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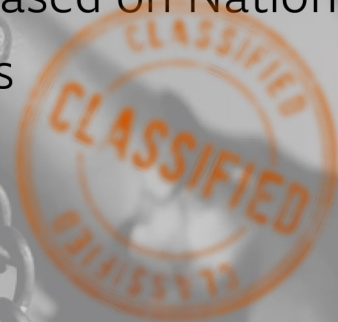
THE RIGHT TO KNOW

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



HUNGARIAN HELSINKI COMMITTEE

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Ισότητα, Στήριξη, Αντιρατσισμός
Equality, Support, Antiracism

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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**;** 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.

The need for a common European approach to address this problem is based on two comparative studies, which showed that this issue exists in at least one third of 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.

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[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 and Katalin Juhász, HHC, *The Right to Know in the European Union: Comparative Study on Access to Classified Data in National Security Related Immigration Cases*, April 2024.

EU and international law

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.

Above situations are governed by the secondary EU legislation, namely the Procedures Directive[3] and the Qualification Directive.[4] In the case of detention of asylum-seekers, the Reception Directive[5] is also relevant. Since EU law is applicable, the Charter of the Fundamental Rights of the European Union ('Charter') and the right to an effective remedy and fair trial, as well as as the right to a good administration as a general principle of EU law, which embrace the right to be heard and the right to a reasoned decision, are applicable to both groups of applicants. .

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. 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]

[3] 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 (recast) ('Procedures Directive').
[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.

1.2. Third-country nationals

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

(i) whose **residence permit has been withdrawn** or whose residence permit application has been **rejected and/or their return has been ordered**;

(ii) who have an **EU citizen family member and** whose **residence permit has been withdrawn or their application has been rejected (regardless of the return being ordered)** ('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** is the Return Directive[7] and the **Charter.** In the case of long-term resident third-country nationals, the Long-Term Residents Directive[8] 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.[9] However, if the applicant's residence permit has been withdrawn **and the applicant has an EU citizen family member** who is not exercising the right to free movement, EU law, namely Art. 20 of the Treaty on the Functioning of the European Union ('TFEU') and the Charter are applicable, no expulsion decision is therefore needed in order to trigger the EU law applicability. The so-called 'derived right of residence', for example, concerns parents of an EU-citizen minor, on whom the child is dependent, or who takes care of the child, or, in exceptional cases the dependency between adults can also be established.[10] Consequently, they have the unconditional right of residence and the

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[7] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ('Return Directive').

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

[9] 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.

[10] 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. Administración*

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.[11]

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.[12] 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)(a) and Art. 17(1)(d) of the Qualification Directive.[13] These provisions provide for the revocation or the rejection of granting of refugee status or subsidiary protection based on national security grounds. Three

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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.

[11] 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.

[12] 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.

[13] A preliminary reference on this issue is still pending, C-454/23, K.A.M.

CJEU judgments of 2023, however, interpret Art. 14 (4)(b) of the Directive constituting that refugee status is to be revoked, refused or not to be renewed, if the applicant, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

First of all, it is clarified by the court that the existence of both a criminal conviction and a danger to the community are cumulative conditions to revoke a refugee status. Second, the article is only to be applied if the third-country national concerned constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of the society of the Member State in which he or she is present. This implies a propensity in the individual concerned to repeat the conduct constituting such a threat in the future, but it is possible that past conduct alone may constitute such a danger. Third, the authority, when applying that provision, must undertake an assessment of all the circumstances for each individual case. This means that a past conviction cannot solely establish the application of Art. 14(4)(b), and, as articulated by the CJEU, a criminal record of the third-country national cannot trigger it either.[14] Finally, the application of the provision is moreover conditional on a proportionality assessment: the competent authority is to establish that the revocation of refugee status constitutes a proportionate measure compared to the danger posed by the third-country national to a fundamental interest of the society of the Member State. This does not mean that public interest has to outweigh the protection interest of the third-country national, but a balancing exercise between the danger of public interest and the right to protection of refugees must be made.[15]

There has also 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 security or public order'.[16]

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.[17]

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.[18]

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

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[14] CJEU, Case C-8/22, *XXX v. Commissaire général aux réfugiés et aux apatrides,* 6 July 2023, § 30, §§ 60-67.

[15] CJEU, Case C-663/21, *Bundesamt für Fremdenwesen und Asyl v. AA,* 6 July 2023.

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

[17] 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.

[18] 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.

The term 'public security' ('national security') has been held by the CJEU to cover both a Member State's internal and external security.[19] 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.[20] 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*.'[21] It also presupposes the existence of a threat to public security that is of a '*particularly high degree of seriousness*.'[22]

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*.'[23] The Court emphasises that this means more than the mere '*perturbation of the social order which any infringement of the law involves*.'[24]

'National security' and 'public order' cover cases where an applicant belongs to an association which supports international terrorism or supports such an association.[25] 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 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).[26]

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.[27] Furthermore, the danger posed by the applicant must be based on consistent, objective and specific evidence.[28] 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.[29]

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

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

[21] 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.

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

[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, §79.

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

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

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

[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, 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.

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 the level of protection against expulsion in a given case is not the same as that guaranteed under the Free Movement Directive.[30] 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.[31] 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.[32]

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 be based on an individual assessment.[33] 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*'.[34] 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*'.[35]

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[30] 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.

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

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

[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, §48, §§65-66.

[34] 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.

[35] *Ibid*.

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.[36]

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.[37] 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.[38] 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.

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.[39] Even if there are serious national

[36] 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.
[37] 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.
[38] 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.
[39] Art. 4(1) Procedures Directive.

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.[40]

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.[41] 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.[42] 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.[43]

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 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 Directive[44] (keeping in mind the exclusion clauses in Qualification Directive Arts. 12, 14, 17 and 19), and conduct a necessity and proportionality assessment.[45]

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

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[40] Preamble (20) of the Procedures Directive.

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

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

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

[44] 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.

[45] Article 52(1) of the Charter.

assessment, as well as the absence of examination of necessity and proportionality, violates the procedural guarantees required by EU law.

This has been confirmed by the CJEU in the G.M. judgment of 2022 concerning an asylum case. The judgment holds that while some of the information used by the determining authority in conducting its assessment can be provided by specialist bodies responsible for national security, the scope of that information and its relevance to the decision to be taken must be freely assessed by that authority. The authority cannot therefore be required to rely on a non-reasoned opinion given by specialist bodies with functions linked to national security.[46]

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.[47] 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.[48] 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.[49] These principles laid down by the Court in the *J.N.* judgment, were reiterated in the *K.* judgment and the *V.L.* judgment.[50]

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 their 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 decision. These are namely: the best interest of the child, family

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[46] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ*, 22 September 2022, §§82-83.

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

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

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

[50] 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.

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).[51] 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.[52]

3.4. Residence permit withdrawal/rejection procedure, where Art. 20 of TFEU is applicable

As the 'immigration counterpart' of the G.M. judgment, concerning immigration procedures of third-country nationals who may enjoy a derived right of (long-term) residence under Article 20 TFEU, the CJEU has recently adopted similar procedural findings to *G.M.* It was held in the cases of N.W. and P.Q. "*that Article 20 TFEU, read in conjunction with Article 47 of the Charter, must be interpreted as precluding national legislation which requires national authorities, on grounds of national security, to withdraw the residence permit of a third-country national who may enjoy a derived right of residence under that article or to refuse to issue such a permit to such a person, solely on the basis of a binding non-reasoned opinion adopted by a body entrusted with specialist functions linked to national security, without a rigorous examination of all the individual circumstances and of the proportionality of that decision to withdraw or to refuse a residence permit.*"[53]

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)[54] 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.

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

[52] Art. 52(1) of the Charter.

[53] CJEU, Joined Cases C-420/22 and C-528/22, *NW. and PQ. v. Miniszterelnöki Kabinetirodát vezető miniszter,* 25 April 2024, §85.

[54] E.g. only a general statement that the applicant is supporting a terrorist organisation.

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 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 41[55]), 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).[56] 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**.[57] 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 (...)'*.[58] 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.[59] 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.[60] 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

[55] 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.

[56] Art. 51(1) of the Charter.

[57] 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.

[58] 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.

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

[60] 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.

by the Template), they are obliged to observe the rights of the defence of addressees of decisions which significantly affect their interests.[61]

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.[62]

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.[63]

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.[64] 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.[65]

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.[66]

<u>Right to good administration as a general principle of EU law</u>:

The general principle of the **right to good administration** includes the **right to be heard** and the **right to a reasoned decision**.[67] It is enshrined in Art. 41 of the Charter, however, that article is addressed exclusively to EU institutions.

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

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

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

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

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

[66] 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.

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

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*'.[68] The Court recalled the *Cicala* judgment where the CJEU first came to this conclusion in 2011.[69] It then continued by referring to the *HN* judgment which stated that '*the right to good administration (…) reflects a general principle of EU law*'.[70] Judgments such as those issued in the cases of *Mukarubega*[71] and *Boudjlida*[72] 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.[73]

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.[74]

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

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

[69] 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.

[70] 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 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.

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

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

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

[74] 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.

threat assessment.[75] 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.[76] 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), return procedures, regardless of the legal status of the person concerned and residence withdrawal/rejection cases when Article 20 of TFEU (derived right to residence) is applicable.

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.[77]

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.[78]

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 (…)*'.[79] Once the case is at the court, the applicant '*must have the right to*

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

[76] 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.

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

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

[79] 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.

examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them'.[80]

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.[81] However, an applicant's right to effective remedy can only be limited to the extent that is strictly necessary.[82] 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.[83]

Importantly, however, 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, 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. The *Kadi II judgment* provided more clues as to the nature and content of the essence of the grounds concept; *i.e.* which information provided to the person concerned is satisfactory for the protection of their rights of the defence.[84] 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.[85]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.[86]

Lately, the opinion of the Advocate General (AG) in the N.W. and P.Q. joint cases before the CJEU clarified the concept of 'essence' of the confidential grounds in a more detailed manner. The AG stated that the "*concept refers to the essential information in the file allowing the person concerned to be aware of the main facts*

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[80] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §55.
[81] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §57.
[82] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §64.
[83] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §65.
[84] 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.
[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, §143, §145, §147, §149.
[86] 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.

and conduct attributed to him or her so that he or she may express his or her point of view in the context of the administrative procedure and any subsequent judicial proceedings".[87] The AG nevertheless added that "*the concept must be defined taking into account the necessary confidentiality of the evidence*", which, if disclosed, may be liable to compromise State security.[88] This finding is the re-iteration of the conclusions of *ZZ judgment*, holding that 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'.[89]

The *ZZ* judgment also provides some direction with regard to the involvement of a special advocate in the procedure.[90] 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:

The concept of the 'essence of the grounds' was re-iterated by the CJEU in the *G.M.* judgment specifically with regard to the asylum procedure. The judgment laid out that asylum seekers and beneficiaries of international protection must be given access to the essence of the grounds of the authority's decision. The asylum authority must state in its decision the reasons for which protection is being refused and cannot rely solely on the unjustified decision of the authorities (security services), stating that the applicant threatens state security.[91]

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

[87] Opinion of Advocate General Richard De La Tour in joint CJEU cases *C-420/22 NW and C-528/22 PQ v Országos Idegenrendészeti Főigazgatóság, Miniszterelnöki Kabinetirodát vezető miniszter Miniszterelnöki Kabinetirodát vezető miniszter,* 23 November 2023, §116.

[88] Opinion of Advocate General Richard De La Tour in joint CJEU cases *C-420/22 NW and C-528/22 PQ v Országos Idegenrendészeti Főigazgatóság, Miniszterelnöki Kabinetirodát vezető miniszter Miniszterelnöki Kabinetirodát vezető miniszter,* 23 November 2023. §118.

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

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

[91] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* 22 September 2022, §92.

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.

With reference to this provision read in conjunction with Article 45(4) of that directive and in light of the general principle of EU law relating to the right to sound administration and of Article 47 of the Charter, the G.M. judgment stated that national legislation, which provides that in the asylum procedure the applicants or their legal adviser can access that information only after obtaining authorisation to that end, while they are not provided even with the substance of the grounds on which such decisions are based, and they cannot use the information to which they may have had access for the purposes of administrative procedures or judicial proceedings, is not compliant with EU law.[92] Referring to the adversarial principle, this judgment also confirmed that the applicants or their advisers in the asylum procedure "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."[93] The judgment nonetheless underlines that the rights of defence are not absolute and may be limited for interest relating to state security, but even in this case, the applicant and his adviser is to be informed at the very least of the substance of the grounds on which the decision was taken, as described above.[94] It is crucial that the judgment clearly articulates that the rights of defence are not respected solely by the power of the national court being to access the file. The fact that the reviewing court may see all information cannot replace the applicants' access, who have to be able to express their views on that information.[95]

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.[96] 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.

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[92] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* 22 September 2022, § 60.

[93] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* 22 September 2022, § 49.

[94] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* 22 September 2022, §§50-51.

[95] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* 22 September 2022, §§57-58.

[96] 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.

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.[97] 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.

Residence permit withdrawal/rejection procedure, where Art. 20 of TFEU is applicable:

In the already mentioned N.W. and P.Q. cases applicable in immigration procedures of third-country nationals who may enjoy a derived right of (long-term) residence under Article 20 TFEU, it was held that the general principle of good administration and Article 47 of the Charter, in conjunction with Article 20 TFEU, must be interpreted as precluding national legislation, where a decision to withdraw or refuse a right of residence is based on information the disclosure of which would compromise national security of a Member State, does not allow those persons to be informed even of the substance of the reasons on which such decisions are based or to have access to the information to which they have had access in administrative or judicial proceedings.[98]

[97] 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.
[98] CJEU, Joined Cases C-420/22 and C-528/22, *NW and PQ v. v Miniszterelnöki Kabinetirodát vezető miniszter,* 25 April 2024, §101.

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.[99]

The domestic court examines all the grounds, and the related evidence based on which the decision was taken.[100] The court must determine whether state security reasons block a disclosure of the grounds on which the decision in question is based and of the related evidence, 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.[101] If the Court concludes that state security does not obstruct disclosure, it gives the national authority the opportunity to disclose the information. 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.[102]

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.[103]

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.[104] 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.[105] As mentioned above, recently the CJEU has emphasised in the G.M. judgment that respect for the rights of the defence does not mean that only the court having jurisdiction has access to all

[99] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §58.
[100] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §59.
[101] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §§60-61.
[102] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §63.
[103] CJEU, C-300/11, *ZZ. v. Secretary of State for the Home Department*, 4 June 2013, §68.
[104] CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §31.
[105] CJEU, C-348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, 26 July 2017, §32.

relevant information, but also the applicants or their advisers, who have to be able to express their point of view on that information.[106]

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.[107]

Residence withdrawal/rejection procedure, where Art. 20 of TFEU is applicable:

The CJEU, with regard to the residence permit cases of third-country nationals whose long-term residence rights may be derived from Art. 20 TFEU, re-iterated the findings of ZZ judgments in the joint cases of N.W. and P.Q as they are presented above within the context of the scope of judicial review.[108] The CJEU additionally concludes in this judgment that the court with jurisdiction to review a decision on the application of Article 20 TFEU does not necessarily have to "*have the power to categorise certain information as non-classified and to disclose, of its own motion, that information to the applicant, since such declassification and disclosure is not essential in order to ensure effective judicial protection when assessing the legality of the contested decision.*"[109] The court is, as laid out by ZZ, only obliged not to base its decision on information which has not been disclosed to the applicant. The scope of judicial review concerning "*Article 47 of the Charter, read in conjunction with Article 20 TFEU, must be interpreted as not requiring a court which is responsible for reviewing the legality of a decision on residence under Article 20 TFEU, based on classified information, to have the power to verify the lawfulness of the categorisation of that information as classified and to authorise access by the person concerned to all of that information, in the event that it considers that that categorisation is unlawful, or the substance of that information, if it considers that that categorisation is lawful.* "[110]

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

[106] CJEU, C-159/21, *G.M. v. Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* 22 September 2022, §§57-58.
[107] 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.
[108] CJEU, Joined Cases C-420/22 and C-528/22, *NW and PQ v. v Miniszterelnöki Kabinetirodát vezető miniszter,* 25 April 2024, §§106-112.
[109] CJEU, Joined Cases C-420/22 and C-528/22, *NW and PQ v. v Miniszterelnöki Kabinetirodát vezető miniszter,* 25 April 2024, §115.
[110] CJEU, Joined Cases C-420/22 and C-528/22, *NW and PQ v. v Miniszterelnöki Kabinetirodát vezető miniszter,* 25 April 2024, §116.

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.[111] 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.[112] Additionally, it set out that there must be **some form of adversarial proceedings**, if need be through a **special representative** with security clearance.[113] 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.[114] 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.[115]

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.[116] 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.[117]

The Court found a violation of Art. 8 of the Convention in Trapitsyna and Isaeva v. Hungary case, which concerns the revocation of immigration and settlement permits of a mother and her daughter, following the decision to expel the former on national

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

[112] 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.

[113] 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.

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

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

[116] 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.

[117] 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.

security grounds. The applicant was not given so much as an outline of the national security case against her or a summary of the content of any classified document in her case. The immigration authority's decision contained neither the facts on the basis of which a threat to national security had been found, nor a general description of the conduct ascribed to the first applicant, nor the nature of the risk she purportedly represented. In the Court's view, such a process entailed a significant interference with the first applicant's right to be informed of the factual elements which had served as a basis for the domestic authorities' decision to order her expulsion from Hungary. As to the question whether the judicial review proceedings counterbalanced or mitigated the interference with the first applicant's procedural rights, the Court observed that the domestic court confined itself to a purely formal examination of the decision to expel the first applicant, without meaningfully scrutinising the allegations to the effect that the applicant represented a serious national security risk. The applicant was not able to challenge, in an effective manner, the allegation that she represented a danger to national security, nor did she enjoy the requisite degree of protection against arbitrariness on the part of the authorities.[118]

On the contrary, no violation was found in Mirzoyan v. the Czech Republic case, which concerns a refusal of applicant's applications to extend his long-term residence permit for business purposes and long-term residence permit for family purposes on grounds he was considered to pose a threat to national security and public order based on classified documents made partly accessible to applicant's lawyer but not disclosed to applicant himself. Domestic courts on several occasions considered that the impugned classified information did not meet the qualitative requirements laid down in the relevant domestic case-law, and requested further details in order to verify that the applicant really did represent a danger to national security and public order. The Supreme Administrative Court in this regard considered it crucial that classified information be as credible and verifiable by the courts as possible. Ultimately, that court found that the information contained in the classified part of the administrative file was sufficient in terms of conclusiveness, accuracy and reliability. The Court was satisfied that the applicant was able to have his case reviewed by independent courts which had the power to effectively examine the grounds underlying the administrative authorities' decisions, had access to the classified documents and were diligent in verifying the authenticity of those documents and the credibility and veracity of the classified information adduced in support.[119]

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,[120] that it entails the requirement of procedural fairness according to which the judicial

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[118] ECtHR, *Trapitsynaand Isaeva v. Hungary,* no. 5488/22, 19 September 2024, NOT FINAL, §§73-75, 80, 81.

[119] ECtHR, *Mirzoyan v. the Czech Republic*, no. 15117/21, 15689/21, 16 May 2024, §§91, 93.

[120] '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.

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.[121] 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.[122] 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.[123] 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*'.[124]

Under Art. 1 Prot. 7 ECHR, the Court has 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.[125]

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.[126] These rights can be limited

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[121] 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.

[122] 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.

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

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

[125] 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.

[126] 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 documents, the applicants intended to engage in activities capable of endangering national security. The applicants were summoned to court without providing them with documents.

on the grounds of national security. 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.[127] 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;[128]

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);[129]

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;[130] 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*'.[131] 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.[132]

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.

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

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

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

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

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

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

It follows that the expulsion procedure, decision and its review procedure under Art. 1 Prot. 7 requires the observation of the safeguards set out above in points (1)-(4) in order to be compliant with the Convention.

Violation of Art. 1 Prot. 7 was also found in Poklikayew v. Poland case, concerning expulsion on national security grounds on the basis of classified information not disclosed to the applicant. The Court notes that the applicant was only provided with very general information as to the reasons for national security risk, namely that he had collaborated with the Belarusian secret services. Given that at the relevant time the applicant had already been expelled to Belarus it made it very difficult for him to plead his case. He was not provided with any information on how to access the documents in the file or a list of the names of lawyers who held the relevant security clearance. Even though the judicial proceedings took place before the superior courts in the hierarchy of the Polish legal system, given the scarce and unspecific information available to the applicant, he could not effectively challenge the authorities' statements that national security was at stake. The domestic courts gave very general reasons for their conclusions.[133]

In F.S. v. Croatia case, concerning expulsion on national security grounds without reasons and on the basis of classified information not disclosed to the applicant, the Court also found a violation of Art. 1 Prot. 7. As the applicant lacked even an outline of the facts which served as a basis for the conclusion that he posed a threat to national security, in the Court's view it cannot be said that he was able to present his case adequately in the subsequent judicial review proceedings. The Court notes that in their judicial review of the expulsion decision, the domestic courts seem to have failed to make use of the procedural mechanisms available to them under domestic law, which could have given the applicant an effective opportunity to submit reasons against his expulsion. Instead, they confined themselves to a merely formalistic examination of the disputed decisions, thereby failing to subject the executive's assertion that the applicant posed a national security risk to any meaningful judicial scrutiny.[134]

ECtHR standards regarding the consequences when the court determines that non-disclosure is not justified are higher compared to the CJEU. The ECtHR requires the reviewing authority to be entitled to either declassify itself the classified information or invite the competent authority to review the said classification, failing which there will be a violation of Art. 1 Prot. 7.[135] By contrast, the CJEU does not consider the possibility of a declassification to be required by Art. 47 of the Charter.[136]

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[133] ECtHR, *Poklikayew v. Poland*, no. 103/16, 22 June 2023, §§73-75, 78, 79.

[134] ECtHR, *F.S. v Croatia*, no. 8857/16, 5 December 2023, §§ 64, 70.

[135] ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, §142.

[136] CJEU, Joined Cases C-420/22 and C-528/22, *NW and PQ*, 25 April 2024, §§113-115. See Prof. Dr. iur. Johan Callewaert, Similarities and differences between Strasbourg and Luxembourg on classified documents used in expulsion cases – Judgment of the CJEU in the cases of NW and PQ, compared with Muhammad and Muhammad v. Romania, https://johan-callewaert.eu/similarities-and-differences-between-strasbourg-and-luxembourg-on-classified-documents-used-as-a-basis-for-expulsion-judgment-of-the-cjeu-in-the-cases-of-nw-and-pq-compared-with-muhammad-an/.

Information provided in a Convention-compliant manner to the applicant has also been addressed in ECtHR case law. Accordingly, it must be sufficiently specific.[137] An outline of the national security case against the applicant, or the mere enumeration of the numbers of legal provisions about the accusations against them cannot suffice.[138] 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.[139] 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.[140] 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.[141]

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.[142] 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.[143] By referring to ECtHR case law, the UNHCR

[137] ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §220.
[138] 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.
[139] 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.
[140] ECtHR, *A. and others v. UK* [GC], no. 3455/05, 19 February 2009, §222.
[141] ECtHR, A. *and others v. UK* [GC], no. 3455/05, 19 February 2009, §223.
[142] 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.
[143] 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.

emphasises that national security interests may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.[144] As such, the UNHCR notes a safeguard that whereas the general content of the sensitive material should be given to the applicant, the details of it can be reserved to the legal representative; provided that the latter had gone through a security clearance check.[145] 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.[146]

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 their 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.[147] 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.

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[144] 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).

[145] 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.

[146] 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.

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

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.[148] 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 institutions.[149] 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.[150] 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,[151] and the full practical effect ('*effet utile*') of EU law,[152] which are equally binding on administrative authorities and courts.[153] 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*

[148] *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.

[149] 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.

[150] 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.

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

[152] 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.

[153] 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.

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 (….).[154] *(…) 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 (…)'.*[155]

[154] 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.

[155] 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.

Annex I

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