse to an effective judicial remedy upon a violation of his/her rights. Furthermore, in the case of *Vilho Eskelinen* the Court stated that Art. 1 and 14 of the Convention “*stipulate that »everyone within [the] jurisdiction « of the Contracting States must enjoy the rights and freedoms in Section I »without discrimination on any ground« (...).*”<sup>71</sup> Consequently, the very restriction of the procedures to those that concern the civil rights or obligations of the applicant, or a criminal charge brought up against them is contrary to the essence of the rule of law, therefore Art. 6 should be applicable to all cases in which determination by a public authority of the legal position of a private party is at stake.<sup>72</sup> This argumentation coincides with the opinion of the dissenting judges in the *Maaouia* judgment. They claimed essentially the same. Accordingly, all legal rights and obligations should be given the broadest possible meaning and should extend to all legal rights and obligations of the individual whether vis-à-vis other individuals or vis-à-vis the State.<sup>73</sup> In their view, otherwise it contradicts to the very purpose of the rule of law, *i.e.* to safeguard the administration of justice. To provide the right to a fair trial in disputes between individuals but leaving individuals without protection in administrative procedures where the power is uneven and for this reason the individual faces the powerful authorities of the State is unjust.

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<sup>69</sup> Van Dijk et al. (2018), p. 500.

<sup>70</sup> *Ibid.*, p. 522.

<sup>71</sup> ECtHR, *Vilho Eskelinen and Others v. Finland [GC]*, no. 63235/00, 19 April 2007, §58.

<sup>72</sup> Van Dijk et al. (2018), p. 522.

<sup>73</sup> See the dissenting opinion of Judge Loucaides joined by Judge Traja in the *Maaouia* judgment, fn. (4).

Lastly, according to Judge Loucaides and Judge Traja the conceptual approach to the interpretation of civil rights and obligations suggests that the civil adjective denotes the meaning of “non-criminal”.<sup>74</sup> From this they went on claiming that if the term allows more than one interpretation, the one which enhances individual rights is to be preferred. This would be more in line with the ‘object and purpose’ of the Convention: it would “*guarantee not rights that are theoretical or illusory but rights that are practical and effective*”.<sup>75</sup> This argument is supported furthermore by the interpretation requirement of treaties determined by the Vienna Convention on the Law of Treaties. Its Art. 31(1) “*grants a prime place to good faith [which implies that] the terms of the treaty are » intended to mean something, rather than nothing*”<sup>76</sup>

### 3.1.2 Historical interpretation

A broader interpretation of civil rights and obligation is suggested by the drafting history of the Convention, as well. Originally, there were two drafts prepared, one based on the Universal Declaration of Human Rights and another based on the UN draft of the International Covenant on Civil and Political Rights.<sup>77</sup> Importantly, in line with the international treaties serving as a muster sample, none of these documents prescribed that the rights and obligations with regard to a fair trial must be of a civil nature.<sup>78</sup> Conversely, both referred to the rights and obligations in general terms. Schabas pointed out that the word “civil” was added only later to the text of the Convention.<sup>79</sup> As opposed to this originally more liberal approach, there is no indication in

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<sup>74</sup> *Ibid.*

<sup>75</sup> ECtHR, *Airey v. Ireland*, no. 6289/73, 9 October 1979, §24.

<sup>76</sup> Polgári, E. (2021). The Role of the Vienna Rules in the Interpretation of the ECHR A Normative Basis or a Source of Inspiration?, *Erasmus Law Review*, 2, p. 4.

<sup>77</sup> Schabas (2015), p. 267.

<sup>78</sup> *Ibid.*, p. 265.

<sup>79</sup> *Ibid.*, p. 270.

the drafting history of the Convention which would refer to the restrictive purpose of adding the word “civil” to Art. 6.<sup>80</sup>

### 3.1.3 Systemic integration approach

By applying the systemic integration approach or contextual interpretation focusing on external sources, one cannot avoid examining the universal applicability of Art. 6 in light of the broader European context, namely the law of the European Union.<sup>81</sup> Importantly, the number of references to EU law by the Court has increased after the Charter of Fundamental Rights of the European Union (“Charter”) was adopted and especially as of the entry into force of the Lisbon Treaty which rendered the Charter binding. As Glas and Krommendijk indicate, the reliance on the Charter by the Court can be reasoned with the ‘living instrument’ doctrine.<sup>82</sup> The Court invokes EU law as a reference point for showing a contemporary consensus with the final view to modernize the Convention.<sup>83</sup> They further claim on the same token that the occasional higher degree of protection that the Charter provides can be favorable for the Court to boost its case-law. Article 47 of the Charter on the Right to an effective remedy and to a fair trial provides a perfect example for that. Namely, Art. 47 of the Charter provides higher protection than Art. 6 because it is not confined to procedures relating to civil rights and obligations or to criminal matters.<sup>84</sup> It has also been noted by the Court.<sup>85</sup> The Explanatory Note on Art. 47 of the Charter echoes the rule of law argument put forward above.<sup>86</sup> According

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<sup>80</sup> Van Dijk et al. (2018), p. 501.

<sup>81</sup> The systemic integration is based on Art. 31 (3) c) of the Vienna Convention on the Law of Treaties.

<sup>82</sup> Glas, L. R., & Krommendijk, J. (2017). From Opinion 2/13 to Avotiņš: recent developments in the relationship between the Luxembourg and Strasbourg Courts. *Human Rights Law Review*, 17(3), 567-587., p. 577.

<sup>83</sup> *Ibid.*

<sup>84</sup> Art. 47 of the Charter states “rights and freedoms guaranteed by the law of the Union” and that “everyone is entitled to a fair and public hearing” [Schabas (2015), p. 266].

<sup>85</sup> *Regner* judgment, fn. (27), § 71; the dissenting opinion to the *Regner* judgment by Judge Sajó, §10, §38; *Vilho Eskelinen* judgment, fn. (67), §60; Mole and Meredith (2010), pp.126-127.

<sup>86</sup> Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.) (2014). *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing., pp. 1197-1198.

to that the difference regarding the scope of fair trial stems from the fact that the EU is a Union based on the rule of law as it was declared in the judgment of *Les Verts v. the EP*.<sup>87</sup> All in all, in line with the arguments for the application of the systemic integration approach, there is a clear need for the Court to broaden the scope of the right to a fair trial in the Convention based on Art. 47 of the Charter, as Mole and Meredith put it, in order to “*safeguard the individual in a real and practical way.*”<sup>88</sup>

Based on the aforementioned, there are thus good reasons why the scope of Art. 6 is to be broadened by the Court in order to ensure the full integrity of Art. 6 in light of the principle of rule of law and the European legal context.

### **3.2 Overturning the non-applicability of Art. 6 in specific asylum procedures**

Before discussing the proposed line of argumentation to be used to convince the Court in asylum cases such as that of Hussein to overrule the *Maaouia* judgment, some broader perspective should be given regarding the legal basis of the ‘overruling practice’ of the Court and the justification thereof.

The legal basis for the departure of the Court from its previous case-law is provided by Art. 30 ECHR. It states that the Chamber might relinquish jurisdiction in favor of the Grand Chamber if the “*resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.*”<sup>89</sup> The departure is furthermore justified by a dynamic approach based on the ‘object and purpose’ of the Convention: it derives from Preamble of the Convention which holds that the aim of the Convention is pursued by the

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<sup>87</sup> CJEU, Case 294/83, *‘Les Verts’ v European Parliament*, 23 April 1986, [1986] ECR 1339.

<sup>88</sup> Mole and Meredith (2010), pp. 126-127.

<sup>89</sup> Art. 30 ECHR, see Mowbray, A. (2009). An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law. *Human Rights Law Review*, 9(2), 179-201., p. 180.

“maintenance and further realization of Human Rights and Fundamental Freedoms.” The dynamic approach furthermore means that the Convention should be interpreted in light of the present-day conditions.<sup>90</sup>

Whereas legal certainty and foreseeability in general require that the Court follows its own case-law there can be “good reasons” for the Court’s departure.<sup>91</sup> Mowbray identified three justifications in the Court’s case-law that serve to overrule its previous jurisprudence.<sup>92</sup> Firstly, there might be legal uncertainty in the existing case-law of the Court calling for clarification. Secondly, an increasing number of complaints can urge the Court to alter its precedent. Finally, the most frequently used justification is represented by the ‘living instrument’ doctrine invoked by the Court.<sup>93</sup> In the case of Hussein the Court could potentially rely on the first and the third justifications.<sup>94</sup>

### 3.2.1 Legal uncertainty in relation to the non-applicability of Art. 6

With regard to legal uncertainty concerning the scope of Art. 6, I argue that the current status quo in the case-law does not prove to be satisfactory for at least three reasons. The Court stated in the *Vilho Eskelinen* judgment that „(...) there should (...) be convincing reasons for excluding any category of applicant from the protection of Article 6 § 1. (...)”<sup>95</sup> However, I argue that the known reasons (see Chapter 2.2 above) for excluding persons in a similar situation to Hussein from the scope of Art. 6 is not convincing. Firstly, his case should be distinguished from the earlier cases of the Court establishing the non-applicability of Art. 6 in immigration and asylum

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<sup>90</sup> ECtHR, *Mihalache v. Romania*, no. 54012/10, 8 July 2019, §91.

<sup>91</sup> Mowbray (2009), p. 183; *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, 4 February 2005, §121.

<sup>92</sup> Mowbray (2009), pp. 191-193 and p. 198.

<sup>93</sup> *Ibid.*

<sup>94</sup> Even though the issue is raising the alarm on a national level at least in three EU Member States, these cases probably do not reach the Court under an Art. 6 complaint because of the Court’s stance on the issue. Only cases – connected to national security combined with the classified data element - that come under other provisions of the Convention reach the Court.

<sup>95</sup> *Vilho Eskelinen* judgment, fn. (67), §59.

procedures. On the one hand, the case of Hussein is clearly different from the seminal case, the *Maaouia* judgment since the latter, as opposed to that of Hussein, concerned a decision issued in a removal procedure. It also differs from the case of *Panjeheighalehei* since the case of Hussein does not require the Court to adjudicate on the outcome of the asylum procedure. The Commission furthermore upon establishing the non-applicability of Art. 6 to immigration and asylum procedures did not acknowledge the different nature of the asylum and immigration procedures and failed to distinguish them in terms of fundamental rights implications and their consequences as to the discretionary powers of the state (see Chapter 3.2.2 below). Thus, it applied the same reasoning in both instances. Taking into account the above presented arguments for the universal applicability of Art. 6 as well, there is a clear need for an unequivocal guidance on the interpretation of civil rights and obligations to be given by the Court in this matter.<sup>96</sup>

### **3.2.2 Challenging the discretionary argument of the Court by the ‘living instrument’ doctrine**

The lack of differentiation between the cases resulted in the mistaken implicit statement of the Court according to which decisions issued in asylum procedures are administrative discretionary acts.

Nevertheless, in the framework of the ‘living instrument’ doctrine, two main European developments should be taken into account by the Court. The first one relates to the extensive asylum legislation which has been taking place in the European Union since 2000 when the *Maaouia* judgment was issued. Moreover, at the time when the Commission issued its first decisions with regard to asylum procedures concerning Art. 6 there was not even a common

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<sup>96</sup> Van Dijk et al. (2018), p. 522.

EU legislation on the matter at place. The sole international document providing for the protection of refugees in force at the material time in the Member States of the Council of Europe was the 1951 Convention Relating to the Status of Refugees. As opposed to that, by 1999 the Amsterdam Treaty had established the Common European Asylum System within the European Union. Subsequently, detailed asylum legislation was set in motion and in 2009 the Charter came into force enshrining the right to asylum in its Art. 18. Consequently, since 2009 the right to asylum as a freedom forms part of the fundamental rights catalogue of the Union and is safeguarded by procedural rules regarding its determination through secondary legislation as well as its potential limitation is set out [Art. 52(1) of the Charter].<sup>97</sup>

Resulting from the EU legislation on asylum, the argument of the Commission according to which asylum procedures fall out of the scope of Art. 6 due to their discretionary nature, which was also implicitly endorsed by the Court, does not hold.<sup>98</sup> In the jurisprudence of the ECtHR the term “discretionary power” means a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.<sup>99</sup> From the EU and Hungarian law (Section 6 of the Asylum Act) though it is clear that if the conditions for international protection status are established, the authority has no other choice than granting the status or to cogently withdraw that. The lack of discretion is also reinforced by the CJEU. In the *Torubarov* judgment, it stated that if a person meets the minimum standards set by EU law to qualify for one of the statuses because he or she fulfils the conditions laid down in the Qualification Directive, Member States have no discretion with regard to the granting of

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<sup>97</sup> See the Qualification and Procedures Directives.

<sup>98</sup> See above on p. 14.

<sup>99</sup> Committee of Ministers, Recommendation No. R(80)2 concerning the exercise of discretionary powers by administrative authorities, 11 March 1980.

international protection status (besides taking into consideration the grounds for exclusion provided for by that directive).<sup>100</sup>

### 3.2.3 Overruling by analogy of the case of civil servants

The case of civil servants exemplifies a possible trajectory how the Court might broaden the scope of Art. 6 to asylum procedures where the underlying information of the decision is classified. Until the delivery of the Court's judgment in the case of *Pellegrin v. France*,<sup>101</sup> disputes relating to the recruitment, careers and termination of service of civil servants fell *categorically* outside of the scope of Art. 6.<sup>102</sup> This exclusion was partially abandoned by the Court when it realized that the Convention does not provide equal treatment to public servants compared to other, non-public employees.<sup>103</sup> Therefore, it introduced a functional criterion and excluded from the scope of Art. 6 only those who were acting as the depositary of public authority.<sup>104</sup> In the *Vilho Eskalinen* judgment the Court changed this standpoint by referring to the existing uncertainty in the application of the established criterion. Nevertheless, in fact it did so due to the criticism it received regarding its practice.<sup>105</sup> Accordingly, the Court abandoned the functional criterion set up in the *Pellegrin* judgment and fully incorporated the case of civil servants with two conditions under Art. 6 regardless, whether they exercised their activities based on public law or not.<sup>106</sup>

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<sup>100</sup> CJEU, C-556/17, *Alekszj Torubarov v Bevándorlási és Menekültügyi Hivatal*, 29 July 2019, §50.

<sup>101</sup> ECtHR, *Pellegrin v. France [GC]*, no. 28541/95, 8 December 1999.

<sup>102</sup> *Vilho Eskalinen* judgment, fn. (67), §43.

<sup>103</sup> *Ibid.*, §46.

<sup>104</sup> *Ibid.*, §47

<sup>105</sup> Van Dijk et al. (2018), p. 518.

<sup>106</sup> *Vilho Eskalinen* judgment, fn. (67), §62.

Even though the judgment cannot be automatically applied to asylum cases, the context and the logic of the Court might be of help.<sup>107</sup> As we have seen, even categorical statements of the Court can be reviewed with time. Therefore, such as in the case of *Pellegrin*, it might be possible with “good reasons” to alter the categorical exclusion of asylum cases from the scope of the right to a fair trial. The case of *Pellegrin* was not based on a right provided by the Convention, since there is no such a right as the right to recruitment, the same being true for the right to asylum.<sup>108</sup> The Court further invoked Art. 1 and 14 of the Convention and claimed that everyone within the state’s jurisdiction should enjoy the rights under Section I of the ECHR. Accordingly, it recognized the previous discriminatory treatment of civil servants. On the same token the unequal guarantees provided to refugees who are granted leave to stay as opposed to those who are expelled from the country is to be recognized. The statement of the Court according to which “[a]s a general rule the guarantees in the Convention extend to civil servants” should be held for refugees, as well with regard to Art. 6.<sup>109</sup>

Finally, the Court explicitly relied on the EU case law and the Charter in overturning the *Pellegrin* judgment, where the access to the court of civil servants is protected by both.<sup>110</sup> It has already been explained above that the protection of the right to a fair trial in all aspects of asylum procedures are observed in EU law by Art. 47 of the Charter. It must be noted furthermore that the case-law of the CJEU has settled minimum safeguards for individuals concerning their administrative procedures where classified data serve as a ground for the decision.<sup>111</sup> Even though the case of *ZZ* concerned a family member (having both French and Algerian citizenship) of an EU citizen and not a refugee, the established standards therein relate

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<sup>107</sup> The Court explicitly stated in Art. 61 of the *Vilho Eskalinen* judgment [fn. (67)] that its reasoning does not extend to matters of asylum, nationality and residence.

<sup>108</sup> Mole (2003), p. 9 and *Vilho Eskalinen* judgment, fn. (67), §57. The exceptions provided by the test reflect the boundaries of rule of law. See Shinar, A. (2017). One rule to rule them all? Rules of law against the rule of law. *The Theory and Practice of Legislation*, 5(2), 149-170.

<sup>109</sup> *Vilho Eskalinen* judgment, fn. (67), §58.

<sup>110</sup> *Ibid.*, §60.

<sup>111</sup> *ZZ*. judgment, fn. (12).

to Art. 47, therefore they apply to all cases concerning classified information, regardless of the legal status of the person concerned.<sup>112</sup> Therefore, EU law provides a higher protection to refugees than the ECHR.

Refusing to consider the case of Hussein under Art. 6 by the Court by referencing schematically to the *Maaouia* judgment would have two main consequences. On the one hand, by maintaining the non-applicability of Art. 6 in such asylum cases, the Court would keep overlooking the main problem, namely an overall securitization tendency of asylum in Europe.<sup>113</sup> On the other hand, it would result in the tacit approval of arbitrary national law and practice with regard to a vulnerable and marginalized group, namely refugees.<sup>114</sup> Ultimately, this evokes similar problems noted by Kosař and Šípulová regarding the case of *Baka v. Hungary* where the Court did not want or was not able to address the underlying structural rule of law problem of the dismissal of Judge Baka, but it translated the complaint into individual human rights claims and narrow-sightedly examined the complaint under Art. 10 and Art. 6.<sup>115</sup> In the case of Hussein based on the arguments presented above this mistake should be avoided.

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<sup>112</sup> CJEU, case C-437/13, *Unitrading Ltd. v. Staatssecretaris van Financiën*, 23 October 2014, §§20-21.

<sup>113</sup> Atak, I., & Crépeau, F. (2013). The securitization of asylum and human rights in Canada and the European Union. In Contemporary issues in refugee law. Edward Elgar Publishing.

<sup>114</sup> Mutatis mutandis see the *M.S.S. v. Belgium and Greece* judgment where the Court stated that asylum-seekers are “a particularly underprivileged and vulnerable population group in need of special protection” (ECtHR, *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011, §251).

<sup>115</sup> Kosař, D., & Šípulová, K. (2018). The strasbourg court meets abusive constitutionalism: *Baka v. Hungary* and the rule of law. *Hague Journal on the Rule of Law*, 10(1), 83-110.

## CONCLUSION

The research aimed to provide arguments why and how the Court should overrule its standing interpretation on the non-applicability of Art. 6 in asylum procedures where the underlying information of the decision is classified. From a broader perspective, I have offered three approaches in favor of the universal applicability of Art. 6. Firstly, by applying a teleological interpretation, I argued that the rule of law requires that individuals whose rights are subject to state interference have access to an effective judicial remedy. Otherwise, the rule of law as a central vision of the Convention would be harmed. It is necessary therefore, supported by the joint reading of Arts. 1, 13 and 14 of the Convention that Art. 6 applies to all administrative procedures.

Secondly, I presented that the universal applicability of Art. 6 is further justified by a historical interpretation approach. Accordingly, the ‘civil’ adjective should be simply understood as ‘non-criminal’ and should not automatically exclude any other type of rights and obligations. This approach follows primarily from the drafting history of the Convention.

Thirdly, following a systemic integration approach I put forward the argument that the European Union’s legal order also provides a good example for the Court to change its case-law on the issue. According to the Charter, the right to a fair trial enshrined in Art. 47 applies to all procedures – where EU law is applicable - based on the argument that the EU is a Union based on the rule of law. The latter reasoning even embraces the rule of law argumentation set out at the first place.

Regarding the act of overturning the case-law of the Court I identified two directions in which the Court could depart. I argued that there is legal uncertainty concerning the non-applicability of Art. 6 in asylum cases similar to that of Hussein. The case of Hussein is different from both type of cases that serve as a basis for the exclusion of asylum and immigration procedures from the scope of Art. 6, therefore the same arguments could not be

applied by the Court. The arguments in favor of the universal applicability also suggest that there is an existing uncertainty in the interpretation of civil rights and obligations.

Besides the existing legal uncertainty, the application of the ‘living instrument’ doctrine serves as another justification for the departure of the Court. According to that, it should pay due attention to the accelerated European legislation in the field of asylum taking place after the *Maaouia* judgment and the Commission’s relevant decisions were issued. Especially, particular attention should be given to the fact that the domestic authorities have no discretion upon the granting or the withdrawal of refugee status. Therefore, the argument originating from the Commission’s case law about the discretionary act does not hold anymore. Finally, I gave the example of civil servants who were fully included under Art. 6 by the Court as a result of the *Vilho Eskalinen* judgment building upon the *Pellegrin* judgment. I pointed to some of the similarities between those overruling judgments and the case of Hussein. They both concern categorical exclusions, none of them entail classical civil rights or obligation or a criminal charge and in both of the cases the EU law, and notably the Charter was given significant importance.

The problem of Hussein discussed in the thesis exists not only in Hungary but in other State Parties, as well. Its significance is reflected by the fact that a joint one-year long project, named as the “Right to Know”, was set up in January 2021 to tackle the issue. It is led by the Hungarian Helsinki Committee, and is realized with the cooperation of the Polish Helsinki Foundation for Human Rights and the Cypriot KISA.<sup>116</sup> It aims to produce *i.a.* a legal template addressing the relevant EU and international law and jurisprudence with regard to the matter.

I wish that my findings would be widely disseminated among European legal practitioners so that they could be of help for lawyers litigating before the ECtHR. I hope that it could contribute to a real change in the legislation and practice of the State Parties and that ultimately

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<sup>116</sup> <https://www.epim.info/projects/the-right-to-know-project/>

and most importantly, that people in need would enjoy their right to a fair trial under the Convention in all circumstances in the near future.

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## **ANNEX I: LEGAL TOOLBOX**

Toolbox for legal practitioners litigating before the European Court of Human Rights

# LEGAL TOOLBOX

TOOLBOX FOR LEGAL PRACTITIONERS LITIGATING BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

29 June 2021

## SYNOPSIS

**The Toolbox provides legal practitioners litigating before the European Court of Human Rights (ECtHR or Court) with arguments as to why and how the Court should overrule its standing interpretation on the non-applicability of Art. 6 in asylum procedures where the underlying information of the decision is classified.**



[Courtroom of the European Court of Human Rights]

## GENERAL CONTEXT OF THE TOOLBOX

In some State Parties to the Convention, such as in Hungary, Poland and Cyprus, if the asylum authority **revokes the refugee status** of a third-country national based on the allegation that the person **poses a threat to national security**, there is **no (or not sufficient) reasoning** provided to the person concerned. Therefore, the applicant is not in the position to effectively challenge the decision of the asylum authority, thus **his/her right to a fair trial is violated**.

## FAST-TRACK CONTROL FOR APPLICABILITY

» Tick in case of a positive answer «

- Am I a lawyer litigating before the ECtHR?
- Is the applicant a refugee or a beneficiary of subsidiary protection (together as 'refugees')?
- Is the applicant granted leave to stay as a result of the asylum procedure?
- Is the applicant considered to pose a threat to national security by domestic authorities?
- Is the decision of the asylum authority based on national security consideration?
- Is the information substantiating the asylum authority's decision regarding the national security threat classified for which there is no reasoning provided on the allegation to the applicant?

» If you ticked all, this toolbox is useful for you «

## WHAT IS THE CORE PROBLEM?

The **European Convention on Human Rights (ECHR)** in light of the interpretation of the ECtHR grants **protection regarding the right to a fair trial** of refugees and asylum-seekers who are under an expulsion procedure (Art. 1 Prot. 7, Art. 3, Art. 8, Art. 13 in conjunction with Art. 3 or 8) or are in detention [Art. 5(4)]. See the standards primarily in the *Muhammad and Muhammad* judgment, delivered by the Grand Chamber in 2020. (ECtHR, [Muhammad and Muhammad v. Romania \[GC\]](#), no. 80982/12, 15 October 2020)

However, the above listed articles are not applicable to those **refugees** who are not expelled from the country or are not in detention, *i.e.* **granted leave to stay**. In their case the sole provision that may **potentially be invoked is Art. 6 (Right to a fair trial)**. However, as of the **Maaouia judgment**, delivered by the Grand Chamber in 2000, **procedures that concern the entry, stay and deportation of aliens fall out of the scope of Art. 6**. (ECtHR, [Maaouia v. France \[GC\]](#), no. 39652/98, 5 October 2000)

As a result, **refugees in such cases have no recourse to the ECHR, while their right to a fair trial is seriously violated**.

## WHY IS IT RELEVANT? (CONSEQUENCES OF THE NON-APPLICABILITY)

- **From the viewpoint of the applicant:**

The refugee cannot effectively challenge the decision on the revocation of his status which amounts to the **deprivation of all entitlements that are attached to the refugee status such as employment, healthcare, access to education** etc. (see [Chapter VII of Qualification Directive](#)).

- **From a broader rule of law perspective:**

The lack of reaction by the Court would result in the tacit approval of arbitrary national law and practice, *i.e.* a **systemic violation of the rule of law**. It would also contribute to the **further securitization of asylum** in Europe.

## ARGUMENTS TO BE PUT FORWARD BEFORE THE ECTHR

Arguments in favor of overruling the *Maaouia* judgment and for the applicability of Art. 6:

- I) [Arguments calling for the universal applicability of Art. 6](#)
- II) [Specific suggestions for the overruling of the Maaouia judgment in asylum cases](#)

### I)

#### ARGUMENTS CALLING FOR THE UNIVERSAL APPLICABILITY OF ART. 6

- 1- **Teleological interpretation of the Convention: the right to a fair trial which is essential to the Rule of Law must be maintained in all administrative procedures.**

*Rule of Law requires that individuals whose rights are subject to state interference have access to an effective judicial remedy. Otherwise, the rule of law as a central vision of the Convention would be harmed. It is necessary therefore, supported by the joint reading of Arts. 1, 13 and 14 of the Convention that Art. 6 applies to all administrative procedures.*

*(See ECtHR, [Klass and Others v. Germany](#), no. 5029/71, 6 September 1978, §55)*

- 2- **Historical interpretation approach: no indication in the drafting history of the Convention can be found that would refer to the restrictive meaning of the word 'civil' in Art. 6.**

*The 'civil' adjective should be simply understood as 'non-criminal' and should not automatically exclude any other type of rights and obligations that are not 'civil'.*

- 3- **Systemic integration approach: the Court should follow the legislation of the European Union – Art. 47 of the Charter of Fundamental Rights has no limitation regarding the type of procedures in which it is applicable.**

*The right to a fair trial enshrined in Art. 47 applies to all types of procedures – where EU law is applicable - based on the argument that the EU is a Union based on the Rule of Law. This reasoning embraces the rule of law argumentation set out in point 1 above.*

*(See CJEU, Case 294/83, ['Les Verts' v European Parliament](#), 23 April 1986, [1986] ECR 1339)*

## II)

### **SPECIFIC SUGGESTIONS FOR THE OVERRULING OF THE *MAAOUIA* JUDGMENT IN ASYLUM CASES**

#### **1- Legal uncertainty regarding the non-applicability of Art. 6: the issue at question can be clearly distinguished from the *Maaouia* judgment**

*Legal uncertainty provides a basis for departure from the earlier case-law of the Court. This uncertainty stems from the fact that as opposed to the procedure at question, the procedure present in the Maaouia judgment concerned a decision issued in a removal procedure. The present case also differs from the case of Panjeheighalehei since it does not require the Court to adjudicate on the outcome of the asylum procedure. Consequently, the prior case-law cannot be automatically applied to the case at issue. The disregard of major differences in the nature of procedures had already been present in the jurisprudence of the Commission serving as a basis of the Maaouia judgment.*

*(See Maaouia v. France [GC], no. 39652/98, 5 October 2000; ECtHR, Panjeheighalehei v. Denmark, no. 11230/07, 13 October 2009; ECmHR, Bozano v. France, no. 9990/82, 15 May 1984; ECmHR, Kareem v. Sweden, no. 32025/96, 25 October 1996; ECmHR, L. v. the United Kingdom, no. 12122/86, 16 October 1986; ECmHR, Uppal and Singh v. the United Kingdom, no. 8244/78, 2 May 1979; ECmHR, Urrutikoetxea v. France, no. 31113/96, 5 December 1996)*

#### **2- 'Living instrument' doctrine: the argument that asylum procedures fall out of the scope of Art. 6 due to their discretionary nature does not hold**

*In light of the 'living instrument' doctrine the accelerated European asylum legislation should be taken into account by the Court. It started with the 1999 Amsterdam Treaty which established the Common European Asylum System within the European Union. With the adoption of the binding Charter the right to asylum as a freedom forms part of the fundamental rights catalogue of the Union (Art. 18) and is safeguarded by procedural rules regarding its determination through secondary legislation. (See the main acts such as Procedures Directive, Qualification Directive, Reception Directive and Dublin Regulation) From the EU law it is clear that the national authorities have no discretion regarding the granting, refusal or withdrawal of the refugee status.*

*(See Qualification Directive and CJEU, C-556/17, Alekszj Torubarov v Bevándorlási és Menekültügyi Hivatal, 29 July 2019, §50)*

#### **3- Overruling by analogy of the case of civil servants: invoking the *Vilho Eskalinen* judgment**

*Even though the Vilho Eskalinen judgment cannot be automatically applied to asylum cases, the context and the logic of the Court in this case might be of help. This judgment reveals that even categorical statements of the Court can be reviewed and altered with time. Consequently, it suggests that the standing categorical exclusion of asylum procedures from the scope of Art. 6 can be potentially changed. Following the Court's argumentation in the Vilho Eskalinen judgment according to which "[a]s a general rule the guarantees in the Convention extend to civil servants" Art. 6 should be applicable to refugees based on the joint reading of Arts. 1 and 14 of the Convention. Lastly, this judgment gave an example of the application of systemic integration approach set out above by directly relying on Art. 47 of the Charter upon the broadening of the scope of Art. 6 to all civil servants.*

*(See ECtHR, Vilho Eskalinen and Others v. Finland [GC], no. 63235/00, 19 April 2007; ECtHR, Pellegrin v. France [GC], no. 28541/95, 8 December 1999; CJEU, C-300/11, ZZ. v. Secretary of State for the Home Department, 4 June 2013)*