

HANDBOOK

Handbook on European law relating to asylum, borders and immigration



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Foreword

In March 2011, as a result of their first joint project, the European Union Agency for Fundamental Rights and the European Court of Human Rights launched a handbook on European law in the field of non-discrimination. Following the positive feedback received, it was decided to pursue this collaboration in another very topical area where equally there was felt to be a need for a comprehensive guide to the case law of the European Court of Human Rights, the Court of Justice of the European Union as well as to relevant EU regulations and directives. The present handbook seeks to provide an overview of the various European standards relevant to asylum, borders and immigration.

The handbook is intended for lawyers, judges, prosecutors, border guards, immigration officials and others working with national authorities, as well as non-governmental organisations and other bodies that may be confronted with legal questions in any of the areas the handbook sets out to cover.

With the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights of the European Union became legally binding. The Lisbon Treaty also provides for EU accession to the European Convention on Human Rights, which is legally binding on all member states of the EU and the Council of Europe. Improving the understanding of common principles developed in the case law of the two European courts, and in EU regulations and directives is essential for the proper implementation of relevant standards, thereby ensuring the full respect of fundamental rights at national level. It is our hope that this handbook will serve to further this important objective.

Erik Fribergh

Registrar of the European Court
of Human Rights

Morten Kjaerum

Director of the European Union Agency
for Fundamental Rights

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Acronyms

CAT	United Nations Convention Against Torture
CJEU	Court of Justice of the European Union (prior to December 2009, European Court of Justice)
CoE	Council of Europe
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
CPT	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice (since December 2009, Court of Justice of the European Union)
ECSR	European Committee of Social Rights
EEA	European Economic Area
EEA nationals	Nationals of one of the 27 EU Member States, Iceland, Liechtenstein or Norway
EEC	European Economic Community
EFTA	European Free Trade Association
ESC	European Social Charter
EU	European Union
FRA	European Union Agency for Fundamental Rights
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

PACE	Parliamentary Assembly of the Council of Europe
RABIT	Rapid Border Intervention Teams
SAR	Search and Rescue
SIS	Schengen Information System
SOLAS	Safety of Life at Sea
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

How to use this handbook

This handbook provides an overview of the law applicable to asylum, border management and immigration in relation to European Union (EU) law and the European Convention on Human Rights (ECHR). It looks at the situation of those foreigners whom the EU usually refers to as third-country nationals, although such distinction is not relevant for cited ECHR law.

The handbook does not cover the rights of EU citizens, or those of citizens of Iceland, Liechtenstein, Norway and Switzerland who, under EU law, can enter the territory of the EU freely and move freely within it. Reference to such categories of citizens will be made only where necessary in order to understand the situation of family members who are third-country nationals.

There are, under EU law, some 20 different categories of third-country nationals, each with different rights that vary according to the links they have with EU Member States or that result from their need for special protection. For some, such as asylum seekers, EU law provides a comprehensive set of rules, whereas for others, such as students, it only regulates some aspects while leaving other rights to EU Member States' discretion. In general, third-country nationals who are allowed to settle in the EU are typically granted more comprehensive rights than those who stay only temporarily. Table 1 provides a broad overview of the various categories of third-country nationals under EU law.

This handbook is designed to assist legal practitioners who are not specialised in the field of asylum, borders and immigration law; it is intended for lawyers, judges, prosecutors, border guards, immigration officials and others working with national authorities, as well as non-governmental organisations (NGOs) and other bodies that may be confronted with legal questions relating to these subjects. It is a first point of reference on both EU and ECHR law related to these subject areas, and explains how each issue is regulated under EU law as well as under the ECHR, the European Social Charter (ESC) and other instruments of the Council of Europe. Each chapter first presents a single table of the applicable legal provisions under the two separate European legal systems. Then the relevant laws of these two European orders are presented one after the other as they may apply to each topic. This allows the reader to see where the two legal systems converge and where they differ.

Practitioners in non-EU states that are member states of the Council of Europe and thereby parties to the ECHR can access the information relevant to their own

country by going straight to the ECHR sections. Practitioners in EU Member States will need to use both sections as those states are bound by both legal orders. For those who need more information on a particular issue, a list of references to more specialised material can be found in the 'Further reading' section of the handbook.

ECHR law is presented through short references to selected European Court of Human Rights (ECtHR) cases related to the handbook topic being covered. These have been chosen from the large number of ECtHR judgments and decisions on migration issues that exist.

EU law is found in legislative measures that have been adopted, in relevant provisions of the Treaties and in particular in the Charter of Fundamental Rights of the European Union, as interpreted in the case law of the Court of Justice of the European Union (CJEU, otherwise referred to, until 2009, as the European Court of Justice (ECJ)).

The case law described or cited in this handbook provides examples of an important body of both ECtHR and CJEU case law. The guidelines at the end of this handbook are intended to assist the reader in searching for case law online.

Not all EU Member States are bound by all the different pieces of EU legislation in the field of asylum, border management and immigration. Annex 1 on the 'Applicability of EU directives cited in this handbook' provides an overview of which states are bound by which provisions. It also shows that Denmark, Ireland and the United Kingdom have most frequently opted out of the instruments listed in this handbook. Many EU instruments concerning borders, including the Schengen *acquis* – meaning all EU law adopted in this field – and certain other EU law instruments, also apply to some non-EU Member States, namely Iceland, Liechtenstein, Norway and/or Switzerland.

While all Council of Europe member states are party to the ECHR, not all of them have ratified or acceded to all of the ECHR Protocols or are State Party to the other Council of Europe conventions mentioned in this handbook. Annex 2 provides an overview of the applicability of the relevant Protocols to the ECHR.

Substantial differences also exist among the states which are party to the ESC. States joining the ESC system are allowed to decide whether to sign up to individual articles, although subject to certain minimum requirements. Annex 3 provides an overview of the acceptance of ESC provisions.

The handbook does not cover international human rights law or refugee law, except to the extent that this has been expressly incorporated into ECHR or EU law. This is the case with the 1951 Geneva Convention relating to the Status of Refugees (1951 Geneva Convention), which is expressly referred to in Article 78 of the Treaty on the Functioning of the European Union (TFEU). European states remain, of course, bound by all treaties to which they are party. The applicable international instruments are listed in Annex 4.

The handbook includes an introduction, which briefly explains the role of the two legal systems as established by ECHR and EU law, and nine chapters covering the following issues:

- access to the territory and to procedures;
- status and associated documentation;
- asylum determination and barriers to removal: substantive issues;
- procedural safeguards and legal support in asylum and return cases;
- private and family life and the right to marry;
- detention and restrictions on the freedom of movement;
- forced returns and manner of removal;
- economic and social rights;
- persons with specific needs.

Each chapter covers a distinct subject while cross-references to other topics and chapters provide a fuller understanding of the applicable legal framework. Key points are presented at the end of each chapter.

Table 1: Categories of third-country nationals under EU law

Persons with rights derived from EU free movement provisions	Family members of citizens of EU Member States
Persons with rights derived from international agreements	Family members of citizens of the European Economic Area (EEA) and Switzerland
	Turkish citizens and their family members
	Citizens of countries which have concluded bilateral or multilateral agreements with the EU (some 25 agreements covering 103 countries)
Short- and long-term immigrants	Family members of third-country national sponsors
	Long-term residents in the EU
	Blue Card holders and their family members
	Posted workers
	Researchers
	Students
	<i>Seasonal workers</i>
Persons in need of protection	<i>Intra-corporate transferees</i>
	Asylum seekers
	Beneficiaries of subsidiary protection
	Beneficiaries of temporary protection
	Refugees
Migrants in an irregular situation	Victims of human trafficking
	Illegally-staying third-country nationals
	Illegally-staying third-country nationals whose removal has been postponed

Note: Italics added to any EU legislation on categories still pending as at December 2012.

Source: FRA, 2012



Introduction

This introduction will briefly explain the roles of the two European legal orders regulating migration. References to Council of Europe legal system will primarily relate to the ECHR and the case law developed by the ECtHR, except for Chapter 8, which also presents the ESC. EU law is mainly presented through the relevant regulations and directives and in the provisions of the EU Charter of Fundamental Rights.

The Council of Europe

The Council of Europe was formed in the aftermath of the Second World War to bring together the states of Europe to promote the rule of law, democracy, human rights and social development. For this purpose, it adopted the ECHR in 1950. The ECtHR – and the former European Commission of Human Rights – was set up under Article 19 of the ECHR to ensure that states observed their obligations under the Convention. The ECtHR does this by considering complaints from individuals, groups of individuals, non-governmental organisations or legal persons alleging violations of the Convention. As at April 2013, the Council of Europe comprised 47 member states, 27 (28 from 1 July 2013 onwards) of these being also members of the EU. An applicant before the ECtHR is not required to be a citizen or a lawful resident of one of those 47 member states, except for some specific provisions. The ECtHR can also examine inter-state cases brought by one or more Council of Europe member states against another member state.

The ECHR contains few provisions expressly mentioning foreigners or limiting certain rights to nationals or lawful residents (for example, Articles 2, 3 and 4 of Protocol 4 to the ECHR and Article 1 of Protocol 7). Migration issues have generated

a vast body of case law from the ECtHR, a selection of which is presented as examples in this handbook. They mainly relate to Articles 3, 5, 8 and 13 of the ECHR.

Article 1 of the ECHR requires states to “secure” the Convention rights to “every-one within their jurisdiction”. This includes foreigners; in certain specific cases, the concept of jurisdiction can extend beyond the territory of a state. A State Party to the ECHR is responsible under Article 1 of the ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.¹

Article 13 of the ECHR requires states to provide a national remedy for complaints made under the Convention. The principle of subsidiarity places the primary responsibility on states to ensure their compliance with obligations under the ECHR, leaving recourse to the ECtHR as a last resort.

States have an international obligation to ensure that their officials comply with the ECHR. All Council of Europe member states have now incorporated or given effect to the ECHR in their national law, which requires their judges and officials to act in accordance with the provisions of the Convention.

The provisions of the Council of Europe’s ESC, adopted in 1961 and revised in 1996, complement the ECHR provisions in relation to social rights. As at April 2013, 43 out of the 47 Council of Europe member states had ratified the ESC.² The ESC does not provide for a court, but does have the European Committee of Social Rights (ECSR), which is composed of independent experts who rule on the conformity of national law and practice within the framework of two procedures: the reporting procedure under which states submit national reports with regular intervals; and the collective complaints procedure,³ which allows organisations to lodge complaints. The ECSR adopts conclusions in respect of national reports and adopts decisions in respect of collective complaints. Some of its conclusions and decisions are mentioned in this handbook.

1 ECtHR, *Matthews v. the United Kingdom* [GC], No. 24833/94, ECHR 1999-I, para. 32; ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], No. 45036/98, ECHR 2005-VI, para. 153.

2 Thirty-two states are bound by the 1996 revised ESC and 11 by the 1961 Charter. The ESC offers the possibility to State Parties to sign up to specific provisions only. Annex 3 provides an overview of the applicability of ESC provisions.

3 The complaints procedure is optional (as opposed to the reporting procedure) and, as at October 2012, had been accepted by 15 states that are party to the ESC.

The European Union

The EU comprises 27 Member States, with Croatia due to join on 1 July 2013. EU law is composed of treaties and secondary EU law. The treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), have been approved by all EU Member States and are also referred to as ‘primary EU law’. The regulations, directives and decisions of the EU have been adopted by the EU institutions that have been given such authority under the treaties; they are often referred to as ‘secondary EU law’.

The EU has evolved from three international organisations established in the 1950s that dealt with energy, security and free trade; collectively, they were known as the European Communities. The core purpose of the European Communities was the stimulation of economic development through the free movement of goods, capital, people and services. The free movement of persons is thus a core element of the EU. The first regulation on the free movement of workers in 1968⁴ recognised that workers must not only be free to move, but also able to take their family members – of whatever nationality – with them. The EU has developed an accompanying body of complex legislation on the movement of social security entitlements, on social assistance rights and on healthcare as well as provisions relating to the mutual recognition of qualifications. Much of this law which was developed for EU nationals primarily also applies to various categories of non-EU nationals.

Nationals of non-EU Member States – namely of Iceland, Liechtenstein and Norway – that are part of the European Economic Area (EEA), which entered into force in 1994, have the same free movement rights as EU nationals.⁵ Similarly, based on a special agreement concluded with the EU on 21 June 1999,⁶ Swiss nationals enjoy a right to move and settle in the EU. The EU and EEA states, together with Switzerland, are all members of the European Free Trade Association (EFTA), which is an intergovernmental organisation set up for the promotion of free trade and economic integration. EFTA has its own institutions, including a court. The EFTA Court is competent to interpret the EEA Agreement with regard to Iceland, Liechtenstein and Norway. It is modelled on the CJEU and tends to follow its case law.

⁴ Commission Regulation (EEC) No. 1612/68, 15 October 1968.

⁵ Agreement on the European Economic Area, 2 May 1992, Part III, Free Movement of Persons, Services and Capital, OJ 1994 L1.

⁶ Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, entered into force on 1 June 2002, OJ 2002 L 114/6.

Turkish citizens may also have a privileged position under EU law. They do not have the right to freedom of movement into or within the EU. However, in 1963 the European Economic Community (EEC)-Turkey Association Agreement (the Ankara Agreement) was concluded with Turkey and an additional protocol was adopted in 1970 ('Additional Protocol to the Ankara Agreement').⁷ As a result, those Turkish citizens who are permitted to enter the EU to work or establish themselves enjoy certain privileges, have the right to remain and are protected from expulsion. They also benefit from a standstill clause in Article 41 of the Additional Protocol to the Ankara Agreement, which prevents them from being subjected to more restrictions than those which were in place at the time at which the clause came into effect for the host Member State. The EU has also concluded agreements with several other countries (see Chapter 8, Section 8.2.6), but none of those are as wide-ranging as the Ankara Agreement.

The Treaty of Maastricht entered into force in 1993 and created citizenship of the Union, although predicated on possessing the citizenship of one of the EU Member States. This concept has been widely used to buttress freedom of movement for citizens and their family members of any nationality.

In 1985, the Schengen Agreement was signed, which led to the abolition of internal border controls of participating EU Member States. By 1995, a complex system for applying external controls was put in place, regulating access to the Schengen area. In 1997, the Schengen system – regulated thus far at an international level – became part of the EU legal order. It continues to evolve and develop in the context of the Schengen Borders Code, which consolidates EU rules relating to border management. In 2004, the EU agency Frontex was created to assist EU Member States in the management of the external borders of the Union.

Since the Treaty of Rome in 1950, successive treaty amendments have enlarged the competence of the European Communities (EC), now the EU, in issues affecting migration; the Treaty of Amsterdam gave the EU new competence across the field of borders, immigration and asylum, including visas and returns. This process culminated with the Treaty of Lisbon which afforded the EU new competence in the field of integration of third-country nationals.

⁷ EEC-Turkey Association Agreement (1963), OJ No. 217 of 29 December 1964 (Ankara Agreement), which was supplemented by an Additional Protocol signed in November 1970, OJ 1972 L293.

Against this background, there has been an ongoing evolution of the EU asylum *acquis*, a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU. Not all EU Member States, however, are bound by all elements of the asylum *acquis*. As at April 2013, several instruments of the *acquis* were in the process of being revised, with several EU Member States not accepting the revisions (see Annex 1).

Over the past decade, the EU has adopted legislation concerning immigration to the EU for certain categories of persons as well as rules on third-country nationals residing lawfully within the Union (see Annex 1).

Under the EU treaties, the EU established its own court, which was known as the European Court of Justice (ECJ) until the entry into force of the Treaty of Lisbon in December 2009; since then, it has been renamed the Court of Justice of the European Union (CJEU).⁸ The CJEU is entrusted with a number of competences. On the one hand, the Court has the right to decide over the validity of EU acts and over failures to act by the EU institutions under EU and relevant international law, as well as to decide over infringements of EU law by EU Member States. On the other hand, the CJEU retains an exclusive competence in ensuring the correct and uniform application and interpretation of EU law in all EU Member States. Pursuant to Article 263 (4) of the TFEU, access to the CJEU by individuals is relatively narrow.⁹

However, individual complaints having as an object the interpretation or the validity of EU law can always be brought before national courts. The judicial authorities of EU Member States, based on the duty of sincere cooperation and the principles that rule effectiveness of EU law at national level, are entrusted with the responsibility to ensure that EU law is correctly applied and enforced in the national legal system. In addition, following the ECJ ruling in the *Francovich* case,¹⁰ EU Member States are required, under certain conditions, to provide redress, including compensation in appropriate cases for those who have suffered as a consequence of a Member State's failure to comply with EU law. In case of doubt on the interpretation or

8 This handbook refers to the ECJ for decisions and judgments issued prior to December 2009 and to the CJEU for cases ruled on since December 2009.

9 This, for example, was the case in ECJ, Joined Cases C-402/05 P and C-415/05 P [2008] I-6351, *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 3 September 2008.

10 ECJ, Joined Cases C-6/90 and C-9/90 [1991] ECR I-05357, *Francovich and Bonifaci and Others v. Italian Republic*, 19 November 1991; ECJ, Case C-479/93 [1995] ECR I-03843, 9 November 1995.

the validity of an EU provision, national courts can – and must in certain cases¹¹ – seek guidance from the CJEU using the preliminary reference procedure under Article 267 of the TFEU. In the area of freedom, security and justice, the urgent preliminary ruling procedure (PPU) was created to ensure a quick ruling in cases pending before any national court or tribunal with regard to a person in custody.¹²

The Charter of Fundamental Rights of the EU

The original treaties of the European Communities did not contain any reference to human rights or their protection. However, as cases came before the ECJ alleging human rights breaches occurring in areas within the scope of EU law, the ECJ developed a new approach to grant protection to individuals by including fundamental rights in the so-called ‘general principles’ of European law. According to the ECJ, these general principles would reflect the content of human rights protection found in national constitutions and human rights treaties, in particular the ECHR. The ECJ stated that it would ensure compliance of EU law with these principles.¹³

In recognising that its policies could have an impact on human rights and in an effort to make citizens feel ‘closer’ to the EU, the EU proclaimed the Charter of Fundamental Rights of the European Union in 2000. The Charter contains a list of human rights inspired by the rights enshrined in EU Member State constitutions, the ECHR, the ESC and international human rights treaties, such as the United Nations (UN) Convention on the Rights of the Child (CRC). The EU Charter of Fundamental Rights as proclaimed in 2000 was merely a ‘declaration’, meaning it was not legally binding. The European Commission, the primary body for proposing new EU legislation,

11 According to Art. 267 (3), such obligation always arises for courts against whose decisions there is no judicial remedy under national law and concern also other courts whenever a preliminary reference concerns the validity of an EU provision and there are grounds to consider that the challenge is founded (see, for example, ECJ, Case 314/85 [1987] ECR 4199, *Foto-Frost*, 22 October 1987).

12 See Statute of the Court of Justice, Protocol No. 3, Art. 23 a and Rules of Procedure of the Court of Justice, Arts. 107-114. For a better overview of cases that might be subjected to a PPU, see CJEU, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01), 6 November 2012, para. 40: “for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person’s legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling”.

13 ECJ, Case C-44/79 [1979] ECR 3727, *Liselotte Hauer v. Land Rheinland-Pfalz*, 13 December 1979, para. 15.

soon thereafter stated that it would ensure compliance of legislative proposals with the Charter.

When the Treaty of Lisbon entered into force on 1 December 2009, it altered the status of the EU Charter of Fundamental Rights, making it legally binding. As a result, EU institutions (as well as EU Member States) are bound to comply with the Charter “when implementing EU law” (Article 51 of the Charter).

A Protocol has been adopted interpreting the Charter in relation to Poland and the UK. In a 2011 migration case before the CJEU, the Court held that the main purpose of such Protocol was to limit the application of the Charter in the field of social rights. The Court furthermore held that the Protocol does not affect the implementation of EU asylum law.¹⁴

Article 18 of the EU Charter of Fundamental Rights contains – for the first time at European, level – a right to asylum. According to Article 18, it is a qualified right: “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention [...] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union [...]” Article 19 of the Charter includes a prohibition to return a person to a situation where he or she has a well-founded fear of being persecuted or runs a real risk of torture or inhuman and degrading treatment or punishment (principle of *non-refoulement*).

Moreover, other Charter provisions on the protection granted to individuals appear to be relevant in the context of migration. Article 47 of the Charter provides for an autonomous right to an effective remedy and lays down fair trial principles. The principle of judicial review enshrined in Article 47 requires a review by a tribunal. This provides broader protection than Article 13 of the ECHR which guarantees the right to an effective remedy before a national authority that is not necessarily a court. Furthermore, Article 52 of the EU Charter of Fundamental Rights stipulates that the minimum protection afforded by the Charter provisions are those provided by the ECHR; the EU may nevertheless apply a more generous interpretation of the rights than that put forward by the ECtHR.

¹⁴ CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011.

European Union accession to the European Convention on Human Rights

EU law and the ECHR are closely connected. The CJEU looks to the ECHR for inspiration when determining the scope of human rights protection under EU law. The EU Charter of Fundamental Rights reflects the range of rights provided for by the ECHR, although it is not limited to these rights. Accordingly, EU law has largely developed in line with the ECHR although the EU is not yet a signatory to the ECHR. According to the law as it currently stands, however, individuals wishing to complain about the EU and its failure to guarantee human rights are not entitled to bring an application against the EU as such before the ECtHR. Under certain circumstances, it may be possible to complain indirectly about the EU by bringing an action against one or more EU Member States before the ECtHR.¹⁵

The Lisbon Treaty contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR amends the ECHR to allow this accession to take place. It is not yet clear what effect this will have in practice and, in particular, how this will influence the relationship between the CJEU and ECtHR in the future. The EU's accession to the ECHR is, however, likely to improve access to justice for individuals who consider that the EU has failed to guarantee their human rights. The negotiations for the EU's accession to the ECHR are ongoing and may take several years.

¹⁵ For more details on ECtHR case law in this complex area, see, in particular, ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], No. 45036/98, 30 June 2005.

Key points

- Migration into and within Europe is regulated by a combination of national law, EU law, the ECHR, the ESC and by other international obligations entered into by European states.
- Complaints against acts or omissions by a public authority violating the ECHR may be brought against any of the 47 Member States of the Council of Europe. These include all 27 (soon to be 28) EU Member States. The ECHR protects all individuals within the jurisdiction of any of its 47 states, regardless of their citizenship or residence status.
- Article 13 of the ECHR requires states to provide a national remedy for complaints under the Convention. The principle of subsidiarity, as understood in the ECHR context, places the primary responsibility for ensuring compliance with the ECHR on the states themselves, leaving recourse to the ECtHR as a last resort.
- Complaints against acts or omissions by an EU Member State violating EU law can be brought to national courts, which are under an obligation to ensure that EU law is correctly applied and may – and sometimes must – refer the case to the CJEU for a preliminary ruling on the interpretation or the validity of the EU provision concerned.

1

Access to the territory and to procedures

EU	Issues covered	CoE
Convention implementing the 1985 Schengen Agreement, 19 June 1990 Visa List Regulation, Regulation 539/2001 Visa Code, Regulation 810/2009	Schengen visa regime	
Carrier Sanctions Directive, 2001/51/EC Facilitation Directive, 2002/90/EC	Preventing unauthorised entry	
Schengen Information System (SIS), set up by Title IV of the 1985 Convention implementing the Schengen Agreement SIS II Regulation, Regulation 1987/2006 and SIS II Decision, Council Decision 2007/533/JHA Return Directive, 2008/115/EC, Article 11	Entry ban/ Schengen alert	ECHR, Article 2 of Protocol No. 4 (freedom of movement)
Schengen Borders Code, Regulation 562/2006	Border checks	
Return Directive, 2008/115/EC, Article 4 (4)	Transit zone	ECTHR, <i>Amuur v. France</i> , 1996 (detention in transit zone found to be a deprivation of liberty)
EU Charter of Fundamental Rights, Article 18 (right to asylum) Charter, Article 19 (protection in the event of removal, expulsion or extradition) Asylum Procedures Directive, 2005/85/EC	Asylum seekers	ECHR, Article 3 (prohibition of torture)

EU	Issues covered	CoE
Schengen Borders Code, Regulation 562/2006, Articles 3 and 12	Push backs at sea	ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> , 2012 (collective expulsion from high seas)
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial) Asylum Procedures Directive, 2005/85/EC Schengen Borders Code, Regulation 562/2006, Article 13 Visa Code, Regulation 810/2009, Article 32 (3) and Article 34 (7)	Remedies	ECHR, Article 13 (right to effective remedy)

Introduction

This chapter provides an overview of the regimes applicable to those who wish to enter the territory of a European state. Furthermore, it sets out the main parameters that states have to respect under ECHR law as well as under EU law when imposing conditions for access to the territory or when carrying out border management activities.

As a general rule, states have a sovereign right to control the entry and continued presence of non-nationals in their territory. Both EU law and the ECHR impose some limits on this exercise of sovereignty. Nationals have the right to enter their own country, and EU nationals have a general right under EU law to enter other EU Member States. In addition, as explained in the following paragraphs, both EU law and the ECHR prohibit the rejection at borders of persons at risk of persecution or other serious harm (principle of *non-refoulement*).

Under EU law, common rules exist for EU Member States regarding the issuance of short-term visas and the implementation of border control and border surveillance activities. The EU has also set up rules to prevent illegal entry. The EU agency Frontex was created in 2004 to support EU Member States in the management of external EU borders.¹⁶ The agency also provides operational support through joint operations at land, air or sea borders. Under certain conditions, EU Member States can request Frontex to deploy a rapid intervention system known as RABIT.¹⁷ When acting in the context of a Frontex or RABIT operation, EU Member

¹⁶ Regulation (EC) 2007/2004, 26 October 2004; Regulation (EU) 1168/2011, 25 October 2011.

¹⁷ Regulation (EC) 863/2007, 11 July 2007.

States maintain responsibility for their acts and omissions. In October 2011, Regulation 1168/2011 amending Regulation 2007/2004, which had established Frontex, strengthened the fundamental rights obligations incumbent on Frontex.

As illustrated in Figure 1, the Schengen *acquis* applies in full to most EU Member States. It establishes a unified system for maintaining external border controls and allows individuals to travel freely across borders within the Schengen area. Not all EU Member States are parties to the Schengen area and the Schengen system extends beyond the borders of the EU to Iceland, Liechtenstein, Norway and Switzerland. Article 6 of the Schengen Borders Code (Regulation No. 562/2006) prohibits the application of the code in a way which amounts to *refoulement* or unlawful discrimination.

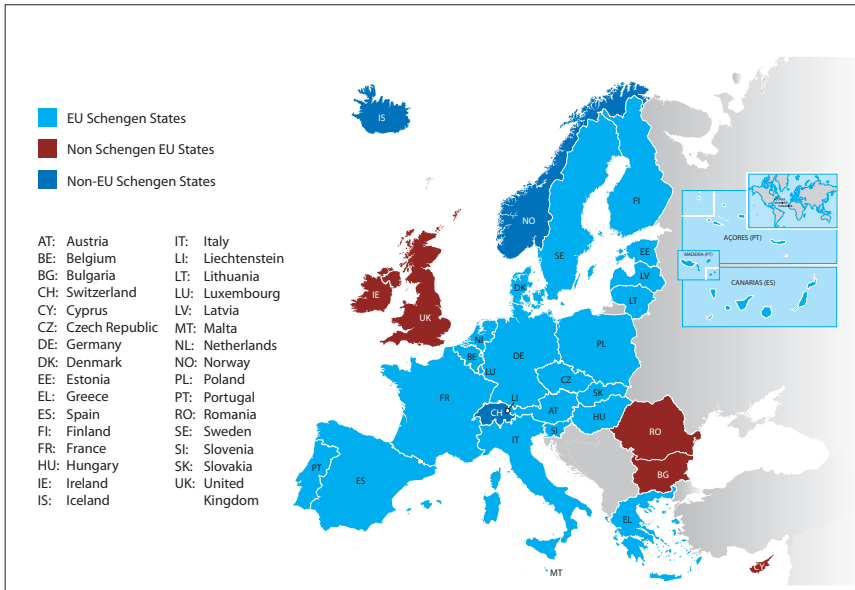
Under the ECHR, states have the right as a matter of well-established international law and subject to their treaty obligations (including the ECHR) to control the entry, residence and expulsion of non-nationals. Access to the territory for non-nationals is not expressly regulated in the ECHR, nor does it say who should receive a visa. ECtHR case law only imposes certain limitations on the right of states to turn someone away from their borders, for example, where this would amount to *refoulement*. The case law may, under certain circumstances, require states to allow the entry of an individual when it is a pre-condition for his or her exercise of certain Convention rights, in particular the right to respect for family life.¹⁸

1.1. The Schengen visa regime

EU nationals and nationals from those countries that are part of the Schengen area and their family members have the right to enter the territory of EU Member States without prior authorisation. They can only be excluded on grounds of public policy, public security or public health.

¹⁸ For more information, see ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, paras. 82-83.

Figure: Schengen area, as at 19 December 2011



Source: *European Commission, Directorate-General of Home Affairs, 2012*

Under EU law, nationals from countries listed in the Annex 1 to the Visa List Regulation (Regulation 539/2001, note also amendments) can access the territory of the EU with a visa issued prior to entry. The Annex to the Regulation is regularly amended and was most recently amended in November 2009 when mandatory visas ceased to be required for nationals of the following three Balkan states: Serbia, Montenegro and the former Yugoslav Republic of Macedonia.¹⁹ Turkish nationals, who were not subject to a visa requirement at the time of the entry into force of the provisions of the standstill clause in 1970, cannot be made subject to a visa requirement in EU Member States.²⁰

¹⁹ Council Regulation (EC) No.1244/2009, 30 November 2009.

²⁰ Additional Protocol to the Ankara Agreement, OJ 1972 L 293, Art. 41.

Personal information on short-term visa applicants is stored in the Visa Information System (VIS Regulation 767/2008 as amended by Regulation 81/2009), a central IT system which connects consulates and external border crossing points.

Visits for up to three months in states that are part of the Schengen area are subject to the Visa Code (Regulation 810/2009, note also amendments). In contrast, longer stays are the responsibility of individual states, which can regulate this in their domestic law. Nationals who are exempted from a mandatory visa under Regulation 539/2001 may require visas prior to their visit if coming for purposes other than a short visit. All mandatory visas must be obtained before travelling. Only specific categories of third-country nationals are exempt from this requirement.

Example: In the *Koushkaki* case,²¹ pending as of December 2012 before the CJEU, the Court has been asked some key questions about challenges to the refusal of Schengen visas, namely: (1) whether the national court must satisfy itself that the applicant intends to leave the territory of the EU Member States before the expiry of the visa applied for, or whether it is sufficient if the court has no doubts based on special circumstances as to the applicant's stated intention to leave the territory of the Member States before the expiry of the visa applied for; and perhaps most importantly (2) whether the Visa Code establishes a non-discretionary right to the issue of a Schengen visa if the entry conditions are satisfied and there are no grounds for refusing the visa under the Code.

Under Article 21 of the Convention implementing the Schengen Agreement,²² third-country nationals who hold uniform visas and who have legally entered the territory of a Schengen state may freely move within the whole Schengen area while their visas are still valid. According to the same article, a residence permit accompanied by travel documents may under certain circumstances replace a visa. Regulation 1030/2002 lays down a uniform format for residence permits.²³ Aliens not subject to a visa requirement may move freely within the Schengen territory for

21 CJEU, Case C-84/12 [2012], *Ezatollah Rahmanian Koushkaki v. Federal Republic of Germany*, 17 February 2012, reference for a preliminary ruling from the Administrative Court (*Verwaltungsgericht*) in Berlin, Germany, lodged on 17 February 2012.

22 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 249/19.

23 Council Regulation 1030/2002, laying down a uniform format for residence permits for third-country nationals, 13 June 2002, as amended by Regulation 380/2008/EC.

a maximum period of three months during the six months following the date of first entry, provided that they fulfil the entry conditions.

The Schengen Borders Code (Regulation No. 562/2006) abolished internal border controls. In this regard, the CJEU has held that states cannot conduct surveillance at internal borders, which has an equivalent effect to border checks.²⁴ Surveillance, including through electronic means, of internal Schengen borders is allowed when based on evidence of illegal residence, but it is subject to certain limitations, such as intensity and frequency.²⁵

1.2. Preventing unauthorised entry

Under EU law, measures have been taken to prevent unauthorised access to EU territory. The Carriers Sanctions Directive (2001/51/EC) provides for sanctions against those who transport undocumented migrants into the EU.

The Facilitation Directive (Directive 2002/90/EC) defines unauthorised entry, transit and residence and provides for sanctions against those who facilitate such breaches. Such sanctions must be effective, proportionate and dissuasive (Article 3). EU Member States can decide not to sanction humanitarian assistance, but they are not obliged to do so (Article 1 (2)).

1.3. Entry bans and Schengen alerts

An entry ban prohibits individuals from entering a state from which they have been expelled. The ban is typically valid for a certain period of time and ensures that individuals who are considered dangerous or non-desirable are not given a visa or otherwise admitted to enter the territory.

Under EU law, entry bans are entered into a database called the Schengen Information System (SIS), which the authorities of other states signatory to the Schengen Agreement can access and consult. In practice, this is the only way that the issuing state of an entry ban can ensure that the banned third-country national will not come back to its territory by entering through another EU Member State of

24 CJEU, Joined Cases C-188/10 and C-189/10, [2010] ECR I-05667, *Aziz Melki and Selim Abdeli* [GC], para. 74.

25 CJEU, Case C-278/12 PPU, *Atiqullah Adil v. Minister voor Immigratie, Integratie en Asiel*, 19 July 2012.

the Schengen area and then moving freely without border controls. The Schengen Information System was replaced by the second-generation Schengen Information System (SIS II), which started to be operational on 9 April 2013.²⁶ SIS II, whose legal bases are the SIS II Regulation²⁷ and the SIS II Decision,²⁸ is a more advanced version of the system and has enhanced functionalities, such as the capability to use biometrics and improved possibilities for queries. Entry bans can be challenged.

Example: In the case of *M. et Mme Forabosco*, the French Council of State (*Conseil d'État*) quashed the decision denying a visa to Mr Forabosco's wife who was listed on the SIS database by the German authorities on the basis that her asylum application in Germany had been rejected. The French Council of State held that the entry ban on the SIS database resulting from a negative asylum decision was an insufficient reason for refusing a French long-term visa.²⁹

Example: In the case of *M. Hicham B*, the French Council of State ordered a temporary suspension of a decision to expel an alien because he had been listed on the SIS database. The decision to expel the alien mentioned the SIS listing but without indicating from which country the SIS listing originated. Since expulsion decisions must contain reasons of law and fact, the expulsion order was considered to be illegal.³⁰

For those individuals subject to an entry ban made in the context of a return order under the Return Directive (Directive 2008/115),³¹ the ban will normally be accompanied by an SIS alert and they will be denied access to the whole Schengen area. The EU Member State which has issued an entry ban will have to withdraw it before any other EU Member State can grant a visa or admit the person. Since the ban may have been predicated on a situation which was specific to the state that issued it,

26 For matters falling within the scope of Title IV of the Treaty establishing the European Community see: Council Decision 2013/158/EU of 7 March 2013 fixing the date of application of Regulation (EC) No. 1987/2006 of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2013 L87, p. 10 ; for matters falling within the scope of Title VI of the Treaty on European Union see: Council Decision 2013/157/EU of 7 March fixing the date of application of Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2013 L87, p. 8.

27 Regulation (EC) No. 1987/2006 of the European Parliament and of the Council, 20 December 2006.

28 Council Decision 2007/533/JHA, 12 June 2007.

29 France, Council of State, *M. et Mme Forabosco*, No. 190384, 9 June 1999.

30 France, Council of State, *M. Hicham B*, No. 344411, 24 November 2010.

31 Directive 2008/115/EC, OJ 2008 L 348, Art. 3 (6) and Art. 1.

questions arise as to the proportionality of a Schengen-wide ban, particularly in situations involving other fundamental rights, such as when reuniting a family.

Entry bans issued outside the scope of the Return Directive do not formally bar other states from allowing access to the Schengen area. Other states, however, may take entry bans into account when deciding whether to issue a visa or allow admission. The bans may therefore have effects across the Schengen area, even though a ban may only be relevant to the issuing state that deems an individual undesirable, including, for example, for reasons related to disturbing political stability: a Schengen alert issued on a Russian politician by an EU Member State prevented a member of the Parliamentary Assembly of the Council of Europe (PACE) from attending sessions of the parliament in France. This was discussed in detail at the October 2011 meeting of the PACE Committee on Legal Affairs and Human Rights, which led to the preparation of a report on restrictions of freedom of movement as punishment for political positions.³²

Under the ECHR, placing someone on the SIS database is an action taken by an individual Member State within the scope of EU law. As such, complaints can be brought to the ECtHR alleging that the state in question violated the ECHR in placing or retaining someone on the list.

Example: In the *Dalea v. France* case, a Romanian citizen whose name had been listed on the SIS database by France before Romania joined the EU was unable to conduct his business or provide or receive services in any of the Schengen area states. His complaint that this was an interference with his right to conduct his professional activities (protected under Article 8 of the ECHR on the right to respect for private and family life) was declared inadmissible. In its first Chamber decision concerning registration on the SIS database and its effects, the Court considered that the state's margin of appreciation in determining how to provide safeguards against arbitrariness is wider as regards entry into national territory than in relation to expulsion.³³

³² Council of Europe, Committee on Legal Affairs and Human Rights (2012), *The inadmissibility of restrictions on freedom of movement as punishment for political positions*, 1 June 2012 and Resolution No. 1894 (provisional version), adopted on 29 June 2012.

³³ ECtHR, *Dalea v. France* (dec.) No. 964/07, 2 February 2010.

The ECtHR has also had to consider the effects of a travel ban imposed as a result of placing an individual on an UN-administered list of **terrorist suspects** as well as designed to prevent breaches of domestic or foreign immigration laws.

Example: The case of *Nada v. Switzerland*³⁴ concerned an Italian-Egyptian national, living in Campione d'Italia (an Italian enclave in Switzerland), who was placed on the 'Federal Taliban Ordinance' by the Swiss authorities which had implemented UN Security Council anti-terrorism sanctions. The listing prevented the applicant from leaving Campione d'Italia, and his attempts to have his name removed from that list were refused. The ECtHR noted that the Swiss authorities had enjoyed a certain degree of discretion in the application of the UN counter-terrorism resolutions. The Court went on to find that Switzerland had violated the applicant's rights under Article 8 of the ECHR by failing to alert Italy or the UN-created Sanctions Committee promptly that there was no reasonable suspicion against the applicant and to adapt the effects of the sanctions regime to his individual situation. It also found that Switzerland had violated Article 13 of the ECHR in conjunction with Article 8 as the applicant did not have any effective means of obtaining the removal of his name from the list.

Example: The *Stamose v. Bulgaria*³⁵ case concerned a Bulgarian national upon whom the Bulgarian authorities imposed a two years travel ban on account of breaches of the U.S. immigration laws. Assessing for the first time whether a travel ban designed to prevent breaches of domestic or foreign immigration laws was compatible with Article 2 Protocol No. 4 ECHR, the ECtHR found that a blanket and indiscriminate measure prohibiting the applicant from travelling to every foreign country due to the breach of the immigration law of one particular country was not proportionate.

1.4. Border checks

Article 6 of the Schengen Borders Code requires that border control tasks have to be carried out in full respect of human dignity. Controls have to be carried out in a way which does not discriminate against a person on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. More

34 ECtHR, *Nada v. Switzerland* [GC], No. 10593/08, 12 September 2012.

35 ECtHR, *Stamose v. Bulgaria*, No. 29713/05, 27 November 2012.

favourable rules exist for third-country nationals who enjoy free movement rights (Articles 3 and 7 (6)).

Under the ECHR, the requirement for a Muslim woman to remove her headscarf for an identity check at a consulate or for a Sikh man to remove his turban at an airport security check was found not to violate their right to freedom of religion under Article 9 of the ECHR.³⁶

In the case of *Ranjit Singh v. France*, the UN Human Rights Committee considered that the obligation for a Sikh man to remove his turban in order to have his official identity photo taken amounted to a violation of Article 18 of the International Covenant on Civil and Political Rights (ICCPR), not accepting the argument that the requirement to appear bareheaded on an identity photo was necessary to protect public safety and order. The reasoning of the UN Human Rights Committee was that the state had not explained why the wearing of a Sikh turban would make it more difficult to identify a person, who wears that turban all the time, or how this would increase the possibility of fraud or falsification of documents. The committee also took into account the fact that an identity photo without the turban might result in the person concerned being compelled to remove his turban during identity checks.³⁷

1.5. Transit zones

States have sometimes tried to argue that individuals in transit zones do not fall within their jurisdiction.

Under EU law, Article 4 (4) of the Return Directive sets out minimum rights that are also to be applied to persons apprehended or intercepted in connection with their irregular border crossing.

Under the ECHR, the state's responsibility may be engaged in the case of persons staying in a transit zone.

36 ECtHR, *Phull v. France* (dec.), No. 35753/03, 11 January 2005; ECtHR, *El Morsli v. France* (dec.), No. 15585/06, 4 March 2008.

37 UN Human Rights Committee, *Ranjit Singh v. France*, Communications Nos. 1876/2000 and 1876/2009, views of 22 July 2011, para. 8.4.

Example: In *Amuur v. France*,³⁸ the applicants were held in the transit zone of a Paris airport. The French authorities argued that as the applicants had not 'entered' France, they did not fall within French jurisdiction. The ECtHR disagreed and concluded that the domestic law provisions in force at the time did not sufficiently guarantee the applicants' right to liberty under Article 5 (1) of the ECHR.³⁹

1.6. Asylum seekers

Under EU law, the EU Charter of Fundamental Rights provides for the right to asylum in Article 18 and the prohibition of *refoulement* in Article 19. Article 78 of the TFEU provides for the creation of a Common European Asylum System which must respect states' obligations under the 1951 Geneva Convention. Several legislative instruments have been adopted to implement this provision. They also reflect the protection from *refoulement* contained in Article 33 of the 1951 Geneva Convention.

Although Article 18 of the Charter guarantees the right to asylum, EU law does not provide for ways to facilitate the arrival of asylum seekers. Individuals who wish to seek asylum in the EU are primarily nationals of countries requiring a visa to enter the EU. As these individuals often do not qualify for an ordinary visa, they may have to cross the border in an irregular manner.

The EU asylum *acquis* only applies from the moment an individual has arrived at the border. Article 3 (1) of the Asylum Procedures Directive (2005/85/EC), which defines the scope of the directive's application, applies to all claims made in the territory of EU Member States, including at the border or in transit zones. For those claims, Article 6 lays down details on access to the asylum procedure. In particular, Article 6 (2) and (5) require states to ensure that individuals are able to access the procedures effectively in practice. The safeguards in the directive are triggered by accessing the procedures. They do not apply to those who cannot reach the territory, the border or a transit zone.

Article 35 of the Asylum Procedures Directive permits the processing of asylum seekers at the border. The directive allows states to continue to keep border

³⁸ ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, paras. 52-54.

³⁹ See also ECtHR, *Nolan and K v. Russia*, No. 2512/04, 12 February 2009; ECtHR, *Riad and Idiab v. Belgium*, Nos. 29787/03 and 29810/03, 24 January 2008.

procedures that existed before December 2005, even if these fall short of the guarantees provided by the directive for applications submitted from within the territory of EU Member States. This provision is only guaranteed if certain basic safeguards, such as access to information, an interpreter or a personal interview, are respected.

Under the ECHR, there is no right to asylum as such. Turning away an individual, however, whether at the border or elsewhere within a state's jurisdiction, thereby putting the individual at risk of torture or inhuman or degrading treatment or punishment, is prohibited by Article 3 of the ECHR. In extreme cases, a removal, extradition or expulsion may also raise an issue under Article 2 of the ECHR which protects the right to life.

The former European Commission of Human Rights examined a number of cases of 'refugees in orbit' where no country would accept responsibility for allowing them to enter its territory in order for their claims to be processed.

Example: The *East African Asians* case⁴⁰ concerned the situation of British passport holders with no right to reside in or enter the United Kingdom and who had been expelled from British dependencies in Africa. This left them 'in orbit'. The former European Commission of Human Rights concluded that, apart from any consideration of Article 14 of the ECHR, discrimination based on race could in certain circumstances of itself amount to degrading treatment within the meaning of Article 3 of the ECHR.

1.7. Push backs at sea

Access to EU territory and Council of Europe member states may be by air, land or sea. Border surveillance operations carried out at sea not only need to respect human rights and refugee law, but must also be in line with the international law of the sea.

Activities on the high seas are regulated by the UN Convention on the Law of the Sea as well as by the Safety of Life at Sea (SOLAS) and Search and Rescue (SAR) Conventions. These instruments contain a duty to render assistance and rescue persons in distress at sea. A ship's captain is furthermore under the obligation to deliver those rescued at sea to a 'place of safety'.

⁴⁰ European Commission of Human Rights, *East African Asians (British protected persons) v. the United Kingdom* (dec.), Nos. 4715/70, 4783/71 and 4827/71, 6 March 1978.

In this context, one of the most controversial issues is where to disembark persons rescued or intercepted at sea.

Under EU law, Article 12 read in conjunction with Article 3 of the Schengen Borders Code stipulates that border management activities must respect the principle of *non-refoulement*. Given the complexity of the issue, the EU adopted guidelines to assist Frontex in the implementation of operations at sea.⁴¹ The European Parliament has asked the CJEU to pronounce itself on the legality of these guidelines.

Example: In *European Parliament v. Council of the EU*,⁴² the European Parliament called on the CJEU to pronounce itself on the legality of the guidelines for Frontex operations at sea (Council Decision 2010/252/EU). The guidelines were adopted under the comitology procedure regulated in Article 5 a of Decision 1999/468/EC without full involvement of the European Parliament. The CJEU annulled them, despite stating that they should continue to remain in force until replaced. The CJEU pointed out that the adopted rules contained essential elements of external maritime border surveillance and thus entailed political choices, which must be made following the ordinary legislative procedure with the Parliament as co-legislator. Moreover, the Court noticed that the new measures contained in the contested decision were likely to affect individuals' personal freedoms and fundamental rights and therefore these measures again required the ordinary procedure to be followed. According to the Court, the fact that the provisions contained in Part II ('Guidelines for search and rescue situations and or disembarkation in the context of sea border operations coordinated by the Agency') to the Annex to Council Decision 2010/252/EC were referred to as 'guidelines' and were said to be 'non-binding' by Article 1 did not affect their classification as essential rules.

Under the ECHR, the Convention applies to all those who are 'within the jurisdiction' of a Council of Europe member state. The ECtHR has held on several occasions⁴³ that individuals may fall within its jurisdiction when a state exercises control over them on the high seas. In a 2012 case against Italy, the ECtHR's Grand Chamber set

⁴¹ Council Decision 2010/252/EU, 26 April 2010.

⁴² CJEU, Case C-355/10 [2012], *European Parliament v. Council of the EU*, 5 September 2012, paras. 63-85.

⁴³ ECtHR, *Xhavara and Others v. Italy and Albania*, No. 39473/98, 11 January 2001; ECtHR, *Medvedyev and Others v. France* [GC], No. 3394/03, 29 March, 2010.

out the rights of migrants seeking to reach European soil and the duties of states in such circumstances.

Example: In *Hirsi Jamaa and Others v. Italy*,⁴⁴ the applicants were part of a group of about 200 migrants, including asylum seekers and others, who had been intercepted by the Italian coastguards on the high seas while within Malta's search and rescue area. The migrants were summarily returned to Libya under an agreement concluded between Italy and Libya, and were given no opportunity to apply for asylum. No record was taken of their names or nationalities. The ECtHR noted that the situation in Libya was well-known and easy to verify on the basis of multiple sources. It therefore considered that the Italian authorities knew, or should have known, that the applicants, when returned to Libya as irregular migrants, would be exposed to treatment in breach of the ECHR and that they would not be given any kind of protection. They also knew, or should have known, that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin, which included Somalia and Eritrea. The Italian authorities should have had particular regard to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR.

The ECtHR reaffirmed that the fact that the applicants had failed to ask for asylum or to describe the risks they faced as a result of the lack of an asylum system in Libya did not exempt Italy from complying with its obligations under Article 3 of the ECHR. It reiterated that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees. The transfer of the applicants to Libya therefore violated Article 3 of the ECHR because it exposed the applicants to the risk of *refoulement*.

1.8. Remedies

As regards remedies, Chapter 4 on procedural safeguards will look at this issue in more depth, while Chapter 6 will address remedies in the context of deprivation of liberty.

⁴⁴ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

Under EU law, some instruments – such as the Visa Code (Articles 32 (3) and 34 (7)), the Schengen Borders Code (Article 13) and the Asylum Procedures Directive (Article 39) – make provision for specific appeals and remedies. Article 47 of the EU Charter of Fundamental Rights also provides for a more general guarantee. All individuals who allege to having been the victim of a violation of the rights and freedoms guaranteed by EU law, including violation of a Charter provision, must automatically have access to an effective remedy which includes ‘effective judicial protection’ against a refusal of access to the territory or access to the procedures involved.

Under the ECHR, all those whose access to the territory or to procedures arguably engages rights guaranteed under the ECHR must, under Article 13 of the ECHR, have access to an effective remedy before a national authority. For example, in the *Hirsi Jamaa and Others v. Italy* case, the ECtHR found that there was no such remedy because the migrants had been sent back to Libya without having been afforded the possibility to challenge this measure.

Key points

- States have a right to decide whether to grant foreigners access to their territory, but must respect EU law, the ECHR and applicable human rights guarantees (see Introduction to this chapter).
- EU law establishes common rules for EU Member States regarding the issuance of short-term visas (see Section 1.1).
- EU law contains safeguards relating to the implementation of border control (see Section 1.4) and border surveillance activities, particularly at sea (see Section 1.7).
- EU law, particularly the Schengen *acquis*, enables individuals to travel free from border controls within the agreed area (see Section 1.1).
- Under EU law, an entry ban against an individual by a single state of the Schengen area can deny that individual access to the entire Schengen area (see Section 1.3).
- The EU Charter of Fundamental Rights provides for the right to asylum and for the prohibition of *refoulement*. The EU asylum *acquis* applies from the moment an individual has arrived at an EU border (see Section 1.6).
- In certain circumstances, the ECHR imposes limitations on the right of a state to detain or turn away a migrant at its border (see Introduction to this chapter and Sections 1.5 and 1.6), regardless of whether the migrant is in a transit zone or otherwise within that state’s jurisdiction. The state may also be required to provide a remedy whereby the alleged violation of the ECHR can be put before a national authority (see Sections 1.7 and 1.8).

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.

2

Status and associated documentation

EU	Issues covered	CoE
Asylum Procedures Directive (2005/85/EC), Article 7, (Right to remain) Reception Conditions Directive (2003/9/EC), Article 6, (right to documentation)	Asylum seekers	ECtHR, <i>Saadi v. the United Kingdom</i> , 2008 (entry considered unauthorised until formally authorised)
Qualification Directive (2011/95/EC)	Recognised refugees and persons granted subsidiary protection	ECHR, Article 3 (prohibition of torture)
Residence Permits for Victims of Trafficking Directive (2004/81/EC) Employer Sanctions Directive (2009/52/EC)	Victims of trafficking and particularly exploitative working conditions	Council of Europe Convention against Trafficking, Article 14 (residence permit also owing to the personal situation of the victim) ECtHR <i>Rantsev v. Cyprus and Russia</i> , 2010 (Russian victim of trafficking in Cyprus)
	Persons affected by Rule 39 interim measures	ECtHR, <i>Mamatkulov and Askarov v. Turkey</i> , 2005 (extradition despite indication of Rule 39 by the ECtHR)
Return Directive (2008/115/EC) ECJ, C-357/09, <i>Kadzoev</i> , 2009. CJEU, C-34/09, <i>Ruiz Zambrano</i> , 2011	Migrants in an irregular situation	ECtHR, <i>Kurić v. Slovenia</i> , 2012 (unlawful deprivation of residence permits)
Long-Term Residents Directive (2003/109/EC)	Long-term residents	Convention on Establishment, 13 December 1955
1970 Additional Protocol to the Ankara Agreement, Article 41 (standstill clause) Decision 1/80 of the EEC-Turkey Association Council (privileges for family members)	Turkish nationals	

EU	Issues covered	CoE
Free Movement Directive (2004/38/EC)	Third-country national family members of EEA nationals	
CJEU, C-135/08, <i>Rottmann</i> , 2010 (loss of citizenship of the Union)	Stateless persons	

Introduction

This chapter will look at status and documentation of different groups of migrants.

For many migrants, lack of status or documentation as evidence of their status can lead to various problems, such as being denied access to public or private services, or to the labour market. EU law includes detailed mandatory provisions relating to both status and documentation, and any failure to comply with those provisions will violate EU law. The ECtHR may be called on to consider whether the absence of status or documentation interferes with the enjoyment of an ECHR right of the individual concerned and, if so, whether such interference is justified.

If no formal authorisation has been given by the host state, a third-country national's presence may be considered unlawful by that state. Both EU and ECHR law, however, set out circumstances in which a third-country national's presence must be considered lawful, even if 'unauthorised' by the state concerned (see Sections 2.2 and 2.5). Some EU, ECHR, EU Charter of Fundamental Rights and ESC rights are granted only to those whose presence in a particular country is lawful (see Chapter 8).

EU law may make express provision for a particular type of status to be recognised or granted. It may make the issue of specific documentation mandatory (see Sections 2.1, 2.2 and 2.8). Where an individual is entitled under EU or national law to a certain status – or to certain documentation – the failure to accord the status or issue the documentation will constitute an infringement of EU law.

The ECHR does not expressly require a state to grant a migrant a certain status or issue him or her specific documentation. In some circumstances, the right to respect for family and private life (Article 8) may require the states to recognise status, authorise residence or issue documentation to a migrant. Article 8, however, cannot be construed as guaranteeing as such the right to a particular type of residence

permit. Where the domestic legislation provides for several different types of residence permits, the ECtHR will normally be called upon to analyse the legal and practical implications of issuing a particular permit.⁴⁵

2.1. Asylum seekers

Asylum seekers seek international protection on the basis that they cannot return or be returned to their country of origin because they have a well-founded fear of persecution or are at risk of being ill-treated or being subjected to other serious harm (see Chapter 3).

Under EU law, the situation of asylum seekers in EU Member States is regulated by the EU asylum *acquis* (all the relevant texts of the asylum *acquis* and the states in which they apply are listed in Annex 1). Obtaining access to the asylum procedure is discussed in Chapter 1. This section deals with those asylum seekers whose claims are pending and who are waiting for a final decision. EU law prohibits removal of an asylum seeker until a decision on the asylum application is taken. Article 7 (1) of the Asylum Procedures Directive (2005/85/EC), provides that the asylum seeker's presence in the territory of an EU Member State is lawful. It states that asylum seekers are 'allowed to remain in the Member State' for the purpose of the procedure until a decision has been made. Article 35 (3) (a) makes similar provision for those being processed at a border point.

The right to documentation for asylum seekers under EU law is set out in the Reception Conditions Directive (2003/9/EC; see Annex 1 for EU Member States bound by the directive). Article 6 of this directive states that all those who lodge a claim for asylum must be given, within three days, a document testifying that they are allowed to stay while the asylum claim is being examined.

Under the ECHR, no corresponding provision exists governing the asylum seekers' status during the processing of their claims for protection. It will therefore be necessary to consider whether under domestic law asylum seekers are allowed to remain in the territory while their claims are processed.

Article 5 (1) (f) of the ECHR permits detention of asylum seekers to prevent them from effecting 'an unauthorised entry' into the territory of a state. According to the

⁴⁵ ECtHR, *Liu v. Russia*, No. 42086/05, 6 December 2007, para. 50.

ECtHR, an entry remains ‘unauthorised’ until it has been formally authorised by the national authorities.

Example: The ECtHR held in *Saadi v. the United Kingdom*⁴⁶ that an entry remained ‘unauthorised’ until it had been formally authorised by the national authorities. In that case, the Court found that there had been no violation of Article 5 (1) where an asylum seeker had been lawfully detained for seven days in suitable conditions while his asylum application was being processed.

Article 2 of Protocol No. 4 to the ECHR refers to the free movement rights of those who are ‘lawfully’ within a state, whereas Article 1 of Protocol No. 7 provides for certain procedural safeguards against expulsion for those who are ‘lawfully’ within the territory of a state. A person can, however, lose his or her ‘lawful’ status.

Example: Before the UN Human Rights Committee⁴⁷ the German government had acknowledged that the asylum seekers were lawfully resident for the duration of their asylum procedure. However, in *Omwenyeké v. Germany*,⁴⁸ the Court accepted the government’s argument that in violating the conditions that the state had attached to his temporary residence – that is, the obligation to stay within the territory of a certain city – the applicant had lost his ‘lawful’ status and thus fell outside the scope of Article 2 of Protocol No. 4 to the ECHR.

2.2. Recognised refugees and those recognised as being in need of subsidiary protection

Under EU law, the EU Charter for Fundamental Rights guarantees the right to asylum (Article 18), thus going beyond the right to seek asylum. Those who qualify for asylum have the right to have this status recognised. Articles 13 (refugee status) and 18 (subsidiary protection status for those who need international protection, but do not qualify for refugee status) of the Qualification Directive (2011/95/EC) give an express right to be granted the status of refugee or subsidiary protection.

46 ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 65.

47 CCPR/C/DEU/2002/5, 4 December 2002.

48 ECtHR, *Omwenyeké v. Germany* (dec.), No. 44294/04, 20 November 2007.

Persons granted international protection can lose their status if there is genuine improvement of the situation in their country of origin (see Chapter 3.1.8).

Article 24 of the same directive regulates the right to documentation. Those recognised as being in need of international protection are entitled to residence permits: three years for refugees, and one year for subsidiary protection. Article 25 entitles refugees and, in certain cases, beneficiaries of subsidiary protection to travel documents.

Under the ECHR, there is no right to asylum such as that found in Article 18 of the EU Charter of Fundamental Rights. Also, the ECtHR cannot examine whether the refusal or withdrawal of refugee status under the 1951 Geneva Convention⁴⁹ or the non-recognition of the right to asylum under the Qualification Directive⁵⁰ is contrary to the ECHR. The ECtHR can, however, examine whether the removal of an alien would subject him or her to a real risk of treatment contrary to Article 3 of the ECHR or certain other ECHR provisions (see Chapter 3).⁵¹

2.3. Victims of trafficking and of particularly exploitative labour conditions

Under EU law, the Employer Sanctions Directive (2009/52/EC) criminalises some forms of illegal employment of migrants in an irregular situation. In the case of workers who are minors or of workers who are subject to particularly exploitative working conditions, they may be issued a temporary residence permit to facilitate the lodging of complaints against their employers (Article 13).⁵²

Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking or who have been the subject of an action to facilitate illegal immigration allows for a reflection period during which the victim cannot be expelled. It also requires EU Member States to issue a residence permit to victims of trafficking who cooperate with the authorities (Articles 6 and 8, respectively). The permit has to be valid for at least six months and is renewable.

49 ECtHR, *Ahmed v. Austria*, No. 25964/94, 17 December 1996, para. 38.

50 ECtHR, *Sufi and Elmi v. United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, para. 226 (relating to Art. 15 of the Qualification Directive).

51 ECtHR, *NA. v. The United Kingdom*, No. 25904/07, 17 July 2008, paras. 106-07.

52 Directive 2009/52/EC, OJ 2009 L 168/24, Art. 9.

Although not dealing directly with residence permits for victims, the 2011 Trafficking Directive (2011/36/EU) requires assistance and support measures to be provided before, during and after the conclusion of criminal proceedings (Article 11). However, where proceedings against the traffickers are not envisaged or the victim has not cooperated with any investigation, there is no clear requirement for an EU Member State to grant a residence permit.

Under the ECHR, the prohibition against slavery and forced labour in Article 4 of the ECHR may, in certain circumstances, require states to investigate suspected trafficking and to take measures to protect victims or potential victims.

Example: The ECtHR case of *Rantsev v. Cyprus and Russia*⁵³ concerned a Russian victim of trafficking in Cyprus. The Court held that Cyprus had failed to comply with its positive obligations under Article 4 of the ECHR on two counts: first, it had failed to put in place an appropriate legal and administrative framework to combat trafficking and, secondly, the police had failed to take suitable operational measures to protect the victim from trafficking. The ECtHR also found that the Russian authorities had failed to conduct an effective investigation into the victim's recruitment by traffickers which had occurred on Russian territory. This failure had more serious consequences in the light of the circumstances of her departure from Russia and her subsequent death in Cyprus.

Under ECHR law, in states that are party to the Council of Europe Convention against Trafficking, the authorities must allow the suspected victim a recovery and reflection period during which they cannot be removed (Article 14). If the competent authorities have 'reasonable grounds' for believing that a person has been a victim of trafficking, the person may not be removed from the country until it has been determined whether he or she has been a victim of a trafficking offence (Article 10 (2)). The competent authority can issue renewable residence permits to victims if it believes the victim's stay is necessary owing to their personal situation or for the purposes of the criminal investigation (Article 14 (1)). The provisions are intended to ensure that the victims of trafficking are not at risk of being returned to their countries without being given the appropriate help (see also Chapter 9 on vulnerable groups and, for the list of ratifications, Annex 2).

⁵³ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 284.

2.4. Persons affected by Rule 39 interim measures

When the ECtHR receives an application, it may decide that a state should take certain provisional measures while it continues its examination of the case.⁵⁴ These are usually referred to as Rule 39 measures.⁵⁵ These measures often consist of requesting a state to refrain from returning individuals to countries where it is alleged that they would face death or torture or other ill-treatment. In many cases, this concerns asylum seekers whose claims have received a final rejection and who have exhausted all appeal rights under domestic law. In some states, it may be unclear which status an individual has when the ECtHR has applied a Rule 39 interim measure to prevent the individual's removal while it examines the case. Regardless of this question of status, the expelling state is under an obligation to comply with any Rule 39 measure indicated by the ECtHR.

Example: In the case of *Mamatkulov and Askarov v. Turkey*,⁵⁶ the respondent state extradited the applicants to Uzbekistan notwithstanding a Rule 39 interim measure indicated by the ECtHR. The facts of the case clearly showed that, as a result of their extradition, the Court had been prevented from conducting a proper examination of the applicants' complaints in accordance with its settled practice in similar cases. This ultimately prevented the Court from protecting them against potential violations of the ECHR. By virtue of Article 34 of the Convention, member states undertook to refrain from any act or omission that might hinder the effective exercise of an individual applicant's right of application. A failure by a member state to comply with interim measures was to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right, thus violating Article 34 of the Convention.

2.5. Migrants in an irregular situation

The presence of those who have either entered or remained in a state without authorisation or legal justification is considered irregular or unlawful. Irregular or unlawful presence can arise in many ways, ranging from clandestine entry or

⁵⁴ ECtHR, *Rules of the Court*, as in force on 1 September 2012, Rule 39.

⁵⁵ For detailed instructions on how to lodge a request under Rule 39, see UNHCR (2012).

⁵⁶ ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], No. 46827/99 and 46951/99, 4 February 2005.

absconding from a mandatory address, to being ineligible to renew an otherwise lawful residence permit because of a change of personal circumstance. Lack of lawful status often affects the possibility of benefiting from other procedural and substantive rights (see Section 8.6 on access to social security and social assistance).

Under EU law, according to the Return Directive (2008/115/EC; see Annex 1 for EU Member States bound by the directive), illegally-staying third-country nationals can no longer be left in limbo. EU Member States participating in the directive must either regularise their stay or issue a return decision.

All persons without legal authorisation to stay fall within the ambit of the directive. Article 6 obliges EU Member States to issue them with a 'return decision'. Article 6 (4), however, also sets out the circumstances excusing states from this obligation. Along with humanitarian or other reasons, another reason to regularise the stay can be pressing reasons of family or private life guaranteed under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the ECHR (see Chapter 5 on family life).

Example: In *M. Ghevondyan*,⁵⁷ 4 June 2012, the French Council of State (*Conseil d'Etat*) held that Article 6 of the Return Directive did not impose on the competent authorities of the Member States the obligation to take systematically a return decision against illegally-staying third-country nationals. Article 6 (4) mentions a number of exceptions and derogations to Article 6 (1). Therefore, return decisions may not be made automatically. The administration has the obligation to consider the personal and family situation of the alien and to take into account circumstances that might prevent an expulsion order. Among these are the interests of the child, the situation of the family and the health of the alien, as stated by Article 5 of the directive. Consequently, the courts should review, if this ground is invoked by the alien, the legality of the decision in view of its consequences on the alien's personal situation.

Allowing people to remain pending the outcome of any procedure seeking authorisation of stay is possible (Article 6 (5)) but not mandatory, as it is in the case of asylum seekers. The provision does not address the status of such people. Recital 12 to the Return Directive reveals an awareness of the common situation that some of those who stay without authorisation cannot be removed. It also notes that states

⁵⁷ France, Council of State (*Conseil d'Etat*), *M. Ghevondyan*, 4 June 2012.

should provide written confirmation of their situation, but this is not reflected in the operative parts of the directive. The situation is most acute for those who have to be released from detention because the maximum permitted detention has elapsed (see Chapter 6 on detention) but who still do not have permission to stay.⁵⁸

Example: In *Kadzoev*,⁵⁹ a rejected Chechen asylum seeker in Bulgaria, who could not be removed, was released from detention after a CJEU ruling maintained that applicable EU law could under no circumstances authorise the maximum detention period to be exceeded. Once released, the applicant found himself without status or documents and left destitute, as Bulgarian law did not provide for him to have any status even though he could not be removed. This case was still pending before the ECtHR in April 2013.⁶⁰

Under the ECHR, there is no Convention right to be granted specific status or related documentation in a host country; however a refusal may, in certain circumstances, violate the ECHR if it was based on discriminatory grounds.

Example: In *Kiyutin v. Russia*,⁶¹ an Uzbek national, who had been married and had a child with a Russian, requested a residence permit from the Russian authorities. His permit was refused since he had tested positive for HIV. The ECtHR stressed the particular vulnerability of persons infected with HIV and accepted that the disease could amount to a form of disability. The blanket provision of domestic law requiring deportation of HIV-positive non-nationals left no room for an individualised assessment based on the facts of a particular case and was found not to be objectively justified. The Court thus found that the applicant had been a victim of discrimination on account of his health status and concluded it to be a breach of Article 14 of the ECHR taken in conjunction with Article 8.

Under the ESC, the personal scope is, in principle, limited to nationals of other state parties that are lawfully resident or working regularly within the territory. The ECSR has held however that, due to their fundamental nature and their link to human

⁵⁸ On the situation of non-removed persons, see FRA (2011b), Chapter 2.

⁵⁹ ECJ, C-357/09 [2009] ECR I-11189, *Kadzoev*, 30 November 2009.

⁶⁰ ECtHR, *Kadzoev v. Bulgaria*, No. 56437/07, pending as at December 2012.

⁶¹ ECtHR, *Kiyutin v. Russia*, No. 2700/10, 10 March 2011.

dignity, certain rights apply to all persons in the territory, including irregular migrants. These rights comprise the right to medical assistance,⁶² the right to shelter⁶³ and the right to education.⁶⁴

2.6. Long-term residents

Under EU law, the Long-Term Residents Directive (2003/109/EC as amended by Directive 2011/51/EU; see Annex 1 for states bound by the directive) provides for entitlement to enhanced 'long-term residence' status for third-country nationals who have resided in an EU Member State legally and continuously for five years.⁶⁵ This entitlement is subject to conditions relating to stable and regular resources and sickness insurance. There is no case law on the interpretation of these requirements, but in relation to similar requirements in the Family Reunification Directive (2003/86/EC; see Chapter 5 on families) the CJEU leaned towards a strict interpretation of those conditions. It maintained that the margin of EU Member State manoeuvre must not be used in a manner which would undermine the objective of the directive.⁶⁶

Under Article 11 of the Long-, the grant of long-term resident status leads to treatment equal to nationals in several important areas (see Chapter 8 on economic and social rights).

According to the CJEU, EU Member States cannot impose excessive and disproportionate fees for the grant of residence permits to third-country nationals who are long-term residents and to members of their families. Such fees would jeopardise the achievement of the objective pursued by the directive, depriving it of its effectiveness.

62 ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 8 September 2004.

63 ECSR, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009.

64 ECSR, Conclusions 2011, General Introduction, January 2012, para. 10, Statement of interpretation on Art. 17 (2).

65 See also CJEU, C-502/10 [2012], *Staatssecretaris van Justitie v Mangat Singh*, 18 October 2012.

66 CJEU, C-578/08 [2010] ECR I-01839, *Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 52.

Example: In *Commission v. the Netherlands*,⁶⁷ the CJEU held that the Netherlands had failed to fulfil its obligation under the Long-Term Residents Directive, in so far as it imposed excessive and disproportionate fees (varying from €188 to €830) on (i) third-country nationals seeking long-term resident status, (ii) third-country nationals who have acquired long-term resident status in another EU Member State and who seek to exercise their right to reside and (iii) third-country nationals' family members seeking reunification. More specifically, the Court pointed out that Member States do not enjoy unlimited discretion in levying fees on third-country nationals when issuing a residence permit and that Member States are not allowed to set charges which might create an obstacle to the exercise of the rights enshrined in the Long-Term Residents Directive.

Under the ECHR, long-term residence has generally been recognised as a factor to be taken into account if expulsion is proposed (see Section 3.4).

Example: In *Kurić v. Slovenia*,⁶⁸ the ECtHR considered the Slovenian register of permanent residents and the 'erasure' of former citizens of the Socialist Federal Republic of Yugoslavia (SFRY) who were still permanent residents but who had not requested Slovenian citizenship within a six-month time limit. The consequences of such 'erasure' were either statelessness or loss of their residence rights.⁶⁹ Foreigners who were not citizens of other SFRY republics were not affected in this way. The ECtHR reiterated that there might be positive obligations inherent in effectively respecting private or family life, in particular in the case of long-term migrants, such as the applicants, who had been unlawfully 'erased' from the permanent residence register in violation of Article 8 of the ECHR. It also found that the difference in treatment between non-SFRY foreigners and those who had previously been citizens of the SFRY constituted discrimination in breach of Article 14 of the Convention taken together with Article 8.

The Council of Europe's 1955 European Convention on Establishment provides for an enhanced status in all member states for those who are long-term residents, but only if they are nationals of states which are parties to the convention.

⁶⁷ CJEU, C-508/10, *European Commission v. Kingdom of the Netherlands*, 26 April 2012, para. 70.

⁶⁸ ECtHR, *Kurić and Others v. Slovenia* [GC], No. 26828/06, 26 June 2012.

⁶⁹ Slovenia is not a party to the Council of Europe 2006 Convention on the avoidance of statelessness in relation to state succession.

2.7. Turkish citizens

The Ankara Agreement signed in 1963 and the Additional Protocol to the Ankara Agreement added in 1970 strengthen trade and economic relations between what was then the European Economic Community (EEC) and Turkey in light of a possible accession by the latter to the EEC. The agreement has been the subject of more than 40 judgments by the CJEU and, previously, the ECJ. It has also been complemented by a number of decisions by the Association Council, some of which relate to the status of the many Turkish citizens in the territory of EU Member States. The agreement does not give Turkish citizens any substantial right to enter or reside in an EU Member State; however, self-employed persons and providers of services benefit from a standstill clause (Article 41 of the Additional Protocol). This clause prevents states from imposing new and more stringent procedural or financial requirements on them, other than those that were already in force at the time the agreement came into being.⁷⁰ A case is currently pending before the CJEU to determine if such rights also apply to Turkish nationals who wish to make use of – rather than provide – services, also referred to as a passive freedom to provide services.⁷¹

Example: Various cases have addressed the requirements imposed on Turkish lorry drivers employed by Turkish companies in Turkey to drive lorries to Germany. Such cases thus concerned the Turkish companies' right of freedom to provide services in EU Member States. In *Abatay*,⁷² the ECJ held that Germany must not impose a work permit requirement on Turkish nationals willing to provide services in its territory if such a permit was not already required when the standstill clause came into effect.

The case of *Soysal*⁷³ concerned a visa requirement. The ECJ held that Article 41 of the Additional Protocol to the Ankara Agreement precluded the introduction of a visa requirement to enter Germany for Turkish nationals who wanted to provide services on behalf of a Turkish company if no visa was

70 ECJ, C-37/98 [2000] ECR I-02927, *Savas*, 11 May 2000; ECJ, C-16/05 [2007] ECR I-07415, *Tum and Mehmet Dari*, 20 September 2007; CJEU, C-186/10, *Oguz v. Secretary of State for the Home Department*, 21 July 2011.

71 CJEU, C-221/11 (pending), *Leyla Ecem Demirkan v. Federal Republic of Germany*, reference for a preliminary ruling from the Higher Administrative Court (*Oberverwaltungsgericht*) in Berlin-Brandenburg (Germany) lodged on 11 May 2011.

72 ECJ, Joined Cases C-317/01 and C-369/01 [2003] ECR I-12301, *Eran Abatay and Others and Nadi Sahin v. Bundesanstalt für Arbeit*, 21 October 2003.

73 ECJ, C-228/06 [2009] ECR I-01031, *Mehmet Soysal and Ibrahim Savatli v. Bundesrepublik Deutschland*, 19 February 2009.

required at the time of the entry into force of the protocol. According to the Court, this conclusion is not affected by the fact that the national legislation introducing the visa was an implementation of EU Regulation 539/2001 (see Chapter 1). Secondary EU law needs to be interpreted in a manner that is consistent with the international agreement containing the standstill clause.

In *Oguz*,⁷⁴ the CJEU maintained that the standstill clause does not preclude EU Member States from using domestic law to penalise abuse relating to immigration. However, the fact that Mr Oguz had entered into self-employment in breach of national immigration law, eight years after having been granted leave to enter and remain in the country, was not considered by the CJEU to constitute an abuse.

In relation to newer EU Member States, the relevant date for the operation of the Turkish standstill clause is the date on which they joined the Union.

The 1970 Additional Protocol to the Ankara Agreement provides for several rights, which are discussed in Chapter 8 on access to economic and social rights. With regard to status, Turkish citizens have the right to remain in the territory while exercising their social and labour market rights.⁷⁵

Family members, including those who are not Turkish nationals, benefit from privileged treatment under Decision 1/80 of the Association Council established by the Ankara Agreement ('EEC-Turkey Association Council', see Chapter 5 on family life).⁷⁶ Such rights are not subject to the conditions related to the ground on which the right of entry and of residence was originally granted to the Turkish national in the host Member State.

⁷⁴ CJEU, C-186/10, *Oguz v. Secretary of State for the Home Department*, 21 July 2011, para. 46; ECJ, C-16/05 [2007] ECR I-07415, *Veli Tum and Mehmet Dari*, 20 September 2007.

⁷⁵ ECJ, C-337/07 [2008] ECR I-10323, *Altun v. Stadt Böblingen*, 18 December 2008, para. 21; ECJ, C-171/95 [1997] ECR I-00329, *Recep Tetik v. Land Berlin*, 23 January 1997, para. 48; Council of Europe 1955 Convention on Establishment, Art. 2: "[...] *each Contracting Party* [which includes Turkey and many other EU countries] *shall, to the extent permitted by its economic and social conditions, facilitate the prolonged or permanent residence in its territory of nationals of the other Parties.*"

⁷⁶ CJEU, C-451/11, *Natthaya Dülger v. Wetteraukreis*, 19 July 2012.

Example: In *Altun*,⁷⁷ the ECJ held that the fact that a Turkish national had obtained the right of residence in an EU Member State and, accordingly, the right of access to the state's labour market as a refugee did not prevent a member of his family from enjoying the rights arising under Decision No. 1/80 of the Association Council. In addition, in *Kahveci*⁷⁸ the CJEU clarified that family members of a Turkish worker could still claim the rights conferred upon them by such decision once the worker had acquired the nationality of the host EU Member State while still retaining his Turkish nationality.

2.8. Third-country nationals who are family members of EEA or Swiss nationals

Under EU law, family members of EEA or Swiss nationals, of whatever nationality, as well as third-country nationals who are family members of EU nationals who have exercised their right to free movement, enjoy, under certain conditions, a right to entry and residence in the territory of an EU Member State in order to accompany or join the EEA, Swiss or EU citizen.⁷⁹ This can only be refused for reasons of public policy, public security or public health.

This right also entails a right to residence documents, which are evidence of their status. Under Article 10 (1) of the Free Movement Directive (2004/38/EC), the residence cards of third-country national family members are to be issued, at the latest, within six months from the date on which they submit the application, and a certificate confirming the application for a residence card is to be issued immediately.⁸⁰

Under the ECHR, a failure to deliver a residence permit to a third-country national when that permit is mandated under EU law may raise an issue under Article 8 of the ECHR.

⁷⁷ ECJ, C-337/07 [2008] ECR I-10323, *Altun*, 18 December 2008, para. 50.

⁷⁸ CJEU, Joined Cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v. Tayfun Kahveci and Osman Inan*, 29 March 2012.

⁷⁹ See the agreements concluded with the EEA and with Switzerland (see footnotes 5 and 6), and the Free Movement Directive (Directive 2004/38/EC).

⁸⁰ Directive 2004/38/EC, OJ 2004 L 158/77.

Example: In *Aristimuño Mendizabal v. France*,⁸¹ the ECtHR found that the applicant's rights under Article 8 of the ECHR had been violated due to the French authorities' excessive delay of over 14 years in issuing her with a residence permit. The ECtHR noted that the applicant had been entitled to such a permit under both EU and French law.

2.9. Stateless persons and the loss of citizenship or documentation

Neither EU law nor the ECHR covers the acquisition of citizenship. This responsibility remains at national level. There are, however, some limits on national action relating to the loss of citizenship.

Under EU law, EU Member States have exclusive sovereignty over acquisition of citizenship, which thus also includes EU citizenship, as well as the additional rights which citizenship confers in many jurisdictions. Article 20 of the TFEU enshrines the concept of citizenship of the Union, but benefits of EU citizenship are limited to those who have national citizenship of one of the Member States.⁸²

Loss of citizenship, however, may engage EU law if this also entails loss of EU rights.

Example: In the *Rottmann* case,⁸³ Dr Rottmann was born a citizen of Austria. After having been accused in Austria for serious fraud in the exercise of his profession, he had moved to Germany where he applied for naturalisation. By acquiring German citizenship he lost his Austrian citizenship by operation of law. Following information from the Austrian authorities that Dr Rottmann was the subject of an arrest warrant in their country, the German authorities sought to annul his acquisition of German citizenship on the ground that he had obtained it fraudulently. Such decision, however, had the effect of rendering him stateless. The referring court wished to know if this was a matter that fell within the scope of EU law, as Dr Rottmann's statelessness also entailed the loss of Union citizenship. The CJEU ruled that an EU Member State decision to

⁸¹ ECtHR, *Aristimuño Mendizabal v. France*, No. 51431/99, 17 January 2006.

⁸² Under Art. 20 (1) of the TFEU, "Citizenship of the Union shall be additional to and not replace national citizenship"; ECJ, C-369/90 [1009] I-4239, *Micheletti*, 7 July 1992; ECJ, C-192/99 [2001] ECR I-01237, *The Queen v. Secretary of State for the Home Department ex parte Kaur*, 20 February 2001.

⁸³ CJEU, C-135/08 [2010] ECR II-05089, *Rottmann v. Freistaat Bayern*, 2 March 2010, paras. 41-45.

deprive an individual of citizenship, in so far as it implies the loss of status of EU citizen and deprivation of attached rights, falls within the ambit of EU law and, therefore, must be compatible with its principles. The CJEU concluded that it is legitimate for a Member State to revoke naturalisation on account of deception, even when the consequence is that the person loses Union citizenship, in addition to citizenship of that Member State. Such a decision, however, must comply with the principle of proportionality, which, among other things, requires a reasonable period of time to be granted in order for him or her to recover the citizenship of his or her Member State of origin.

Under the ECHR, there is no right to acquire citizenship of a state.⁸⁴ The ECtHR, however, has stated that an arbitrary denial of citizenship might raise an issue under Article 8 of the Convention because of the impact that such a denial may have on the private life of the individual.⁸⁵

Example: In the case of *Genovese v. Malta*,⁸⁶ the ECtHR considered the denial of Maltese citizenship to a child born out of wedlock outside of Malta to a non-Maltese mother and a judicially recognised Maltese father. The refusal of citizenship itself did not give rise to a violation of Article 8 when taken alone, but the Court considered that the impact of the refusal on the applicant's social identity brought it within the general scope and ambit of Article 8, and that there had been a violation of Article 8 of the ECHR when taken together with Article 14 because of the arbitrary and discriminatory nature of the refusal.

84 European Commission of Human Rights, *Family K. and W. v. the Netherlands* (dec.), No. 11278/84, 1 July 1985.

85 ECtHR, *Karashev v. Finland* (dec.), No. 31414/96, 12 January 1999; ECtHR, *Slivenko v. Latvia* [GC], No. 48321/99, 9 October 2003; ECtHR, *Kuduzović v. Slovenia* (dec.), No. 60723/00, 17 March 2005.

86 ECtHR, *Genovese v. Malta*, No. 53124/09, 11 October 2011.

Key points

- Documentation often allows non-citizens to access the labour market, and private and public services; it also prevents issues with the authorities (see Introduction to this chapter).
- The EU Charter of Fundamental Rights expressly guarantees the right to asylum. Although the ECHR does not guarantee the right to obtain asylum, the expelling state may be required to refrain from removing an individual who risks death or ill-treatment in the receiving state (see Section 2.2).
- Under EU law, asylum seekers have a right to remain in the territory of the host state while they await a final decision on their asylum claim (see Section 2.1) and must be given identity documents (see Section 2.1).
- Recognised refugees must be given identity as well as travel documents under EU law (see Section 2.2).
- Victims of trafficking are entitled to residence permits to facilitate their cooperation with the police under both EU and ECHR law. EU law and the ECHR may require states to take particular measures to protect them (see Section 2.3).
- The Return Directive requires that EU Member States either regularise the position of illegally-staying third-country nationals or issue a return decision to them (see Section 2.5).
- Under the ECHR, failure to recognise a migrant's status or to issue him or her with documentation might raise an issue under Article 8 (see Section 2.5).
- Under EU law, third-country nationals are entitled to enhanced status after legally residing in an EU Member State continuously for five years (see Section 2.6).
- Turkish citizens and their families cannot be made subject to more stringent conditions as regards self-employment or providing services than were in force at the time of the 1970 Additional Protocol to the Ankara Agreement. Turkish workers and their families have enhanced rights to remain (see Section 2.7).
- Third-country nationals who are family members of EEA or Swiss nationals or of EU citizens exercising free movement rights are eligible for privileged status under EU law (see Section 2.8).
- Neither EU law nor the ECHR covers acquisition of citizenship, but loss of citizenship may engage EU law if the citizenship loss also entails loss of EU rights (see Section 2.9).

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.

3

Asylum determination and barriers to removal: substantive issues

EU	Issues covered	CoE
TFEU, Article 78 and EU Charter of Fundamental Rights, Article 18 (right to asylum), both referring to UN Convention relating to the status of refugees, which enshrines this principle in its Article 33 EU Charter of Fundamental Rights, Article 19 (protection in the event of removal, expulsion or extradition)	Principle of non-refoulement	ECHR, Article 3 as interpreted by the ECtHR in <i>Soering v. the United Kingdom</i> , 1989 (extradition giving rise to exposure to ill-treatment) ECHR, Article 2 (right to life) ECtHR, <i>Saadi v. Italy</i> , 2008 (absolute nature of prohibition of return to torture)
Qualification Directive (2011/95/EC), Article 4	Assessment of the risk	ECtHR, <i>Sufi and Elmi v. the United Kingdom</i> , 2011 (how to assess the existence of a real risk in situations of indiscriminate violence and in respect of humanitarian conditions) ECtHR, <i>Salah Sheekh v. the Netherlands</i> , 2007 (burden of proof for members of persecuted groups)
Council Regulation (EC) No. 343/2003 (Dublin II Regulation) CJEU, Joined Cases C-411/10 and C493/10, 2011 <i>N.S. and M.E.</i> , (Dublin transfers)	Dublin transfers	ECtHR, <i>M.S.S. v. Belgium and Greece</i> , 2011 (return to a state of destitution by one EU Member State to another)
Return Directive (2008/115/EC), Articles 5 and 9	Expulsion of persons seriously ill	ECtHR, <i>N. v. the United Kingdom</i> , 2008 (proposed removal of HIV patient where her access to appropriate medical treatment was uncertain at home)
	Diplomatic assurances	ECtHR, <i>Ramzy v. the Netherlands</i> , 2010 (insufficient assurances) ECtHR, <i>Othman (Abu Qatada) v. the United Kingdom</i> (acceptable assurances)

EU	Issues covered	CoE
EU Charter of Fundamental Rights, Article 18 (right to asylum) Qualification Directive (2011/95/EC) ECJ, C-465/07, <i>Elgafaji</i>, 2009 (subsidiary protection) Exclusion from protection: CJEU, Joined Cases C-57/09 and C101/09, <i>BB and D</i>, 2010 Cessation of protection: CJEU, C-175/08, <i>Abdulla</i>, 2010 EU Charter of Fundamental Rights, Article 19 (protection in the event of removal, expulsion or extradition)	Asylum determination (refugee status and subsidiary protection)	
Qualification Directive (2011/95/EC), Article 8	<i>Internal relocation</i>	ECtHR, <i>Sufi and Elmi v. the United Kingdom</i>, 2011 (how to assess humanitarian conditions in cases of internal relocation)
EU Charter of Fundamental Rights, Article 19 (protection in the event of removal, expulsion or extradition)	Prohibition of collective expulsion	ECHR, Article 4 of Protocol No. 4 (prohibition of expulsion of aliens) ECtHR, <i>Čonka v. Belgium</i>, 2002 (expulsion without individual assessment) ECtHR, <i>Hirsi Jamaa and Others v. Italy</i>, 2012 (collective expulsion from high seas).
	Barriers to expulsion on other human rights grounds	ECtHR, <i>Mamatkulov and Askarov v. Turkey</i>, 2005 (risk of a flagrant denial of justice under Article 6 of the ECHR)
Long-term residents: Long-Term Residents Directive (2003/109/EC), Article 12 Third-country national family members of EEA nationals: Free Movement Directive (2004/38/EC), Article 28 CJEU, C-348/09, <i>P. I.</i>, 2012 Turkish nationals: Association Council Decision 1/80, Article 14 (1) ECJ, C-349/06, <i>Polat</i>, 2007	Third-country nationals with a higher degree of protection from removal	

Introduction

This chapter looks at when an individual must not, or may not, be removed from a state due to requirements of EU law and/or the ECHR.

Absolute and near absolute barriers: Under the ECHR, absolute barriers to removal exist at the very least where an expulsion would be in breach of the absolute rights guaranteed by Article 2 on the right to life and Article 3 on the prohibition of torture, inhuman or degrading treatment or punishment. Article 15 of the ECHR sets out those rights that are absolute and which cannot be ‘derogated’ from.

Near absolute barriers to removal exist where there are exceptions to a general prohibition, as is the case under the 1951 Geneva Convention and under the Qualification Directive (2011/95/EC). In exceptional circumstances, both instruments allow for exceptions to the prohibition on removal of a refugee.

Non-absolute barriers exist for striking a balance between the individual’s private interest or rights, and the public or state interest, such as when removal would break up a family (see Section 3.4).

3.1. The right to asylum and the principle of *non-refoulement*

The starting point for considering asylum in Europe is the 1951 Geneva Convention and its 1967 Protocol, which are now largely incorporated into EU law through the Qualification Directive (2011/95/EU). The 1951 Geneva Convention is the specialised treaty for rights of refugees. The *non-refoulement* principle is the cornerstone of refugee protection.⁸⁷ It means that, in principle, refugees must not be returned to a country where they have a reason to fear persecution.

Article 33 (1) of the 1951 Geneva Convention provides: “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

⁸⁷ Under international human rights law, the meaning of the *non-refoulement* principle extends beyond Art. 33 (1) of the 1951 Geneva Convention, as *non-refoulement* duties also derive from Art. 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as from general international law. See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007.

The *non-refoulement* principle applies both to returns to the country of origin and to returns to any country where the refugee would face persecution. All Member States of the EU and Council of Europe are parties to the 1951 Geneva Convention, but Turkey applies the Convention only in relation to refugees from Europe.⁸⁸ The UNHCR has issued a Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Geneva Convention, which covers in detail the issues dealt with in Sections 3.2.1 – 3.2.8 as well as 4.1.⁸⁹

Under EU law, Article 78 of the TFEU stipulates that the EU must provide a policy for asylum, subsidiary protection and temporary protection, ‘ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with [the 1951 Geneva Convention and its Protocol] and other relevant treaties’, such as the ECHR, the UN Convention on the Rights of the Child (UNCRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), ICCPR, ICESCR. The EU asylum *acquis* measures have been adopted under this policy, including the Dublin II Regulation (Council Regulation (EC) No. 343/2003), the Qualification Directive, the Asylum Procedures Directive (2005/85/EC) and the Reception Conditions Directive (2003/9/EC).⁹⁰

Example: When implementing the Qualification Directive in *Salahadin Abdulla and Others*, the CJEU underlined “that it is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.”⁹¹

88 Turkey maintains a geographic reservation under Art. 1 (B) of the Convention, which restricts its obligations to people uprooted by events in Europe.

89 UNHCR (2011).

90 All these measures are in the process of being amended or ‘recast’; not all recasts had, however, yet been adopted as of December 2012.

91 CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 [2010] ECR I-01493, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, 2 March 2010, para. 52; CJEU, C-31/09 [2010] ECR I-05539, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivata*, 17 June 2010, para. 37; CJEU, Joined Cases C57/09 and C101/09 [2010] ECR I-10979, *Bundesrepublik Deutschland v. B. and D.*, para. 77.

The Qualification Directive, as revised in 2011,⁹² brought into EU law a set of common standards for the qualification of persons as refugees or those in need of international protection. This includes the rights and duties of that protection, a key element of which is *non-refoulement* under Article 33 of the 1951 Geneva Convention.

However, neither Article 33 of the 1951 Geneva Convention nor Articles 17 and 21 of the Qualification Directive absolutely prohibit such *refoulement*. The articles allow for the removal of a refugee in very exceptional circumstances, namely when the person constitutes a danger to the security of the host state or when, after the commission of a serious crime, the person is a danger to the community.

Under the EU Charter of Fundamental Rights, Article 18 guarantees the right to asylum, which includes compliance with the *non-refoulement* principle. Article 19 of the Charter provides that no one may be removed, expelled or extradited to a state where they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The Explanation to the Charter states that Article 19 ‘incorporates the relevant case law’ of the ECtHR regarding Article 3 of the ECHR.⁹³

As such, under EU law, any form of removal under the Return Directive (2008/115/EC) or transfer of an individual to another EU Member State under the Dublin II Regulation must be in conformity with the right to asylum and the principle of *non-refoulement*.

Under the ECHR, Articles 2 and 3 of the ECHR absolutely prohibit any return of an individual who would face a real risk of treatment contrary to either of those provisions. This is different from a risk of persecution on one of the grounds set out in the 1951 Geneva Convention.

The ECtHR has held that Article 3 of the ECHR enshrines one of the fundamental values of a democratic society and in absolute terms prohibits torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct, however undesirable or dangerous. Under Article 3, a state’s responsibility will be engaged when any expulsion is made where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or

⁹² Directive 2011/95/EU, OJ 2011 L 337/9.

⁹³ See explanations relating to the EU Charter of Fundamental Rights (2007/C 303/02); ECtHR, *Ahmed v. Austria*, No. 25964/94, 17 December 1996; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989.

to inhuman or degrading treatment or punishment in the country to which he or she was returned.⁹⁴

Example: In *Saadi v. Italy*,⁹⁵ the applicant was a Tunisian national who had been sentenced in Tunisia, while absent from the country, to 20 years' imprisonment for being a member of a terrorist organisation. The applicant was also convicted in Italy of conspiracy. The Court considered that the prospect of the applicant possibly posing a serious threat to the community did not diminish, in any way, the risk that he might suffer harm if deported. Furthermore, reliable human rights reporting recorded ill-treatment of prisoners in Tunisia, particularly of those convicted of terrorist offences. Diplomatic assurances, provided in this case, also did not negate this risk. The Court therefore considered that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the ECHR if he were to be deported to Tunisia.

Example: In *Abdulle v. Minister of Justice*,⁹⁶ the Maltese Civil Court held that Malta's deportation of asylum seekers to Libya, who were subsequently imprisoned and tortured, violated Article 3 of the ECHR as well as Article 36 of the Constitution of Malta.

3.1.1. The nature of the risk under EU law

Under EU law, the Qualification Directive protects against *refoulement*. Individuals are also eligible for refugee status (see Chapter 2 on status and associated documentation) if they would suffer an act of persecution within the meaning of Article 1 A of the 1951 Geneva Convention. Under Article 9 of the Qualification Directive such act of persecution must:

94 ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007, para. 135; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991.

95 ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008; ECtHR, *Mannai v. Italy*, No. 9961/10, 27 March 2012.

96 Malta, *Abdul Hakim Hassan Abdulle Et v. Ministry tal-Gustizzja u Intern Et, Qorti Civili Prim'Awla (Gurisdizzjoni Kostituzzjonali)*, No. 56/2007, 29 November 2011.

- a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the ECHR; or
- b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

Article 9 of the Qualification Directive also specifies that persecution can take different forms, including acts of physical or mental violence, administrative or legal measures (this could for example be the case for laws prohibiting homosexuality or religious freedom) as well as ‘acts of a gender-specific or child-specific nature’. For example, victims of trafficking can be considered as suffering from persecution. The various forms of persecution and the acts listed above must be attributable to one of the five **reasons for persecution** derived from the 1951 Geneva Convention: race, nationality, religion, membership of a particular social group and political opinion. These five reasons for persecution are enshrined in Article 10 of the Qualification Directive.

Persecution may also exist when, upon return, a person is forced to conceal his or her political convictions, sexual orientation or religious beliefs and practices to avoid serious harm.

Example: In the joined case *Y and Z*,⁹⁷ the CJEU was called to define which acts may constitute an ‘act of persecution’ in the context of a serious violation of freedom of religion under Articles 9 (1) (a) of the Qualification Directive and Article 10 of the Charter. Specifically, the Court was asked whether the definition of acts of persecution for religious reasons covered interferences with the ‘freedom to manifest one’s faith’. The CJEU clarified that an act of persecution may actually result from an interference with the external manifestation of freedom of religion. The intrinsic severity of such acts and the severity of their consequences on the persons concerned determine whether a violation of the right guaranteed by Article 10 (1) of the Charter constitutes an act of persecution under Article 9 (1) of the directive. The CJEU also held that national authorities, in assessing an application for refugee status on an individual basis, cannot reasonably expect an asylum seeker to forego religious activities that can put his or her life in danger in the country of origin.

⁹⁷ CJEU, Joined Cases C-71/11 and C-99/11 [2012], *Federal Republic of Germany v. Y and Z*, 5 September 2012, paras. 72 and 80.

A similar situation involving criminalisation of same-sex relations is under CJEU scrutiny.⁹⁸ The questions posed to the CJEU regard, in particular, whether foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10 (1) (d) of the Qualification Directive; and to what extent a person can be expected to refrain from expressing his or her sexual orientation in order to avoid persecution after returning to the country of origin.

The protection needs of persons whose asylum claims arise while in the host country (*'sur place'* refugees) are recognised; Article 5 of the Qualification Directive specifically covers the issue of a well-founded fear of persecution or serious harm based on events that have taken place after the applicant left his or her country of origin.

Subsidiary protection: The Qualification Directive guarantees 'subsidiary protection' to those who do not qualify as refugees but who, if returned to their country of origin or former habitual residence, would face a real risk of suffering serious harm defined as the death penalty (Article 15 (a)), torture or inhuman or degrading treatment or punishment (Article 15 (b)) and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15 (c)).

Example: The *Elgafaji* case⁹⁹ concerned the return of an Iraqi national to Iraq. The CJEU assessed the granting of subsidiary protection status to an Iraqi national who could not be qualified as a refugee and based its reasoning on the meaning of "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" referred to in Article 15 (c) of the Qualification Directive. The Court held that the meaning of Article 15 (c) of the directive has its own field of application which is different from the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment' used in Article 15 (a)-(b) of the directive. It covers a more general risk of harm relating either to the circumstances of the applicant and/or to the general situation in the country of origin.

98 CJEU, Joined Cases C-199/12, C-200/12 and C-201/12 (pending), *Minister voor Immigratie en Asiel v. X, Y and Z*, reference for a preliminary ruling from the *Raad van State* (Dutch Council of State) lodged on 27 April 2012.

99 ECJ, C-465/07 [2009] ECR I-00921, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, 17 February 2009, paras. 35-39. On similar issues, see also CJEU, C-285/12 (pending), *Aboubacar Diakite v. Commissaire général aux réfugiés et aux apatrides*, reference for a preliminary ruling from the Belgian Council of State (*Conseil d'État*), lodged on 7 June 2012.

Eligibility for subsidiary protection under Article 15 (c) requires showing that the applicant is affected by factors particular to his or her personal circumstances and/or by indiscriminate violence. The more the applicant is able to show that he or she is affected by specific factors particular to his or her personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection under Article 15 (c). In exceptional situations, the applicant may be eligible for subsidiary protection where the degree of indiscriminate violence of an armed conflict reaches such a high level that substantial grounds are shown for believing that he or she may face a real risk of being subject to threat of harm based solely on account of his or her presence in the country or region of origin.¹⁰⁰

3.1.2. The nature of the risk under the ECHR

Under the ECHR, removal is absolutely prohibited where a state would expose an individual to a real risk of loss of life under Article 2 of the ECHR or of torture or inhuman or degrading treatment or punishment under Article 3. There is no need to show persecution for a '[1951] Geneva Convention reason'. There are no exceptions to the prohibition of removal (see Section 3.2.7).

The ECtHR tends to examine cases either under Article 2 or 3 of the ECHR, depending on the particular circumstances and the treatment the individual risks facing if deported or extradited. The key difference between these two ECHR articles is as follows: in cases related to Article 2 of the ECHR, the prospect of death on return must be a virtual certainty; in cases related to Article 3 of the ECHR substantial grounds must exist for believing that the person to be removed would face a real risk of being subjected to torture or other forms of ill-treatment prohibited by that provision.

Example: In *Bader and Kanbor v. Sweden*,¹⁰¹ the ECtHR found that to expel someone to Syria, where he had been sentenced to death *in absentia*, would be a violation of Articles 2 and 3 of the ECHR.

¹⁰⁰ The CJEU has also been asked to define the term 'internal armed conflict' in *Aboubacar Diakite v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, reference for a preliminary ruling from the Belgian Council of State, lodged on 7 June 2012.

¹⁰¹ ECtHR, *Bader and Kanbor v. Sweden*, No. 13284/04, 8 November 2005.

Example: In *Al-Saadoon v. the United Kingdom*,¹⁰² when authorities of the United Kingdom operating in Iraq handed over Iraqi civilians to the Iraqi criminal administration under circumstances where the civilians faced capital charges, the United Kingdom was found in violation of Article 3. The Court did not consider it necessary also to examine the complaints under Article 2 of the ECHR or Protocol No. 13.

The ECtHR focuses on the foreseeable consequences of removing a person to the proposed country of return. It looks at the personal circumstances of the individual as well as the general conditions in a country, such as whether there is a general situation of violence or armed conflict or whether there are human rights abuses. Where an individual is a **member of a group subject to systematic ill-treatment**, it may not be necessary to adduce evidence of personal risk factors.

Example: In *Salah Sheekh v. the Netherlands*,¹⁰³ the ECtHR found that members of minority clans in Somalia were “a targeted group” at risk of prohibited ill-treatment. The relevant factor was whether the applicant would be able to obtain protection against and seek redress for the past acts perpetrated against him in that country. The ECtHR considered that he would not be able to obtain such protection or redress, given that there had been no significant improvement in the situation in Somalia since he had fled. The applicant and his family had been specifically targeted because they belonged to a minority group and were known to have no means of protection. The applicant could not be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continued to be, personally at risk. The ECtHR concluded that his expulsion would violate Article 3 of the ECHR.

In most cases, a situation of general violence in a country will not breach Article 3 of the ECHR. When violence is of a sufficient level or intensity, however, the individual does not need to show that he or she would be worse off than other members of the group to which he or she belongs. Sometimes the individual may have to show a combination of both personal risk factors and the risk of general violence. The sole question for the Court to consider is whether there is a foreseeable and real risk of ill-treatment contrary to Article 3 of the ECHR.

¹⁰² ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, 2 March 2010.

¹⁰³ ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007.

Example: In *NA. v. the United Kingdom*,¹⁰⁴ the ECtHR found that the level of generalised violence in Sri Lanka was not sufficient to prohibit all returns to the country; however, taken together with the personal factors specific to the applicant, his return would violate Article 3 of the ECHR. For the first time, the ECtHR accepted the possibility that a situation of generalised violence could, in itself, mean that all returns were prohibited.

Example: In *Sufi and Elmi v. the United Kingdom*,¹⁰⁵ the ECtHR held that the indiscriminate violence in Mogadishu in Somalia was of a sufficient level and intensity to pose a real risk to the life or person of any civilian there. In assessing the level of violence, the Court looked at the following non-exhaustive criteria: whether the parties to the conflict were either employing methods and tactics of warfare that increased the risk of civilian casualties or directly targeted civilians; whether the use of such methods and/or tactics was widespread among the parties to the conflict; whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting. The situation of general violence in Mogadishu was sufficiently intense to enable the ECtHR to conclude that any returnee would be at a real risk of ill-treatment contrary to Article 3 solely on account of his or her presence in the country, unless it could be demonstrated that he or she was sufficiently well connected to powerful actors in the city to enable him or her to obtain protection.

The individual to be removed may be at risk of various types of **harm** that may amount to treatment contrary to Article 3 of the ECHR, including sources of risk that do **not emanate from the receiving state** itself, but rather from non-state actors, illness or humanitarian conditions in that country.

Example: *HLR v. France*¹⁰⁶ concerned a convicted drug dealer who feared retribution from a Columbian drug ring as he had given information to the authorities which lead to the conviction of one of their members. The Court, however, held that, at that stage, the Columbian authorities were able to

104 ECtHR, *NA. v. the United Kingdom*, No. 25904/07, 17 July 2008, paras. 114-117, 147.

105 ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 241-250, 293.

106 ECtHR, *H.L.R. v. France* [GC], No. 24573/94, 29 April 1997, paras. 43-44.

offer the applicant protection against the risk of ill-treatment. Therefore, his deportation would not breach Article 3 of the ECHR.

Example: *D. v. the United Kingdom*¹⁰⁷ concerned the expulsion of a terminally-ill man. The Court considered the circumstances of the applicant's deportation: the withdrawal of medical treatment, the harshness of the conditions in the country of return and the likely imminent death upon his return. It concluded that in these very exceptional circumstances the applicant's deportation would amount to a breach of Article 3 of the ECHR. The Court, however, set a high threshold for these types of cases. In a later case, *N. v. the United Kingdom*,¹⁰⁸ the expulsion of a woman to Uganda was held not to violate Article 3 of the ECHR because the available evidence demonstrated that some form of medical treatment was available in the woman's home country and that she was not terminally ill at the time. The same approach was followed in *S.H.H. v. the United Kingdom*¹⁰⁹ where a disabled applicant failed to prove the "very exceptional circumstances" he would face in Afghanistan that could otherwise prevent his removal from the United Kingdom.

Example: In *Sufi and Elmi*,¹¹⁰ the Court found that the applicants, if expelled, were likely to find themselves in refugee camps in Somalia and neighbouring countries where the dire humanitarian conditions breached Article 3 of the ECHR. The Court noted that the humanitarian situation was not solely due to naturally occurring phenomena, such as drought, but also a result of the actions or inactions of state parties to the conflict in Somalia.

Example: At the national level, in *M. A.*,¹¹¹ the French Council of State (*Conseil d'État*) quashed a decision to send M. A., an Albanian national who had been denied a residence permit, back to Albania. It found that in Albania, M. A. would be exposed to ill-treatment and death by the family members of a person killed when M. A. conducted a police raid. The Council of State held that Article 3 of the ECHR applied whenever state authorities were unable to offer sufficient protection, even if the risk came from private groups.

107 ECtHR, *D. v. the United Kingdom*, No. 30240/96, 2 May 1997.

108 ECtHR, *N. v. the United Kingdom* [GC], No. 26565/05, 27 May 2008.

109 ECtHR, *S.H.H. v. the United Kingdom*, No. 60367/10, 29 January 2013.

110 ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 267-292.

111 France, *Conseil d'État, M. A.*, No. 334040, 1 July 2011.

The ECtHR has also had to consider whether an individual's participation in dissident activities in the host country increased his or her risk of being subjected to treatment contrary to Article 3 of the ECHR upon return.¹¹²

Example: In *S.F. v. Sweden*,¹¹³ the Court held that it would violate Article 3 of the ECHR to remove an Iranian family of political dissidents who had fled Iran and taken part in significant political activities in Sweden. The Court found that the applicants' activities in Iran were not, on their own, sufficient to constitute a risk, but their activities in Sweden were important as the evidence showed that the Iranian authorities effectively monitored internet communications, as well as those critical of the regime, even outside of Iran. The Iranian authorities would thus easily be able to identify the applicants on return, given their activities and incidents in Iran before moving to Sweden, and also because the family had been forced to leave Iran illegally without valid identity documents.

3.1.3. Assessment of risk

The principles applied under EU law and those under the ECHR have a lot in common when assessing the risk on return. This commonality may be attributed to the EU asylum *acquis* standards being largely derived from the case law of the ECtHR and the UNHCR guidelines. These principles include the fact that assessments must be individualised and based on a consideration of all relevant, up-to-date laws, facts, documents and evidence. This includes information on the situation in the country of origin. Past harm to a person can be a strong indication of future risk.

Under EU law, Article 4 of the Qualification Directive sets out detailed rules for assessing facts and circumstances in applications for international protection. For example, there must be an individualised assessment; when a person has suffered past persecution, this may be a strong indicator of future risk on return. Eligibility officers need to consider any explanation that constitutes a 'genuine effort' to substantiate a claim.

The Qualification Directive does not provide detailed guidance on the timing of an assessment, apart from stating in Article 4 (3) that it is to be carried out at the time of taking a decision on the application. It is unclear, however, whether the right

¹¹² See, for example, ECtHR, *Muminov v. Russia*, No. 42502/06, 11 December 2008.

¹¹³ ECtHR, *S.F. and Others v. Sweden*, No. 52077/10, 15 May 2012.

of appeal in the Asylum Procedures Directive requires a further assessment at the time the appeal is heard. The timing to assess the cessation of protection status is described in Section 3.1.8.

Under ECHR law, it is for the applicant to cite evidence capable of proving that there are substantial grounds for believing that, if he or she is removed from a member state, he or she would be exposed to a real risk of being subjected to treatment prohibited by Article 2 or 3 of the ECHR. Where such evidence is cited, it is for the government to dispel any doubts about it.¹¹⁴ The ECtHR has acknowledged that asylum seekers are often in a special situation which frequently necessitates giving them the benefit of the doubt when assessing the credibility of their statements and their submitted supporting documents.¹¹⁵ However, when information is lacking or when there is a strong reason to question the veracity of his or her submissions, the individual must provide a satisfactory explanation.¹¹⁶

Example: In *Singh and Others v. Belgium*,¹¹⁷ the Court noted that the Belgian authorities had rejected documents submitted in support of an asylum claim by Afghan nationals. The authorities had not found the documentation convincing without sufficiently investigating the matter. In particular, they had failed to check the authenticity of copies of documents issued by the UNHCR office in New Delhi granting the applicants refugee status, although such verification would have been easily undertaken. Therefore, they had not conducted a close and rigorous scrutiny of the asylum claim as required by Article 13 of the ECHR, violating that provision in conjunction with Article 3.

Under ECtHR case law, the risk must not only be assessed on the basis of individual factors, but cumulatively.¹¹⁸ Any assessment must be individualised, taking into

¹¹⁴ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, para. 129.

¹¹⁵ ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007, para. 148; ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010, para. 50.

¹¹⁶ ECtHR, *Matsiukhina and Matsiukhin v. Sweden* (dec.), No. 31260/04, 21 June 2005; ECtHR, *Collins and Akaziebie* (dec.), No. 23944/05, 8 March 2007.

¹¹⁷ ECtHR, *Singh and Others v. Belgium*, No. 33210/11, 2 October 2012.

¹¹⁸ ECtHR, *S.F. and Others v. Sweden*, No. 52077/10, 15 May 2012, paras. 68-69.

account all the evidence.¹¹⁹ If a person has suffered past persecution, this might be a strong indication that they will suffer future risk.¹²⁰

When assessing the risk on return, the ECtHR has considered evidence of the general country conditions as well as evidence of a particular risk to the individual. The ECtHR has provided guidance on the kinds of documentation that may be relied upon when considering country conditions, such as reports by the UNHCR and international human rights organisations. The Court has found reports to be unreliable when the sources of information are unknown and the conclusions inconsistent with other credible reporting.¹²¹

When an individual has not been expelled, the date of the ECtHR's assessment is the point in time for considering the risk.¹²² This principle has been applied regardless of whether the ECHR right at stake was absolute, such as Article 3, or non-absolute, such as Article 8.¹²³ When an applicant has already been expelled, the ECtHR will look at whether the individual has been ill-treated or whether the country information demonstrates substantial reasons for believing that the applicant would be ill-treated.

Example: In *Sufi and Elmi v. the United Kingdom*,¹²⁴ the ECtHR looked at reports by international organisations on the conditions and levels of violence in Somalia as well as the human rights abuses carried out by al-Shabaab, a Somali Islamist insurgent group. The Court was unable to rely on a government fact-finding report on Somalia from Nairobi, Kenya, as it contained vague and anonymous sources and conflicted with other information in the public domain. Judging by the available evidence, the Court considered the conditions in Somalia unlikely to improve soon.

119 ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010, para. 51 (on medical certificate); ECtHR, *N. v. Sweden*, No. 23505/09, 20 July 2010, para. 52; ECtHR, *Sufi and Elmi v. the United Kingdom*, No. 8319/07 and 11449/07, 28 June 2011.

120 ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010.

121 ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 230-234.

122 ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008.

123 ECtHR, *A. A. v. the United Kingdom*, No. 8000/08, 20 September 2011.

124 ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011.

Example: In *Muminov v. Russia*,¹²⁵ the applicant was an Uzbek national who was, on the basis of available information, apparently serving a five-year sentence of imprisonment in Uzbekistan after being extradited from Russia. The ECtHR held that even though there was no other reliable information on the applicant's situation after his extradition, beyond his conviction, there was sufficient credible reporting on the general ill-treatment of convicts in Uzbekistan to lead the Court to find a violation of Article 3 of the ECHR.

3.1.4. Sufficiency of protection

Under international refugee law, an asylum seeker who claims to be in fear of persecution is entitled to refugee status if he or she can show both a well-founded fear of persecution for a reason covered by the 1951 Geneva Convention and an insufficiency of state protection. Sufficiency of state protection means both a willingness and ability in the receiving state, whether from state agents or other entities controlling parts of the state territory, to provide through its legal system a reasonable level of protection from the ill-treatment the asylum claimant fears.

Under EU law, when determining eligibility for refugee or subsidiary protection, it is necessary to consider whether in the country of proposed return the applicant would be protected from the harm feared. Article 7 of the Qualification Directive provides that “[p]rotection against persecution or serious harm can only be provided by [...] the State or [...] parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State provided they are willing and able to offer protection [...]” which is “effective and of a non-temporary nature”. Reasonable steps to prevent persecution are required, which include operating an effective legal system for detection, prosecution and punishment. The applicant must have access to such protection systems.

Example: In *Salahadin Abdulla and Others*,¹²⁶ which concerned the cessation of refugee status, the CJEU held that in order for the protection offered by the state of the refugee's nationality to be sufficient, the state or other entities providing protection under Article 7 (1) of the Qualification Directive must objectively have a reasonable level of capacity and the willingness to prevent

¹²⁵ ECtHR, *Muminov v. Russia*, No. 42502/06, 11 December 2008.

¹²⁶ CJEU, C-175/08 [2010] ECR I-01493, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, 2 March 2010; see also Errera, R. (2011), ‘Cessation and assessment of new circumstances: a comment on Abdulla’, *International Journal of Refugee Law*, Vol. 23, No. 3, p. 521.

acts of persecution. They must take reasonable steps to prevent persecution by, among other things, operating an effective legal system accessible to the person concerned after refugee status has ceased in order to detect, prosecute and punish acts of persecution. The state, or other entity providing protection, must meet certain concrete requirements, including having the authority, organisational structure and means, among other things, to maintain a minimum level of law and order in the refugee's country of nationality.

For Palestinian refugees, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) has been established to provide them with protection and assistance. The UNRWA operates in the West Bank, including East Jerusalem and the Gaza Strip, as well as Jordan, Syria and Lebanon. Individuals who receive assistance from the UNRWA are not entitled to refugee status (Article 12 (1) (a) of the Qualification Directive).

Example: The *Bolbol* case¹²⁷ concerned a stateless person of Palestinian origin who left the Gaza strip and arrived in Hungary where she submitted an asylum application without previously having sought protection or assistance from the UNRWA. The CJEU clarified that, for the purposes of Article 12 (1) (a) of the Qualification Directive, a person should be regarded as having received protection and assistance from a UN agency, other than the UNHCR, only when he or she has actually used that protection or assistance, not merely by virtue of being theoretically entitled to it.

In *El Kott*,¹²⁸ the CJEU further clarified that persons forced to leave the UNRWA operational area for reasons unconnected to their will and beyond their control and independent volition must be automatically granted refugee status, where none of the grounds of exclusion laid down in Articles 12 (1) (b) or (2) and (3) of the directive apply.

Under the ECHR, the assessment of whether Article 3 has been – or would be – violated may entail an examination of any protection that the receiving state or organisations within it might make available to the individual to be removed. There

¹²⁷ CJEU, C-31/09 [2010] ECR I-05539, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivata*, 17 June 2010.

¹²⁸ CJEU, C-364/11, *Abed El Karem El Kott and Others*, 19 December 2012.

is a similarity between the concept of sufficiency of protection in refugee cases (as previously described) and cases relating to Article 3 of the ECHR. If the treatment the individual risks upon his or her return meets the minimum severity level to engage Article 3, it must be assessed whether the receiving state is effectively and practically able and willing to protect the individual against that risk.

Example: In *Hida v. Denmark*,¹²⁹ the applicant was an ethnic Roma facing forced return to Kosovo during the conflict in 2004. The Court was concerned about incidents of violence and crimes against minorities, and considered that the need remained for international protection of members of ethnic communities, such as Roma. The Court noted that the United Nations Interim Administration Mission in Kosovo (UNMIK) performed an individualised screening process prior to any forced returns proposed by the Danish National Commissioner of Police. When UNMIK had objected to some returns, the Police Commissioner had suspended them until further notice. The Police Commissioner had not yet contacted UNMIK regarding the applicant's case as his forced return had not yet been planned. In these circumstances, the Court was satisfied that should UNMIK object to his forced return, the return would likewise be suspended until further notice. The Court found that no substantial grounds had been shown for believing that the applicant, being ethnic Roma, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment upon return to Kosovo. The Court, therefore, declared the case inadmissible for being manifestly ill-founded.

The ECtHR has been called upon to examine whether **diplomatic assurances** by the receiving state can obviate the risk of ill-treatment a person would otherwise be exposed to on return. In cases where the receiving state has provided assurances, those assurances, in themselves, are not sufficient to ensuring adequate protection against the risk of ill-treatment. There is an obligation to examine whether practical application of assurances provides a sufficient guarantee that the individual will be protected against the risk of ill-treatment. The weight given to assurances by the receiving state in each case depends on the circumstances prevailing at the material time.

The preliminary question for the ECtHR is whether the general human rights situation in the receiving state excludes accepting any assurances. It will only be in rare cases that the general situation in a country will mean that no weight at all

¹²⁹ ECtHR, *Hida v. Denmark*, No. 38025/02, 19 February 2004.

is given to assurances. More usually the Court will first assess the quality of assurances given and, secondly, whether, in light of the receiving state's practices, they are reliable. In doing so, the Court will also consider various factors outlined in recent case law.¹³⁰

3.1.5. Internal relocation

Under both EU and ECHR law, states may conclude that an individual at risk in his or her home area may be safe in another part of his or her home country and therefore not in need of international protection.

Under EU law, the possibility of such internal relocation has been codified in Article 8 of the Qualification Directive.

Under the ECHR, a proposed internal relocation by the state must undergo a detailed assessment from the point of return to the destination site. This includes considering if the point of return is safe, if the route contains roadblocks or if certain areas are safe for the individual to pass to reach the destination site. An assessment of individual circumstances is also required.

Example: In *Sufi and Elmi v. the United Kingdom*,¹³¹ the ECtHR held that Article 3 of the ECHR, in principle, did not preclude the member states from relying on the possibility of internal relocation, provided that the returnee could safely avoid exposure to a real risk of ill-treatment when travelling to, gaining admittance to and settling in the area in question. In that case, the Court considered that there may be parts of southern and central Somalia where a returnee would not necessarily be at a real risk of ill-treatment solely on account of the situation of general violence. If the returnees had to travel to or through an area under the control of al-Shabaab, they would likely be exposed to a risk of treatment contrary to Article 3, unless it could be demonstrated that the applicant had recent experience living in Somalia and could therefore avoid drawing al-Shabaab's attention. In the applicants' case, the Court held that for a number of reasons the applicants would be at a real risk of being exposed to treatment in breach of Article 3.

¹³⁰ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012, para. 189; ECtHR, *Ismoilov and Others v. Russia*, No. 2947/06, 24 April 2008, para. 127; ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008; ECtHR, *Ryabikin v. Russia*, No. 8320/04, 19 June 2008.

¹³¹ ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011.

3.1.6. Safety elsewhere

Under EU law, an EU Member State may be permitted, for international protection reasons, to return an applicant to another country for the examination of his or her application, provided such country is considered safe and that certain safeguards are respected.

Two situations presume safety in another country. A country can be considered safe if its national law fulfils a set of requirements listed in the Asylum Procedures Directive (Article 27). Among these, the asylum seeker has to be admitted by the so-called **safe third country**, have the possibility to seek protection and, if found to be in need of international protection, be treated in accordance with the 1951 Geneva Convention. It is particularly important that states ensure that a returnee would not face onward *refoulement* to an unsafe country.

The second presumption regards states who apply the Dublin II Regulation, namely the 27 EU Member States as well as Iceland, Liechtenstein, Norway and Switzerland (see Section 4.2).¹³² The Dublin II Regulation involves an allocation of responsibility to Member States for examining asylum applications; there is a hierarchy of criteria to allocate responsibility for examining asylum applications of persons who lodged an application in one EU Member State and then travelled to another. There is a rebuttable presumption that all states that apply the Dublin II Regulation are safe and comply with the EU Charter of Fundamental Rights and the ECHR.

Among the various criteria listed in the Dublin II Regulation, the state responsible for allowing the applicant to enter the common area is typically determined to be the state responsible for reviewing the application (Chapter III of the Dublin II Regulation). To determine through which state a person entered, his or her fingerprints are taken upon arrival and entered into the Eurodac database (see Eurodac Regulation, 2725/2000/EC), which all states applying the Dublin II Regulation can access. For example, if an asylum seeker arrives in country A and lodges an application for asylum and has his fingerprints taken but then travels to country B, the fingerprints in country B will be matched with those taken in country A; country B would then have to apply the Dublin criteria to determine whether it or country A has responsibility for the examination of the application for asylum.

States must ensure that individuals are not returned to EU Member States which have systemic deficiencies in their asylum and reception systems. In certain cases leading to serious violations of the EU Charter of Fundamental Rights, this may lead

¹³² Council Regulation (EC) No. 343/2003, 18 February 2003.

to states having to examine an application, even if it is not their responsibility to do so under the Dublin II Regulation.

Example: In the joined cases of *NS* and *ME*,¹³³ the CJEU gave a preliminary ruling on whether under certain circumstances a state may be obliged to examine an application under the sovereignty clause included in Article 3 (2) of the Dublin II Regulation even if, according to the Dublin criteria, responsibility lies with another EU Member State. The Court clarified that EU Member States must act in accordance with the fundamental rights and principles recognised by the EU Charter of Fundamental Rights when exercising their discretionary power under Article 3 (2). Therefore, Member States may not transfer an asylum seeker to the Member State responsible within the meaning of the regulation when the evidence shows – and the Member State cannot be unaware of – systemic deficiencies in the asylum procedure and reception conditions that could amount to a breach of Article 4 of the Charter (prohibition on torture). This also obliges the Member State to examine the other criteria in the regulation and identify if another Member State is responsible for examining the asylum application. If identifying another Member State is not possible or the procedure to do so takes an unreasonable amount of time, the Member State itself must examine the application in accordance with Article 3 (2).

Under the ECHR, the ECtHR will consider, among the various elements before it, credible human rights reporting in order to assess the foreseeable consequences of proposed removal. The removing state has a duty to verify the risk, particularly when human rights reports on a country show that the removing state knew or ought to have known of the risks.

Example: In *M.S.S. v. Belgium and Greece*,¹³⁴ the ECtHR held that the applicant's living and detention conditions in Greece had breached Article 3 of the ECHR. According to authoritative reporting, there was a lack of access to an asylum procedure and risk of onward *refoulement*. Belgian authorities were therefore found liable under Article 3 for a Dublin transfer to Greece because, based on available evidence, they knew, or ought to have known, of the risk to asylum seekers in Greece of being subject to degrading treatment at that time.

¹³³ CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011.

¹³⁴ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

3.1.7. Exclusion from international protection

Article 1F of the 1951 Geneva Convention as well as Articles 12 and 17 of the Qualification Directive contain provisions that exclude refugee protection for those persons who do not deserve protection. These are individuals who have allegedly committed at least one of the following acts:

- a crime against peace, a war crime or a crime against humanity;
- a serious non-political crime outside the country of refuge prior to his or her admission;
- an act contrary to the purposes and principles of the United Nations.

Assessing exclusion from international protection must come after assessing whether a person can qualify for international protection. Persons who fall under the exclusion clauses are not considered refugees or persons entitled to subsidiary protection.

Example: In *B and D*,¹³⁵ the CJEU provided guidance on how to apply the exclusion clauses. The fact that the person concerned in this case was a member of an organisation and actively supported the armed struggle waged by the organisation did not automatically constitute a serious basis for considering his acts as ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the UN’. Both provisions would exclude him from refugee protection. A case-by-case assessment of the specific facts must be the basis for finding whether there are serious reasons for considering the person guilty of such acts or crimes. This should be done with a view to determining whether the acts committed by the organisation meet the conditions of those provisions, and whether the individual responsibility for carrying out those acts can be attributed to the person, accounting for the standard of proof required under Article 12 (2) of the directive. The Court also added that the basis for exclusion from refugee status is not conditional on the person posing an ongoing threat to the host Member State nor on an assessment of proportionality in relation to the particular case.

Under the ECHR, since the prohibition of torture and inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct, the

¹³⁵ CJEU, Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, 9 November 2010.

nature of the applicant's alleged offence is irrelevant for the purposes of assessing Article 3 of the ECHR. Consequently, the applicant's conduct, however undesirable or dangerous, cannot be taken into account.

Example: In *Saadi v. Italy*,¹³⁶ the Court reconfirmed the absolute nature of the prohibition of torture under Article 3. The applicant was prosecuted in Italy for participation in international terrorism and ordered to be deported to Tunisia. The ECtHR found that he would run a real risk of being subjected to treatment in breach of Article 3 if returned to Tunisia. His conduct and the severity of charges against him were irrelevant to the assessment of Article 3.

Example: *Babar Ahmed and Others v. the United Kingdom*¹³⁷ also involved alleged terrorists facing extradition to the United States of America. The Court found that Article 3 would not be breached by their expected detention conditions at ADX Florence (a 'supermax' prison) nor by the length of their possible sentences.

3.1.8. Cessation of international protection

Under EU law, when the risk situation in a country has improved, Articles 11 and 16 of the Qualification Directive allow for refugee status to come to an end, mirroring the cessation clauses under Article 1 C of the 1951 Geneva Convention.

Example: The case of *Salahadin Abdulla and Others*¹³⁸ concerned the cessation of refugee status of certain Iraqi nationals to whom Germany had granted refugee status. The basis of the cessation of refugee status was that the conditions in their country of origin had improved. The CJEU held that, for the purposes of Article 11 of the Qualification Directive, refugee status ceases to exist when there has been a significant and non-temporary change of circumstances in the third country concerned and the basis of fear, for which

¹³⁶ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, para. 138; ECtHR, *Ismoilov and Others v. Russia*, No. 2947/06, 24 April 2008, para. 127; ECtHR, *Ryabikin v. Russia*, No. 8320/04, 19 June 2008.

¹³⁷ ECtHR, *Babar Ahmad and Others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.

¹³⁸ CJEU, Joined Cases C-175/08, C-176/08, C-178/08, C-179/08 [2010] I-01493, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, 2 March 2010.

the refugee status was granted, no longer exists and the person has no other reason to fear being 'persecuted'. For assessing a change of circumstances, states must consider the refugee's individual situation while verifying whether the actor or actors of protection have taken reasonable steps to prevent the persecution and that they, among other things, operate an effective legal system for the detection, prosecution and punishment of acts constituting persecution. This protection must also be accessible to the national concerned if he or she ceases to have refugee status.

Under the ECHR, there are no specific cessation clauses. Instead, the ECtHR will examine the foreseeable consequences of an intended removal. The receiving state's past conditions may be relevant for shedding light on its current situation, but it is the present conditions that are relevant when assessing the risk.¹³⁹ To assess the situation, the ECtHR relies on relevant government reports, information provided by the UNHCR and various international non-governmental organisations, such as Human Rights Watch or Amnesty International.

Example: The ECtHR has made various assessments of the risk young Tamil men would face on their return to Sri Lanka. Such assessments have been made at various times throughout the long conflict and also following the cessation of hostilities. The ECtHR considered the evolving overall conditions in the country and examined the country-related risk factors that could affect the particular individuals at the proposed time of removal.¹⁴⁰

3.2. Collective expulsion

Under both EU and ECHR law, collective expulsions are prohibited. A collective expulsion describes any measure that compels individuals to leave a territory or country as a group, and where this decision has not been based on a reasonable and objective examination of each individual's particular case.¹⁴¹

139 ECtHR, *Tomic v. the United Kingdom* (dec.), No. 17837/03, 14 October 2003; ECtHR, *Hida v. Denmark* (dec.), No. 38025/02, 19 February 2004.

140 ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991; ECtHR, *NA. v. the United Kingdom*, No. 25904/07, 17 July 2008.

141 For more information, see ECtHR, 'Collective Expulsions', Factsheet, June 2012, available at: www.echr.coe.int/NR/rdonlyres/6E875E50-67A2-4F67-9C33-815AF6618352/0/Collective_expulsions.pdf.

Under EU law, collective expulsions are at odds with Article 78 of the TFEU, which requires the asylum *acquis* to be in accordance with “other relevant treaties”, and are prohibited by Article 19 of the EU Charter of Fundamental Rights.

Under the ECHR, Article 4 of Protocol No. 4 prohibits collective expulsions.

Example: In *Čonka v. Belgium*,¹⁴² the ECtHR found that the removal of a group of Roma asylum seekers violated Article 4 of Protocol No. 4 to the ECHR. The Court was not satisfied that individual consideration had been taken for the personal circumstances of each member of the expelled group. In particular, prior to the applicants’ deportation, the political authorities announced that collective expulsions would be carried out; they instructed the relevant authority to implement these. All of the individuals were told to report to a given police station at the same time, and each of the expulsion orders and reasons for arrest were expressed in identical terms. Moreover, there was also a lack of access to lawyers, and the asylum procedure had not been completed.

Example: In *Hirsi Jamaa and Others v. Italy*,¹⁴³ the Italian authorities in operating a ‘push back’ of a boat of potential asylum seekers breached Article 4 of Protocol No. 4. The Court held that the prohibition of expulsion also applied to measures taken on the high seas. The ECtHR looked at the international law provisions and EU law concerning sea interventions and the duties of coast guards and flag ships, including in international waters where the state still had jurisdiction within the meaning of Article 1 of the ECHR.

Example: In *Sultani v. France*,¹⁴⁴ the applicant, who had been refused asylum in France, complained about the manner in which he was to be returned to Afghanistan. The applicant claimed that sending him back on a grouped charter flight would amount to collective expulsion proscribed by Article 4 of Protocol No. 4. The ECtHR reiterated that collective expulsions were to be understood as measures compelling aliens, as a group, to leave a country, except where the expulsions were taken on the basis of a reasonable and objective examination of the particular case of each individual alien in the group. Thus, if each person concerned had been given the opportunity to put forward arguments against expulsion to the competent authorities on an individual basis, as was the

¹⁴² ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002.

¹⁴³ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

¹⁴⁴ ECtHR, *Sultani v. France*, No. 45223/05, 20 September 2007.

case with the applicant, then several aliens being subject to similar decisions or travelling in a group for practical reasons did not, in itself, lead to the conclusion that there was a collective expulsion.

Collective expulsions are also contrary to the ESC and its Article 19 (8) on safeguards against expulsion.

In its decision in *European Roma and Travellers Forum v. France*,¹⁴⁵ the ECSR held that the administrative decisions, during the period under consideration, ordering Roma of Romanian and Bulgarian origin to leave French territory, where they were resident, were incompatible with the ESC: as the decisions were not based on an examination of the personal circumstances of the Roma, they did not respect the proportionality principle; by targeting the Roma community, they were also discriminatory in nature. The Committee found this to be in breach of Article E on non-discrimination read in conjunction with Article 19 (8) of the ESC.

3.3. Barriers to expulsion based on other human rights grounds

Both EU law and the ECHR recognise that there may be barriers to removal based on human rights grounds which are not absolute, but where a balance has to be struck between the public interests and the interests of the individual concerned. The most common would be the right to private or family life, which may include considerations for a person's health (including physical and moral integrity), the best interests of children, the need for family unity or specific needs of vulnerable persons.

Under EU law, return procedures have to be implemented while taking into account the best interests of the child, family life, the state of health of the person concerned and the principle of *non-refoulement* (Article 5 of the Return Directive).

Under the ECHR, states have the right, as a matter of well-established international law and subject to their treaty obligations, including the ECHR, to control the entry, residence and expulsion of aliens. There is extensive case law on the circumstances in which qualified rights may act as a barrier to removal. Qualified rights are those

¹⁴⁵ ECSR, *European Roma and Travellers Forum v. France*, Complaint No. 64/2011, merits, 22 January 2012.

rights with built-in qualifications, such as Articles 8-11 of the ECHR. The right to respect for private and family life in Article 8 of the ECHR is often invoked as a shield against expulsion in cases not involving the risk of inhuman or degrading treatment contrary to Article 3. Section 5.2 will discuss the respect afforded to these Article 8 rights.

Barriers to removal may also be considered in respect of an allegedly flagrant breach of Article 5 or 6 of the ECHR in the receiving country, such as if a person risks being subjected to arbitrary detention without being brought to trial; he or she risks being imprisoned for a substantial period after being convicted at a flagrantly unfair trial; or he or she risks a flagrant denial of justice when awaiting trial. The applicant's burden of proof is high.¹⁴⁶

Example: In *Mamatkulov and Askarov v. Turkey*,¹⁴⁷ the ECtHR considered whether the applicants' extradition to Uzbekistan resulted in their facing a real risk of a flagrant denial of justice in breach of Article 6 of the ECHR.

Example: In *Othman (Abu Qatada) v. the United Kingdom*,¹⁴⁸ the ECtHR found, under Article 6 of the ECHR, that the applicant could not be deported to Jordan on the basis that evidence obtained from torture of third persons would most likely be used in a retrial against him.

Example: In a domestic case, *EM Lebanon*, the United Kingdom House of Lords concluded that if there is a manifest violation of qualified (non-absolute) rights – such as Article 8 of the ECHR – that strikes at the essence of the right in question, there is no need to assess proportionality.¹⁴⁹

Under the ESC, Article 19 (8) prohibits the expulsion of migrant workers lawfully residing within the territory of a state party, except where they endanger national security or offend against public interest or morality.

The ECSR has notably held that if a state has conferred the right of residence on a migrant worker's spouse and/or children, the loss of the migrant worker's own right of residence cannot affect their family members' independent rights of residence for as long as those family members hold a right of residence.

¹⁴⁶ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012, para. 233.

¹⁴⁷ ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], No. 46827/99 and 46951/99, 4 February 2005.

¹⁴⁸ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012.

¹⁴⁹ The United Kingdom, *EM (Lebanon) v. Secretary of State For The Home Department* [2008] UKHL 64.

Foreign nationals who have been resident in a state for a sufficient amount of time, either legally or with the authorities' tacit acceptance of their illegal status in view of the host country's needs, should be covered by the rules that already protect other foreign nationals from deportation.¹⁵⁰

3.4. Third-country nationals who enjoy a higher degree of protection from removal

Under EU law, there are certain categories of third-country nationals, other than those in need of international protection, who enjoy a higher degree of protection from removal. These include long-term residence status holders; third-country nationals who are family members of EU/EEA nationals who have exercised their right to freedom of movement; and Turkish nationals.

3.4.1. Long-term residents

Long-term residents enjoy enhanced protection against expulsion. A decision to expel a long-term resident must be based on conduct that constitutes an actual and sufficiently serious threat to public policy or public security.¹⁵¹

3.4.2. Third-country national family members of EEA and Swiss nationals

Individuals of any nationality who are family members of EEA nationals, including EU citizens but only in so far as they have exercised free movement rights, have a right to residence which derives from EU free movement provisions. Under the Free Movement Directive (2004/38/EC), third-country nationals who have such family relations enjoy a higher protection from expulsion compared with other categories of third-country nationals. According to Article 28 of the directive, they can only be expelled on grounds of public policy or public security.¹⁵² In the case of

¹⁵⁰ ECSR, Conclusions 2011, General Introduction, January 2012, statement of interpretation on Art. 19 (8).

¹⁵¹ Council Directive 2003/109/EC, OJ 2003 L 016/44, Art. 12.

¹⁵² As at December 2012, there has been no CJEU case law on family members. For cases concerning EU citizens, in which the Court has interpreted the notion of "*imperative grounds of public security*" under Art. 28 (3), see: CJEU, C-348/09, *Pl. v. Oberbürgermeisterin der Stadt Remscheid*, 22 May 2012, paras. 39-56; CJEU, C-145/09 [2010] ECR I-11979, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, 23 November 2010, paras. 20-35.

permanent residents, the grounds for expulsion must reach the level of ‘serious grounds’ relating to ‘public policy or public security’. As stated in Article 27 (2) of the directive, these measures must comply with the principle of proportionality, be based exclusively on the personal conduct of the individual concerned and the individual must also represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”.¹⁵³ For Swiss nationals, the legal basis for protection from expulsion is found in Article 5 of Annex I to the Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons. According to that provision, the rights granted under the agreement may only be restricted on grounds of public order, public security or public health.¹⁵⁴

There is protection for family members in the event of death, divorce or departure of the EEA national who exercised free movement rights (Articles 12 and 13 of the Free Movement Directive). In specific situations, third-country nationals may also be protected against expulsion by virtue of Article 20 of the TFEU (see Section 5.2).¹⁵⁵

3.4.3. Turkish nationals

Under EU law, Article 14 (1) of Association Council Decision 1/80 provides that Turkish nationals exercising rights under the Ankara Agreement can only be expelled on grounds of public policy, public security or public health. The Court has emphasised that the same criteria as those used for EEA nationals should apply when considering a proposed expulsion of Turkish citizens who have established and secured residence in one of the EU Member States. EU law precludes the expulsion of a Turkish national when that expulsion is exclusively based on general preventive grounds, such as deterring other foreign nationals, or when it automatically follows

¹⁵³ For case law on Art. 27 of Directive 2004/38/EC, with regard to the notion of ‘public policy’, see CJEU, C-434/10, *Petar Aladzhov v. Zamestnik director na Stolichna direktsia na vateshnite raboti kam Ministerstvo na vateshnite raboti*, 17 November 2011; CJEU, C-430/10, *Hristo Gaydarov v. Director na Glavna direktsia “Ohranitelna politisia” pri Ministerstvo na vateshnite raboti*, 17 November 2011. With regard to the notion of a ‘genuine present and sufficiently serious threat affecting one of the fundamental interests of society’, see ECJ, Joined Cases C-482/01 and C-493/01, [2004] ECR I-05257, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, 29 April 2004, paras. 65-71.

¹⁵⁴ Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, entered into force on 1 June 2002, OJ 2002 L 114/6.

¹⁵⁵ For information on a case with protection granted, see CJEU, C-34/09, *Ruiz Zambrano v. Office national de l’emploi*, 8 March 2011. For information on a case where protection was not granted, see CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011; see also CJEU, C-40/11, *Iida v. Stadt Ulm (City of Ulm)*, 8 November 2012.

a criminal conviction; according to well-established case law, derogations from the fundamental principle of freedom of movement for persons, including public policy, must be interpreted strictly so that their scope cannot be unilaterally determined by the EU Member States.¹⁵⁶

Example: In *Nazli*,¹⁵⁷ the ECJ found that a Turkish national could not be expelled as a measure of general deterrence to other aliens, but the expulsion must be predicated on the same criteria as the expulsion of EEA nationals. The Court drew an analogy with the principles laid down in the field of freedom of movement for workers who are nationals of a Member State. Without minimising the threat to public order constituted by the use of drugs, the Court concluded, from those principles, that the expulsion, following a criminal conviction, of a Turkish national who enjoys a right granted by the decision of the Association Council can only be justified where the personal conduct of the person concerned is liable to give reasons to consider that he or she will commit other serious offences prejudicial to the public interest in the host Member State.

Example: In *Polat*,¹⁵⁸ the Court specified that measures authorising limitations on the rights conferred to Turkish nationals, taken on grounds of public policy, public security or public health under Article 14 of the Association Council, are to be based exclusively on the personal conduct of the individual concerned. Several criminal convictions in the host Member State may constitute grounds for taking such measures only in so far as the behaviour of the person concerned constitutes a genuine and sufficiently serious threat to a fundamental interest of society, a circumstance that is for the national court to ascertain.

156 ECJ, Case 36/75 [1985] ECR I-01219, *Rutili v. Ministre de L'intérieur*, 28 October 1985, para. 27; ECJ, Joined Cases C-482/01 and C-493/01 [2003] ECR I-05257, *Orfanopoulos and Oliveri*, 11 September 2003, para. 67.

157 ECJ, C-340/97 [2000] ECR I-00957, *Ömer Nazli, Caglar Nazli and Melike Nazli v. Stadt Nürnberg*, 10 February 2000.

158 ECJ, C-349/06 [2007] ECR I-08167, *Murat Polat v. Stadt Rüsselsheim*, 4 October 2007.

Key points

- There are absolute, near absolute and non-absolute barriers to removal (Introduction to this chapter).
- Prohibition of ill-treatment under Article 3 of the ECHR is absolute. Persons who face a real risk of treatment contrary to Article 3 in their country of destination must not be returned, irrespective of their behaviour or the gravity of charges against them. The authorities must assess this risk independently of whether the individual may be excluded from protection under the Qualification Directive or the 1951 Geneva Convention (see Sections 3.1.2 and 3.1.7).
- The *non-refoulement* principle under the 1951 Geneva Convention prohibits the return of people to situations where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion (see Section 3.1).
- Under EU law, any action taken by EU Member States under the EU asylum *acquis* or under the Return Directive, including under the Dublin II Regulation, must be in conformity with the right to asylum and the principle of *non-refoulement* (see Section 3.1).
- In assessing whether there is a real risk, the ECtHR focuses on the foreseeable consequences of the removal of the person to the country of proposed return, looking at the personal circumstances of the individual as well as the general conditions in the country (see Sections 3.1.3 and 3.3).
- Under the ECHR, the asylum seeker needs, in principle, to corroborate his or her claim, and it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements. However, where substantiation is lacking or when information is presented which gives strong reason to question the veracity of the asylum seeker's submissions, the individual must provide a satisfactory explanation for this (see Section 3.1.3).
- An individual may risk treatment prohibited by EU law or the ECHR in the receiving state, even if this does not always emanate from the receiving state itself but rather from non-state actors, an illness or humanitarian conditions in that country (see Section 3.1.2).
- An individual, who would risk treatment prohibited by EU law or the ECHR if returned to his home area in the receiving country, may be safe in another part of the country ('internal relocation') (see Section 3.1.5). Alternatively, the receiving state may be able to protect him against such a risk ('sufficiency of protection') (see Section 3.1.4). In these cases, the expelling state may conclude that he or she is not in need of international protection (see Section 3.1.4).
- Both EU law and the ECHR prohibit collective expulsions (see Section 3.2).
- Under EU law, qualifying third-country national family members of EEA nationals can only be expelled on grounds of public policy, or public security. These derogations are to be interpreted strictly and their assessment must be based exclusively on the personal conduct of the individual involved (see Section 3.4.2).

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.

4

Procedural safeguards and legal support in asylum and return cases

EU	Issues covered	CoE
Asylum Procedures Directive (2005/85/EC)	Asylum procedures	
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial)	<i>Right to an effective remedy</i>	ECHR, Article 13 (right to an effective remedy) ECtHR, <i>Abdolkhani and Karimnia v. Turkey</i> , 2009 (domestic remedy needs to deal with the substance of the claim)
Asylum Procedures Directive (2005/85/EC), Article 39	<i>Suspensive effect</i>	ECtHR, <i>Gebremedhin v. France</i> , 2007 (suspensive effect of domestic remedy for asylum claims in transit zone) ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> , 2012 (absence of suspensive effect of domestic remedies against military personnel operating a “push back at sea”)
Asylum Procedures Directive (2005/85/EC), Article 23 (4)	<i>Accelerated asylum procedures</i>	ECtHR, <i>I.M. v. France</i> , 2012 (procedural safeguards for accelerated asylum procedures)
Council Regulation (EC) No. 343/2003 (Dublin II Regulation) CJEU, C-411/10, <i>N.S.</i> , 2011 CJEU, C-245/11, <i>K.</i> , 2012	Dublin procedures	ECtHR, <i>M.S.S. v. Belgium and Greece</i> , 2011 (transfer under the “Dublin procedure” raising risk of degrading treatment) ECtHR, <i>De Souza Ribeiro v. France</i> 2012 (suspensive effect in Article 8 ECHR claims)
Return Directive (2008/115/EC)	Return procedure	ECHR, Article 13 (right to an effective remedy) ECHR, Protocol 7, Article 1 (procedural safeguards relating to expulsion of aliens) ECtHR, <i>C.G. and Others v. Bulgaria</i> , 2008 (lack of procedural safeguards in deportation proceedings)

EU	Issues covered	CoE
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial)	Legal assistance	ECHR, Article 13 (right to an effective remedy) ECtHR, <i>M.S.S. v. Belgium and Greece</i> , 2011 (ineffective legal aid scheme)
Asylum Procedure Directive (2005/85/EC), Article 15	Legal assistance in asylum procedures	Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009
Return Directive (2008/115/EC), Article 13 (remedies)	Legal assistance in return decisions	Committee of Ministers, Twenty guidelines on forced return, 4 May 2005

Introduction

This chapter looks at the procedure for examining applications for international protection (asylum procedures), as well as procedures for expulsion or return. It first touches on procedural requirements imposed on those responsible for making asylum or return decisions. It then examines the right to an effective remedy against such decisions, listing the main elements that are required for a remedy to be effective (see also Section 1.8 on remedies in the context of border management). Finally, the chapter addresses issues concerning legal assistance. Chapter 7 will focus on the way removal is performed.

ECtHR case law requires states to exercise independent and rigorous scrutiny of claims, which raise substantive grounds for fearing a real risk of torture, inhuman or degrading treatment or punishment upon return. Some of the requirements elaborated in the Court's case law have been included in the recast Asylum Procedures Directive, which was under review at EU level in October 2012.

Throughout this chapter, the right to an effective remedy as included in Article 13 of the ECHR will be compared with the broader scope of the right to an effective remedy as found in Article 47 of the EU Charter of Fundamental Rights.

4.1. Asylum procedures

Under both EU law and the ECHR, asylum seekers must have access to effective asylum procedures, including remedies capable of suspending a removal during the appeals process.

The EU Asylum Procedures Directive (2005/85/EC) sets out minimum standards on procedures for granting and withdrawing asylum. In October 2012, the amendments to the directive were discussed in order to define common standards. The

directive applies to asylum claims made in the territory of EU Member States bound by the directive, including at borders and in transit zones (Article 3).

4.1.1. Interview, examination procedure and initial decision making

Asylum seekers and their dependants need to have access to asylum procedures, according to Article 6 of the Asylum Procedures Directive (see also Section 2.2). They are allowed to remain in an EU Member State until a decision is made in accordance with procedures under Chapter 3 of the directive.¹⁵⁹

Under EU law, the Asylum Procedures Directive sets out provisions for the examination of a claim. Applications should not automatically be rejected by the quasi-judicial or administrative body responsible for taking first instance decisions for failure to submit an application as soon as possible.

Applicants need to be given a **personal interview** (Articles 12-13 of the Asylum Procedures Directive)¹⁶⁰ and a corresponding written report has to be drafted and made accessible to the applicants (Article 14). Unaccompanied minors have specific guarantees, including the right to a representative. The best interests of the child must be a primary consideration (Article 17 (6); see also Chapter 9). For more information on legal assistance, see Section 4.5.

The **examination of an asylum** claim must always be taken individually, objectively and impartially using up-to-date information (Articles 2 and 8 of the Asylum Procedures Directive and Article 4 of the Qualification Directive). Article 10 of the Asylum Procedures Directive provides that asylum applicants must be informed of the procedure to follow and time frame in a language they may reasonably be supposed to understand; receive the services of an interpreter, whenever necessary; be allowed to communicate with UNHCR; be given notice of the decision within a reasonable time; and be informed of the decision in a language they understand or may reasonably be supposed to understand.

Asylum seekers are entitled to **withdraw** their asylum claims. The procedures for withdrawal must also comply with notification requirements, which include written

159 Unless it is an extradition case under the Council Framework Decision 2002/584/JHA on the European arrest warrant, which has its own procedural safeguards, see ECJ, C-388/08 [2008] ECR I-08993, *Leymann & Pustovarov*, 1 December 2008.

160 See also CJEU, C-277/11 [2012], *M. M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, 22 November 2012.

notification (Articles 37 and 38 of the Asylum Procedures Directive). In other cases, claims may be treated as withdrawn or abandoned; the state, however, needs to take a decision to discontinue the examination and record the action taken (Articles 19 and 20 of the Asylum Procedures Directive).

The examination of a claim must comply with the procedural requirements of the Asylum Procedures Directive, as well as the requirements for assessing evidence of a claim under the Qualification Directive (Article 4).

The Asylum Procedures Directive includes provisions for EU Member States to derogate from basic guarantees under the directive in respect of inadmissible applications, safe third-country cases or subsequent claims (Article 24). Claims can only be considered unfounded if the application does not qualify for protection under the Qualification Directive.

Decisions on asylum applications must be taken as soon as possible and in accordance with the basic guarantees. If decisions cannot be taken within six months, the applicant has to be informed of the delay or upon his or her request given information as to when a decision can be expected (Article 23). Decisions must be in writing and must give information on how they can be challenged (Article 9 of the Asylum Procedures Directive).

Under the ECHR, the Court has held that individuals need access to the asylum procedure as well as adequate information concerning the procedure to be followed. The authorities are also required to avoid excessively long delays in deciding asylum claims.¹⁶¹ In assessing the effectiveness of examining first instance asylum claims, the Court has also considered other factors, such as the availability of interpreters, access to legal aid and the existence of a reliable system of communication between the authorities and the asylum seekers.¹⁶² In terms of risk examination, Article 13 requires independent and rigorous scrutiny by a national authority of any claim where there exist substantial grounds for fearing a real risk of being treated in a manner contrary to Article 3 (or Article 2) in the event of an applicant's expulsion.¹⁶³

161 ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011; ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009.

162 For more information, see ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 301.

163 *Ibid.*, para. 293.

4.1.2. Right to an effective remedy

Individuals must have access to a practical and effective remedy against a refusal of asylum, a residence permit or for any other complaint alleging a breach of their human rights. In this context, both EU law and the ECHR recognise that procedural safeguards need to be complied with in order for individual cases to be examined effectively and speedily. To such end, detailed procedural requirements have been developed both under EU law and by the ECtHR.

Under EU law, Article 47 of the EU Charter of Fundamental Rights provides a “right to an effective remedy and to a fair trial”. The first paragraph of Article 47 of the Charter is based on Article 13 of the ECHR, which ensures the right to an “effective remedy before a national authority”. The EU Charter of Fundamental Rights, however, requires that the review be done by a tribunal, whereas Article 13 of the ECHR only requires a review before a national authority.¹⁶⁴

The second paragraph of Article 47 of the EU Charter of Fundamental Rights is based on Article 6 of the ECHR, which guarantees the right to a fair hearing but only in the determination of civil rights or obligations, or any criminal charge. This has precluded the application of Article 6 of the ECHR to immigration and asylum cases since they do not involve the determination of a civil right or obligation.¹⁶⁵ Article 47 of the EU Charter of Fundamental Rights makes no such distinction.

Under the ECHR, Article 6 of the ECHR guarantees the right to a fair hearing before a court, but this provision has been held to be inapplicable to asylum and immigration cases (see Section 4.5). It is Article 13 that is applicable to such cases and provides the right to an effective remedy before a national authority. Other convention rights, including Article 3 of the ECHR, may be read in conjunction with Article 13. Furthermore, the right to private and family life, as guaranteed by Article 8 of the ECHR, has also been held to include inherent procedural safeguards (briefly described in Section 4.4). In addition, the prohibition of arbitrariness inherent in all convention rights is often relied on to provide important safeguards in asylum or immigration cases.¹⁶⁶ For remedies against unlawful or arbitrary deprivation of liberty, see Chapter 6 (Section 6.10).

¹⁶⁴ Explanations relating to the EU Charter of Fundamental Rights, No. 2007/C 303/02.

¹⁶⁵ ECtHR, *Maaouia v. France* (dec.), No. 39652/98, 12 January 1999, paras. 38-39.

¹⁶⁶ ECtHR, *C.G. and Others v. Bulgaria*, No. 1365/07, 24 April 2008, para. 49.

The ECtHR has laid down general principles as to what constitutes an effective remedy in cases concerning the expulsion of asylum seekers. Applicants must have a remedy at national level capable of addressing the substance of any “arguable complaint” under the ECHR and, if necessary, granting appropriate relief.¹⁶⁷ As a remedy must be “effective” in practice as well as in law, the ECtHR may need to consider, among other elements, whether an asylum seeker was afforded sufficient time to file an appeal.

Example: In *Abdolkhani and Karimnia v. Turkey*,¹⁶⁸ both the administrative and judicial authorities remained passive regarding the applicants’ serious allegations of a risk of ill-treatment if they were returned to Iraq or Iran. Moreover, the national authorities failed to consider their requests for temporary asylum, to notify them of the reasons thereof and to authorise them to have access to legal assistance, despite their explicit request for a lawyer while in police detention. These failures by the national authorities prevented the applicants from raising their allegations under Article 3 of the ECHR within the relevant legislative framework. Furthermore, the applicants could not apply to the authorities for annulment of the decision to deport them as they had not been served with the deportation orders or notified of the reasons for their removal. Judicial review in deportation cases in Turkey could not be regarded as an effective remedy since an application for annulment of a deportation order did not have suspensive effect unless the administrative court specifically ordered a stay of execution. The applicants had therefore not been provided with an effective and accessible remedy in relation to their complaints based on Article 3 of the ECHR.

Example: Constitutional courts in Austria and the Czech Republic have found deadlines that were two and seven days too short.¹⁶⁹ Conversely, in *Diouf*¹⁷⁰ the CJEU found that a 15-day time limit to appeal in an accelerated procedure “does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved”.

167 ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 288; ECtHR, *Kudla v. Poland* [GC], No. 30210/96, 26 October 2000, para. 157.

168 ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009, paras. 111-117.

169 Austria, Austrian Constitutional Court (*Österreichische Verfassungsgerichtshof*), decision G31/98, G79/98, G82/98, G108/98 of 24 June 1998; Czech Republic, Czech Constitutional Court (*Ústavní soud České republiky*) Decision No. 9/2010, Coll. which came into effect in January 2010.

170 CJEU, C-69/10, *Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, 28 July 2011, para. 67.

Other state action, which may hinder the effectiveness of guarantees, include failing to notify individuals of a decision or of their appeal rights, or hindering a detained asylum seeker's contact with the outside world. In some respects, there is a commonality between the requirements elaborated by the ECtHR and the procedural safeguards under the Asylum Procedures Directive.

Example: In *Čonka v. Belgium*,¹⁷¹ a case involving the collective expulsion of Roma asylum seekers under Article 4 of Protocol No. 4 to the Convention, administrative and practical barriers hindered the ability of the applicants to pursue their asylum claims in Belgium. In the first instance proceedings, the applicants had no access to their case file, could not consult the record of notes taken at the hearing or demand that their observations be put on record. The remedies available before the higher instance had no automatic suspensive effect. The Court concluded that there had been a violation of Article 13 in conjunction with Article 4 of Protocol No. 4 to the ECHR.

Even if a single remedy alone does not entirely satisfy the requirements of Article 13 of the ECHR, the aggregate of remedies provided for under domestic law may do so.¹⁷²

4.1.3. Appeals with automatic suspensive effect

Under EU law, Article 39 of the Asylum Procedures Directive provides the right to an effective remedy before a court or tribunal. This follows the wording of Article 47 of the EU Charter of Fundamental Rights. The directive requires EU Member States to define in their domestic laws whether applicants have the right to remain in the country pending the outcome of the appeal. In case of a non-automatic suspensive effect, the state must provide measures to ensure the right to an effective remedy. In practice, some EU Member States do not provide for an automatic right to stay pending the outcome either of applications considered manifestly unfounded or inadmissible, or of transfer decisions taken under the Dublin II Regulation (Council Regulation (EC) No. 343/2003).¹⁷³

171 ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002.

172 ECtHR, *Kudła v. Poland* [GC], No. 30210/96, 26 October 2000.

173 For an overview of state practices in the EU, see FRA (2012), pp. 41-45.

Under the ECHR, the Court has held that when an individual appeals against a refusal of his or her asylum claim, the appeal must have an automatic suspensive effect when the implementation of a return measure against him or her might have potentially irreversible effects contrary to Article 3.

Example: In *Gebremedhin [Gaberamadhien] v. France*,¹⁷⁴ the ECtHR considered that the applicant's allegations as to the risk of ill-treatment in Eritrea had been sufficiently credible to make his complaint under Article 3 of the ECHR an "arguable" one. The applicant could therefore rely on Article 13 taken in conjunction with Article 3. The latter provision required that foreign nationals have access to a remedy with suspensive effect, against a decision to remove him or her to a country where there was real reason to believe that he or she ran the risk of being subjected to ill-treatment contrary to Article 3. In the case of asylum seekers who claimed to run such a risk and who had already been granted leave to enter French territory, French law provided for a procedure that met some of these requirements. The procedure did not apply, however, to persons claiming such a risk who turned up at the border upon arrival at an airport. In order to lodge an asylum application, foreign nationals had to be on French territory. If they turned up at the border, they could not make such an application unless they were first given leave to enter the country. If they did not have the necessary papers to that effect, they had to apply for leave to enter on grounds of asylum. They were then held in a "waiting area" while the authorities examined whether their intended asylum application was "manifestly ill-founded". If the authorities deemed the application to be "manifestly ill-founded", they refused the person concerned leave to enter the country. He or she was then automatically liable to be removed without having had the opportunity to apply for asylum. While the individual in question could apply to the administrative courts to have the ministerial decision refusing leave to enter set aside, such an application had no suspensive effect and was not subject to any time limits. Admittedly, he or she could apply to the urgent applications judge, as the applicant had done without success. This remedy, however, did not have an automatic suspensive effect either, meaning the person could be removed before the judge had given a decision. Given the importance of Article 3 of the ECHR and the irreversible nature of the harm caused by torture or ill-treatment, it is a requirement under Article 13 that, where a state party has decided to remove a foreign national to a country

¹⁷⁴ ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007.

where there was real reason to believe that he or she ran a risk of torture or ill-treatment, the person concerned must have access to a remedy with automatic suspensive effect. Such an effect “in practice” was not sufficient. As the applicant had not had access to such a remedy while in the “waiting area”, Article 13 of the ECHR, read in conjunction with Article 3, had been breached.

Example: In *M.S.S. v. Belgium and Greece*,¹⁷⁵ the Court found that Greece had violated Article 13 of the ECHR in conjunction with Article 3 because of its authorities’ deficiencies in examining the applicant’s asylum request, and the risk he faced of being directly or indirectly returned to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

Example: In *Hirsi Jamaa and Others v. Italy*,¹⁷⁶ an Italian ship at sea had intercepted potential asylum seekers. The Italian authorities had led them to believe that they were being taken to Italy and had not informed them of the procedures to take in order to avoid being returned to Libya. The applicants had thus been unable to lodge their complaints under Article 3 of the ECHR or Article 4 of Protocol No. 4 with a competent authority, and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced. The Court concluded that there had been a violation of Article 13 of the ECHR taken in conjunction with Article 3 and of Article 4 of Protocol No. 4.

In a recent Grand Chamber case, the ECtHR considered whether a claim under Article 13 of the ECHR in conjunction with Article 8 also required the domestic remedy to have an automatic suspensive effect.

Example: In *De Souza Ribeiro v. France*,¹⁷⁷ the applicant, a Brazilian national, had resided in French Guiana (a French overseas territory) with his family since the age of seven. Following his administrative detention for failing to show a valid residence permit, the authorities ordered his removal. He was deported the next day, approximately 50 minutes after having lodged his appeal against the removal order. The Grand Chamber of the ECtHR considered that the haste with which the removal order was executed had the effect of rendering the

¹⁷⁵ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 293.

¹⁷⁶ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 197-207.

¹⁷⁷ ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, 13 December 2012.

available remedies ineffective in practice and therefore inaccessible. The applicant had not had access in practice to effective remedies in respect of his complaint under Article 8 of the Convention when he was about to be deported. The Court found a violation of Article 13 in conjunction with Article 8.

4.1.4. Accelerated asylum procedures

Under EU law, Article 23 (4) of the Asylum Procedures Directive lists the circumstances in which accelerated or priority procedures might be applied, such as when an application is considered unfounded because the applicant is from a safe country of origin. Typically, accelerated procedures include shorter deadlines in which to appeal, and lower procedural safeguards; an appeal may not have automatic suspensive effect such that the right to stay during the appeal procedure must specifically be requested and/or granted on a case by case basis. The Asylum Procedures Directive, including its provisions on accelerated procedures, was as at December 2012 still being amended.

Under the ECHR, the Court has held that there was a need for independent and rigorous scrutiny of every asylum claim. Where this was not the case, the Court has found breaches of Article 13 of the ECHR taken in conjunction with Article 3.

Example: In *I.M. v. France*,¹⁷⁸ the applicant, who claimed to be at risk of ill-treatment if deported to Sudan, attempted to apply for asylum in France. The authorities had taken the view that his asylum application had been based on “deliberate fraud” or constituted “abuse of the asylum procedure” because it had been submitted after the issuance of his removal order. The first and only examination of his asylum application was therefore automatically processed under an accelerated procedure, which lacked sufficient safeguards. For instance, the time limit for lodging the application had been reduced from 21 to five days. This very short application period imposed particular constraints as the applicant had been expected to submit a comprehensive application in French, with supporting documents, meeting the same application requirements as those submitted under the normal procedure by persons not in detention. While the applicant could have applied to the administrative court to challenge his deportation order, he only had 48 hours to do so as opposed to the two months under the ordinary procedure. The

¹⁷⁸ ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, paras. 136-160.

applicant's asylum application was thus rejected without the domestic system, as a whole, offering him a remedy that was effective in practice. Therefore, he had not been able to assert his complaint under Article 3 of the ECHR. The Court found that there had been a violation of Article 13 combined with Article 3 of the ECHR.

4.2. Dublin procedures

The Dublin II Regulation,¹⁷⁹ applied by 31 European states, determines which state is responsible for examining an asylum application. Based on the criteria established by the regulation, if another state is responsible for examining the application, the regulation sets forth the transfer procedure to this state.

Under EU law, the Dublin II Regulation provides time frames for compliance and stipulates the need for the state to gather certain evidence before transferring an applicant, the need to ensure confidentiality of personal information, as well as the need to inform the individual of the Dublin transfer and its basis. There are evidential requirements in terms of administrative cooperation (Article 21 of the Dublin II Regulation) and safeguards in terms of cessation of responsibility.

Example: In *Kastrati*,¹⁸⁰ the CJEU held that the regulation no longer applies when an asylum application is withdrawn before the EU Member State that is responsible for examining the application and that has agreed to take charge of the applicant. It is for the Member State, in whose territory the application was lodged, to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination, recording that information on the applicant's file.

The Dublin II Regulation also contains procedural safeguards for certain vulnerable individuals. Article 6 of the regulation makes special provision for unaccompanied minors. A responsible state may request an EU Member State to examine an application in order to maintain family unity or where there are other humanitarian concerns (Article 15 "humanitarian clause"). Where serious humanitarian issues are concerned, an EU Member State may in some circumstances become responsible

¹⁷⁹ Council Regulation 2003/343/EC, 18 February 2003.

¹⁸⁰ CJEU, C-620/10, *Migrationsverket v. Nurije Kastrati and Others*, 3 May 2012, para. 49.

under Article 15 (2) of the regulation for reviewing an asylum application when one person is dependent on another person and provided that family ties exist between the two.

Example: The case of *K*,¹⁸¹ concerned the proposed transfer from Austria to Poland of a woman whose daughter-in-law had a new-born baby. The daughter-in-law was furthermore suffering from serious illness and a handicap, following a traumatic experience in a third country. If what happened to her were to become known, the daughter-in-law would likely be at risk of violent treatment by male family members on account of cultural traditions seeking to re-establish family honour. In these circumstances the CJEU held that where the conditions stated in Article 15 (2) are satisfied, the Member State which, on the humanitarian grounds referred to in that provision, is obliged to take charge of an asylum seeker becomes the Member State responsible for the examination of the application for asylum. The proposed amendments to the Dublin II Regulation place a greater focus on the safety of vulnerable groups.

An EU Member State, even where it is not responsible under the Dublin II Regulation criteria, may nevertheless decide to examine an application (the “sovereignty clause” of Article 3 (2) of the Dublin II Regulation). Article 3 (2) can be used to safeguard third-country nationals against a breach of core rights enshrined in the EU Charter of Fundamental Rights. If a transfer to an EU Member State deemed responsible under the Dublin criteria would expose the applicant to a risk of ill-treatment prohibited by Article 4 of the charter, the state which intends to transfer the applicant must continue examining the other regulation criteria and, within a reasonable length of time, determine whether the criteria enable another Member State to be identified as responsible for the examination of the asylum application. This may lead the first mentioned state, if necessary, to make use of the sovereignty clause in order to eliminate the risk of infringement of the applicant’s fundamental rights.

¹⁸¹ CJEU, Case C-245/11, *K v. the Bundesasylamt*, 6 November 2012.

Example: In the joint cases of *N.S. and M.E.*,¹⁸² the CJEU looked at whether Article 4 of the EU Charter of Fundamental Rights, which corresponds to Article 3 of the ECHR, would be breached if the individuals were transferred to Greece under the Dublin II Regulation. By the time the CJEU considered the cases, the ECtHR had already held that the reception and other conditions for asylum seekers in Greece breached Article 3 of the ECHR. The CJEU held that the Member States could not be “unaware” of the systemic deficiencies in the asylum procedure and reception conditions in Greece that create a real risk for asylum seekers to be subjected to inhuman or degrading treatment. It stressed that the Dublin II Regulation had to be implemented in conformity with Charter rights, which meant that the United Kingdom and Ireland were obliged to examine the asylum claims, despite the fact that the applicants had lodged their asylum claims in Greece.

Under the ECHR, it is not the role of the ECtHR to interpret the Dublin II Regulation. However, as shown by the Court’s case law, Articles 3 and 13 can also be applicable safeguards in the context of Dublin transfers.

Example: In *M.S.S. v. Belgium and Greece*,¹⁸³ the ECtHR found violations by both Greece and Belgium in respect of the applicant’s right to an effective remedy under Article 13 of the ECHR taken in conjunction with its Article 3. The Court concluded that due to Greece’s failure to apply the asylum legislation and the major structural deficiencies for access to the asylum procedure and remedies, there were no effective guarantees protecting the applicant from onward arbitrary removal to Afghanistan, where he risked ill-treatment. Regarding Belgium, the procedure for challenging a Dublin transfer to Greece did not meet the ECtHR case law requirements of close and rigorous scrutiny of a complaint in cases where expulsion to another country might expose an individual to treatment prohibited by Article 3.

¹⁸² CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011.

¹⁸³ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

4.3. Procedures relating to reception conditions of asylum seekers

Under EU law, within 15 days of lodging an asylum application, asylum seekers must be informed of the benefits to which they are entitled and any obligations they must comply with in relation to reception conditions. Information on the legal assistance or help available also needs to be provided. The individual should be able to understand the information provided.

Asylum applicants have the right to appeal against decisions of the authorities not to grant benefits (Article 21 of the Reception Conditions Directive (2003/9/EC)). In addition, national law must set down procedures relating to access to legal assistance and representation.

Failure to comply with obligations under the Reception Conditions Directive may either be actionable as a breach of EU law giving rise to *Francovich* damages (see the Introduction to this handbook), and/or as a breach of Article 3 of the ECHR.¹⁸⁴

Example: Both the ECtHR and the CJEU have held in *M.S.S.* and *N.S.*, respectively, that systemic flaws in the asylum procedure and reception conditions for asylum seekers in the responsible Member State resulted in inhuman and degrading treatment contrary to Article 3 of the ECHR or Article 4 of the EU Charter of Fundamental Rights.¹⁸⁵

4.4. Return procedures

Under EU law, the Return Directive (2008/115/EC) provides for certain safeguards on the issuance of return decisions (Articles 6, 12 and 13) and encourages the use of voluntary departures over forced removals (Article 7).

According to Article 12 of the directive, return decisions as well as re-entry ban decisions must be in writing in a language that the individual can understand or may reasonably be presumed to understand, including information on available legal remedies. To this end, EU Member States are obliged to publish information

¹⁸⁴ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

¹⁸⁵ *Ibid.*; CJEU, C-411/10 [2011], *N.S. v. Secretary of State for the Home Department*, 21 December 2011, para. 86.

sheets at least in the five most common languages for migrant groups specific to a Member State. Article 13 of the Return Directive provides that third-country nationals must be afforded the right to an appeal or review of a removal decision before a competent judicial or administrative authority or other competent independent body with the power to suspend removal temporarily while any such review is pending. The third-country national should have the possibility to obtain legal advice, representation and, if necessary, linguistic assistance – free of charge – in accordance with rules set down in national law.

Article 9 of the directive provides that removal decisions have to be postponed if they would breach the *non-refoulement* principle and where persons are pursuing a remedy with suspensive effect. Removal may, furthermore, be postponed due to reasons specific to the person, such as state of health, and for technical obstacles to removal. If removal is postponed, EU Member States need to provide written confirmation that the enforcement action is postponed (Article 14).

The Return Directive does not apply to third-country nationals who are family members of EU nationals who have moved to another EU Member State or of other EEA/Swiss nationals whose situation is regulated by the Free Movement Directive (2004/38/EC). The Free Movement Directive established procedural safeguards in the context of restrictions on entry and residence on the grounds of public policy, public security or public health. There must be access to judicial and, where appropriate, administrative procedures when such decisions are made (Articles 27, 28 and 31). Individuals must be given written notification of decisions and must be able to comprehend the content and the implications. The notification must specify procedural aspects concerning the lodging of appeals as well as time frames (Article 30). Turkish citizens enjoy comparable protection.

Under the ECHR, in addition to considerations relating to Article 13 of the ECHR, specific safeguards are set forth in Article 1 of Protocol No. 7 to the Convention that need to be respected in cases of expulsion of lawfully residing aliens. Furthermore, the ECtHR has held that Article 8 contains procedural safeguards to prevent arbitrary interference with the right to private and family life. This can be relevant to individuals who have been in a state for some time and may have developed private and family life there or who may be involved in court proceedings in that state. Defects in the procedural aspects of decision making under Article 8 may result in a breach of Article 8 (2) on the basis that the decision has not been in accordance with the law.

Example: *C.G. v. Bulgaria*¹⁸⁶ concerned a long-term resident who was removed for reasons of national security on the basis of a classified secret surveillance report. The ECtHR held that a non-transparent procedure such as that used in the applicant's case did not amount to a full and meaningful assessment required under Article 8 of the ECHR. Furthermore, the Bulgarian courts had refused to gather evidence to confirm or dispel the allegations against the applicant, and their decisions had been formalistic. As a result, the applicant's case had not been properly heard or reviewed, as required under paragraph 1 (b) of Article 1 of Protocol No. 7.

Example: In *Anayo* and *Saleck Bardi*,¹⁸⁷ both cases concerned the return of third-country nationals in which children were involved. The ECtHR found a breach of Article 8 of the ECHR in that there were defects in the decision-making process, such as a failure to consider the best interests of the child or lack of coordination between the authorities in determining such interests.

4.5. Legal assistance in asylum and return procedures

Access to legal assistance is a cornerstone of access to justice. Without access to justice, the rights of individuals cannot be effectively protected.¹⁸⁸ Legal support is particularly important in asylum and return proceedings where language barriers may make it difficult for the persons concerned to understand the often complex or rapidly implemented procedures.

Under the ECHR, the right of access to a court is derived from the right to a fair trial – a right which holds a prominent position in any democracy.¹⁸⁹ The right of access to a court, which is one aspect of Article 6 of the ECHR, has been held as inapplicable to asylum and immigration proceedings because the proceedings do not concern the determination of a civil right or obligation, or a criminal charge.¹⁹⁰ It does not follow, however, that the principles of 'access to court' the Court has

¹⁸⁶ ECtHR, *C.G. and Others v. Bulgaria*, No. 1365/07, 24 April 2008.

¹⁸⁷ ECtHR, *Anayo v. Germany*, No. 20578/07, 21 December 2010; ECtHR, *Saleck Bardi v. Spain*, No. 66167/09, 24 May 2011.

¹⁸⁸ For more information, see: FRA (2010b); FRA (2011c).

¹⁸⁹ ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979.

¹⁹⁰ ECtHR, *Maquouia v. France*, No. 39652/98, 5 October 2000, para. 38.

developed under Article 6 of the ECHR are irrelevant to Article 13. In terms of procedural guarantees, the requirements of Article 13 are less stringent than those of Article 6, but the very essence of a ‘remedy’ for the purposes of Article 13 is that it should involve an accessible procedure.

Example: In *G.R. v. the Netherlands*,¹⁹¹ the Court found a violation of Article 13 of the ECHR on the issue of the effective access to the administrative procedure for obtaining a residence permit. The Court noted that, although “available in law”, the administrative procedure for obtaining a residence permit and the exemption from paying the statutory charges were not “available in practice”, due to the disproportionate administrative charge relative to the actual income of the applicant’s family. The Court also underlined the formalistic attitude of the competent minister who did not fully examine the indigent state of the applicant. The ECtHR reiterated that the principles of ‘access to court’ developed under Article 6 were also relevant for Article 13. This overlap was therefore to be interpreted as requiring an accessible procedure.

In its case law, the ECtHR has referred to Council of Europe recommendations on legal aid to facilitate access to justice, in particular for the very poor.¹⁹²

Example: In *M.S.S. v. Belgium and Greece*,¹⁹³ the ECtHR held that the applicant lacked the practical means to pay a lawyer in Greece, where he had been returned; he had not received information concerning access to organisations offering legal advice and guidance. Compounded by the shortage of legal aid lawyers, this had rendered the Greek legal aid system as a whole ineffective in practice. The ECtHR concluded that there had been a violation of Article 13 of the ECHR taken in conjunction with Article 3.

Under EU law, the EU Charter of Fundamental Rights marks a staging post in the development of the right to legal aid and assistance under EU law. According to its Article 51, the Charter only applies when EU Member States implement EU law.

¹⁹¹ ECtHR, *G.R. v. the Netherlands*, No. 22251/07, 10 January 2012, paras. 49-50.

¹⁹² Council of Europe, Committee of Ministers (1981) Recommendation No. R (81)7 of the Committee of Ministers to member states on measures facilitating access to justice; ECtHR, *Siałkowska v. Poland*, No. 8932/05, 22 March 2007.

¹⁹³ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 319.

Article 47 of the Charter provides that “[e]veryone shall have the possibility of being advised, defended and represented [...]” and that “[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice [...]”.

The right to a fair hearing under EU law applies to asylum and immigration cases, which is not the case under the ECHR. The inclusion of legal aid in Article 47 of the EU Charter of Fundamental Rights reflects its historical and constitutional significance. The Explanatory Report on Article 47 in regard to its legal aid provision mentions Strasbourg case law – specifically the *Airey* case.¹⁹⁴ Legal aid in asylum and immigration cases is an essential part of the need for an effective remedy and the need for a fair hearing.

4.5.1. Legal assistance in asylum procedures

Under EU law, Article 15 (1) of the Asylum Procedures Directive entitles applicants to consult with a legal adviser on matters relating to their application. In the case of a negative decision by the administration, EU Member States shall ensure that free legal assistance and/or representation be granted to applicants in order to lodge an appeal. Member States may require that certain conditions be fulfilled, such as monetary matters or time limits. The Asylum Procedures Directive also allows Member States to provide legal assistance only to those appeals that are likely to succeed.

Article 16 of the directive also makes provision for the scope of legal assistance and representation, including allowing the legal adviser to access the applicant’s file information, as well as practical access to the client if held or detained in closed areas, such as detention facilities and transit zones. There is provision for EU Member States to set down rules on legal adviser attendance at the personal asylum interview.

The Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures¹⁹⁵ also recognise the right to legal aid and assistance.

¹⁹⁴ ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979.

¹⁹⁵ Council of Europe, Committee of Ministers (2009), *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009.

4.5.2. Legal assistance in return decisions

Under EU law, the provision of legal assistance is not limited to asylum decisions but also includes return decisions. This is notable as it allows individuals to seek judicial review of a removal decision. Some individuals, who are recipients of a return decision made under the Return Directive, may never have had an appeal or any judicial consideration of their claims. Some of these individuals may have formed families during their time in the EU Member State and will require access to a court to determine the compatibility of the return decision with human rights. As such, Article 13 of the Return Directive states that EU Member States ‘shall ensure that the necessary legal assistance and/or representation is granted on request free of charge’ in accordance with relevant national legislation and within the terms of Article 15 (3) (6) of the Asylum Procedures Directive.

These provisions note that legal aid should be made available on request. This entails individuals being informed about the provision of legal aid in clear and simple language that they understand, as otherwise the rules would be rendered meaningless and hamper effective access to justice.

The Council of Europe Twenty Guidelines on Forced Return (Guideline 9) also foresees legal assistance.¹⁹⁶

4.5.3. Legal assistance to challenge asylum support decisions

Under EU law, a decision to refuse asylum support taken under the Reception Conditions Directive may be challenged by the affected individual. The directive, however, lays down a broad rule that appeals against negative decisions must be laid down in national law (Article 21), including the procedures for access to legal assistance in such cases.

Asylum seekers who are refused asylum support or welfare benefits should be able to challenge such decisions, as they may otherwise be forced into destitution. This could then constitute a separate breach of their rights under articles such as Article 3 of the ECHR or Article 4 of the EU Charter of Fundamental Rights.¹⁹⁷

¹⁹⁶ Council of Europe, Committee of Ministers (2005).

¹⁹⁷ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011; CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011.

Key points

- EU law requires fair and efficient procedures in the context of both examining an asylum claim and examining returns (see Sections 4.1.1 and 4.4).
- Article 13 of the ECHR requires an effective remedy before a national authority, in respect of any arguable complaint under any provision of the ECHR or its protocols. In particular, it requires independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 2 or Article 3 of the ECHR in the event of an individual's expulsion or extradition (see Section 4.1.2).
- Article 13 of the ECHR requires a remedy with automatic suspensive effect when the implementation of a return measure against him or her might have potentially irreversible effects (see Section 4.1.3).
- Article 47 of the EU Charter of Fundamental Rights requires a judicial remedy and contains more extensive fairness safeguards than Article 13 of the ECHR (see Section 4.1.2).
- There are procedural safeguards under EU law in respect of the entitlement to and withdrawal of support and benefits for asylum seekers (see Section 4.3).
- Lack of legal assistance may raise an issue under Article 13 of the ECHR as well as Article 47 of the EU Charter of Fundamental Rights (see Section 4.5).

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.

5

Private and family life and the right to marry

EU	Issues covered	CoE
EU Charter of Fundamental Rights, Article 9 (right to marry and right to found a family) Council Resolution 97/382/01 on measures to be adopted on the combating of marriages of convenience	The right to marry and to found a family	ECHR, Article 12 (right to marry) ECtHR, <i>O'Donoghue v. the United Kingdom</i>, 2010 (obstacles to the right to marry)
EU Charter of Fundamental Rights, Article 7 (respect for private and family life) Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC) ECJ, C-127/08, <i>Metock</i>, 2008 (previous lawful stay of third-country national family member in EU Member States is not required) ECJ, C-60/00, <i>Mary Carpenter</i>, 2002 (third-country national spouse can remain with the children in spouse's home country when husband moves to another EU Member State) ECJ, C-59/85, <i>State of the Netherlands</i>, 1986 (registered partners) CJEU, C-34/09, <i>Ruiz Zambrano</i>, 2011 (children at risk of losing the benefits of EU citizenship) CJEU, C-256/11, <i>Murat Dereci</i>, 2011 (spouse and children)	Family regularisation	ECHR, Article 8 (right to respect for private and family life) ECtHR, <i>Rodrigues da Silva v. the Netherlands</i>, 2006 (best interest of the child) ECtHR, <i>Darren Omoregie and Others v. Norway</i>, 2008 (strong ties of Nigerian spouse with his country of origin) ECtHR, <i>Nuñez v. Norway</i>, 2011 (family life in Norway)

EU	Issues covered	CoE
Family members of third-country national sponsors: Family Reunification Directive (2003/86/EC) (the family member has normally to apply from outside the country)		
Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC) CJEU, <i>Chakroun</i> , 2010 (it does not matter whether the family was created before or after the third-country national arrived)	Family reunification	ESC, Article 19 (6) (family reunion of foreign workers) ECtHR, <i>Gül v. Switzerland</i> , 1996 (left behind children) ECtHR, <i>Sen v. the Netherlands</i> , 2001 (left behind children) ECtHR, <i>Osman v. Denmark</i> , 2011 (teenager re-joins family in Denmark)
Family members of third-country national sponsors: Family Reunification Directive (2003/86/EC)		
EU Charter of Fundamental Rights, Article 7 (respect for private and family life)	Protection from expulsion	ECHR, Article 8 (right to respect for private and family life)
Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC), Article 13	Relationship breakdown cases	ECtHR, <i>Berrehab v. the Netherlands</i> , 1988 (maintaining contact with children) ECtHR, <i>Sorabjee v. the United Kingdom</i> , 1995 (divorce)
Family members of third-country national sponsors: Family Reunification Directive (2003/86/EC), Article 15		
Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC), Articles 27-33	Criminal conviction cases	ECtHR, <i>Boultif v. Switzerland</i> , 2001 (criteria to assess proportionality of expulsion) ECtHR, <i>Üner v. the Netherlands</i> , 2006 (criteria to assess barriers deriving from the right to family and private life)
Family members of third-country national sponsors: Family Reunification Directive (2003/86/EC), Article 6 (2)		

Introduction

This chapter will look at the right to respect for private and family life as well as the right to marry and to found a family. It also examines questions relating to family regularisation and reunification as well as safeguards to preserve family unity.

Under the ECHR, the right to respect for “private and family life” is guaranteed by Article 8 of the ECHR. The notion of ‘private life’ is wide and an exhaustive definition is

not easily found. It covers the physical and psychological integrity of a person, a right to personal development and the right to establish and develop relationships with other human beings and the outside world.¹⁹⁸ Aside from possible ‘family life’, the expulsion of a settled migrant might constitute an interference with his or her right to respect for ‘private life’, which may or may not be justified, depending on the facts of the case. Whether it is appropriate for the Court to focus on the ‘family life’ rather than the ‘private life’ aspect will depend on the circumstances of a particular case.¹⁹⁹

Example: In *Omojudi v. the United Kingdom*,²⁰⁰ the Court reaffirmed that Article 8 of the ECHR also protected the right to establish and develop relationships with other human beings and the outside world, and could also embrace aspects of an individual’s social identity. It must be accepted that the totality of social ties between settled migrants and the community in which they were living constituted part of the concept of ‘private life’ within the meaning of Article 8, regardless of the existence of a ‘family life’.

Under EU law, the EU Charter of Fundamental Rights enshrines the right to marry and to found a family (Article 9) and the right to respect for family life (Article 7) and also protects the rights of the child (Article 24), particularly the right to maintain contact with both parents (Article 24 (3)).

In relation to migration, the first measure on the free movement of persons adopted over 40 years ago (Regulation 1612/68) included the express right for a European migrant worker to be accompanied not only by his or her spouse and their children under the age of 21 years but also by dependent children over that age and dependent parents and grandparents. Registered partners are now included, and the admission and authorisation of other family members must be facilitated. The nationality of family members was – and is – immaterial to this right. Since the majority of national immigration policies seek to restrict the movement of third-country nationals, much of the EU litigation has involved the rights of third-country national family members rather than the EEA nationals themselves.

The question for the CJEU has been whether restrictions on family migration may act as a discouragement to EU citizens to exercise their rights to free movement

198 ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002, para. 61.

199 ECtHR, *A. v. the United Kingdom*, No. 8000/08, 20 September 2011; ECtHR, *Rachwalski and Ferenc v. Poland* [GC], No. 46410/99, 18 October 2006.

200 ECtHR, *Omojudi v. the United Kingdom*, No. 1820/08, 24 November 2009, para. 37.

or will impede the enjoyment of EU citizenship. Paradoxically, in many EU Member States EU nationals exercising free movement rights enjoy far greater rights to family reunification than the states' own nationals do. Family reunification for EU nationals who have not made use of free movement rights is regulated by national law, which remains more restrictive in some EU Member States.

There are also special provisions for the family members of Turkish citizens under Article 7 of Decision No. 1/80 of the Ankara Agreement. The adoption at EU level of the Long-Term Residents Directive (2003/109/EC) and the Family Reunification Directive (2003/86/EC concerning family members of third-country national sponsors – meaning the family member in the EU who requests family reunification) has expanded EU competence in this field.

Finally, refugees have long been accorded special family reunion privileges in European states, based on the impossibility of returning to their country of origin to continue their family life. In this sense, special provisions for refugees are contained in Chapter V of the Family Reunification Directive.

5.1. The right to marry and to found a family

The right to marry is enshrined in Article 12 of the ECHR and in EU law in Article 9 of the EU Charter of Fundamental Rights. It concerns the right to form a marital relationship and a family. This is quite distinct from the right to respect for family life, which relates to families seeking immigration authorisation on the basis of an existing family relationship.

European states have put in place restrictions on the right to marry, since marriages of convenience are seen as a device for circumventing immigration controls.

A **sham marriage** (or marriage of convenience) is a marriage entered into purely for immigration purposes “with the sole aim of circumventing the rules on entry and residence”²⁰¹ and without any intention to cohabit or share the other social characteristics of marriage. Knowingly facilitating a sham marriage is a criminal offence in many jurisdictions.

201 Art. 1 of Council Resolution 97/C382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience.

Forced marriages occur when one (or both) of the spouses is an unwilling party to the marriage. Coercing someone into a forced marriage is now a criminal offence in many jurisdictions. In practice, it may be difficult to distinguish a forced marriage from a marriage of convenience, particularly in the case of ‘arranged marriages’, a term that can cover a variety of situations from something close to a forced marriage to a system whereby the spouse freely and voluntarily selects a partner from a short list of candidates proposed by their families after careful research as to their suitability. Little exists in terms of European legislative measures or case law linked to forced marriages.²⁰²

Example: In the *Quila* case,²⁰³ the United Kingdom Supreme Court was asked whether the ban on the entry for settlement of foreign spouses or civil partners contained in paragraph 277 of the Immigration Rules – under which the minimum age of both parties to enter and settle had been raised from 18 to 21 years – was a lawful way of deterring or preventing forced marriages. Relying on ECtHR case law, the Supreme Court struck down the provision, finding that the refusal to grant a marriage visa amounted to a violation of Article 8 of the ECHR. In this case, there was no suspicion of a forced marriage and, therefore, the Supreme Court found that there was no logical connection between such a blanket rule that permitted no exceptions and the incidence of forced marriage.

Under EU law, the perceived incidence of sham marriages for immigration purposes led to the adoption at EU level of Council Resolution 97/C382/01. This resolution reflected the European states’ concern for marriages of convenience, and listed factors which might provide grounds for believing that a marriage was one of convenience.

Legislation on the free movement of persons is generally silent about the possibilities of immigration authorisation for a fiancé(e), preferring to focus on family regularisation or reunification. Only the principle of non-discrimination would apply to the situation of those seeking admission for future spouses from abroad.

Under the ECHR, it follows from ECtHR case law that a state may properly impose reasonable conditions on the right of a third-country national to marry in order to

²⁰² Council of Europe, Parliamentary Assembly, Resolution 1468 (2005) on Forced Marriages and Child Marriages, 5 October 2005.

²⁰³ The United Kingdom Supreme Court, *R (Quila and another) v. Secretary of State for the Home Department* [2011] UKSC 45, 12 October 2011.

ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it. Consequently, a state is not necessarily in violation of Article 12 of the ECHR if they subject marriages involving foreign nationals to scrutiny in order to establish whether they are marriages of convenience. This may include requiring foreign nationals to notify the authorities of an intended marriage and, if necessary, asking them to submit information relevant to their immigration status and to the genuineness of the marriage. In a recent case, however, the ECtHR found that, although not inherently objectionable, the requirement for persons subject to immigration control to submit an application for a certificate of approval before being permitted to marry in the United Kingdom gave rise to a number of grave concerns.

Example: The case of *O'Donoghue v. the United Kingdom*²⁰⁴ concerned impediments to contracting a marriage that were imposed by the United Kingdom. Persons subject to immigration control were required to obtain the immigration authorities' permission before being able to contract a marriage with civil validity, unless the persons opted to marry in a Church of England ceremony. The ECtHR found that the scheme was not rationally connected to the stated aim of reducing the incidence of sham marriages as, when deciding whether to issue the required certificate, the determinative test considered only the immigration status of the individual applicant and no enquiries were made as to the genuineness of the marriage. The Court found that the scheme violated Article 12 of the ECHR. It was also held to be discriminatory on the ground of religion as only marriages celebrated in the Church of England were exempt from the requirement to obtain a certificate of approval. The Court also found that the fees charged for such certificates were excessively high and did not provide waivers or fee reductions for needy persons.

Under the ECHR, complaints concerning the refusal to allow a fiancé(e) to enter a country for the purpose of getting married are relatively rare.²⁰⁵

²⁰⁴ ECtHR, *O'Donoghue and Others v. the United Kingdom*, No. 34848/07, 14 December 2010.

²⁰⁵ ECtHR, *Abdulaziz, Cabales, and Balkandali v. the United Kingdom*, Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985. This case initially concerned women (some of whom were not yet married) who found themselves in a disadvantageous position when seeking to bring their fiancés or spouses to the United Kingdom. By the time, the case came to be considered by the ECtHR, all the applicants were married and the case was considered as one governing the rights of spouses.

5.2. Family regularisation

Family regularisation describes situations where the resident sponsor wishes to regularise – as a family member – the situation of a family member who is already in the territory in either some other capacity or in an irregular situation.

Under EU law, the rules set out in the Free Movement Directive (2004/38/EC) apply to third-country nationals who are the family members of EEA nationals, albeit in the case of EU citizens, the directive only applies if free movement rights have been exercised by the individual concerned. For EEA citizens, the qualifying family members are spouses, children under the age of 21, children aged over 21 years but dependent (Articles 2 (2)) and “other family members” (Article 3 (2)). The category of qualifying family members of Swiss nationals is somewhat more restrictive.²⁰⁶ The CJEU has provided clarification concerning “other family members”.

Example: In *Rahman*,²⁰⁷ the CJEU clarified that Article 3 (2) of the Free Movement Directive not only makes it possible but also obliges EU Member States to confer a certain advantage on applications for entry and residence submitted by those other family members of an EU citizen who are dependent and can demonstrate that their dependence existed at the time they sought entry. In order to meet that obligation, EU Member States must ensure that their legislation contains measures that enable the persons concerned to have their application for entry and residence duly and extensively examined and to obtain, in the event of refusal, a reasoned denial, which they are entitled to have reviewed before a judicial authority.

Third-country national family members of EEA nationals (including EU citizens but only in so far as they have exercised free movement rights) are often in a privileged situation compared to third-country nationals who are family members of nationals of the country concerned, as their status is regulated purely by national law. The right of third-country national family members to enter and reside exists irrespective of when and how he or she entered the host country. It applies also to persons who entered in an irregular manner.

²⁰⁶ Pursuant to the Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons which was approved by Decision 2002/309/EC regulating the free movement of persons between the EU and the Swiss Confederation, family members include spouses, descendants who are under 21 years of age or who are dependants, and dependent relatives in the ascending line, if accommodation and maintenance are provided for (in the case of students, it covers only spouses and minor children).

²⁰⁷ CJEU, C-83/11, *Secretary of State for the Home Department v. Rahman and Others*, 5 September 2012.

Example: The case of *Metock and Others*²⁰⁸ concerned the third-country national spouses of non-Irish EU citizen residents in Ireland. The Irish government argued that, in order to benefit from the Free Movement Directive, the third-country national spouse had to have previously been lawfully resident in another EU Member State, and that the right of entry and residence should not be granted to those who entered the host Member State before becoming spouses of EU citizens. The Court held that EU Member States could not make the right to live together under the Free Movement Directive conditional on matters such as when and where the marriage had taken place or on the fact that the third-country national had previously been lawfully resident in another EU Member State.

Example: In the case of *MRAX*,²⁰⁹ the ECJ found that it would be unlawful to refuse residence when third-country nationals married to EU citizens had entered the country unlawfully after their visa had expired.

Over time, the CJEU has extended the scope of application of the rights and freedoms deriving from the EU treaties to EU nationals, thus granting, under certain conditions, derived rights to their third-country national family members.

Example: The case of *Carpenter*²¹⁰ concerned a third-country national wife of a national of the United Kingdom whose business consisted of providing services, for remuneration, in other Member States. It was argued successfully that, if his wife was not permitted to remain with him in the United Kingdom and to look after his children while he was away, he would be restricted in the exercise of his freedom to provide services across the EU. In this case, the Court used the freedom to provide services recognised by Article 56 of the TFEU to acknowledge family rights to a Union citizen who had never lived abroad but who pursued cross-border economic activity. The ECJ also referred to the fundamental right to respect for family life as enshrined in Article 8 of the ECHR.

208 ECJ, C-127/08 [2008] ECR I-06241, *Metock and Others v. Minister for Equality, Justice and Law Reform*, 25 July 2008, paras. 53-54, 58. *Metock* was followed by the Swiss Federal Supreme Court in its decision BGE 136 II 5, 29 September 2009.

209 ECJ, C-459/99 [2002] ECR I-06591, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State*, 25 July 2002, para. 80.

210 ECJ, C-60/00 [2002] ECR I-06279, *Mary Carpenter v. Secretary of State for the Home Department*, 11 July 2002, paras. 36-46; ECJ, C-370/90 [1992] ECR I-04235, *The Queen v. IAT and Surinder Singh, ex parte Secretary of State for the Home Department*, 17 July 1992, concerning the possibility to claim such rights for EU nationals returning to their home country.

The CJEU has recognised that, under certain circumstances, residence rights may be linked directly to the status of Union citizens under Article 20 of the TFEU, applying it in cases where the EU national never exercised free movement rights.

Example: In *Ruiz Zambrano*,²¹¹ the CJEU found that the third-country nationals, who are parents of dependent minor children of Belgian nationality, had to be granted a Belgian residence and work permit in order to live with and support their children. Article 3 (1) of the Free Movement Directive was held not to be applicable because the children, who were Union citizens, had never moved to or resided in a Member State other than their country of national origin. The Court directly referred to their status as Union citizens under Article 20 of the TFEU in order to grant their third-country national parents a permit to work and reside in Belgium. A refusal to do so, the Court pointed out, would “deprive the children of the genuine enjoyment of the substance of the rights attaching to the status of Union citizens” in so far as they would have to leave the territory of the European Union in order to accompany their parents.

This ruling, however, related to the specific circumstances of the case and does not apply in all circumstances.

Example: In *McCarthy*,²¹² two months after *Ruiz Zambrano*, the CJEU ruled on a case concerning a dual British/Irish national. Mrs McCarthy, who was born in the United Kingdom and had always lived there, applied as an Irish citizen for a right of residence in the United Kingdom for her and her third-country national spouse. The permit was refused on the ground that she was not a “qualified person”, such as a worker or a self-employed or self-sufficient person. In this case, the Court affirmed that the Free Movement Directive was not applicable as Mrs McCarthy had never exercised her free movement rights, clarifying that the fact of being an EU citizen who is a national of more than one Member State is not sufficient in itself to conclude that she had made use of her right to freedom of movement. The CJEU also did not find that Articles 20 and 21 of the TFEU would entitle her to receive a residence right in the United Kingdom for her husband as the refusal would not deprive her of the genuine enjoyment of the substance of the rights associated with her

211 CJEU, C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011; ECJ, C-200/02, [2004] ECR I-09925, *Zhu and Chen v. Secretary of State for the Home Department*, 19 October 2004, paras. 42-47.

212 CJEU, C-434/09, *McCarthy v. Secretary of State for the Home Department*, 5 May 2011.

status as an EU citizen, nor would it impede the exercise of her right to move and reside freely within the territory of the EU Member States.

Example: In *Dereci*,²¹³ shortly after the decision in *Ruiz Zambrano*, the CJEU was given the opportunity to pronounce itself on whether a third-country national is allowed to reside in the EU Member State territory in which his spouse and children – all EU citizens – are resident, even though they have never exercised their rights to free movement and are not dependent on the third-country national for their subsistence. The CJEU stated that Member States can refuse a residence permit to a third-country national unless such refusal would, for the EU citizen concerned, lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his or her status as an EU citizen, which is a matter for the referring court to verify. To guide such assessment, the CJEU pointed out that “the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted”.

Example: In *Iida v. Ulm*,²¹⁴ a Japanese citizen moved to Germany with his German wife and under-age daughter. His wife and daughter later moved to Austria, while the applicant remained in Germany. Mr Iida and his wife were permanently separated since 2008, although not divorced. In 2008, Mr Iida applied for a residence card of a family member of a Union citizen, which was refused by the German authorities. In these circumstances, the CJEU was asked to ascertain whether a third-country national can be allowed to reside in the state of origin of his family members, even though they had moved from the Member State of origin and had been residing predominantly in another EU Member State. The CJEU noted that a third-country national family member of an EU citizen who has exercised free movement rights can only benefit from Directive 2004/38 if he installs himself in the host Member State in which his EU family member resides. The CJEU also noted that Mr Iida’s daughter cannot claim residence rights for her father, as Article 2 (2) (d) of the directive only

213 CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011, para. 68.

214 CJEU, C-40/11, *Iida v. Stadt Ulm (City of Ulm)*, 8 November 2012.

applies to direct relatives in the ascending line who are dependent on the child and not to situations where a child is dependent on the parent.

The CJEU also looked at the case from the perspective of Articles 20 and 21 of the TFEU. However, in the present case, the Court excluded a denial of Mr Lida's spouse and daughter genuine enjoyment of the substance of the rights associated to their status of Union citizens. In so concluding, the CJEU took into consideration the fact that the applicant was seeking a right of residence in a Member State other than that in which his daughter and spouse were residing, as well as the fact that Mr Lida was in principle eligible for being granted an extension of his right of residence under national law, as well as the status of long-term resident within the meaning of Directive 2003/109/EC.

Article 2 (2) of the Free Movement Directive includes "registered partners" among the category of family members, provided this is consistent with the national law of the host EU Member State. In certain circumstances, unregistered partners may also be granted the right to join a citizen or settled migrant.

Example: In *State of the Netherlands v. Reed*,²¹⁵ the ECJ ruled that as Dutch law permitted the stable partners of Dutch citizens to reside with them in the Netherlands, the same advantage must be given to Ms Reed, who was in a stable relationship with a worker from the United Kingdom exercising treaty rights in the Netherlands. Permission for the unmarried companion to reside, the Court held, could assist integration into the host state and thus contribute to the achievement of the free movement of workers. Its denial amounted to discrimination.

The Family Reunification Directive regulates the situation of the spouse and unmarried minor children of eligible third-country national sponsors. Article 5 (3) of the directive requires that a family reunification application be submitted and examined while the family member is still outside the EU Member State territory where the sponsor resides. Member States can derogate from this provision. Family members of EEA nationals, however, cannot be made subject to such a requirement.²¹⁶

²¹⁵ ECJ, C-59/85 [1986] ECR I-01283, *State of Netherlands v. Ann Florence Reed*, 17 April 1986, paras. 28-30.

²¹⁶ ECJ, C-459/99 [2002] ECR I-6591, *MRAX*, 25 July 2002; ECJ, C-503/03 [2006] ECR I-1097, *Commission v. Spain*, 31 January 2006.

Under the ECHR, Council of Europe Member States have the right to control the entry, residence and expulsion of aliens. Article 8 of the ECHR nevertheless requires Member States to respect family life and any interference with it must be justified (see Section 5.4.2 for a list of criteria that may be relevant in the examination of such cases). A considerable number of cases have been brought before the ECtHR, raising issues relating to the refusal to admit or regularise the spouses or other family members of Member States' own citizens or settled migrants. One of the key questions in deciding whether the Member State's refusal was justified is whether there are obstacles to conducting family life abroad. This may involve the citizen leaving his or her own state, but if this is assessed as not being unreasonable, the ECtHR will normally consider the Member State's decision proportionate.²¹⁷ The Court's case law in this area is closely tied to the particular features and facts of each case (also see Section 5.4 for further examples).

Example: In *Darren Omoregie and Others v. Norway*,²¹⁸ the Court found that the Norwegian wife of a Nigerian should not have had an expectation that her husband would be allowed to live with her and their child in Norway despite the fact that they had married while the husband was lawfully resident in the country. The ECtHR took particularly into account the ties that the husband had to his country of origin.

Example: In the case of *Nuñez v. Norway*,²¹⁹ the applicant entered Norway with illegal documentation after having previously committed a criminal offence there under a different name. The applicant then married a Norwegian national and had two daughters. The Court found that Norway would violate Article 8 if it expelled the applicant.

The refusal to regularise the situation of a foreign spouse following the breakdown of a marriage has been upheld by the Court, even if this may lead to the *de facto* exile of child family members who are citizens of the host state (also see Section 5.4.1).

²¹⁷ ECtHR, *Darren Omoregie and Others v. Norway*, No. 265/07, 31 July 2008, para. 68; ECtHR, *Baj Sultanov v. Austria*, No. 54131/10, 12 June 2012, para. 91; ECtHR, *Onur v. the United Kingdom*, No. 27319/07, 17 February 2009, paras. 60-61.

²¹⁸ ECtHR, *Darren Omoregie and Others v. Norway*, No. 265/07, 31 July 2008.

²¹⁹ ECtHR, *Nunez v. Norway*, No. 55597/09, 28 June 2011.

Example: In *Sorabjee v. the United Kingdom*,²²⁰ the former European Commission of Human Rights declared the applicant's Article 8 complaint, concerning the deportation of her mother to Kenya, inadmissible. It found that since the applicant was three years old, she was of an age at which she could move with her mother and be expected to adapt to the change in environment. Her British citizenship was irrelevant. This approach can be contrasted with the CJEU decision in *Ruiz Zambrano* (see the example above in this Section).

Where the national courts have considered, however, that a child should remain in the state of residence, the ECtHR may be reluctant to condone the separation of the family proposed by the immigration authorities.

Example: In *Rodrigues da Silva and Hoogkamer v. the Netherlands*,²²¹ the Court found that, where the domestic courts had expressly ruled that it was in the best interests of the child to remain in the Netherlands with her Dutch father, it was disproportionate to refuse to regularise the situation of her Brazilian mother with whom she had regular contact.

There are also situations that there may be an indirect interference with the right to respect for family life, even if there is not an outright refusal to authorise a stay.

Example: The case of *G.R. v. the Netherlands*²²² looked at the interference caused by charging excessively high fees for the regularisation of the immigration situation of a foreign spouse. The Court decided to consider the matter under Article 13 of the ECHR because the complaint related to the applicant's inability to challenge the refusal of his residence permit since his application was rejected purely on the basis that he had failed to pay the necessary fees.²²³

220 European Commission of Human Rights, *Sorabjee v. the United Kingdom* (dec.), No. 23938/94, 23 October 1995; European Commission of Human Rights, *Jaramillo v. the United Kingdom* (dec.), No. 24865/94, 23 October 1995.

221 ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006.

222 ECtHR, *G.R. v. the Netherlands*, No. 22251/07, 10 January 2012.

223 ECtHR, *Anakomba Yula v. Belgium*, No. 45413/07, 10 March 2009.

5.3. Family reunification

Family reunification describes situations where the person who is resident in an EU or Council of Europe member state wishes to be joined by family members left behind when he or she migrated.

Under EU law, the Free Movement Directive's provisions relating to the family members of EEA nationals exercising treaty rights make no distinction between family regularisation and reunification – it is the relationship between the family member and the EU citizen sponsor which is determinative.

In relation to family members who are not part of the core family, the CJEU has recently held that EU Member States have a wide discretion in selecting the factors to be considered when examining the entry and residence applications of the persons envisaged in Article 3 (2) of the Free Movement Directive. The Member States are therefore entitled to lay down in their legislation particular requirements as to the nature and duration of dependence. The CJEU has, however, also specified that those requirements must be consistent with the normal meaning of the words relating to the dependence referred to in Article 3 (2) of the directive and cannot deprive that provision of its effectiveness.²²⁴

Under Article 4 of the Family Reunification Directive, spouses and minor unmarried children are entitled to join an eligible third-country national sponsor, but EU Member States can impose conditions relating to the resources that the sponsor must have at his or her disposal. The directive states that where a child is over 12 years old and arrives independently from the rest of his or her family, the Member State may, before authorising entry and residence under the directive, verify whether the child meets a condition for integration provided for by its national legislation existing on the date of implementation of the directive. The ECJ dismissed an action brought by the European Parliament alleging that these restrictive provisions of the directive violated fundamental rights. The ECJ did stress, however, that there are a set of requirements that Member States need to follow when implementing it.²²⁵

Article 4 (5) of the Family Reunification Directive allows EU Member States to require the sponsor and his or her spouse to be of a minimum age, which cannot be

224 CJEU, C-83/11, *Secretary of State for the Home Department v. Rahman and Others*, 5 September 2012, paras. 36-40.

225 ECJ, C-540/03, [2010] ECR I-05769, *European Parliament v. Council*, 27 June 2006, paras. 62-65.

set higher than 21 years of age, before the spouse can join him or her. A number of European states seem to be adopting legislation raising the age of marriage visas.

EU law does not draw a distinction between whether a family relationship was concluded before or after the sponsor took up residence in the territory.²²⁶

With regard to the family members of third-country nationals living in the EU, the EU Family Reunification Directive specifically states in Article 2 (d) that the directive applies irrespective of whether the family was formed before or after the migrant arrived in the home country, although legislation in some Member States does make a clear distinction. This distinction is also not relevant for qualifying third-country national family members of EEA citizens.

Example: In *Chakroun*,²²⁷ the CJEU addressed Dutch legislation that made a distinction between family “formation” and “reunification”, each of which has different residence regimes, including financial requirements. Such distinction depended exclusively on whether the relationship was entered into before or after the sponsor’s arrival to take up residence in the host state. Since the couple, in this specific case, had married two years after the sponsor’s arrival in the Netherlands, their situation was treated as family formation and not family reunification, despite the couple having been married for over 30 years at the time of the disputed decision.

The Court confirmed that the right of a qualifying sponsor under the Family Reunification Directive to be joined by qualifying third-country national family members existed whether or not the family relationship arose before or after the sponsor’s entry. The Court took into account the lack of such a distinction existing in EU law (Article 2 (d) and Recital 6 of the directive and Article 7 of the EU Charter of Fundamental Rights) and the necessity not to deprive the directive’s provisions of their effectiveness.

The Free Movement Directive and, before its adoption, Regulation 1612/68 make clear that the spouses of EEA nationals are entitled to reside with them, but EEA nationals exercising free movement rights are also to be given the same “social

²²⁶ ECJ, C-127/08 [2008] ECR I-06241, *Metock and Others v. Minister for Equality, Justice and Law Reform*, 25 July 2008.

²²⁷ CJEU, C-578/08, [2010] ECR I-01839, *Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010.

and tax advantages” as their host states’ own citizens, including the benefit of any immigration rules applicable to situations not covered by the express terms of the directive.²²⁸

Under the ECHR, the Court has considered a number of cases that concerned the refusal to grant visas for spouses, children or elderly relatives left behind and with whom the applicant had previously enjoyed family life abroad.

Regarding spouses who have been left behind, many of the same arguments that are raised by Council of Europe member states – and accepted by the ECtHR – in family regularisation cases are also applied to reunification cases. Spouses resident in Council of Europe member states, who have contracted marriages with partners who are abroad, may be expected to relocate abroad unless they can demonstrate that there are serious obstacles to this, particularly if they should have known about the restrictive immigration rules. Member states are not obliged to respect the choice of married couples to reside in a certain country, nor to accept the non-national spouses for settlement. If a member state, however, decides to enact legislation conferring the right to be joined by spouses to certain categories of immigrants, it must do so in a manner compatible with the principle of non-discrimination enshrined in Article 14 of the ECHR.²²⁹

A common feature of migration is leaving children behind: parents migrate to establish themselves in the host country but leave their children behind, often in the care of a grandparent or other relative, until they have legally, socially and economically established and secured themselves enough to be able to bring their children to join them. The ECtHR’s approach in this type of case largely depends on the specific circumstances of each particular case.

Example: In *Gül v. Switzerland*,²³⁰ a child had been left behind in Turkey with relatives when first her father and then her mother migrated to Switzerland. As a result of serious injuries in a fire, the mother was granted a humanitarian permit in Switzerland as the authorities at the time considered that her physical well-being would be jeopardised if she were to return to Turkey. Her husband was therefore offered a residence permit to stay with her. They applied to have their left-behind child join them, but, although both parents were lawfully

228 EFTA Court, *Clauder*, No. E-4/11, 26 July 2011, para. 44.

229 ECtHR, *Hode and Abdi v. the United Kingdom*, No. 22341/09, 6 November 2012, paragraphs 43-55.

230 ECtHR, *Gül v. Switzerland*, No. 23218/94, 19 February 1996.

resident in Switzerland, their status had not made them eligible for family reunion. Having considered the particular issues and circumstances of the case, the ECtHR found that there was no real reason why the whole family could not relocate to Turkey, given that the mother's health had appeared to stabilise. It thus found that the refusal to allow the child to join the parents had not been in violation of Article 8 of the ECHR.

Example: In *Sen v. the Netherlands*,²³¹ the eldest daughter was left behind in Turkey when the parents came to the Netherlands. The Court found that the parents' decision to leave their daughter behind could not be considered irrevocable with the effect that she should remain outside the family group. In the particular circumstances, the Dutch authorities' refusal to allow her to join her parents in that country amounted to a violation of Article 8 of the ECHR.

Example: In *Osman v. Denmark*,²³² the Court considered a case where a Somali teenage schoolgirl – a long-term lawful resident with her family in Denmark – had been taken from Denmark by her father to provide full-time care to her elderly grandmother in a refugee camp in Kenya. When, after two years, she applied for a new residence permit to rejoin her family in Denmark, the Danish authorities rejected her application. The Court found a violation of Article 8 of the ECHR.

Under the ESC, Article 19 (6) guarantees the right to family reunion. The ECSR has stated the following as regards conditions and restrictions of family reunion:

- a) refusal on health grounds may only be admitted for specific illnesses which are so serious as to endanger public health;²³³
- b) a requirement of suitable housing should not be so restrictive as to prevent any family reunion;²³⁴

²³¹ ECtHR, *Sen v. the Netherlands*, No. 31465/96, 21 December 2001.

²³² ECtHR, *Osman v. Denmark*, No. 38058/09, 14 June 2011.

²³³ See ECSR, Conclusions XVIII-1 (Turkey), Articles 1, 12, 13, 16 and 19 of the Charter, 1998, Article 19 "Conditions of family reunion".

²³⁴ See ECSR, Conclusions 2011 (Belgium), Articles 7, 8, 16, 17 and 19 of the Revised Charter, January 2012, Article 19, para. 6.

- c) a requirement of a period of residence of more than one year for migrant workers wishing to be joined by members of their family is excessive and, consequently, in breach of the ESC;
- d) migrant workers who have sufficient income to provide for the members of their families should not be automatically denied the right to family reunion because of the origin of such income, in so far as they are legally entitled to the benefits they may receive;
- e) a requirement that members of the migrant worker's family sit language and/or integration tests in order to be allowed to enter the country, or a requirement that they sit (and pass) these tests once they are in the country in order to be granted leave to remain constitutes a restriction likely to deprive the obligation laid down in Article 19 (6) of its substance and is consequently not in conformity with the ESC.²³⁵

5.4. Maintaining the family – protection from expulsion

Many cases arise in which the third-country national's spouse or parent is threatened with expulsion, or is expelled, in situations where this could have serious repercussions for existing family life. Such situations often arise in the following two scenarios, which themselves can also be interrelated:

- a) the relationship on which the permission to reside was based has broken down and the couple are separated or divorced – there will typically be children from the relationship who have contact rights with both parents;
- b) the third-country national family member has committed criminal offences that have attracted a deportation order. The question is whether the right to respect for family life makes the deportation disproportionate.

It may also simply be a case of the authorities deciding that the family member no longer complies with the requirements that originally authorised his or her stay.

²³⁵ For a recent statement on these principles, see ECSR, Conclusions 2011, General Introduction, January 2012, Statement of interpretation on Art. 19 (6).

In these cases, it is necessary to look at the specifics of the situation of the person concerned.

Example: In the *Pehlivan* case before the CJEU,²³⁶ a Turkish national who joined her parents in the Netherlands could validly claim a right of residence in the host EU Member State notwithstanding the fact that she married before the expiry of the three-year period laid down in the first paragraph of Article 7 of Decision No. 1/80 of the Association Council. The three-year period refers to the initial three years of residence before the individual can access the labour market and during which time the EU Member State can impose conditions on the individual. Throughout that period, the applicant lived together with her parents through whom she was admitted to the Netherlands on the ground of family reunification.

5.4.1. Relationship breakdown

Where the third-country national has not yet obtained a residence permit in his or her own right but the relationship establishing a basis for residence breaks down, the foreign partner may lose the right to continue to reside.

Under EU law, the relationship continues to justify the residence of the separated third-country national until the marriage on which it is based is legally dissolved (Free Movement Directive).²³⁷ Relationship breakdown is not sufficient to justify loss of residence.

Article 13 of the Free Movement Directive provides for the retention of a right of residence for third-country national family members, in the event of divorce or annulment where the marriage has lasted three years, one year of which was spent in the host state, or where there are children of the marriage necessitating the presence of the parents. The Free Movement Directive contains a specific provision aimed at protecting residence status for third-country national victims of domestic violence whose partner is an EEA national (Article 13 (2) (c)).

The Family Reunification Directive also provides for the possibility of granting a residence permit to foreign partners in cases where the relationship with the sponsor breaks down due to death, divorce or separation. A duty to grant a separate

²³⁶ CJEU, C-484/07, *Fatma Pehlivan v. Staatssecretaris van Justitie*, 16 June 2011.

²³⁷ ECJ, C-267/83 [1983] ECR I-00567, *Aissatou Diatta v. Land Berlin*, 13 February 1985.

permit only exists after five years of residence (Article 15). According to Article 15 (3) of the directive, EU Member States should lay down provisions ensuring that an autonomous residence permit is granted in the event of particularly difficult circumstances following divorce or separation. Like Article 13 (2) (c) of the Free Movement Directive, this is intended to extend to situations of domestic violence, although Member States have discretion as to what provisions are introduced.

Under the ECHR, the ECtHR considers whether family life and the need to maintain contact with the children demand that the third-country national should be allowed to remain. This is different from the national law of many Member States, where relationship breakdown can lead to the loss of residence rights for third-country national spouses or parents. Often the Court sees no reason why contact should not be maintained through visits,²³⁸ but it will consider that some situations may require the third-country national to be permitted to remain.

Example: In *Berrehab v. the Netherlands*,²³⁹ the Court held that Article 8 of the ECHR prevented the Netherlands from expelling a father who, despite his divorce, maintained contact with his child four times a week.

5.4.2. Criminal convictions

An EU Member State may wish to deport a lawfully resident third-country national who has committed criminal offences.

Under EU law, Articles 27-33 of the Free Movement Directive confer on qualifying family members the same – derived – enhanced protection from expulsion as EEA nationals themselves enjoy. For example, any attempt to restrict the freedom of movement and residence of EU citizens and their family members on grounds of public policy or public security must be based on the fact that the personal conduct of the individual concerned represents a genuine, present and sufficiently serious threat. Previous criminal convictions cannot in themselves constitute grounds for taking such measures.

Under Article 28 (3) (b) of the directive, minor children can only be expelled on imperative grounds of national security, unless the expulsion is in the child's best interests.

²³⁸ ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006.

²³⁹ ECtHR, *Berrehab v. the Netherlands*, No. 10730/84, 21 June 1988.

Family members of Turkish nationals, regardless of their nationality, who have achieved stable residence are similarly protected.²⁴⁰

Article 6 (2) of the Family Reunification Directive allows Member States to withdraw or refuse to renew a family member's residence permit on grounds of public policy, public security or public health. When making a decision on this basis, the Member State must consider the severity or type of offence against public policy or public security committed by the family member, or the dangers emanating from such person.

Under the ECHR, the Court will first decide whether it is reasonable to expect the family to accompany the offender overseas, and, if not, whether the criminal conduct still justifies expulsion when it is clear that this will cause total separation of the family. In these situations, the conclusion reached by the ECtHR is closely tied to the details of each case. The ECtHR has adopted various criteria for assessing the proportionality of an expulsion order. These include:

- the nature and seriousness of the offence committed by the applicant in the expelling state;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the applicant and any family members concerned;
- the solidity of his, her or their social, cultural and family ties with the host country and with the country of destination;
- the best interests and well-being of any children involved, in particular any difficulties they would encounter if they had to follow the applicant to the country to which he or she is to be expelled.²⁴¹

²⁴⁰ CJEU, C-451/11, *Natthaya Dülger v. Wetteraukreis*, 19 July 2012.

²⁴¹ ECtHR, *Boultif v. Switzerland*, No. 54273/00, 2 August 2001; ECtHR, *Üner v. the Netherlands* [GC], No. 46410/99, 18 October 2006; ECtHR, *Balogun v. the United Kingdom*, No. 60286/09, 10 April 2012, paras. 43-53.

Example: The case of *A. A. v. the United Kingdom*²⁴² concerned a Nigerian national who had come to the United Kingdom as a child to join his mother and siblings and was granted permanent residence. He committed a serious offence as a schoolboy and served his sentence. He went on to become a model of rehabilitation, committed no further offences, obtained a university degree and found stable employment. He did this by the time his deportation, which was based on the offence he had committed as a juvenile, was ordered. The ECtHR noted the applicant's previous conviction and his exemplary rehabilitation, and stressed the significance of the period of time since the offence was committed and the applicant's conduct throughout that period. It concluded that, in this particular circumstance, the applicant's expulsion would have constituted a violation of Article 8 of the ECHR.

Example: In *Antwi and Others v. Norway*,²⁴³ the applicants were a Ghanaian national and his wife and daughter, who were Norwegian nationals. The ECtHR held that there was no violation of Article 8 of the ECHR following the authorities' decision to expel Mr Antwi and to prohibit his re-entry into Norway for five years after they discovered that his passport was forged. The Court held that since both parents had been born and brought up in Ghana (the wife having left the country when she was 17) and had visited the country three times with their daughter, there were no insurmountable obstacles to them settling together in Ghana or, at the least, maintaining regular contact.

Example: In *Amrollahi v. Denmark*,²⁴⁴ the applicant was an Iranian national with permanent residence in Denmark. He had two children with his Danish partner and another child living in Denmark from a previous relationship. Upon his release from prison following a conviction for drug trafficking, the authorities sought to deport him to Iran. The ECtHR held that this would violate Article 8 of the ECHR because the applicant's proposed permanent exclusion from Denmark would separate the family. It was effectively impossible for them to continue their family life outside Denmark since the applicant's wife had never been to Iran, did not understand Farsi and was not a Muslim. Apart from being married to an Iranian man, she had no ties with the country.²⁴⁵

242 ECtHR, *A. A. v. the United Kingdom*, No. 8000/08, 20 September 2011.

243 ECtHR, *Antwi and Others v. Norway*, No. 26940/10, 14 February 2012.

244 ECtHR, *Amrollahi v. Denmark*, No. 56811/00, 11 July 2002.

245 For other similar judgments, see ECtHR, *Beldjoudi v. France*, No. 12083/86, 26 March 1992; ECtHR, *Boultif v. Switzerland*, No. 54273/00, 2 August 2001.

Key points

- Family reunification of EU nationals who have not exercised free movement rights is not covered by EU law. In some EU Member States, EU nationals exercising free movement rights enjoy far greater rights to family reunion than the states' own nationals do (see Introduction to this chapter).
- The Free Movement Directive applies to qualifying family members of EEA nationals and of EU citizens, in so far as those EU citizens have exercised free movement rights, irrespective of their own nationality. It confers on qualifying family members the same – derived – enhanced protection from expulsion as the EEA nationals themselves enjoy (see Section 5.2).
- Family reunification of third-country national sponsors is regulated by the Family Reunification Directive. In principle, it requires the family member to be outside the country, although Member States can derogate from such requirement (see Section 5.3).
- For family reunification purposes, EU law does not draw a distinction between whether a family relationship was concluded before or after the sponsor took up residence in the territory (see Section 5.3).
- The ECHR has elaborated criteria to assess the proportionality of an expulsion decision, bearing in mind the right to respect for private and family life guaranteed by Article 8 of the ECHR. The ECtHR's approach to the expulsion of family members or to family reunification depends on the specific factual circumstances of each case (see Section 5.2 and/or 5.4.1).
- The ESC provides for a right to family reunion and the case law of the ECSR circumscribes the conditions and restrictions that may be applied to such reunion (see Section 5.3).
- Under the ECHR, a blanket prohibition to marry based on the person's immigration status may not be acceptable (see Section 5.1).

Further case law and reading:

To access further case law, please consult the guidelines **How to find case law of the European courts** on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '**Further reading**' section on page 217.

6

Detention and restrictions to freedom of movement

EU	Issues covered	CoE
Reception Conditions Directive (2003/9/EC), Article 2 (k)	Definitions: detention or restriction on free movement	ECHR, Article 5 (right to liberty and security) ECHR, Article 2 of Protocol No. 4, (freedom of movement)
Return Directive (2008/115/EC), Article 15 (1)	Alternatives to detention	ECtHR, <i>Mikolenko v. Estonia</i> , 2010 (necessary examination of alternatives to detention)
Return Directive (2008/115/EC), Article 15 (1)	Exhaustive list of exceptions to the right to liberty	ECHR, Article 5 (1) (a)-(f) (right to liberty and security)
Schengen Borders Code, Article 13 (refusal of entry)	<i>Detention to prevent an unauthorised entry into the country</i>	ECHR, Article 5 (1) (f) (right to liberty and security), first limb ECtHR, <i>Saadi v. the United Kingdom</i> , 2008 (persons not yet authorised by the state to enter)
Return Directive (2008/115/EC), Article 15 CJEU, C-61/11, <i>El Dridi</i> , 2011 and C329/11, <i>Achughbabian</i> , 2011 (relationship between pre-removal and criminal detention)	<i>Detention pending deportation or extradition</i>	ECHR, Article 5 (1) (f) (right to liberty and security), second limb
Return Directive (2008/115/EC), Article 20	Prescribed by law	ECHR, Article 5 (1) (right to liberty and security) ECtHR, <i>Nowak v. Ukraine</i> , 2011 (procedural guarantees)
Return Directive (2008/115/EC), Articles 15 and 3 (7)	Necessity and proportionality	ECtHR, <i>Rusu v. Austria</i> , 2008 (inadequate reasoning and arbitrariness of detention)

EU	Issues covered	CoE
	Arbitrariness	
	<i>Good faith</i>	ECtHR, <i>Longa Yonkeu v. Latvia</i> , 2011 (coast guards hiding their knowledge of an asylum application)
Return Directive (2008/115/EC), Article 15 (1)	<i>Due diligence</i>	ECtHR, <i>Singh v. the Czech Republic</i> , 2005 (two and a half years in detention pending deportation procedure)
Return Directive (2008/115/EC), Article 15 ECJ, C-357/09, <i>Kadzoev</i> , 2009	<i>Realistic prospect of removal</i>	ECtHR, <i>Mikolenko v. Estonia</i> , 2010 (detention in spite of no realistic prospect of removal)
Return Directive (2008/115/EC), Article 15 (5) (6) ECJ, C-357/09, <i>Kadzoev</i> , 2009	<i>Maximum length of detention</i>	ECtHR, <i>Avad v. Bulgaria</i> , 2011 (assessment of reasonable length of detention according to particular circumstances of each case)
Return Directive (2008/115/EC), Articles 3 (9), 16 (3) and 17 Reception Conditions Directive (2003/9/EC), Article 17 Trafficking Directive (2011/36/EU), Article 11	Detention of individuals with specific needs	ECtHR, <i>Mubilanzila Mayeka and Kaniki Mitunga v. Belgium</i> , 2006 (unaccompanied child) ECtHR, <i>Muskhadzhiyeva and Others v. Belgium</i> , 2007 (children detained in unsuitable facilities) ECtHR, <i>Rantsev v. Cyprus and Russia</i> , 2010 (victim of trafficking)
	Procedural safeguards	
Return Directive (2008/115/EC), Article 15 (2)	<i>Right to be given reasons</i>	ECHR, Article 5 (2) (right to liberty and security) ECtHR, <i>Saadi v. the United Kingdom</i> , 2008 (two days delay considered too long)
EU Charter of Fundamental Rights, Article 47 (right to an effective remedy and to a fair trial) Return Directive (2008/115/EC), Articles 13 (4) and 15 (3)	<i>Right to review of detention</i>	ECHR, Article 5 (4) (right to liberty and security) ECtHR, <i>Abdolkhani and Karimnia v. Turkey</i> , 2009 (no procedure for review)
Return Directive (2008/115/EC), Articles 16 and 17	Detention conditions or regimes	ECtHR, <i>S.D. v. Greece</i> , 2009 (detention conditions)
	Compensation for unlawful detention	ECHR, Article 5 (5) (right to liberty and security)

Introduction

Detention is an exception to the fundamental right to liberty. Deprivation of liberty must therefore comply with important safeguards. It must be provided for by law and must not be arbitrary.²⁴⁶ Detention of asylum seekers and migrants in return proceedings must be a measure of last resort. It should only be used after other alternatives are exhausted. Despite these principles, a large number of people in Europe are detained either upon entry or to prevent their absconding during removal procedures. When deprived of liberty, individuals must be treated in a humane and dignified manner.

International law restricts the possibility of detaining asylum seekers and refugees. According to Article 31 of the 1951 Geneva Convention penalties must not be imposed, on account of illegal entry or presence, on “refugees who, coming directly from a territory where their life or freedom was threatened [...], enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.²⁴⁷

The ECHR comprises an exhaustive list of grounds for detention, one of them being to prevent unauthorised entry or to facilitate the removal of a person. Under EU law, the overarching principle is that detention of persons in return procedures must be necessary. The revised directives on reception conditions and asylum procedures are expected to regulate the detention of asylum seekers. At present, this legal framework is under review. With the revisions, it is intended that an exhaustive list of grounds will be introduced under which asylum seekers can exceptionally be deprived of liberty. In order not to render detention arbitrary, certain additional requirements need to be met, such as giving reasons for any detention and allowing the detainee to have access to speedy judicial review.

²⁴⁶ For more information on state practices regarding deprivation of liberty, see FRA (2010a).

²⁴⁷ UNHCR (1999), *Revised guidelines on applicable criteria and standards relating to the detention of asylum-seekers*, 26 February 1999; Council of Europe, Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2008-2009), *20 Years of Combating Torture: 19th General Report*, 1 August 2008-31 July 2009.

6.1. Deprivation of liberty or restriction on the freedom of movement?

Under EU law, the Reception Conditions Directive (2003/9/EC) defines ‘detention’ as “confinement of an asylum seeker by [an EU] Member State within a particular place, where the applicant is deprived of his or her freedom of movement” (Article 2 (k)). The Return Directive (2008/115/EC) does not define detention.

Under the ECHR, Article 5 regulates issues pertaining to deprivation of liberty and Article 2 of Protocol No. 4 to the ECHR concerns restrictions on freedom of movement. While some obvious examples of detention are given, such as confinement in a cell, other situations are more difficult to define and may amount to a restriction on movement as opposed to a deprivation of liberty.

When determining whether an individual’s situation is protected by Article 5 of the ECHR or Article 2 of Protocol No. 4, the ECtHR has held that there needs to be an assessment of the individual’s situation, taking into account a range of criteria, such as the type, duration, effects and manner of implementation of the measure in question.²⁴⁸ The difference between deprivation of liberty and restriction on freedom of movement is one of degree or intensity and not of nature or substance.²⁴⁹ The assessment will depend on the specific facts of the case.

A deprivation of liberty may not be established on the significance of any one factor taken individually but by examining all elements cumulatively. Even a short duration of a restriction, such as a few hours, will not automatically result in a finding that the situation constituted a restriction on movement as opposed to a deprivation of liberty. This is particularly the case if other factors are present, such as whether the facility is closed, whether there is an element of coercion²⁵⁰ or whether the situation has particular effects on the individual, including any physical discomfort or mental anguish.²⁵¹

248 ECtHR, *Austin and Others v. the United Kingdom* [GC], Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, para. 57.

249 ECtHR, *Guzzardi v. Italy*, No. 7367/76, 6 November 1980, para. 93.

250 ECtHR, *Foka v. Turkey*, No. 28940/95, 24 June 2008; ECtHR, *Nolan and K. v. Russia*, No. 2512/04, 12 February 2009.

251 ECtHR, *Guzzardi v. Italy*, No. 7367/76, 6 November 1980; ECtHR, *H.L. v. the United Kingdom*, No. 45508/99, 5 October 2004.

Any underlying public interest motive for detention, such as protecting or having the intention to protect, treat or care for the community against a risk or threat caused by the individual, has no bearing on the question whether that person has been deprived of his liberty. Such intentions might be relevant when considering the justification for detention under Article 5 (1) (a)-(f) of the ECHR.²⁵² In each case, however, Article 5 (1) must be interpreted in a manner that accounts for the specific context in which the measures are taken. There should also be regard for the responsibility and duty of the police to maintain order and protect the public, which they are required to do under both national and ECHR law.²⁵³

Example: In *Guzzardi v. Italy*,²⁵⁴ the applicant was restricted from moving around a specified area, placed under curfew and special supervision, required to report to the authorities twice a day, and had restricted and supervised contact with the outside world. The Court held that there had been an unjustified deprivation of liberty under Article 5 of the ECHR.²⁵⁵

Example: In *Raimondo v. Italy*,²⁵⁶ the applicant was placed under police supervision, which was held to be a restriction on movement, not a deprivation of liberty. He could not leave his home without informing the police, although he did not need their permission to actually leave.

Example: In *Amuur v. France* and *Riad and Idiab v. Belgium*, both concerning asylum seekers,²⁵⁷ and in *Nolan and K. v. Russia*,²⁵⁸ involving a third-country national, a detention in the transit zone of an airport was held to be unlawful under Article 5 (1) of the ECHR. The Court had not accepted the authorities' argument that there had not been a deprivation of liberty because the person concerned could avoid detention at the airport by taking a flight out of the country.

252 ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, paras. 163-164.

253 ECtHR, *Austin and Others v. the United Kingdom* [GC], Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, para. 60.

254 ECtHR, *Guzzardi v. Italy*, No. 7367/76, 6 November 1980.

255 *Ibid.*

256 ECtHR, *Raimondo v. Italy*, No. 12954/87, 22 February 1994.

257 ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, paras. 38-49; ECtHR, *Riad and Idiab v. Belgium*, Nos. 29787/03 and 29810/03, 24 January 2008.

258 ECtHR, *Nolan and K. v. Russia*, No. 2512/04, 12 February 2009, paras. 93-96.

Example: In *Rantsev v. Cyprus and Russia*,²⁵⁹ the applicant's daughter was a Russian national residing in Cyprus and working as an artist in a cabaret on a work permit issued by request of the cabaret owners. After several months, the daughter decided to leave her employment and return to Russia. One of the cabaret owners reported to the immigration office that the daughter had abandoned her place of work and residence. The daughter was subsequently found and brought to the police station, where she was detained for about an hour. The police decided that the daughter was not to be detained and that it was for the cabaret owner, the person responsible for her, to come and collect her. Consequently, the cabaret owner took the applicant's daughter to the apartment of another cabaret employee, which she could not leave of her own free will. The next morning she was found dead on the street below the apartment. While the total duration of the daughter's detention was about two hours, the Court held that it amounted to a deprivation of liberty within the meaning of Article 5 of the ECHR. The Cypriot authorities were responsible for the detention in the police station and also in the apartment because, without the active cooperation of the Cypriot police with the cabaret owners in the present case, the deprivation of liberty would not have occurred.

6.2. Alternatives to detention

Under EU law, detention must be a last resort and all alternatives must first be exhausted, unless there is evidence to suggest that such alternatives would not be effective in the individual case (Article 15 (1) of the Return Directive (2008/115/EC): “[u]nless other sufficient but less coercive measures can be applied”). Detention should therefore only take place after full consideration of all possible alternatives, or when monitoring mechanisms have not achieved the lawful and legitimate purpose. The need to give priority to alternatives is also envisaged in the revisions of the Reception Conditions Directive for asylum seekers.

Viable alternatives to detention include: reporting obligations, such as reporting to the police or immigration authorities at regular intervals; the obligation to surrender a passport or travel document; residence requirements, such as living and sleeping at a particular address; release on bail with or without sureties; guarantor requirements; release to care worker support or under a care plan with community care or mental health teams; or electronic monitoring, such as tagging.

²⁵⁹ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 314-325.

Under the ECHR, the ECtHR looks at whether a less intrusive measure could have been imposed prior to detention.

Example: In *Mikolenko v. Estonia*,²⁶⁰ the Court found that the authorities had other measures at their disposal than keeping the applicant in protracted detention at the deportation centre when there was no immediate prospect of his being expelled.

Alternatives to detention often involve restrictions on freedom of movement. Under the ECHR, the right to freedom of movement is guaranteed by Article 2 of Protocol No. 4 provided the state has ratified this Protocol (see Annex 2). A restriction on this freedom must be necessary and proportionate and comply with the aims in the second paragraph of Article 2 of Protocol No. 4. This provision only applies to those “lawfully within the territory” and therefore does not assist those in an irregular situation.

Example: In *Omwenyeké v. Germany*,²⁶¹ the applicant had been confined to living in a particular area as part of his temporary residence condition pending the outcome of his asylum claim. The ECtHR held that, since the applicant had breached his conditions of temporary residence, he had not been “lawfully” within the territory of Germany and could therefore not rely on the right to freedom of movement under Article 2 of Protocol No. 4.

6.3. Exhaustive list of exceptions to the right to liberty

Under EU law, deprivation of liberty is regulated in the Reception Conditions Directive for asylum seekers and in the Return Directive for persons in return procedures (Article 15 of the Return Directive). It should be noted that as at April 2013, EU law did not contain an exhaustive list of grounds for the detention of asylum seekers; this will, nevertheless, be introduced as part of planned revisions of EU law.

²⁶⁰ ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009.

²⁶¹ ECtHR, *Omwenyeké v. Germany* (dec.), No. 44294/04, 20 November 2007.

According to Article 18 of the Asylum Procedures Directive (2005/85/EC), it is not acceptable to detain a person solely for the reason that she or he has lodged an asylum application.²⁶²

Article 15 (1) of the Return Directive only allows for the detention of third-country nationals who are the “subject of return procedures”. Deprivation of liberty is permitted for the following two reasons, in particular when there is a risk of absconding or of other serious interferences with the return or removal process:

- in order to prepare return;
- in order to carry out the removal process.

Under the ECHR, Article 5 (1) protects the right to liberty and security. Its subparagraphs (a)-(f) provide an exhaustive list of permissible exceptions: “No one shall be deprived of his liberty”, except in any of the following cases and in accordance with a procedure prescribed by law:

- after conviction by a competent court;
- for failure to comply with a court order or a specific obligation prescribed by law;
- pending trial;
- in specific situations concerning minors;
- on public health grounds or due to vagrancy;
- to prevent an unauthorised entry or to facilitate removal of an alien.

It is for the state to justify detention by relying on one of these six grounds.²⁶³ If the detention cannot be based on any of these grounds, it is automatically unlawful.²⁶⁴

262 For more information, see European Commission, Directorate-General of Home Affairs (2012), ‘Reception conditions’, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/reception-conditions/index_en.htm.

263 The United Kingdom, Supreme Court, *WL (Congo) 1 & 2 v. Secretary of State for the Home Department; KM (Jamaica) v. Secretary of State for the Home Department* [2011] UKSC 12, 23 March 2011.

264 ECtHR, *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, 7 July 2011, para. 99.

The grounds are restrictively interpreted.²⁶⁵ There is no catch-all provision, such as detention to prevent an unspecified crime or disorder in general. Failure to identify clearly the precise purpose of detention and the ground may mean that the detention is unlawful.

Article 5 (1) (f) of the ECHR provides for detention of asylum seekers and irregular migrants in two situations:

- to prevent an unauthorised entry into the country;
- of a person against whom action is being taken with a view to his or her deportation or extradition.

As with the other exceptions to the right to liberty, detention under Article 5 (1) (f) must be based on one of these specific grounds that are restrictively interpreted.

Example: *Yoh-Ekale Mwanje v. Belgium*²⁶⁶ concerned the detention of a Cameroonian national with advanced HIV. The authorities knew the applicant's identity and fixed address, and she had always kept her appointments with them and had initiated several steps to regularise her status in Belgium. Notwithstanding the fact that her health deteriorated during detention, the authorities did not consider a less intrusive option, such as issuing her a temporary residence permit to safeguard the public interest. They kept her instead in detention for almost four months. The ECtHR saw no link between the applicant's detention and the government's aim to deport her, and therefore found that Article 5 (1) (f) of the ECHR had been violated.

Example: In *A. and Others v. the United Kingdom*,²⁶⁷ the Court held that a policy of keeping an applicant's possible deportation "under active review" was not sufficiently certain or determinative to amount to "action [...] being taken with a view to deportation" under Article 5 (1) (f). The detention was clearly not aimed at preventing an unauthorised entry and was therefore unlawful.

²⁶⁵ ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009.

²⁶⁶ ECtHR, *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011.

²⁶⁷ ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 167.

6.3.1. Detention to prevent an unauthorised entry into the country

Under EU law, the Schengen Borders Code (Regulation No. 562/2006) requires that third-country nationals who do not fulfil the entry conditions are refused entry into the EU. Border guards have a duty to prevent irregular entry. The national law of many EU Member States provides for short-term deprivation of liberty at the border, which often takes place in the transit area of an airport. In the context of the Reception Conditions Directive's revisions, several grounds for the detention of asylum seekers are being proposed, including when a decision is taken on an asylum seeker's right to enter.

Under the ECHR, detention has to adhere to a number of conditions in order to be lawful under Article 5 of the ECHR.

Example: In *Saadi v. the United Kingdom*,²⁶⁸ the ECtHR held that until a Member State has 'authorised' entry into the country, any entry is 'unauthorised'. The detention of a person who wished to effect an entry but did not yet have authorisation to do so could be, without any distortion of language, aimed at preventing his effecting an unauthorised entry within the meaning of Article 5 (1) (f) of the ECHR. The Court did not accept that since, as soon as an asylum seeker surrenders to the immigration authorities, he or she is seeking to effect an "authorised" entry. The result therefore being that his or her detention could not be justified under Article 5 (1) (f). An interpretation of this provision as only permitting detention of a person who was shown to be trying to evade entry restrictions would place too narrow a construction on the provision's terms and on the Member State's power to exercise its undeniable right to control the liberty of aliens in an immigration context. Such an interpretation would also be inconsistent with Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Programme, the UNHCR's Guidelines and the relevant Committee of Ministers Recommendation. All of these envisage the detention of asylum seekers in certain circumstances, for example, while identity checks are taking place or while determining the elements that form the basis of an asylum claim. The Court held that the applicant's seven-day detention under an accelerated asylum procedure, which had been taken due to a mass influx situation, had not been in violation of Article 5 (1) (f).

²⁶⁸ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 65.

6.3.2. Detention pending deportation or extradition

Under EU law, the revised Reception Conditions Directive will allow for the detention of asylum seekers in specific situations, where this is deemed necessary following an individual examination of the case. Most of the grounds provided for in the draft of the revised directive are aimed at mitigating a risk of absconding.

Article 15 (1) of the Return Directive permits detention in order to prepare return or to carry out the removal process, unless this can be achieved by other sufficient but less coercive measures (see Section 6.2). Detention is permitted, particularly in cases where there is a risk of absconding or other serious interferences with the return or removal process and if there is a realistic prospect of removal within a reasonable time. There are maximum time limits set by Article 15 (5) (6) of the directive.

Several cases have been referred to the CJEU concerning the imprisonment of third-country nationals in return procedures for the crime of irregular entry or stay.²⁶⁹

Example: In *El Dridi*,²⁷⁰ the CJEU was asked to verify whether it was compatible with Articles 15 and 16 of the Return Directive to impose a criminal detention sanction during the return procedure and on the sole ground that a third-country national did not comply with an administrative order to leave the territory within a given period. The Court had to consider whether criminal detention could have been regarded as a measure necessary to implement the return decision within the meaning of Article 8 (1) of the directive or, on the contrary, a measure compromising the implementation of that decision. Given the circumstances of the case, the Court held that the criminal detention sanction was not compatible with the scope of the directive – namely the establishment of an effective return policy in line with fundamental rights – and did not contribute to the removal of the third-country national from the EU Member State concerned. When the obligation to return is not complied with within the period for voluntary departure, EU Member States have to pursue the enforcement of the return decision in a gradual and proportionate manner, using the least coercive measures possible and with due respect for fundamental rights.

²⁶⁹ CJEU, C-430/11, *Sagor*, 6 December 2012 (concerning the imposition of a fine); CJEU, C-297/12, *Strafverfahren v. Gjoko Filev and Adnan Osmani*, reference for a preliminary ruling from the Local Court (*Amtsgericht*) of Laufen (Germany) lodged on 18 June 2012 (concerning detention based on violating a pre-existing entry ban).

²⁷⁰ CJEU, C-61/11, *El Dridi*, 28 April 2011, paras. 29-62.

Example: In *Achughbabian*,²⁷¹ the Court examined whether the principles established in *El Dridi* also applied to a third-country national's imprisonment sentence for an offence of entry or illegal stay in the territory of an EU Member State. The Court clarified that the Return Directive does not preclude a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national residence rules, nor from imposing detention while determining whether his or her stay is legal. When detention is imposed before or during the return procedure, said situation is covered by the directive and, thus, has to pursue the removal. The CJEU found that the Return Directive was not respected because the criminal detention would not pursue the removal. It would hinder the application of the common standards and procedures and delay the return, thereby undermining the effectiveness of the directive. At the same time, the CJEU did not exclude the possibility for Member States to impose criminal detention after the return procedure is completed, that is to say when the coercive measures provided for by Article 8 have been applied but the removal has failed.

Under the ECHR, under the second limb of Article 5 (1) (f), Council of Europe member states are entitled to keep an individual in detention for the purpose of his or her deportation or extradition, where such an order has been issued and there is a realistic prospect of removal. Detention is arbitrary when no meaningful "action with a view to deportation" is under way or actively pursued in accordance with the requirement of due diligence.

Example: In *Mikolenko v. Estonia*,²⁷² the applicant was a Russian national living in Estonia. The Estonian authorities refused to extend his residence permit and detained him from 2003 to 2007. The ECtHR accepted that the applicant was clearly unwilling to cooperate with the authorities during the removal process, but found his detention unlawful because there was no realistic prospect of expulsion and the authorities failed to conduct proceedings with due diligence.

Example: In *M. and Others v. Bulgaria*,²⁷³ the applicant's deportation to Afghanistan had been ordered in December 2005, but the first time authorities had attempted to secure an identity document for him to facilitate deportation

271 CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne*, 6 December 2011, paras. 29-31.

272 ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009.

273 ECtHR, *M. and Others v. Bulgaria*, No. 41416/08, 26 July 2011, paras. 75 and 76.

was in February 2007. This request was repeated 19 months later. During this period, the applicant had remained in detention. The Bulgarian authorities had also tried to send him to another country but did not have evidence of such an effort. The detention was unlawful and, for lack of diligence, it was a breach of Article 5 of the ECHR.

Example: In *Popov v. France*,²⁷⁴ the applicants were nationals of Kazakhstan who had arrived in France in 2000. Their applications for refugee status and for a residence permit were rejected. In August 2007, they were arrested and transferred to an airport for their expulsion. Their flight was cancelled and the expulsion did not take place. They were then transferred to a detention centre with their two children, aged five months and three years, where they stayed for 15 days. A second flight was cancelled and a judge set them free. Following a new application, they were granted refugee status. The Court found that, although the children had been placed with their parents in a wing reserved for families, their particular situation had not been taken into account and the authorities had not sought to establish whether any alternative solution, other than administrative detention, could have been envisaged. The French system had therefore not properly protected the childrens' right to liberty under Article 5 of the ECHR.

6.4. Prescribed by law

Detention must be lawful according to domestic law, EU law and ECHR law.

Under EU law, EU Member States are obliged to bring into force laws, regulations and administrative provisions necessary to comply with the Return Directive (Article 20). Similarly, the draft revision of the Reception Conditions Directive requires that the grounds for detention be laid down in national law.

Under the ECHR, Article 5 (1) provides that “no one shall be deprived of his liberty” unless “in accordance with a procedure prescribed by law”. This means that national law must lay down substantive and procedural rules prescribing when and in what circumstances an individual may be detained.

²⁷⁴ ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012.

Article 5 does not merely “refer back to domestic law” but also relates to the “quality of the law”, requiring it to be compatible with the rule of law, a concept inherent in all articles of the ECHR. For the law to be of a certain ‘quality’, it must be sufficiently accessible, and precise and foreseeable in its application to avoid a risk of arbitrariness. Any deprivation of liberty has to be in line with the purpose of Article 5 of the ECHR so as to protect the individual from arbitrariness.²⁷⁵

Example: In *S.P. v. Belgium*,²⁷⁶ the applicant was placed in a detention centre pending his imminent expulsion to Sri Lanka. The ECtHR then issued an interim measure staying his expulsion and the applicant was released from detention 11 days later. The ECtHR stated that the application of an interim measure temporarily suspending the procedure for the applicant’s deportation did not render his detention unlawful, as the Belgian authorities had still envisaged deporting him and that, notwithstanding the suspension, action was still “being taken” with a view to his deportation.

6.5. Necessity and proportionality

Under EU law, Article 15 (5) of the Return Directive provides that “detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal”. There must be clear and cogent evidence, not just bare assertion, of the necessity in each individual case. Article 15 (1) of the directive refers to detention for the purpose of removal where there is a risk of absconding – but such risk must be based on “objective criteria” (Article 3 (7)). Decisions taken under the directive should be adopted on a ‘case-by-case’ basis and based on objective criteria. It is not enough to detain an individual on the mere basis of illegal stay (Recital 6 of the Return Directive).

EU law requires weighing whether the deprivation of liberty is proportionate to the objective to be achieved, or whether removal could be successfully implemented by imposing less restrictive measures, such as alternatives to detention (Article 15 (1) of the Return Directive).²⁷⁷

²⁷⁵ ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, para. 50; ECtHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001, para. 55.

²⁷⁶ ECtHR, *S.P. v. Belgium* (dec.), No. 12572/08, 14 June 2011.

²⁷⁷ CJEU, C-61/11, *El Dridi*, 28 April 2011, paras. 29-62.

The draft revision of the Reception Conditions Directive foresees that the detention of asylum seekers may prove necessary on the basis of an individual assessment and when other less coercive alternative measures cannot be effectively applied.

In addition to questions of legality and procedural safeguards, detention must also substantively comply with the fundamental rights contained in the ECHR and under the EU Charter of Fundamental Rights.²⁷⁸

Under the ECHR, Article 5 stipulates the right to liberty and security. Under Article 5 (1) (f), there is no requirement for a necessity test in order to detain a person who tries to enter the country unauthorised or against whom action is being taken with a view to deportation or extradition. This is in contrast with other forms of detention covered by Article 5 (1), such as preventing an individual from committing an offence or fleeing.²⁷⁹

Article 9 of the ICCPR requires that any deprivation of liberty imposed in an immigration context must be lawful, necessary and proportionate. In a case concerning the detention of a Cambodian asylum seeker in Australia, the UN Human Rights Committee has explicitly found that detention must be necessary and proportionate to comply with Article 9 of the ICCPR.²⁸⁰

6.6. Arbitrariness

Under the ECHR, compliance with national law is insufficient. Article 5 of the ECHR requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no arbitrary detention can be compatible with Article 5 (1). The notion of “arbitrariness” extends beyond lack of conformity with national law; a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the ECHR.²⁸¹

To avoid being considered arbitrary, detention under Article 5 (1) (f) must be carried out in good faith: it must be closely connected to the detention ground identified and relied on by the government; the place and conditions of detention should be

²⁷⁸ CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne*, 6 December 2011, para. 49.

²⁷⁹ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 72.

²⁸⁰ UN Human Rights Committee, *A v. Australia*, Communication No. 560/1993, views of 30 April 1997.

²⁸¹ ECtHR, [GC], No. 13229/03, 29 January 2008, para. 67; ECtHR, [GC], No. 3455/05, 19 February 2009, para. 164.

appropriate; and the length of the detention should not exceed a duration that is reasonably required for the purpose pursued. Proceedings have to be carried out with due diligence and there must be a realistic prospect of removal. What is considered arbitrary depends on the facts of the case.

Example: In *Rusu v. Austria*,²⁸² the applicant was arrested when trying to leave Austria because she had entered the country illegally without a valid passport and visa, and because she lacked the necessary subsistence means for a stay in Austria. For those reasons, the authorities assumed that she would abscond and evade the proceedings if released. The ECtHR reiterated that detention of an individual was a serious measure and that in a context where detention was necessary to achieve a stated aim the detention would be arbitrary unless it was justified as a last resort after other less severe measures had been considered and found to be insufficient for safeguarding the individual or public interest. The authorities' reasoning for detaining the applicant was inadequate and her detention contained an element of arbitrariness. Her detention therefore violated Article 5 of the ECHR.

6.6.1. Good faith

Under the ECHR, detention might be considered arbitrary if the detaining authorities do not act in good faith.²⁸³

Example: In *Longa Yonkeu v. Latvia*,²⁸⁴ the Court rejected the government's argument that the State Border Guard Service only learned of the suspension of the applicant's deportation two days after he had been deported. For four days, the authorities had been aware that the applicant had applied for asylum on humanitarian grounds, as they had received a copy of his application. Further, under domestic law, he enjoyed asylum seeker status from the date of his application and as such could not be deported. Consequently, the State Border Guard Service did not act in good faith by deporting the applicant before his application for asylum on humanitarian grounds was examined by the competent domestic authority. Therefore, his detention for that purpose was arbitrary.

282 ECtHR, *Rusu v. Austria*, No. 34082/02, 2 October 2008, para. 58.

283 ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009; ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008.

284 ECtHR, *Longa Yonkeu v. Latvia*, No. 57229/09, 15 November 2011, para. 143.

6.6.2. Due diligence

EU and ECHR law both contain the principle that the Member State must exercise due diligence when detaining individuals subject to removal.

Under EU law, Article 15 (1) of the Return Directive provides that detention should be maintained only as long as removal arrangements are in progress and executed with due diligence. Similarly, a due diligence provision is being introduced in the Reception Conditions Directive for asylum seekers.

Under the ECHR, detention under the second limb of Article 5 (1) (f) of the ECHR is only justified for as long as deportation or extradition proceedings are in progress. If such proceedings are not conducted with due diligence, the detention will cease to be permissible under the ECHR.²⁸⁵ Member States must therefore make an active effort to organise a removal, whether to the country of origin or to a third country. In practice, Member States must take concrete steps and provide evidence – not simply rely on their own statements – of efforts made to secure admission, for example where the authorities of a receiving state are particularly slow to identify their own nationals.

Example: In *Singh v. the Czech Republic*,²⁸⁶ the Court noted that the applicants were detained for two and a half years pending deportation. The proceedings were characterised by periods of inactivity, and the Court considered that the Czech authorities ought to have shown greater diligence, especially once the Indian Embassy had expressed its unwillingness to issue passports to the applicants. In addition, the Court noted that the applicants had been convicted of a minor offence, and that the length of their detention pending deportation had exceeded that of the prison sentence related to the offence. Consequently, the Court considered that the Czech authorities had not shown due diligence in handling the applicants' case and that the length of their detention had been unreasonable.

6.6.3. Realistic prospect of removal

Under both EU and ECHR law, detention is only justified where there is a realistic prospect of removal within a reasonable time.

²⁸⁵ ECtHR, *Chahal v. the United Kingdom* [GC], No. 22414/93, 15 November 1996, para. 113; ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 164.

²⁸⁶ ECtHR, *Singh v. the Czech Republic*, No. 60538/00, 25 January 2005.

Under EU law, where a reasonable prospect of removal no longer exists, detention ceases to be justified and the person must be immediately released (Article 15 (4) of the Return Directive). Where there are barriers to removal, such as the principle of *non-refoulement* (Article 5 of the Return Directive), reasonable prospects of removal do not normally exist. If an individual has made an asylum claim, or submitted a new asylum application (Article 32 of the Asylum Procedures Directive), detention pending removal would only be allowed if the asylum procedure can be swiftly completed.

Example: In *Kadzoev*, the ECJ²⁸⁷ held that when the national court reviewed the detention, there needed to be a real prospect that removal could successfully be carried out in order for there to be a reasonable prospect of removal. That reasonable prospect did not exist where it was unlikely that the person would be admitted to a third country.

In a domestic context, the United Kingdom Border Agency has developed a practical yardstick. It states that in deportation cases: “[...] removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks. [However] where the [individual] is frustrating removal by not co-operating with the documentation process, and where that is a significant barrier to removal, these are factors weighing strongly against release.”²⁸⁸

Under the ECHR, realistic prospects for expulsion are required.

Example: *Mikolenko v. Estonia*²⁸⁹ concerned an alien detained for a lengthy period of time of almost four years for refusing to comply with an expulsion order. The Court found that Article 5 (1) (f) had been violated because the grounds for detention had not remained valid for the whole detention period owing to the lack of a realistic prospect of his expulsion and due to the domestic authorities’ failure to conduct the proceedings with due diligence.

287 ECJ, C-357/09 [2009] ECR I-11189, *Kadzoev*, 30 November 2009, paras. 65 and 66.

288 The United Kingdom Border Agency (2012), *Enforcement Instructions and Guidance: Chapter 55 Detention and Temporary Release*, available at www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals.

289 ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009, para. 67.

6.6.4. Maximum length of detention

Under EU law, the Return Directive stipulates that detention must be for the shortest period possible (Article 15 (1)). The directive, however, also provides for a time limit of up to six months for detention, which is extendable by 12 months in exceptional circumstances, namely in cases of non-cooperation or where there are barriers to obtaining travel documentation (Articles 15 (5) and 15 (6)). Exceptional extensions require the authorities to have first taken all reasonable efforts to remove the individual. Further detention is not possible once the six month and, in exceptional cases, the additional 12 month periods have expired.

Example: In *Kadzoev*, the ECJ held that it was clear that, upon reaching the maximum duration of detention provided for in Article 15 (6) of the Return Directive, there was no longer a question of whether there was a ‘reasonable prospect of removal’ within the meaning of Article 15 (4). In such a case, the person concerned must be immediately released.²⁹⁰

Under the ECHR, the permissible duration of detention for the purposes of Article 5 (1) (f) of the ECHR depend on an examination of national law together with an assessment of the particular facts of the case. Time limits are an essential component of precise and foreseeable law governing the deprivation of liberty.

Example: In *Mathloom v. Greece*,²⁹¹ an Iraqi national was kept in detention for over two years and three months pending deportation, although an order had been made for his conditional release. The Greek legislation governing detention of persons whose expulsion had been ordered by the courts did not lay down a maximum period and therefore did not satisfy the ‘legality’ requirement under Article 5 of the ECHR as there was no foreseeability in the legislation.

Example: In *Louled Massoud v. Malta*,²⁹² an Algerian national was placed in a detention centre for a little more than 18 months with a view to deportation. During that time, the applicant refused to cooperate and the Algerian authorities had not been prepared to issue him travel documents. In finding

²⁹⁰ ECJ, C-357/09 [2009] ECR I-11189, *Kadzoev*, 30 November 2009, para. 60.

²⁹¹ ECtHR, *Mathloom v. Greece*, No. 48883/07, 24 April 2012.

²⁹² ECtHR, *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010.

a violation of Article 5 (1), the ECtHR expressed grave doubts as to whether the grounds for the applicant's detention, the intended deportation, remained valid for the whole period of his detention. This included doubts about the more than 18 month period following the rejection of his asylum claim, the probable lack of a realistic prospect of his expulsion and the possible failure of the domestic authorities to conduct the proceedings with due diligence. Moreover, the Court established that the applicant did not have any effective remedy for contesting the lawfulness and length of his detention.

Example: In *Auad v. Bulgaria*,²⁹³ the ECtHR held that the length of detention should not exceed the length reasonably required for the purpose pursued. The Court noted that a similar point had been made by the ECJ in relation to Article 15 of the Return Directive in the *Kadzoev* case. The Court stressed that, unlike Article 15 of the Return Directive, Article 5 (1) (f) of the ECHR did not contain maximum time limits. Whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depended solely on the particular circumstances of each case.

6.7. Detention of individuals with specific needs

Under EU law, Article 17 of the Reception Conditions Directive and Article 3 (9) of the Return Directive list persons considered to be vulnerable (see Chapter 9). The Return Directive does not bar the detention of vulnerable persons, but when they are detained, Article 16 (3) requires that detailed attention be paid to their specific needs. The Trafficking Directive (2011/36/EU) contains a duty to provide assistance and support to victims of trafficking, such as providing appropriate and safe accommodation (Article 11), although the directive does not fully ban their detention.

Under the ECHR, the ECtHR has reviewed immigration cases involving the detention of children and persons with mental health problems. The Court found their detention in facilities not equipped to handle their needs to be arbitrary and in violation of Article 5 of the ECHR as well as, in some cases, also raising issues under Article 3

²⁹³ ECtHR, *Auad v. Bulgaria*, No. 46390/10, 11 October 2011, para. 128.

of the ECHR.²⁹⁴ The Court also considered that asylum seekers are particularly vulnerable, in the context of detention and as regards conditions in which they were held.²⁹⁵

Example: In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,²⁹⁶ the Court held that detention of an unaccompanied asylum-seeking child in an adult detention centre breached Article 3 of the ECHR.

Example: In *Muskhadzhieva v. Belgium*,²⁹⁷ the Court held that the detention of four Chechen children pending a Dublin transfer in a facility not equipped to deal with the specific needs of children had been in breach of Article 3 of the ECHR.

Example: In *Rantsev v. Cyprus and Russia*,²⁹⁸ the Court found that the Cypriot authorities had not provided an explanation as to the reasons and legal basis for not allowing the applicant's late daughter, a victim of trafficking, to leave the police station of her own accord, but to release her into the custody of a private individual. In these circumstances, the Court found that her deprivation of liberty had been both arbitrary and unlawful under Article 5 of the ECHR.

6.8. Procedural safeguards

Under both EU law and the ECHR, there are procedural safeguards with respect to the detention of asylum seekers and migrants. The protection against arbitrary detention under the ECHR arguably makes the protection stronger than under EU law, especially for asylum seekers.

Under EU law, the Return Directive deals with specific guarantees when illegally-staying migrants face return. The Asylum Procedures Directive, which as at the end of 2012 was still under review, simply states that asylum seekers cannot be

294 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006; ECtHR, *Muskhadzhieva and Others v. Belgium*, No. 41442/07, 19 January 2010; ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011; ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012; ECtHR, *M.S. v. the United Kingdom*, No. 24527/08, 3 May 2012; ECtHR, *Price v. the United Kingdom* No. 33394/96, 10 July 2001.

295 ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009; ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

296 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006.

297 ECtHR, *Muskhadzhieva and Others v. Belgium*, No. 41442/07, 19 January 2010.

298 ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010.

detained solely based on having made an application for asylum and that, if detained, asylum applicants must have access to speedy judicial review. It is planned that these safeguards for asylum seekers will be strengthened in the revised Reception Conditions Directive.

Under the ECHR, Article 5 of the ECHR contains its own built-in set of procedural safeguards. The following two articles also apply to deprivation of liberty under Article 5 (1) (f):

- Article 5 (2): the right to be informed promptly, in a language understood by the person concerned, of the reasons for his or her arrest and of any charge against him or her.
- Article 5 (4): the right to take proceedings by which the lawfulness of detention shall be decided speedily by a court and release ordered if the detention is not lawful.

6.8.1. Right to be given reasons

Under EU law, Article 15 (2) of the Return Directive requires authorities to order detention in writing and give reasons in fact and in law.

Under the ECHR, every detainee must be informed of the reasons for their detention ‘promptly’ and ‘in a language which he or she understands’ (Article 5 (2) of the ECHR). This means that a detainee must be told the legal and factual grounds for his arrest or detention in simple, non-technical language that the detainee can understand so as to be able, if he sees fit, to challenge its lawfulness in court in accordance with Article 5 (4).

Example: In *Nowak v. Ukraine*,²⁹⁹ a Polish national asked for the reasons for his arrest and was told that he was an “international thief”. The ECtHR held that this statement could hardly correspond to the deportation order which had been drafted in Ukrainian and referred to a provision of national law. The applicant did not have sufficient knowledge of the language to understand the document, which he received on the fourth day of his detention. Before that date, there was no indication that he had been notified that he was detained

²⁹⁹ ECtHR, *Nowak v. Ukraine*, No. 60846/10, 31 March 2011, para. 64.

with a view to deportation. Furthermore, the applicant had no effective means of raising his complaint while in detention or of claiming compensation afterwards. Consequently, there had been a breach of Article 5 (2) of the ECHR.

Example: In *Saadi v. the United Kingdom*,³⁰⁰ a 76 hour delay in providing reasons for detention was considered too long and in breach of Article 5 (2) of the ECHR.

Example: In *Dbouba v. Turkey*,³⁰¹ the applicant was an asylum seeker. Two police officers took his statement about his application to the UNHCR. He was told that he had been released pending trial on the charge of being a member of al-Qaeda, and that a deportation procedure had been initiated against him. The applicant was not given any documents with information on the grounds for his detention in the police headquarters. The ECtHR held that the reasons for the applicant's detention were 'never communicated' to him by the national authorities, which was a breach of Article 5 (2) of the ECHR.

6.8.2. Right to review of detention

Under EU law and the ECHR, the right to judicial review is key for assuring against arbitrary detention.

Under EU law, Article 47 of the EU Charter of Fundamental Rights demands that any individual in a situation governed by EU law, such as those detained pursuant to the Return Directive, has the right to an effective remedy and to a fair and public hearing within a reasonable time. Article 47 of the Charter and Article 13 (4) of the Return Directive also require that all individuals have the possibility of being advised, represented and defended in legal matters, and that legal aid be made available to ensure access to justice (see Chapter 4 for more details). In addition, Article 15 (3) of the Return Directive establishes that detention has to be reviewed at reasonable intervals of time either by application from the third-country national or *ex officio*. Furthermore, in case of prolonged detention periods, the article also requires that the reviews be subject to the supervision of a judicial authority. Provisions for the detention of asylum seekers are still under negotiation.

300 ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008.

301 ECtHR, *Dbouba v. Turkey*, No. 15916/09, 13 July 2010, paras. 52-54.

Under the ECHR, Article 5 (4) specifically requires that “everyone” deprived of his or her liberty be entitled to take proceedings to have the legality of their detention “decided speedily by a court and their release ordered if the detention is not lawful”. This obligation is mirrored in Article 9 (4) of the ICCPR.

The need for “speedy” review and “accessibility” of the remedy are two key safeguards. The purpose of Article 5 (4) is to guarantee a detainee’s right to “judicial supervision” of the measure to which they are subjected. As such, Article 5 (4) does not simply require access to a judge to decide speedily the legality of detention, but also requires a court’s periodic review of the need for continued detention. The remedy must be available during the detention to allow the detainee to obtain speedy judicial review, and the review must be capable of leading to release. The remedy must be sufficiently certain, in theory and in practice, in order to be accessible and effective.

It is particularly important that asylum seekers have access to effective remedies because they are in a precarious position and could face *refoulement*.

Example: In *Abdolkhani and Karimnia v. Turkey*,³⁰² two Iranian asylum seekers had been detained in the police headquarters. The ECtHR found that they had not had at their disposal any procedure through which the lawfulness of their detention could have been examined by a court.³⁰³

Example: In *S.D. v. Greece*,³⁰⁴ an asylum seeker had been detained even though he could not be expelled pending a decision on his asylum application. The ECtHR held that he had been in a ‘legal vacuum’ because there was no provision for direct review of his detention pending expulsion.

6.9. Detention conditions or regimes

The conditions of detention in themselves may breach EU or ECHR law. Both EU and ECHR law require that detention must comply with other fundamental rights, including that conditions of deprivation of liberty must be humane, families should not be

302 ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009.

303 ECtHR, *Z.N.S. v. Turkey*, No. 21896/08, 19 January 2010; ECtHR, *Dbouba v. Turkey*, No. 15916/09, 13 July 2010.

304 ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009.

separated, and children and vulnerable individuals should normally not be detained (see Section 6.7 concerning detention of individuals with specific needs and children).³⁰⁵

Under EU law, detention conditions for persons in return procedures are regulated in Article 16 of the Return Directive and for children and families, in Article 17. The detention conditions of asylum seekers are expected to be regulated in the revised Reception Conditions Directive.

Under the ECHR, the place, regime and conditions of detention must be ‘appropriate’, otherwise they may raise an issue under Articles 3, 5 or 8 of the ECHR. The Court will look at the individual features of the conditions and their cumulative effect. This includes, among other elements: where the individual is detained (airport, police cell, prison); whether or not other facilities could be used; the size of the containment area; whether it is shared and with how many other people; availability and access to washing and hygiene facilities; ventilation and access to open air; access to the outside world; and whether the detainees suffer from illnesses and have access to medical facilities. An individual’s specific circumstances are of particular relevance, such as if they are a child, a survivor of torture, a pregnant woman, a victim of trafficking, an older person or a person with disabilities.

The ECtHR takes into account reports of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (‘CPT’) when assessing conditions of detention in a specific case. Those reports also provide helpful guidance to Member States on what conditions are unacceptable.

Example: In the cases *Dougoz*, *Peers* and *S.D. v. Greece*,³⁰⁶ the Court set out important principles about conditions of detention and also made clear that detained asylum seekers were particularly vulnerable given their experiences when fleeing persecution, which could increase their anguish in detention.

Example: In *M.S.S. v. Belgium and Greece*,³⁰⁷ the Court found a violation of Article 3 of the ECHR not only in relation to the applicant’s detention conditions,

³⁰⁵ For more information, see: ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (unaccompanied child), No. 13178/03, 12 October 2006; ECtHR, *Rantsev v. Cyprus and Russia* (victim of trafficking) No. 25965/04, 7 January 2010.

³⁰⁶ ECtHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001; ECtHR, *Peers v. Greece*, No. 28524/95, 19 April 2001; ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009.

³⁰⁷ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

but also in relation to his general living (reception) conditions in Greece. The applicant was an Afghan asylum seeker, and the Greek authorities had been aware of his identity and that he was a potential asylum seeker since his arrival in Athens. He was immediately placed in detention without any explanation. There had been various reports by international bodies and NGOs concerning the Greek authorities' systematic placement of asylum seekers in detention. The applicant's allegations that he was subjected to brutality by the police were consistent with witness reports collected by international organisations, in particular the CPT. Findings by the CPT and the UNHCR also confirmed the applicant's allegations of unsanitary conditions and overcrowding in the detention centre next to Athens international airport. Even though the applicant was detained for a relatively short time, the conditions of detention in the holding centre were unacceptable. The ECtHR held that the applicant must have experienced feelings of arbitrariness, inferiority and anxiety, and that the detention conditions had undoubtedly had a profound effect on his dignity, amounting to degrading treatment. In addition, he was particularly vulnerable as an asylum seeker because of his migration and the traumatic experiences he had likely endured. The Court concluded that there had been a violation of Article 3 of the ECHR.

Relevant soft law sources on this issue include the Council of Europe Twenty Guidelines on Forced Return, the European prison rules and the 2005 EU Guidelines on the treatment of immigration detainees.³⁰⁸

6.10. Compensation for unlawful detention

Damages may be payable to individuals who have been detained unlawfully, as a matter of both EU and ECHR law.

Under the EU, the ECJ in *Francovich*³⁰⁹ established that national courts must provide a remedy for damages caused by a breach of an EU provision by an EU Member State. The principle has not yet been applied to breaches caused by a Member State's non-implementation of a directive in the context of immigration detention.

³⁰⁸ Council of Europe, Committee of Ministers (2003) Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers; Council of Europe, Committee of Ministers (2005); Council of Europe, Committee of Ministers (2006) Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006.

³⁰⁹ ECJ, Joined Cases C-6/90 and C-9/90 [1991] ECR I-05357, *Francovich and Bonifaci and Others v. Italian Republic*, 19 November 1991.

Under the ECHR, Article 5 (5) of the ECHR states that “everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”. Thus, for there to be compensation, there must be a violation of any one or more paragraphs of Article 5 of the ECHR.

Key points

- Under both EU law and the ECHR, deprivation of liberty must be a measure of last resort, after exhausting the possibility of less intrusive measures (see Section 6.2).
- Under the ECHR, the concrete situation of an individual may amount to a deprivation of liberty under Article 5 of the ECHR or to a restriction on his or her freedom of movement under Article 2 of Protocol No. 4 to the ECHR (see Section 6.1).
- Under the ECHR, a deprivation of liberty must be: justified for a specific purpose defined in Article 5 (1) (a)-(f); be ordered in accordance with a procedure prescribed by law; and not be arbitrary (see Section 6.3).
- Under EU law, a deprivation of liberty must be in accordance with the law (see Section 6.3), necessary and proportionate (see Section 6.5).
- Under EU law, a maximum length of pre-removal detention has been set at six months, which can exceptionally be extended for up to a maximum of 18 months (see Section 6.6.4).
- Under both EU law and the ECHR, there must be a realistic prospect for removing someone who is being detained for the purpose of removal (see Section 6.6.3) and removal procedures have to be carried out with due diligence (see Section 6.6.2).
- A deprivation of liberty must comply with the procedural safeguards in Article 5 (2) on the right to be informed of the reasons, and Article 5 (4) of the ECHR on the right to have the detention decision reviewed speedily (see Section 6.8).
- Under both EU law and the ECHR, deprivation of liberty or restriction on freedom of movement must comply with other human rights guarantees, such as: the conditions of detention respecting human dignity; never putting the health of individuals at risk; and the need for special consideration of members of vulnerable groups (see Sections 6.7 and 6.9).
- An individual who has been detained arbitrarily or unlawfully may have a claim for damages under both EU law and the ECHR (see Section 6.10).

Further case law and reading:

To access further case law, please consult the guidelines **How to find case law of the European courts** on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the ‘**Further reading**’ section on page 217.

7

Forced returns and manner of removal

EU	Issues covered	CoE
Return Directive (2008/115/EC) Frontex Regulation (amendments), No. 1168/2011 Council Decision on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (2004/573/EC)	Carrying out removal: safe, dignified and humane	Committee of Ministers, Twenty Guidelines on Forced Return, 2005, No. 19
Asylum Procedures Directive (2005/85/EC), Article 41	Confidentiality	Committee of Ministers, Twenty Guidelines on Forced Return, September 2005, No. 12
EU Charter of Fundamental Rights, Article 2 (right to life) Return Directive (2008/115/EC), Article 8 (4)	Serious harm caused by restraint measures	ECHR, Article 2 (right to life) Committee of Ministers, Twenty Guidelines on Forced Return, September 2005, No. 19
	Investigations	ECtHR, <i>Ramsahai v. the Netherlands</i> 2007 (effective system) ECtHR, <i>Tarariyeva v. Russia</i> , 2006 (medical care in prisons) ECtHR, <i>Tais v. France</i> , 2006 (check of medical conditions while in custody)

Introduction

This chapter examines the manner in which an alien is removed from a state. Legal barriers to removal, such as barriers to removing asylum seekers, are examined in Chapters 1, 3 and 4.

Whether they are removed by air, land or sea, individuals should be returned in a safe, dignified and humane manner. There have been incidents of returnees dying in the removal process because of asphyxiation or suffering serious injury. Deaths have also occurred in detention centres before the removal could take place. The removal process may also increase the risk of self-harm or suicide, either during detention before removal or during the removal itself.

Under EU law, forced returns are regulated by the Return Directive (2008/115/EC). Frontex-coordinated joint return operations are regulated by the revised Frontex Regulation (No. 1168/2011).

The ECtHR has rarely been called on to consider the actual manner of removal. There is, however, a wealth of case law primarily under Articles 2, 3 and 8 of the ECHR. This case law regards the authorities' use of force in general, the need to protect individuals from harm, as well as the authorities' procedural obligation to investigate their handling of situations that allegedly subjected an individual to serious harm. These general principles may also be applicable in certain circumstances, such as in the context of forced returns. This will be looked at in more detail.

In addition to legislative provisions, there are important soft law instruments on this specific issue. The Council of Europe Twenty Guidelines on Forced Return provides useful guidance and is therefore referred to in several parts of this chapter.³¹⁰ The CPT standards also include a specific section on returns by air.³¹¹

Returns are often made possible through readmission agreements concluded at the political or operational level. In the EU, readmission agreements can be concluded by individual Member States or by the Union. In the period 2005-2012, 13 EU readmission agreements were concluded and entered into force.³¹²

³¹⁰ Council of Europe, Committee of Ministers (2005).

³¹¹ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2002-2011), Chapter IV, p. 69ff.

³¹² Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia (chronological order). Also see: Commission Staff Working Paper, SEC (2011) 209, 23 February 2011, Table 1.

7.1. Carrying out removal: safe, dignified and humane

Under EU law, the Return Directive states that forced returns must be carried out with due respect for the dignity and the physical integrity of the person concerned (Article 8 (4)). Moreover, voluntary departures are to be given priority (Article 7) and an effective monitoring system of forced returns has to be established (Article 8 (6)).³¹³ In an annex to a 2004 Council Decision, the common guidelines on security provisions for joint removals by air also provide guidance on, among other things, medical issues, the training and conduct of escort officers, and the use of coercive measures.³¹⁴

The Return Directive requires that the individual's state of health is taken into account in the removal process (Article 5). In the case of return by air, this typically requires medical staff to certify that the person is fit to travel. The person's physical and mental health condition may also be the reason for a possible postponement of the removal (Article 9). Due account has to be given to the right to family life when implementing removals (Article 3). Domestic legislation and policy may also address specific health issues, such as women in a late stage of pregnancy.

The Return Directive requires that unaccompanied minors only be returned to family members, a nominated guardian or to adequate reception facilities (Article 10).

Under the ECHR, an assessment will be made as to whether the injuries or harm that public officials may have caused to individuals under their custody and control are of sufficient gravity to engage Article 3 of the ECHR. An individual's particular vulnerabilities, such as those deriving from age or from mental health concerns, have to be taken into account.³¹⁵

According to the Council of Europe Guidelines on Forced Return, authorities should cooperate with returnees so as to limit the necessity to use force, and returnees should be given an opportunity to prepare for the return (Guideline 15). Returnees must also be fit to travel (Guideline 16).

³¹³ For more information on EU Member State practices, see: FRA (2012) pp. 51-54.

³¹⁴ Council Decision 2004/573/EC, Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders.

³¹⁵ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011; ECtHR, *Darraj v. France*, No. 34588/07, 4 November 2010.

7.2. Confidentiality

It is important to ensure that only the information necessary to facilitate a removal is passed on to the country of return so as to preserve confidentiality of the information obtained in the asylum process. Escorts accompanying a returnee from the detention centre to their point of return should also ensure such confidentiality.

Under EU law, information obtained during asylum procedures is governed by Article 41 of the Asylum Procedures Directive (2005/85/EC) and requires EU Member States to respect the confidentiality of any information obtained. Article 22 of the directive provides guarantees of non-disclosure of information to alleged persecutors when collecting information on individual asylum applicants.

Under the ECHR, a breach of confidentiality might raise issues within the scope of Article 8 of the ECHR and, where a breach would lead to risk of ill-treatment upon return, it may fall within Article 3 of the ECHR. However, in a different context, the Court has held that any measure that interferes with privacy must be subject to detailed rules and minimum safeguards that provide sufficient guarantees against the risk of abuse and arbitrariness. These safeguards must concern, among other things, duration, storage, usage, access of third parties, procedures for preserving data integrity and confidentiality, and procedures for data destruction.³¹⁶

The Council of Europe Twenty Guidelines on Forced Return also address respect and restrictions imposed on the processing of personal data and the prohibition of sharing information related to asylum applications (Guideline 12).

7.3. Serious harm caused by restraint measures

Under domestic law, state agents, such as custody officers or escort staff, may be empowered to use force in the exercise of their functions. Both EU law and the ECHR stipulate that such force has to be reasonable, necessary and proportionate.

EU law and the ECHR set down common standards applicable to death in custody cases. The right to life is guaranteed under Article 2 of both the EU Charter of Fundamental Rights and the ECHR. Article 2 is one of the most important rights,

³¹⁶ ECtHR, *S. and Marper v. the United Kingdom* [GC], No. 30562/04, 4 December 2008, para. 99.

from which no derogation is provided for under Article 15 of the ECHR. The ECHR does set out, however, that the use of force, particularly lethal force, is not in violation of Article 2 if the use of force is ‘absolutely necessary’ and is ‘strictly proportionate’.³¹⁷

Under EU law, the Return Directive sets out rules on coercive measures. Such measures are to be used as a last resort and must be proportionate and not exceed reasonable force. They have to be implemented with due respect for the dignity and physical integrity of the person concerned (Article 8 (4)).

Under the ECHR, case law relating to Article 2 of the ECHR requires a legislative, regulatory and administrative framework governing the use of force by state agents in order to protect against arbitrariness, abuse and loss of life, including avoidable accidents. Personnel structure, channels of communication and guidelines on the use of force need to be clearly and adequately set out within such a framework.³¹⁸ Where state agents exceed the amount of force they are reasonably entitled to use and this leads to harm, or even death, the Member State may be held accountable. There needs to be an effective investigation into what happened that is capable of leading to a prosecution.³¹⁹

The Court has held that Member States not only have ‘negative’ obligations not to harm individuals, but also ‘positive’ obligations to protect individuals against loss of life or serious injury, including from third parties or from him- or herself, as well as to provide access to medical services. The Member State’s obligation to protect also encompasses a duty to establish legal provisions and appropriate procedures, including criminal provisions to prevent offences against a person, with accompanying sanctions to deter the commission of such offences.³²⁰ The question is whether the authorities have done all that could reasonably be expected of them in order to avoid a real and immediate risk to life which they knew of or ought to have known of.³²¹

317 European Commission of Human Rights, *Stewart v. the United Kingdom* (dec.), No. 10044/82, 10 July 1984; ECtHR, *McCann and Others v. the United Kingdom*, No. 18984/91, 27 September 1995, paras. 148-149.

318 ECtHR, *Makaratzis v. Greece* [GC], No. 50385/99, 20 December 2004, para. 58; ECtHR, *Nachova and Others v. Bulgaria* [GC], Nos. 43577/98 and 43579/98, 6 July 2005, para. 96.

319 ECtHR, *McCann and Others v. the United Kingdom*, No. 18984/91, 27 September 1995, para. 161; ECtHR, *Velikova v. Bulgaria*, No. 41488/98, 18 May 2000, para. 80.

320 ECtHR, *Osman v. the United Kingdom* [GC], No. 23452/94, 28 October 1998; ECtHR, *Mastromatteo v. Italy* [GC], No. 37703/97, 24 October 2002, paras. 72-73; ECtHR, *Finogenov and Others v. Russia*, Nos. 18299/03 and 27311/03, 20 December 2011, para. 209.

321 ECtHR, *Branko Tomašić and Others v. Croatia*, No. 46598/06, 15 January 2009, para. 51.

In considering the legality of the use of force, the ECtHR has looked at several factors, including the nature of the aim pursued and the bodily and life danger inherent in the situation. The Court looks at the circumstances of a particular use of force, including whether it was deliberate or unintentional, and whether there was adequate planning and control of the operation.

Example: In *Kaya v. Turkey*,³²² the ECtHR reiterated that the member state must consider the force employed and the degree of risk that it may result in the loss of life.

The use of restraint may not only raise issues under Article 2, which involves a loss of life or a near-death situation, such as attempted suicide that causes lasting harm, but also under Articles 3 and 8 in situations where the individual is harmed or injured through use of restraint that falls short of unlawful killing.

Example: In *Ilhan v. Turkey*,³²³ the Court found that Article 3 of the ECHR, rather than Article 2, was breached where the individual suffered brain damage as a result of the use of excessive force upon arrest.

The ECtHR has expressed concerns about incidents involving police or other officers taking part in 'interventions' against individuals in the context of Article 8 of the ECHR.³²⁴

Death or injury may be caused by coercive restraint techniques or by the Member State's failure to prevent loss of life, including from self-harm or for medical reasons.³²⁵ In this sense, the Council of Europe Twenty Guidelines on Forced Return ban restraint measures likely to obstruct the airways, partially or wholly, or forcing the returnee into positions where he or she risks asphyxia (Guideline 19).

322 ECtHR, *Kaya v. Turkey*, No. 22729/93, 19 February 1998.

323 ECtHR, *Ilhan v. Turkey* [GC], No. 22277/93, 27 June 2000, paras. 77 and 87.

324 ECtHR, *Kučera v. Slovakia*, No. 48666/99, 17 July 2007, paras. 122-124; ECtHR, *Rachwalski and Ferenc v. Poland*, No. 47709/99, 28 July 2009, paras. 58-63.

325 See, for example, the United Kingdom case of *FGP v. Serco Plc & Anor* [2012] EWHC 1804 (Admin), 5 July 2012.

7.4. Investigations

Under the ECHR, general principles developed primarily under Articles 2, 3 and 8 of the ECHR may in certain circumstances also be applicable in the context of forced returns. There must be some form of effective and official investigation when an individual loses his or her life or suffers serious injury at the hands of the Member State, or when this occurs in circumstances where the Member State may be held responsible, such as if the individual is in custody. The Member State may remain liable even if it outsources parts of its work in removal situations to private companies. A minimum level of effectiveness must be satisfied, which depends on the circumstances of the case.³²⁶ There must be effective accountability and transparency to ensure respect for the rule of law and to maintain public confidence.³²⁷

Where an individual is found dead or injured and is or has been subject to the custody or control of the Member State, the burden lies on the Member State to provide a satisfactory and convincing account of the events in question. For example, a breach of Article 2 was found where the government asserted death from natural causes without any other satisfactory explanation for death or defective postmortem.³²⁸ Similarly, there were also examples of breaches of Article 2 found in cases on defective medical care in a prison hospital³²⁹ and shortcomings in the examination of the applicant's condition while in custody.³³⁰

For an Article 2 compliant investigation, the essential criteria are that it should be: independent; prompt; involve the family; be adequate and effective. The investigation and its results should also be open to public scrutiny. The onus is on the authorities to launch the investigation of their own initiative and without waiting for a complaint to be made. In a hierarchical, institutional and practical sense, the investigation should be conducted by an officer or body who is independent from those implicated in the events.³³¹

326 ECtHR, *McCann and Others v. the United Kingdom* [GC], No. 18984/91, 27 September 1995, para. 161; ECtHR, *Velikova v. Bulgaria*, No. 41488/98, 18 May 2000, para. 80.

327 ECtHR, *Ramsahai and Others v. the Netherlands* [GC], No. 52391/99, 15 May 2007, para. 325.

328 ECtHR, *Tanli v. Turkey*, No. 26129/95, 10 April 2001, paras. 143-147.

329 ECtHR, *Tarariyeva v. Russia*, No. 4353/03, 14 December 2006, para. 88.

330 ECtHR, *Taïs v. France*, No. 39922/03, 1 June 2006.

331 ECtHR, *Finucane v. the United Kingdom*, No. 29178/95, 1 July 2003, para. 68.

Key points

- Removals have to be carried out safely, humanely and must protect the dignity of the individual (see Section 7.1).
- Individuals should be fit to travel, having regard to their physical and mental health (see Section 7.1).
- Special care should be taken with regard to vulnerable persons, including children, as well as those at risk of suicide or self-harm (see Section 7.1).
- Under EU law, Member States have to establish effective return monitoring systems (see Section 7.1).
- The Return Directive requires that unaccompanied minors only be returned to family members, a nominated guardian or to adequate reception facilities (see Section 7.1).
- Confidentiality of information obtained in the asylum process should be ensured (see Section 7.2).
- Under both EU law and the ECHR, any use of coercive measures must be reasonable, necessary and proportionate (see Section 7.3).
- Under the ECHR, the authorities are required to investigate arguable allegations of excessive use of force (see Section 7.4).

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.

8

Economic and social rights

EU	Issues covered	CoE
EU Charter of Fundamental Rights, Articles 12 (freedom of assembly and association), 15 (1) (freedom to choose an occupation and right to engage in work), 16 (freedom to conduct a business), 28 (right of collective bargaining and action), 29 (right of access to placement services), 30 (protection in the event of unjustified dismissal), 31 (fair and just working conditions) and 32 (prohibition of child labour and protection of young people at work) Access to the labour market is regulated by secondary EU law for each specific category	Economic rights	ECHR, Article 4 (prohibition of slavery and forced labour) ECHR, Article 11 (freedom of association) ECtHR, <i>Bigaeva v. Greece</i>, 2009 (foreigner allowed to complete professional training but not allowed to sit related examination)
Charter, Article 14 (right to education for everyone) Return Directive (2008/115/EC), Article 14 (1) (migrants in an irregular situation) Reception Conditions Directive (2003/9/EC), Article 10 (<i>asylum seekers</i>)	Education	ECHR, Protocol No. 1, Article 1 (right to education) ESC, Articles 17 (right of children to social, legal and economic protection), 18 (right to engage in a gainful occupation) and 19 (right of migrant workers and their families to protection and assistance) ECtHR, <i>Ponomaryovi v. Bulgaria</i>, 2011 (migrants in an irregular situation charged higher fees for secondary education) European Commission of Human Rights, <i>Karus v. Italy</i>, 1998 (foreigners charged higher fees for tertiary education)

EU	Issues covered	CoE
EU Charter of Fundamental Rights, Article 34 (3) (social security and social assistance) For third-country national family members of EEA nationals, long-term residents, asylum seekers, refugees, subsidiary protection status holders and victims of trafficking, rules on housing are contained in secondary EU law	Housing	ECtHR, <i>Gillow v. the United Kingdom</i>, 1986 (right to respect for home) ECtHR, <i>M.S.S. v. Belgium</i>, 2011 (failure to provide housing can amount to a violation of Article 3 of the ECHR) ESC, Article 31 (right to housing) ECSR, <i>DCI v. the Netherlands</i>, 2009 (housing for children in an irregular situation)
Charter, Article 35 (healthcare) Healthcare is regulated by secondary EU law for each specific category	Healthcare	ESC, Article 13 (the right to social and medical assistance) ECSR, <i>FIDH v. France</i>, 2004
For third-country national family members of EEA nationals: Free Movement Directive (2004/38/EC), Articles 24 and 14 Coordination of Social Security Regulation, 883/2004/EC, amended by 465/2012/EU For third-country national moving within the EU: Regulations 859/2003 and 1231/2010 Other categories: Secondary EU law has specific entitlements for asylum seekers, refugees, persons granted subsidiary protection, victims of trafficking and long-term residents	Social security and assistance	ECtHR, <i>Wasilewski v. Poland</i>, 1999 (no right to financial assistance) ECtHR, <i>Gaygusuz v. Austria</i>, 1996 (discrimination of foreigners as regards unemployment benefits) ECtHR, <i>Koua Poirrez v. France</i>, 2003 (discrimination of foreigners as regards disability benefits) ECtHR, <i>Andrejeva v. Latvia</i>, 2009 (discrimination of foreigners as regards pensions) ESC, Articles 12 (right to social security), 13 (right to social and medical assistance), 14 (right to benefit from social welfare services), 15 (rights of persons with disabilities), 17 (right of children to social, legal and economic protection), 23 (communication of reports) and 30 (protection against poverty and social exclusion)

Introduction

For most migrants, being permitted to enter or to remain in a state is only the first step in establishing full residence rights. Accessing employment, education, housing, healthcare, social security, social assistance and other social benefits can be a challenging exercise. An acknowledged right to enter or remain is normally necessary for accessing the full range of social rights.

States are generally permitted to differentiate between nationalities when they are exercising their sovereign right to permit or deny access to their territory.

In principle, it is not unlawful to enter agreements or pass national legislation permitting certain nationalities privileged rights to enter or remain in the state's territory. States are therefore normally also permitted to attach differentiated conditions to such entry or residence, such as stipulating that there should be no access to employment or no recourse to public funds. States must bear in mind, however, that international and European human rights instruments prohibit discrimination, including on the ground of nationality, in the respective fields they regulate.³³²

The more a particular situation falls under a state's sovereign right to admit or exclude foreigners, the more discretion the state has in imposing differentiated conditions.³³³ Differentiated treatment becomes less acceptable the more similar a foreigner's immigration situation is to the situation of a state's own citizens.³³⁴ Where core fundamental rights are concerned, such as the right to life or the prohibition on degrading treatment, differentiated treatment amounts to prohibited discrimination.³³⁵ These principles are of particular importance when looking at access to social rights.

This chapter provides a brief overview of both EU and Council of Europe standards relating to access to economic and social rights, namely the right to work, education, housing, healthcare and social protection.

8.1. Main sources of law

Under EU law, EU free movement provisions have a significant impact on the situation of third-country national family members of EU citizens who have exercised their right to free movement within Europe. The Free Movement Directive (2004/38/EC) regulates the situation of their family members of whatever nationality. Article 2 (2) of the directive defines which family members are covered by the directive. The directive also applies to third-country national family members of citizens from Iceland, Liechtenstein and Norway.³³⁶ Family members of Swiss citizens enjoy a similar status.³³⁷ The family members covered by these different

332 CFR, Art. 21; ECHR, Art. 14 and Protocol No. 12, Art. 1; ESC, Part V, Art. E.

333 ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 27 September 2011.

334 ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996.

335 ECSR, *Defence for Children International v. the Netherlands*, No. 47/2008, 20 October 2009.

336 Agreement on the European Economic Area, 2 May 1992, Part III, Free Movement of Persons, Services and Capital, OJ L 1 of 3 March 1994.

337 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, 21 June 1999, Art. 7, OJ L 114/7, 30 April 2002 (subsequently extended to other EU Member States).

provisions are not only entitled to access the labour market, but also have access to social benefits.

Under EU law, Turkish citizens, although not EEA nationals, and their family members have a privileged position in EU Member States. This derives from the Ankara Agreement of 1963 and its 1970 Additional Protocol which assumed that Turkey would become a member of the EU by 1985. As at 2010, there were almost 2.5 million Turkish nationals residing in the EU, making Turkish nationals the largest group of third-country nationals residing in the EU.³³⁸

The degree of access to the labour market of other categories of third-country nationals, such as asylum seekers, refugees or long-term residents, is regulated by specific directives. In December 2011, the EU adopted the Single Permit Directive (2011/98/EU), which will introduce a single application procedure for third-country nationals to reside and work in an EU Member State's territory, as well as a common set of rights for legally residing third-country national workers.

In addition, the Racial Equality Directive (2000/43/EC) prohibits discrimination on the basis of race or ethnicity in the context of employment and when accessing goods and services as well as the welfare and social security system.³³⁹ It also applies to third-country nationals; according to Article 3 (2) of the directive, however, it "does not cover differences of treatment based on nationality and is without prejudice [...] to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned".

The Community Charter of the Fundamental Social Rights of Workers was adopted on 9 December 1989 by a declaration by all Member States, with the exception of the United Kingdom. It established the major principles that form the basis of the European labour law model, and shaped the development of the European social model in the following decade. The fundamental social rights declared in the Community Charter are further developed and expanded in the EU Charter of Fundamental Rights. The Charter is limited in its application to those matters which fall within the scope of EU law, and its provisions cannot expand the scope of EU law. Under the EU Charter of Fundamental Rights, very few social rights are guaranteed to all individuals, like the right to education in Article 14 (1) (2), as most of rights are restricted to citizens and/or those who are lawfully resident.

³³⁸ European Commission, Eurostat (2010), 'Main countries of origin of non-nationals, EU-27, 2010', available at: [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Main_countries_of_origin_of_non-nationals,_EU-27,_2010_\(million\).png&filetimestamp=20111125175250#file](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Main_countries_of_origin_of_non-nationals,_EU-27,_2010_(million).png&filetimestamp=20111125175250#file).

³³⁹ Directive 2000/43/EC, OJ L 180/22.

Under the Council of Europe system, the ECHR mainly guarantees civil and political rights and thus provides only limited guidance on economic and social rights.

The ESC (adopted in 1961 and revised in 1996), however, supplements the ECHR and is a key reference for European human rights law in the field of economic and social rights. It lays down fundamental rights and freedoms and establishes a supervisory mechanism based on a reporting procedure and a collective complaints procedure, guaranteeing the respect of ESC rights by State Parties. The ESC enshrines a body of rights that encompass housing, health, education, employment, social protection, the free movement of individuals and non-discrimination.

Although the ESC's protection for migrants is not based on the principle of reciprocity, its provisions apply at the outset only to nationals of member states that have ratified the ESC and who are migrants in other member states that have also ratified the ESC. According to the ESC Appendix, Articles 1-17 and 20-31 of the ESC, while not specifically referring to them, apply to foreigners provided they are nationals of member states party to the ESC lawfully resident or working regularly within the territory of a member state party to the ESC. These articles are to be interpreted in light of Articles 18 and 19 on migrant workers and their families. Article 18 secures the right to engage in a gainful occupation in the territory of the member states party to the ESC, and Article 19 secures the right of migrant workers and their families to protection and assistance.

The ESC's scope of application is thus somewhat limited, but the ECSR has developed a significant body of jurisprudence. When certain fundamental rights are at stake, ECSR case law has extended the ESC's personal scope to cover everyone in the territory, including migrants in an irregular situation.³⁴⁰

The ESC has an important relationship to the ECHR that gives ECSR case law considerable value. Even though not all EU and Council of Europe Member States have ratified the ESC or accepted all of its provisions, the ECtHR has held that ratification is not essential for the Court's interpretation of certain issues raised under the ECHR that are also regulated by the ESC.³⁴¹

340 ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 8 September 2004.

341 ECtHR, *Demir and Baykara v. Turkey* [GC], No. 34503/97, 12 November 2008, paras. 85-86. Other examples of relevant international instruments applicable in this field include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on Migrant Workers and ILO Convention 143.

8.2. Economic rights

This section looks at economic rights, including access to the labour market and the right to equal treatment at work. Access to the labour market is usually dependent upon a person's legal status. From the moment a person is working, however, whether lawfully or not, core labour rights have to be respected. Similarly, regardless of legal status, workers are entitled to receive any payment due for the work they have carried out.

Under the ECHR, economic and social rights are not explicitly guaranteed, with the exception of the prohibition of slavery and forced labour (Article 4) and the right to form trade unions (Article 11).

Among ECtHR cases in related areas, the Court has examined the situation of a foreigner who had been allowed to commence training for a certain profession and was then denied the right to exercise it.

Example: In *Bigaeva v. Greece*,³⁴² a Russian citizen had been permitted to commence an 18-month traineeship with a view to being admitted to the Greek Bar. Upon completion, the Bar Council refused her permission to sit for the Bar examinations on the grounds that she was not a Greek national. The ECtHR noted that the Bar Council had allowed the applicant to commence her traineeship although it was clear that on completion she would not be entitled to sit for the Bar examinations. The Court found that the authorities' conduct had shown a lack of consistency and respect towards the applicant both personally and professionally, and had constituted an unlawful interference with her private life within the meaning of Article 8 of the ECHR. The ECtHR did not find, however, that excluding foreigners from the law profession was, in itself, discriminatory.

Under the ESC, Article 18 provides for the right to engage in a gainful occupation in the territory of other member states party to the ESC. This provision does not regulate entry to the territory for work purposes and is in some respects exhortatory rather than mandatory. It does require, however, that work permit refusal rates be not too high;³⁴³ that work and residence permits be obtainable by means of a single

³⁴² ECtHR, *Bigaeva v. Greece*, No. 26713/05, 28 May 2009.

³⁴³ ECSR, Conclusions XVII-2, Spain, Art. 18 (1).

application procedure and without excessive fees and charges;³⁴⁴ that any work permits granted be not too restrictive geographically and/or occupationally;³⁴⁵ and loss of employment need not automatically and immediately lead to loss of residence permit, giving the person time to look for another job.³⁴⁶

Article 19 of the ESC includes an extensive catalogue of provisions supporting migrant workers on the territory of other State Parties, but with the stipulation that they must be there lawfully (see, however, Chapter 3 for details on Article 19 (8)).

The ESC also covers working conditions, such as the right to reasonable working hours, the right to paid annual leave, the right to health and safety at the workplace, and the right to fair remuneration.³⁴⁷

Under EU law, one of the freedoms enshrined in the EU Charter of Fundamental Rights is “the right to engage in work and to pursue a freely chosen or accepted occupation” (Article 15 (1) of the Charter). This right is, however, circumscribed by national law, including national laws regulating the right for foreigners to work. The Charter recognises the right to collective bargaining (Article 28) and the freedom to form trade unions (Article 12). It also grants everyone the right to free placement services (Article 29). Every worker, including non-EU nationals, enjoys protection from unjustified dismissals (Article 30), the right to fair and just working conditions, as well as the right to rest and to paid annual leave (Article 31). Article 16 guarantees the freedom to conduct business. The Charter also provides for the protection of health and safety at work (Article 31). It also prohibits child labour (Article 32).

Secondary EU law devoted to a specific category of persons usually regulates access to the labour market. Third-country nationals have differing degrees of access to the labour market depending on the category to which they belong. Sections 8.2.1-8.2.9 briefly outline the situation of the main categories of third-country nationals.

344 ECSR, Conclusions XVII-2, Germany, Art. 18 (2).

345 ECSR, Conclusions V, Germany, Art. 18 (3).

346 ECSR, Conclusions XVII-2, Finland, Art. 18 (3).

347 ECSR, *Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005, merits, 6 December 2006, which refers to mine workers.

8.2.1. Family members of EEA and Swiss nationals

Under EU law, designated family members – of whatever nationality – of EU citizens who exercise free movement rights as well as of other EEA citizens and Swiss citizens have the right to move freely throughout Europe for the purposes of employment and self-employment, and have the right to treatment equal to a Member State's own nationals (Article 24 of the Free Movement Directive for EU nationals).

Family members of Swiss nationals do not have the right to full equality of treatment in this respect.³⁴⁸ Temporary restrictions to access the labour market have been placed on Bulgarian and Romanian nationals and their family members until June 2013. Similar transitional provisions will apply to Croatia after its expected accession to the EU in July 2013.

In the context of the free movement of citizens and their family members of whatever nationality, Article 45 (4) of the TFEU makes provision for Member States to reserve employment in the public service for their own nationals. The ECJ has interpreted this strictly and has not allowed Member States to reserve access to certain positions for nationals only, for example to work as a trainee teacher³⁴⁹ or a foreign language university assistant.³⁵⁰

To facilitate the genuine free movement of workers, the EU has also adopted complex legislation concerning the mutual recognition of qualifications, both in general and per sector, which apply to third-country national family members as well as to EEA nationals. Directive 2005/36/EC on the recognition of professional qualifications was last consolidated in March 2011 (note also amendments). There are complex provisions relating to those who have obtained all or part of their qualifications outside the EU, even if those qualifications have already been recognised in one EU Member State. The ECJ/CJEU has handed down more than 130 judgments in this field.³⁵¹

348 CJEU, C-70/09 [2010] ECR I-07233, *Alexander Hengartner and Rudolf Gasser v. Landesregierung Vorarlberg*, 15 July 2010, paras. 39-43.

349 ECJ, C-66/85 [1986] ECR I-02121, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, 3 July 1986, paras. 26-27.

350 ECJ, Joined Cases C-259/91, C-331/91 and C-332/91 [1993] I-04309, *Pilar Allué and Carmel Mary Coonan and Others v. Università degli studi di Venezia and Università degli studi di Parma*, 2 August 1993, paras. 15-21.

351 For a complete list of the judgments with summaries, see: http://ec.europa.eu/internal_market/qualifications/doc.judgments/list_en.

8.2.2. Posted workers

Those third-country nationals not enjoying free movement rights but who are lawfully working for an employer in one Member State, and who are temporarily sent by that employer to carry out work on its behalf in another Member State are covered by the Posting of Workers Directive (96/71/EC). The purpose of the directive is to guarantee the protection of posted workers' rights and working conditions throughout the European Union in order to prevent "social dumping". More explicitly, the directive is aimed at reconciling the freedom to provide cross-border services under Article 56 of the TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose.³⁵² As the ECJ highlighted, this cannot however lead to a situation in which an employer is obliged under the directive to respect the relevant labour law of both the sending state and the host country, as the protection standard granted in the two Member States can be regarded as equivalent.³⁵³

To that extent, the directive sets out minimum standards that must apply to employees from one Member State posted to work in another. Specifically, Article 3 of the directive provides that terms and conditions established by the host country's legislation or by universally applicable collective agreements, apply to posted workers, especially in relation to minimum work periods, breaks, annual holidays and rates of pay.

In March 2012, the European Commission proposed a directive³⁵⁴ which seeks to improve the implementation and enforcement of the existing Posting of Workers Directive.

8.2.3. Blue Card holders, researchers and students

After two years of legal employment, third-country nationals who hold EU Blue Cards are entitled to equal treatment with nationals as regards access to any highly qualified employment in the host Member State. After 18 months of legal residence in one Member State, the EU Blue Card holder may move to another Member State

³⁵² ECJ, C-346/06 [2008] I-01989, *Dirk Rüffert v. Land Niedersachsen*, 3 April 2008.

³⁵³ ECJ, C-341/05 [2007] I-11767, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1 Byggettan and Svenska Elektrikerförbundet*, 18 December 2007.

³⁵⁴ European Commission (2012) *Proposal for Directive concerning the enforcement of the provision applicable to the posting of workers in the framework of the provision of services*, COM(2012)131 final.

to take up highly qualified employment, subject to the Member State's limits on the number of non-nationals accepted.

Under Article 15 (6) of the Blue Card Directive (2009/50/EC), the family members of EU Blue Card holders, of whatever nationality, acquire an automatic general right to access the labour market. Unlike the Family Reunification Directive (2003/86/EC), the Blue Card Directive does not impose a time limit for acquiring this right.

Researchers are covered by the Scientific Research Directive (2005/71/EC; for a list of participating Member States, see Annex 1). An applicant must present a valid travel document, a hosting agreement signed with a research organisation, and a financial responsibility statement; in addition the applicant must not be considered to pose a threat to public policy, public security or public health. The issue of residence permits for researchers' family members remains at the discretion of Member States. This directive, much like the Single Permit Directive, does not grant rights of family reunification to family members living in third countries.

The Students Directive (2004/114/EC) regulates third-country nationals admitted to the EU for study, pupil exchange, unremunerated training or voluntary service. Member States have to allow students to work outside of study time for a maximum number of hours per week as set by the Member State, but the Member State may also require that certain other conditions be fulfilled (Article 17).

8.2.4. Turkish citizens

Turkish citizens have a particularly privileged position under the 1963 Ankara Agreement and its 1970 Additional Protocol, as well as the decisions taken by the EEC-Turkey Association Council set up under those instruments. Turkish citizens do not have the direct right to enter any EU Member State in order to take up employment. If a Member State's national law, however, permits them to take up employment, they then have the right to continue in that same employment after one year.³⁵⁵ After three years, under certain conditions, they may also seek other employment under Article 6 (1) of Decision No. 1/80 of the EEC-Turkey Association Council. Like EEA workers, Turkish workers are defined in a broad manner.

³⁵⁵ ECJ, C-386/95 [1997] I-02697, *Eker v. Land Baden-Württemberg*, 29 May 1997, paras. 20-22.

Example: In the *Tetik* case,³⁵⁶ the German authorities did not want to grant Mr Tetik a residence permit after he completed his three years and was looking for other employment. The ECJ found that he had to be permitted a reasonable period of lawful residence in order to seek the work he was entitled to take up, should he find it.

Example: The CJEU concluded in *Genc*³⁵⁷ that a Turkish national who only works a particularly limited number of hours, namely 5.5 hours per week, for an employer in return for remuneration that only partially covers the minimum necessary for her subsistence is a worker within the meaning of Article 6 (1) of Decision No. 1/80 of the Association Council, provided that her employment is real and genuine.

Under Article 7 of Decision No. 1/80, family members of a Turkish worker, even if the family members are not Turkish citizens themselves, can access the labour market after they have been legally residing for three years. Objective reasons may justify the family member concerned living apart from the Turkish migrant worker.³⁵⁸ A child of a Turkish national who has completed vocational training in the host country may respond to employment offers, provided one of the parents has been legally employed in the host country for at least three years.

Example: In the *Derin* case,³⁵⁹ the ECJ held that a Turkish national, who as a child joined his Turkish parents legally working in Germany, could only lose the right of residence in Germany, which was derived from a right to free access to employment, on grounds of public policy, public security or public health, or if he were to leave the Member State's territory for a significant period of time without good reason.

In relation to the right of establishment or the provision of services, Turkish citizens benefit from the standstill clause in Article 41 of the Additional Protocol to the Ankara Agreement. If no visa or work permit requirement was imposed on Turkish citizens at the time Article 41 of the Protocol came into force in a particular Member State, then that Member State is prohibited from now imposing a visa or work permit requirement (see also Section 2.8).

356 ECJ, C-171/95, *Recep Tetik v. Land Berlin*, 23 January 1997, para. 30.

357 CJEU, C-14/09 [2010] I-00931, *Hava Genc v. Land Berlin*, 4 February 2010, paras. 27-28.

358 ECJ, C-351/95 [1997] ECR I-02133, *Kadiman v. State of Bavaria*, 17 April 1997, para. 44.

359 ECJ, C-325/05 [1997] ECR I-00329, *Ismail Derin v. Landkreis Darmstadt-Dieburg*, 18 July 2007, paras. 74-75.

8.2.5. Long-term residents and beneficiaries of the Family Reunification Directive

Persons who have acquired long-term resident status under Article 11 (a) of the Long-Term Residents Directive (2003/109/EC) enjoy equal treatment with nationals as regards access to paid and unpaid employment; conditions of employment and working conditions (including working hours, health and safety standards, holiday entitlements, remuneration and dismissal); and freedom of association and union membership and freedom to represent a union or association.

For beneficiaries of the Family Reunification Directive (see also Chapter 5), the family member of a legally residing third-country national sponsor is entitled to access to employment and self-employed activity (Article 14). Access to the labour market is subject to a time limit after arrival in the host state that cannot exceed 12 months. During this time, the host state can consider whether its labour market can accept him or her.

8.2.6. Nationals of other countries with association or cooperation agreements

Article 216 of the TFEU provides for the conclusion of agreements between third countries and the EU, with Article 217 providing specifically for association agreements. Citizens of certain states with whom the EU has concluded association, stabilisation, cooperation, partnership and/or other types of agreements³⁶⁰ enjoy equal treatment in many respects, but they are not entitled to the full equal treatment that is enjoyed by EU citizens. As at the end of 2012, the EU had concluded agreements with over 103 states.³⁶¹

These association and cooperation agreements do not create a direct right for their nationals to enter and work in the EU. Nationals from these countries working legally in a given EU Member State are, however, entitled to equal treatment and the same working conditions as the nationals of that Member State. This is, for

³⁶⁰ Stabilisation and Association Agreements are in place with Albania, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Montenegro and Serbia. Partnership and cooperation agreements exist with 13 Eastern European and Central Asian countries; the original agreements with Morocco, Tunisia and Algeria have now been replaced by the Euro-Mediterranean agreements. Agreements have been signed with the 79 Afro-Caribbean Pacific states (the Cotonou Agreements), and with Chile.

³⁶¹ For an up-to-date and comprehensive overview of the impact of these agreements on nationals of those states and their family members, see Rogers, N. *et al.* (2012), Chapters 14-21.

example, the case of Article 64 (1) of the Euro-Mediterranean Agreements with Morocco and Tunisia, which establishes that “the treatment accorded by each Member State to workers of Moroccan [or Tunisian] nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals”.³⁶² For temporary employment, non-discrimination is limited to working conditions and remuneration (Article 64 (2)). Article 65 (1) of both agreements also introduced non-discrimination in the field of social security.³⁶³

The ECJ/CJEU has dealt with a number of cases relating to these agreements.³⁶⁴ Some of these have concerned the possibility of renewing, for work purposes, a third-country national’s residence permit, after having lost their rights of residence as a dependant due to a breakdown in a relationship.

Example: The *El Yassini*³⁶⁵ case concerned a Moroccan national who lost the initial reason for his stay and was subsequently refused an extension of his residence permit, regardless of his gainful employment. In this case, the Court had to ascertain whether the approach taken in its case law concerning Turkish nationals³⁶⁶ was also applicable by analogy to Moroccan nationals, and therefore whether Article 40 of the EEC-Morocco Agreement (later replaced by the Euro-Mediterranean Agreement with Morocco) included employment security for the whole duration of employment, as contractually determined between the employer and employee. The ECJ found that the EEC-Morocco Agreement was directly applicable, as it set up clear, unconditional

³⁶² Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, entered into force on 1 March 2000, OJ 2000 L70 p. 2, and Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (entered into force on 1 March 1998, OJ 1998 L97, p. 2).

³⁶³ ECJ, C-18/90 [2009] ECR I-00199, *Office National de l'emploi v. Kziber*, 31 January 1991.

³⁶⁴ Some cases related to the agreements are: ECJ, C-18/90 [2009] ECR I-00199, *Office National de l'emploi v. Kziber*, 31 January 1991; (Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, Art. 41 (1) *allocation d'atteinte*, OJ 1978 L 264 pp. 2–118, superseded by the EU-Morocco Euro-Mediterranean Association Agreement); ECJ, C-416/96 [1999] ECR I-01209, *El Yassini v. Secretary of State for the Home Department*, 2 March 1999 (Cooperation Agreement between the European Economic Community and the Kingdom of Morocco); ECJ, C-438/00 [2003] I-04135, *Deutscher Handballbund v. Kolpak*, 8 May 2003 (Slovak Republic).

³⁶⁵ ECJ, C-416/96 [1999] ECR I-01209, *El Yassini v. Secretary of State for the Home Department*, 2 March 1999, paras. 64, 65, 67.

³⁶⁶ ECJ, C-237/91 [1992] ECR I-6781, *Kazim Kus v. Landeshauptstadt Wiesbaden*, 16 December 1992, paras. 21–23 and 29.

and sufficiently practical principles in the field of working conditions and remuneration. The Court nevertheless excluded the fact that case law concerning the Ankara Agreement could have been applied to the present case. The Ankara Agreement and the EEC-Morocco Agreement were substantially different and, unlike the one with Turkey, the EEC-Morocco Agreement did not provide for the possibility of Morocco acceding to the Community nor was it aimed at securing freedom of movement for workers. Consequently, the Court held that the United Kingdom was not precluded from refusing to extend the applicant's residence permit, even though this would have implied the termination of his employment before expiry of the employment agreement. The Court went further and pointed out that the situation would have been different if the Member State had granted the Moroccan national "specific rights in relation to employment which were more extensive than the rights of residence".

Example: In *Gattoussi*,³⁶⁷ the Court was called to decide a similar case, but under the prohibition of discrimination laid down in Article 64 (1) of the Euro-Mediterranean Agreement Association between the EU and Tunisia. In this case, however, the applicant had been explicitly granted an indefinite work permit. In these circumstances, the Court concluded that Article 64 (1) of the EU-Tunisia Association Agreement "may have effects on the right of a Tunisian national to remain in the territory of a Member State in the case where that person has been duly permitted by that Member State to work there for a period extending beyond the period of validity of his permission to remain". In essence, the Court pointed out that in principle the EU-Tunisia Association Agreement did not prohibit a Member State from curtailing the Tunisian national's right when he had previously been authorised to enter and work. However, when the Tunisian national had been granted specific employment rights that were more extensive than the rights of residence, the refusal to extend his right of residence had to be justified on grounds of protection of a legitimate national interest, such as public policy, public security or public health.

³⁶⁷ ECJ, C-97/05 [2006] ECR I-11917, *Mohamed Gattoussi v. Stadt Rüsselsheim*, 14 December 2006, para. 39.

Similarly, Article 80 of the Stabilisation and Association Agreement between EU Member States and Albania³⁶⁸ establishes that “in relation to migration, the Parties agree to the fair treatment of nationals of other countries who reside legally on their territories and to promote an integration policy aiming at making their rights and obligations comparable to those of their citizens”.

In a less extensive manner, Article 23 of the Partnership and Cooperation Agreement with Russia³⁶⁹ regarding labour conditions establishes that “subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals”.

Example: The *Simutenkov* case³⁷⁰ concerned a Russian national employed as a professional football player in a Spanish club in Spain, whose participation in competitions was limited by the Spanish rules because of his nationality. The ECJ interpreted the non-discrimination provision laid down in Article 23 when assessing a rule drawn up by a Member State’s sports federation which provides that, in competitions organised at national level, clubs may only field a limited number of players from countries that are not parties to the EEA Agreement. The Court held that the rule was not in compliance with the purpose of Article 23 (1)).

8.2.7. Asylum seekers and refugees

Article 11 of the Reception Conditions Directive (2003/9/EC) makes provision for the possibility of Member States permitting **asylum seekers** and those seeking subsidiary protection to work, but does not make it mandatory. Access to the labour market, however, has to be granted if a decision at first instance has not been taken within one year of the presentation of an asylum application and if this delay

368 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (entered into force on 1 April 2009), OJ 2009 L107, p. 166.

369 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (entered into force on 1 December 1997), OJ 1997 L327, p. 3.

370 ECJ, C-265/03 [2005] I-02579, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, 12 April 2005, para. 41.

cannot be attributed to the applicant. Priority can be given, however, to EEA nationals and other legally residing third-country nationals.

Article 26 (1) and (3) of the Qualification Directive (2011/95/EC) recognises the right of **refugees** and those granted subsidiary protection to take up employment and to be self-employed. The same access that nationals have is to be granted to procedures for recognition of qualifications. In addition, Article 28 of the Qualification Directive provides for access to measures to assess prior learning, in case documentary evidence of previous qualification cannot be provided by the individual. These provisions reflect Articles 17, 18, 19 and 22 (2) of the Geneva Convention on the Status of Refugees. The directive also obliges the Member State to guarantee access to vocational training under the same conditions as nationals. Until 22 December 2013, however, when the revised Qualification Directive provisions will enter into force, Member States can consider the current labour market when granting beneficiaries of subsidiary protection with access to employment.

8.2.8. Migrants in an irregular situation

Access to many social rights depends on being lawfully present, or resident, in the host state. The EU is committed to eliminating the arrival and presence of unauthorised economic migrants. The key measure is the Employer Sanctions Directive (2009/52/EC): it prohibits the employment of irregular migrants from outside the EU by punishing employers through fines, or even criminal sanctions in the most serious of cases. All EU Member States, except Denmark, Ireland and the United Kingdom, are bound by the directive. It is also intended to offer migrant workers in an irregular situation a degree of protection from abusive employers.

Under the directive, before recruiting a third-country national, employers are required to check that they are authorised to stay, and to notify the relevant national authority if they are not. Employers who can show that they have complied with these obligations and have acted in good faith are not liable to sanctions. As many migrants in an irregular situation work in private households, the directive also applies to private individuals as employers.

Employers who have not carried out such checks and are found to be employing irregular migrants will be liable for financial penalties, including the costs of returning irregularly staying third-country nationals to their home countries. They also have to repay outstanding wages, taxes as well as social security contributions. Employers are liable to criminal penalties in the most serious of cases, such as,

repeated infringements, the illegal employment of children or the employment of significant numbers of migrants in an irregular situation.

The directive protects migrants by ensuring that they get any outstanding remuneration from their employer, and by providing access to support from third parties, such as trade unions or NGOs. The directive puts a particular emphasis on the enforcement of the rules. See Section 2.4 on the issuance of residence permits to victims of particularly exploitative working conditions who collaborate with the justice system.

8.3. Education

The right to education for children is protected under several international human rights instruments and the committees overseeing the Convention on the Rights of the Child, the International Covenant on Social and Economic Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. These committees have consistently held that the non-discrimination requirements of those instruments also apply to refugees, asylum seekers and to migrants in regular as well as irregular situations.

Under the ECHR, Article 2 of Protocol 1 provides for the right to education, and Article 14 and Protocol No. 12 prohibit discrimination on the ground of ‘national origin’. Article 2 of Protocol No. 1 in principle guarantees the right to primary and secondary education, whereas differences in treatment in respect of tertiary education might be much easier to justify.

Example: The case of *Timishev v. Russia*³⁷¹ concerned Chechen migrants who, though not technically foreigners, lacked the required local migration registration to enable their children to attend school. The Court found that the right for children to be educated was one of “the most fundamental values of democratic societies making up the Council of Europe” and held that Russia had violated Article 2 of Protocol No. 1.

³⁷¹ ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 64.

Example: In *Ponomaryovi v. Bulgaria*,³⁷² the ECtHR found that a requirement to pay secondary school fees that were predicated on the immigration status and nationality of the applicants was not justified. The Court noted that the applicants were not unlawfully arriving in the country and then laying claim to the use of its public services, including free schooling. Even when the applicants fell, somewhat inadvertently, into the situation of being aliens that lack permanent residence permits, the authorities had no substantive objection to their remaining in Bulgaria, and apparently never had serious intentions of deporting them. Considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants.

Example: In the case of *Karus v. Italy*,³⁷³ the former European Commission of Human Rights found that charging higher fees to foreign university students did not violate their right to education as the differential treatment was reasonably justified by the Italian government's wish to have the positive effects of tertiary education staying within the Italian economy.

Under the ESC, Article 17 governs the right to education and is subject to the provisions of Articles 18 and 19 in relation to migrants. The ECSR has made the following statement of interpretation relating to Article 17 (2):

*"As regards the issue as to whether children unlawfully present in the State Party are included in the personal scope of the Charter within the meaning of its Appendix, the Committee refers to the reasoning it has applied in its Decision on the Merits of 20 October 2009 of the Complaint No. 47/2008 Defence for Children International (DCI) v. the Netherlands (see, inter alia, paragraphs 47 and 48) and holds that access to education is crucial for every child's life and development. The denial of access to education will exacerbate the vulnerability of an unlawfully present child. Therefore, children, whatever their residence status, come within the personal scope of Article 17 § 2. Furthermore, the Committee considers that a child's life would be adversely affected by the denial of access to education. The Committee therefore holds that States Parties are required, under Article 17 § 2 of the Charter, to ensure that children unlawfully present in their territory have effective access to education as any other child."*³⁷⁴

372 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011, paras. 59-63.

373 European Commission of Human Rights, *Karus v. Italy* (dec.), No. 29043/95, 20 May 1998.

374 ECSR, Conclusions 2011, General Introduction, January 2012.

Under EU law, the EU Charter of Fundamental Rights provides in Article 14 that everyone has the right to education and the “possibility” of receiving free compulsory education. Under secondary EU law, all third-country national children in the EU, except those only present for a short period of time, are entitled to access basic education. This also includes child migrants in an irregular situation whose removal has been postponed.³⁷⁵ For other categories, such as family members of EEA nationals, refugees or long-term residents, broader entitlements have been codified.

Under certain conditions, third-country national children of EEA nationals have the right to remain for the continuation or completion of their education, including after the EEA national died or moved on (Article 12 (3) of the Free Movement Directive). These children also have the right to be accompanied by the parent who has custody (Article 12 (3)).³⁷⁶ In addition, children of EEA workers who are or were employed in a Member State other than their own benefit from the provision contained in Article 10 of Regulation 492/2011³⁷⁷ (former Regulation 1612/68), which continues to apply independently of the provisions of the Free Movement Directive.³⁷⁸

Article 22 (1) of the Refugee Convention and the EU asylum *acquis* provide for the right to education of asylum-seeking children and for those granted refugee status or subsidiary protection.³⁷⁹

Third-country nationals recognised as long-term residents under the Long-Term Residents Directive (see Section 2.7) enjoy equal treatment with EU Member State citizens as regards access to education and vocational training, and study grants, as well as recognition of qualifications (Article 11). They also have the right to move to other EU Member States for education and vocational training (Article 14).

³⁷⁵ Directive 2008/115/EC, OJ L 348/98, Art. 14 (1).

³⁷⁶ See Article 12 (3) of the Free Movement Directive 2004/38/EC, OJ L 158/77, which builds upon ECJ case law on Art. 12 of the Regulation 1612/68 (today Art. 10 of Regulation 492/2011/EU) and especially on ECJ, Joined Cases C-389/87 and 390/87 [1989] ECR I-00723, *G. B. C. Echternach and A. Moritz v. Minister van Onderwijs en Wetenschappen*, 15 March 1989, and on ECJ, C-413/99 [2002] ECR I-07091, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002.

³⁷⁷ Regulation 492/2011/EU, OJ L 141/1, 5 April 2011.

³⁷⁸ ECJ, C-480/08, [2010] ECR I-01107, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*.

³⁷⁹ For information on asylum seekers, see Directive 2003/9/EC on Reception Conditions, OJ L 31/18, Art. 10; for information on refugees and subsidiary protection status holders, see Qualification Directive 2011/95/EU, OJ L 337/9, Art. 27.

8.4. Housing

The right to adequate housing is part of the right of everyone to an adequate standard of living laid down in Article 11 of the International Covenant on Economic, Social and Cultural Rights.

Under the ECHR, there is no right to acquire a home, only a right to respect for an existing one.³⁸⁰ Immigration controls that limit an individual's access to his or her own home have been the subject of several cases brought before the ECtHR.

Example: In the case of *Gillow v. the United Kingdom*,³⁸¹ the ECtHR found a violation of Article 8 when a British couple who had worked many years abroad were refused a residence permit that would enable them to return to live in the home they owned in Guernsey and had built 20 years beforehand.

Although there is no right to a home as such, the ECtHR has considered the failure of Member States to provide shelter when they are required to do so by law, and, in extreme situations, the Court found the denial to be so severe as to constitute a violation of Article 3 of the ECHR on the prohibition of inhuman and degrading treatment.

Example: In *M.S.S. v. Belgium and Greece*,³⁸² the ECtHR found that Greece's failure to make adequate provision for asylum seekers in view of their obligations under EU law, resulting in the applicant's destitution, reached the threshold required for there to be a violation of Article 3 of the ECHR.

The Court has been careful not to interfere with Member States' right to impose admission conditions, including the situation of where newly arrived migrants are excluded from public housing assistance.

³⁸⁰ ECtHR, *Chapman v. the United Kingdom* [GC], No. 27238/95, 18 January 2001.

³⁸¹ ECtHR, *Gillow v. the United Kingdom*, No. 9063/80, 24 November 1986, paras. 55-58.

³⁸² ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

Example: The case of *Bah v. the United Kingdom*³⁸³ concerned the refusal to consider a mother and her 14-year-old son as 'in priority need' of housing because the son had only recently been admitted from abroad for family reunion and was subject to an immigration condition that he should not have recourse to public funds. The applicant alleged that the consequent denial of access to priority-need housing had been discriminatory. The Court rejected the application. It found nothing arbitrary in the denial of a claim of priority need based solely on the presence of the applicant's son, whose leave to enter the United Kingdom had been expressly conditional upon having no recourse to public funds. By bringing her son into the United Kingdom while fully aware of his entrance conditions, the applicant accepted this condition and effectively agreed not to have recourse to public funds to support him. The legislation at issue in this case pursued a legitimate aim, namely fairly allocating a scarce resource between different categories of claimants. It is important to note that the applicants in the *Bah* case were not left destitute and alternative housing was available to them.

It should be noted that in certain exceptional cases, the ECtHR has ordered interim measures under Rule 39 to ensure that asylum-seeking families are provided with shelter while their claims before the ECtHR were pending (see also Section 2.4).³⁸⁴

Under the ESC, Article 19 (4) (c) provides that states must ensure adequate accommodation to migrant workers, but this right is restricted to those who move between states that are party to the ESC.

The right to housing (Article 31 of the ESC) is closely linked to a series of additional ESC (revised) rights: Article 11 on the right to health; Article 13 on the right to social and medical assistance; Article 16 on the right to appropriate social, legal and economic protection for the family; Article 17 on the right of children and young persons to social, legal and economic protection; and Article 30 on the right to protection against poverty and social exclusion which can be considered alone or be read in conjunction with Article E on non-discrimination.

³⁸³ ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 27 September 2011.

³⁸⁴ ECtHR, *Afif v. the Netherlands* (dec.), No. 60915/09, 24 May 2011; ECtHR, *Abdilahi Abdulwahidi v. the Netherlands*, No. 21741/07, still pending.

Example: In *COHRE v. Croatia*, the ECSR stressed that “States Parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities”.³⁸⁵

Example: In *COHRE v. France*, the ECSR found that the evictions of Roma from their dwellings and their expulsions from France constituted a breach of Article E when read in conjunction with Article 19 (8).³⁸⁶ Similarly, in *COHRE v. Italy*, the ECSR found Italy’s treatment of the Roma in violation of Article E in conjunction with other articles of the ESC.³⁸⁷

Although the ESC Appendix to the ESC limits its application to lawfully resident nationals of State Parties, the ECSR has also applied specific provisions of the revised ESC to children in an irregular situation, stressing that the ESC has to be interpreted in the light of international human rights law.

Example: In *Defence for Children International (DCI) v. the Netherlands*,³⁸⁸ it was alleged that Dutch legislation deprived children illegally residing in the Netherlands of the right to housing and, thus, other ESC rights. The ECSR held that the ESC could not be interpreted in a vacuum. The ESC should, to the furthest extent possible, be interpreted in harmony with other rules of international law of which it formed part, including in this case those relating to the provision of adequate shelter to any person in need, regardless of whether he or she is legally in the member state’s territory. Under Article 31 (2), member states party to the ESC must take measures to prevent homelessness. This requires a member state to provide shelter as long as the children are in its jurisdiction, whatever their residence status. In addition, evicting unlawfully present persons from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness, which is contrary to respect for human dignity. The ECSR also found a violation of Article 17 (1) (c), which protects separated children.

385 ECSR, *COHRE v. Croatia*, Complaint No. 52/2008, merits, 22 June 2010.

386 ECSR, *COHRE v. France*, Complaint No. 63/2010, merits, 28 June 2011.

387 ECSR, *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June 2010.

388 ECSR, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009.

Under EU law, Article 1 of the EU Charter of Fundamental Rights provides for the right to dignity and Article 34 provides for the right to social assistance with regard to housing. Relevant provisions concerning housing can also be found in secondary EU law on third-country national family members of EEA and Swiss nationals, long-term residents, persons in need of international protection, and victims of trafficking. For other categories of third-country nationals, EU law tries to ensure that they will not constitute a burden for Member States' social assistance systems. Therefore, before researchers (Scientific Research Directive, Article 6 (2) (b)) and students (Students Directive, Article 7 (1) (b)) are allowed to enter the EU, they need to provide proof that their housing needs are covered. Member States can establish similar requirements for family members of third-country national sponsors (Article 7 (1) (a) of the Family Reunification Directive).

Example: In *Kamberaj*,³⁸⁹ the CJEU found that a national law treating third-country nationals differently from EU citizens with regard to housing benefits violated Article 11 (1) (d) of the Long-Term Residents Directive. Specifically, the Court maintained that under Article 11 (4), Member States can limit social assistance and protection, noting though that the list of minimum core benefits contained in Recital 13 is not exhaustive. The CJEU extended the core benefits to include housing benefits. In doing so, the Court recalled Article 34 of the EU Charter of Fundamental Rights, which, in order to combat social exclusion and poverty, “recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources”.

Under Article 24 of the Free Movement Directive, third-country national family members of EEA nationals must have the same access to social and tax advantages as nationals. Family members of EEA and Swiss nationals cannot be subjected to restrictions on their right to access housing, including socially supported housing.³⁹⁰ This does not apply to third-country national family members of EU citizens who have not exercised free movement rights, as their situation is not regulated by EU law; for them, rules established by domestic law apply. Economically inactive EEA nationals and their family members, who must show that they are economically

389 CJEU, C-571/10, [2012] ECR 00000, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, 24 April 2012.

390 Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, entered into force on 1 June 2002, OJ 2002 L 114/6.

self-sufficient, may not be eligible for financial assistance for their housing needs (Article 7 (1) (b) of the Free Movement Directive).

Long-term residents are entitled to receive equal treatment as nationals with regard to procedures for obtaining housing (Article 11 (1) (f) of the Long-Term Residents Directive). Victims of trafficking are entitled to special assistance and support measures that include “at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation” (Article 11 (5) of the Trafficking Directive).

Under the Reception Conditions Directive, asylum seekers have a right to be supported. Under Articles 13 and 14 of the directive, Member States are required to provide asylum seekers with “material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence”. This can be in cash or in kind by the provision of appropriate housing.

Example: In *Cimade*,³⁹¹ the CJEU clarified how to apply the Reception Conditions Directive in the case of transfer requests under the Dublin II Regulation. The CJEU held that a Member State seeking to transfer an asylum seeker under the Dublin II Regulation is responsible, including financially, for ensuring that asylum seekers have the full benefit of the Reception Conditions Directive until the applicant is physically transferred. The directive aims to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the EU Charter of Fundamental Rights. Therefore, minimum reception conditions must also be granted to asylum seekers awaiting a Dublin II Regulation decision.

Under Article 32 of the Qualification Directive (for Ireland and the United Kingdom, Article 31 of the 2003 version of the same directive), Member States are required to ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under conditions equivalent to those imposed on other third-country nationals legally resident in the Member State’s territory.

³⁹¹ CJEU, C-179/11 [2012], *Cimade, Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, 27 September 2012; CJEU, joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011.

8.5. Healthcare

Under the ECHR, there is no express right to healthcare, although this is arguably an aspect of ‘moral and physical integrity’ which may fall within the scope of Article 8 guaranteeing the right to respect for private life.³⁹² The ECHR also does not guarantee the right to any particular standard of medical service or the right to access to medical treatment.³⁹³ Under certain circumstances, a Member State’s responsibility under the ECHR, however, may be engaged where it is shown that Member State’s authorities put an individual’s life at risk through acts or omissions that deny the individual healthcare that has otherwise been made available to the general population.³⁹⁴ In relation to migration, healthcare issues have primarily arisen under the ECHR in the context of healthcare needs being invoked as a shield against expulsion. In extreme cases, this may engage Article 3 of the ECHR (see Chapter 3).

Under the ESC, Article 13 of the ESC provides for the right to medical assistance.³⁹⁵ The ECSR considers that this right is applicable to migrants in an irregular situation.

Example: In *International Federation of Human Rights Leagues (FIDH) v. France*,³⁹⁶ the FIDH claimed that France had violated the right to medical assistance (Article 13 of the Revised ESC) by ending the medical and hospital treatment fee exemption for migrants in an irregular situation and with very low incomes. Further, the complainant alleged that the right of children to protection (Article 17) was contravened by a 2002 legislative reform that restricted access to medical services for migrant children in an irregular situation. ESC rights can, in principle, only extend to foreigners who are nationals of other member states party to the ESC and lawfully resident or working regularly within the State. The ECSR emphasised, however, that the ESC must be interpreted in a purposive manner consistent with the principles of individual human dignity, and that any restrictions should consequently be narrowly read. It held that any legislation or practice that denies foreign

³⁹² ECtHR, *Bensaid v. the United Kingdom*, No. 44599/98, 6 February 2001.

³⁹³ ECtHR, *Wasilewski v. Poland* (dec.), No. 32734/96, 20 April 1999.

³⁹⁴ ECtHR, *Powell v. the United Kingdom* (dec.), No. 45305/99, 4 May 2000.

³⁹⁵ Also see the European Convention on Social and Medical Assistance which similarly provides for mutual provision of social and medical assistance to nationals of states which are parties to it on the territory of other states party. This Council of Europe Convention has only 18 parties, all of whom except Turkey are also part of the EU, open for signature on 11 December 1953, entered into force 1 July 1954, ETS No. 014.

³⁹⁶ ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 8 September 2004.

nationals entitlement to medical assistance while they are within the territory of a State Party, even if they are there illegally, is contrary to the ESC, although not all ESC rights may be extended to migrants in an irregular situation. By a majority of 9 to 4, the ECSR found no violation of Article 13 on the right to medical assistance, since adult migrants in an irregular situation could access some forms of medical assistance after three months of residence, while all foreign nationals could obtain treatment for 'emergencies and life threatening conditions' at any time. Although the affected children had similar access to healthcare as adults, the ECSR found a violation of Article 17 on the right of children to protection as the article was more expansive than Article 13 on the right to medical assistance. This decision corresponds to the approach later taken with respect to children in the *Defence of Children International* case (see Section 8.4).

Under EU law, the EU Charter of Fundamental Rights does not include a right to health, but recognises related rights such as the protection of human dignity (Article 1) and the right to physical integrity (Article 3). The Charter also includes the right to 'healthcare' under Article 35, which states that "[e]veryone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices". The Charter's application is limited to those matters that fall within the scope of EU law. The Charter does not make any distinction on the ground of nationality; it makes, however, the exercise of the right to healthcare subject to national laws and practices.

Secondary EU law regulates access to healthcare for a variety of categories of third-country nationals and requires some of them to have sickness insurance before they are granted a particular status or admission into the Member State territory. The most common third-country national categories will be briefly mentioned.

Whatever their nationality, working or self-employed family members of EEA and Swiss nationals who exercised free movement rights are entitled to equal treatment with nationals (Article 24 of the Free Movement Directive for EU nationals).³⁹⁷ Those who wish to reside in another Member State on the basis that they are

³⁹⁷ Agreement on the European Economic Area, 2 May 1992, Part III, Free Movement of Persons, Services and Capital; Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, entered into force on 1 June 2002, OJ 2002 L 114/6.

economically self-sufficient must show that they have health insurance to cover all risks for both themselves and their family members (Article 7 (1) (b)).

Whether an EEA national or a third-country national, any individual who is affiliated with a national health scheme in their EEA state of residence is entitled to the necessary treatment³⁹⁸ when they visit other EEA Member States and Switzerland.³⁹⁹ Travelling to another Member State for the purpose of receiving publicly provided medical treatment is subject to complex rules.⁴⁰⁰

Under the Family Reunification Directive, the sponsor may be required to prove that he or she has, in particular, a “sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family” as well as “stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned” (Article 7 (1) (b) (c)).

Similarly, before being granted long-term resident status, third-country nationals and their family members are required to provide evidence of sickness insurance that covers all risks that are normally covered by the host Member State for its own nationals (Article 5 (1) (b) of the Long-Term Residents Directive). They also need to show that they have stable and regular resources that are sufficient to maintain himself or herself and the members of his or her family without recourse to the Member State’s social assistance system (Article 5 (1) (a)). Persons who obtained long-term resident status are entitled to equal treatment with nationals of the host Member State as regards “social security, social assistance and social protection as defined by national law” (Article 11 (1) (d)). Recital 13 of the directive states that with regard to social assistance, “the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy,

398 Regulation 883/2004/EC, 29 April 2004, Art. 19 (1); CJEU, C-211/08 [2010] ECR I-05267, *European Commission v. Kingdom of Spain*, 15 June 2010, paras. 58 and 61.

399 Decision 2012/195/EU of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012, replacing Annex II to that Agreement on the coordination of social security schemes.

400 See Art. 22 (1) (c) of Regulation 1408/71, at issue in both ECJ, C-368/98, [2001] ECR I-05363, *Abdon Vanbraekel and Others v. Alliance nationale des mutualités chrétiennes (ANMC)*, 12 July 2011 and ECJ, C-372/04 [2010] ECR I-04325, *The Queen, on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health*, 16 May 2006.

parental assistance and long-term care. The modalities for granting such benefits should be determined by national law”.

Under Articles 13 and 15 of the Reception Conditions Directive, asylum seekers are entitled to emergency care and essential treatment for illness, as well as necessary medical or other assistance for those who have special needs. The Return Directive (2008/115/EC) similarly states that “[p]articular attention shall be paid to the situation of vulnerable persons. Emergency healthcare and essential treatment of illness shall be provided to those whose removal has been suspended or who have been given time to depart voluntarily”.

Recognised refugees and those with subsidiary protection are entitled to equal access to healthcare as the Member State’s own nationals under Article 30 of the Qualification Directive. Until December 2013, this can be limited to “core benefits” for subsidiary protection status holders. There are also special provisions for those with special needs. Assistance and support measures to be given to victims of trafficking encompass necessary medical treatment, including psychological assistance, counselling and information (Article 11 (5) of the Trafficking Directive).

8.6. Social security and social assistance

Social security and social assistance refer to benefits that are either based on past contributions into a national social security system, such as retirement pensions, or that are provided by the state to persons in need such as persons with disabilities. They include a wide range of benefits, which are usually financial.

Under the ECHR, there is no express right to social security or social assistance.

Example: In the case of *Wasilewski v. Poland*,⁴⁰¹ the Court noted that “[i]n so far as the applicant’s complaints relate to his difficult financial situation, the Court recalls that neither Article 2 nor any other provision of the Convention can be interpreted as conferring on an individual a right to enjoy any given standard of living, or a right to obtain financial assistance from the State”.

⁴⁰¹ ECtHR, *Wasilewski v. Poland* (dec.), No. 32734/96, 20 April 1999.

In certain circumstances, an issue of discrimination may arise in the area of social security and social assistance, regardless of whether the individual in question has financially contributed to the scheme in question. The ECtHR has been critical of states that refused benefits to lawful residents on the discriminatory basis that they did not meet a nationality requirement.⁴⁰²

Examples: The case of *Gaygusuz v. Austria*⁴⁰³ concerned the denial of unemployment benefits to a Turkish citizen on the basis that he did not have Austrian nationality. The case of *Koua Poirrez v. France*⁴⁰⁴ concerned the denial of disability benefits to a lawfully resident migrant because he was neither French nor a national of a country with a reciprocal agreement with France. In both cases, the ECtHR found that the applicants had been discriminated against, which was in violation of Article 14 of the ECHR read in conjunction with Article 1 of Protocol No. 1 on the right to peaceful enjoyment of possessions.

Example: The case of *Andrejeva v. Latvia*⁴⁰⁵ related to contribution-based benefits. The applicant had worked most of her life in the territory of Latvia when it was part of the Soviet Union. She was denied a part of her pension because she had been working outside Latvia and was not a Latvian citizen. The ECtHR could not accept the government's argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of the pension claimed. The prohibition of discrimination enshrined in Article 14 of the ECHR was only meaningful if, in each particular case, the applicant's personal situation is taken as is and without modification when considered in relation to the criteria listed in the provision. To proceed otherwise by dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance. The ECtHR found a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

402 ECtHR, *Luczak v. Poland*, No. 77782/01, 27 November 2007; ECtHR, *Fawsie v. Greece*, No. 40080/07, 28 October 2010.

403 ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996, paras. 46–50.

404 ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, para. 41.

405 ECtHR, *Andrejeva v. Latvia* [GC], No. 55707/00, 18 February 2009, para. 91.

In these examples, the applicants were, in all other respects, similar to a state's own national; none of the applicants were in a precarious immigration situation or subject to restrictions on having recourse to public funds.

Example: The case of *Weller v. Hungary*⁴⁰⁶ concerned a Hungarian father and a Romanian mother. At the time of application, which was prior to Romania's accession to the EU, the mother had a residence permit, but not a settlement permit in Hungary. Under Hungarian law, only mothers with Hungarian citizenship or a settlement permit could apply for the maternity benefit. The applicant complained that men with foreign spouses were treated less favourably in the enjoyment of the benefit than those with Hungarian wives. The Court held that there had been a violation of Article 8 of the ECHR taken together with Article 14.

Under the ESC, there is a right to social security (Article 12), a right to social and medical assistance (Article 13) and a right to benefit from social welfare services (Article 14). In addition, there are specific provisions for persons with disabilities (Article 15), children and youth (Article 17) and elderly persons (Article 23). Article 30 contains the right to protection against poverty and social exclusion. As far as social assistance is concerned, Article 13 of the ESC is applicable to migrants in an irregular situation.

Under EU law, two situations regarding third-country nationals have to be distinguished. First, there is a system of coordination of benefits among Member States for third-country nationals moving within the EU. Second, specific categories of third-country nationals are entitled under secondary EU law to certain benefits regardless of whether they have moved within the EU.

a) Coordination of benefits within the EU

Third-country national family members of EEA nationals who have moved to an EU Member State are entitled under Article 24 of the Free Movement Directive (and for non-EU citizens under the EU-EEA agreement) to the same social and tax advantages as the host Member State's own nationals. According to Article 14 (1) of the same directive, however, those who are exercising free movement rights without working must not become an unreasonable burden on the host Member State's social assistance system. A complex body of law has been built up over the years

⁴⁰⁶ ECtHR, *Weller v. Hungary*, No. 44399/05, 31 March 2009, paras. 36-39.

to coordinate social security and social assistance for persons exercising free movement rights. This has been codified in Regulation 883/2004/EC (as amended)⁴⁰⁷ with the basic principle that the EU-wide system is a system of coordination, not harmonisation.⁴⁰⁸ It is intended to minimise the negative effects of migrating between Member States by simplifying administrative procedures and ensuring equal treatment between those who move between Member States and nationals of a Member State. Some entitlements are exportable, while others are not. Regulation 987/09 (amended by Regulation 465/2012/EU) sets out the procedures needed to implement Regulation 883/2004/EC.

Employed third-country nationals who move between EU Member States

as well as their family members and their heirs are entitled to the benefit of the cross-border legislation on accumulation and coordination of social security benefits (Regulations 859/2003 and 1231/2010). This is subject to the condition that the employed third-country nationals are legally resident in a Member State's territory and have links beyond those to the third country and a single Member State. These regulations do not cover employed third-country nationals that only have links to a third country and a single Member State.

b) Entitlements for certain categories of third-country nationals

Asylum seekers have no specific right to access social assistance under the Reception Conditions Directive. Article 13, however, sets out general rules on the availability of material reception conditions and Article 13 (5) expressly states that these may be provided in kind, or in the form of financial allowances or vouchers, or in a combination of these provisions.

Example: On 18 July 2012, the German Federal Constitutional Court (*Bundesverfassungsgericht*) ruled that Germany must increase the aid given to asylum seekers, which it had not increased for 19 years and which did not cover the minimum required to ensure a dignified existence under Article 1 of the German Constitution.⁴⁰⁹

⁴⁰⁷ The regulation has been amended by Regulation (EC) No. 988/2009, Regulation 1231/2010/EU and most recently in 2012 by Regulation 465/2012/EU.

⁴⁰⁸ ECJ, C-21/87 [1988] ECR I-03715, *Borowitz v. Bundesversicherungsanstalt für Angestellte*, 5 July 1988, para. 23; ECJ, C-331/06 [2008] ECR I-01957, *Chuck v. Raad van Bestuur van de Sociale Verzekeringsbank*, 3 April 2008, para. 27.

⁴⁰⁹ Germany, *Bundesverfassungsgericht*, No. 56/2012, 18 July 2012.

Under Article 29 of the revised Qualification Directive, a Member State is to ensure that refugees and beneficiaries of subsidiary protection receive 'necessary social assistance' equal to that provided to a national in the host Member State. For subsidiary protection status holders, however, this can be limited to 'core benefits'. Article 23 (2) extends benefits to the family members of beneficiaries of subsidiary protection. Member States may continue to have some restrictions for beneficiaries of subsidiary protection until December 2013. According to Article 11 (7) of the Trafficking Directive, Member States are required to attend to victims of trafficking with special needs, and specific requirements are set for child victims of trafficking (Articles 13).

Under the Long-Term Residents Directive, those who have acquired long-term resident status are entitled to equal treatment with the host country nationals with regard to social security, social assistance and social protection under Article 11 (1) (d). Social assistance and social protection entitlements, however, may be limited to core benefits.

The Family Reunification Directive does not provide access to social assistance to family members of third-country national sponsors. The sponsors have to show that they have stable and regular resources that are sufficient to maintain themselves as well as the family member without recourse to the Member State's social assistance system (Article 7 (1) (c) of the directive).

Key points

General points under EU law and the ESC

- An acknowledged right to enter or remain is normally necessary in order to access economic and social rights (see Introduction to Chapter 8).
- Core components of social rights are to be provided to any individual present in the territory (see references to migrants in an irregular situation in Sections 8.2-8.6).
- The closer the migrant's situation is to that of a state's own citizens, the greater the justification that will be required if discriminating on the ground of nationality (see Introduction to Chapter 8).
- Many rights under the EU Charter of Fundamental Rights are restricted solely to citizens and those lawfully resident in an EU Member State (see Section 8.1).
- The ESC enshrines a body of economic and social rights; the enjoyment of these rights is, in principle, restricted to nationals of a state party to the ESC when in

the territory of another state party to the ESC. The ECSR has, however, made some exceptions when it concerned housing for children (see Section 8.4) and healthcare (see Section 8.5).

Economic rights under EU law

- Access to the labour market can be restricted; however, from the moment a person is working, whether lawfully or not, core labour rights have to be respected (see Section 8.2).
- The degree to which third-country nationals have access to the labour market differs according to which category they belong (see Section 8.1).
- Qualifying family members of EEA nationals have the same right to access the labour market as citizens of an EU Member State (see Section 8.2.1).
- Turkish citizens benefit from the standstill clause of Article 41 of the Additional Protocol to the Ankara Agreement, which prevents states from imposing new burdens on them (see Section 8.2.4).
- Asylum seekers have to be granted access to the labour market at the latest one year after lodging the application for asylum (see Section 8.2.7).
- The Employer Sanctions Directive penalises those who employ migrants in an irregular situation and also provides the right to claim withheld pay and some other protection for migrants in abusive situations (see Section 8.2.8).

Education (see Section 8.3)

- Pursuant to Article 2 of Protocol No. 1 to the ECHR, no one must be denied the right to education. Member states, however, enjoy a wider margin of appreciation in imposing certain limitations in respect of higher levels of education.
- All third-country national children staying in the EU, including migrants in an irregular situation whose removal has been postponed, are entitled under secondary EU law to access basic education.

Housing (see Section 8.4)

- EU law deals with housing through the EU Charter of Fundamental Rights; it also includes specific provisions for third-country national family members of EEA nationals, long-term residents, persons in need of international protection and victims of trafficking in secondary EU law.
- EU Member States are required to provide asylum seekers with a standard of living adequate for the health of applicants and capable of ensuring their subsistence.
- A failure by the authorities to respect someone's home may raise an issue under Article 8 of the ECHR. In extreme situations, a failure to provide shelter may raise an issue under Article 3 of the ECHR.
- The ESC grants a right to housing, which acts as a gateway to a series of additional rights.

Healthcare (see Section 8.5)

- Persons affiliated with a national health scheme in their EEA state of residence can benefit from local healthcare provisions when they visit other EEA Member States and Switzerland.
- Under EU law, refugees are entitled to equal access to healthcare as nationals, whereas asylum seekers and migrants in an irregular situation whose removal has been postponed are entitled to emergency care and essential treatment.
- The ECHR contains no specific provision concerning healthcare, but the ECtHR may examine complaints of this sort under Articles 2, 3 or 8 of the ECHR.
- The ESC guarantees medical assistance to migrants in an irregular situation.

Social security and social assistance (see Section 8.6)

- Under EU law, for those third-country nationals moving between Member States under the free movement provisions, a complex body of law has been built up over the years regarding entitlement to social security and social assistance.
- Under the ECHR, the refusal of social assistance or other benefits to a foreigner may raise an issue of discrimination regardless of whether he or she contributed to the scheme from which the allowance will be paid out.
- The ESC requires that social assistance be guaranteed to persons in need, including those in an irregular situation.

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.

9

Persons with specific needs

EU	Issues covered	CoE
EU Charter of Fundamental Rights, Article 24 (the rights of the child)	Unaccompanied minors	ESC, Article 17 (right of children to social, legal and economic protection) ECtHR, <i>Rahimi v. Greece</i> , 2011 (unaccompanied minor asylum seeker detained in adult detention centre)
Dublin II Regulation, Article 6 Reception Conditions Directive (2003/9/EC), Article 19 Qualification Directive (2004/83/EC), Article 31 Return Directive (2008/115/EC), Article 10	<i>Reception and treatment</i>	
Asylum Procedures Directive (2005/85/EC), Article 17	<i>Age assessment</i>	Convention on Action against Trafficking in Human Beings, Article 10 (3)
Trafficking Directive (2011/36/EU)	Victims of trafficking	ECHR, Article 4 (prohibition of slavery and forced labour) ECtHR, <i>Rantsev v. Cyprus</i> , 2010 (authorities obliged to carry out investigation of their own motion) Convention on Action against Trafficking in Human Beings
Convention on the Rights of Persons with Disabilities (ratified by the EU) Reception Conditions Directive (2003/9/EC), Article 17 Asylum Procedures Directive (2005/85/EC), Article 12	Persons with disabilities	
Reception Conditions Directive (2003/9/EC), Article 20 Asylum Procedures Directive (2005/85/EC), Articles 12 and 14	Victims of torture and other serious forms of violence	ECtHR, <i>Opuz v. Turkey</i> , 2009 (domestic violence)

Introduction

This chapter will look at certain groups of individuals who could be classified as especially vulnerable and requiring specific attention. In addition to what has been generally said in previous chapters, both EU and ECHR law may afford extra protection to persons with specific needs.

In EU law, vulnerable persons are defined in Article 17 of the Reception Conditions Directive (2003/9/EC) and Article 3 (9) of the Return Directive (2008/115/EC). Both definitions include “minors, unaccompanied minors, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”.

9.1. Unaccompanied minors

The term ‘unaccompanied minors’ is used to describe individuals under the age of 18 who enter European territory without an adult responsible for them in the receiving state. There are key provisions of EU legislation on asylum and immigration that address their situation, which will be reviewed in this section.

The ECHR does not expressly contain provisions in relation to unaccompanied minors, but their treatment may be considered under various provisions, such as Article 5 on the right to liberty and security, Article 8 on the right to respect for private and family life or Article 2 of Protocol No. 1 on the right to education. The ECtHR has held that states have a responsibility to look after unaccompanied minors and not to abandon them when releasing them from detention.⁴¹⁰

Any decision concerning a child must be based on respect for the rights of the child as set out in the UN Convention on the Rights of the Child (CRC), which has been ratified by all states except Somalia and the United States of America. The CRC lays out children’s human rights that are to be applied regardless of immigration status.⁴¹¹ The principle of ‘the best interests of the child’ is of fundamental importance and public authorities must make this a primary consideration when taking actions related to children. Unlike the EU Charter of Fundamental Rights, this principle is not

⁴¹⁰ ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011.

⁴¹¹ The UN Committee on the Rights of the Child has provided additional guidance for the protection, care and proper treatment of unaccompanied children in its General Comment No. 6 (2005) available at www2.ohchr.org/english/bodies/crc/comments.htm.

explicitly stated in the ECHR, but it is regularly expressed in its case law. The principle also underpins specific provisions of EU legislation in relation to unaccompanied minors.

The ESC refers to separated children in Article 17 (1) (c). The ECSR – like the ECtHR – has highlighted that states interested in stopping attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a state's immigration policy must therefore be reconciled.⁴¹²

9.1.1. Reception and treatment

Under EU law, the protection that will be discussed in this section only becomes applicable once the unaccompanied minor applies for asylum. Before considering their treatment during the application process, it is important to be aware of which state is responsible for processing their asylum application. The Dublin II Regulation (Council Regulation (EC) No. 343/2003) states that where the applicant is a separated child, the Member State responsible for examining the application is the state where a member of his or her family is legally present, if that is in the child's best interests. In the absence of a family member, the Member State responsible is the state where the child has lodged his or her application for asylum (Article 6). There is currently no guidance, however, for determining which Member State is responsible for examining an asylum application of an unaccompanied minor who has lodged asylum claims in more than one Member State. The issue was the subject of a reference for a preliminary ruling and is now pending before the CJEU.⁴¹³

Unaccompanied minors seeking asylum have to be provided with a representative as soon as they have applied for asylum (Article 19 of the Reception Conditions Directive). The legislation does not, however, provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities. Further, there is no guidance on the role of the representative. Some EU Member States have established a comprehensive guardianship role in relation to unaccompanied minors; in this case, the guardian has the legal status to ensure respect

⁴¹² ECSR, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009. The Committee held, *inter alia*, that unaccompanied minors enjoy a right to shelter under Art. 31 (2) of the ESC.

⁴¹³ CJEU, C-648/11, *MA, BT, DA v. Secretary of State for the Home Department*, reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) lodged on 19 December 2011.

for the unaccompanied child's best interests, not only during the asylum process, including interviews and age assessment, but also in other areas such as accommodation, education and health matters. Other countries simply appoint a legal representative to the child to advise on the asylum process, but who has no involvement with other matters.

The Reception Conditions Directive (Article 19) provides guidance on the type of accommodation to be provided to unaccompanied minors, such as with adult relatives, with a foster-family, in special facilities equipped or suitable for their needs. Detention centres are not listed as an option for unaccompanied minors. The directive also notes that applicants aged 16 and over, but under the age of 18 and therefore still minors, may be placed in accommodation centres for adult asylum seekers.

The Reception Conditions Directive further specifies that as far as possible siblings must be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Residence changes of unaccompanied minors must be kept to a minimum. Furthermore, the directive stipulates that Member States must try to trace the family members of unaccompanied minors as soon as possible with due regard for their safety. Finally, it ensures that individuals working with unaccompanied minors must receive or have completed the appropriate training.

The Dublin II Regulation (see Section 4.2) also contains procedural safeguards in respect of certain vulnerable individuals. A Member State may be requested by a responsible state to examine an application in order to maintain family unity or where there are health concerns (Article 15, 'humanitarian clause'). Special provision is made in respect of unaccompanied minors under Article 6. The proposed amendments to the Dublin II Regulation place greater focus on the safety of vulnerable groups.

The revised Qualification Directive (2004/83/EC) includes specific provisions for unaccompanied minors who are granted refugee or subsidiary protection status. EU Member States are required to ensure representation of the unaccompanied minor and that regular assessments are carried out by the appropriate authorities. The appointed representative can be a legal guardian or, where necessary, a representative of an organisation responsible for the care and well-being of minors, or any other appropriate representative (Article 31).

Article 31 of the Qualification Directive further requires Member States to ensure that unaccompanied minors granted asylum are placed with adult relatives, a foster

family, in reception centres with special provisions for minors, or in other suitable accommodation. The child's views on the type of accommodation must be taken into account in accordance with the minor's age and maturity. The directive echoes the Reception Conditions Directive provisions regarding placement with siblings, family tracing and training of adults working with unaccompanied minors.

The Asylum Procedures Directive (2005/85/EC) sets out special guarantees for unaccompanied minors. Article 17 states that Member States have to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of the Reception Conditions Directive. The representative has to accompany the minor to the asylum interview and be given adequate time to discuss matters with the minor beforehand. Any interview with an unaccompanied minor must be conducted by someone with knowledge of the special needs of this group.

Under Article 10 of the Return Directive (2008/115/EC), when removing an unaccompanied minor from a Member State's territory, the authorities of that Member State must be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the state of return. There is no absolute ban on returning unaccompanied minors, but the decision to return must give due consideration to the best interests of the child. If return is postponed or a period for voluntary repatriation granted, children's special needs must be taken into account (Article 14).

Under the ECHR, the ECtHR has held that respecting the best interests of the child requires that other placement options than detention be explored for the unaccompanied minors.

Example: In *Rahimi v. Greece*,⁴¹⁴ the applicant was an unaccompanied Afghan minor who had been detained in an adult detention centre and later released without the authorities offering him any assistance with accommodation. The ECtHR concluded that the applicant's conditions of detention and the authorities' failure to take care of him following his release had amounted to degrading treatment proscribed by Article 3.

⁴¹⁴ ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011.

9.1.2. Age assessment

Under EU law, the Asylum Procedures Directive allows Member States to use medical examinations to determine the age of unaccompanied minors within the context of their asylum application (Article 17). In cases where medical examinations are used, Member States should ensure that unaccompanied minors are informed beforehand of such an assessment and that their consent is sought. The age assessment issue has become increasingly contentious throughout Europe. Since minors are afforded increased protection in the asylum process and receiving states have an extra ‘duty of care’ for them in other matters including accommodation and education, some individuals arrive in an EU territory, often without documentation, claiming to be under the age of 18. These individuals may then find themselves subject to examination in order to determine whether they are, in fact, below the age of 18 years. The test results will often have a significant impact on their asylum application and access to social welfare. There is no guidance in the directive as to what types of medical examinations are appropriate or adequate, and a wide variety of techniques are applied throughout Europe.

Under the Council of Europe system, the Convention on Action against Trafficking in Human Beings (‘Trafficking Convention’) also envisages an age assessment when the age of the victim is uncertain, but provides no guidance as to the nature of a suitable assessment (Article 10 (3)).⁴¹⁵

9.2. Victims of human trafficking

A distinction should be made between ‘smuggling’ and ‘trafficking’. Smuggling of migrants is an activity undertaken for a financial or other material benefit by procuring the illegal entry of a person into a state where the person is not a national or a permanent resident.⁴¹⁶

Under both EU and ECHR law, trafficking of persons is “[the] recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments

⁴¹⁵ Separated Children in Europe Programme (SCEP) (2012); In accordance with European Commission (2010) *Action Plan on Unaccompanied Minors*, COM(2010) 213 final, 6 May 2010, EASO has started developing technical documentation, including specific training and a handbook on age assessment.

⁴¹⁶ United Nations Protocol against the Smuggling of Migrants by Land, Air and Sea supplementing the UN Convention against Transnational Crime, Art. 3.

or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".⁴¹⁷ There is an element of compulsion and intimidation involved in trafficking that is not involved in smuggling.

Under the ECHR, the ECtHR held in *Rantsev v. Cyprus and Russia*⁴¹⁸ that trafficking falls within the scope of Article 4 of the ECHR, which prohibits slavery and forced labour. Member States are under a positive obligation to put effective provisions into place for the protection of victims and potential victims of trafficking, in addition to criminal provisions for punishing traffickers.

Example: In *Rantsev v. Cyprus and Russia*,⁴¹⁹ the Court held that it was important that a victim of trafficking should not need to request an identification or investigation; The authorities are obliged to take the initiative themselves when such criminal activity is suspected.

The Trafficking Convention is the first European treaty to provide detailed provisions on the assistance, protection and support to be provided to victims of trafficking in addition to the Member States' obligations to carry out effective criminal investigations and to take steps to combat trafficking. The Convention requires state parties to adopt legislative or other measures necessary for identifying victims of trafficking, and to provide competent authorities with trained personnel qualified in preventing and combating trafficking and identifying and helping victims of trafficking (Article 10). Parties must adopt measures as necessary to assist victims in their recovery (Article 12).

Under EU law, the Trafficking Directive (2011/36/EU)⁴²⁰ defines trafficking in the same terms as the Council of Europe Trafficking Convention. Under the directive, Member States must ensure that victims of trafficking have access to legal counsel without delay. Such advice and representation has to be free of charge where the victim does not have sufficient financial resources (Article 12). The directive also introduces the concept of criminal and civil liability of legal persons as well as that of natural persons. Child victims of trafficking receive particular attention in

⁴¹⁷ Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 2005, Art. 4; Directive 2011/36/EU, OJ L 337/9, Art. 2 (1).

⁴¹⁸ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 282-286.

⁴¹⁹ *Ibid.*, para. 288.

⁴²⁰ Directive 2011/36/EU, OJ L 337/9, 5 April 2011.

the directive, especially with regard to assistance and support (Articles 13-16). Such assistance and support measures include: a guardian or representative being appointed to the child victim as soon as the authorities identify the child (Article 14); interviews with the child being conducted without delay and, where possible, by the same person (Article 15); and a durable solution based on the best interests of the child in cases of unaccompanied child victims of trafficking (Article 16).

The Trafficking Directive protects victims of trafficking against prosecution for crimes that they have been forced to commit, which may include passport offences, offences linked with prostitution or working illegally under national law. The assistance and support provided to victims of trafficking should not be conditional upon cooperation with the authorities in a criminal investigation (Article 11). There are also procedural safeguards for victims involved in criminal proceedings (Article 12), including free legal representation where the victim does not have sufficient financial resources. Victims need to be treated in a particular way during the procedure to prevent trauma and re-trauma (Articles 12 and 15). Specific guarantees apply to child victims of trafficking (Articles 13-16).

Both EU and ECHR law are concerned with the status of trafficking victims once trafficking has been detected. This issue has been dealt with in Section 2.4.

9.3. Persons with disabilities

When seeking asylum, persons with physical, mental, intellectual or sensory impairments may face specific barriers to accessing protection and assistance, and they may need extra assistance that may not always be provided by the competent authorities.

The CRPD sets forth international standards concerning persons with disabilities. Article 5 of the CRPD sets principles of equality and non-discrimination, and Article 18 states that “States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others”.

Under the ECHR, there is no definition of disability, but the ECtHR has held that Article 14 protects against discrimination based on disability.⁴²¹

⁴²¹ ECtHR, *Glor v. Switzerland*, No. 13444/04, 30 April 2009; ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002.

Under EU law, the European Union has ratified the CRPD and is therefore bound by the Convention. Article 17 of the Reception Conditions Directive states that EU Member States have to take into account the specific situation of vulnerable persons, including persons with disabilities, when implementing the provisions related to reception conditions and healthcare outlined in the directive. There is no further guidance on what assessments or measures should be put in place for these vulnerable persons. Only unaccompanied minors and victims of torture and violence have specific safeguards set out. The Return Directive also includes persons with disabilities when defining vulnerable persons, but there are no particular provisions in relation to them.

Under Article 12 of the Asylum Procedures Directive, the personal interview may “be omitted where it is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control”. This is especially relevant for those with mental disabilities who may not be able to participate effectively in the interview and thus at risk of not completing an interview. Special examination techniques may be necessary.

9.4. Victims of torture and other serious forms of violence

As stated in the introduction to this chapter, victims of torture, rape or other serious forms of psychological, physical or sexual violence are a group of vulnerable people that have specific safeguards set out in relation to their treatment.

Under EU law, Article 20 of the Reception Conditions Directive contains a duty for Member States to “ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts”. This should not just be confined to medical treatment for physical conditions, but also treatment for mental health issues resulting from the torture or other trauma suffered.

Difficulties in recounting the trauma suffered may cause problems with the personal interview. Rather than having the interview omitted under Article 12 of the Asylum Procedures Directive, “Member States shall ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so” (Article 13).

For those persons in return procedures, if removal is postponed or a period of voluntary repatriation granted, the special needs of victims of torture and other serious forms of violence must be taken into account (Article 14).

A particular category of victims of serious crimes are individuals who have been subjected to domestic violence. This may also occur in the domestic work environment.⁴²²

Under the ECHR, the ECtHR has held that victims of domestic violence may fall within the group of ‘vulnerable individuals’, along with children, thereby being entitled to Member State protection in the form of effective deterrence against such serious breaches of personal integrity.⁴²³

In 2011, the Council of Europe adopted the Convention on Preventing and Combating Violence Against Women and Domestic Violence. It is the first legally binding instrument in the world creating a comprehensive legal framework to prevent violence, to protect victims and to end the impunity of perpetrators. It is not yet in force.

Under EU law, victims of domestic violence who are third-country national family members of EEA nationals are entitled under the Free Movement Directive to an autonomous residence permit in case of divorce or termination of the registered partnership (Article 13 (2) (c)). For family members of third-country national sponsors, according to Article 15 (3) of the Family Reunification Directive (2003/86/EC), “Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances” following divorce or separation.

422 FRA has documented the risks that migrants in an irregular situation typically encounter when they are employed in the domestic work sector, see FRA (2011a).

423 ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, para. 160.

Key points

- The best interests of the child must be a primary consideration in all actions concerning children (see Section 9.1).
- Under EU law, the Asylum Procedures Directive allows EU Member States to use medical examinations to determine the age of unaccompanied minors within the context of their asylum application, but the EU Member States have to respect certain safeguards (see Section 9.1.2).
- Both under EU law and the ECHR, there is a positive obligation to put into place effective provisions for the protection of victims and potential victims of human trafficking in addition to criminal provisions punishing the trafficker (see Section 9.2).
- Under the ECHR, children and victims of domestic violence may fall within the group of 'vulnerable individuals', thereby being entitled to effective State protection (see Sections 9.1.1 and 9.4).

Further case law and reading:

To access further case law, please consult the guidelines [How to find case law of the European courts](#) on page 237 of this handbook. Additional materials relating to the issues covered in this chapter can be found in the '[Further reading](#)' section on page 217.



Further reading

The following selection of references includes publications by international organisations, academics, NGOs as well as by the ECtHR and the FRA. The list of further reading has been grouped in seven broad categories (general literature, asylum and refugee law, detention, irregular migrants and return, children, persons with disabilities and stateless persons). In some cases, it can be noted from the title that the publication relates to more than one area. In addition, articles on the topics covered in this handbook can be found in different journals, such as the *European Journal of Migration and Law*, the *International Journal of Refugee Law*, the *Refugee Survey Quarterly* and others.

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How to find case law of the European courts

European Court of Human Rights: HUDOC case law database

The **HUDOC database** provides free access to ECtHR case law:
<http://HUDOC.echr.coe.int>.

The database is available in English and French and provides a user-friendly search engine that makes it easy to find case law.

Video tutorials and user manuals are available on the HUDOC **Help** page. For help with the search functions and options, the user can place the mouse pointer on the  for more details and examples of how to use that search function.

The case law references in this handbook provide the reader with comprehensive information that will enable them to easily find the full text of the judgment or decision cited.

Before starting a search, please note that the default settings show the Grand Chamber and Chamber judgments in the order of the latest judgment published. To search in other collections such as decisions, the user should tick the appropriate box in the **'Document Collections'** field appearing on the upper left side of the screen.

The simplest way to find cases is by entering the application number into the 'Application Number' field under the **Advanced Search** on the upper right side of the screen and then clicking the blue 'Search' button.

To access further case law pertaining to other issues, for example, asylum-related issues, the user can use the **Search field** indicated with a magnifying glass on the top right part of the screen. In the search field, the user can search using a:

- single word (e.g. asylum, refugees)
- phrase (e.g. “asylum seekers”)
- case title
- State
- Boolean phrase (e.g. aliens NEAR residence)

Alternatively, the user can open the **Simple Boolean search** by clicking on the arrow appearing inside of the **Search field**. The Simple Boolean search offers five search possibilities: this exact word or phrase, all of these words, any of these words, none of these words, Boolean search. When performing a Boolean search, it is important to remember that phrases must be surrounded by double quotes and Boolean operators must always be in capital letters (e.g. AND, NEAR, OR, etc.)

Once the search results appear, the user can easily narrow the results using the filters appearing in the **Filters** field on the left side of the screen, for example, ‘Language’ or ‘State’. Filters can be used individually or in combination to further narrow the results. The ‘Keywords’ filter can be a useful tool, as it often comprises terms extracted from the text of the ECHR and is directly linked to the Court’s reasoning and conclusions.

Example: Finding the Court’s case law on the issue of expulsion of asylum seekers putting them at risk of torture or inhuman or degrading treatment or punishment under Article 3 ECHR

- 1) The user first enters the phrase “asylum seekers” into the **Search field** and clicks the blue ‘Search’ button.
- 2) After the search results appear, the user then selects the ‘3’ under the ‘Violation’ filter in the **Filters** field to narrow the results to those related to Article 3.
- 3) The user can then select keywords under the ‘Keywords’ filter to narrow the results to those relevant to Article 3, such as the keywords ‘(Art. 3) Prohibition of torture’.

For more significant cases, a legal summary is available in HUDOC. The summary comprises a descriptive head note, a concise presentation of the facts and the law, with emphasis on points of legal interest. If a summary exists, a link will appear in the results together with the link to the judgment text or decision. Alternatively, the user can search exclusively for legal summaries by ticking the 'Legal Summaries' box in the **'Document Collections'** field.

If non-official translations of a given case have been published, a link will appear in the results together with the link to the judgment text or decision. HUDOC also provides links to third-party internet sites that host other translations of ECtHR case law. For more information, see 'Language versions' under the HUDOC 'Help' section.

Court of Justice of the European Union: CURIA case law database

The **CURIA case law database** provides free access to ECJ/CJEU case law: <http://curia.europa.eu>.

The search engine is available in all official EU languages⁴²⁴ and can be used to search for information in all documents related to concluded and pending cases by the Court of Justice, the General Court and the Civil Service Tribunal.

There is a '**Help**' section available at <http://curia.europa.eu/common/juris/en/aid-eGlobale.pdf#>. Each search box also has a help page that can be accessed by clicking the icon and contains useful information to help the user make the best possible use of the tool.

The simplest way to find a specific case is to enter the full case number into the search box entitled '**Case number**' and then clicking the green 'Search' button. It is also possible to search for a case using a part of the case number. For example, entering 122 in the 'Case number' field will find Case No. 122 for cases from any year and before any of the three courts: Court of Justice, the General Court and/or the Civil Service Tribunal.

⁴²⁴ Available since 30 April 2004: Spanish, Danish, German, Greek, English, French, Italian, Dutch, Portuguese, Finnish and Swedish; since 1 May 2004: Czech, Estonian, Latvian, Lithuanian, Hungarian, Polish, Slovak and Slovene; since 1 January 2007: Bulgarian and Romanian; since 30 April 2007: Maltese; since 31 December 2011: Irish; temporary derogations have been laid down by Council Regulations (EC) Nos. 930/2004 and 1738/2006, and Council Regulation No. 920/2005.

Alternatively, one can also use the '**Name of parties**' field to search with the common name of a case. This is usually the simplified form of the names of the parties to the case.

There are a total of 16 multi-functional search fields available to help narrow the search results. The different search fields are user-friendly and can be used in various combinations. The fields often have search lists that can be accessed by clicking the icon and selecting available search terms.

For more general searches, using the '**Text**' field produces results based on keyword searches in all documents published in the European Court Reports since 1954, and since 1994 for the European Court Reports – Staff Cases (ECR-SC).

For more subject-specific searches, the '**Subject-matter**' field can be used. This requires clicking the icon to the right of the field and selecting the relevant subject(s) from the list. The search results will then produce an alphabetised list of selected documents related to the legal questions dealt with in the decisions of the Court of Justice, the General Court, the Civil Service Tribunal and in the Opinions of the Advocates General.

The CURIA website also has additional case law tools:

'Numerical access': this section is a collection of case information for any case brought before one of the three courts. The cases are listed by their case number and in the order in which they were lodged at the relevant registry. Cases can be consulted by clicking on their case number. The 'Numerical access' section is available at http://curia.europa.eu/jcms/jcms/Jo2_7045/.

'Digest of the case-law': this section offers a systematic classification of case law summaries on the essential points of law stated in the decision in question. These summaries are based as closely as possible on the actual wording of that decision. The 'Digest' section is available at http://curia.europa.eu/jcms/jcms/Jo2_7046/.

'Annotation of judgments': this section contains references to annotations by legal commentators relating to the judgments delivered by the three courts since they were first established. The judgments are listed separately by court or tribunal in chronological order according to their case number, while the annotations by legal commentators are listed in chronological order according to their appearance.

References appear in their original language. The 'Annotation of judgments' section is available at http://curia.europa.eu/jcms/jcms/Jo2_7083/.

'National case-law database': this external database can be accessed through the CURIA website. It offers access to relevant national case law concerning EU law. The database is based on a collection of case law from EU Member State national courts and/or tribunals. The information has been collected by a selective trawl of legal journals and direct contact with numerous national courts and tribunals. The 'National case-law database' is available in English and in French and is available at: http://curia.europa.eu/jcms/jcms/Jo2_7062/.

in this handbook

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Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	CH	IS	LI	NO	
Employer Sanctions Directive 2009/52/EC	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Facilitation Directive 2002/90/EC	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	
Return Directive 2008/115/EC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	
Legal Migration																																
Blue Card Directive 2009/50/EC	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Family Reunification Directive 2003/86/EC	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Long-Term Residents Directive 2003/109/EC, as amended by Directive 2011/51/EU	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Resident Permits Format Regulation (EC) No. 1030/2002, as amended by Regulation (EC) No. 380/2008	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	
Scientific Research Directive 2005/71/EC	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Single Permit Directive 2011/98/EU	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Students Directive 2004/114/EC	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
Free Movement and Equality																																
Free Movement Directive 2004/38/EC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	
Coordination of Social Security Regulation (EC) No. 883/2004, last amended by Regulation (EU) No. 465/2012	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Regulation (EU) No. 1231/2010 (extending the Coordination of Social Security Regulation (EC) No. 883/2004 to third-country nationals)	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	✗	✗	✗	✗	✗	
Posting of Workers Directive 96/71/EC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	
Professional Qualifications Directive 2005/36/EC, last amended by Regulation 623/2012/EU	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Racial Equality Directive 2000/43/EC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗

✓ = accepted
0 = accepted, but not latest amendments
✗ = not accepted

✓ = accepted 0 = accepted, but not latest amendments ✗ = not accepted

Notes:

Schengen acquis (including instruments listed under 'Borders and Visa' and 'Irregular Migration and Return')

- For **Denmark** see Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union, Article 3 and Protocol (No. 22) on the Position of Denmark.
- For the **United Kingdom** see Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union, Article 4; Council Decision 2000/365/EC approving the request by the United Kingdom adopted on 29.5.2000. (OJ 2000 L 131, pp. 43-47); and Council Decision 2004/926/EC of 22.12.2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (OJ 2004 L 395, pp. 70-80).
- For **Ireland** see Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; Protocol (No. 19) On the Schengen acquis integrated into the framework of the European Union, Article 4; and Council Decision 2002/192/EC of 28.2.2002 concerning Ireland's request to take part in some provisions of the Schengen acquis (OJ 2002 L 64, pp. 20-23).
- For **Norway and Iceland** see Protocol (No. 19) on the Schengen acquis integrated into the framework of the European Union, Article 6; Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the association of these two states to the implementation, to application and to the development of the Schengen acquis, signed on 18.5.1999 and entered into force on 26.6.2000 (OJ 1999 L 176, pp. 36-62); and Council Decision 1999/437/EC of 17.5.1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ 1999 L 176, pp. 31-33).
- For **Switzerland** see Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, signed on 26.10.2004 and entered into force on 01.03.2008 (OJ 2008 L 53, pp. 52-79) and Council Decision 2008/146/EC of 28.1.2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (OJ 2008 L 53, pp. 1-2).
- For **Liechtenstein** see the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, signed on 28.02.2008, and entered into force on 19.12.2011 (OJ 2011 L 160, pp. 21-36).

Application of specific instruments

Dublin II and Eurodac Regulations

- For **Denmark** see Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, signed on 10.03.2005 and entered into force on 01.04.2006 (OJ 2006 L 66, pp. 38-43) and Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p.37);
- for **Iceland and Norway** see Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway - Declarations, signed on 19.01.2001 and entered into force into 01.04.2001 (OJ 2001 L 93, pp. 40-47) and Council Decision 2006/167/EC of 21.2.2006 (OJ 2006 L 57, pp. 15-18);
- for **Switzerland** see Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, signed on 26.10.2004 and entered into force 01.03.2008 (OJ 2008 L 53, p. 5-17); and Council Decision 2008/147/EC of 28.1.2008 (OJ 2008 L 53, pp. 3-4);
- for **Liechtenstein** see Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, signed on 28.02.2008 and entered into force on 19.12.2011 (OJ 2011 L 160, pp. 39-49)

Schengen Borders Code

The Schengen Borders Code applies to Bulgaria, Romania, Cyprus except for Title III on internal borders.

SIS II Regulations

The SIS II Regulation became applicable on 9 April 2013, as established by the Council Decision 2013/158/EU of 7 March 2013, OJ L87/10 27.3.2013.

Bulgaria and Romania will be able to use SIS II for refusal of entry only once the Council has accepted these two Member States into the Schengen area, but have access to SIS II for police and judicial cooperation purposes under the SIS II Decision (2007/533/JHA) and Council Decision 2010/365/EU of June 2010 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Republic of Bulgaria and Romania.

Ireland and the **United Kingdom** do not take part and are not bound by or subject to Council Decision 2013/158/EU of 7 March 2013, therefore only the SIS II Decision (2007/533/JHA of 12 June 2007) will be applicable to them.

Free Movement and Social Security

For **Liechtenstein, Iceland and Norway** see Annex VI to the *Agreement on the European Economic Area*, as amended by Decisions of the EEA Joint Committee No 76/2011 of 1 July 2011 (OJ 2011 L 262, pp. 33–43) and No. 18/2012 of 10 February 2012 (OJ 2012 L 761, p. 24);

For **Switzerland** see Annex II to the *Agreement on the coordination of social security schemes*, as updated by Decision No. 1/2012 of the Joint Committee established under the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012 replacing Annex II to that Agreement on the coordination of social security schemes (2012/195/EU) (OJ 2012 L 103, pp. 51–59).

Application of specific instruments

Regulation 1231/2010/EU is not applicable to the **United Kingdom**, which remains however bound by Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, pp. 1–3).

Professional Qualification Directive (2005/36/EU) with the exception of Title II, is provisionally applicable in **Switzerland** according to Decision No. 2/2011 of the EU-SWISS Joint Committee established by Article 14 of the 1999 *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, of 30 September 2011 replacing Annex III (Mutual recognition of professional qualifications) thereto* (2011/702/EU) (OJ 2011 L 277, pp. 20–35)

The **Posted Workers Directive (96/71/EC)** is not applicable to **Switzerland** who has however to provide similar rules according to Article 22 of Annex I to the 1999 *Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons*, signed on 21.06.1999 and entered into force on 01.06.2002. (OJ 2002 L 114, pp. 6 - 72)

Annex 2: Applicability of selected Council of Europe instruments

Applicability of selected Council of Europe instruments, by EU Member State and Croatia

Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	IV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	
Total number of ratifications/accessions	7	8	7	7	7	7	7	7	7	9	8	8	7	9	8	7	10	6	8	9	6	8	8	9	8	7	7	8	Total
ECHR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
ECHR Protocol No. 1 (property, education, etc.)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
ECHR Protocol No. 4 (freedom of movement, prohibition of collective expulsion of aliens etc.)	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	26
ECHR Protocol No. 6 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
ECHR Protocol No. 7 (Procedural safeguards relating to expulsion of aliens etc.)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	25
ECHR Protocol No. 12 (discrimination)	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✗	✓	✓	✗	✓	✓	✓	✓	8
ECHR Protocol No. 13 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
European Convention on Social and Medical Assistance (1953)	✗	✓	✗	✗	✓	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✗	✓	✗	✓	✗	✓	✓	✗	15
European Convention on Establishment (1955)	✓	✓	✗	✗	✓	✓	✓	✗	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✗	✓	✗	✗	✗	✓	✗	✓	✓	✗	10
Council of Europe Convention on Action against Trafficking in Human Beings (2005)	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
Convention on preventing and combating violence against women and domestic violence (2011)	✓	✓	✗	✗	✗	✓	✗	✗	✓	✓	✓	✓	✗	✗	✓	✗	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	1

✓ = State party / applicable ✓ = signed ✗ = not signed

Applicability of selected Council of Europe instruments, by other Council of Europe member states

Country	AD	AL	AM	AZ	BA	CH	GE	IS	LI	MC	MD	ME	MK	NO	RS	RU	SM	TR	UA	Total
Total number of ratifications/accessions	8	8	7	6	8	4	8	8	7	5	7	8	8	9	8	4	8	8	8	
ECHR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19
ECHR Protocol No. 1 (property, education, etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17
ECHR Protocol No. 4 (freedom of movement, prohibition of collective expulsion of aliens etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17
ECHR Protocol No. 6 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	18
ECHR Protocol No. 7 (Procedural safeguards relating to expulsion of aliens etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	18
ECHR Protocol No. 12 (discrimination)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10
ECHR Protocol No. 13 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	16
European Convention on Social and Medical Assistance (1953)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	3
European Convention on Establishment (1955)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	2
Council of Europe Convention on Action against Trafficking in Human Beings (2005)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	15
Convention on preventing and combating violence against women and domestic violence (2011)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	2

✓ = State party / applicable ✓ = signed ✗ = not signed

Acceptance of ESC provisions, by EU Member State and Croatia

ESC (1961) and Additional Protocol 1988

		ESC (1996)													ESC (1961) and Additional Protocol 1988														
		AT	BE	BG	CY	EE	FI	FR	HU	IE	IT	LV	MT	NL	PT	RO	SK	SI	SE	CZ	DK	DE	EL	LU	PL	ES	UK	HR	
Country	Total accepted	13	24	17	16	20	26	31	18	27	30	24	26	20	30	31	17	25	29	23	15	18	15	21	16	10	22	14	15
Art 17 - protection of children and young persons		✓	✓	0	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 18 - work in the territory of other Parties		0	✓	0	0	✗	✓	✓	✗	✓	0	0	✓	0	✓	✓	0	0	✓	✓	0	✓	✓	✓	0	✓	✓	✗	✓
Art 19 - protection and assistance of migrant workers		0	0	✓	✓	✓	0	✓	✗	✓	0	0	0	✓	0	✓	0	0	✓	0	✓	✓	✓	✓	✓	✓	✓	✗	✓
Art 20 - non-discrimination on the grounds of sex		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 21 - information and consultation		✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✗	✓	✓	✗	✓
Art 22 - participation in improvement of working conditions		✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
Art 23 - social protection of elderly persons		✗	✗	✗	✗	✗	✓	✓	✗	✓	✓	✗	✗	✓	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✗	✓	✓	✗	✓
Art 24 - protection in cases of termination of employment		✗	✗	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 25 - protection in case of employer's insolvency		✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
Art 26 - dignity at work		0	0	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 27 - workers with family responsibilities		0	✗	0	0	✓	✓	✓	✗	0	✓	✓	✓	0	✓	✓	0	0	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓
Art 28 - protection of workers' representatives		✓	✗	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 29 - consultation in collective redundancy procedures		✗	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 30 - protection against poverty and social exclusion		✗	✓	✓	✗	✗	✓	✓	✗	✓	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 31 - housing		✗	✗	✗	✗	✗	✓	✓	✗	✓	✓	0	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗

✓ = accepted
0 = partly accepted
✗ = not accepted

✓ = accepted 0 = partly accepted x = not accepted

Notes: Yellow-shaded boxes indicate MS who have ratified only the 1996 ESC Convention

Acceptance of ESC provisions, by other Council of Europe member states who ratified the ESC

Third country	ESC (1996)										ESC (1961)				
	AD	AL	AM	AZ	BA	GE	MD	ME	MK	NO	RS	RU	TR	UA	IS
Art 1 - right to work	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 2 - just conditions of work	✓	✓	0	✓	✓	0	✓	0	✓	0	0	✓	0	0	0
Art 3 - safe and healthy work conditions	✓	✓	0	✓	✓	✓	0	✓	0	0	✓	✓	✓	✓	✓
Art 4 - fair remuneration	✓	✓	0	✓	0	0	0	0	0	✓	0	0	0	0	✓
Art 5 - right to organise	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 6 - right to bargain collectively	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 7 - protection of children and young persons	✓	✓	✓	✓	✓	✓	0	0	0	0	✓	✓	✓	✓	✓
Art 8 - protection of maternity of employed women	✓	✓	✓	✓	✓	0	✓	✓	✓	0	✓	✓	✓	✓	✓
Art 9 - vocational guidance	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 10 - vocational training	✓	✓	✓	✓	✓	✓	✓	0	✓	0	0	✓	✓	✓	✓
Art 11 - protection of health	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 12 - social security	✓	✓	0	✓	0	0	✓	✓	✓	✓	✓	0	✓	✓	✓
Art 13 - social and medical assistance	✓	✓	0	✓	0	✓	0	✓	✓	✓	✓	✓	✓	✓	✓
Art 14 - benefit from social welfare services	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 15 - persons with disabilities	✓	✓	0	✓	✓	0	0	✓	0	✓	✓	0	✓	✓	✓
Art 16 - protection of the family	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 17 - protection of children and young persons	✓	✓	✓	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 18 - work in the territory of other Parties	0	✓	✓	✓	✓	0	0	✓	✓	✓	0	0	✓	✓	✓
Art 19 - protection and assistance of migrant workers	0	✓	✓	✓	✓	✓	0	0	✓	0	0	0	✓	✓	✓
Art 20 - non-discrimination on the grounds of sex	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 21 - information and consultation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 22 - participation in improvement of working conditions	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 23 - social protection of elderly persons	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 24 - protection in cases of termination of employment	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 25 - protection in case of employer's insolvency	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 26 - dignity at work	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 27 - workers with family responsibilities	✓	✓	✓	✓	✓	✓	0	0	✓	✓	✓	✓	✓	✓	✓
Art 28 - protection of workers' representatives	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	✓	✓	✓	✓	✓
Art 29 - consultation in collective redundancy procedures	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 30 - protection against poverty and social exclusion	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 31 - housing	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	0

✓ = accepted
0 = partly accepted
x = not accepted

Notes: Yellow-shaded boxes indicate states who have ratified only the 1996 ESC Convention
 ✓ = accepted
 0 = partly accepted
 x = not accepted

Annex 4: Acceptance of selected UN Conventions

Acceptance of selected UN Conventions, by EU Member State and Croatia

Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	Total
Total number of ratifications/accessions	15	13	14	13	12	15	15	11	12	14	13	14	14	12	13	13	13	14	14	12	14	12	15	15	14	14	15	15	
Refugee Convention	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
Stateless Persons Convention	✓	✓	✓	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	✓	✓	23
Reduction of Statelessness Convention	✓	✗	✓	✗	✓	✓	✓	✗	✗	✗	✓	✓	✓	✓	✗	✗	✗	✓	✓	✗	✗	✓	✓	✓	✗	✓	✓	✓	15
ICERD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
ICCPR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
ICESCR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
CEDAW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
CAT	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
CAT - OP	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	19
CRC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
CRC - OP1 (armed conflict)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
UNTOC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
UNTOC - OP1 (smuggling of migrants)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	26
UNTOC - OP2 (trafficking)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
CRPD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	25

✓ = State party / applicable s = signed ✗ = not signed

Acceptance of selected UN Conventions, by other Council of Europe member states

	Country	Country																UA	Total
		AD	AL	AM	AZ	BA	CH	GE	IS	LI	MC	MD	ME	MK	NO	RS	RU	SM	TR
Total number of ratifications/accessions		7	14	15	15	15	14	13	10	14	11	15	14	14	13	15	11	11	13
Refugee Convention		x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x	✓
Stateless Persons Convention		x	✓	✓	✓	✓	✓	x	x	✓	x	✓	✓	✓	✓	✓	x	x	✓
Reduction of Statelessness Convention		x	✓	✓	✓	✓	x	x	x	✓	x	✓	x	x	✓	✓	x	x	✓
ICERD		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICCPR		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICESCR		x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CEDAW		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CAT		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CAT - OP		x	✓	✓	✓	✓	✓	✓	s	✓	x	✓	✓	✓	s	✓	x	x	✓
CRC		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRC - OP1 (armed conflict)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
UNTOC		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
UNTOC - OP1 (smuggling of migrants)		x	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
UNTOC - OP2 (trafficking)		x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRPD		s	✓	✓	✓	✓	x	s	s	x	s	✓	✓	✓	s	✓	✓	✓	✓

✓ = State party / applicable - s = signed - x = not signed

- Refugee Convention - UN Convention relating to the Status of Refugees (1951)
- Stateless Persons Convention - UN Convention relating to the Status of Stateless Persons (1954)
- Reduction of Statelessness Convention - UN Convention on Reduction of Statelessness (1961)
- ICERD - International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- ICCPR - International Covenant on Civil and Political Rights (1966)
- ICESCR - International Covenant on Economic, Social and Cultural Rights (1966)
- CEDAW - Convention on the Elimination of All Forms of Discrimination against Women (1979)
- CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- CAT - OP - Optional Protocol to the CAT (2002)
- CRC - Convention on the Rights of the Child (1989)
- CRC - OP 1 - Optional Protocol to the CRC on the involvement of children in armed conflicts (2000)
- CRPD - Convention on the Rights of Persons with Disabilities (2006)
- UNTOC - Convention on Transnational Organized Crime (2000)
- UNTOC - OP 1 - Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)
- UNTOC - OP 2 - Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)

Annex 5: Country codes

Code	Country
AD	Andorra
AL	Albania
AM	Armenia
AT	Austria
AZ	Azerbaijan
BA	Bosnia and Herzegovina
BE	Belgium
BG	Bulgaria
CH	Switzerland
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
GE	Georgia
HR	Croatia
HU	Hungary
IE	Ireland
IS	Iceland

Code	Country
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxembourg
LV	Latvia
MC	Monaco
MD	Moldova
ME	Montenegro
MK	Macedonia
MT	Malta
NL	The Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
RS	Serbia
RU	Russia
SE	Sweden
SI	Slovenia
SK	Slovakia
SM	San Marino
TR	Turkey
UA	Ukraine
UK	United Kingdom

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European Court of Human Rights - Council of Europe

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EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Schwarzenbergplatz 11 - 1040 Vienna - Austria
Tel. +43 (1) 580 30-60 - Fax +43 (1) 580 30-693
fra.europa.eu - info@fra.europa.eu

EUROPEAN COURT OF HUMAN RIGHTS COUNCIL OF EUROPE

67075 Strasbourg Cedex - France
Tel. +33 (0) 3 88 41 20 18 - Fax +33 (0) 3 88 41 27 30
echr.coe.int - publishing@echr.coe.int



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