Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

QRP

European Jurisdiction on Refugee and Complementary Protection: July to December 2023[1]

Holger Hoffmann[2]

This compilation of case law samples, summarizes and refers to jurisdiction of international relevance for the application of legal standards in the field of refugee and complementary protection by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) in the period July to December 2023.

1. European Court of Justice

1.1 ECJ, Judgment of 6/7/2023 - C-8/22 XXX (Belgium), C663/21 AA (Austria) and C-402/22 M.A. (Netherlands): On the clarification of the terms "particularly serious criminal offence" and "danger to the general public" in the case of revocation or refusal of refugee status

Third-country nationals who have been convicted of a particularly serious criminal offence can lose their refugee status. However, according to EU law, this only applies if they also pose a danger to the general public in the Member State in which they are staying.

In C-8/22, XXX was deprived of refugee status after being convicted of aggravated theft and intentional homicide with the aim of facilitating a theft.

In C-663/21, AA was stripped of his refugee status by Austria after he was convicted of assault, dangerous and threatening behaviour, destruction of property belonging to others and unauthorised handling of drugs and drug trafficking.

In C-402/22, M.A.'s application for international protection was rejected after he had been convicted of three completed sexual assaults, one attempted sexual assault and the theft of a mobile phone.

The ECJ ruled that it cannot be concluded, solely on the basis of a final conviction, that the convicted person poses a real, present and substantial threat to a "fundamental interest of the community" of the MS in which he or she resides. The conviction must always relate to an offence that is of "exceptional gravity" and "one of the offences which most seriously affect the legal order of the society concerned". In Article 14(4)(b) of the Return Directive (conviction for a particularly serious criminal offence), the term "particularly serious criminal offence" must be interpreted as meaning that it covers a criminal offence which, by virtue of its specific characteristics, is exceptionally serious because it is one of the offences which most seriously affects the legal order of the

[2] Dr. Holger Hoffmann is a retired professor for law at the University of Applied Sciences Bielefeld, Germany.

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

Community. In order to assess whether an offence is of such seriousness, account must be taken, inter alia, of the nature of the offence, the penalty provided for and imposed for that offence, aggravating or mitigating circumstances, whether the offence was committed intentionally, the nature and extent of the damage caused and the procedure used to punish it. Several less serious offences should not be added together to form one serious offence. Rather, there must be at least one offence that is extremely serious as such. In addition, the competent authority must assess all the circumstances of the case in each individual case.

It cannot be assumed that if one of the two conditions is fulfilled, it is sufficient to state that the other is also fulfilled. The existence of a danger to the general public of a MS in which third-country nationals are present cannot be considered proven merely by the fact that the person has been convicted of a particularly serious criminal offence. Rather, the authorities must prove that the danger posed by the third-country national is actual, present and sufficiently serious and that the withdrawal of refugee status is a measure that is proportionate to this danger.

If these requirements are met, an MS can – but does not have to – revoke refugee status.

With regard to proportionality, the ECJ ruled (C-663/21) that authorities are not obliged to examine whether the public interest outweighs the third-country national's interest in protection when taking into account the extent and nature of the measures to which he would be exposed after being returned to his country of origin. However, a balance must be struck between the risk to the public interest and the right to protection of refugees. Possible consequences of repatriation must be taken into account in this decision. Art. 5 Return Directive precludes a return decision if it is established that deportation to the intended country is ruled out indefinitely due to the principle of non-refoulement.

1.2 ECJ, Judgment of 29/6/2023 - C-829/21 T.E. and C-129/22 - E.F. (829/21 - referral Hess. VGH; 129/22 - referral VG Darmstadt): On the conditions for the extension of a right of residence granted to third-country nationals with long-term residence status pursuant to Art. 22(1)(b) Directive 2003/109 in the version of Directive 2011/51/EU

T.E., a Ghanaian national, travelled to Germany with a long-term EU residence permit issued in Italy and was granted a one-year residence permit. She gave birth to R.U. The child suffered from a heart defect, forcing T.E. to give up her job. An extension of her residence permit was refused on the grounds that her livelihood was not secure. She was asked to leave Germany. In the course of the proceedings, the authorities argued that it was no longer possible to grant her a residence permit as T.E. had not been in Italy for more than six years and therefore no longer had long-term resident status.

The second case concerned E.F., a Pakistani national who also travelled to Germany with a long-term EU residence permit issued in Italy and was granted a one-year residence permit. His extension was refused because his long-term residence authorisation could not be maintained after he had not been in Italy for more than six years.

The ECJ ruled that Art. 22(1)(b) of Directive 2003/109 as amended by Directive 2011/51/EU (Directive on long-term residents) must be interpreted as meaning that a Member State may refuse to renew a residence permit that it has issued to a third-country national in accordance with Chapter III of Directive 2011/51/EU if the third-country

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

national has not resided for six years in the territory of the first Member State that issued the residence permit to him/her in accordance with Art. 9(4)(2) and this Member State has not made use of the option provided for in Art. 9(4)(3). The six-year period ends at the latest on the day on which the application for renewal of the residence permit was submitted in the second MS. However, the third-country national must have previously been requested to provide evidence of his/her presence in the state that issued the long-term residence permit during the six-year period.

The Court then held that the second subparagraph of Article 9(4) and Article 22(1)(b) of Directive 2011/51/EU must be interpreted as meaning that those provisions have been correctly transposed into national law by a second Member State which has transposed them by means of two separate provisions, where the first provision lays down the ground for the loss of the right to be granted long-term resident status within the meaning of Article 9(4) and the second provides, without expressly referring to one of the grounds for the loss of that right, that a residence permit shall be withdrawn in accordance with the provisions of Chapter III if the third-country national is no longer entitled to retain his or her long-term resident status in the MS that issued it.

Finally, the ECJ ruled that Article 15(4)(2) of the Directive must be interpreted as meaning that the Member State in which the third-country national has applied for a residence permit in accordance with the provisions of Chapter III or for the renewal of such a permit cannot reject this application on the grounds that the third-country national has not submitted documents with the application showing that he has adequate accommodation if that Member State has not implemented this provision.

1.3 Advocate General Collins, Opinion of 13/7/2023 - C-646/21 - K. L. v. Netherlands (pending): Are Westernised young women/Iraqis a social group?

In September 2015, the applicants left Iraq together with their father, mother and aunt. On 7 November 2015, they applied for international protection in the Netherlands. The applicants were 10 and 12 years old at the time. On 31 July 2018, the Council of State finally rejected the applications. On 4 April 2019, the applicants submitted subsequent applications for international protection. These were rejected as manifestly unfounded on 21 December 2020. They appealed against the decisions to the referring court. The court held an oral hearing on 17 June 2021. The applicants were now 15 and 17 years old and had been living in the Netherlands continuously for five years and seven and a half months.

During this time in Dutch society, they experienced that gender equality is a value and adopted the values, norms and behaviour of their Dutch peers. In their follow-up applications, they claimed that if they were to return to Iraq, they would not be able to adapt to the values, norms and behaviours there because women and girls would not be granted the freedoms they enjoy in the Netherlands. In the Netherlands, they had become aware of the freedom they have as girls to make their own life choices. They pointed out that, as in the Netherlands, they wanted to continue to decide for themselves whether they have contact with boys, whether they play sports, whether they study, whether – and whom – they marry and whether they want to work outside the home. They also wanted to decide for themselves what political and religious opinions to hold and be able to express these in public. As they would have to renounce these values, norms and behaviours if

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

they returned to Iraq, they needed international protection. The Secretary of State for Justice rejected the applications as manifestly unfounded.

The referring court wishes to know whether third-country nationals in the applicants' situation, who have lived in an MS for a significant part of their identity-forming life, may be entitled to international protection because they are members of a particular social group within the meaning of Article 10(1)(d) of Directive 2011/95/EU and how the best interests of the child should be taken into account when examining such applications.

Advocate General Collins comments on this in his Opinion: In order to determine whether a group in a country of origin has a clearly delineated identity because it is regarded as different by the surrounding society, MS are obliged under Art. 4 of Directive 2011/95 to take into account all facts relating to the country of origin which are relevant at the time of the decision on an application for international protection, including the laws and regulations of the country of origin and the manner in which they are applied, as well as any relevant evidence presented by the applicant for international protection.

- a group consisting of women and girls who share a belief in gender equality has a distinct identity in the country of origin if, when they express that belief by way of statements or conduct, they are perceived by society in that country as transgressing social mores;
- it is unnecessary for a shared belief in gender equality to have a religious or political basis.

Directive 2011/95 in conjunction with Art. 24(2) and Art. 51(1) of the Charter of Fundamental Rights of the European Union (CFR) must be interpreted in such a way that

- a national practice whereby a decision-maker, when carrying out the substantive assessment of an application for international protection or a subsequent application for international protection, does not take into account, as a primary consideration, the best interests of the child, or weighs up the best interests of the child without first determining, in each procedure, what the best interests of the child are, is incompatible with EU law;
- the methodology and procedure for determining the best interests of the child are matters for the Member States to establish, taking full account of the principle of effectiveness;
- harm that a minor has suffered as a result of his or her long stay in a Member State is irrelevant to a decision as to whether to grant a subsequent application for international protection when that long stay in a Member State is the result of decisions of the minor's parents or guardians to exhaust the legal remedies available to challenge the rejection of the initial application and to lodge a subsequent application for international protection.

1.4 Advocate General Emiliou, Opinion of 7/9/2023 - C-216/22 - A.A. v. Germany - Opinion GA Emiliou (referral Administrative Court Sigmaringen 23/3/2022 - pending): Can an ECJ decision be a "new element" for a subsequent application?

The Syrian national A.A. had been granted subsidiary protection in Germany, but his second asylum application was rejected by the BAMF on the grounds that an ECJ judgement does not constitute a new element that changes the position of an asylum seeker, as is required for the examination of a subsequent application on the merits. In

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

its unusually detailed preliminary question, the Administrative Court asks the ECJ to clarify the interpretation of the term "new element" within the meaning of Art. 33 para. 2 letter d and Art. 40 of Directive 2013/32 as well as the scope of the legal remedy that an applicant can lodge against the official decision to reject a subsequent application as inadmissible:

(1) (a) Is a national provision which considers a subsequent application admissible only if the factual or legal position on which the original rejection decision was based has subsequently changed in favour of the applicant compatible with Article 33(2)(d) and Article 40(2) of Directive [2013/32]?

(b) Do Article 33(2)(d) and Article 40(2) of Directive [2013/32] preclude a national provision that does not treat a decision of the [Court] as a "new element"[,] "new circumstance" or "new finding" if the decision does not establish the incompatibility of a national provision with EU law but is limited to the interpretation of EU law? What conditions, if any, apply in order for a [decision] of the [Court] which merely interprets EU law to be taken into account as a "new element"[,] "new circumstance" or "new finding"?

(2) If Questions (1)(a) and [(b)] are answered in the affirmative: must Article 33(2)(d) and Article 40(2) of Directive [2013/32] be interpreted as meaning that a judgment of the [Court] which has ruled that there is a strong presumption that a refusal to do military service under the conditions set out in Article 9(2)(e) of Directive [2011/95] is linked to one of the five grounds listed in Article 10 of that directive must be taken into account as a "new element"[,] "new circumstance" or "new finding"?

(3) (a) Must Article 46(1)(a)(ii) of Directive [2013/32] be interpreted as meaning that the judicial remedy against an inadmissibility decision taken by the determining authority within the meaning of Article 33(2)(d) and Article 40(5) of [that directive] is limited to examining whether the determining authority has correctly concluded that the conditions for the subsequent application for asylum to be considered inadmissible… have been met?

(b) If Question 3(a) is answered in the negative: must Article 46(1)(a)(ii) of Directive [2013/32] be interpreted as meaning that the judicial remedy against an inadmissibility decision also covers the examination of whether the conditions for the grant of international protection within the meaning of Article 2(b) of Directive [2011/95] have been met if the [national] court finds, after conducting its own examination, that the conditions for rejection of the subsequent application for asylum as inadmissible are not met?

(c) If Question 3(b) is answered in the affirmative: does such a decision by the [national] court require that the applicant [first be] granted the special procedural guarantees [provided for in] the third sentence of Article 40(3) [of Directive 2013/32] in conjunction with the rules in Chapter II of [that directive]? May [that] court conduct that procedure itself or must it delegate it to the determining authority, where necessary after suspending the court proceedings? Can the applicant waive compliance with those procedural guarantees?

Advocate General Emiliou replies to this in his Opinion:

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

"New" is a "factor" on which the previous decision could not yet be based and which significantly increases the likelihood that the application will be successful on the merits. The term can therefore also be applied to an ECJ judgement that results in a change in the interpretation of the national provisions on which the final decision on the asylum application is based.

On the third question regarding effective legal remedies and the scope of judicial review of an appeal against a decision declaring a subsequent application inadmissible, he referred to the procedural autonomy of the MS and the Alheto judgement. The MS are free to provide that national courts do not judge a subsequent application on its merits. If national courts are allowed to make such an assessment instead of the authority, this must be done in accordance with the procedural guarantees of Directive 2013/32.

1.5 ECJ, Judgment of 21/9/2023 - C-143/22 - ADDE and Others v. France: On the applicability of the Return Directive after the introduction of internal border controls

The background to the preliminary enquiry is a French regulation that allows authorities to refuse entry to third-country nationals at internal borders where checks are temporarily being carried out again due to a "serious threat to public order or internal security" in France. Several organisations, including lawyers, had filed a complaint against this order. They allege a violation of the Return Directive (2008/115/EC), according to which illegally resident third-country nationals must be issued a return decision with a deadline for voluntary departure. Forced deportation is only a last resort.

According to the ECJ, the Return Directive applies to any third-country national who has entered the territory of a Member State without fulfilling the conditions for entry or residence there. This also applies if the person concerned has already entered the territory before crossing a border crossing point where such controls take place. The Directive must always be applied if a third-country national has entered the country illegally – i.e. even if they are apprehended at a border crossing point located on the territory of the controlling EU state. Although entry may be refused in accordance with the Schengen Borders Code, the requirements of the Return Directive must be complied with – even if the refusal of entry remains ineffective as a result. The situation is different at the EU's external borders. There, illegally entering third-country nationals could exceptionally be excluded from the scope of the Return Directive.

1.6 ECJ, Judgment of 21/9/2023 – C-568/21 – E. and S. v. Netherlands: Is a diplomatic identity card under the Vienna Convention a residence permit within the meaning of Art. 2(l) Dublin III Regulation?

E. and S. and their minor children are third-country nationals. E. was a member of his country's diplomatic mission in MS X and lived there with his wife and children. During their stay, the Ministry of Foreign Affairs of this MS issued them diplomatic identity cards. The family left MS X and applied for international protection in the Netherlands. On 31 July 2019, the State Secretary determined that MS X was responsible for examining these applications in accordance with Art. 12(2) of the Dublin III Regulation, as the diplomatic identity cards issued by the authorities of this MS were residence permits. The Netherlands and MS X are parties to the Vienna Convention. MS X granted the applications for admission on 25 September 2019. In a decision dated 29 January 2020, the Dutch State Secretary refused to examine the applications for international protection because MS X was responsible for examining them.

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

E. and S. appealed against these decisions: MS X was not responsible for examining their applications, as its authorities had never issued them a residence permit. Their right of residence arose directly from their diplomatic status under the Vienna Convention. In its judgement of 20 March 2020, the court upheld the claim. The State Secretary lodged an appeal: the diplomatic identity cards issued by MS X were residence permits within the meaning of Art. 2(l) Dublin III Regulation and were still valid at the time of the application for international protection in the Netherlands.

The ECJ ruled that a diplomatic passport issued by a MS on the basis of the Vienna Convention on Diplomatic Relations is a residence permit within the meaning of Art. 2(l) Dublin III Regulation.

1.7 ECJ, Judgment of 21/9/2023 – C-151/22 – S. and A. v. Netherlands: On the interpretation of the term "political opinion"

Ms. S. and Mr. A., Sudanese nationals, had applied for asylum due to political activities in the Netherlands against the Sudanese government and the resulting risk of return. Their applications were rejected because their actions did not constitute political opinion within the meaning of 10(1)(e) Directive 2011/95/EU (Qualification Directive). The Dutch Council of State then asked the ECJ to interpret what the term "political opinion" within the meaning of the Directive encompasses.

The ECJ clarified that the wording of Art. 10(1)(e) and (2) of Directive 2011/95/EU indicates that the term "political opinion" and "political character" must be interpreted broadly. The views, ideas or convictions of an asylum seeker do not have to include a specific conviction, nor do they have to be so deeply rooted that they cannot refrain from expressing them in their country of origin. The grounds of persecution based on "religion" and "political opinion" are intended to promote the application of fundamental rights and must therefore be taken into account alongside Art. 10 and 11 CFR. Only a broad interpretation of the term "political opinion" is suitable for achieving this goal. Opinions, ideas or beliefs can also fall under the term "political opinion" or "political characteristic" if they have not yet aroused the negative interest of potential persecutors in the country of origin.

On the further question of whether Art. 4(3)-(5) of Directive 2011/95/EU should be interpreted as meaning that the authorities must take into account the degree of political convictions of a third-country national and the extent to which they are so deeply rooted, as well as whether a third-country national cannot refrain from expressing them, the ECJ ruled: It follows from the provisions that the MS are obliged to carry out a comprehensive and thorough examination of all relevant circumstances relating to the particular personal situation of a third-country national and the general context of the country of origin. The degree of conviction of political opinions and whether he/she engages in activities to promote these opinions are just as important as the risk that these actions have attracted the negative interests of the actors of possible persecution.

For the existence of a "political opinion", it is sufficient to claim to express or to have expressed the respective opinion/attitude. When assessing whether the fear of persecution on the grounds of political opinion is well-founded, the authorities of the MS must take into account whether the political opinion has attracted or could attract the unfavourable attention of potential persecutors in the country of origin due to the degree of conviction or any activities carried out to promote this conviction. There is no

Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

requirement that the conviction be so deeply rooted as to make it unavoidable for the branch to express it and thus expose himself to the risk of persecution.

1.8 ECJ, Order of 27/9/2023 - C-58/23 – Abboudnam v. Slovenia: A time limit of three days after rejection of the asylum application as manifestly unfounded is contrary to EU law

In the light of Article 47 CFR, Article 46(4) of Directive 2013/32 precludes a national provision that provides for a time limit of three days – including public holidays and non-working days – for lodging a judicial appeal against a decision issued under the accelerated procedure rejecting an application for international protection as manifestly unfounded, since such a time limit may prevent the effective exercise of the rights guaranteed in Article 12(1)(b) and (2) and Articles 22 and 23 of the Directive.

Comment by Wittmann, Higher Administrative Court of Baden-Württemberg: The decision does not directly affect the German asylum procedure, as Section 36(3) cl. 1 and Section 34a(2) cl. 1 AsylG provide for an application and action deadline of one week in cases of rejection of applications as manifestly unfounded (as well as individual cases of rejection as inadmissible) and the German procedural law excludes a deadline expiry on weekends or public holidays (§ 57[2] VwGO in conjunction with § 222[2] ZPO).

However, the ECJ bases its decision primarily on the possibility of the effective utilisation of procedural guarantees under EU law, which it spells out in para. 29 et seq. Among other things, it takes into account the fact that the Ministry of the Interior did not provide the applicant's authorised representative with an interpreter during the appeal period at issue in the main proceedings. He also points out that the guarantees to be observed in judicial proceedings also include the use of an interpreter so that the persons concerned can present their case to the competent authorities. However, it does not explain in more detail whether this right must also be guaranteed at the expense of the public authorities in proceedings to prepare an action or an application for urgent legal protection – as provided for in Article 12(1)(b) of Directive 2013/32, at least for administrative proceedings. The decision, which is very succinct at this point and also issued in the order procedure pursuant to Art. 99 of the Rules of Procedure of the Court of Justice – i.e. as a supposedly clear-cut case – does not provide an answer to this, but may harbour considerable explosive potential.

1.9 ECJ, Judgment of 5/10/2023 – C-294/22 – OFPRA v. S.W.: On the discontinuation of the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)

Art. 12(1) lit. a, cl. 2 of Directive 2011/95/EU must be interpreted as meaning that the protection or assistance provided by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) is to be regarded as no longer granted if the organisation is unable to guarantee a stateless person of Palestinian origin to whom that protection or assistance applies access to medical care and treatment, without which there is a real and immediate threat to his life or a real risk of serious, rapid and irreversible deterioration in his state of health or a significant shortening of his life expectancy. It is for the national court to assess the existence of such a risk.

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

1.10 Attorney General de la Tour, Opinion of 19/10/2023 – C 352/22 – on the reference for a preliminary ruling from the OLG Hamm (pending): Under EU law, a Member State is not bound by the decision of another Member State on the recognition of refugee status within the meaning of the Refugee Convention. Asylum and extradition proceedings are to be assessed independently of each other

A Turkish national was recognised as a refugee by Italian authorities in 2010. He had been in Germany since 2019 but was in custody pending extradition for criminal offences committed. The Higher Regional Court took the view that asylum and extradition proceedings should be assessed independently of each other and that there was therefore no obstacle to extradition, even if the refugee status recognised in Italy was still valid until 2030.

Attorney General de la Tour confirmed this but pointed out that in order to guarantee the principle of non-refoulement (Art. 18, 19[2] CFR), the MS must extensively examine whether the person is at real risk of being subjected to treatment prohibited under the Charter of Fundamental Rights in the country of destination. The decision of another Member State that has recognised refugee status must be given particular weight in this regard.

Under EU law, a Member State is not bound by the decision of another Member State to recognise refugee status within the meaning of the Refugee Convention. At the current stage of its development, EU law does not provide for a principle according to which MS mutually recognise decisions on the granting of refugee status.

Attorney General de la Tour points out that the legal question concerns three other pending referral proceedings of the German Federal Administrative Court (C-753/22), the German Administrative Court Stuttgart (C-288/23, El-Baheer) and the Dutch Raad van State (C-551/23, Cassen).

1.11 Attorney General de la Tour, Opinion 9/11/2023 – C-608/22 and C-609/22 – (pending): On the group persecution of Afghan women through the cumulative effect of the measures taken by the Taliban regime (Question from the Federal Office for Immigration and Asylum Austria and Others)

Discriminatory measures by the Taliban regime against Afghan women can jeopardise their physical or psychological integrity as well as pose more direct threats to their lives due to their cumulative effect and the severity of the associated deprivations.

Due to their deliberate and systematic application and their cumulative effect, the measures bear witness to the establishment of a social organisation based on a system of exclusion and oppression of girls and women. They are to be excluded from civil society and denied the right to a dignified and decent life in their country of origin. Girls and women are flagrantly and persistently denied their most basic human rights because of their gender. They are deprived of their identity and their daily lives are made unbearable. The accumulation of discriminatory acts and measures by the Taliban against girls and women in Afghanistan is – according to the Attorney General – persecution. Such acts could jeopardise their physical or psychological integrity just as much as more direct threats to their lives due to the seriousness of the deprivations involved.

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

The measures against girls and women are applied solely on the basis of their presence in the country without regard to their identity or personal situation. Although it is possible that a woman is not affected by one or more of the measures due to particular circumstances, she continues to be subjected to restrictions and deprivations which, considered individually or collectively, reach the level of severity required to be considered persecution. There is nothing to prevent a MS from taking the view that it is not necessary to prove that the applicant is affected on the basis of distinguishing characteristics other than her sex (ECJ, press release no. 172/2023 of 9/11/2023).

1.12 ECJ, Judgement of 9/11/2023 – C-125/22 – X., Y. and others v. Netherlands: Requirements for determining and individualising the risk of "serious harm" in the case of subsidiary protection

On 28 January 2018, X and Y, a married couple with Libyan nationality, applied for international protection, also on behalf of their six minor children. They claimed that if they returned to Libya, they would be at risk of suffering "serious harm" within the meaning of Art. 15 lit. b and/or lit. c of Directive 2011/95 (Qualification Directive). To this end, they referred both to their personal situation and to the general situation in Libya, in particular the extent of the violence and the resulting humanitarian situation. X further submitted that he had worked as a bodyguard for high-ranking politicians from 2012 to June 2017, including two prime ministers, a deputy prime minister and several ministers. He claimed that he was shot at outside of his working hours and was hit in the head and injured by a bullet fragment on his left cheek. He was subsequently threatened in telephone conversations that took place about five months and one to two years after he was shot. He suspected those responsible for these acts but could not prove it. He also stated that his brother had told him that militias were trying to seize a piece of land he had inherited from his father and had threatened to kill anyone who stood in their way. Finally, X explained that his departure from Libya was also due to the difficult living conditions in Tripoli, in particular the lack of fuel, drinking water and electricity.

Y based her application for international protection on the fear arising from X's personal experience and the generally insecure situation in Libya, which had also caused her health problems.

On 24 December 2020, the Secretary of State rejected the applications for international protection as unfounded because the applicants had no reason to fear serious harm within the meaning of Art. 15(b) of the Directive 2011/95. The alleged threats were not credible. X also failed to prove that the shooting of which he was the victim was specifically directed against him or that there was a connection between this violence and his professional activity as a bodyguard. On the question of whether a dangerous situation such as that is covered by Art. 15(c) of Directive 2011/95, it is not necessary to assess the general security situation in Libya. The applicant did not have to fear serious harm within the meaning of Art. 15. X and Y brought an action against the decisions before the competent District Court in The Hague. The court referred questions on the interpretation of Art. 15 Directive 2011/95 to the ECJ. The latter ruled:

1. Article 15 of Directive 2011/95/EU (Qualification Directive as amended) must be interpreted as meaning that, for the purpose of determining whether an applicant for international protection is eligible for subsidiary protection, the competent national authority must examine all relevant evidence relating both to the individual situation

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

and personal circumstances of the applicant and to the general situation in the country of origin before determining what type of serious harm may be demonstrated on the basis of that evidence.
2. Article 15(c) of Directive 2011/95 must be interpreted as meaning that, in assessing whether there is a real risk of suffering serious harm, as defined in the provision, the competent national authority must be able to take into account evidence of the applicant's individual situation and personal circumstances other than the mere fact that he comes from a territory of a particular country in which, within the meaning of the judgment of the ECtHR of 17 July 2008, NA. v. United Kingdom (CE:ECHR:2008:0717JUD002590407, § 115), the "most extreme cases of generalised violence" occur.
3. Article 15(b) of Directive 2011/95 must be interpreted as meaning that the intensity of the arbitrary violence in the applicant's country of origin cannot weaken the requirement of individualisation of the serious harm defined in that provision.

1.13 ECJ, Judgement of 23/11/2023 - C-374/22 - XXX v. Belgium: No obligation under EU law to grant derived refugee protection

XXX, a Guinean national, came to Belgium in 2007 and applied for international protection, which was rejected. He then submitted two further applications in 2010 and 2011, which the Belgian authorities did not consider. On 29 January 2019, he submitted a fourth application for international protection, stating that he was the father of two children born in Belgium in 2016 and 2018, who had been recognised as refugees there, as had their mother. After this fourth application was rejected as inadmissible, XXX lodged an appeal with the Council for Aliens' Disputes, which rejected it in a decision dated 17 April 2020. The Belgian court hearing the appeal in cassation had doubts as to whether Article 23 of Directive 2011/95 applied to XXX's situation, as XXX claimed, since it follows from Article 2(j) of Directive 2011/95 that family members of a beneficiary of international protection are covered by that directive "provided that the family already existed in the country of origin". According to XXX's statements, however, his family had not yet existed in his country of origin, but had only been established in Belgium.

The ECJ ruled: Art. 23 of Directive 2011/95/EU (Qualification Directive) must be interpreted as meaning that MS are not obliged to grant the parent of a child recognised as a refugee in one MS the right to international protection in another MS.

The ECJ thus confirms its previous case law, according to which the granting of derived international protection for family members provided for in Section 26 Asylum Act, for example, is permissible under EU law, but not mandatory. A Member State may limit itself to granting family members without their own protection status the benefits provided for in Art. 24 et seq. of Directive 2011/95/EU for relatives of recognised beneficiaries of protection (including residence permit, access to medical care, etc.) in the respective context.

(See also: German Federal Administrative Court, decision of 15/11/2023 - 1 C 7.22: third-country national family members of a child born after leaving the country of persecution, who was granted refugee status in Germany, are not entitled to refugee status under § 26 AsylG even if the marital partnership of the parents or the entire family, with the exception of the parent, already existed in the country of persecution).

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

1.14 ECJ, Judgement of 30/11/2023 – C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21 – joined cases D. G. et al. v. Italy: Information, consultation and examination obligations in the Dublin III procedure

These cases concern five applicants who were in Italy and had previously submitted applications for international protection in Slovenia, Finland, Sweden and Germany. They had lodged appeals against the Italian transfer decisions. The MS in which the initial applications had been made had previously agreed to take them back in accordance with the Dublin III Regulation.

The ECJ ruled that information and consultation obligations under the Dublin III Regulation must also be observed when a new application is submitted in another MS. However, while a breach of the obligation to be heard generally leads to the cancellation of a transfer decision and can only be cured in court proceedings if the hearing held there meets the requirements of Art. 5 of the Dublin III Regulation, the effects of a breach of the obligation to provide information depend on whether the person concerned was actually deprived of the opportunity to put forward their arguments so that the administrative procedure could have led to a different outcome (causality requirement).

A court of the requesting MS that has to rule on an appeal lodged against a transfer decision may only examine a violation of the prohibition of refoulement in the destination state if the asylum procedure and the reception conditions for applicants for international protection in the requested MS have systemic weaknesses. For this purpose, it is not sufficient that the authorities and courts of the requesting MS on the one hand and the authorities and courts of the requested MS on the other hand hold different views on the interpretation of the substantive conditions for international protection.

The common information sheet pursuant to Art. 4 Dublin III Regulation in connection with applications for international protection and situations concerning readmission procedures must be applied. The same obligation to provide information applies to the personal interview in accordance with Art. 5 of the Dublin III Regulation in the case of readmission procedures. In the event of a breach of this obligation, a national court is responsible for assessing the legality of the transfer decision. It could declare it null and void if the person concerned was prevented from presenting their arguments due to a lack of information or a lack of a personal interview.

The ECJ also examined whether national courts should examine the risk of indirect refoulement in a requested MS that has rejected an application for international protection. The aim of the Dublin III Regulation is to establish a clear and effective method for determining the MS responsible and to prevent secondary movements. Therefore, national courts are barred from carrying out a substantive examination of the risk of refoulement. They must assume that the asylum authority of the responsible MS has properly assessed the risk of refoulement in accordance with Art. 19 CFREU and that the applicant has effective legal remedies to challenge the authority's decisions in accordance with Art. 47 CFREU. Art. 3 para. 1 and 2 in conjunction with Art. 27 Dublin III Regulation must be interpreted in light of Art. 4, 19 and 47 CFREU in such a way that the national court may not examine whether there is a risk of a violation of the principle of non-refoulement in the requested MS if there are no systemic deficiencies in the asylum procedure and reception conditions of this MS. Differences of opinion between the

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

authorities and courts of the requesting and requested MS on the interpretation of the substantive conditions for international protection are not systemic deficiencies.

With regard to the function of Art. 17 Dublin III Regulation, if a national court does not agree with the assessment of the requested MS, the ECJ emphasised the optional and discretionary nature of Art. 17, stating that it is up to the MS to determine the circumstances in which they make use of the possibility to examine an application for international protection even if they are not responsible (self-referral). A court of the requesting MS is not obliged under Art. 17 to declare the MS responsible if it does not agree with the assessment of the risk of refoulement of the person concerned and cannot force the requesting MS to examine an application for international protection on the basis of Art. 17 on the grounds that there is a risk of a breach of the principle of non-refoulement in the requested MS, unless there are systemic deficiencies in the asylum procedure or reception conditions in the requested MS.

2. European Court of Human Rights

2.1 ECtHR, Judgement of 11/7/2023 – 61365/16 – S.E. v. Serbia: Art. 2 Prot. No. 4 violated because Serbia did not issue travel documents to a recognised refugee whose passport had expired

S.E., a Syrian national, was granted refugee status in Serbia. After his Syrian passport expired, he applied for a travel document for refugees. He was then informed that a travel document could not be issued as the Minister of the Interior had not yet issued subsidiary regulations for this. In 2022, S.E. obtained a Syrian passport and used it to leave Serbia.

The Serbian Asylum Act recognises the individual right of a recognised refugee to be issued a travel document and obliges the Minister of Interior to adopt subsidiary legislation to ensure its implementation. S.E.'s claim therefore arose from domestic legislation intended to implement the obligations under the Refugee Convention. Serbia had also failed to demonstrate that it had made efforts to act in accordance with the rule of law and to take appropriate regulatory and operational measures to implement and thus eliminate the structural problem. Serbia had thus deprived H.E. of his right to leave the country for seven years in a way that amounted to an interference within the meaning of Art. 2 Prot. No. 4, because no travel documents for refugees were issued due to the lack of subsidiary regulations for the implementation of the Asylum Act.

2.2 ECtHR, Judgement of 13/7/2023 - 4677/20 - A.A. v. Sweden: Art. 2 and 3 not violated because Libyan did not prove threat

The Libyan national A.A. applied for asylum in Sweden and initially claimed that he was being threatened by the Libyan mafia. He submitted a second asylum application on the grounds that he was on a wanted list in Libya and that he would be at risk of abuse if he was returned because he had worked for the Gaddafi regime. Both applications were rejected.

The ECtHR recognised that Libya was in breach of human rights and international humanitarian law and that the general situation was serious and unstable. However, it could not be established that the generalised violence was so extreme that there was a real risk of ill-treatment for any person returning to Libya. There is therefore no reason to doubt Sweden's conclusions, which were drawn after a thorough examination with regard

Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

to the complainant's personal circumstances. His oral statements were vague. They lacked detail and coherence. He was unable to provide written evidence of arrest warrants against him. Therefore, his statements were not credible. He had failed to substantiate his alleged connection to the Gaddafi regime and the arrest warrant against him in Libya and thus his need for international protection. His deportation did not violate Articles 2 and 3, as the case was thoroughly examined in Sweden.

2.3 ECtHR, Judgement of 18/7/2023 – 49255/22 – Camara v. Belgium: Art. 6 violated by systematic refusal of Belgian authorities to implement national court judgements to accommodate a Guinean asylum seeker

The complainant, Mr. Camara, a Guinean national, applied for international protection in Belgium. Fedasil, the Federal Agency for the Reception of Asylum Seekers, informed him that he could not be accommodated in a Belgian reception centre because the network of reception centres was overloaded. He then lodged a complaint with the labour court in Brussels, which ordered Fedasil to provide accommodation on pain of a fine. The judgement became final on 29 August 2022, but the complainant was only admitted to a reception centre on 4 November 2022. He was forced to live on the street for that long. The ECtHR initially issued a provisional measure in accordance with Art. 39, which was cancelled after the placement had taken place.

The ECtHR emphasised that this was not an isolated case. Rather, it revealed the systematic failure of Belgian authorities to implement final court decisions on the reception of applicants for international protection. While recognising Belgium's difficult situation due to the increase in the number of applications for international protection, it could not accept that the time taken by Belgian authorities to enforce a court order for the protection of human dignity was reasonable. On the contrary, this systematic failure had placed a heavy burden on the work of national courts and the ECtHR. Belgium had not "only" implemented the judgement with a delay, but had evidently systematically refused to comply with national court decisions. The principle of legal certainty had thus been disregarded and Article 6(1) violated. Systematic failure by states could also be a violation of Art. 34. According to Art. 46, it is the responsibility of Belgium to take appropriate measures to end the poor administrative practice.

Judges Krenc and Derencinovic argued in dissenting opinions that Article 3 was also violated.

The applicant claimed financial compensation in the amount of the penalty payment that Fedasil had been ordered to pay by the Labour Court. However, the ECtHR held that the finding of a violation of Article 6 constituted sufficient just satisfaction.

Following this decision, 1,350 similar complaints were deleted from the ECtHR register.

Addendum, 13/09/2023: The Belgian Council of State suspended the decision of the Secretary of State not to provide accommodation to single male asylum seekers (judgement no. 257.300). Several NGOs had previously objected to the unpublished decision of the Secretary of State for Asylum and Migration to exclude single male asylum seekers from reception as part of an urgent procedure. The Council of State ruled that the emergency procedure was justified as the Secretary of State had not demonstrated that male asylum seekers could be received anywhere besides in the network of the Federal Agency for the Reception of Asylum Seekers (FEDASIL). They are thus exposed to the risk

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

of finding themselves in a situation of destitution, which is seriously detrimental to their interests. Art. 3 of the National Reception Act stipulates that every asylum seeker has the right to reception in order to lead a dignified life and that reception means material assistance granted in accordance with this Act or social assistance granted by the public social action centres. Article 6(1) also states that material assistance applies to "any" asylum seeker from the moment the asylum application is made and can be claimed throughout the asylum procedure. The Council of State therefore found that the contested decision violated these provisions and ordered its suspension.

2.4 ECtHR, Judgement of 29/8/2023 – 21768/19 – Ghadamian v. Switzerland: Article 8 violated by the refusal to legalise the complainant's residence in Switzerland

The complainant Ghadamian, an Iranian national, was born in Iran in 1940, came to Switzerland legally at the age of 29, lived there with a residence permit until 2002 and worked as a radiologist. He started a family (two sons from a marriage that lasted from 1971 to 1989) and developed strong social ties to Switzerland. Between 1988 and 2004, he was sentenced to a total of five years in prison for various criminal offences (including forgery, threats and property offences, which he considered to be connected to his divorce). One of the convictions was linked to an expulsion order.

In 2000, he received an expulsion order, which he did not comply with. When it became legally binding in 2002, his stay became unlawful, which led to him being sentenced to prison again. Even after serving his sentence, he remained in Switzerland and in 2008 applied for his deportation to be cancelled and for a residence permit to be issued. Both were rejected. Two subsequent applications for a residence permit for pensioners were also rejected: the Swiss government referred to his criminal offences, his long period of irregular residence (more than 14 years) and references to a family in Iran. At the time of the ECtHR judgement, the complainant was 83 years old and in good health. He continued to reside in Switzerland irregularly but economically independent. He has lived there for 54 years, 33 of them legally. His two adult sons also live in Switzerland with their families, but no relationship of dependency between the complainant and them was established. The Swiss government saw no obligation to issue a residence permit in accordance with Art. 8.

The ECtHR ruled that the refusal to legalise the complainant's residence in Switzerland violated his right to private life (Art. 8). Although he could not invoke a right to family life, he could invoke his private life. When weighing up the interests, the ECtHR confirmed the state's interest in protecting public order, which was based on the complainant's criminal convictions. However, the complainant had not been charged with any serious criminal offences after 2006; there had only been convictions in connection with his irregular stay and for a minor theft in 2016. The complainant had also acted in "bad faith" because he did not comply with the deportation order and continued to reside in the country illegally. However, the expulsion efforts of the Swiss authorities had primarily consisted of the delivery of the expulsion order and house searches in search of the complainant's passport. There were also practical difficulties in forcibly deporting the complainant to Iran because the government had no access to his passport. Nevertheless, it remained doubtful whether the state had taken all possible measures to gain access to the complainant's passport and deport him.

Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

With regard to the interests of the complainant, the ECtHR emphasises the "obviously very long" duration of a 54-year stay but adds that the entire duration of the stay cannot be given the same weight as the years in which he held a residence permit. However, since he had built up his private life mainly during his legal residence, these years were of considerable weight. In addition, he had spent most of his life in Switzerland, integrated himself into Swiss society, contributed to the "monde du travail" through his work as a radiologist and built up pension entitlements. With regard to the possibility of leading a private life in Iran, the ECtHR states that it is "indisputable" that a return to Iran would be extremely complicated, despite his physical and economic independence. He would be separated from his children and grandchildren. He has no living siblings in Iran.

The Swiss courts had given too much weight to the general interest and had not sufficiently taken into account the individual particularities of the case. Switzerland had therefore exceeded its discretionary powers. It was not necessary to examine whether there was also a violation of Art. 13 in conjunction with Art. 8.

2.5 ECtHR, Judgement of 31/8/2023 - 70583/17 - M.A. v. Italy: Art. 3 violated because a minor with a history of abuse and specific mental impairments was placed in an adult centre

M.A., a Ghanaian national, arrived in Italy as a minor in October 2016 and was placed in a reception centre for adults. In September 2017, the ECtHR issued a provisional measure under Article 39 after the complainant requested to be transferred to a centre with appropriate reception conditions for minors. In December 2017, she was granted international protection due to the forced marriage and abuse she had suffered in Ghana.

The ECtHR examined Article 3 and emphasised that authorities must exercise particular vigilance when dealing with vulnerable persons and grant them increased protection. The complainant had disclosed her history of sexual abuse shortly after her arrival and repeated it to a psychologist and a mediator. The police headquarters were aware of this history due to the asylum application. The authorities therefore knew that the complainant was particularly vulnerable. The applicant's representative had also made four requests to the prefecture, the police headquarters and the Red Cross to transfer the complainant to a suitable centre. Her situation had only improved after the ECtHR's provisional measure. Her treatment by the competent authorities reached the level of severity required to apply Article 3. The continued stay in the centre and the continued failure of the authorities to act with regard to her situation and needs as a vulnerable minor violated Article 3 (EUR 6,500 compensation for non-material damage).

2.6 ECtHR, Judgement of 5/9/2023 – Noorzae (44810/20) and Sharifi (31434/21) v. Denmark: Art. 8 violated by expulsion orders and entry bans for Afghan settled migrants who were convicted of criminal offences as juveniles

Two Afghan applicants had entered Denmark as children and were sentenced to prison as minors and adults for criminal offences. They received deportation orders with a twelve-year re-entry ban.

Noorzae argued that he could not be deported as he had undergone therapy and had resumed his studies to become an educator. Sharifi argued that his girlfriend was pregnant, they had known each other since 2017 and were living together.

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

The ECtHR examined whether expulsion orders and entry bans interfere with private life in a proportionate manner. In the Noorzae case, it emphasised that the previous convictions did not indicate that he posed a general threat to public order, that he had not received any previous warnings of possible expulsion and that he had attempted to reintegrate into Danish society. In addition, a relatively lenient sentence had been imposed. He had very strong ties to Denmark, whereas there were no such ties to Afghanistan, as he came to Denmark at a very young age and had resided there legally for about 18 years.

With regard to Sharifi, the ECtHR repeated a similar argument with the difference that there were no recent criminal convictions and that the complainant had been lawfully resident in Denmark for around 16 years. Both expulsion orders and re-entry bans were therefore disproportionate and violated Art. 8.

2.7 ECtHR, Judgement of 7/9/2023 - Compaoré v. France: Art. 3 violated because diplomatic assurances after military coup in Burkina Faso were not reassessed before extradition of a Burkinabe national

The complainant, a Burkinabe national, is the brother of the former President of Burkina Faso. The complainant was investigated for the murder of journalists in 1998. The investigation was initially closed, but resumed in 2015 and an international arrest warrant was issued. The complainant was arrested in France as a result. Burkina Faso requested his extradition and gave assurances. The complainant's appeals in France were dismissed, but the ECtHR issued interim measures to suspend his extradition, referring to two military coups in 2022, whereby the second government suspended the constitutional order.

The ECtHR found that the initial stages of France's examination of the assurances were appropriate and thorough. However, given the radically different political context in Burkina Faso, these could not continue to be considered valid. Measures taken by the current regime violated Article 3 and the assurances given by the previous government had not been confirmed by the second transitional government. Therefore, the reliability of the assurances, on which France relied exclusively in its argumentation, was in question. The fact that France had not taken into account the new political and constitutional context in Burkina Faso, in particular that the assurances were given by a previous government before the coup d'état, did not enable France to adequately assess the risk of Compaoré being treated in violation of Article 3. Therefore, if the extradition order were enforced, France would be in breach of the procedural part of Article 3.

2.8 ECtHR, Judgement of 14/9/2023 – 48139/16 and 7077/15 – M.N. and A.A. v. Hungary: Article 5 violated because Afghan and Algerian asylum seekers were unlawfully detained without evidence that they did not cooperate with the authorities

An Afghan and an Algerian national applied for asylum in Hungary and were detained due to the risk of absconding, as their identities had to be clarified, they had no financial means and had no contacts in Hungary. With regard to M.N., the ECtHR found that the complainant initially wanted to travel on to Finland or Germany, but that deportation orders were then issued during the proceedings, which were cancelled by domestic courts that ordered the asylum authority to conduct new proceedings. M.N.'s detention was

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

terminated after about five months, as the authorities realised that the reasons had ceased to exist.

A.A. was remanded in custody for using a forged passport. In addition, his application was motivated by financial interests and he had entered Hungary illegally – according to the authorities. However, they were already aware of his identification details when he applied for asylum.

The ECtHR disagreed with Hungary's argument that the detention had served to prevent unauthorised entry or had been ordered with a view to possible deportation. Both complainants were granted residence permits on humanitarian grounds while the proceedings were ongoing. The deportation order against M.N. was not enforceable. According to the ECtHR, detention may not be ordered simply because asylum has been applied for. There were also no indications that the complainants were not cooperating with the authorities. The grounds for detention "clarification of identity" and "risk of absconding" had not been sufficiently individualised. With regard to A.A., the court also noted that he had submitted a birth certificate to the authorities. A financial motivation for his application was neither proven nor relevant. The fact that he had entered Hungary unlawfully could not in itself justify detention. Hungary had violated Art. 5 para. 1 through these measures.

2.9 ECtHR, Judgement of 14/9/2023 – 44646/17 – Diakitè v. Italy: Art. 8 violated because the age of a minor. was not carefully checked and he was placed in an adult centre (despite presenting a birth certificate)

On arrival in Italy, an Ivorian adolescent presented his birth certificate and declared that he was a minor. Nevertheless, he was placed in a reception centre for adults because a medical report claimed that his bone age corresponded to that of a person aged at least eighteen. Around five months later, he was transferred to a centre for minors after a medical examination revealed that he was between 17 and 18 years old. A guardian was appointed. The complainant applied for asylum, which was later granted.

The ECtHR found that although the complainant presented his birth certificate to the authorities, he was initially placed in a centre for adults on the basis of an X-ray examination and only transferred to a centre for minors at the request of his representative. Although he had already proved that he was a minor on arrival, he had not benefited from the minimum procedural guarantees for minors. However, the presumption of minority is an integral part of the protection of the right to respect for the private life of an unaccompanied alien who declares himself to be a minor. Italy violated Article 8 because it did not act with due diligence and did not fulfil its obligation to guarantee the complainant's right to respect for his private life.

2.10 ECtHR, Judgement of 5/10/2023 – 16127/20 – E.F. v. Greece: Articles 3 and 13 violated as the condition of an HIV-positive asylum seeker in the Lesbos camp was not prevented from deteriorating and no effective remedy was available to her

The complainant, a Cameroonian national, was accommodated in the Moria and Polykastro camps in 2019/20. She fled Cameroon to escape persecution and sexual abuse. She was HIV-positive and stated that she informed the Greek authorities of this immediately upon her arrival. Her condition deteriorated rapidly as she still did not receive antiretroviral treatment.

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

At one stage in Polykastro, she suffered from severe symptoms related to her HIV diagnosis, including a fainting spell, after which she was hospitalised. She also complained about poor living conditions in the Moria and Polykastro camps (no bed linen; no mattress; no provision of food according to her health situation; no hot water, which meant that she could not wash her clothes or go to the toilet because this was forbidden for African women).

Nevertheless, the ECtHR ruled that the complaint regarding the living conditions was inadmissible because the complainant had not provided sufficiently detailed information.

2.11 ECtHR, Judgement of 5.10.2023 – 58680/18 – M.A. and Others v. Hungary: Art. 3, 5(1) and 5(4) violated due to inadequate living conditions and de facto detention of an Afghan family

An Afghan family of five (parents and three children aged four months, eight and ten years) spent over three months in the Röszke transit zone on the border with Serbia. The family now lives in Germany. All of the complainants claimed that their rights under Article 3 had been violated, inter alia due to the poor conditions in the container in which they were accommodated (all five of them in 13 m^2 of space), heat, deterioration of their mental state, rapid weight loss of the children and poor quality and quantity of food. Furthermore, Article 5(1) and (4) had been violated because the more than three-month placement was a de facto deprivation of liberty.

The ECtHR referred, inter alia, to its judgement in R.R. and Others v. Hungary (no. 36037/17). The material circumstances underlying the complaint under Article 5(1) and (4) were similar to those in R.R. and Others. Accordingly, there had been a violation. With regard to the children, Hungary had violated Art. 3, but the threshold for a violation of Art. 3 was not reached with regard to the parents. EUR 11,000 was awarded for the non-material damage.

2.12 ECtHR, Judgement of 5.10.2023 – 53272/17 – P.S. and A.M. v. Hungary: Articles 3, 5(1) and 5(4) violated due to unreasonable conditions and detention of Iraqi nationals at the Serbian border

The complainants, an Iraqi mother and her daughter (born in 2012), spent four months in the Tompa transit zone at the Serbian border. They had fled Iraq because they had been physically abused by their husband/father. They complained about the degrading and inhuman conditions in Tompa and the length of their detention in accordance with Art. 3, 5 para. 1 and 5 para. 4.

The poor mental state of the adult complainant was not disputed by either side. However, the Hungarian government claimed that appropriate psychological support had been provided by ordering a medical examination, repeatedly prescribing sedatives and transferring her and her daughter to an open reception centre. The ECtHR ruled that the complainant had not received adequate care. The conditions of detention and the associated constraints and insecurities had caused her considerable psychological suffering, of which the authorities must have been aware. Article 3 had been violated.

With regard to Art. 5(1) and 5(4), the ECtHR ruled that the material conditions were functionally identical to those in the case R.R. and Others v. Hungary, and consequently found a violation of these rights.

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

2.13 ECtHR, Judgement of 5.10.2023 – 53528/19 – O.Q. v. Hungary: Articles 3, 5(1) and 5(4) violated because a Syrian asylum seeker was detained for eight months and repeatedly deprived of food

O.Q., a Syrian national, applied for asylum in the Tompa transit zone in July 2018. His application was deemed inadmissible by the Hungarian authorities and he was placed in a separate section of the centre. He complained under Art. 3, 5(1) and (4) about deliberate withholding of food by the Hungarian authorities, which occurred twice and lasted at least three days each time. He also complained about the detention period of eight months and inadequate conditions in Tompa.

The ECtHR examined the claim with reference to previous case law (e.g. R.R. and Others v. Hungary, W.O. and Others v. Hungary) and initially focused on food deprivation. This violated Art. 3. Furthermore, it ruled that since a stay of less than four months in the transit centre had already been regarded as a violation of Art. 5 in the case of R.R. and Others, Art. 5(1) and 5(4) had also been violated here by the eight-month placement.

2.14 ECtHR, Judgement of 5/10/2023 – 37967/18 – Shazad v. Hungary: Article 3 violated due to forcible return to Serbia (12 persons) and lack of investigation into the incident

The Pakistani complainant and eleven other people were arrested in Hungary by a joint Slovakian-Hungarian squadron on Hungarian territory, driven back to the Serbian border and ordered to cross it. They were beaten with metal rods and batons, slapped and kicked. The complainant lost consciousness and suffered two head wounds of 10 cm and 4 cm, which required stitches, as well as considerable blood loss and extensive, severe bruising. He unsuccessfully sought legal redress in the Hungarian legal system. Complaints included inadequate treatment by Hungarian border guards and an inadequate investigation into the incident.

The ECtHR ruled that Hungary had not conducted a proper procedure to investigate the incident. The complainant was neither heard nor was a forensic medical examination carried out. The Hungarian explanations for the complainant's documented injuries did not appear plausible. There was also no indication that the use of force was necessary. Rather, the Hungarian border guards had violated the procedural rights under Article 3. Hungary's assertion that the complainant's injuries could have been caused by other members of the group he was in or by the Serbian police was "extremely unconvincing". The complaint of a violation of Article 3 was therefore also substantiated in its material aspect.

2.15 ECtHR, Judgement of 12/10/2023 – 56417/19 and 44245/20 – S.S. and Others v. Hungary: Art. 3 and Protocol No. 4 violated due to "pushback" of Yemeni and Afghan families across the Serbian border

A Yemeni family of seven and an Afghan family of three left their countries of origin by plane and landed in Budapest with forged travel documents. As a result, the Hungarian authorities initiated criminal proceedings against some of the applicants. All of them received information in languages they could understand and were taken to the Serbian border.

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

The complainants claimed a violation of Art. 4 Protocol No. 4 as well as Art. 3 in the procedural part, as the authorities had not examined whether they should have been granted access to an asylum procedure.

The ECtHR examined whether the individual circumstances of the family members were taken into account. In the case of the Yemeni family, for example, one complainant had Down syndrome and another had physical health problems that could not be treated in Yemen. The ECtHR ruled that Hungary had violated domestic law because it did not provide a basis for deportation and did not give the complainants an effective opportunity to present arguments against their deportation to Serbia, but instead deported them immediately. The complaint pursuant to Art. 4 Protocol No. 4 was therefore well-founded. Art. 3 was also violated because no assessment was made with regard to the protection of the essential rights of the complainants after crossing the border and because the order to enter and stay in Serbia was unlawful.

2.16 ECtHR, Judgement of 17/10/2023 – 12427/22 – A.D. v. Malta: Articles 3, 5(1) and 13 violated by detention of an Ivorian minor in Malta

An Ivorian national arrived in Malta irregularly by boat from Libya as a minor at the end of 2021. Although he claimed to be 17 years old upon arrival, he was categorised as 19 years old by Maltese authorities during the age assessment – carried out without legal representation or a guardian – and was arrested and detained in various detention facilities for 225 days, with the authorities citing "health reasons". He had limited access to water, medical care and psychological support and was unable to communicate in French (the only language he speaks). He complained about the gruelling conditions during the winter months, the extremely limited clothing and hygiene options and the lack of outdoor and prayer spaces. He was also isolated in a shipping container for 120 days, during which time his mental state deteriorated and he often contemplated suicide. His complaint was based on Article 3 because of his treatment in Malta, Article 5(1) because his stay amounted to de facto deprivation of liberty, and Article 13 because there was no effective remedy.

The ECtHR found that the Maltese authorities had repeatedly failed to keep accurate records of who he was detained by and that he was still a minor at the time. The Court criticised his isolation detention as well as his detention with adults and the living conditions in Maltese detention centres in general. The detention of people in centres such as "China House" for health reasons violates the principles of human rights and must be stopped. The ECtHR ruled that Malta had violated Articles 3, 13 and 5(1) in two cases. It also recommended that Malta take all necessary measures to ensure that the law is effectively applied in practice and that vulnerable persons are not detained, as well as to limit detention periods so that they are related to the reason for detention, in appropriate places and in appropriate conditions.

2.17 ECtHR, Judgement of 24/10/2023 – 23048/19 – A.M.A. v. Netherlands: Article 3 violated because risk of ill-treatment in Bahrain was not assessed

A Bahraini national had fled to the Netherlands via Iran. He applied for asylum there as he feared mistreatment and persecution by the Bahraini authorities due to his religious beliefs and political activities. His brother had been recognised as a refugee in Germany.

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

During his stay in the Netherlands, Dutch immigration officials questioned him several times because his account was sometimes considered incoherent and implausible. He was due to be deported but did not want to comply as he feared arrest on arrival. He was allowed to lodge an appeal as part of a "last-minute procedure", but this did not prevent his deportation to Bahrain. In Bahrain he was arrested, convicted and stripped of his citizenship (later restored). He was still in custody and on hunger strike in the summer of 2023.

The complainant alleges that the Dutch authorities failed to carry out an adequate assessment of the risk of torture in the event of his return to Bahrain in the context of the "last-minute procedure", contrary to the provisions of Article 3. Furthermore, he considers Article 13 to have been violated because he had no effective remedy.

The ECtHR ruled that the Dutch immigration authorities had regarded the objection as a mere means of delaying deportation and had not attached sufficient value to the evidence submitted by the complainant. It is permissible to oppose repeated and/or clearly abusive or manifestly unfounded applications for asylum. However, given the absolute nature of Art. 3, such difficulties do not release a state from its obligations under Art. 3. In this case, the Netherlands had violated Art. 3. It was not necessary to examine Art. 13. The complainant was awarded non-material damages in the amount of EUR 50,000.

2.18 ECtHR, Judgement of 16/11/2023 – 18911/17, 18941/17 and 18959/17 – A.E. and Others v. Italy: Violation of Art. 3 and 5 by mistreatment of Sudanese migrants

The complainants, four Sudanese nationals, had reached the southern Italian coast by boat. They were taken to various hotspots and subjected to an expulsion procedure. When they were arrested, their belongings were confiscated and they were forced to undress completely and then remain naked for ten minutes without any justification. The conditions were described as inadequate given the heat and there were insufficient food and water supplies. In addition, some detainees had to take a 15-hour bus journey to be deported, while others were forced onto an airplane, beaten and tied up. No investigation was ever initiated against these victims of physical violence. The complainants claimed a violation of Art. 3, 5(1)(f) and 5(2) and (4).

The ECtHR was convinced of the veracity of the complainant's recollections regarding the material circumstances of her arrest and the bus transfer, as well as the violent (uninvestigated) behaviour of the police officers. Article 3 had thus been violated in substantive and procedural terms. The fact that the complainants did not know where they were going when they were on the bus, were not allowed to leave either of the two centres and were not given any information about the legal basis for their detention proves that they were unjustly deprived of their liberty. Article 5(1)(f), (2) and (4) were thus violated. The complaints regarding Art. 3, 8 and 13 were dismissed. Each complainant was awarded between EUR 8,000 and EUR 10,000 as non-material damages.

2.19 ECtHR, Judgement of 16/11/2023 – 18787/17 – W.A. and Others v. Italy: No violation of Art. 3 due to doubts about identity and contradictory information

The complainants, five Sudanese nationals, claimed that after their deportation they were at risk of suffering treatment contrary to Article 3 due to their dissident behaviour. All of them have since been deported to Niger, Egypt or Sudan. Prior to this, they had all been rescued by the Italian navy, transferred for identification and processing and detained at

Quarterly on Refugee Problems, 2024, Vol. 63, Issue 1, 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

police stations for several days. All of them stated that they had not received any information about international protection. After their deportation, the complainants were banned from re-entering Italy for five years.

The first of the five complainants presented the most comprehensive evidence of his refugee status in Niger and, according to the Belgian police's expert report on facial comparison, was the person who most closely matched one of the persons who had been deported to Sudan during the specified period. His application was therefore the only one that was not rejected by the court. He complained that the Italian authorities had not properly examined his claim that he had been treated contrary to Article 3 when he was deported to Sudan. Furthermore, he was subjected to collective expulsion in violation of Art. 4 Prot. no. 4.

The court found several inconsistencies in the complainant's account: confirmed by his signature, he had indicated that he did not intend to apply for international protection and that, contrary to his claims, he had access to a legal representative and an interpreter. The fact that he obtained refugee status in Niger was not proof that Italian authorities did not provide him with guarantees of protection against arbitrary refoulement. It was only after he had submitted the application to the ECtHR that he claimed to belong to a tribe that was being persecuted by Sudanese authorities. Therefore – according to the ECtHR – the Italian authorities did not have this information at the time of their decision. The Court thus found no violation of Art. 3 ECHR and declared the application inadmissible.

2.20 ECtHR, Judgement of 16/11/2023 – 3571/17 – Sadio v. Italy: Violation of Art. 3 and 13 for Malian national due to eight-month placement in the Cona reception centre (5th Section ECtHR as Committee)

The complainant argued that the reception conditions in the facility violated Article 3 due to overcrowding, lack of heating and hot water, lack of medical and psychological care, lack of access to legal counselling, and too few staff and translators. He submitted photos as well as reports and a parliamentary question on the facility in Cona. There was also no effective legal remedy to complain about the living conditions in court, which he considered a violation of Art. 13.

The ECtHR referred to its previous judgements in Darboe and Camara v. Italy and saw no significant difference in terms of material living conditions compared to the Sadio case. It ruled unanimously that the length of stay and the living conditions in the centre violated Article 3. As the Italian government had failed to introduce an effective remedy to challenge the conditions in Cona, Article 13 had also been violated.

2.21 ECtHR, Interim Measures of 28/11/2023 – 40788/23 – I.A. v. France: Interim injunction against deportation/extradition of a recognised refugee to Russia

A refugee recognised for political persecution in Chechnya applied for a temporary suspension of his deportation from France to Russia. The ECtHR granted the application with a provisional suspension: an irreparable impairment of the rights under Art. 2 and 3 could not be ruled out with sufficient certainty in view of the continued refugee status and a request for extradition expressed by the Russian Federation (press release).

Hoffmann, H. (2024). European Jurisdiction on Refugee and Complementary Protection
Quarterly on Refugee Problems, 2024, Vol. 63, Issue , 81-104
ISSN 2750-7882, Section: Jurisdiction
Open Access Publication, https://doi.org/10.57947/qrp.v63i1.126

2.22 ECtHR, Judgement of 30/11/2023 – 16771/23 – Kamaras v. Hungary: Violation of Art. 6 due to unreasonable duration of proceedings

An Iranian national and his 9-year-old son were detained in the Röszke transit zone for 17 months between December 2018 and May 2020, father and son in two separate sectors of the transit zone. Two separate proceedings were also conducted, one in relation to the asylum applications and another in relation to their expulsion on different legal grounds. The ECtHR did not see sufficient justification for this procedure. The reasonableness of the duration of the proceedings had to be assessed in light of the circumstances of the case and taking into account the following criteria: Complexity of the case, behaviour of the complainant and the competent authorities and what was at stake for the complainant in the litigation (see Frydlender v. France [GC], no. 30979/96, para. 43). In the comparable case of Gazsó v. Hungary, no. 48322/12, 16 July 2015, a violation of Article 6 had already been found in relation to the duration of the proceedings. The examination of the material in the proceedings pending here had not revealed any facts or arguments that could have justified the overall duration of the proceedings at a national level. It was excessively long and did not fulfil the criterion of a reasonable period of time. This constituted a violation of Art. 6(1). The complainants were awarded compensation in the amount of EUR 17,500.

2.23 ECtHR, Judgement of 5/12/2023 – 30919/20 – H.A. v. UK: No violation of Art. 3 with regard to the return of a Palestinian applicant to Lebanon

The complainant, a stateless person of Palestinian origin, was born in the Ein El-Hilweh refugee camp in Lebanon and lived there before fleeing to the UK following fighting and targeted recruitment attempts by paramilitary groups in the camp. His asylum application was rejected. He argued that if he was deported to Lebanon, he would be at risk of treatment contrary to Article 3.

The ECtHR based its decision on the finding of the court of first instance that there would be no risk upon his return to Lebanon and examined whether there was now material that could lead to the conclusion that his deportation to Lebanon would entail a risk of treatment contrary to Article 3. He referred to an EASO report on the recruitment of young Palestinians in refugee camps in Lebanon. The report stated that there was no information on the consequences faced by persons who resist recruitment by Fatah in Lebanon. Therefore, it did not support the complainant's argument that his refusal to be recruited would expose him to the risk of serious harm within the meaning of Article 3. Rather, the material does not call into question the conclusion of the court of first instance that there is no evidence of the risk of serious harm upon return as alleged by the complainant. In the case of his deportation to Lebanon, there was therefore no violation of Art. 3.