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QRP

JURISDICTION

European Jurisdiction on Refugee and Complementary Protection: August-December 2022[1]

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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 Human Rights (ECtHR) and the European Court of Justice (ECJ) in the period August to December 2022

1. European Court of Human Rights

1.1 ECtHR, Judgement of 30/8/2022, R. v. France (no. 49857/20): Art. 3 violated because of insufficient risk assessment before the deportation of a refugee to Chechnya

A Russian national with Chechen roots was to be deported to Russia. He initially had refugee status in France. This was revoked "on the grounds of serious threat to national security" after he was sentenced to six years' imprisonment and permanently banned from living in France for participating in a criminal conspiracy to prepare a terrorist act.

He argued that his deportation violated Articles 2, 3 and 8 and that there was a risk that he would be forcibly removed or mistreated in Russia. His wife (also a Russian national with refugee status) and his minor children continue to live in France.

The ECtHR recognised the dangers that terrorism poses to a society and the importance of combating terrorism. However, the protection enshrined in Art. 3 is absolute and does not allow for any limitations or exceptions. Even if the revocation of the refugee status of the complainant did not alone constitute a risk of treatment contrary to Article 3, he was still a refugee, which had to be taken into account when determining the actual risk of expulsion. France could not rule out the possibility that Russian authorities had learned of the court proceedings leading to the expulsion and of his involvement in terrorist acts.

The French Administrative Court had indeed assessed the defendant's situation in detail – but only after his deportation to Russia. This did not remedy the inadequacy of the careful risk analysis that had been omitted before the execution.

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1.2 ECtHR, Judgement of 30/8/2022, M W. v. France (no. 1348/21): Article 3 violated by the enforcement of a deportation order against a Russian national of Chechen origin

The ECtHR had initially issued a provisional measure pursuant to Art. 39 of the Constitution, according to which the complainant could not be expelled until the ECtHR had ruled.

In its judgment, the ECtHR recognised that society is confronted with terrorist threats and that governments must take precautionary measures. The expulsion of foreigners who pose a threat to national security is, in principle, a permissible measure. The human rights situation in Chechnya does not lead to the conclusion that deportations to Chechnya generally violate the ECHR. What was required was an individual assessment. The complainant had submitted sufficient material evidence that the French authorities had been in direct contact with the Russian authorities with regard to a readmission application and had forwarded the file containing detailed information about him and his involvement in terrorist activities. Because of this, and because reliable international sources indicate that arbitrary detention and torture continue to occur in the Chechen Republic in cases involving terrorist suspects, the ECtHR decided that there were substantial grounds for finding that the complainant faced a real risk of being subjected to treatment contrary to Article 3, confirmed his stay in France, and at the same time extended the provisional measure until this judgment became final.

1.3 ECtHR, Judgement of 31/8/2022, A.N. v. Sweden (no. 32891/22): Articles 3 and 34 violated for mistreatment of Kyrgyz asylum-seekers at Kyiv airport

The Syrian applicant requested a reconsideration of his asylum application, which had already been rejected, due to a serious accident which had led to several serious health problems, wheelchair dependency, limited use of hands and arms, and the need for constant medication and assistance. His expulsion violated Article 3, as he could not be deported to Syria without serious risk to his life and had no possibility of accessing medical treatment and medication there at the required level of care. The Swedish authorities, however, rejected his application: the medical problems were not an obstacle to enforcement. It had not been proven that he needed medical care that was not available in Syria.

Pursuant to Art. 39 of the Procedural Order, the ECtHR granted a stay of deportation as a provisional measure for the duration of the proceedings before the ECtHR.

1.4 ECtHR, Judgement of 15/9/2022, O.M. and D.S. v. Ukraine (no. 18603/12): Articles 3 and 34 violated for mistreatment of Kyrgyz asylum-seekers at Kyiv airport

The 2012 case concerned a prominent journalist and politician persecuted in Kyrgyzstan (including as head of the presidential administration from 2009) and her son, who travelled with her to Ukraine to apply for international protection. They had previously lived in the Netherlands.

Upon arrival in Kiev, the first complainant was taken to the airport transit zone by border officials because she used a false identity and her son, the second complainant, did not have the necessary documents to cross the border into Ukraine. Their documents were confiscated and officials allegedly refused to process the asylum applications. The defendants were offered the opportunity to travel on voluntarily to Kazakhstan or to leave

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for another third country of their choice under threat of repatriation to Kyrgyzstan. After they refused to leave Ukraine, they were deported to Georgia.

The defendants stated that they had been mistreated by the Ukrainian officials in the transit area of the airport and complained about their deportation to Georgia, without their submission about the risk of mistreatment or refoulement being examined first.

The ECtHR stated that the procedural obligation under Article 3 had been violated because the Ukrainian officials had failed to examine the alleged risk of treatment contrary to Article 3 prior to deportation. The complainant's detailed, specific and consistent description of the relevant events in Ukraine proved that the border officials refused to accept asylum applications and that the complainant was deported from Ukraine against her will.

Furthermore, the Ukrainian authorities failed to comply with the provisional measures ordered under Article 39 of the Constitution without providing sufficient justification. This violates Article 34.

Article 5 was not violated, as the control and surveillance measures did not constitute a deprivation of liberty within the meaning of Art. 5 para. 1. The duration, extent or intensity did not go beyond what was strictly necessary for the Ukrainian officials to complete the formalities.

1.5 ECtHR, Judgement of 27/09/2022, Otite v. UK (no. 18339/19): Art. 8 not violated in case of expulsion after criminal conviction for (serious) fraud

The applicant entered the UK as the spouse of a settled person and was initially granted indefinite leave to remain. Following a criminal conviction for a serious fraud offence, he was deported. Authorities and courts in the UK considered that it would not cause undue hardship to the complainant and his family (wife and three children, all British citizens) if he were deported.

The ECtHR ruled that the national court had examined the facts of the case in detail, weighed the seriousness of the offence against the likely impact on family and private life, and referred to criteria set out in the ECtHR's case-law in Boultif v. Switzerland (54273/00) and Üner v. Netherlands (46410/99). It was true that the deportation constituted an encroachment on the rights of the complainant under Article 8 para. 1. What is decisive is whether the deportation order strikes a fair balance between the complainant's rights and the public interest. In this case, it was in accordance with national law and pursued a legitimate aim (prevention of criminal offences) within the meaning of Article 8 para. 2. The complainant had only spent eleven years in freedom in the UK (four with criminal offences) and had obviously not integrated economically. The offence of fraud had been a serious crime. The defendant's family and private life in the UK did not outweigh the public interest in his deportation. His deportation therefore did not violate Article 8.

1.6 ECtHR, Judgement of 6/10/2022, B.Ü. v. Czech Republic (no. 9264/15): Art. 3 not violated due to allegedly "insufficient" investigation into the ill-treatment of an asylum seeker during detention

The complainant, a Turkish citizen, arrived at Prague airport on 16 October 2013 and was taken into custody. He was issued with a deportation order and a re-entry ban. Due to his aggressiveness, he was placed under strict conditions in the Bělá-Jezová Detention Centre

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for Foreigners. As regards the violation of Article 3, he claims that during his detention he was ill-treated by officers, beaten with a truncheon, kicked and tear-gassed. He referred to ill-treatment at the airport as well as in detention and the resulting preliminary proceedings. He also claimed that Article 13 had been violated because there was no effective domestic remedy to pursue his claims.

The ECtHR ruled that when force is used during an arrest, it must be examined whether the use of force was strictly necessary and proportionate in view of the circumstances. Pepper spray, not tear gas, had been used against the defendant after "other manual control techniques" had had no effect. At the time of the incidents at the airport, the officers could not have known that the complainant was in a vulnerable state due to a psychosocial disorder. The Czech government had presented a plausible explanation and corresponding evidence despite the different statements on the cause of the complainant's injuries. The examining doctors at the airport and in the hospital had not mentioned any negative effects of the spray. Under the circumstances – according to the ECtHR – the use of pepper spray was neither disproportionate nor unlawful. Article 3 had not been violated either substantively or procedurally, and separate questions under Article 13 therefore did not arise.

1.7 ECtHR, Judgement of 6/10/2022, Liu v. Poland (no. 37610/18): Art. 3 violated in case of extradition to China

A Taiwanese national, charged with large-scale international fraud, was to be extradited from Poland to China. He argued that this would lead to a real risk of ill-treatment in detention. He would be denied a fair trial. His extradition detention of over four years was unreasonably long and thus arbitrary.

The ECtHR was not convinced that the complainant's allegations had been properly investigated by the Polish authorities. China had not ratified the International Covenant on Civil and Political Rights (ICCPR), nor was it a party to the Optional Protocol to the Convention against Torture. China has not recognised the power of the UN Committee against Torture (CAT) to conduct an investigation. As a result, persons claiming violations of their human rights cannot avail themselves of an independent international protection mechanism and no independent international body has the power to conduct an on-site investigation without prior invitation from China. There are still serious shortcomings in the prohibition and prevention of torture in China. The extent to which torture and other forms of ill-treatment are used in Chinese prisons, according to credible and consistent reports, can be regarded as a general situation of violence. Therefore, there is a real risk of ill-treatment in detention. The informal Chinese statements given to the Polish government (no diplomatic assurances) did not provide sufficient legal guarantees for the complainant, who therefore did not have to prove any particular personal reasons for his fear. His extradition to China would violate his human rights.

Regarding the extradition detention of more than four years, the ECtHR ruled that the domestic authorities had not acted with due diligence and had not ensured that the duration of the complainant's detention did not exceed the time that could reasonably be required for the purpose pursued. The detention had therefore violated Art. 5 para. 1.

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1.8 ECtHR, Judgement of 6/10/2022, S. v. France (18207/21): Art. 3 violated if defendant deported to Russia without proper ex nunc assessment of situation

The Russian citizen S. had initially been recognised as a refugee – as had his wife. However, this was later revoked for S. because of "threat to national security". He was to be deported to Russia.

Referring to its Khasanov and Rakhmanov v. Russia judgments (28492/15 and 49975/15), the ECtHR focused its examination on the foreseeable consequences of expulsion and deportation, taking into account the general situation, the personal circumstances of the complainant and information on the existence of a vulnerable group.

The general situation in the North Caucasus, despite reported serious human rights violations, does not lead to a finding that deportation to Russia always violates Art. 3.

As regards the individual situation of the complainant, who was involved in the Chechen resistance struggle and suspected of having been involved in terrorist activities, the ECtHR found that the group to which he was attributed was not considered to be systematically persecuted and ill-treated. Nevertheless, the authorities had not adequately assessed the risk of ill-treatment in the event of deportation, as it did not appear to have been examined whether the complainant had a profile corresponding to one of the particularly vulnerable groups. Therefore, it would violate the procedural aspect of Art. 3 to enforce the deportation order without the authorities carrying out an ex nunc assessment of the possible risk.

1.9 ECtHR, Judgement of 13/10/2022, T.Z. and others v. Poland (no. 41764/17): Art. 3 and Art. 4 of Protocol No. 4 violated due to collective expulsion to Belarus and serious risk of chain deportation and ill-treatment

For the defendants, a Russian family of Chechen origin, Polish authorities repeatedly refused to consider applications for international protection, refused entry and deported them back to Belarus.

On admissibility, the ECtHR ruled that the appeal against the refusal of entry had no suspensive effect and would not have prevented the return to Belarus. It was therefore not an effective remedy within the meaning of the ECHR.

With regard to Article 3, the ECtHR referred to its judgment in M.K. and Others v. Poland (applications nos. 40503/17, 42902/17 and 43643/17) and reiterated that the Polish State was obliged to ensure the safety of the complainants, in particular by allowing them to remain within the Polish jurisdiction and by providing guarantees that they would not have to return to their country of origin until their application had been properly examined by a competent Polish authority. A State may not refuse access to its territory to a person who presents himself at a border crossing point and alleges that he may be ill-treated if he remains on the territory of the neighbouring State, as long as he has not lodged an application for international protection, unless appropriate measures are taken to eliminate such a risk. Here, however, no procedure had been initiated to review the asylum applications. Nor did the defendants have effective safeguards against the real risk of being subjected to inhuman or degrading treatment and torture. The fact that the complainants were not allowed to remain in Poland pending the outcome of the examination of their application exposed them to the serious risk of chain deportation from Belarus and treatment prohibited under Article 3.

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A violation of Art. 4 Protocol No. 4 to the ECHR and Art. 13 ECHR in conjunction with Art. 3 and Art. 4 Prot. Art. 3 and Art. 4 Protocol No. 4 also existed, as the defendants were deported to Belarus without examining their asylum application.

1.10 ECtHR, Judgement of 20/10/2022, M.T. and others v. Sweden (no. 22105/18): Art: 8 not violated due to 3-year time limit for family reunification for beneficiaries of subsidiary protection

The Swedish authorities had refused to grant a residence permit to a mother and her son who were in Syria to reunite with another son/brother who had initially come to Sweden as an unaccompanied minor, had been living there as a beneficiary of subsidiary protection since November 2016 and had come of age in August 2018. They had applied for a residence permit at the Swedish embassy in Khartoum in February 2017 because of the son's/brother's protection status in Sweden. Their right to family reunification was suspended for three years due to a change in the law that applied to persons with subsidiary protection status since 24.11.2015, which provides for different treatment than for recognised refugees.

The ECtHR referred to its judgment M.A. .v. Sweden (6697/18), in which Art. 8 had been held to have been violated because a long-term married couple had been refused reunification on the basis of the three-year waiting period for persons with temporary protection status. In contrast, in M.T., the waiting period had been gradually reduced. The defendants had de facto only been affected by the suspension from 17 February 2017 to 8 August 2018, i.e. for less than two years. There were no indications that the Swedish Act on Fixed-term Employment did not allow for an individual assessment of the interests of family unity in the light of the specific situation of the persons concerned or that such an assessment was not carried out in the case of the complainants. Taking into account the margin of appreciation, the ECtHR was convinced that the authority had struck a fair balance in the suspension between the interest of the complainants in being reunited in Sweden and the interest of the general public in protecting the economic well-being of the country by regulating immigration and controlling public expenditure.

The ECtHR then examined a possible violation of Art. 14 in conjunction with Art. 8. The conditions for persons fleeing a general situation of danger differ significantly, as they generally have a more "temporary" need for protection than persons with refugee/asylum status. The number of asylum seekers claiming a general situation in Syria is higher and the procedure for granting status is different. Also in EU law, norms restrict the right to family reunification for beneficiaries of subsidiary protection and distinguish them from recognised refugees. Therefore, with regard to the need for protection and the need for family reunification, there are factual and legal arguments that persons fleeing from a general situation in their country of origin are not in the same situation as those who have fled from persecution or ill-treatment due to individual danger. Art. 14 in conjunction with Art. Article 8 has therefore not been violated.

1.11 ECtHR, Judgement of 31/10/2022, Camara v. Belgium (no. 49255/22): Provisional measure under Article 39 of the Constitution for accommodation and granting of social benefits

Mr. Camara, a Guinean national, had not received accommodation from the Federal Agency for the Reception of Asylum Seekers (Fedasil) since his application for international protection because the reception centres for asylum seekers in Belgium

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were allegedly overcrowded. Belgian courts had already ordered Fedasil to accommodate the complainant in a reception centre, a hotel or another suitable facility, but this was not implemented.

The ECtHR ruled that Belgium must comply with the court order and provide the complainant with accommodation and material support to meet his basic needs. Similar to this measure, the decision obliges Belgium to comply with the orders of the Brussels Labour Court and provide each of the 148 asylum seekers with accommodation and material support to cover their basic needs while the procedure is ongoing.

1.12 ECtHR (Grand Chamber), Judgement of 14/6/2022, Sanchez-Sanchez v. UK (no. 22854/20): Article 3 not violated by extradition of Mexican suspect from UK to USA

Mr Sanchez, a Mexican national, was arrested in the UK at the request of the USA on suspicion of being involved in drug trafficking in the USA. He claimed that his extradition was in breach of Article 3 as he was facing life imprisonment without the possibility of parole.

The Grand Chamber stated that the imposition of life imprisonment on an adult offender is not prohibited by or incompatible with Article 3 or any other article of the ECHR. However, the imposition of a sentence without the prospect of release may be disproportionate in individual cases. The principles established in Vinter and others v. UK (66069/09, 130/10 and 3896/10) for domestic criminal cases would have to be adapted for extradition proceedings. However, a defendant would then have to show substantial grounds for believing that he would face life imprisonment without parole if convicted. Article 3 was not violated if the sentence could be reduced both de jure and de facto by a review mechanism that enabled the domestic authorities to take into account progress made by the person concerned in his rehabilitation or other grounds for release based on his conduct or other relevant personal circumstances.

With regard to Article 3, however, the complainant had not submitted any evidence that his extradition to the USA would expose him to the real risk of treatment that would reach the threshold of Article 3, since it had not yet been decided that he would be sentenced to life imprisonment. Therefore, his extradition was compatible with Article 3. The suspensive measure pursuant to Art. 39 of the Constitutional Regulation was lifted.

Note: The ECtHR has thus developed a new approach for extradition cases to non-treaty states in which neither a conviction nor a sentence has been handed down, but the prohibition of extradition would at the same time prevent the judicial proceedings.

1.13 ECtHR, Interim Measure of 8/12/2022, M.K. and others v. France (no. 34349/18, 34638/18 and 35047/18): Article 6 para. 1 violated for failure to comply with interim measures to allocate emergency accommodation

The complainant in case 34349/18, a Congolese national, had fled her country of origin accompanied by her three daughters (aged 3, 5 and 14 – the other three complainants). Her 5-year-old daughter had been the victim of rape. All the defendants entered France on 29/5/2018 and applied for asylum on 01/6/2018. It was certified that the application had been made but would have to be reviewed in the Dublin procedure. On the same day, she accepted the material reception conditions offered by the Office for Immigration and Integration.

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From 2-21/6/2018, the first defendant contacted social services fourteen times in order to obtain accommodation in a shelter for the homeless with her three daughters. However, this was always refused again. In the individual notes, the staff noted the vulnerability of the family, that one of the girls was ill and that the first complainant was afraid for her eldest daughter, who had allegedly been threatened by men in the park where they slept. The social services mentioned the exhaustion of all family members several times. On 11/6/2018, a doctor wrote a certificate expressing concern about the five-year-old girl's health and indicating that safeguarding through accommodation was essential. The girl was provided with psychological care, as evidenced by the reports of the on-call health care access service from 15-27/6/2018 and 20/7/2018. From 12/6/2018, the complainant spent their nights in the entrance hall of a hospital on seats or on the floor. From 26/6-3/7/2018, they were again living on the street and contacted the Social Welfare Office a total of nine times about their accommodation. Notes from the social welfare office mentioned the urgency of accommodation but did not propose a solution.

On 25/6/2018, the first complainant applied to the Administrative Court for an interim injunction to order the administration to accommodate her and her daughters. Her application was directed, on the one hand, against the social welfare authority with regard to the accommodation provided for in the asylum procedure and, on the other hand, against the prefecture of the department with regard to the emergency accommodation provided for by law. By decision of 27/6/2018, the judge of the Administrative Court ordered the prefect of the department to immediately assign the complainant to emergency accommodation – under threat of a penalty payment of €200 per day of delay.

With regard to Article 6 para. 1, the ECtHR stated that a right to emergency accommodation exists in France and can be claimed. This is not a decision relating to immigration, entry, residence or deportation of aliens. Granting or refusing a place in emergency accommodation is a civil right similar to housing or social assistance. Since the Administrative Court had recognised that the complainants fulfilled the requirements for the granting of emergency accommodation, the state had not fulfilled its duty and had obviously violated the fundamental right to emergency accommodation. The right of access to the courts guaranteed in Art. 6 para. 1 would be illusory if the domestic legal system allowed a final court decision to remain ineffective. Enforcement is an integral part of the right, since it is primarily the task of state authorities to ensure the enforcement of a court decision. Lack of funds could not be an argument for not enforcing. Delays should not violate the core of the protected right.

The regional authorities had not taken the action required by the Administrative Court during the enforcement phase, but had remained completely passive, although the protection of human dignity was at stake. The complainants had made diligent efforts to enforce the orders. This was shown by their numerous applications, although the state should have enforced the measures ex officio. Although the periods of non-compliance with the orders were not excessively long (between 12 and 27 days), the authorities had not only acted with delay, but had openly refused to comply with court orders, so that enforcement had only taken place after the interim measures ordered by the ECtHR. Consequently, Article 6 para. 1 had been violated.

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In those particular circumstances, the applicants are also exempt from the obligation to exhaust the remedies available under national law, since, in view of the steps taken by the applicants to enforce the court decisions granting them emergency accommodation, it would constitute a disproportionate obstacle to the effective exercise of their right to an individual remedy within the meaning of Article 34 to require them to go back to the national courts in order to obtain compensation

1.14 ECtHR, Judgment of 15/12/2022, W.A. and others v. Hungary (no. 64050/16, 64558/16, 66064/16): Article 3 violated due to insufficient assessment of the risks of returning third-country nationals to Serbia

The complainants came from Serbia to Hungary to the Röszke transit zone on the border between the two countries. They immediately applied for asylum. However, the asylum authority rejected the applications as inadmissible within a few hours and ordered their expulsion. The complainants applied for a judicial review, which was unsuccessful. The Hungarian border police deported them to Serbia without consulting the Serbian authorities.

The ECtHR referred to Ilias and Ahmed .v. Hungary (47287/15 - 21.11.2019), which summarised the procedural obligations of the expelling State under Article 3. The domestic law and the applicable country information are identical. The only difference was that the defendants did not have access to legal assistance here, which aggravated their situation.

Hungary has not sufficiently demonstrated that Serbia is generally a safe third country and that the UNHCR report on asylum in Serbia is unreliable. Since Hungary did not assess the risk of her treatment there before deporting the complainant to Serbia, it violated its procedural obligations under Article 3.

1.15 ECtHR, Judgement of 20/12/2022, S.H. v. Malta (no. 37241/21): Articles 3 and 13 violated due to inadequate international protection procedures

The accused, S.H., arrived in Malta by boat and was immediately arrested. He claimed to be a journalist in Bangladesh who was persecuted by the ruling party for his coverage of irregularities during the 2018 national elections. His asylum application was rejected at first instance and on appeal. S.H. complained under Articles 3 and 13 that the Maltese authorities had not properly examined his asylum application, that the procedure had been flawed and, in particular, that no effective remedy had been available.

On Art. 13, the ECtHR firstly noted that people like the complainant in Maltese prisons do not have access to legal counsel. This access had been further restricted during the Covid 19 pandemic. Secondly, the ECtHR reaffirmed the principle of a "factual necessity" to be granted to asylum seekers when assessing their credibility, especially when they are – like the complainant – without legal counsel and also detained. Malta would have had to give detailed reasons why the complainant's submissions and evidence had been disregarded.

In this case, however, the national decisions had been taken within 24 hours and only brief and stereotypical reasons had been given. Effective asylum procedures required reliable communication between the authority and the complainant. However, S.H. was only informed several months after the decision. The communication system was therefore clearly deficient – according to the ECtHR. The Maltese constitutional remedy

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was not an appropriate remedy as it had no suspensive effect. S.H. therefore did not have access to an effective remedy under Article 13 for the Article 3 claim.

With regard to Art. 3, the ECtHR ruled that it would be violated if the complainant were deported to Bangladesh without re-examining his claim that, as a journalist who had reported on the irregularities in the 2018 elections, he would be at risk of being treated contrary to Art. 3 if returned.

1.16 ECtHR-typical patterns of interpretation of the principle of proportionality (judgments 2020 - 2022)

1.16.1 Administrative detention for (young) children is almost always disproportionate

Z. E.g. Bilalova and others ./. Poland - 23685/14 - U. v. 26.03.2020; N.B. and others ./. France - No. 49775/20 - 31.03.2021; R.R. and others ./. Hungary - 36037/17 - U. v. 02.03.2021; M.D. and A.D. ./. France - No.

57035/18 - U. v. 22.07.2021; M.H. and Croatia - No. 15670/18 - 18.11.2021; M.B.K and a. ./. Hungary -

73860/17 - 24.02. 2022; Nikoghosyan and others ./. Poland - 14743/17 - 03.03 2022; H.M. and others ./. Hungary -

38967/17 - 02.06.2022

1.16.2 Administrative detention for adults, especially after filing an asylum application, is permissible in principle, but the procedure must then be expedited (max. 2-3 months).

Cf. above; for detention pending deportation: Feilazoo v Malta - 6865/19 - judgment of 11.03.2021; M.B.K. and others v Hungary - 73860/17 - 24.02.2022; Muhammad Saqawat v Belgium - 54962/18 - judgment of 30.06.2020.

1.16.3 Detention pending deportation for more than six months is always problematic, often disproportionate

M.D. and others ./. Russia - 71321/17 - U. v. 14.09.2021; Ali Reza ./. Bulgaria - 35422/16 - U. v. 17.05.2022

1.16.4 States (such as Hungary or Poland) whose borders are at least partly external borders of the Schengen area must allow "real" and "effective" access to legal entry, especially to asylum procedures at the border.

M. K. and others ./. Poland - 40503/17, 42902/17, 43643/17 - U. v. 23.07.2020; D.A. and others /. Poland - No. 51246/17 - 08.07.2021.

1.16.5 Legal remedies against administrative decisions must be provided for by law, and must be factually accessible and effective for those affected (also: interpreters available, possibly lawyers).

D. ./. Bulgaria - 29447/17 - 20.07.2021; H.H. v. Malta - 37241/21 - 20.12.2022

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1.16.6 Art. 8/rooting: deportation and re-entry ban up to six years is ok, lifelong requires special justification, otherwise disproportionate

Abd i./. Denmark - 41643/19 - U. v. 14.09.2021; Savran ./. Denmark - 57467/15 - U. v. 07.12.2021; Munir Johanna ./. Denmark - 56803/18 U. v. 12.01.2021; Khan ./. Denmark - 26957/19 - U. v. 12.01.2021.

1.16.7 Living conditions in homelessness: 63 days of homelessness are proportionate, more than 90 days are not

N.H. et al. /. France - 28820/13 - U. v. 02.07.2020

1.16.8. Sexual orientation: No one should be obliged to hide their sexual orientation in order to avoid persecution:

C and B. ./. Switzerland - Nos. 43987/16 and 889/19 - U. v. 17.11.2020

1.16.9. Family reunification (especially with refugees): Three-year statutory waiting period for family reunification for persons with subsidiary or temporary protection status violates Art. 8 ECHR:

M.A. ./. Denmark - 6697/18 - U. v. 09.07.2021; dissent: M.T. and others ./. Sweden - 22105/18 - U. v. 20.10.2022

1.16.10. Behaviour of refugees that could mean a "storm on Europe" (crossing the border in Ceuta/Mellia; March of Hope in Northern Macedonia, application for a visa to carry out an asylum procedure in the EU) must be rejected.

N.D. and N.T. ./. Spain- Nos. 8675/15, 8697/15 - U. v. 13.02.2020; Asady and others ./. Slovakia - 24917/15 - U. v. 24.03.2020; M.N. and others ./. Belgium - 3599/18 - 05.05.2020; A.A. and others ./. Northern Macedonia - 55798/16, 55808/16, 55817/16 - U. v. 05.04.2022

2. European Court of Justice

2.1 ECJ, Judgment of 1/8/2022, RO v. Germany (C-720/20): On the responsibility for asylum in the case of "children born after" (preliminary ruling - reference VG Cottbus)

The asylum application of a Russian girl born in Germany was rejected as inadmissible because her parents and siblings had been granted asylum in Poland before her birth and before the family entered Germany. According to the Dublin III Regulation, Poland was responsible for the examination. The girl appealed to the Cottbus Administrative Court, which referred the case to the European Court of Justice.

The Court ruled: The Member State that granted asylum to the family members is only responsible for the examination according to the Dublin III Regulation if this wish was expressly expressed in writing. According to the clear wording of the Dublin III Regulation, this requirement could not be deviated from because the family left the Member State that had granted asylum and entered the Member State where the person had applied for asylum illegally. If such a wish had not been expressed in writing and if no other Member State could be determined as responsible on the basis of the criteria of the Dublin III Regulation, the first Member State in which the asylum application had been lodged was responsible for its examination. Also on the basis of the Asylum Procedures Directive

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(2013/32/EU), a person's application cannot be declared inadmissible on the grounds that his parents enjoy international protection in another Member State. The ground of inadmissibility that protection has already been granted in another Member State only applies if the applicant himself already enjoys international protection.

2.2 ECJ, Judgement of 1/8/2022, I. and S. v. NL (C-19/21): An unaccompanied child has the right to a judicial remedy against the refusal of an application for admission under the Dublin system (reference for a preliminary ruling from the Rechtbank Den Haag)

I., an Egyptian citizen, applied for international protection in Greece as a minor and at the same time that he wanted to be reunited with his uncle S., who is legally resident in the Netherlands and can take care of him. The Greek authorities then applied to the Dutch authorities to take custody of him; this was refused. I. and S. lodged an appeal, which was inadmissible because the Dublin III Regulation does not provide for applicants for international protection to appeal against a decision rejecting a request to take charge. I. and S. applied for annulment of the decision, claiming that they were entitled to initiate legal proceedings. The referring court wanted to know from the ECJ whether Art. 27 of the Dublin III Regulation or Art. 47 d CFR granted the applicant and his family member a judicial remedy against the rejection of the application for admission by the Members State.

The ECJ commented: One of the aims of Dublin III is to protect the applicant by means of judicial guarantees. An unaccompanied minor must therefore be able to appeal not only if the requesting Member State issues a transfer decision, but also if the Member State refuses to take him in. The interest that an unaccompanied minor may have in being reunited with members of his extended family for the examination of his application is protected by the provisions of the Dublin Regulation and the Charter. Art. 27 para. 1 Dublin III Regulation in conjunction with Art. 7, 24 and 47 CFR obliged the Member State to which an application for admission had been submitted to grant a refugee applying for international protection the right to appeal against its negative decision. However, the same does not apply to a relative of the minor, in this case the uncle.

2.3 ECJ, Judgement of 1/8/2022, T.O. v. Italy (Ministry of the Interior) (C-422/21): Applicants for international protection may not be sanctioned with withdrawal of all material reception conditions if this deprives them of their most basic needs (on the interpretation of Art. 20 para. 4 and 5 of the Reception Conditions Directive No. 2013/33/EU)

T.O., applicant for international protection, was initially granted the material reception conditions guaranteed in the Reception Conditions Directive and Italian standards. He lived in a temporary accommodation centre. The police reported an incident in which T.O. had verbally and physically assaulted a railway employee and two municipal police officers. After T.O. failed to comment on the matter after being asked to do so, the competent authority decided to withdraw his material reception conditions.

Art. 20 para. 4 and 5 of the Reception Directive empower the Member State to determine sanctions to be applied in case of serious violations of the rules of the accommodation centres and in case of serious violent behaviour. These may include withdrawal or restriction of material reception conditions. But: Does the term "serious violence", which can be sanctioned according to the Directive, also include acts committed outside an

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accommodation centre? From the ECJ's perspective, the term "serious violence" covers any such conduct, regardless of where it occurred.

Furthermore, the Italian court wanted to know whether Art. 20 para. 4 and 5 of the Directive precluded sanctioning the withdrawal of material reception conditions in cases where an applicant for international protection had committed serious violent conduct against public officials.

The ECJ ruled that the Reception Directive does not allow for sanctions in the form of withdrawal of material reception conditions for applicants for international protection who have behaved in a seriously violent manner against officials with regard to accommodation, food or clothing, if this would have the effect of depriving them of the possibility to meet their most basic needs.

All other sanctions must comply with the conditions laid down in the Directive, including respect for human dignity and the principle of proportionality (reference to C-233/18 - Haqbin). The principle of proportionality enshrined in the Directive would not be met if the most severe sanctions deprived a branch of the possibility of satisfying its most basic needs, regardless of how serious and reprehensible its conduct was.

Member States may, depending on the circumstances of the case and subject to the requirements set out in the Directive, impose sanctions that do not result in the applicant being deprived of material reception conditions, such as placement in a separate part of the accommodation centre, a ban on contact with certain residents of the centre, transfer to another accommodation centre or accommodation, or even detention.

2.4 ECJ, Judgement of 1/8/2022, SW (C-273/20), BL, BC (C-355/20) and XC (C-279/20) v. Germany: On family reunification with (formerly) minor child

All procedures concern Syrian nationals. SW, BL and BC applied for national visas for family reunification with their respective son, who was recognised as a refugee in Germany. XC applied for a family reunification visa with her father, who was recognised as a refugee in Germany. All applications were rejected because the children reached the age of majority during the application procedure. In February 2019 (15 K 936/17 V), the Berlin Administrative Court (VG Berlin) obliged Germany to grant the visas, as all applicants were to be considered minors according to the ECJ's case law. Following an appeal by the BAMF, the BVerwG referred the cases to the ECJ for a preliminary ruling.

The ECJ explains (as already in the U. v. 12.04.2018, A. and S. v. Netherlands, C-550/16; and BMM and others v. Belgium - C-133/19, C-136/19 and C-137/19 - 16.07.2020 and 09.09.2021 - C-768/19 - S.E. v. Germany), the aim of the directive is to favour family reunification and, in particular, to grant protection to minors. The directive is to be interpreted in the light of the right to respect for private and family life in conjunction with the obligation to protect minors. in conjunction with the obligation to take into account the best interests of the child. It was neither consistent with the objectives of the Directive nor with the requirements arising from the EU Charter of Fundamental Rights to take as the relevant point in time for the assessment of the age of the applicant or sponsor for the purpose of granting reunification the date on which the authority of the Member State decided on an application. National authorities and courts would otherwise have no reason to give priority to applications by the parents of minors with the urgency required to take account of the need for protection. On the contrary, they could act in such a way

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as to jeopardise the right to family life of both a parent with his or her minor child and the child with a family member.

It is therefore contrary to European Union law to refuse a visa for family reunification to the parent of an unaccompanied minor refugee who has come of age during the procedure. The same applies if such an application is made by a child who has reached the age of majority before one of the parents has been recognised as a refugee and has applied for family reunification.

Otherwise, the success of an application for family reunification would depend mainly on circumstances in the sphere of the national authorities or courts (more or less rapid processing or decision on appeals against a refusal), but not on circumstances in the sphere of the applicant. Therefore, the time of the administrative decision is not decisive for the assessment of minors. Being a minor was not a "condition" that a Member State could refuse an application if it was not fulfilled. The Directive also precludes a national regulation according to which the parents' right of residence ends when the child reaches the age of majority.

With essentially the same reasoning, the ECJ ruled in C-279/20: The decisive factor for the question of whether the child of a sponsor recognised as a refugee is still a minor if he or she came of age before the parent was recognised as a refugee and before the application for family reunification was filed is the time at which the parent filed his or her asylum application. The application for reunification must be filed within three months of the reunifier(s) being recognised.

In the case of family reunification of a parent and a minor recognised as a refugee or of a (former) minor child with his or her parent recognised as a refugee, the relationship in the direct ascending line of the first degree or the legal parent-child relationship is not sufficient for the assumption that actual family ties exist between the parent in question and the child in question if the child has reached the age of majority before the decision on the application of this parent is issued or before the reunifying parent is recognised as a refugee and before the application for family reunification is filed.

However, it was not necessary for the refugee and the other family member to live together in the same household for the parents or child to be entitled to family reunification (thus already: ECJ U. v. 09.09.2021 - C - 768/19 - S.E. v. Germany: The term "family member", in order to obtain derived international protection, required, according to Art. 2 j Qualification Directive 2011/95 in conjunction with Art. Article 23 paras. 2 and 7 CFR do not presuppose that the parent with the right of origin and his or her child actually live together). The granting of protection status should therefore not be dependent on the "resumption of family life" between parents and child. Casual visits and regular contact may be sufficient to assume that they are rebuilding personal and emotional relationships and as evidence of the existence of actual family ties.

Note: In an instruction dated 9/9/2022 (No. 508-543.53/2), the Federal Foreign Office implements the above-mentioned case law and instructs its visa offices accordingly as follows:

If parents apply for a visa to join a child and the child is no longer a minor when the decision on the visa application is made, the child is still considered a minor within the meaning of § 36 of the Residence Act (AufenthG) if

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- the child was a minor at the time of his or her asylum application,
- the child was unaccompanied at the time of his asylum application,
- the visa application is submitted within three months of the child's refugee status.

If a child applies for a visa to join his or her parents and becomes of age after the parents have applied for asylum, but before he or she can apply for a visa himself or herself, the child is still considered to be of minor age within the meaning of § 32 of the Residence Act (AufenthG) if the visa application was filed within three months of the parents' refugee recognition.

In its instructions to the competent ministries and senate administrations of the Länder (circular letter of 7/11/2022, M3-21002/1#73), the Federal Ministry of the Interior refers to an instruction of the Foreign Ministry of 28/9/2022. This is not available here, but appears to be identical to the one cited above.

2.5 ECJ, Judgement of 7/9/2022, I E.K. v Staatssecretaris van Justitie en Veiligheid (NL) (C-624/20): Conditions for long-term resident status

A Ghanaian woman is the mother of a son with Dutch nationality and was therefore granted a residence permit for the Netherlands in 2013 pursuant to Art. 20 TFEU as a family member of a Union citizen on the basis of the existing dependency relationship. In 2019, she applied for a long-term residence permit under the Dutch regulations transposing the Permanent Residence Directive 2003/109/EC. The Dutch authorities refused because the right of residence as a family member of a Union citizen was only temporary and therefore excluded from the scope of the Directive. The woman sued. The Dutch court asked the ECJ whether the residence permit as a family member of a Union citizen precluded the acquisition of long-term resident status.

The ECJ commented: No. A third-country national who enjoys a right of residence as a family member of a Union citizen must fulfil the requirements of the Directive in order to obtain long-term resident status. In addition to five years of uninterrupted legal residence in the territory of the Member State concerned immediately prior to submitting the relevant application, he must therefore prove that he has stable and regular resources for himself and his dependent family members which are sufficient to maintain himself and his family members without recourse to the social assistance system of the MS, as well as sickness insurance covering all risks in that Member State which are normally also covered for its own nationals. Similarly, the Member State in question could require third-country nationals to meet the integration requirements laid down by its national law. The primary objective of the Directive was the integration of third-country nationals who were long-term residents in the Member State. Such integration results above all from the duration of uninterrupted legal residence of five years.

The Directive only excludes third-country nationals from the scope of application who reside exclusively on a temporary basis, for example as au pairs, seasonal workers or posted workers, or whose residence permit has been formally limited. Their common objective characteristic is that these stays are strictly temporary and of short duration and do not enable a third-country national to become a long-term resident in the territory of the Member State concerned.

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In the present case, the right of residence of the third-country national mother as a family member of a Union citizen is justified if the residence is necessary in order for that Union citizen to be able to effectively enjoy the core of the rights conferred by that status for as long as the relationship of dependency continues. In principle, this is not intended to be of short duration, but can extend over a considerable period of time. With regard to the relationship of dependency between a third-country national and his or her child, who is a citizen of the Union, the duration of residence in the territory of the Member State can go well beyond five years.

2.6 ECJ, Judgement of 22/9/2022, T.L., N.D., V.H., Y.T. and H.N. v. Germany (C-497/21): No inadmissible subsequent application in the case of a previous asylum procedure in Denmark (reference for a preliminary ruling from the VG Schleswig-Holstein)

The applicants in the main proceedings, Georgian nationals, left Georgia in 2017 and went to Denmark, where they applied for asylum. This was rejected with final effect in April 2020. The BAMF examined the asylum applications filed later in Germany as "second (subsequent) applications" within the meaning of section 71a of the Asylum Act and rejected them as inadmissible pursuant to section 29 para. 1 no. 5 of the Asylum Act by decision of 3/6/2021. The applicants had already filed applications for asylum in Denmark, which according to the judgment of 20/5/2021 - L.R. (C 8/20, EU:C:2021:404 - application for asylum rejected by Norway) was to be regarded as a "safe third country" within the meaning of section 26a of the Asylum Act. The requirements for further proceedings were not fulfilled, as the arguments put forward by the applicants in support of their applications did not show any change in the factual situation compared to that on which they had based their application rejected by the Danish authorities.

According to the VG Schleswig-Holstein, it had to be clarified whether Art. 33 para. 2 lit. d in conjunction with Art. 2 lit. q of Directive 2013/32 was applicable. Art. 2 lit. q of Directive 2013/32 is applicable if a final decision on an earlier application for international protection has been issued in another Member State. Denmark certainly is an EU Member State. However, according to the Protocol on the position of Denmark, it is not bound by Directives 2011/95 and 2013/32. As is clear from the definitions in Art. 2 of Directive 2013/32 and the judgment of 20/5/2021, L. R. (asylum application rejected by Norway - C-8/20), a further application for international protection can therefore only be classified as a "subsequent application" within the meaning of the Directive if the previous application by the same applicant sought refugee status or subsidiary protection status under Directive 2011/95. The term "Member State" within the meaning of Directive 2013/32 must be interpreted restrictively to the effect that it only covers those Member States which participate in the CEAS and are bound by Directives 2011/95 and 2013/32. This does not apply to Denmark.

According to the ECJ, a subsequent application filed in a Dublin State other than Denmark may not be rejected as inadmissible under Article 33 para. 2 lit. d of the EU Asylum Procedures Directive if the previous asylum application was filed and rejected in Denmark. Neither the Qualification Directive nor the Asylum Procedures Directive are applied by Denmark. Therefore, the application made in Denmark is not an asylum application within the meaning of Art. 2 lit. b of the Asylum Procedures Directive. This applies both to refugee status and to subsidiary protection under the Qualification Directive.

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Note: Regarding Norway - as a non-EU MS - the ECJ had similarly decided the question in its judgment of 20.05.2021 (C-8/20).

2.7 ECJ, Judgement of 22/9/2022, M.A., P.B., L.E. v. Germany (C 245/21 and C 248/21): Dublin III transfer deadline is not interrupted due to COVID-19 pandemic (submission BVerwG, B. v. 26.01.2021 - 1 C 52.20)

In both cases, German authorities had requested transfer to Italy. The execution had to be suspended because it was impossible during the COVID 19 pandemic. The questions for a preliminary ruling concerned the interpretation of Article 27 para. 4 of the Dublin III Regulation: Does the provision cover the situation in which a requesting Member State decides, during pending appeal proceedings, to suspend enforcement solely on the basis of (temporary) material impossibility of enforcement due to the COVID 19 pandemic and is the transfer period thereby interrupted?

The ECJ ruled that Article 27 para. 4 of the Dublin III Regulation does not provide for an interruption or suspension of the transfer deadline, but only for an exceptional possibility of extension. This required a narrow interpretation and excluded the application to other cases of impossibility to enforce the transfer decision. It is true that Article 27 para. 4 of the Dublin III Regulation provides that the execution of a transfer may be suspended until the conclusion of an appeal or a review – but only in direct connection with the judicial protection of the person concerned. If the scope of application of Article 27 para. 4 of the Dublin III Regulation were to be extended further, the transfer deadline mentioned in Article 29 para. 1 could be deprived of any effectiveness. The division of responsibilities between the Member States provided for in the Regulation could change and the processing of applications for international protection could become permanently protracted.

However, a decision to suspend enforcement on the ground that it is materially impossible because of the COVID 19 pandemic cannot be regarded as directly linked to judicial protection. The transfer period is therefore not interrupted when the competent authority of a Member State takes a revocable decision to suspend the enforcement of a transfer decision on the ground that it is materially impossible because of the COVID 19 pandemic. The Union legislator had not been of the opinion that the practical impossibility of executing a transfer was suitable for justifying the interruption or suspension of the transfer period referred to in Article 29 para. 1 of the Dublin III Regulation. Rather, the Regulation was intended to guarantee the expeditious processing of asylum applications, for which purpose the Union legislature had provided the reception and readmission procedures conducted in application of the Dublin III Regulation with a series of mandatory time limits in order to ensure that the procedures were carried out without unjustified delay.

2.8 ECJ, Judgement of 06/19/2022, I.L. v. Estonia (C-241/21): Return Directive does not allow detention of third-country nationals without clear legal basis

The subject of the preliminary ruling was the interpretation of Article 15 para. 1 of the Return Directive. In particular, the referring court wanted to know whether the provision was to be interpreted in such a way that the Member State could detain a third-country national solely on the basis of the criterion of "risk of impeding the enforcement of removal", without one of the specific grounds for detention defined in the standards being present.

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The ECJ ruled that detention under the Return Directive was only permissible "for the purpose of preparing the return and/or carrying out the removal procedure". This measure is aimed at ensuring the effectiveness of the return procedure and does not have a punitive purpose. Any detention may only take place in strict compliance with the principle of proportionality, meet the requirements of clarity, predictability and protection against arbitrariness and respect the fundamental rights of third-country nationals. According to Art. 52 para. 1 CFR, any restriction on the exercise of the right to liberty must be provided for by law, respect the essence of that right and be subject to the principle of proportionality.

A general criterion based on the risk that the effective enforcement of removal will be impaired does not meet these requirements. Due to the lack of precision of such a criterion, the persons concerned cannot foresee with the necessary degree of certainty under which circumstances they may be taken into custody. Thus, there is no adequate protection against arbitrariness. Article 15 para. 1 of the Refugee Directive therefore does not allow a third-country national to be detained solely on the basis of a general criterion "because of the risk of impeding effective enforcement of removal" without one of the specific grounds for detention defined in the standard being met.

2.9 ECJ, Judgement of 22/9/2022, GM v. Hungary (C-159/21): No blanket withdrawal of international protection on grounds of national security

Regulations in Hungarian law according to which secret reasons of national security are supposed to lead to the subsequent denial of international protection in a host country, but the competent asylum authority does not know what is at stake, but is obliged per se to follow a reference to such secret reasons, are not compatible with the Procedures Directive and the Qualification Directive.

If international protection is withdrawn, the person concerned or at least his or her legal representative must have access to the case file and be able to obtain knowledge of the essential content. The rights of defence of the person concerned are not respected if such access can be granted upon request but the information obtained may not be used in administrative or judicial proceedings. Moreover, the competent asylum authority must itself examine a decision on the withdrawal of international protection in the knowledge of all relevant facts and circumstances and may not be obliged to do so in a blanket manner, especially since it must state the reasons leading to the withdrawal of international protection in its decision.

2.10 ECJ, Judgement of 20/10/2022, UP v. Belgium (C-825/21): Return Directive does not preclude national rules under which a right to stay results in the implicit withdrawal of a return decision

The Belgian authorities rejected the application of a Congolese asylum seeker for international protection and a residence permit on medical grounds. She was ordered to leave Belgium. The Higher Labour Court of Liège later held that the effect of the order to leave was temporarily suspended when the applicant permissibly applied for residence, but later became enforceable again when she was no longer granted a residence certificate. The applicant argued that she had been entitled to reside "irregularly" in Belgium following her application for a residence permit and that the exit order should be revoked. The Belgian court made a reference to the ECJ for a preliminary ruling on the interpretation of Articles 6 and 8 of Directive 2008/115 (Return Directive).

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The ECJ ruled that it follows from the wording of Art. 6 para. 4 of the Directive that Member States may grant a right of residence at any time to third-country nationals who are unlawfully present on their territory, not only for the reasons expressly mentioned, but for any other reason they deem appropriate, and that Member States have a broad discretion in this respect. Moreover, it follows from the wording of the Directive that the granting of a right of residence may result in the implicit withdrawal of a previously issued expulsion decision.

In previous rulings, such as N (C-601/15 PPU), the ECJ had stated that the effectiveness of the Directive required that deportations be carried out as quickly as possible. However, this interpretation could not be applied to the present case, because according to the last sentence of the Directive, Member States can provide that the granting of a residence permit results in the revocation of a return decision. Article 6 para. 4 of Directive 2008/115 must be interpreted as not precluding a provision of a Member State according to which the granting of a right of residence to a third-country national who is unlawfully present on its territory results in the implicit revocation of a return decision until the processing of an application for a residence permit has been completed on the basis of the admissibility of that application.

2.11 ECJ, Judgement of 08/11/2022, C and B. v. Netherlands (C-704/20 and C 39/21): On the scope of review of the conditions for detention pending deportation (reference for a preliminary ruling NL - Grand Chamber)

The cases involved nationals from Algeria, Sierra Leone and Morocco who were detained in the Netherlands in preparation for their deportation. They filed a complaint against this. According to the Dutch court, there is no obligation in Union law to examine all conditions for the lawfulness of detention *ex officio*.

The ECJ disagreed: Courts of a Member State must examine all conditions of detention of third-country nationals *ex officio*. This includes whether detention is lawful against an asylum seeker or a third-country national who is illegally in the country. This also applies if the non-existence of the circumstances justifying detention was not contested by the person concerned in the proceedings, the decision on detention is made by the authority and the court decides (only) on the basis of the application, the documents submitted and the oral hearing. The starting point is that the detention of a third-country national constitutes a serious interference with his or her right to liberty under Art. 6 of the European Convention on Human Rights and can only be justified under the narrow conditions that EU norms (including the Return Directive) attach to it. The EU provisions on detention pending deportation in conjunction with Article 6 (right to liberty) of the European Convention on Human Rights. Art. 6 (right to liberty) and Art. 47 CFR (guarantee of effective legal remedy), it follows that courts have to examine *ex officio* any violations of the conditions of lawfulness of detention or its maintenance. If the conditions are not or no longer fulfilled, the person must be released immediately

2.12 ECJ, Judgement of 17/11/2022, X. v. Belgium (C-230/21): On the interpretation of Art. 2 lit. f and Art. 10 para. 3 lit. a of the Family Reunification Directive

X., a Palestinian, has a daughter born on 2/2/2001. On 8/12/2016, this daughter, then 15 years old, married Y.B. in Lebanon. On 28/8/2017, the daughter entered Belgium to move in with Y.B., who had a residence permit there. On 29/8/2017, the Belgian guardianship service considered the daughter to be an unaccompanied alien minor and

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appointed her a guardian. On 20/9/2017, she applied for international protection. On the same day, the Aliens' Office refused to recognise the marriage certificate on the grounds that it was a child marriage. Such a marriage was considered incompatible with public policy under the provisions of Belgian private international law. On 26/9/2018, the daughter was then recognised as a refugee. On 18/12/2018, X. applied to the Belgian Embassy in Lebanon for a visa to reunite with her daughter and for humanitarian visas for her minor sons Y. and Z. The applications were rejected.

X. filed a complaint against this, claiming that neither the Belgian Aliens Act nor Directive 2003/86 stipulated that a refugee had to be unmarried in order for the right to family reunification with his parents to arise. Moreover, her daughter's marriage certificate had not been recognised in Belgium, which was why it had no legal effect there. Her daughter had to fulfil only two conditions in order to exercise the right to family reunification with her parents. Those conditions were met because her daughter was a minor and unaccompanied within the meaning of Art. 2 lit. f of Directive 2003/86. The referring Belgian court asked:

1. Is EU law, in particular Art. 2 lit. f in conjunction with Art. 10 para. 3 lit. a of Directive 2003/86, to be interpreted as meaning that an 'unaccompanied minor' refugee residing in a Member State must be unmarried under its national law in order for a right to family reunification with relatives in the direct ascending line in the first degree to arise?
2. If so, can an underage refugee whose marriage contracted abroad is not recognised on grounds of public policy be regarded as an 'unaccompanied minor' within the meaning of Article 2 para. f and Article 10 para. 3 of Directive 2003/86?

The ECJ ruled that Art. 10 para. 3 lit. a in conjunction with Art. 2 para. f of Directive 2003/86/EC must be interpreted as meaning that an unaccompanied minor refugee residing in a Member State does not have to be unmarried in order to obtain sponsor status for the purpose of family reunification with his or her first-degree relatives in the direct ascending line.

2.13 ECJ, Judgement of 22/11/2022, X. v. Netherlands (C-69/21): On the conditions for deportation in the case of life-threatening disease

A Russian national, 16 years old, is suffering from a rare form of blood cancer and is receiving medical treatment in the Netherlands, including cannabis for pain relief. This is forbidden in Russia. After unsuccessful asylum applications, he was to be deported to Russia. The Dutch court asked the ECJ whether EU law prevented the issuance of a return decision or a measure terminating residence, in particular whether a significant increase in the intensity of pain due to the lack of medical treatment after deportation violated the CFR.

The ECJ ruled that the Return Directive in conjunction with the CFR must be interpreted as precluding the return of a third-country national who is irregularly present in a Member State, suffers from a serious illness and would be exposed to the risk of a significant increase in pain caused by the illness because the only effective pain-relieving treatment is prohibited in the destination state. With respect for private life, which includes medical treatment, a return decision or deportation may only take place if the health condition of the person concerned has been taken into account. As a threshold for the seriousness of

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the illness, there must be valid reasons to show that the return entails a real risk of a substantial reduction in life expectancy or a rapid, substantial and lasting deterioration in health and that the lack of treatment exposes the person concerned to a real risk of a rapid, substantial and lasting deterioration in health.

The patient should not be exposed to an increase in pain of such intensity that it would be contrary to human dignity, as it could lead to severe and irreversible psychological consequences or even induce suicide. It is not necessary for the disease to aggravate itself.

Although the prohibition of return also applies if the removal in the strict sense cannot be organised in a way that ensures that the risk of a significant and lasting aggravation of the disease or pain during the removal is excluded, it cannot be assumed that adequate treatment during the removal is sufficient for a Member States to be allowed to take a return decision. The Member State must ensure that the person receives the medical care required by his or her state of health not only during the deportation but also in the country of destination after the deportation.

A Member State should not set a strict time limit within which the aggravation of pain must occur in order to preclude a return decision or removal order. Time limits do not exempt from the actual examination of the third-country national's situation, taking into account all relevant factors, in particular his or her medical condition.

On the question of whether Member States are obliged to grant a residence permit in this situation, the ECJ ruled that the Return Directive does not contain a provision on residence rights. The state of health of the person concerned and the care received in the Member State together with other relevant factors (e.g., social ties, dependency and health vulnerability) would have to be taken into account by the authority when considering whether to grant a right of residence.

2.14 ECJ, Judgement of 1/12/2022, B.U. v. Germany (C-564/21): On the conditions for effective electronic transmission of asylum files

After the application for international protection was rejected, the lawyer requested the BAMF to send the complete administrative file to the applicant in the form of a single file in PDF format with consecutive pagination. The BAMF refused. He then applied to the Wiesbaden Administrative Court for a temporary injunction. The VG (6 L 582/21.WI.A 6 L 582/21.WI.A) asked the ECJ by way of a preliminary request whether a fair (asylum) procedure is guaranteed if access to the complete electronic authority file is not granted in a way that is possible for BAMF employees but not for the VG or a lawyer, as well as whether, in the case of a decision signed in the original and destroyed after scanning, the decision continues to be in writing pursuant to Art. 11(1), 45(1)(a) of the Asylum Procedures Directive.

The ECJ stated that the Asylum Procedures Directive protects the right of access to the file in proceedings for international protection and implements the principle of effective judicial protection by ensuring that an effective remedy allows for a full and ex nunc examination of both the facts and the legal issues. The right to a fair trial according to Art. 47 CFR obliges the submission of complete and paginated administrative documents, also in electronic form, so that any amendments are comprehensible.

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However, there was no uniform standard for transmission at EU level. Union law does not prevent national administrations from transmitting to the applicant's representative a copy of the electronic file in the form of a series of separate files in PDF format, without sequential pagination, the structure of which can be consulted using free software freely available on the internet, provided that two conditions are met: 1) the method of disclosure ensures access to all information relevant to the defence; 2) the transmission provides as faithful a representation as possible of the structure and chronology of the file, subject to cases where public interest prevents disclosure of certain information.

It is for the national court to verify that the structure and chronology of the file is reflected as faithfully as possible in the various documents, so that the representative of the applicant can verify that all documents relevant to his defence are included and, if necessary, request disclosure of missing documents or the reason for their absence.

The handwritten signature of the competent official who took the decision was not necessary to be considered as having been sent in writing. It only had to be an explicit decision.

2.15 ECJ, Judgement of 1/12/2022, S.M. v. Germany (C-237/21): The conditions for extradition of a Union citizen to a third State for the purpose of execution of a sentence

Bosnia and Herzegovina has requested Germany to extradite a Bosnian for the execution of a prison sentence. The person concerned is a citizen of the Union, as he also holds Croatian citizenship. According to the Munich Higher Regional Court (OLG), Germany is in principle obliged to extradite Bosnia because of the obligations entered into under the European Convention on Extradition. However, it was questionable whether Union law precluded extradition with regard to the right of Union citizens to move and reside freely within the territory of the Member States and in view of the prohibition of discrimination on grounds of nationality.

Article 16 para. 2 cl. 1 of the Basic Law prohibits the extradition of a German to a third country. In such circumstances, Union law only permits unequal treatment between Germans and nationals of other Member States if this is based on objective considerations and is proportionate to the purpose legitimately pursued by the national law. Due to its doubts, the OLG Munich turned to the ECJ: The German authorities had informed the Croatian authorities of the request for extradition without the latter having reacted to it. If Bosnia and Herzegovina agreed, the person concerned could serve his sentence in Germany according to German law.

The ECJ ruled that in such a situation the requested MS (Germany) must actively seek such consent so that the sentence is served on its territory and thus the risk of impunity can be countered if a measure is taken against the citizen concerned that is less detrimental to his freedom of movement than if he were extradited to a third country.

If this consent is not given, however, the right of EU citizens to move and reside freely in the territory of the Member States and the prohibition of discrimination do not preclude extradition in application of an international convention. Otherwise, there would be a risk that the person concerned would remain unpunished. However, extradition would be excluded under the CFR if there was a serious risk of the death penalty, torture or other inhuman or degrading punishment or treatment in the third country.