



# The interplay between return proceedings, the CEAS and fundamental rights

Thursday 30 November 2023 (15:00 – 17:00 CET)

online via WebEx Meetings

## Background Note

### 1. Background information

In accordance with its mandate to support judicial training in the field of international protection<sup>1</sup> and with the support of the EUAA Courts and Tribunals Network, the EUAA is increasing the roll-out effect of their judicial activities through the EUAA expert panels. This activity was introduced in 2021 with the distinctive objective to address specialised topics in the field of international protection. It involves a panel of three judicial professionals and experts that engage in a discussion on a specific area of the CEAS, allowing attendees to deepen their knowledge in the respective field.

The next panel of the EUAA expert panel series is scheduled on Thursday, **November 30, 2023**, from **15:00 to 17:00 CET**, online via the **WebEx Meetings platform** and will focus on ***“The interplay between return proceedings, the CEAS and fundamental rights”***.

The panel will comprise the following experts:

- **Lars Bay Larsen**, Vice-president of the Court of Justice of the European Union
- **Barbara Simma**, Judge, Austrian Federal Administrative Court
- **Mădălina Moraru**, *PhD. Associate Professor of EU Law at the University of Bologna, and the Centre for Judicial Cooperation of the European University Institute, Italy.*

The experts will lead a discussion on the topic structured around questions that participants will address to the panel in advance, upon registration.

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<sup>1</sup> See Article 8 of the [EUAA Regulation](#): “The Agency shall establish, develop and review training for members of its own staff and members of the staff of relevant national administrations, **courts and tribunals**, and of national authorities responsible for asylum and reception” and Article 13: “The Agency shall organise and coordinate activities promoting a correct and effective implementation of Union law on asylum, including through the development of operational standards, indicators, guidelines or best practices on asylum-related matters, and the exchange of best practices in asylum-related matters among Member States.”



## 2. Framing the topic

### 2.1. The Common European Asylum System and the [Returns Directive](#)<sup>2</sup>

Within the European Union, issues pertaining to asylum and international protection are regulated by both the Convention relating to the Status of Refugees (Refugee Convention) as amended by its 1967 Protocol, to which all EU Member States are parties, and by a specific European acquis – the Common European Asylum System (CEAS).

The CEAS is a legislative framework established by the EU. Based on ‘accordance’ with the Refugee Convention, as amended by its 1967 Protocol, the CEAS regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria and harmonising the interpretation and application of asylum law among EU Member States.

The CEAS now comprises the following instruments:

- the [Asylum Procedures Directive \(recast\) 2013/32/EU \(APD recast\)](#)
- the [Reception Conditions Directive \(recast\) 2013/33/EU \(RCD recast\)](#)
- the [Qualification Directive \(recast\) 2011/95/EU \(QD recast\)](#)
- the [Dublin III Regulation \(recast\) 2013/604/EU](#)
- the [Eurodac Regulation \(recast\) 2013/603/EU](#)
- the [Temporary Protection Directive 2001/55/EC](#)

The scope of application of the CEAS ends once an asylum application has been finally decided upon. The stages following an unsuccessful asylum claim, such as the procedure for the return of third-country nationals, detention for this purpose, entry bans and readmission, are not comprised by the CEAS.

However, asylum policies and returns are interlinked. Through the CEAS, the EU has developed legal and policy instruments for the management of asylum in the EU that apply from the moment someone has lodged an asylum application until the moment the application has been recognised or rejected upon appeal, at which stage the individual becomes eligible for return.

Return and readmission of irregular migrants to third countries has been an integral part of the EU's immigration and asylum policy since the 1999 Tampere Council Conclusions and the adoption of the Treaty of Amsterdam. The Returns Directive is part of the common immigration policy of the European Union.

Hence, albeit the Returns Directive is not a CEAS instrument, it emphasises in recital (1) that the Tampere European Council 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a CEAS, a legal immigration policy and the fight against illegal immigration. Thus, the Returns Directive may cover individuals who have been refused refugee status and subsidiary protection or whose international protection status has ceased, been revoked, terminated, or refused to be

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<sup>2</sup> [Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals](#) (hereinafter the 'Returns Directive').



renewed pursuant to the QD (recast) but who have nevertheless remained on the territory of the Member State in breach of immigration law.

### EU immigration and asylum law

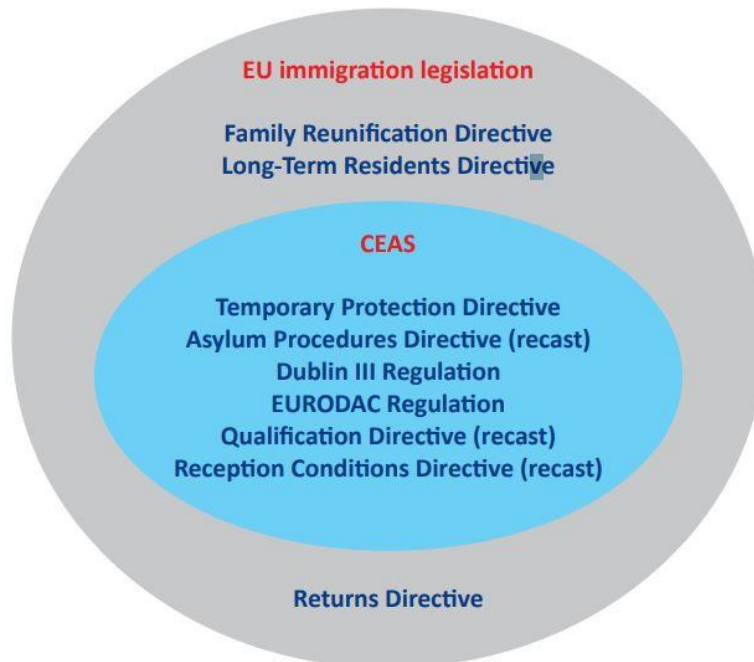


Figure 1<sup>3</sup>

## 2.2. The Returns Directive - adoption and structure

On 16 December 2008, the European Parliament and the Council of the EU adopted the *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals* (the 'Returns Directive'). It took the EU legislator three years to agree on the text of the Returns Directive; the negotiations were difficult. Some of the contentious points concerned the personal scope of the directive, the period of voluntary departure, re-entry bans, detention, procedural rights, and the situation of children.

The objective of the Returns Directive is to ensure that the return of third-country nationals (non-EU nationals) without legal grounds to stay in the EU is carried out effectively through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. The fundamental rights obligations under primary and secondary EU law (including under the EU Charter of Fundamental Rights) and international law include, in particular, the principle of non-refoulement; the right to an effective remedy; the prohibition on collective expulsion; the right to liberty; and the right to the protection of personal data.

Importantly, the European Border and Coast Guard Agency (Frontex)<sup>4</sup> plays a key role in the implementation of return policy, as well as its cooperation with third countries on return.

<sup>3</sup> Figure extracted from the [Judicial analysis on Introduction to the Common European Asylum System | European Union Agency for Asylum \(europa.eu\)](#), p. 18.

<sup>4</sup> [FRONTEX Regulation \(EU\) 2019/1896](#)



The Returns Directive applies to third-country nationals (TCNs) without legal grounds to stay in the territory of the EU (excluding Denmark and Ireland), or the four Schengen-associated states (Iceland, Liechtenstein, Norway, and Switzerland).

The Directive governs termination of illegal stay which can be schematised as a three-step process entailing the obligations for Member States to:

- (1) issue a return decision (Article 6);
- (2) provide a period of voluntary departure (7-30 days) which may not be granted or may be reduced in a limited set of situations (Article 7); and
- (3) take all necessary measures to enforce the return decision by removal which shall, however, be postponed if it were to result in a violation of the principle of non-refoulement or in case of appeal against the return decision (Articles 8-9).

During such process, third-country nationals can be detained for the purpose of removal if necessary and proportionate (Article 15). The conditions of detention are detailed in Article 16 and the particular situation of detained minors and families is regulated by Article 17. Exceptions are laid down in Article 18 in case of emergency situations involving ‘an exceptionally large number of third-country nationals’ to be removed.

### **2.3. The recast proposal of the Returns Directive**

In September 2018, the Commission presented a proposal to recast the Returns Directive. The proposal contains the amendments of several provisions of the Directive such as voluntary departure (Article 9), entry bans (Article 13), remedies (Article 16) and detention (Article 18). The proposal also introduces new provisions related to the definition of the risk of absconding (Article 6), it imposes an obligation on returnees to cooperate (Article 7), and an obligation to create a return management system on Member States (Article 14). Furthermore, it also proposes the establishment of a border procedure to adopt certain return decisions (Article 22).

Among the amended provisions, the proposal extends the detention period with a maximum of three to six months and sets 16 criteria for assessing the risk of absconding. Furthermore, Member States would be able to freely determine the minimum period for voluntary return while the maximum period is set at 30 days. As far as the remedies, the review of the return decision – in case of a rejection of an application for international protection – will be limited to a single level of jurisdiction<sup>5</sup>.

Specialists have written extensively on the proposed Recast of the EU Returns Directive 2008/115/EC focussing on whether the proposal will strengthen or, on the contrary, undermine its effectiveness. Furthermore, a focus has also been dedicated to whether the proposed Recast Directive may lead to violations of fundamental rights of third country nationals in an irregular situation<sup>6</sup>.

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<sup>5</sup> Think Tank European Parliament, Recasting the Return Directive, 11 March 2021, [Recasting the Return Directive | Think Tank | European Parliament \(europa.eu\)](https://www.think-tank.europa.eu/publications/recasting-the-return-directive).

<sup>6</sup> See for instance, Majcher, I and Strik, T, [Legislating without Evidence: The Recast of the EU Return Directive](#), European Journal of Migration and Law 23, 2021, pp. 103-126.



### 3. Discussion points

*Subject to the questions that will be received from the participants, the panel will discuss along the lines described below.*

The European Commission first evaluated the Returns Directive in 2013. It found that the Returns Directive had an overall positive effect on return policy in Europe, because it streamlined Member States' practices with regard to the maximum length of detention, the promotion of voluntary departures and return monitoring as well as the harmonisation of the length and conditions of entry bans.

However, the evaluation also found that the Returns Directive did not seem to have much influence on the postponement of removal and on procedural safeguards.

In November 2019 the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested authorisation to draw up an own-initiative implementation report on the Returns Directive (rapporteur: Tineke Strik, Greens/EFA, the Netherlands). The LIBE Committee took the view that, for the Parliament to adopt a mandate on the proposal to recast the Returns Directive, the Parliament first needed to undertake its own implementation report for this important piece of legislation in support of a holistic approach to migration.

Thus, the report accompanied by a European Implementation Assessment<sup>7</sup>, was published in June 2020<sup>8</sup>. It found **several protection gaps and shortcomings** regarding the four key measures of the Returns Directive – return decision, enforcement of the return decision, entry ban, and detention – which may lead to fundamental rights violations for irregular migrants.

Furthermore, several issues have been brought to the attention of the Court of Justice of the European Union (CJEU). In a series of judgments, the CJEU provided clarifications regarding several key aspects of the Returns Directive, with a significant impact on Member States' implementation of the Directive itself.

Some of these are explored hereunder as proposed discussion points for this panel. Firstly, the scope of application (and disapplication) of the Returns Directive vis-à-vis the scope of application of the CEAS legal framework, has given rise to several questions which constituted the object of preliminary rulings by the CJEU. The principle of *non-refoulement* remains central to both the CEAS and the returns procedure and it brings into discussion aspects such as its (in)adequate application and correlation with the possibility to issue other typologies of residence permits. Furthermore, the respect of fundamental rights in the context of returns goes hand in hand with the need to guarantee procedural safeguards, such as the right to appeal. Lastly, detention is a recurring measure in the context of returns despite its nature as a last resort measure, which raises particular attention with regards to unaccompanied minors.

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<sup>7</sup> Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the European Parliament's Directorate-General for Parliamentary Research Services (EPRS).

<sup>8</sup> See [EPRS\\_STU\(2020\)642840\\_EN.pdf \(europa.eu\)](#).



### 3.1. Disapplication of the Directive – ‘border cases’

- Most Member States rely on **Article 2(2)(a) of the Returns Directive and do not apply the Directive in 'border cases'**. The procedure applicable in such contexts affords fewer guarantees to the person concerned and typically involves the deprivation of liberty.

One very important clarification given by the Luxembourg Court as to the scope of application of the Returns Directive was given in its ruling in the case *Arslan*<sup>9</sup> on 30 May 2013. Its Article 2(1), read in conjunction with recital 9 in the preamble, must be interpreted as meaning that the directive does not apply to a third-country national who has applied for international protection within the meaning of the APD during the period from the making of the application to the adoption of the decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known.

Under Article 2(2)(a) of the Returns Directive, Member States may decide not to apply the Directive in two “border cases.” First, the states are allowed to not apply the Directive to people who are subject to a refusal of entry in accordance with the Schengen Borders Code (SBC). The second category of people to whom the Member States do not have to apply the Returns Directive is more complex. States may decide not to apply the Directive to people “who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.” The phrase “in connection with the irregular crossing” is unclear and may leave a broad margin of appreciation to the states. The risk is that the people apprehended in border areas may systematically be refused the minimum standards laid down in the Directive.

A few countries, including Italy and Bulgaria, did not transpose Article 2(2)(a) into their domestic legislation and, consequently, apply the provisions of the Directive in their border scenarios. Italy, for instance, applies the measure of rejection (*respingimento*) to people who fail to comply with the entry conditions or enter its territory by avoiding border controls and who are stopped at the border or immediately after. In Bulgaria, the main category of returnees consists of people who enter irregularly. In fact, the return order is automatically issued on account of irregular entry or stay before the person has a possibility to apply for asylum. During asylum procedures, return decisions are temporarily suspended.

Already in 2016, in its judgment in the case *Affum*<sup>10</sup>, the Court of Justice of the European Union addressed this exception and interpreted it narrowly. According to the Court, Article 2(2)(a) requires a direct temporal and special link with crossing the border. States may exclude people who have been apprehended or intercepted at the very time of the irregular crossing the border or near the border after it has been so crossed.

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<sup>9</sup> CJEU, [Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie](#), C-534/11, 30 May 2013.

<sup>10</sup> CJEU, [Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d’appel de Douai](#), C-47/15, 7 June 2016, para 72. See also: CJEU, [Préfet des Pyrénées-Orientales v Abdelaziz Arib, Procureur de la République près le tribunal de grande instance de Montpellier, Procureur général près la cour d’appel de Montpellier](#), C-444/17, 19 March 2019.



More recently, on 21 September 2023 the CJEU ruled in the case **ADDE and others**<sup>11</sup> that the Returns Directive applies to any third-country national who has entered the territory of a Member State without fulfilling the conditions of entry, stay or residence. In principle, the Returns Directive applies as soon as a third-country national is, after entering the territory of a Member State illegally, present on that territory without fulfilling the conditions of entry, stay or residence, and is therefore staying there illegally. That also applies where, as in the case in question, the person concerned has been apprehended at a border crossing point on the territory of the Member State concerned. Indeed, a person may have entered the territory of a Member State even before crossing a border crossing point. The Court noted that it is only in exceptional cases that the Returns Directive allows Member States to exclude third-country nationals staying illegally on their territory from the scope of the directive. While this is notably the case when third-country nationals are refused entry at a Member State's external border, it is not the case when, as in the present case, they are refused entry at a Member State's internal border, even when controls have been reintroduced.

### 3.2. The principle of *non-refoulement* – a principle often overlooked.

- The **risk of *refoulement* is not systematically assessed by** the authorities on their own initiative when contemplating the issuing of a return decision. States seem to assume that refused asylum seekers are assessed for their risk of *refoulement* during the asylum procedure. However, such procedures commonly assess only the conditions for granting refugee or subsidiary protection status.

Under international human rights law, not every person in an irregular situation can be returned, in application of the principle of *non-refoulement*. This principle protects from a removal any person who risks serious violations of his/her fundamental rights upon return. It is enshrined in international refugee, human rights, and humanitarian laws and is considered as having the status of a customary law norm. Within the human rights law regime, the principle of *non-refoulement* is absolute, meaning that it is independent of the person's conduct, despite some national Constitutional court attempt to argue that this principle does not have direct and practical effects of a 'prohibition' of expulsion in a situation where asylum has not been approved<sup>12</sup>.

The European Court of Human Rights (ECtHR) implied the prohibition of *refoulement* under Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and

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<sup>11</sup> CJEU, [Association Avocats pour la défense des droits des étrangers \(ADDE\) and others v Ministry of the Interior \(France\)](#), C-143/22, 21 September 2023.

<sup>12</sup> The independent legal status and legal nature of 'right' of the *principle of non-refoulement* have been contested by the Croatian Constitutional Court (Judgment No. U-III-1168/2014). The Croatian Constitutional Court considered that the principle of *non-refoulement* does not have direct and practical effects of a "prohibition" of expulsion in a situation where asylum has not been approved and that it only applied within the context of processing asylum applications. The Court, without recourse to any EU or international human rights instruments or jurisprudence (and without considering to address preliminary questions to the CJEU), conducted the constitutional analysis in the absence of Article 19(2) Charter. For more details, see [Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter](#), ASYLUM AND IMMIGRATION, in the framework of the project "E-learning national active Charter training (E-NACT)" March 2019.



cruel, inhuman, or degrading treatment, and Article 2, which protects the right to life. Furthermore, it should be noted that the *principle of non-refoulement* enshrined in Article 19(2) of the Charter has legally independent status and establishes an absolute fundamental right derived from Article 4 of the Charter, and it should not be treated as a principle lacking direct effects in national cases. The Explanations to Article 19(2) of the Charter clearly set out that the Article codifies obligations under Article 3 of the ECHR, as developed by the ECtHR.

In order to properly implement the prohibition of *refoulement*, there should be a standard *ex officio* assessment of the risk of *refoulement* before the return decision is issued. This would prevent the issuing of a return decision to people whose return is barred under the principle of *non-refoulement*, ensuring adequate protection of the person concerned as well as adequate utilisation of resources, as it would prevent the start of the procedure with respect to a person, who cannot be removed in any case.

There seems to be an assumption that the risk of *refoulement* is already assessed for refused asylum seekers during the asylum procedure. However, arguably, unsuccessful asylum procedure should not preclude a *non-refoulement* assessment before starting the return procedure. In fact, the initial risk assessment, carried out within the asylum procedure, does not necessarily include the risk of *refoulement* in line with the understanding under Article 3 of the ECHR and Article 5 of the Returns Directive.

This is especially valid when the authorities competent to issue the return decision and to examine an appeal against the return decision are different than the authorities competent to examine and hear the appeal in the asylum procedure, especially where these have a certain level of specialisation<sup>13</sup>. Unless a Member State extends its asylum procedure to the assessment of the absolute prohibition of *refoulement*<sup>14</sup>, the procedures regulated under the APD (recast) cover only the determination of the need of international protection. This concept is narrower than the principle of *non-refoulement*<sup>15</sup>.

The Strasbourg case-law on Article 3 should guide the implementation of Article 5 of the Returns Directive. According to the ECtHR jurisprudence, the personal scope of protection from *refoulement* under Article 3 of the ECHR includes people accused of terrorist acts or common criminality, including when they lost their refugee status on this account<sup>16</sup>.

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<sup>13</sup> For instance, in Italy, appeals in the asylum procedure are of the competence of the judges in the Specialized Sections on international protection of the civil tribunals, while appeals against a return order are of the competence of the *Giudice di pace*, who does not necessarily have a specialization in international protection.

<sup>14</sup> For instance, such a system is in place in Germany, where the asylum procedure covers also the issue of a ban on deportation in line with the ECHR.

<sup>15</sup> By virtue of Article 2(e) of the [Qualification Directive](#), the “refugee status” mirrors the definition of a refugee under Article 1(A)(2) of the UN Convention Relating to the Status of Refugees. It is, thus, not an absolute protection from *refoulement*, as Article 3 of the ECHR requires. People who fall within the exclusion grounds under the QD may still have non-refoulement protection needs. This is particularly true in relation to exclusion from the subsidiary protection status and exception to the protection on criminality grounds. The ECtHR is clear that such factors have no incidence on the protection from *refoulement* under Article 3 of the ECHR, which is absolute.

<sup>16</sup> This was the case for the applicants in such leading cases as ECtHR, [Chahal v. the United Kingdom](#), 22414/93, 15 November 1996, para. 80– 81; ECtHR, [Saadi v. Italy](#), 37201/06, 28 February 2008, para. 127; ECtHR, [Ahmed v. Austria](#), 25964/94, 17 December 1996, para. 46.





- The **absence of an obligatory *non-refoulement* exception** to the Member States' obligation to issue a return decision to every person in an irregular situation not only weakens compliance with human rights but also questions the effectiveness of the return procedure. This is foreseen as a reason for postponement of return, thus of actual implementation of a return decision already issued.

Although the Returns Directive does not contain an explicit *non-refoulement*-based exception to issuing return decisions, such protection can be implied from the text of the Directive.

Under the human rights clause in Article 5 of the Directive, when implementing the Directive, states should respect the principle of *non-refoulement*. The obligation to respect this principle should be read together with Article 6(4) of the Directive, which provides the key exception to the obligation to issue a return decision. Under Article 6(4), Member States may, at any moment, decide to grant an autonomous residence permit or other authorisation, offering a right to stay for compassionate, humanitarian, or other reasons, to a person staying irregularly on their territory. In that event, no return decision should be issued. If a return decision has already been issued, it should be withdrawn or suspended for the duration of the validity of the residence permit or other authorisation offering a right to stay.

Furthermore, Article 9(1) of the Directive addresses the situation when it is determined that a person cannot be removed because of the risk of *refoulement* and provides that states should postpone removal in such circumstances. Under the original version of the Directive proposed by the European Commission, states should withdraw their return decision if the return is precluded by the principle of *non-refoulement*. The Directive stops short of requiring it explicitly. If removal is postponed on the account of the principle of *non-refoulement* and yet, the return decision is not withdrawn, the person remains in an irregular situation. Such irregular status, which is known to the authorities (as they postponed removal), conflicts with the protection of fundamental rights of the person concerned. Often non-returnable people face impediments to accessing basic socio-economic entitlements.

The Fundamental Rights Agency (FRA) recommended that Member States develop procedures to avoid circumstances where people who are not removed remain in legal limbo for prolonged periods. Measures in place in some states provide for a few good practices. In DE and PL, if removal is postponed, a permit providing for tolerated status may be issued.

Besides the obligatory postponement of removal on the account of the principle of *non-refoulement*, the Returns Directive provides also for optional postponement. Pursuant to Article 9(2) of the Directive, Member States may postpone removal for an appropriate period considering the specific circumstances of the individual case. Under Article 9(2)(a) of the Directive, the specific circumstances of the individual case calling for the postponement of removal include the person's physical state or mental capacity. In several states, removal may be postponed due to health reasons (including BE, DE, ES, FR, IT, NL, SE) or advanced pregnancy (including BE, DE, DE, EL, ES, FR, IT, NL, SE).

The Luxembourg Court offered guidance on the application of the principle of non-refoulement in a case concerning health issues. In its ruling of 22 November 2022 in



***X v. Stassecretaris van Justitie en Veiligheid***<sup>17</sup> the CJEU decided that Article 5 of Returns Directive read in conjunction with Articles 1, 4 and 19 (2) of the Charter must be interpreted as precluding a return decision from being taken or a removal order from being made in respect of a third-country national who is staying illegally on the territory of a Member State and suffering from a serious illness, where there are substantial grounds for believing that the person concerned would be exposed, in the third-country to which he or she would be removed, to a real risk of a significant, permanent and rapid increase in his or her pain, if he or she were returned, on account of the only effective analgesic treatment being prohibited in that country.

- States provide the **possibility of issuing a residence permit on humanitarian or compassionate grounds**, but in most countries, these considerations are **not automatically assessed** in the context of the return procedure.

Under Article 5 of the Directive, when implementing the Directive, Member States should take due account of the best interests of the child, family life, and the states of health of the person concerned. This human rights clause should be read alongside Article 6(4) of the Directive, as it provides that states may grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian, or other reasons to a person staying irregularly on their territory. In that event, no return decision should be issued. Where a return decision has already been issued, it should be withdrawn or suspended for the duration of the validity of the residence permit or other authorisation offering a right to stay.

A good practice is to conduct the assessment *ex officio*. Automatic assessment of the family and private life and health reasons barring return adequately protects the individual's rights, including under Article 5 of the Returns Directive. It is also efficient because otherwise, the person would need to challenge the return decision on these grounds and appeal procedures require resources.

In its judgment 2022 in ***X v. Stassecretaris van Justitie en Veiligheid***, the CJEU did not support such a position. Instead, it ruled that Directive 2008/115, read in conjunction with Article 7, as well as Article 1 and 4 of the Charter of Fundamental Rights, must be interpreted as meaning that it does not require the Member State on whose territory a third-country national is staying illegally to grant that national a right of residence where he or she cannot be the subject of a return decision or a removal order because there are substantial grounds for believing that he or she would be exposed, in the receiving country, to a real risk of a rapid, significant and permanent increase in the pain caused by the serious illness from which he or she suffers.

### **3.3. Insufficient procedural guarantees**

- In most countries, **an appeal against return is not automatically suspensive**, which may decrease protection from *refoulement* and increase administrative burden (as people must apply for an appeal to be suspensive).

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<sup>17</sup> CJEU, [X v. Staatssecretaris van Justitie en Veiligheid](#), C-69/21, 22 November 2022.



Under Article 12(1) of the Directive, the return decision should be issued in writing, and it should provide reasons in fact and in law as well as information about available remedies. According to the ECtHR, inadequate information about the appeal channels is a key obstacle for the person concerned in accessing the remedy required under Article 13 of the ECHR. As reiterated by the Strasbourg Court, anyone subject to a removal measure, the consequences of which are potentially irreversible, has the right to receive adequate information to be able to access relevant procedures and substantiate their claims<sup>18</sup>.

According to Article 13(1) of the Returns Directive, the person concerned should be afforded an effective remedy to appeal against or seek a review of return decisions. Article 13(1) of the Returns Directive further stipulates that the remedy is to be sought before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy the safeguards of independence. The Directive thus leaves a broad discretion to the states to decide which bodies are competent to receive an appeal against the return decision. Overall, appeal proceedings are regulated by administrative procedure codes, and the judicial bodies involved are commonly administrative courts.

A crucial question is how much **time a person has to appeal against a return decision**. The Directive is silent on this point and the time available in various EU Member States varies from a few days to 30 days. A related question is whether the person will be protected from removal during the time that the court or administrative body examines the appeal. The so-called **suspensive effect** of the appeal is particularly important in the cases where the return is challenged on account of the principle of *non-refoulement*.

Under Article 13(3) of the Returns Directive, the authority or body that is competent to receive appeals should be empowered to temporarily suspend the enforcement of the return decision unless a temporary suspension is already applicable under national legislation. This means that either the legislation should explicitly provide for a suspensive effect, or the person should be allowed to apply for it.

Under Article 13 of the ECHR, however, if the return is challenged on account of the risk of *refoulement*, the appeal should have an automatic suspensive effect. The ECtHR attaches great importance to this requirement because of the irreversible nature of the damage that may occur if the risk of torture or ill-treatment materialises<sup>19</sup>.

Likewise, the CJEU also recognised the suspensive effect, either automatically or by individual application, of appeal in asylum and return proceedings as a procedural safeguard protected under Article 47 of the EU Charter in the **Abdida**<sup>20</sup> preliminary ruling. The Court affirmed that in order for the appeal to be effective in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health, that third country national must be able to avail

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<sup>18</sup> ECtHR, [Hirsi Jamaa and Others v. Italy](#), 27765/09, GC, 23 February 2012, para. 204; ECtHR, [M.S.S v. Belgium and Greece](#), 30696/09, GC, 21 January 2011, para. 304.

<sup>19</sup> ECtHR, [M.S.S v. Belgium and Greece](#), para. 293; ECtHR, [Abdolkhani and Karimnia v. Turkey](#), 30471/08, 22 September 2009, para. 108; ECtHR, [Baysakov and Others v. Ukraine](#), 54131/08, 18 May 2010, para. 71.

<sup>20</sup> CJEU, [Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida](#), C-562/13, 18 December 2014, para. 50.



himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of the Returns Directive.

However, as regards the **right to be heard**, the CJEU did not take a solid position. It affirmed in its rulings in the case *Mukarubega*<sup>21</sup> and *Boudjlida*<sup>22</sup> that the right to be heard in all proceedings, as it applies in the context of the Returns Directive, and in particular Article 6 thereof, must be interpreted as meaning that a national authority is not precluded from failing to hear a third-country national specifically on the subject of a return decision where, after that authority has determined that the third-country national is staying illegally in the national territory on the conclusion of a procedure which fully respected that person's right to be heard, it is contemplating the adoption of such a decision in respect of that person, whether or not that return decision is the result of refusal of a residence permit.

More recently, the CJEU did affirm the importance and need for a judicial review to be available against a return decision. In the case *FMS*<sup>23</sup> it ruled that Article 13 of the Returns Directive read in the light of Article 47 of the EU Charter must be interpreted as precluding legislation of a Member State under which the amendment by an administrative authority of the country of destination stated in an earlier return decision can be contested by the third-country national concerned only by means of an action brought before an administrative authority, without a subsequent judicial review of the decision of that authority being guaranteed. In such a situation, the principle of primacy of EU law and the right to effective judicial protection, guaranteed by Article 47 of the Charter, must be interpreted as requiring the national court dealing with an action contesting the legality, under EU law, of the return decision consisting in such an amendment of the country of destination to declare that it has jurisdiction to hear that action.

### 3.4. Recourse to detention – an exception too often applied

- Detention **should be a measure of the last resort**, ordered based on an **individual assessment**. Although detention is, in practice, based on an individual assessment, it is easy to justify detention because of a broad legal basis.

Besides the rules on pre-removal detention, EU law lays down two other detention regimes. People in asylum procedures may be detained by virtue of the Reception Conditions Directive and people subject to Dublin transfer proceedings may be liable to detention under the Dublin III Regulation. The CJEU, in its *Kadzoev*<sup>24</sup> ruling, has made it very clear that detention for the purpose of removal under the Returns Directive and the detention of an asylum-seeker in accordance with the CEAS legislation fall under different legal rules.

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<sup>21</sup> CJEU, [Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis](#), C-166/13, 5 November 2014

<sup>22</sup> CJEU, [Khaled Boudjlida v Préfet des Pyrénées-Atlantiques](#), C-249/13, 11 December 2014.

<sup>23</sup> CJEU, [FMS and Others](#), C-924/19 and C-925/19, Grand Chamber, 14 May 2020.

<sup>24</sup> CJEU, [Said Shamilovich Kadzoev \(Huchbarov\)](#), C-357/09, judgment of 30 November 2009, Grand Chamber, para. 45.



Recital (9) of the Returns Directive states that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum-seeker has entered into force. The CJEU has made clear that the Returns Directive does not apply to individuals who have applied for refugee status or subsidiary protection until a final negative determination of their claim. There is a limited exception, being a possibility to continue detention under the Returns Directive of a third-country national who has applied for international protection after having been detained, if the application was made solely to delay or jeopardise the enforcement of the return decision and if it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return.<sup>25</sup>

The Returns Directive provides for **two explicit grounds justifying detention**. Under Article 15(1) Member States may only keep in detention a person who is the subject of return procedures in order to prepare the return or carry out the removal process, in particular when: (a) there is a **risk of absconding** or (b) the person concerned **avoids or hampers the preparation of return** or the removal process. Most Member States have transposed both grounds for detention in their domestic legislation.

The CJEU soon (2011) clarified through a preliminary ruling in *El Dridi*<sup>26</sup> that detention of an illegally staying third-country national cannot be justified under the Returns Directive for the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

The **risk of absconding** is one of the key concepts laid down in the Returns Directive. Under Article 3(7) of the Directive, the risk of absconding refers to the existence of reasons in an individual case which are based on objective criteria defined by law that lead to believe that a person who is the subject of return procedures may abscond. The 'objective criteria' are not defined in the Directive. Hence, the understanding of the concept of the risk of absconding may vary between Member States. Given far-reaching consequences of qualifying a person as a potential absconder, the concept of a risk of absconding and the criteria underlying risk assessment should be narrowly defined.

States have long and sometimes non-exhaustive lists of criteria for establishing a risk of absconding. Certain criteria for establishing the risk of absconding are hardly related to a person's propensity to flee the return process, i.e. lack of identity documents or public order considerations. On the contrary, such criteria can capture the majority of people in an irregular situation. For instance, not having valid documents and address in the host state or having entered in an unlawful way are common features of most of migrants, asylum seekers, and refugees worldwide.

As regards the second ground for detention, Article 15(1)(b) of the Returns Directive does not indicate which acts could be perceived as **avoiding or hampering return** nor does it define the parameters of this concept. In addition, Article 15(1) does not demand states to define it in their domestic legislation. This affords authorities wide justification to order detention. Hence,

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<sup>25</sup> CJEU, [Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie](#), C-534/11, judgment of 30 May 2013, paras. 49 and 63.

<sup>26</sup> CJEU, [Hassen El Dridi, alias Karim Soufi](#), C-61/11, 28 April 2011.



such legislation does not appear to be precise and foreseeable in its application, as required under Article 5(1) of the ECHR.

Further, several Member States **allow detention based on state security or public order** considerations or criminality. In *Kadzoev*<sup>27</sup>, the CJEU ruled that public order and public safety considerations are not self-standing grounds for pre-removal detention under the Returns Directive. The legality of the grounds of a decision to place a third-country national in detention are also often challenged before the Strasbourg Court under Article 5 ECHR<sup>28</sup>.

In most countries, detention is ordered by administrative authorities and *ex-officio* reviewed by judicial authorities. All countries primarily use dedicated detention centres. On this latter aspect the CJEU has been straightforward in its rulings in the *Bero and Bouzalmate*<sup>29</sup> and *Pham*<sup>30</sup> cases. In the first case it stated that Article 16(1) of Directive 2008/115 must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility. In the second case, the same article must be interpreted as not permitting a Member State to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto.

More recently in *K v. Landkreis Gifhorn*<sup>31</sup> the Luxembourg Court also provided clarification as to the criteria to define a “specialised detention facility”.

All states provide **alternatives to detention** in their legislation. However, in practice, these measures are applied exceptionally because of the broad understanding of the risk of absconding.

- **Unaccompanied minors** are in need for **special protection** in return proceedings. In particular, **detention of UAMs should be used as a last resort** alternative and the principle of the **best interest of the child** must be paramount.

Children travelling without their parents or guardians are among the most vulnerable categories of people and referred to as unaccompanied minors (UAMs).

Under Article 10(1) of the Returns Directive, before deciding to issue a return decision for an unaccompanied child, assistance by appropriate bodies other than the authorities enforcing the return should be granted with due consideration being given to the best interests of the child. The provisions of Article 10(1) of the Returns Directive appear limited, particularly when compared to the provisions for UAMs in asylum procedures under the Reception Directive<sup>32</sup>.

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<sup>27</sup> CJEU, [Saïd Shamilovich Kadzoev \(Huchbarov\)](#), C-357/09 PPU, 30 November 2009, para. 69-71.

<sup>28</sup> See for instance, ECtHR, [Nabil and Others v. Hungary](#), Application no. 62116/12, 22 December 2015.

<sup>29</sup> CJEU, [Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve](#), C-473/13 and C-514/13, 17 July 2014, para. 32.

<sup>30</sup> CJEU, [Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik](#), C-474/13, 17 July 2014.

<sup>31</sup> CJEU, [K v. Landkreis Gifhorn](#), C-519/20, 10 March 2022.

<sup>32</sup> Article 24(1) of the [Reception Conditions Directive](#) reflects the requirements spelled out by the CRC Committee. It provides that the states should ensure that a representative represents and assists the unaccompanied minor to enable him/her to benefit from their rights and comply with the obligations



In light of the provisions of the CRC, the difference in the scope of guarantees applicable to children in return procedures and those in asylum procedures is unjustifiable. Hence, UAMs falling under the scope of the Returns Directive should be afforded the same level of protection and care as asylum-seeking children, including as regards guardianship arrangements.

The Returns Directive does not prohibit the return of UAMs but lays down conditions for implementing such a measure. According to Article 10(2) of the Directive, before removing an unaccompanied child, the authorities should be satisfied that the child will be returned to a member of his/her family or a nominated guardian or that adequate reception facilities are in place in the state of return. In practice, a few Member States prohibit the return of UAMs. The countries that do not formally prohibit it rarely implement such returns as family tracing and assessment of the reception and care in the destination country is time-consuming and cumbersome.

In a recent ruling, **TQ**<sup>33</sup>, the Luxembourg Court not only reiterated that in the absence of adequate reception facilities in the state of return the UAMs cannot be returned but went further to emphasize the need to not let such a child in *limbo*.

As to the bearing of the principles of the best interest of the child, in **M. A. v. État belge**<sup>34</sup> the Luxembourg judges made clear that this cannot be interpreted restrictively, given that the objective pursued by Article 5 of Directive 2008/115 is to ensure respect for a number of fundamental rights, including the fundamental rights of the child. Thus, the Court held that it cannot be inferred that the best interest of the child must be taken into account only when the return decision is issued in respect of a minor, to the exclusion of the return decisions taken against the parents of that minor. Moreover, Article 24(2) of the Charter provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. It follows that such a provision is itself worded in broad terms and applies to decisions which, like a return decision adopted against a third-country national who is the parent of a minor, are not addressed to that minor but have significant consequences for him or her.

Article 17(1) of the Returns Directive states that UAMs should only be detained as a last resort for the shortest possible period of time.<sup>35</sup> According to Article 17(4) of the Directive, as far as possible, UAMs should be provided accommodation in institutions equipped with personnel and facilities accounting for the needs of people their age. Under Article 17(5), the best interests of the child should be a primary consideration in the context of the detention of children. In several countries, the detention of unaccompanied children is prohibited, but they may however be detained due to an inaccurate age assessment.

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provided for in that Directive. The unaccompanied minor should be informed immediately of the appointment of the representative. The representative should perform his/her duties in accordance with the best interests of the child and should have the necessary expertise to that end.

<sup>33</sup> CJEU, [TQ v Staatssecretaris van Justitie en Veiligheid](#), C-441/19, 14 January 2021, paras. 52 and 53.

<sup>34</sup> CJEU, [M. A. v. État belge](#), C-112/20, 11 March 2021, paras. 35 and 36.

<sup>35</sup> For conditions of detention of minor asylum applicants see ECtHR, [A.D. v Malta](#), Application no 12427/22, 17 October 2023.



**The suggested topics and discussion points outlined above are indicative only and are further to be specified by the experts sitting on this panel, according to the questions that will be received from participants.** For this purpose, annexed to this note, the following can also be found:

- a table that outlines relevant European legal framework
- relevant EUAA and other material
- a table with relevant case-law.

***Disclaimer:*** This background note was drafted on the basis of the EUAA judicial publications and recent doctrinal and case-law research, as a preparatory document for both the experts and participants of the online EUAA Expert Panels. It should not be considered as an EUAA publication and does not necessarily reflect the position of the EUAA.





## ANNEX I

### Legal Framework

#### DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

<b>Article 5</b>	Non-refoulement, best interests of the child, family life and state of health
<b>Article 6</b>	Return decision
<b>Article 8</b>	Removal
<b>Article 9</b>	Postponement of removal
<b>Article 10</b>	Return and removal of unaccompanied minors
<b>Article 12</b>	Form
<b>Article 13</b>	Remedies
<b>Article 14</b>	Safeguards pending return
<b>Article 15</b>	Detention
<b>Article 16</b>	Conditions of detention
<b>Article 17</b>	Detentions of minors and families

#### European Convention on Human Rights

<b>Article 2</b>	Right to life
<b>Article 3</b>	Prohibition of torture
<b>Article 8</b>	Private and family life
<b>Article 5</b>	Right to liberty and security
<b>Article 13</b>	Right to an effective remedy

#### EU Charter of Fundamental Rights

<b>Article 4</b>	Prohibition of torture and inhuman or degrading treatment or punishment
<b>Article 6</b>	Right to liberty and security
<b>Article 7</b>	Respect for private and family life
<b>Article 19</b>	Protection in the event of removal, expulsion or extradition
<b>Article 24</b>	The rights of the child
<b>Article 47</b>	Right to an effective remedy and to a fair trial



## ANNEX II

### Relevant Material

#### EUAA

- EUAA (2016), Judicial Analysis - [Introduction to the Common European Asylum System for courts and tribunals](#)
- EUAA (2020), Judicial Analysis - [Detention of applicants for international protection in the context of the CEAS](#)
- EUAA (2018), Judicial Analysis - [Asylum Procedures and the principle of non-refoulement](#)

#### OTHER

- [Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter](#), ASYLUM AND IMMIGRATION, in the framework of the project “E-learning national active Charter training (E-NACT)” March 2019
- FRA, [Handbook on European law relating to asylum, borders and immigration](#), Edition 2020
- Izabella Majcher, Tineke Strik, [Legislating without Evidence: The Recast of the EU Return Directive](#), European Journal of Migration and Law 23 (2021) 103–126, Brill Nijhoff
- EPRS (2020), [The Return Directive 2008/115/EC, European Implementation Assessment](#)
- Madalina Moraru, [Chapter 20: EU Return Directive: a cause for shame or an unexpectedly protective framework?](#) in Research Handbook on EU Migration and Asylum Law, Edited by Evangelia Tsourdi and Philippe De Bruycker, 13.12.2022, Elgar
- Madalina Moraru, [The interplay between the Schengen Borders Code and the Return Directive – another episode in the reintroduction of internal border controls saga – C-143/22, ADDE and others](#), EULawLive, 18 October 2023
- Moraru, M; Cornelisse, G; De Bruycker, P, [Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union](#), Modern Studies in European Law, 24 February 2022, Bloomsbury Publishing



## ANNEX III

### Case-law

#### Court of Justice of the European Union [CJEU]

- CJEU, [Association Avocats pour la défense des droits des étrangers \(ADDE\) and others v Ministre de l'Intérieur](#), Case C-143/22, ECLI:EU:C:2023:689, 21 September 2023
- CJEU, [Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie](#), Case C-534/11, ECLI:EU:C:2013:343, 30 May 2013
- CJEU, [Bundesrepublik Deutschland v GS](#), Case C-484/22, ECLI:EU:C:2023:122, 15 February 2023
- CJEU, [X v Staatssecretaris van Justitie en Veiligheid](#), Case C-69/21, 22 November 2022
- CJEU, [K v Landkreis Gifhorn](#), Case C-519/20, ECLI:EU:C:2022:178, 10 March 2022
- CJEU, [TQ v Staatssecretaris van Justitie en Veiligheid](#), Case C-441/19, ECLI:EU:C:2021:9, 14 January 2021
- CJEU, [M. A. v. État belge](#), Case C-112/20, ECLI:EU:C:2021:197, 11 March 2021
- CJEU, [FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság](#), C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, 14 May 2020
- CJEU, [Préfet des Pyrénées-Orientales v Abdelaziz Arib, Procureur de la République près le tribunal de grande instance de Montpellier, Procureur général près la cour d'appel de Montpellier](#), C-444/17, ECLI:EU:C:2019:220, 19 March 2019
- CJEU, [Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai](#), C-47/15, ECLI:EU:C:2016:408, 7 June 2016
- CJEU, [Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida](#), Case C-562/13, ECLI:EU:C:2014:2453, 18 December 2014
- CJEU, [Khaled Boudjlida v Préfet des Pyrénées-Atlantiques](#), Case C-249/13, ECLI:EU:C:2014:2431, 11 December 2014
- CJEU, [Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis](#), Case C-166/13, ECLI:EU:C:2014:2336, 5 November 2014
- CJEU, [Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve](#), Cases C-473/13 and C-514/13, ECLI:EU:C:2014:2095, 17 July 2014



- CJEU, [Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik](#), Case C-474/13, ECLI:EU:C:2014:2096, 17 July 2014
- CJEU, [M. G., N. R. v Staatssecretaris van Veiligheid en Justitie](#), Case C-383/13 PPU, ECLI:EU:C:2013:533, 10 September 2013
- CJEU, [Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie](#), Case C-534/11, ECLI:EU:C:2013:343, 30 May 2013
- CJEU, [Hassen El Dridi, alias Karim Soufi](#), Case C-61/11 PPU, ECLI:EU:C:2011:268, 28 April 2011
- CJEU, [Said Shamilovich Kadzoev \(Huchbarov\)](#), Case C-357/09 PPU, ECLI:EU:C:2009:741, 30 November 2009

### European Court of Human Rights [ECtHR]

- ECtHR, [A.D. v Malta](#), Application no 12427/22, ECLI:CE:ECHR:2023:1017JUD001242722, 17 October 2023
- ECtHR, [LOUKILI v. THE NETHERLANDS](#), Application no. 57766/19, ECLI:CE:ECHR:2023:0411JUD005776619, 11 July 2023
- ECtHR, [NABIL AND OTHERS v. HUNGARY](#), Application no. 62116/12, ECLI:CE:ECHR:2015:0922JUD006211612, 22 December 2015
- ECtHR, [Hirsi Jamaa and Others v. Italy](#), Application no. 27765/09, ECLI:CE:ECHR:2012:0223JUD002776509, 23 February 2012
- ECtHR, [M.S.S. v. BELGIUM AND GREECE](#), Application no. 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609, 21 January 2011
- ECtHR, [Baysakov and Others v. Ukraine](#), Application no. 54131/08, ECLI:CE:ECHR:2010:0218JUD005413108, 18 May 2010
- ECtHR, [Abdolkhani and Karimnia v. Turkey](#), Application no. 30471/08, ECLI:CE:ECHR:2009:0922JUD003047108, 22 September 2009
- ECtHR, [SAADI v. ITALY](#), Application no. 37201/06, ECLI:CE:ECHR:2008:0228JUD003720106, 28 February 2008
- ECtHR, [AHMED v. AUSTRIA](#), Application no. 25964/94, ECLI:CE:ECHR:1996:1217JUD002596494, 17 December 1996
- ECtHR, [CHAHAL v. THE UNITED KINGDOM](#), Application no. 22414/93, ECLI:CE:ECHR:1996:1115JUD002241493, 15 November 1996