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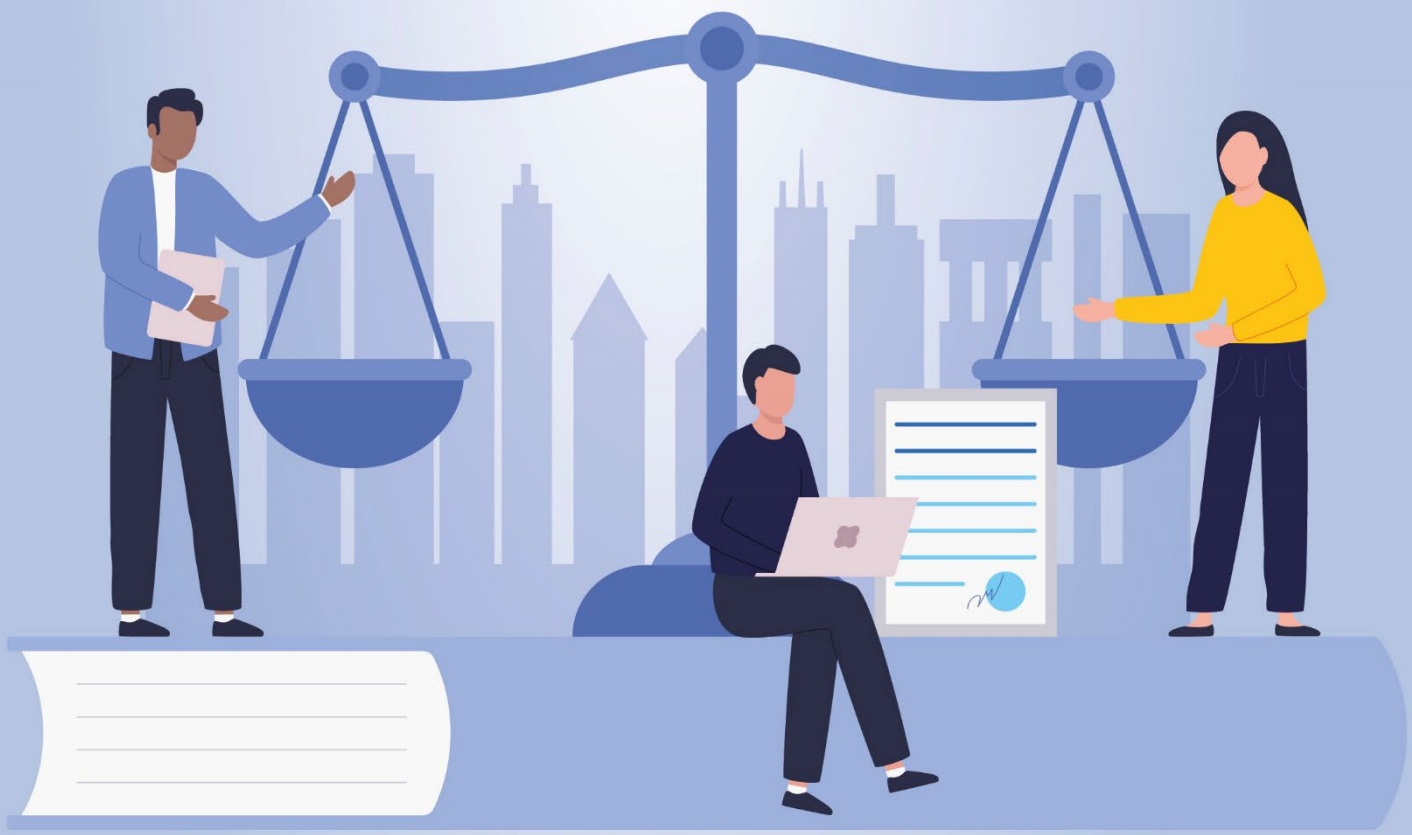
Quarterly Overview of Asylum Case Law



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Note

The "EUAA Quarterly Overview of Asylum Case Law" is based on a selection of cases from the EUAA Case Law Database, which contains summaries of decisions and judgments related to international protection pronounced by national courts of EU+ countries, the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). The database presents more extensive summaries of the cases than what is published in this quarterly overview.

The summaries are reviewed by the EUAA Information and Analysis Sector and are drafted in English with the support of translation software.

The database serves as a centralised platform on jurisprudential developments related to asylum, and cases are available in the Latest updates (last ten cases by date of registration), Digest of cases (all registered cases presented chronologically by the date of pronouncement) and the Search bar.

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List of abbreviations

APD (recast)	Asylum Procedures Directive. 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)
BAMF	Federal Office for Migration and Refugees (Germany)
CALL	Council for Alien Law Litigation (Belgium)
CEAS	Common European Asylum System
CGRS	Office of the Commissioner General for Refugees and Stateless Persons | Commissaire général aux réfugiés et aux apatrides (Belgium)
CJEU	Court of Justice of the European Union
COA	Central Agency for Reception of Asylum Seekers (the Netherlands)
COI	Country of origin information
CNDA	National Court of Asylum | Cour Nationale du Droit d'Asile (France)
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EUAA	European Union Agency for Asylum
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EU+ countries	Member States of the European Union and associated countries
FAC	Federal Administrative Court (Switzerland)
Fedasil	Federal Agency for the Reception of Asylum Seekers (Belgium)
FGM/C	Female genital mutilation/cutting
FIS	Finnish Immigration Service

Member States	Member States of the European Union
NGO	Non-governmental organisation
OFPRA	Office for the Protection of Refugees and Stateless Persons | Office Français de Protection des Réfugiés et Apatrides (France)
QD (recast)	Qualification Directive. 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)
RCD (recast)	Reception Conditions Directive. 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)
Refugee Convention	The 1951 Convention relating to the status of refugees and its 1967 Protocol
UNHCR	United Nations High Commissioner for Refugees
UNWRA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

Main highlights

The interim measures, decisions and judgments presented in this issue of the "EUAA Quarterly Overview of Asylum Case Law, Issue No 4" were pronounced from September to November 2022.

Court of Justice of the European Union

Interpretation of the Dublin III Regulation

In *Federal Republic of Germany* v *MA, PB and LE*, the CJEU held that the suspension of the implementation of a Dublin transfer decision, due to the COVID-19 pandemic, does not have the effect of interrupting the 6-month time limit for a transfer.

In *O.T.E.* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, the CJEU ruled that Dublin transfers of victims of human trafficking may not be implemented during the reflection period provided in Directive 2004/81/EC. However, a Dublin transfer decision may be adopted and preparatory measures may be undertaken during the reflection period.

Interpretation of the recast Qualification Directive (QD)

In *GM* v *Országos Idegenrendeszeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ*, the CJEU ruled on the withdrawal of international protection due to a danger to national security, specifically on decisions based on a non-reasoned opinion of national security bodies which find that the person constitutes a danger to national security.

Interpretation of the recast Asylum Procedures Directive (APD)

In *SI, TL, ND, VH, YT, HN* v *Bundesrepublik Deutschland*, the CJEU ruled that EU Member States' national law may not provide for the inadmissibility of applications for international protection on the basis that the request was rejected in a comparable application in Denmark.

Interpretation of the recast Reception Conditions Directive (RCD)

In *Applicants* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, the CJEU ruled that judicial authorities must review *ex officio* the lawfulness of detention decisions either for a return or related to the international protection procedure.

Interpretation of the Family Reunification Directive

In *X* v *Belgium*, the CJEU interpreted Articles 2(f) and 10(3)(a) of the Family Reunification Directive and ruled that unaccompanied minors do not have to be unmarried to be sponsors for their parents in family reunification procedures.

Interpretation of the Return Directive

The CJEU ruled on the Return Directive in three cases:

- *X* v *Staatssecretaris van Justitie en Veiligheid*, where it held that a person suffering from a serious illness may not be removed if, in the absence of appropriate medical

treatment in the receiving country, the person would be subjected to a real risk of rapid, significant and permanent increase in pain due to the illness;
- *UP* v *Centre public d'action sociale de Liège (Belgium)*, where it held that Member States may provide that the grant of a leave to remain for compassionate, humanitarian or other reasons (Article 6 of the Return Directive) entails the (implicit) withdrawal of a previously adopted return decision; and
- *I.L.* v *Police and Border Guard Board (Politsei- ja Piirivalveamet)*, where it held that Article 15(1) of the Return Directive does not allow a Member State to order the detention of an illegally-staying third-country national solely based on the general criterion of a risk that the effective execution of the removal will be jeopardised.

European Court of Human Rights

Interim measures under Rule 39

In the context of the saturation of the Belgian reception facilities run by Fedasil, the ECtHR indicated interim measures to Belgium in *Camara* v *Belgium* on 31 October 2022 and in *Msallem and 147 Others* v *Belgium* on 15 November 2022. The ECtHR indicated to the government of Belgium to provide them with accommodation and basic needs for the duration of the proceedings before the ECtHR.

Collective expulsions

The ECtHR ruled in two cases on collective expulsion:

- *T.Z. and Others* v *Poland*, collective expulsion at the Polish border with Belarus; and
- *H.K.* v *Hungary*, collective expulsion from Hungary to Serbia.

Family reunification

In *M.T. and Others* v *Sweden*, the ECtHR ruled that the 3-year suspension period introduced in Sweden for family reunification of beneficiaries of subsidiary protection, gradually reduced and allowing individualised assessment, does not amount to a violation of Article 8 of the European Convention.

Return to the region of North Caucasus

In *S.* v *France*, the ECtHR held that there would be a violation of Article 3 of the European Convention if the applicant, of Chechen origin, would be returned to Russia without an individual assessment of the risk of ill treatment upon return.

National courts

Referrals for a preliminary ruling to the CJEU

The Belgian Council of State referred questions to the CJEU for a preliminary ruling on the possibility for a mother of a minor, recognised as a refugee in Belgium, to benefit from the rights enshrined in Articles 24-35 of the recast QD when that state has not transposed Article 23 (maintaining family unity).

The Federal Administrative Court in Leipzig asked the CJEU whether EU law precludes the Member State which received an application for international protection from an applicant who was previously granted protection in another EU+ country to reject it as inadmissible when the transfer would entail a risk of violating Article 4 of the EU Charter.

Access to the asylum procedure

The Administrative Court of Białystok in Poland found in *A.D. v Border Guard* a violation of the right to access the asylum procedure and to an effective remedy for applicants transferred to the border area with Belarus.

Membership of a particular social group

The French CNDA recognised the existence of the social group of women and children exposed to the risk of genital mutilation in Egypt, while the Danish Refugee Appeals Board granted protection due to the risk of being subjected to female genital mutilation or cutting (FGM/C) in Somalia.

In Belgium, the Council for Alien Law Litigation confirmed in two cases (278 654 and 278 701) that Afghans returning from Europe could not be considered members of a particular social group within the meaning of Article 10(1)(D) of the recast QD.

Reception conditions

National courts in Belgium and the Netherlands ruled on reception conditions:

- The Labour Court of Brussels allowed the swift provision of accommodation or financial aid in the context of Fedasil being confronted with a saturation of the reception system and court ordinances not implemented in more than 2,000 cases; and
- The Court of the Hague ordered a comprehensive list of measures to be enforced within specific time limits to remedy the situation of reception conditions in emergency and crisis centres (among these, not to accommodate unaccompanied minors and vulnerable applicants in emergency facilities).

Detention

In France, the Council of State refused to order interim measures after passengers disembarked from Ocean Viking were placed in a temporary waiting area in Toulon (France).

Temporary protection

The Bulgarian Administrative Court of Sofia City ruled in two cases (No 5540 and No 5424) on the impact of registering for temporary protection on proceedings for international protection. The court ruled that the termination of proceedings for international protection were unlawful for Ukrainian applicants who also applied for temporary protection.

In Germany, the High Administrative Court of Baden-Württemberg held that a Nigerian applicant with permanent residence status in Ukraine who can safely and permanently return to his country of origin does not have the right to access employment in Germany.

Access to the asylum procedure

Collective expulsions

ECtHR, *T.Z. and Others v Poland*, No 41764/17, 13 October 2022.

The ECtHR found a violation of Article 3 of the European Convention and a violation of Article 4 of Protocol No 4 to the Convention for the collective expulsion of six Russian nationals who were turned away at the Polish border with Belarus without having their applications for asylum examined by the Polish authorities.

A Russian family with four minor children were denied entry into Poland on 22 occasions and were returned each time to Belarus without having their applications for asylum examined in Poland. Before the ECtHR, they claimed that the officers of the Polish Border Guard disregarded their statements concerning their wish to apply for international protection and returned them to Belarus.

The ECtHR referred to its previous judgment in *M.K. and Others v Poland* (2020) in which it had analysed a similar situation and considered whether Belarus was a safe country in which applicants could be returned without a risk of chain *refoulement*. Similarly, the court concluded that in this case there was a violation of Article 3 of the ECHR as the applicants had not been given the opportunity to lodge asylum requests, despite having expressed such a wish at the border crossing point. The court further found a violation of Article 4 of Protocol No 4 and Article 13 of the Convention in conjunction with Article 3 of the Convention.

ECtHR, *H.K. v Hungary*, No 18531/17, 22 September 2022.

The ECtHR found a violation of Article 4 of Protocol No 4 to the Convention and Article 13 of the European Convention due to the applicant's collective expulsion from Hungary to Serbia.

Waiting for access to the transit zone near the border between Hungary and Serbia, an Iranian national repeatedly tried to enter Hungary irregularly but was removed back to Serbia without a decision. On 3 September 2016, he was removed with 76 individuals from Hungary without receiving any documents or information.

The court found a violation of Article 4 of Protocol No 4 to the Convention. It referred to its previous case law (*Shahzad* v *Hungary*, No 12625/17) and held that the removal from Hungary amounted to a collective expulsion in the absence of a decision pronounced by the domestic authorities and an examination of the applicant's individual situation. The applicant was not provided with information on access to the asylum procedure in Hungary. In addition, the court found a violation of Article 13 of the European Convention in conjunction with Article 4 of Protocol No 4 to the Convention.

Access to the asylum procedure at the Polish-Belarusian border

Poland, Voivodeship Administrative Court [Wojewodzki Sąd Administracyjny], *A.D. v Border Guard*, II SA/Bk 492/22, 15 September 2022.

The Administrative Court of Białystok found a violation of the right to access the asylum procedure and to an effective remedy in the case of Iraqi applicants transferred to the border area with Belarus.

A family with four minor children from Iraq were returned by Poland to the national border and transferred to Belarus, although they declared a wish to apply for international protection in Poland. They claimed a failure to examine their situation individually, including the risk of being subjected to ill treatment in Belarus, in violation of the principle of *non-refoulement* and a failure to provide the right to an effective remedy.

The court noted the authorities' obligations not to initiate return proceedings if the asylum procedure is ongoing (unless a subsequent application was lodged) and not to enforce a return decision if the individual declared an intention to apply for asylum. The court concluded that the authorities had failed to conduct an individual assessment of the case.

The court also noted that neither the national legal provision nor the factual circumstances (including the migration crisis at the EU's external border caused by external factors) could exclude the requirement that a Member State apply the principle of *non-refoulement*, even to foreign nationals who cross Poland's borders illegally.

Dublin procedure

Time limits for a Dublin transfer

CJEU, *Federal Republic of Germany v MA, PB and LE*, C-245/21 and C-248/21, 22 September 2022.

The CJEU held that the suspension of the implementation of a Dublin transfer decision, due to the COVID-19 pandemic, does not have the effect of interrupting the 6-month time limit for a transfer.

The CJEU interpreted Articles 27(4) and 29(1) of the Dublin III Regulation. When a Dublin transfer is suspended because of COVID-19 restrictions, the court confirmed that the 6-month time limit is not interrupted and the requesting Member State must take charge of the applicant's case if the transfer is not implemented within the time limit. The CJEU noted that such a suspension must be distinguished from a suspension granted to allow an applicant to appeal a transfer decision. The CJEU stressed that in the latter case, the time limit starts from the date of the final decision of the appeal to guarantee the applicant's access to procedural safeguards.

In this case, however, extending the time limit would go against the objectives of the Dublin III Regulation to ensure that people are transferred as soon as possible. The CJEU reiterated that a suspension of the implementation of a transfer decision may only be ordered within the framework defined in the Dublin III Regulation, e.g. in situations where a suspension is necessary to guarantee an applicant's right to an effective judicial remedy.

Dublin transfers of victims of human trafficking

CJEU, *O.T.E. v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, C-66/21, 20 October 2022.

The CJEU ruled that Dublin transfers of victims of human trafficking may not be implemented during the reflection period provided in Directive 2004/81/EC. However, a Dublin transfer decision may be adopted and preparatory measures may be undertaken during the reflection period.

A Nigerian national applied for asylum in the Netherlands after lodging asylum applications in Italy and Belgium. Italy agreed to take back the applicant under Article 18(1)(d) of the Dublin III Regulation. The applicant informed the Dutch asylum authorities that he had been a victim of human smugglers in Italy, but the Netherlands did not examine the case as Italy was deemed responsible for examining the application.

The applicant challenged the decision and the District Court of the Hague referred questions to the CJEU to clarify the interpretation of Article 6 of Directive 2004/81/EC (Directive on the residence permit issued to third-country nationals who are trafficking victims), particularly regarding the reflection period prior to an expulsion and the nature of the expulsion.

The CJEU ruled that Article 6(2) of Directive 2004/81/EC must be interpreted to mean that Dublin transfers between Member States are covered by the term 'removal order' and that Article 6(2) prohibits the implementation of a Dublin transfer decision during the reflection period guaranteed in Article 6(1). However, it does not preclude a decision to implement a Dublin transfer or taking preparatory measures for its implementation, if the preparatory measures do not render the Dublin transfer decision invalid.

Organisation of a Dublin transfer while an appeal is pending

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant v Ministry of Justice and Security*, EN22.16306, 7 October 2022.

The District Court of the Hague confirmed that the Ministry of Justice and Security cannot organise the transfer of an applicant pursuant to the Dublin III Regulation when the decision to place the applicant in the Dublin procedure is pending an appeal.

The applicant submitted a request to appeal the decision to transfer him from the Netherlands to Germany under the Dublin III Regulation. The applicant subsequently submitted a request for an interim request when his transfer had been scheduled to take place prior to his appeal hearing.

The District Court of the Hague granted the interim measure and ordered the suspension of the decision to initiate the transfer until a decision was issued in respect of the appeal against the original contested decision.

Dublin transfers to Bulgaria

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, NL22.14416, 20 October 2022.

The Court of the Hague dismissed claims from a Syrian national that a transfer to Bulgaria would entail the risk of a pushback.

A Syrian national appealed the Court of the Hague's decision to return him to Bulgaria under the Dublin III Regulation. The applicant argued that the principle of interstate trust cannot be assumed as there is a practice of widespread pushbacks in Bulgaria.

The appeal was rejected by the Court of the Hague on the grounds that the applicant's circumstances could not be compared to those of a foreign national who has illegally entered Bulgaria or the EU, given that the applicant would already be in Bulgarian territory. The request to take back the applicant, under the Dublin III Regulation, had also been explicitly accepted by Bulgaria.

Dublin transfers to Croatia

Germany, Regional Administrative Court [Verwaltungsgerichte], *Applicant* v *BAMF*, A 16 K 3603/22, 2 September 2022.

The Regional Administrative Court of Stuttgart annulled a Dublin transfer to Croatia due to deficiencies of the asylum procedure and a risk of refoulement.

The Regional Administrative Court of Stuttgart annulled a Dublin transfer to Croatia after having considered that the asylum system in Croatia presents deficiencies which would lead to a risk of *refoulement* and inhuman or degrading treatment. The court noted that applicants who left Croatia who had their asylum applications either withdrawn or rejected would be considered, upon return, as subsequent applicants and be deprived of a substantive assessment of their application, contrary to Article 18(2) of the Dublin III Regulation. In addition, the court noted reports with indications of violence, human rights violations and pushbacks at the borders with Serbia and Bosnia-Herzegovina.

Germany, Regional Administrative Court [Verwaltungsgerichte], *Applicant* v *BAMF*, 15 B 3250/22, 7 September 2022.

The Regional Administrative Court of Hanover ordered the immediate suspension of a Dublin transfer to Croatia due to systemic deficiencies in the asylum and reception systems.

The Regional Administrative Court of Hanover suspended the implementation of a Dublin transfer to Croatia due to serious indications of systemic deficiencies in the asylum and reception systems. The court stated that violent pushbacks were allegedly happening for a long time at the borders with Serbia and Bosnia-Herzegovina, raising concern about human rights violations, contrary to Article 3 of the ECHR and Article 4 of the EU Charter.

Dublin transfers to Italy

Iceland, Immigration Appeals Board [Kærunefnd útlendingamála], *Applicant* v *Directorate of Immigration*, KNU22070026, 7 September 2022.

The Immigration Appeals Board upheld a decision of the Directorate of Immigration to transfer a Gambian national to Italy under the Dublin III Regulation.

A Gambian national who requested international protection in Iceland in 2022 was issued a decision stating that the request would not be examined and he would be transferred to Italy, pursuant to the Dublin III Regulation. The applicant appealed this decision stating that the Directorate of Immigration did not take his individual circumstances into account, namely that in Italy he had experienced racial discrimination in the labour and housing markets and could not access adequate health care.

The board accepted that there was evidence that suggested that reception centres in Italy were often overcrowded and lacking hygiene and that

discrimination against refugees was an ongoing challenge. Nonetheless, the board concluded that the mere fact that living conditions were more optimal in one EU+ country than another was not grounds to stop a Dublin III transfer.

Dublin transfers to Poland

Germany, Regional Administrative Court [Verwaltungsgerichte], *Applicant* v *BAMF*, 12 L 599/22.A, 5 September 2022

The Regional Administrative Court overturned a transfer to Poland for insufficient investigation of minor applicants' risk of being detained in unsuitable conditions, contrary to Article 4 of the EU Charter.

The Regional Administrative Court of Minden overturned a decision on a Dublin transfer to Poland considering that BAMF had insufficiently investigated whether the applicants, including minors, would be at a risk of detention under conditions amounting to a risk of inhuman or degrading treatment, contrary to Article 4 of the EU Charter.

First instance procedures

Admissibility procedure

CJEU, *SI, TL, ND, VH, YT, HN* v *Bundesrepublik Deutschland*, C-497/21, 22 September 2022.

The CJEU ruled that EU Member States' national law may not provide for the inadmissibility of applications for international protection on the basis that the request was rejected in a comparable application in Denmark.

The CJEU interpreted Article 33(2)(d) of the recast APD in the case of Georgian nationals who lodged asylum applications in Germany after their asylum applications were rejected in Denmark (which applies certain provisions of the Dublin III Regulation but does not implement the recast QD and the recast APD).

After having an asylum application rejected by Denmark, the CJEU noted that an application made by the same individual in another Member State may not be considered as a subsequent application. Thus, a rejection by Denmark may not be a reason for dismissing an application as inadmissible in another Member State.

Assessment of new evidence in subsequent applications

Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *Applicant v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, 202100736/1/V2, 28 September 2022.

The Council of State overturned an inadmissibility decision and the dismissal of a first application in a subsequent application concerning insufficient assessment of the growth in faith after conversion to Christianity.

The Council of State overturned an inadmissibility decision and the dismissal of a first application concerning a subsequent application submitted by an Iranian woman and her two sons, who claimed a growth in faith after conversion to Christianity. The Council of State ruled that the working methods of the determining authority give too much weight to the implausibility assessment made in the first asylum application and that new elements and findings, such as statements on a growth in faith, may lead to a different assessment.

The case was sent back to be re-examined on the admissibility criteria, namely whether the elements and findings presented are new compared to the previous procedure and whether those elements and findings are relevant to the assessment of the application.

The Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *Applicant v State Secretary for Justice and Security*, 202006762/1/V2, 15 September 2022.

The Council of State assessed the concept of new evidence in subsequent applications, namely analyses based on a previous report.

An Afghan national appealed the dismissal of his subsequent application as inadmissible, claiming that two analyses of an official report from 2002 and documents referenced therein should have been accepted as new evidence as they demonstrated that the conclusions reached in the original report were unsubstantiated.

The Council of State confirmed that analyses based on a previous report already used as evidence should be viewed as separate evidence and taken into consideration.

Provision of compensation for delays in processing applications

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) (2)*, NL22.12053, 4 November 2022.

The Court of the Hague allowed a second appeal against a delay of the State Secretary to take a decision on the asylum application of an Iranian national.

An Iranian applicant complained about the failure of the State Secretary to take a decision on his application for international protection. In the first appeal. the State Secretary was ordered to adopt a decision within 16 weeks, whereas in the second appeal, it was requested to process the application in a maximum of 8 weeks.

The Court of the Hague considered that no new time limit can be established and the State Secretary must adopt a decision. Failure to do so would accrue a daily penalty of EUR 200 would be applied within the limit of EUR 15,000.

Type of compensation for delays in proceedings: Judicial penalty versus administrative penalty

Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) v Applicant*, 202203068/1/V1, 30 November 2022.

The Council of State ruled that a judicial penalty is an effective means of ensuring that the State Secretary fulfils its obligation to decide timely on asylum applications.

The Council of State ruled on the possibility for a court to impose a judicial penalty against the State Secretary for delays in taking a decision on an asylum application, based on Articles 42 and 43 of the Aliens Act 2000. The Council of State confirmed that Article 1 of the Temporary Act is contrary to Article 47 of the EU Charter, as it excludes the possibility of the administrative court to impose a judicial penalty in an asylum procedure. In the absence of a judicial penalty or an alternative measure, the Council of State confirmed that an appeal is insufficient to comply with the principle of effective legal protection enshrined in Article 47 of the EU Charter.

On the possibility for the State Secretary to forfeit an administrative penalty itself for delays in proceedings, the council ruled that abolishing the administrative penalty in asylum cases is not contrary to the principle of effective legal protection as asylum procedures are not comparable to other administrative procedures.

Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) v Applicant*, 202203066/1/V1, 30 November 2022.

The Council of State clarified that an administrative penalty is not applied to the asylum procedure for failure to take a timely decision.

The Council of State considered that the exclusion of an administrative penalty for the failure of the State Secretary to timely decide in an asylum case is not contrary to EU law. The Council of State underlined that the asylum procedure is different from other types of administrative procedures and such an exclusion is not contrary to the principle of effective legal protection. The Council held that an administrative court can order a judicial penalty for the State Secretary for each day of non-compliance with a ruling ordering it to adopt a timely decision in an asylum case.

Assessment of applications

Armenia as a safe country of origin

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, NL22.15067, 9 November 2022.

The Court of the Hague overturned a negative decision because the State Secretary insufficiently investigated whether Armenia was a safe country of origin for a victim of rape who claimed that the authorities could not provide her protection.

An Armenian applicant who was a victim of rape was rejected in the asylum procedure as the State Secretary did not consider some aspects of her statements to be credible.

The Court of the Hague overturned the decision and stated that the determining authority insufficiently justified its decision not to apply the benefit of the doubt considering the overall credibility assessment of all other statements. The Court of the Hague also ruled that the State Secretary did not fulfil its duty to cooperate and investigate whether the applicant should have further sought protection from the national authorities for the violence.

The principle of interstate mutual trust in an age assessment

Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *Applicant* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, 202104145/1/V1, 2 November 2022.

The Council of State assessed the determination of age for an applicant registered in one or more Member States both as a minor and as an adult.

The application for international protection of a Guinean national was not processed by the State Secretary because, in view of the Dublin III Regulation, another Member State was responsible for processing it, and due to doubts on the age of the applicant, investigations revealed that he was an adult.

The Council of State confirmed the State Secretary's policy of relying on the principle of interstate mutual trust and the investigations conducted to determine the main or leading registration when there are more registrations in other Member States both as a minor and an adult.

Conscription in Eritrea

Germany, Higher Administrative Courts (Oberverwaltungsgerichte/Verwaltungsgerichtshöfe), *BAMF* v *Applicant*, 4 LA 196/21, 8 September 2022.

The High Administrative Court rejected an appeal lodged by BAMF in a case concerning an Eritrean single mother who risked being conscripted, upon return, in the civilian component of the National Service.

An Eritrean single mother was granted international protection on appeal as the regional administrative court found that

although women, in the event of marriage or pregnancy, are exempted from national service in the military component, they are at risk of being drafted in the civilian component. While considering that the case does not raise any issue of fundamental importance and no further clarification was needed, the High Administrative Court rejected the appeal lodged by BAMF as inadmissible. The court consulted COI reports, including the EUAA's Eritrea: National Service, exit and entry, January 2020, and Eritrea: Country Focus, May 2015.

Membership of a particular social group: Women and children exposed to FGM/C in Egypt

France, National Court of Asylum [Cour Nationale du Droit d'Asile (CNDA)], *E. v Office for the Protection of Refugees and Stateless Persons (OFPRA)*, No 21059269 C, 8 September 2022.

The CNDA recognised the existence of a social group of women and children exposed to the risk of genital mutilation in Egypt.

A young Egyptian girl from Tanta requested international protection in France, claiming that she belonged to a group of women and children who are exposed to the risk of genital mutilation in Egypt, where this practice is a social norm.

The CNDA provided refugee protection and noted that public documentary sources highlight the high prevalence of this practice throughout Egypt (average prevalence rate of 87%), as well as an average age of 10 years at which individuals are exposed. The court established the personal fears of the young girl, as her maternal aunts supported the practice and her father would not be able to oppose it as he was recognised as a refugee by decision of the same day on the basis of persecution to which he would be exposed due to his political opinions.

Membership of a particular social group: Women and children exposed to FGM/C in Somalia

Denmark, Refugee Appeals Board [Flygtningenævnet], *Applicants v Danish Immigration Service*, 2022, 1 September 2022.

The Refugee Appeals Board granted protection due to the risk of being subjected to FGM/C in Somalia.

The Refugee Appeals Board reopened a case following a decision of the UN Committee for the Rights of Children of 24 June 2022, which found that the decision of the Board to withdraw the residence permit of a female Somali applicant and her children and deport them to Somalia would expose the daughter to a risk of female genital mutilation.

The Refugee Appeals Board reversed its decision and considered that the assessment of the risk of FGM/C must primarily be based on the extent to which girls and women in the country/area are subjected to this practice. It was also noted that it was necessary to assess the extent to which the young girl would be at risk of being forcibly cut and whether the parents of the girl have the will and ability to withstand any pressure. In this situation, the mother being single may have an impact on her ability to withstand pressure.

On the general situation in Somalia in relation to FGM/C, the Board referred to the EUAA's Country Guidance: Somalia, June 2022.

Membership of a particular social group: Gender-based persecution

Denmark, Refugee Appeals Board [Flygtningenævnet], *Applicants v Danish Immigration Service*, No 2022/200922, 20 September 2022.

The Refugee Appeals Board granted a residence permit to an applicant after the UN Committee on the Rights of the Child criticised a previous decision taken in this case.

A woman and her minor daughter were provided refugee protection in Denmark after their case was reopened following views from the UN Committee on the Rights of the Child about a negative decision of the Danish Refugee Appeals Board. The determining authority found that the woman and her daughter would be in at risk of abuse in India since the woman was from a lower caste than her husband, who was violent towards her and threatened to kill the daughter.

Membership of a particular social group: Gender identity

Luxembourg, Administrative Court [Cour Administrative], *X v Minister of Immigration and Asylum*, 47385C, 27 September 2022.

The Administrative Court confirmed the dismissal of an application lodged by a Senegalese national due to lack of credibility and a late submission of claims related to alleged persecution based on sexual orientation.

The subsequent application of a Senegalese national was rejected due to a lack of overall credibility. The Administrative Court confirmed the findings of the lower court, namely that the late submission of claims related to alleged persecution based on sexual orientation and a lack of evidence undermined the overall credibility assessment. Moreover, the applicant did not prove that Senegalese authorities were unwilling or unable to offer adequate protection.

Westernisation as a reason for persecution

Belgium, Council for Alien Law Litigation [Conseil du Contentieux des Étrangers], *Applicant v Commissioner General for Refugees and Stateless Persons*, 278 700, 13 October 2022.

The Council for Alien Law Litigation confirmed that an Afghan national could be at a risk of persecution as a result of the cumulation of three risk factors: his Hazara ethnicity, his Shia Muslim faith and his connection to Belgian society and western culture.

An Afghan national of Hazara ethnicity and Shia Muslim faith lodged an application for international protection which was rejected in Belgium. While CALL did not consider the applicant's status as a Hazara to be sufficient to establish a well-founded fear of persecution, the court stressed that the situation must be considered in conjunction with other risk factors, such as the probability of the applicant being considered 'westernised' based on the fact that he had left Afghanistan as a minor and had been living in Europe since 2020.

CALL noted that it was probable that the applicant no longer strictly adhered to the Islamic faith as he worked in a meat factory which processed pork. CALL thus confirmed that the combination of risks posed by the applicant's ethnicity, religion and association with western culture amounted to a risk of persecution and granted the applicant refugee status.

Belgium, Council for Alien Law Litigation [Conseil du Contentieux des Etrangers]

- ***Applicant v Commissioner General for Refugees and Stateless Persons*, 278 654, 12 October 2022.**
- ***Applicant v Commissioner General for Refugees and Stateless Persons*, 278 701, 13 October 2022.**

The Council for Alien Law Litigation confirmed that Afghans returning from Europe could not be considered as members of a particular social group within the meaning of Article 10 (1)(D) of the recast QD.

CALL argued that westernisation is neither an innate characteristic nor an identity or belief that is so fundamental that an applicant could not be expected to give it up. CALL also noted that not all returnees share a common identity which differentiates them from the rest of their community, so it is upon each applicant to demonstrate that their individual circumstances would put them at risk of being persecuted.

CALL highlighted that the time spent in the west may result in changes (or perceived changes) of beliefs which would put an individual at risk of persecution on other grounds, such as religion or political beliefs.

Austria, Supreme Administrative Court [Verwaltungsgerichtshof - VwGH], 14 September 2022

- ***A.H. v Federal Office for Immigration and Asylum (BFA)*, Ra 2021/20/0425**
- ***F.N. v Federal Office for Immigration and Asylum (BFA)*, Ra 2022/20/0028**

The Supreme Administrative Court of Austria referred questions for a preliminary ruling to the CJEU concerning Afghan women:

- Whether a combination of measures adopted, encouraged or tolerated by a state which limits a woman's freedom could amount to persecution within the meaning of Article 9(1)(b) of the recast QD.
- Whether a woman affected by such measures should be granted refugee status solely based on her sex or if it is necessary to examine the individual circumstances of the applicant to determine how the measures impact a woman's individual situation.

The Supreme Administrative Court observed several different aspects which could influence the interpretation of Article 9(1)(b) in respect of women from Afghanistan, including westernisation, marriage status, political beliefs and employment, education and sporting aspirations.

Secondary movement when international protection has been granted in another EU+ country

Referral for a preliminary ruling to the CJEU on secondary movement and Article 4 of the EU Charter

Germany, Federal Administrative Court [Bundesverwaltungsgericht], *Applicant v BAMF*, 1 C 26.21, 7 September 2022.

The Federal Administrative Court in Leipzig referred questions for a preliminary ruling to the CJEU on the secondary movement of beneficiaries of international protection.

A Syrian national who was granted international protection in Greece in 2018 applied in Germany and argued against being returned to Greece due to an alleged risk of inhuman or degrading treatment. The Federal Administrative Court in Leipzig asked the CJEU whether EU law is to be interpreted as precluding

the Member State which received an application for international protection from an applicant who was previously granted protection in another EU+ country to reject it as inadmissible when the transfer would entail a risk of violation of Article 4 of the EU Charter.

Insufficient investigation of the validity of a status in Denmark

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) (2)*, NL22.1573, 8 November 2022.

The Court of the Hague overturned an inadmissibility decision and found that further investigation was needed to clarify whether the applicant still had international protection in Denmark.

A Syrian applicant was refused international protection in the Netherlands because the State Secretary considered that the applicant still has international protection in Denmark. The Court of the Hague overturned the decision as the information received from the Danish authorities on the status of the applicant was insufficient. It noted that Denmark is not bound by the recast QD and the State Secretary should have further investigated whether the applicant still has international protection in Denmark.

Transfer of beneficiary of international protection back to Greece

Iceland, Immigration Appeals Board [Kærunefnd útlendingamála], *Applicant* v *Directorate of Immigration*, KNU22100001, 3 November 2022.

The Immigration Appeals Board upheld a decision to transfer an applicant, who had been granted international protection, to Greece under the Dublin III Regulation.

The Immigration Appeal Board upheld the transfer of a Syrian beneficiary of international protection in Greece, although she claimed that she faced discrimination in housing, access to the labour market and access to health care and emphasised that housing support had stopped once she had been granted protection.

The board noted that the Greek government had been criticised by several international and civil society organisations for not providing adequate living conditions to refugees. Nonetheless, it concluded that beneficiaries of international protection have a right to social assistance comparable to that of Greek citizens and should only be granted access to the international protection procedure in Iceland when they identify individual reasons proving that they face a uniquely high risk of discrimination.

While the applicant had numerous health conditions, the board highlighted that she had been able to access treatment in Greece and that her situation was therefore not of such a nature that it constituted special grounds within the meaning of Article 36(2) of the Foreign Nationals Act.

Second instance procedures

Voting rules in an administrative court panel

Finland, Supreme Administrative Court [Korkein hallinto-oikeus], *Applicant* v *Finnish Immigration Service*, KHO:2022:111, 14 September 2022.

The Supreme Administrative Court annulled a lower court decision that did not respect the voting rules set up for the members of the panel.

The Supreme Administrative Court ruled in a case concerning the rules for the composition of the panel of administrative courts in matters related to international protection, returns, entry bans and residence permits. The court reiterated the general rule that decisions must reflect the opinion of the majority of members of the panel, as provided by the Administrative Procedure Act.

When dissenting opinions arise amongst members of a panel in an administrative court, the Supreme Administrative Court ruled that each point of disagreement must be discussed and decided with a vote from each panel member. The Supreme Administrative Court found that the decision was contrary to the voting rules provided in Article 85 of the Law on Proceedings in Administrative Matters and referred the case back for re-examination.

Composition of panels in administrative courts of Finland

Finland, Supreme Administrative Court [Korkein hallinto-oikeus], *Applicant* v *Finnish Immigration Service*, KHO:2022:120, 24 October 2022.

The Supreme Administrative Court clarified that in cases related to international protection involving an assessment of conversion to Christianity, a panel of three judges is required to rule in appeals before administrative courts.

The case concerned an Iraqi national whose application for international protection, based on conversion to Christianity and possible threat upon return to the country of origin, was rejected as unfounded. On appeal, the panel for the oral hearing was composed of two judges who disagreed on the decision. Due to dissenting opinions, a new panel of three judges was assigned and a new oral hearing was conducted, following which the appeal was unanimously rejected.

The Supreme Administrative Court noted that the transfer of the case to a completely new three-member composition undermined the applicant's confidence in the procedure and raised doubts about respect for the right to a fair trial. The court overturned the decision and highlighted that in cases related to international protection involving an assessment of religious conversion a panel of three judges is required to rule on appeals.

Delays in submissions of appeal grounds

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, NL22.17062, 4 November 2022.

The Court of the Hague rejected an appeal as inadmissible because the applicant did not observe the delay to submit the grounds for appeal and no individual facts or circumstances justified the delay.

The Court of the Hague rejected an appeal lodged by a Pakistani national against a Dublin transfer to Germany as inadmissible, because the time limit to submit the grounds for an appeal was not respected. The claims of the applicant that he would be exposed to an indirect risk of *refoulement* if transferred to Germany were not deemed plausible as no significant difference in policy was found, nor individual facts or circumstances that would justify the delay.

Reception

Reception conditions for asylum applicants in Belgium

ECtHR, *Camara v Belgium*, No 49255/22, 31 October 2022.

The ECtHR indicated an interim measure to the government of Belgium to provide accommodation and basic material assistance to an asylum applicant who lacked adequate reception conditions allegedly due to the saturation of the Belgian reception facilities run by Fedasil.

In the context of the saturation of the Belgian reception facilities run by Fedasil in Belgium and after exhausting the available domestic remedies, a Guinean asylum applicant requested interim measures from the ECtHR as he was not provided with accommodation and basic material assistance since 15 July 2022 when he lodged an application for international protection.

The applicant invoked that he was suffering from cold and damp while living on the street, from hunger and health problems, and due to poor sanitation, there was a scabies epidemic among asylum applicants living on the street.

The ECtHR indicated to the Belgian state that it had to comply with the order made by the Brussels Labour Court on 22 July 2022 and provide the applicant with accommodation and basic material assistance.

ECtHR, *Msallem and 147 Others v Belgium*, 48987/22, 15 November 2022.

The ECtHR applied an interim measure concerning 148 homeless asylum applicants in Belgium, indicating to the government of Belgium to provide them with accommodation and basic needs for the duration of the proceedings before the ECtHR.

On 15 November 2022, the ECtHR decided to indicate an interim measure to the Belgian state to comply with orders made by the Brussels Labour Court in respect of 148 applicants and provide them with accommodation and material assistance to meet their basic needs for the duration of the proceedings before the court.

Belgium, Labour Court [Cour du travail/Arbeidshof], *Applicant v Fedasil*, 22 KB/14, 28 September 2022.

The Labour Court of Brussels allowed an appeal concerning the swift provision of accommodation or financial aid to an asylum applicant.

The Labour Court of Brussels allowed an appeal from an applicant who requested to be guaranteed effective access to material reception conditions either by being provided with a place in a reception centre or financial aid. The court allowed the request to have a legal provision not applied to him, namely, not to be assigned a compulsory place of registration, to facilitate his access to other forms of material reception conditions since Fedasil was confronted with a saturation of the reception system and court ordinances in more than 2,000 cases were not implemented.

Accommodation in emergency facilities in the Netherlands

Netherlands, Court of The Hague [Rechtbank Den Haag], *Vluchtelingenwerk Nederland (VWN) v The Dutch state and the COA*, C/09/633760 KG ZA 22-733, 6 October 2022.

The Court of the Hague ordered the State and the Central Agency for the Reception of Asylum Seekers (COA) to remedy the situation of reception conditions in emergency and crisis centres.

In the context of a significant increase in the number of asylum applicants and beneficiaries of international protection accommodated in poor conditions in emergency reception, the Dutch Council for Refugees (VWN) requested before the Court of the Hague that the state and COA provide adequate conditions in line with the standards enshrined in the recast RCD and human rights law, including access to minimum conditions (such as food, water and a bed) and medical assistance.

The Court of the Hague ordered the state and COA a comprehensive list of measures to be enforced within specific time limits, including not to accommodate unaccompanied minors and vulnerable applicants in emergency facilities.

Age assessment as a factor to determine the reception centre

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicant v Central Agency for Reception of Asylum Seekers (COA)*, AWB 2/5940 and AWB 22/6354, 4 November 2022.

The Court of the Hague allowed an interim measure against a COA decision to transfer the applicant, who claimed to be a minor, to an adult reception centre based on the IND's initial age assessment.

An Eritrean applicant for international protection was initially assigned to a minor's reception centre until the determining authority conducted an age assessment. The determining authority considered the applicant to be an adult, relying on information received from Italy. Consequently, COA decided to transfer the applicant to a reception centre for adults and rejected the applicant's request against this decision as inadmissible.

The Court of the Hague allowed interim measures and ordered the applicant's transfer to a centre for minors as Fedasil did not clearly determine the age of the applicant and further investigations were considered necessary.

Entitlement to reception benefits if the applicant already has a residence permit on other grounds

Sweden, Supreme Administrative Court [Högsta förvaltningsdomstolens], *Migration Agency v AA, BB, CC, DD*, 1179-22, 1180-22, 13 October 2022.

The Supreme Administrative Court ruled that asylum applicants who already have a residence permit in Sweden do not fall within the scope of the Act on Reception of Asylum Applicants and thus cannot claim assistance for accommodation and allowances for asylum applicants.

An individual who was granted a temporary residence permit for higher education studies requested international protection, daily allowances and housing assistance (with his family) after entering Sweden.

The Migration Board rejected the applications for assistance on the ground that the family already had a valid residence permit and they did not belong to the category of persons entitled to assistance according to the national law on the reception of asylum applicants.

Reduced social allowance for single adults accommodated in collective centres

Germany, Federal Constitutional Court [Bundesverfassungsgericht], *Düsseldorf Social Court*, 1 BvL 3/21, 19 October 2022.

The Federal Constitutional Court ruled on the constitutionality of a legislative amendment which provided lower social benefits for single adults accommodated in collective centres.

The Federal Constitutional Court reviewed a 2019 legislative amendment, according to which asylum applicants who are single adults accommodated in collective reception centres are entitled to reduced social benefits. The court underlined that the assumption that those affected constitute a community with reduced needs had no factual basis even 3 years after the entry into force of the legislative amendment.

Detention

CJEU judgment on *ex officio* review of detention decisions

CJEU, *Applicants v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, Joined Cases C-704/20 and C-39/21, 8 November 2022.

The CJEU ruled that judicial authorities must review ex officio the lawfulness of detention decisions either in a return or related to the international protection procedure.

When reviewing detention measures adopted in the context of a return, international protection proceedings or transfers, the CJEU ruled that judicial authorities have the duty to examine *ex officio* all the facts and raise any failure to comply with a condition governing the lawfulness of the measure provided by EU law, even when that failure has not been raised by the applicant.

The CJEU stated that EU law establishes the common procedural safeguards to be applied by each Member State enabling the competent judicial authorities to release a person after a careful examination, as soon as it becomes clear that the detention is no longer lawful.

Refusal of interim measures after the placement of passengers from Ocean Viking in a waiting area in Toulon (France)

France, Council of State [Conseil d'État], *Request for interim measure lodged by the National Association for Border Assistance for Foreigners (ANAFE)*, No 468917, 19 November 2022.

The Council of State dismissed the request for urgent measures lodged by the National Association for Border Assistance for Foreigners (ANAFE) to end the temporary waiting area in which passengers from Ocean Viking had been placed.

The Council of State dismissed the request for urgent measures lodged by ANAFE, asking for an end to the temporary waiting area in which some passengers from Ocean Viking had been placed after the vessel was allowed to dock in Toulon for humanitarian reasons. The judge noted the exceptional circumstances in which reception had to be organised (a large number of people, the need for urgent medical care and public order considerations) based on legal provisions applicable in the event of the arrival of a group of people outside a "border-crossing zone". The judge noted that asylum applications at the border were examined by OFPRA and there was a judicial review of the placement in the area of these persons and the extension of continued detention was not authorised for the vast majority. If the persistence of difficulties could be pointed out at the hearing, they were not of such seriousness that they would require the intervention of the judge. Thus, on the date of the order, in the absence of a serious and manifestly illegal infringement of a fundamental freedom, the judge found that there was no reason to pronounce urgent measures.

Content of protection

CJEU judgment on the withdrawal of international protection due to a danger to national security

CJEU, *GM v Országos Idegenrendeszeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ*, C-159/21, 22 September 2022.

The CJEU ruled on the withdrawal of international protection due to a danger to national security, specifically on decisions based on a non-reasoned opinion of national security bodies which found that the person constitutes a danger to national security.

The applicant's refugee status was withdrawn in Hungary by a decision based on a non-reasoned decision issued by two Hungarian security bodies which concluded that GM's stay in Hungary constituted a danger to national security.

The CJEU recalled that the right to defence may be limited, but Article 23(1) of the recast APD does not allow competent authorities to exclude the person and her representative from gaining effective knowledge of the substance of the decisive elements contained in the file. In addition, the possibility of obtaining authorisation to access that information, coupled with the prohibition to use the information in the administrative procedure, does not sufficiently guarantee the right to defence.

The CJEU noted that the determining authority that assesses a withdrawal cannot simply give effect to a decision adopted by another authority, but it must include its own assessment of the facts, circumstances and reasons in its decision. The scope and relevance of the information provided by national security bodies must be assessed by the determining authority.

Thus, a determining authority cannot rely on a non-reasoned opinion given by national security bodies when the factual basis and assessment by these bodies was not disclosed to the determining authority.

CJEU judgment on family reunification of married unaccompanied minors

CJEU, *X v Belgium*, C-230/21, 17 November 2022.

The CJEU interpreted Articles 2(f) and 10(3)(a) of the Family Reunification Directive and ruled that unaccompanied minors do not have to be unmarried to be sponsors for their parents in a family reunification procedure.

The CJEU examined the case of X, a woman from Palestine whose daughter was deemed unaccompanied when she arrived in Belgium to join her husband while she was still a 15-year-old minor. After the daughter was recognised as a refugee, the mother requested family reunification with her daughter.

The CJEU ruled that an unaccompanied minor who resides in a Member State does not have to be unmarried to have the right to family reunification with first-degree relatives in the direct ascending line.

ECtHR judgment on the suspension period of family reunification for beneficiaries of subsidiary protection

ECtHR, *M.T. and Others v Sweden*, No 22105/18, 20 October 2022.

The ECtHR ruled that the 3-year suspension period introduced in Sweden for the family reunification of beneficiaries of subsidiary protection, gradually reduced and allowing an individualised assessment, does not amount to a violation of Article 8 of the European Convention.

The Syrian applicants claimed that the Temporary Act of 20 July 2016, which suspended the right of beneficiaries of subsidiary protection to family reunification until 19 July 2019, breached Articles 8 and 14, taken in conjunction with Article 8 of the ECHR.

The court held that Sweden had individually examined the applicants' cases to determine whether the suspension of family reunification would profoundly impact their right to a family life. It noted that the legislation had a specific end date, so applicants who applied for family reunification later were subjected to a shorter suspension period and all of them had the right to family reunification restored after July 2019. The court concluded that Sweden had not violated Article 8 of the ECHR.

There was also no violation of Article 8 taken in conjunction with Article 14 as the decision to differentiate beneficiaries of subsidiary protection from beneficiaries of refugee status was proportional in light of the high number of asylum seekers who had been granted protection in Sweden since 2015 and the pressure put on the Swedish immigration authorities. The suspension was considered necessary to allow the authorities to improve the capacity of reception facilities and minimum standards required under EU and international laws.

Referral to the CJEU for a preliminary ruling on derivative international protection

Belgium, Council of State [Raad van State - Conseil d'État], *XXX v Commissaire général aux réfugiés et aux apatrides (CGRS)*, 13 September 2022.

The Council of State referred questions to the CJEU for a preliminary ruling on the possibility for a mother of a minor, recognised as a refugee in Belgium, to benefit from the rights enshrined in Articles 24-35 of the recast QD when that state has not transposed Article 23 (maintaining family unity).

The Council of State referred questions to the CJEU seeking clarity on whether Article 23 of the recast QD (maintaining family unity) can have a direct effect on the request for a residence permit submitted by the mother of a minor who has been granted refugees status, although this article has not been transposed into the national legislation in Belgium.

Family life for a homosexual couple in Peru and Venezuela

Iceland, Immigration Appeals Board [Kærunefnd útlendingamála], *Applicant* v *Directorate of Immigration*, KNU22090054, 10 November 2022.

The Immigration Appeals Board determined that a Peruvian national who did not meet the criteria for international protection should be granted a residence permit as it would not be possible for him and his partner to marry and exercise their right to family life in either Peru or Venezuela.

A Peruvian national who identified as homosexual and was diagnosed with HIV was refused international protection in Iceland. His cohabiting partner, a Venezuelan national, was a beneficiary of international protection in Iceland.

The Immigration Appeals Board confirmed the Directorate of Immigration's decision to refuse refugee status. The board highlighted that, although Peru had sufficient legislation to prevent discrimination against people who were HIV positive and HIV medication was available through the public health care system, Peru had not legalised same-sex marriage, which would make it difficult for the applicant and his partner to establish a normal family life in the applicant's home state. The board also recognised that it would not be possible for the couple to move to Venezuela, and it thus granted protection in Iceland based on Article 45(2) of the Foreign Nationals Act.

Revocation of international protection status obtained in Bulgaria for failure to renew identity documents

Netherlands, Court of The Hague [Rechtbank Den Haag], *Applicants* v *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*, NL22.4687, NL22.4689, NL22.4972 and NL22.4974, 26 October 2022.

The Court of the Hague ruled that the Syrian applicants, who were beneficiaries of protection in Bulgaria, faced a high risk of having their refugee status revoked if they were transferred back to Bulgaria due to their failure to renew their identity documents.

The Court of the Hague held that transferring beneficiaries of international protection to Bulgaria may constitute a violation of Article 4 of the EU Charter and Article 3 of the ECHR, as following legislative changes introduced in 2020 by the Bulgarian authorities, it was possible upon transfer to revoke refugee protection due to the beneficiaries' failure to renew their identity documents before their expiry.

The court ruled that until the legal provision remained in force in Bulgaria, the State Secretary for Justice and Security could not order the transfer of third-country nationals to Bulgaria if they were beneficiaries of international protection who had not renewed their identity documents before their expiry.

Temporary protection

The impact of registering for temporary protection on proceedings for international protection

Bulgaria, Administrative Court, City of Sofia [bg. Софийски градски съд]

- ***Applicant v State Agency for Refugees*, No 5540, 29 September 2022.**
- ***E.K. v State Agency for Refugees*, No 5424, 9 September 2022.**

The Administrative Court of Sofia City found that the termination of proceedings for international protection were unlawful for Ukrainian applicants who also applied for temporary protection.

The Administrative Court of Sofia City dealt with two cases concerning the decisions of the deputy Chairperson of the State Agency for Refugees (SAR) to terminate the proceedings for international protection due to the registration of displaced persons from Ukraine for temporary protection. The court considered that the contested decisions lacked a legal basis and were contrary to Article 68(1)(2) of the Law on Asylum and Refugees (LAR) and the EU Council Implementing Decision No 382/04.03.2022, implemented by Bulgaria in Decision No 144 of 10 March 2022 of the Council of Ministers, as amended by Decision No 180 of 30 March 2022. The cases were referred back to SAR for a re-examination and reopening of international protection proceedings.

Access to employment for third-country, non-Ukrainian nationals who can safely return to their country of origin

Germany, Higher Administrative Courts (Oberverwaltungsgerichte/Verwaltungsgerichtshöfe), *Applicant v BAMF*, 26 October 2022.

The High Administrative Court of Baden-Württemberg held that a Nigerian applicant with permanent residence status in Ukraine who can safely and permanently return to his country of origin does not have the right to access employment in Germany.

A Nigerian applicant contested the BAMF decision by which he was provided a residence permit but not access to employment after fleeing Ukraine due to the Russian invasion. The High Administrative Court of Baden-Württemberg rejected the appeal and stated that, although the applicant had a permanent residence status in Ukraine on 24 February 2022, Germany extended the right to employment based on Article 12 of the Temporary Protection Directive to third-country, non-Ukrainian nationals who could not safely and permanently return to their countries of origin. The court noted that the lack of a possibility to complete his studies or access a similar level of education in Nigeria were not sufficient to consider that he could not return safely and permanently to his country of origin.

Return

CJEU judgment on the return of a third-country national suffering from a serious illness

CJEU, *X v Staatssecretaris van Justitie en Veiligheid*, C-69/21, 22 November 2022.

The CJEU ruled that a third-country national suffering from a serious illness may not be removed if, in the absence of appropriate medical treatment in the receiving country, the person would be subjected to a real risk of rapid, significant and permanent increase in pain due to the illness.

The requests for international protection lodged by a Russian national were dismissed in the Netherlands. The applicant suffers from a rare form of blood cancer, receives treatment in the Netherlands which includes medicinal cannabis which is not permitted in Russia claimed that a discontinuation of the treatment would no longer allow him to live a decent life in Russia.

The CJEU ruled that EU law precludes a return decision for an illegally-staying, third-country national suffering from a serious illness, where there are substantial grounds for believing that a return would expose the person to a real risk of a rapid, significant and permanent increase in the intensity of the pain caused by the illness, which would be contrary to human dignity and could cause serious and irreversible psychological consequences, or even lead the person to commit suicide.

CJEU judgment on the implicit withdrawal of a return decision when granting leave to remain for compassionate reasons

CJEU, *UP v Centre public d'action sociale de Liège (Belgium)*, C-825/21, 20 October 2022.

The CJEU held that Member States may provide that the grant of a leave to remain for compassionate, humanitarian or other reasons (Article 6 of the Return Directive) entails the (implicit) withdrawal of a previously-adopted return decision after the dismissal of the application for international protection.

The CJEU interpreted Articles 6 and 8 of the Return Directive in the context of a request made in proceedings between a third-country national and the Liège public social welfare centre in Belgium (CPAS) concerning a decision adopted by the CPAS to withdraw the applicant's entitlement to social assistance. The social assistance had been provided after the applicant's request for leave to remain on the territory of Belgium for medical treatment following the refusal of her application for international protection.

In accordance with Article 6(4) of the Return Directive, the CJEU noted that Member States have a broad discretion to grant illegally-staying, third-country nationals a right to stay as an 'autonomous residence permit' or a right to stay for compassionate, humanitarian or other reasons. In addition, Member States may provide that the right to stay suspends or (implicitly) withdraws a return decision which was previously adopted.

The court further noted that, while the Return Directive aims to establish an effective removal and repatriation policy and under Article 8, Member States have the obligation to carry out the removal as soon as possible.

Since the applicant lodged a request for leave to remain for compassionate, humanitarian or other reasons (and not multiple applications for international protection, as in its previous judgment in the case of N., C-601/15 PPU), the authorities may provide that the grant of that permit or authorisation entails the (implicit) withdrawal of a previously adopted return decision after the dismissal of the application for international protection.

CJEU judgment on detention pending a return

CJEU, *I.L. v Police and Border Guard Board (Politsei- ja Piirivalveamet)*, C-241/2, 6 October 2022.

The CJEU held that Article 15(1) of the Return Directive does not allow a Member State to order the detention of an illegally-staying, third-country national solely based on the general criterion of a risk that the effective execution of the removal will be jeopardised.

The Supreme Court of Estonia requested a preliminary ruling from the CJEU on the interpretation of Article 15(1) of the Return Directive on whether Member States may detain a third-country national who, while at liberty prior to a removal, presents a real risk of committing a criminal offence likely to make the removal process considerably more difficult.

The CJEU held that Article 15(1) of the Return Directive does not allow a Member State to order the detention of an illegally-staying, third-country national solely based on the general criterion of a risk that the effective execution of the removal will be jeopardised, without satisfying one of the specific grounds for detention provided in national law that transposes this provision.

The court noted that, under the Return Directive, detention is permitted only "in order to prepare the return or carry out the removal process" and detention must be proportionate and respectful of fundamental rights. The court cited the ECtHR case of *Del Río Prada* v *Spain*, and noted that the detention of a third-country national who is the subject of return procedures must comply with strict safeguards, namely a legal basis, clarity, foreseeability, accessibility and protection against arbitrariness.

The court held that the detention measure based on the risk that the effective execution of the removal will be jeopardised, without satisfying one of the specific grounds for detention set out in national law, is contrary to the requirements of clarity, predictability and protection against arbitrariness.

ECtHR judgment on the risk of ill treatment upon a return to the region of North Caucasus

ECtHR, *S. v France*, No 18207/21, 6 October 2022.

The ECtHR held that there would be a violation of Article 3 of the European Convention if the applicant, of Chechen origin, would be returned to Russia without an individual assessment of the risk of ill treatment upon return.

A national of Russia of Chechen origin from Daghestan was provided with international protection by the National Court of Asylum in France, which later annulled its decisions due to security records that indicated the man's involvement in terrorist acts.

The court noted that the assessment of the risk to the applicant must be carried out on an individual basis. Although several reports indicated a particular risk for certain categories of persons from the North Caucasus (e.g. from Chechnya, Ingushetia or Daghestan, such as members of the armed forces of Chechen resistance,

persons regarded by the authorities as such, their relatives, persons who have assisted them, civilians forced by the authorities to cooperate, persons suspected or convicted of acts of terrorism), the court does not consider that they are systematically exposed to treatment contrary to Article 3 of the ECHR.

In the applicant's case, the court observed that the domestic courts did not provide an *ex nunc* examination of the risks incurred upon an expulsion considering his profile. The court further noted that the authorities must consider the fact that the applicant has a profile corresponding to one of the particularly risky categories when examining the risk of being exposed to ill treatment in the event of expulsion.

The right to family life and the best interests of the child in a return decision

Finland, Supreme Administrative Court [Korkein hallinto-oikeus], *A, B, C v Finnish Immigration Service*, KHO:2022:121, 26 October 2022.

The Supreme Administrative Court ruled that the spouse and the child have the right to appeal against a return decision taken against the father of the child, based on the right to family life and the best interests of the child.

The spouse and the child of an Iraqi applicant, against whom a return decision was taken by the FIS, submitted a second appeal against the decision of the Administrative Court of Helsinki not to examine their first appeal against the return decision, as they were considered not to be entitled to lodge it.

The Supreme Administrative Court overturned the decision and ruled that the right to family life and the best interests of the child must be considered in return procedures. Specifically, the spouse and the child of a third-country national have the right to appeal against a return decision ordered against their family member.


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