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# EFFECTIVE REMEDIES IN NATIONAL SECURITY- RELATED ASYLUM CASES, WITH A PARTICULAR FOCUS ON ACCESS TO CLASSIFIED INFORMATION

**Joint Legal Note**

**by the European Council on Refugees and Exiles (ECRE)**

**and the Hungarian Helsinki Committee (HHC)**

# I. INTRODUCTION

National security grounds<sup>1</sup> are used for exclusion of asylum applicants from international protection, for withdrawal of status<sup>2</sup> of beneficiaries of international protection, and consequently as a ground for expulsion or detention.

Though no exhaustive research has been done in recent years on the topic in all EU Member States, several serious shortcomings have been reported with regard to the national security-related asylum cases.<sup>3</sup> In some Member States asylum authorities may refrain from giving factual justification why a person presents a threat<sup>4</sup> to national security in their decisions and the person concerned and their legal representative have no access to the underlying classified evidence. The person concerned is therefore not in the position to effectively argue their case before the courts, thus their rights to a fair trial and effective remedies are infringed. This practice is typical among others in **Cyprus, Estonia, Poland and Hungary**.<sup>5</sup> If there are no sufficient procedural guarantees that would enable the affected foreigners to effectively challenge the asylum authorities' decisions, the actual legitimacy of the existence of the threat becomes questionable.

Countries that deny access to data underlying national security assessment to the applicants and their representatives argue that the right to a fair trial and effective remedies is ensured by the courts having access to classified files when reviewing the legality of a decision. However, as it will be shown in this note, such understanding is not compliant with existing EU and European Court of Human Rights (Hereinafter ECtHR) standards. Further on, shortcomings in the judicial review have been observed as well.<sup>6</sup> For example, in **Cyprus** the court does not examine the reasons given for posing a threat to national security, they are only assessed by the executive power.<sup>7</sup> The review of the national security threat in **Hungary** is at the full discretion of the presiding judge and in asylum detention cases courts are reluctant to check classified information underpinning the risk.<sup>8</sup> On the contrary, **Polish** courts have elaborated two assessment criteria based on which they are assessing the credibility of national security threat ex officio, but since only access to a summary of all evidence collected by security agencies is provided to the judges, such review cannot amount to a full and effective review of the case. In none of these three countries, the lawfulness of classification is examined by the courts.<sup>9</sup>

As opposed to the aforementioned national practices, there are Member States, such as for example **France**<sup>10</sup> and **Germany**,<sup>11</sup> where the administrative authority's decision must include legal and factual reasons. The administrative authority may not invoke grounds of national security or public order without giving factual reasons, and cannot refrain from justifying their decision. The administrative authority does not have to disclose all the factual reasons and information at its disposal, as long as it presents sufficient reasons to support the decision. Once the authority refers to certain documents/evidence that are considered secret, they are required to disclose them to the applicant. The judge cannot base their judgments on reasons and facts that were not disclosed to all the parties of the procedure. German courts assess very thoroughly and in detail, whether the person concerned actually presents a threat to national security.<sup>12</sup>

1. The term 'national security grounds' used in this note refers to the opinion/decision of a competent domestic authority stating that the asylum applicant or the beneficiary of international protection poses a threat to state national security or public order.
2. Withdrawal of protection is understood as covering revocation of the status as well as refusal of the renewal of the status in the meaning of the legal note.
3. The most recent study published as a result of the Right to Know project focused exclusively on three MSs, namely Cyprus, Hungary and Poland, all revealing serious infringements of EU law by their laws and practices on national security issues. See Hungarian Helsinki Committee, Kisa, Polish Helsinki Foundation for Human Rights, 'Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland', September 2021, <<https://bit.ly/3IS4RUS>> (hereinafter 'Comparative Report 2021').

A General Report studying all EU Member States, 'Public order, national security and the rights of third-country nationals in immigration and citizenship cases' was prepared by Jacek Chlebny for the Seminar organised by the Supreme Administrative Court of Poland and ACA Europe, in Kraków, 18–19 September 2017, <<https://bit.ly/34Hqn8R>> (hereinafter 'Chlebny 2017').

4. The terms 'threat' and 'risk' posed to national security by the person concerned are used interchangeably.
5. Comparative Report 2021, above n 3; Chlebny 2017, above n 3, pp. 42–43.; On Hungary see Hungarian Helsinki Committee, 'Information Update, National Security Grounds for Exclusion from International Protection as a Carte Blanche: Hungarian asylum provisions not compliant with EU law', 20 December 2021, <<https://bit.ly/3f7n6ls>>.
6. Comparative Report 2021, above n 3.
7. *Ivan Todorov v. Republic*, no. 109/00, 14 December 2000, *Yuri Kolomoets v. Republic* (1999), 4 A C.L.R. 443, *Karaliotas v. Republic* (1987), 3 C.L.R. 1701' as cited in Chlebny 2017, above n 3, p. 43.
8. Regarding an applicant in such a situation, there is a pending case before the ECtHR: *L. v. Hungary*, no. 6182/20. See Comparative Report 2021, above n 3, p. 25.
9. Comparative Report 2021, above n 3, pp. 20–25.
10. [http://www.aca-europe.eu/seminars/2017\\_Cracow/France\\_fr.pdf](http://www.aca-europe.eu/seminars/2017_Cracow/France_fr.pdf).
11. [http://www.aca-europe.eu/seminars/2017\\_Cracow/Germany.pdf](http://www.aca-europe.eu/seminars/2017_Cracow/Germany.pdf).
12. Information provided by the ELENA coordinator in Germany on 11 January 2022.

The divergent practices of states throughout Europe were also noted by the ECtHR in its judgment *Muhammad and Muhammad v. Romania* where it compiled a comparative material on the legislation of 40 Council of Europe member states concerning access to classified information and judicial review of national security cases.<sup>13</sup> Differences in legislation are striking with regard to powers of courts in relation to the verification of the lawfulness of classification as well as the accuracy and relevance of the information contained in classified documents and if courts can themselves declassify documents or might request that. The domestic systems also differ in relation to the conditions under which access to classified documents is given to lawyers.

Divergent domestic practices in the European Union are reported despite the standards set out under EU law. Jurisprudence of the **Court of Justice of the European Union ('CJEU')** and the **ECtHR provides for minimum safeguards in national security cases with regard to the right to an effective remedy**.<sup>14</sup> Therefore, this legal note focuses on **legal standards relating to effective remedies in national security cases in the area of asylum**, in particular where rejections or revocations of international protection, as well as the ordering of asylum detention, took place on the basis of classified information.

The legal note aims at providing guidance as to the standards under EU and international law relating to examination of national security-related asylum cases with a view to guarantee the right to effective remedy. **Chapter II** sets out the applicable EU and international law and briefly describes the applicable jurisprudence of the CJEU and ECtHR with particular attention to their relevance in asylum cases. Subsequently, **Chapter III** firstly focuses on (i) **standards regarding the examination of the lawfulness of classification by courts and on access to classified data** and secondly, on (ii) **standards relating to judicial review of asylum decisions invoking national security grounds**. The legal note circles around the following issues:

- i. The requirements of judicial review ensuring the applicant's rights of the defence.
- ii. Judicial examination of whether the classification of information underlying an asylum decision is justified.
- iii. Subsequent measures once the court holds that disclosure is necessary.
- iv. The meaning of 'the essence of the grounds' as interpreted by the CJEU and the ECtHR.
- v. The definition of national security threat under EU law.
- vi. Assessment and the test in judicial review concerning the verification of a national security threat.
- vii. Specific rights of the applicant to be observed throughout the procedure.

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13. ECtHR, *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, paragraphs 79-87 (hereinafter '*Muhammad and Muhammad*'). Note that this case did not concern asylum but third-country nationals holding residence permit for study purposes.

14. The Legal Template prepared within the framework of the Right to Know project touched upon the right to an effective remedy. See Hungarian Helsinki Committee, Kisa, Polish Helsinki Foundation for Human Rights, 'Legal Template on EU and International Law Regarding Disclosure of Classified Information in Asylum and Return Procedures Based on National Security Grounds', September 2021, <<https://bit.ly/3f7n6ls>> (hereinafter 'Legal Template 2021').

## II. THE LEGAL OBLIGATIONS RELATING TO EFFECTIVE REMEDIES AND ACCESS TO CLASSIFIED INFORMATION UNDER EU AND INTERNATIONAL LAW

### RELEVANT EU LAW AND JURISPRUDENCE

#### *Relevant EU Law*

The **right to an effective remedy and to a fair trial** is enshrined in **Article 47 of the Charter** of Fundamental Rights of the European Union (hereinafter 'Charter').<sup>15</sup>

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

The CJEU has established in its case law that Article 47 of the Charter provides for among others the **rights of the defence** which is a general principle of EU law.<sup>16</sup> The rights of the defence in the interpretation of the CJEU means that the person concerned is able

*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 (...).*<sup>17</sup>

The rights of the defence comprise the **adversarial principle**<sup>18</sup> and the **right to be heard**<sup>19</sup> so that the applicant is enabled to effectively make their views known before the adoption of any decision liable to affect their interests adversely.<sup>20</sup> Additionally, the observation of the rights of the defence also requires

the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (...) the **obligation to state reasons for a decision which are sufficiently specific and concrete** to allow the person concerned to understand why his application is being rejected (...).<sup>21</sup>

The Charter prescribes that **limitation on the exercise of rights** might be made, nonetheless only under the following **conditions** as set out in its Article 52:

*1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

In the legal framework of the Common European Asylum System, **Article 46 of the Asylum Procedures**

15. Importantly, Article 47 of the Charter encompasses guarantees provided by both Article 6 and Article 13 of the ECHR. See the Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35, <https://bit.ly/3o2Fvom>.

16. Judgment of 11 December 2014, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, C-249/13, ECLI:EU:C:2014:2431, paragraph 34.

17. Judgment of 26 July 2017, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, C-348/16, ECLI:EU:C:2017:591, paragraph 35 (hereinafter 'Moussa Sacko').

18. Judgment of 4 June 2013, *ZZ v. Secretary of State for the Home Department*, C-300/11, ECLI:EU:C:2013:363, paragraph 57 (hereinafter 'ZZ').

19. *Moussa Sacko*, above n 17, paragraph 34.

20. Judgment of 5 November 2014, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, C-166/13, ECLI:EU:C:2014:2336, paragraph 46 (hereinafter 'Sophie Mukarubega').

21. *Sophie Mukarubega*, above n 20, paragraph 48.

**Directive<sup>22</sup>** explicitly ensures that the **right to an effective remedy** is also guaranteed in **asylum proceedings**. Accordingly,

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision: (...)

(c) a decision to withdraw international protection pursuant to Article 45. (...)

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

As per the CJEU case law, Article 46 of the Asylum Procedures Directive 'must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection'.<sup>23</sup>

In accordance with **Article 23(1) of the Asylum Procedures Directive**, even if **access** to the information in the applicant's file upon the basis of which a decision is or will be made is **excluded**, Member States shall

(a) make **access** to such information or sources available **to the authorities** referred to in Chapter V; and

(b) **establish** in national law **procedures guaranteeing that the applicant's rights of defence are respected**.

*In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.*

Thus, based on this Article, **court must always have access to classified information** upon which a decision is based. Moreover, Member States must provide for guarantees in their national systems so that the rights of the defence are respected.

*Article 11 Requirements for a decision by the determining authority (...)*

2. Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

*Article 12 Guarantees for applicants*

(...) Member States shall ensure that all applicants enjoy the following guarantees: (...)

(d) they and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), shall have access to the information referred to in Article 10(3)(b) and to the information provided by the experts referred to in Article 10(3)(d), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application;

**Article 9(2) of the Reception Conditions Directive<sup>24</sup>** sets out similar standards with regard to asylum detention as it is established by Article 11(2) of the Procedures Directive

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention

22. 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 (hereinafter 'Asylum Procedures Directive').

23. *Moussa Sacko*, above n 17, paragraph 31.

24. 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 (hereinafter 'Reception Directive').

order shall state the reasons in fact and in law on which it is based.<sup>25</sup>

Furthermore, as to the international protection withdrawal proceedings, the **Asylum Procedures Directive** sets out the same guarantees regarding the reasoned decision in **Article 45(3)** as in Article 11(2).

The right to be heard of the applicant is ensured by **Articles 14 and 16 of the Asylum Procedures Directive**. Regarding withdrawal procedures, **Article 45(1)(b)** provides for the same rights.

#### *Article 14 Personal interview*

*1. Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. (...)*

#### *Article 16 Content of a personal interview*

*When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure 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. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements.*

#### *Guiding CJEU jurisprudence*

The CJEU issued its first judgment on access and use of classified information in administrative procedures as well as on the nature and scope of the judicial review with regard to the legality of classified data in June 2013, in the case of **ZZ. v. Secretary of State for the Home Department**.<sup>26</sup> The case concerned an administrative decision excluding ZZ from the United Kingdom of Great Britain and Northern Ireland on grounds of public security. In its judgment, the CJEU laid down minimum safeguards to be provided to the person concerned both by the administrative authorities and courts in administrative procedures where the administrative decision is based on classified information. Even though the case concerned a third-country national enjoying freedom of movement in the EU, the standards elaborated by the CJEU in the case were derived from Article 47 of the Charter. Therefore, the safeguards established therein are equally applicable to asylum cases. A month later, the CJEU reinforced the minimum standards in the **European Commission v. Kadi** judgment.<sup>27</sup>

The issue of decisions ordering detention based on national security grounds was discussed in the case of **J.N. v. v. Staatssecretaris voor Veiligheid en Justitie** in 2016.<sup>28</sup> The CJEU, by interpreting Article 8(3) (e) of the Reception Conditions Directive, laid down important general safeguards to be observed upon the judicial review in asylum procedures.

The standards stemming from the aforementioned case law are referenced in detail in Chapter III below.

## **RELEVANT INTERNATIONAL LAW AND JURISPRUDENCE**

### *European Convention on Human Rights and ECtHR case law*

The European Convention on Human Rights (hereinafter 'ECHR' or 'Convention') cannot be as such applied to exclusion from/revocation of international status procedures, as it does not contain any substantive norms

25. Furthermore, Article 9(4) of the Reception Conditions Directive prescribes that '[D]etained applicants **shall immediately be informed in writing**, in a language which they understand or are reasonably supposed to understand, of **the reasons for 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.**'

26. ZZ, above n 18.

27. Judgment of 18 July 2013, *European Commission v. Kadi*, joined cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518 (hereinafter '*Kadi*'). Since the European Commission and not a national authority was the defendant in the *Kadi* case, the legal note refers primarily to the ZZ judgment throughout in Chapter III.

28. Judgment of 15 February 2016, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, C-601/15 PPU, ECLI:EU:C:2016:84 (hereinafter '*J.N.*').



on these procedures. However, it does contain rights<sup>29</sup> that must be observed during and after exclusion or revocation procedures. In most cases that the Court ruled upon, these procedures actually led to a decision to expel the person back to their home country invoking the assessment of *inter alia* Article 3 ECHR. On the other hand, as regards the detention of asylum applicants and its effective judicial review, Article 5 is applicable.

The ECtHR caselaw makes it clear that even in cases where national security is at stake, the concepts of legality and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake.<sup>30</sup>

The ECtHR has dealt with several cases where third-country nationals faced deportation or were detained based on a decision invoking national security grounds and where the underlying information as to why the applicants posed a threat to national security was classified and the applicant was denied access to it.<sup>31</sup> The most recent Grand Chamber judgment issued by the ECtHR on the subject matter was the case of *Muhammad and Muhammad v. Romania*.<sup>32</sup> Since the applicants were lawful residents prior to their expulsion, the Court found a violation of **Article 1 of Protocol 7** of the Convention (**Procedural safeguards relating to expulsion of aliens**). The ECtHR elaborated specific standards under this Article that provide for the respect of the applicant's rights of the defence in relation to the national security-related expulsion decision and procedure as well as its judicial review. Article 1 Protocol 7 entails the right to be informed of the relevant factual elements as to why 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 when deciding on the expulsion of the applicant.<sup>33</sup> These rights can be limited on the grounds of national security. Nonetheless, even in the event of limitations, the third-country national 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 duly justified<sup>34</sup> and sufficiently counterbalanced, but even in case of limitations, the applicant must be given **factual reasons** for the expulsion, the indication of the legal provisions is not sufficient.<sup>35</sup>

The ECtHR standards set up in the *Muhammad and Muhammad* judgment are closely linked to the requirement of legality phrased as 'in accordance with law' in Article 1 of Protocol 7 that is to provide protection against arbitrariness and thus ensures respect for the rule of law.<sup>36</sup> As the Court put it in *Muhammad and Muhammad*, rule of law is inherent in all the Articles of the Convention and it must be observed in respect of both procedural and substantive rights.<sup>37</sup> Therefore, the standards laid down in the *Muhammad and Muhammad* judgment, presented below, are valid and applicable in all cases where the Convention rights of an applicant are at stake by a state measure based on national security grounds and classified data.

29. Articles 13 (Right to an effective remedy), 6 (Right to a fair trial), Article 3 (Prohibition of Torture), 8 (Right to respect for private and family life) of the ECHR.

30. ECtHR, *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010, paragraph 29.

31. In relation to finding a violation of Article 13 in conjunction with Article 3 and 8 (respectively) see cases *Chahal v. the United Kingdom*, no. 22414/93 (hereinafter 'Chahal'), 15 November 1996; *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002 (hereinafter 'Al-Nashif'); *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, 17 January 2012; *Bou Hassoun v. Bulgaria*, no. 59066/16, 6 October 2020; finding a violation of Article 5(4) see *A. and others v. UK*, no. 3455/05, 19 February 2009 (hereinafter 'A. and others') and *Chahal*.

32. *Muhammad and Muhammad*, above n 13.

33. *Muhammad and Muhammad*, above n 13, paragraph 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.

34. Whether limitations are duly justified depends on scrutiny by a judicial or other authority which is independent of the executive body seeking to impose the limitation; the scope of the powers of that national authority and in particular whether the authority is entitled to review the necessity of keeping information classified; and the powers vested in the independent authority depending on the finding it has made in a given case as to the need to restrict procedural rights.

35. *Muhammad and Muhammad*, above n 13, paragraphs 147-157, 168 and 175.

36. See the standards in the Legal Template 2021, above n 14, pp. 21-22.

37. *Muhammad and Muhammad*, above n 13, paragraph 118. '118. Article 1 § 1 of Protocol No. 7 establishes as the first basic safeguard that the person concerned may be expelled only «in pursuance of a decision reached in accordance with law». This phrase has a similar meaning throughout the Convention and its Protocols (see *C.G. and Others v. Bulgaria*, cited above, § 73). It concerns not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and must also afford a measure of protection against arbitrary interference by the public authorities with the Convention rights (see *Lupsa v. Romania*, no. 10337/04, § 55, ECHR 2006VII, and *Baltaji v. Bulgaria*, no. 12919/04, § 55, 12 July 2011). This applies equally to Convention provisions which lay down procedural rights, as does Article 1 of Protocol No. 7, for it is well-established case-law that the rule of law, which is expressly mentioned in the Preamble to the Convention, is inherent in all the Articles of the Convention (see *Baka v. Hungary [GC]*, no. 20261/12, § 117, 23 June 2016). Arbitrariness entails a negation of the rule of law (see *Al-Dulimi and Montana Management Inc. v. Switzerland [GC]*, no. 5809/08, § 145, 21 June 2016) and could not be more tolerated in respect of procedural rights than it is in respect of substantive rights.'

In an earlier judgment *Regner v. the Czech Republic*, the ECtHR ruled that the revocation of a security clearance of an employee of the Ministry of Defence based on confidential information where the applicant had no access to that information did not amount to a violation of Article 6 of the Convention.<sup>38</sup> The Court in the reasoning of its decision put an emphasis on the procedure before the courts which, according to the facts of the case, had access to the confidential material and thus, were in the position to guarantee adversarial proceedings and equality of arms and whose procedure constituted adequate safeguards to protect the interest of the person concerned.<sup>39</sup> To put it simply, the Court found no violation of Article 6 on account of the judicial access to the classified information. In light of the most recent Grand Chamber judgment in *Muhammad and Muhammad* it is clear nonetheless that the standards with regard to classified information cases require more scrutiny from state authorities and more safeguards provided for applicants than it was established in the *Regner* judgment, especially when the rights at stake concern the fundamental rights of the applicants. In fact, the ECtHR made it clear that a limitation on the procedural safeguards enshrined in Article 1 of Protocol No. 7 must not negate their very essence, i.e. the person concerned should in all cases be provided with the substance of the accusations made against them.<sup>40</sup> It follows, that in the case of **asylum applicants and beneficiaries of international protection the standards laid down in the Muhammad and Muhammad judgment are to be applied.**

### *UNHCR standards*

The UNHCR has addressed the issue of security concerns in asylum cases in a publication first issued in 2001 and updated in 2015, and in its guidance on the interpretation and application of the exclusion clauses in Article 1F of the 1951 Convention.<sup>41</sup> It emphasised 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'.<sup>42</sup> UNHCR set out certain procedural safeguards in relation to exclusion cases, such as, among others, individual consideration of the case, reasons for exclusion to be given in writing, right to appeal an exclusion decision to an independent body etc.<sup>43</sup> Nevertheless, it realises that in certain cases national security interests might prevent the full disclosure of the evidence. However, UNHCR highlights that even in such cases, the applicant should be able to challenge the substance of the evidence, i.e. an exclusion decision cannot rely upon secret evidence where the substance is not provided to the applicant.<sup>44</sup> It seems from the Background Note that UNHCR considers the role of the **courts, having access to all relevant evidence, in reviewing such exclusion decisions to be crucial.**<sup>45</sup>

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38. ECtHR, *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017 (hereinafter '*Regner*').

39. *Regner*, above n 38, paragraph 149.

40. *Muhammad and Muhammad*, above n 13, paragraphs 133 and 151.

41. 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>> (hereinafter 'UNHCR 2003'); UN High Commissioner for Refugees (UNHCR), 'Addressing Security Concerns without Undermining Refugee Protection, UNHCR's Perspective', Rev. 1., 2001, <<https://www.refworld.org/docid/3c0b880e0.html>> (hereinafter 'UNHCR 2001'); UN High Commissioner for Refugees (UNHCR), 'Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective', 17 December 2015, Rev.2, <<https://www.refworld.org/docid/5672aed34.html>> (hereinafter, 'UNHCR 2015')

42. UNHCR 2001, above n 41, paragraph 28.

43. UNHCR 2003, above n 41, paragraph 98.

44. UNHCR 2003, above n 41, paragraphs 112-113.

45. UNHCR 2003, above n 41, paragraph 113.



### III. THE APPLICABLE STANDARDS IN NATIONAL SECURITY-RELATED ASYLUM CASES

In the ZZ judgment, the CJEU determined the manner in which effective judicial review should be provided by Member States in national security-related cases. Accordingly, Member States besides having

**techniques and rules of procedural law which accommodate**, on the one hand, legitimate **State security considerations** regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to **ensure sufficient compliance with the person's procedural rights**, such as the **right to be heard** and the **adversarial principle**,<sup>46</sup>

are required to

provide for effective judicial review both of the **existence and validity of the reasons invoked by the national authority with regard to State security** and of the **legality of the decision**.<sup>47</sup>

#### LAWFULNESS OF CLASSIFICATION AND ACCESS TO CLASSIFIED INFORMATION

In case the decision of the asylum authority<sup>48</sup> is based on classified information to which the applicant has no access, the applicant must have access to an effective judicial review carried out by an independent court. The national court should consider whether precise and full disclosure to the applicant during the asylum procedure is justified.

*Is precise and full disclosure to the applicant during the asylum procedure justified?*

The first important duty of the court upon adjudicating a national security-related asylum case where the underlying information is classified is to examine the reasons of classification of the underlying evidence. Thus, the question the judge will be considering is **whether 'state security' stands in the way of disclosure?**<sup>49</sup> In that regard, the burden of proof is borne by the competent national authority. It has the duty to prove that 'State security would in fact be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision'.<sup>50</sup>

It is crucial that the presiding **judge** shall have **access to the totality of case files**, including the classified documents. Based on that, the court must have authority to **verify the veracity of the classified information**,<sup>51</sup> i.e. those reasons that 'stand in the way of precise and full disclosure of the grounds on which the decision in question is based and of the related evidence.'<sup>52</sup> In connection with the verification assessment, national procedural rules have to determine the way the court must carry out its independent examination. Nevertheless, the CJEU provides guidance with regard to the process by stating that the examination must cover all the matters of law and fact relied upon by the competent national authority.<sup>53</sup>

Provided that the judge concludes that **classification was unjustified**, the judge shall order the **disclosure of classified materials** to the applicant concerned by the competent authority. However, wherever that authority does not comply with the request, the court should decide on the legality of the decision under review by disregarding evidence not disclosed to the applicant (see Subchapter on Review of National Security Threat by Courts).<sup>54</sup>

*Provision of the 'essence of the grounds'*

In case the judge found **classification justified**, the court must ensure that to the greatest possible extent, 'the adversarial principle is complied with, in order to enable the person concerned to contest the grounds

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46. ZZ, above n 18, paragraph 57.

47. ZZ, above n 18, paragraph 58.

48. Asylum authority refers to the determining authority in the meaning of Art. 2(f) Procedures Directive throughout the legal note.

49. ZZ, above n 18, paragraph 60.

50. ZZ, above n 18, paragraph 61.

51. *Muhammad and Muhammad*, above n 13, paragraph 155(iii).

52. ZZ, above n 18, paragraph 60.

53. ZZ, above n 18, paragraph 62.

54. ZZ, above n 18, paragraph 63.

on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence.<sup>55</sup> To this end, the court shall ensure that the applicant is 'informed, in any event, of the essence of the grounds on which a decision' is based ('substance of the accusation' as it is put in the Muhammad judgment by the ECtHR<sup>56</sup>).<sup>57</sup> Therefore, the court must examine if the applicant was provided access to classified documents during the administrative procedure to the extent that is necessary for the enjoyment of their rights of the defence in the scope of the legality of the decision at hand.

Both per the CJEU and ECtHR jurisprudence, the mere presence of special legal representatives and their access to the classified information without having been able to communicate with the applicant afterwards does not meet the requirements of adversarial proceedings.<sup>58</sup> Consequently, if national systems provide access to classified materials for legal representatives, provided that they have gone through security clearance, the communication between the legal representative and the applicant after having taken cognisance of classified materials must be ensured.

Regarding the minimum content of the term '**essence of the grounds**', both courts have given some guidance, but it has not fully crystallised in their jurisprudence yet. It has been emphasised that the ECtHR examines the essence of the grounds on a case-by-case basis.<sup>59</sup> It has also been highlighted that the grounds are to be sufficiently detailed and specific, i.e. an outline of the grounds or a mere enumeration of legal provisions is insufficient in this regard.<sup>60</sup> Similar approach is adopted by the CJEU, It found in the Kadi case 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. The Court reasoned its conclusion by stating that 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.<sup>61</sup>

Moreover, the ECtHR found in the *A. and Others* case that 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 is insufficiently specific and detailed.<sup>62</sup> Causal link between evidence and the assessment of the authorities must also be disclosed to the applicant. Accordingly, the ECtHR held that 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.<sup>63</sup> Furthermore, for example, 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.<sup>64</sup>

Due to the lack of elaborated case law of the CJEU on the issue, a preliminary reference is currently pending before the Court.<sup>65</sup>

In sum, in case of exclusion from international protection, withdrawal thereof, or ordering asylum detention on the basis of national security grounds, where the underlying information is classified, the court must be empowered to rule on the lawfulness of classification itself. If disclosure is justified, it has to order the provision of information to the person concerned. If the domestic authority does not comply, the court must disregard the classified evidence upon deciding the case. If classification is justified, the court has to ensure that at least the essence of the grounds as to why the national security threat is established is shared with the person concerned.

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55. ZZ, above n 18, paragraph 65.

56. *Muhammad and Muhammad*, above n 13, paragraph 151.

57. ZZ, above n 18, paragraph 65.

58. See ZZ, above n 18 and *Muhammad and Muhammad*, above n 13, paragraph 155.

59. *Muhammad and Muhammad*, above n 13, paragraph 151.

60. *Kadi*, above n 27, paragraph 141.; *Muhammad and Muhammad*, above n 13, paragraphs 168 and 220.

61. *Kadi*, above n 27, paragraphs 141, 143, 145, 147 and 149.

62. *A. and others*, above n 31, paragraph 222.

63. *A. and others*, above n 31, paragraph 223.

64. *A. and others*, above n 31, paragraph 220; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 2 10112/16, 25 June 2019, paragraphs 25 and 121.

65. *GM v. Országos Idegenrendészeti Főigazgatóság and Others*, C-159/21, <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=242725&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1957331>>.

## EFFECTIVE JUDICIAL REVIEW OF DECISIONS BASED ON NATIONAL SECURITY THREAT, INCLUDING THE ACTUAL EXISTENCE OF THE THREAT

According to the EU case law, a judicial review by the court assessing the legality of a decision based on national security threat is effective only if the court has the power to examine all the evidence and reasons on the basis of which it was concluded that someone represents a threat to national security. **There is no presumption as to the existence and validity of the reasons put forward by the national authority.**<sup>66</sup> Judicial control must therefore not be purely formalistic.

Similarly, ECtHR held that while the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.<sup>67</sup> When the national courts leave **full and uncontrolled discretion to the national authority** to certify, with reference to little more than its own general statements, that an alien was a threat to national security and had to be expelled, such judicial review is considered to be beyond any meaningful judicial scrutiny, providing no safeguard against arbitrariness.<sup>68</sup>

According to the *Muhammad and Muhammad* judgment, an independent authority must be involved in the procedure having access to the 'totality of the file constituted by the relevant national security body'.<sup>69</sup> It 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 authority 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 authority's decision.<sup>70</sup>

With regard to the national security threat, domestic law should ensure that national court is competent to:

- » independently examine all legal and factual elements asserted by the competent national authority (e.g. security agency)
- » give the applicant a chance to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them (see previous section), *i.e.* the right to be heard of the applicant is observed.<sup>71</sup>

### *Definition of national security threat*

First of all, **the national courts will look into whether the alleged threat falls within the established definition of the national security concept**, as according to the CJEU, the strict circumscription of the power of the competent national authorities is also ensured by the interpretation which the case-law of the Court of Justice gives to the concepts of 'national security' and 'public order'.<sup>72</sup> In order that legal certainty is guaranteed in judicial proceedings, the precise meaning of national security threat should be defined in a straightforward way.<sup>73</sup>

The term 'public security' ('national security') covers both a Member State's internal and external security.<sup>74</sup> 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 the peaceful coexistence of nations, or a risk to military interests, may affect public security.<sup>75</sup> According to the CJEU, internal security may be affected by a **'direct threat'** to the peace of mind and physical security of the

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66. ZZ, above n 18, paragraphs 59-61.

67. *Kaushal*, above n 30, paragraph 29; ECtHR, *C.G. v. Bulgaria*, Appl. No. 1365/07, 24 April 2008, paragraph 40; *Al-Nashif*, above n 31, paragraphs 123-124.

68. *Bou Hassoun*, above n 31, paragraph 33.

69. *Muhammad and Muhammad*, above n 13, paragraph 155(iii).

70. *Muhammad and Muhammad*, above n 13, paragraphs 156(v), 194-196, 199-201.

71. ZZ, above n 18, paragraph 55.

72. *J.N.*, above n 28, paragraph 64; Judgment of 11 November 2004, *Inan Cetinkaya v. Land Baden-Württemberg*, C-467/02, ECLI:EU:C:2004:708, paragraph 43.

73. Chlebny 2017, above n 3, p. 19.

74. *J. N.*, above n 28, paragraphs 65-67.

75. Judgment of 11 September 2014, *H. T. v. Land Baden-Württemberg*, C-373/13, ECLI:EU:C:2015:413, paragraph 78 (hereinafter '*H. T.*').

population of the Member State concerned.<sup>76</sup> It also presupposes the existence of a threat to public security that is of a **'particularly high degree of seriousness'**.<sup>77</sup>

Not every 'problematic' applicant's conduct, therefore, falls under the concept of national security. For example, aggressive behaviour during the Dublin transfer cannot be considered as such as it does not represent a threat affecting a fundamental interest of society or the internal or external security of the Member State concerned. Moreover, not even the support of a terrorist organisation leads automatically to the establishment of compelling national security grounds.<sup>78</sup>

#### *Individual assessment, proportionality and necessity tests*

Second, when reviewing exclusion, withdrawal or detention decisions, the applicable EU law requires that decisions are based on **individual assessment**, that the exclusion/withdrawal or detention are **necessary and proportionate to the legitimate objective pursued** (in this case protection of national security).<sup>79</sup>

The general requirement of individual assessment follows from *inter alia* Article 4(1)-(3) as well as from Article 10(3) of the Qualification Directive. Furthermore, with regard to withdrawal of subsidiary protection, Article 19(4) of the Qualification Directive explicitly sets out that the Member State shall, '*on an individual basis, demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection*'. The individual assessment principle was reinforced with regard to the withdrawal decision of international protection by the CJEU in the *Ahmed* judgment.<sup>80</sup> The Court stated that '*any decision to exclude a person from refugee status must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically*'.<sup>81</sup> Such a requirement applies to exclusion from subsidiary protection as well.<sup>82</sup>

The content and structure of Article 14(4) and 14(5) of Qualification Directive, concerning the withdrawal of refugee status, bear similarities to Article 12(2)(a) to (c) relating to exclusion from refugee status, i.e. the findings of the Court in the context of the exclusion cases should therefore also apply to withdrawal cases. Therefore, the findings in *B and D* case, according to which it is required that '*any decision to exclude a person from refugee status must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically*'<sup>83</sup> should by analogy apply in cases of revocation or refusal to renew refugee status. Individual assessment when ordering detention is required by Article 8(2) of the Reception Conditions Directive.

According to the CJEU jurisprudence, an **individual assessment of a threat to national security** means that the personal conduct of the individual concerned needs to be taken into account. The following factors are of relevance: the time that has elapsed since the crime was allegedly committed, the degree of individual involvement, any grounds for excluding criminal liability, conviction, further conduct (whether that conduct reveals hostility to EU fundamental values, capable of disturbing the peace of mind and physical security of the population).<sup>84</sup>

In case fundamental rights are at stake, a **necessity and proportionality test** of the limitation must always be carried out.<sup>85</sup> When examining the necessity of detention based on national security grounds (Article 8(3)(e) of the Reception Conditions Directive), CJEU 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.<sup>86</sup> Exclusion from subsidiary

76. Judgment of 2 May 2018, *K v. Staatssecretaris van Veiligheid en Justitie and H.F. v. Belgische Staat*, joined cases of C-331/16 and C-366/16, ECLI:EU:C:2018:296, paragraph 42 (hereinafter '*K and H.F.*').

77. *H. T.*, above n 75, paragraph 78.

78. *H. T.*, above n 75, paragraph 99; Judgment of 9 November 2010, *Bundesrepublik Deutschland v. B and D*, joined cases of C-57/09 and C-101/09, ECLI:EU:C:2009:285, paragraphs 91 and 93 (hereinafter '*B and D*').

79. See i.a. Articles 4(1)-(3) and 10(3) of the Qualification Directive; Article 8(2) of the Reception Directive concerning detention; Article 52(1) of the Charter, Articles 14(4)(a), 14(5), 17(1)(d), 19(3)(a) as interpreted by the CJEU and 19(4) of the Qualification Directive concerning withdrawal and exclusion.

80. Judgment of 13 September 2018, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, C-369/17, ECLI:EU:C:2018:713 (hereinafter '*Ahmed*').

81. *Ahmed*, above n 80, paragraph 49.

82. *Ahmed*, above n 80, paragraph 50.

83. *B and D*, above n 78, paragraphs 91 and 93.

84. *K and H.F.* above n 76, paragraph 66.

85. See Article 52(1) of the Charter quoted above under Chapter II on EU law.

86. *J.N.*, above n 28, paragraph 67.

protection based on national security grounds also requires the specification of **'serious reasons'**<sup>87</sup> whereas withdrawal of or exclusion from international protection based on national security assumes the **existence of 'reasonable grounds'**.<sup>88</sup>

With regard to asylum detention, the requirement of proportionality test was reiterated by the CJEU in the J.N. judgment. It held therein that even if a national security threat is established, this mere fact cannot automatically lead to the ordering of detention.<sup>89</sup> 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** (balancing exercise).<sup>90</sup>

Moreover, the **asylum authority cannot base its decision solely on the conclusions of an expert's report (i.e. the report of the security agencies)**.<sup>91</sup> It clearly follows from Articles 2(f) and 4(1) read in conjunction with Article 4(2) of the Asylum Procedures Directive that the asylum authority shall be responsible for the examination of an asylum application as well as of the withdrawal of an international protection. Article 4 of the Qualification Directive also specifies that the assessment of the individual facts and circumstances of an application for international protection is the duty of the determining authority alone. Consequently, deriving a decision on exclusion from or withdrawal of international protection based on national security grounds solely on the conclusions of the reports of security agencies constitutes an unlawful delegation of powers of the asylum authority and is contrary to EU law.

Similarly, the ECtHR ruled on the insufficiency of judicial review on numerous occasions. To illustrate, in *C.G. and Others v. Bulgaria*, the Court found a violation of the Convention due to the fact that 'the applicant did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities,' where a Bulgarian court held 'that once the Ministry of Internal Affairs had produced a report based on undisclosed secret surveillance measures asserting that the first applicant had engaged in criminal activities, no further inquiry into the facts was possible or necessary (...).' It thus failed to examine a critical aspect of the case: whether the authorities were able to demonstrate the existence of specific facts serving as a basis for their assessment that the first applicant presented a national security risk. On appeal, the Supreme Administrative Court did not gather evidence either and confined its reasoning on this point to the following brief statement: 'It has been established (...) that [the first applicant] has acted as an intermediary for the supply of narcotics and maintains regular contacts with Bulgarian citizens who distribute narcotics and intoxicating substances (...).' It did not elaborate on the evidentiary basis for making such a finding and did not deal with the first applicant's detailed submissions that he had not in fact been involved in such activities (...). These elements lead the Court to conclude that **the national courts confined themselves to a purely formal examination of the decision to expel the first applicant (...). They refused to examine other pieces of evidence to confirm or refute the allegations against him and rested their rulings solely on uncorroborated information tendered by the Ministry of Internal Affairs on the basis of the covert monitoring** of the first applicant.<sup>92</sup>

In sum, where the court merely automatically concludes that the applicant poses a threat to national security without taking due account of the applicant's personal conduct and the risk posed by that conduct to national security, the state concerned does not respect the standard of individual assessment and the principle of proportionality.

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87. Article 17(1)(d) of Qualification Directive.

88. Article 14(4)(a) of the Qualification Directive.

89. *J.N.*, above n 28, paragraph 61.

90. *J.N.*, above n 28, paragraph 69.

91. Judgment of 25 January 2018, *F. v. Bevándorlási és Állampolgársági Hivatal*, C-473/16, ECLI:EU:C:2018:36, paragraphs 41-42 and 45.

92. *C.G.*, above n 68, paragraphs 47 and 49.



## IV. CONCLUSION

Even though law and practices of states throughout Europe are manifold, evoking national security concerns in the area of asylum has become a *carte blanche* for some EU Member States to exclude asylum applicants from international protection, revoke it or arbitrarily detain them, without any meaningful judicial control and without giving them the possibility to know at least the summary of the reasons why they are considered a threat to national security.

The legal note aimed at drawing attention of legal professionals involved in such cases to the applicable standards deriving from EU law and the international law as interpreted by the CJEU and ECtHR, in particular. **A summary of the concluding arguments** relating to access to effective remedies in national security cases including access to classified data is as follows:

- i. Domestic courts are under obligation not to accept the mere opinion of the national authorities on the risk to national security posed by the applicant concerned, but rather should have competence to thoroughly review all the documents based on which such opinion was formed (including the classified ones) and first decide if state security reasons indeed justify the classification of the underlying material;
- ii. EU law and ECHR standards require that domestic courts will ensure that the applicant is informed of at least the essence of the grounds as to why they present a threat to national security and to form their views on it provided that classification of information concerned was justified;
- iii. Domestic courts of EU MS will verify whether the applicant's individual conduct actually 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 (i.e. apply the concept of national security/public order as defined by the CJEU);
- iv. Courts will carry out an individual assessment of the applicant's conduct (e.g. time since alleged crime was committed, individual involvement, grounds for excluding criminal liability, conviction, further conduct of the applicant and their values);
- v. Courts will conduct an adequate balance exercise to assess whether it was necessary and proportionate to exclude from/withdraw the international protection or detain a person in order to protect national security, taking into due consideration the statements made by the applicant during the judicial procedure.

Judicial decisions are crucial in preventing and remedying human rights violations. Independent courts serve as the guardians of the rule of law by identifying and ruling out arbitrary measures of state bodies, including the asylum authority. However, sensitive nature of the matter, insufficient national legislation and public pressure connected to national security cases sometimes results in judicial anomalies when the right to an effective remedy is undermined in practice. A superficial review of an asylum decision on the rejection or revocation of international protection may amount to a violation of the right to respect for private and family life, the right to education or even to an infringement of the prohibition of torture and ill-treatment in case the expulsion of the person concerned was simultaneously ordered. In case of asylum detention, the person concerned may be arbitrarily deprived of their liberty, thereby isolating them from society and resulting in mental health problems.

While the standards on the matter are being further advanced, the existing standards and jurisprudence give a sufficient arsenal of arguments in order to address violations of those affected. Whereas most EU Member States follow the standards outlined, legal professionals in the countries where these are not respected can draw on the guarantees under EU and international law in order to change this situation.