# LEGAL TOOLBOX

TOOLBOX FOR LEGAL PRACTITIONERS LITIGATING BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS[1]

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## 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]

[1] The Toolbox forms a part of the Capstone project delivered in the framework of the LLM in Human Rights program of the Central European University in the academic year 2020/2021 under the supervision of Dr. Eszter Polgári, Assistant Professor. Barcza-Szabó, Z. (2021). Challenging the National Security Card in Asylum Cases: Bringing Article 6 ECHR into Play. https://bit.ly/3x4mmnp.

## 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

**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, Alekszij 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 Eskelinen 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)*